

Supplementary Legislative Consent Memorandum

Employment Rights Bill

Background

1. This memorandum has been lodged by Neil Gray MSP, Cabinet Secretary for Health and Social Care, in accordance with Rule 9B.3.1(c) of the Parliament's Standing Orders. As a supplementary memorandum, it should be read in conjunction with the Scottish Government's previous memorandum on the Bill dated 11 December 2024.
2. The UK [Employment Rights Bill](#) was introduced by the UK Government by Justin Madders MP, Minister for Employment Rights, Competition and Markets, Department for Business and Trade in the House of Commons on 10 October 2024.
3. Further details of the Bill were highlighted in the [previous memorandum](#) which related to the devolvement of public procurement amendments raised by the Minister for Public Finance on 3 December 2024.

Content of the Bill

4. The purpose of the Employment Rights Bill is to deliver the key legislative reforms set out in the UK Government's [Plan to Make Work Pay](#). The Bill therefore seeks to update and enhance existing employment rights and make provision for new rights; make provision regarding pay and conditions in particular sectors; and make reforms in relation to trade union matters and industrial action. It further creates a new regime for the enforcement of employment law.
5. Such matters dealt with by the Bill include:
 - Zero hours contracts – introducing a right to reasonable notice of shifts and to be offered a contract with guaranteed hours, reflecting hours regularly worked.
 - Flexible working – requiring employers to justify the refusal of flexible working requests.
 - Statutory sick pay – removing the three-day waiting period (so employees are eligible from the first day of illness or injury) and the lower earnings limit test for eligibility.
 - Family leave – removing the qualifying period for paternity leave and ordinary parental leave (so employees have the right from the first day of employment) and expanding eligibility for bereavement leave.

- Protection from harassment – expanding employers’ duties to prevent harassment of staff.
- Unfair dismissal – removing the two-year qualifying period (so employees are protected from unfair dismissal from the first day of employment), subject to a potential probationary period.
- Fire and rehire – making it automatically unfair to dismiss workers because they refuse to agree to a variation of contract.
- Sectoral collective bargaining – reintroducing the School Staff Negotiating Body for England and creating an Adult Social Care Negotiating Body, which could determine pay and other terms and conditions for workers in these sectors.
- Trade unions – introducing rights for trade unions to access workplaces, and repealing the Strikes (Minimum Service Levels) Act 2023 and most provisions of the Trade Union Act 2016.
- Enforcement – bringing together powers of existing labour market enforcement bodies, along with some new powers, under the Secretary of State and enforcement officers.

6. The Bill is in 6 Parts and has 12 schedules.

7. This supplementary LCM relates to the provisions on Social Care Negotiating Bodies, which are included within Chapter 2 of Part 3, with further consequential amendments in Schedule 5.

8. The policy objective of Chapter 2 is to introduce negotiated agreements in the social care sector. It seeks to do this by creating a framework, through various regulation making powers, for establishing and implementing a legally binding agreement which may be negotiated by a “negotiating body” made up of relevant employer and worker representatives, and other representatives as deemed necessary. This framework will allow for agreements to set out matters relating to pay and other terms for relevant workers in the social care sector.

9. Amendments tabled on [5 March 2025](#) seek to adjust the provisions in Chapter 2 by making provision for social care negotiating bodies for Scotland and Wales. This LCM is concerned with those amendments as they relate to Scotland.

10. The policy objective of the extended provisions under Chapter 2 (alongside related amendments to clauses 153 and 155 and Schedule 7) is to enable Ministers to create a social care negotiating body in Scotland.

11. The Bill is available on the UK Parliament website via this link: [Employment Rights Bill - Parliamentary Bills - UK Parliament](#)

Provisions which require the consent of the Scottish Parliament

12. 77 amendments were tabled in relation to Chapter 2 of Part 3 of the Bill. The Scottish and UK Governments agree that 75 of those 77 amendments make provision to alter the executive competence of the Scottish Ministers, and therefore require the Scottish Parliament's consent. The purposes set out in those 75 amendment provisions fall within the reserved scope of employment rights and duties and industrial relations (Head H1 of Schedule 5 of the Scotland Act 1998), despite the subject matter of these provisions also falling within the devolved matter of social care. Two new substantial clauses are included in these amendments which are referred to, and summarised in the context of the amended Bill as follows (clause numbers relate to the print of the Bill (HL 81) as brought by the Commons):

[Employment Rights Bill \(parliament.uk\)](http://parliament.uk)

13. New substantial clause: Clause 36 extends Part 3, Chapter 2 of the Bill to Scotland by creating a power under clause 36(3) which permits Scottish Ministers to make regulations establishing in Scotland a Social Care Negotiating Body for Scotland (Negotiating Body). Clause 36(3) also provides that regulations can only be made with the agreement of the Secretary of State. Clause 36(4) makes clear that such agreement is also required in relation to any other regulations made under Chapter 2. This means that agreement would be needed in relation to regulations made under clauses 37, 38, 40, 41, 42, 43, 45, 46, 47, 49 and 51. For the purposes of extending Chapter 2 to Scotland, clause 36(5)(c) makes clear that the "appropriate body" referred to in relation to the Negotiating Body means the Scottish Ministers.

14. Clause 37 provides a regulatory power which enables Scottish Ministers to make further provision in relation to the establishment of a Negotiating Body with sub-clause (2) setting out examples of the types of provision that may be made by this body. This includes provision about membership, appointment of members, numbers of members, termination of appointments, the Chair of the body, decision-making, record keeping, payment of fees and expenses and provision of staff, facilities and reports.

15. Clause 37(3) requires regulations made by Scottish Ministers under this clause to ensure that members include officials from trade unions that represent the interests of social care workers as well as employers representing the interests of such workers. Other descriptions of members can also be provided for.

16. Clause 37(4) provides that Scottish Ministers may make regulations to provide that the validity of anything done by the Negotiating Body is not affected by a vacancy or a defective appointment.

17. Clause 37(5) makes clear that regulations made by Scottish Ministers under this clause may amend any enactment in consequence of the establishment of the Negotiating Body.

18. Clause 37(6) (as well as clauses 38(2), 40(3), 41(4), 46(4) and 47(3) make clear that references to specified matters means references to matters specified in regulations.
19. Clause 38 provides that matters within the Negotiating Body's remit are matters which relate to the remuneration of certain relevant social care workers, their terms and conditions or any other matter relating to their employment.
20. Clause 38(2) defines "relevant social care worker" for the purposes of clause 38(1).
21. Clause 39 defines "social care worker" for the purposes of chapter 2. Clause 39(1)(b) provides an alternative definition for Scotland (and Wales).
22. Clause 39(2) defines "social care" for the purposes of clause 39(1).
23. Clause 40 provides Scottish Ministers with regulation making powers to make provision in relation to the remit of the Negotiating Body. Provision made through regulations may include the circumstances in which a matter can be considered, factors which may be regarded when considering matters, conditions to be met in relation to agreements, the provision of information, requirements to submit agreements or requirements to take certain steps.
24. Clause 41 enables Scottish Ministers to make regulations to require reconsideration by the Negotiating Body of agreements submitted to the Scottish Ministers.
25. Clause 41(2) provides that regulations may also be made by Scottish Ministers to provide what happens in those circumstances with clause 41(3) setting out that those regulations might include a requirement for an agreement to be reconsidered, factors that must be considered when reconsidering, conditions that must be met when reconsidering, the provision of information and specified steps to be taken after reconsideration or before a specified date.
26. Clause 42 enables Scottish Ministers to make regulations to deal with scenarios where a Negotiating Body is unable to reach an agreement.
27. Clause 42(2) provides that regulations may include provision to resolve disagreements, confer functions on Scottish Ministers or otherwise and require the Negotiating Body to act in accordance with a decision of the Scottish Ministers or otherwise.
28. Clause 43 provides regulation making powers to enable Scottish Ministers to ratify an agreement submitted under clauses 40 (consideration of matters) or 41 (reconsideration of matters) to varying degrees.

29. Clause 44 makes provision where Scottish Ministers make regulations under section 43 ratifying (to any extent) an agreement submitted by the Negotiating Body.
30. Clause 44(2) provides that a social care worker's remuneration is to be paid and determined in accordance with the ratified agreement.
31. Clause 44(3) provides that a provision of the ratified agreement that relates to any other term or condition of a social care worker's employment has effect as a term of that worker's contract.
32. Clause 44(4) makes clear that provisions prohibited by or inconsistent with the ratified agreement have no effect.
33. Clause 45 sets out the provisions which apply when a Negotiating Body is (1) unable to reach an agreement on a matter, (2) Scottish Ministers are notified accordingly and (3) conditions specified in regulations are met.
34. Clauses 45(2) and (3) enable Scottish Ministers to make regulations on such matters, including matters which may have effect for determining terms and conditions of employment of certain social care workers.
35. If regulations as regards such terms and conditions are made, clause 45(4) makes clear that clause 45(5) to (7) are to apply. These sub-clauses provide that if the regulations deal with a social care worker's remuneration, then that remuneration is to be determined and paid according to those regulations (clause 45(5)), that a provision of the regulations that relates to any other term or condition of such a worker's employment has effect as a term of the worker's contract (clause 45(6)) and that provisions prohibited by or inconsistent with the ratified agreement have no effect (clause 45(7)).
36. Clause 46 enables Scottish Ministers to make provision through regulations about the issuing of guidance and codes of practice in relation to agreements (submitted in terms of regulations made under clauses 40 or 41) and regulations permitting the Scottish Ministers to deal with matters (clause 45). These regulations may impose duties on certain persons to comply with such guidance and codes of practice as well as set out repercussions for failure to do so.
37. Clause 46(3) provides that such repercussions may include situations where the guidance and/or codes of practice haven't been taken into account before court and tribunal proceedings.
38. Clause 47 enables Scottish Ministers to make regulations requiring employers to keep certain records.
39. Under clause 47(2), regulations may provide for certain provisions of the National Minimum Wage Act 1998 (the 1998 Act) to apply (with or without modification) in relation to those regulations, namely section 10 (worker's right of

access to records), section 11 (failure of employer to allow access to records) and section 11A (extension of time limit to facilitate conciliation before institution of proceedings).

40. Clause 47(3) enables section 49 of the 1998 Act (restrictions on contracting out) to apply, with or without modification, in relation to those regulations.

41. New Substantial Clause: Clause 48 sets out when an individual is considered to be an agency worker (clause 48(1)) and makes clear that the provisions of Chapter 2 are to apply to any such individual as if a worker's contract was in place between that individual and the payer of the agency work (clause 48(2)). Clause 48(3) puts in place provision to deal with scenarios under clauses 44(2) and 45(5) where the protection of wages provisions under the Employment Rights Act 1996 would come into play and provides when it is to be assumed that a contract is or was in place, such as for the purposes of certain civil enforcement proceedings (clause 48(4)).

42. Clause 48(5) defines the meaning of "work" for the purposes of that clause.

43. Clauses 49(1) and (2) set out supplementary provisions relating to regulations made under section 43 or 45, including the ability for such regulations to have retrospective effect subject to such regulations not retrospectively reducing remuneration or such regulations retrospectively and detrimentally altering a person's employment.

44. Clauses 49(3) and (4) note that such regulations may refer to a submitted agreement or any other document and that, if they do, those regulations must provide for publication of that agreement or other document.

45. Clause 50 does not contain any tabled amendments, but affects the majority of clauses in Chapter 2 due to it dealing with regulations in general. This includes conferring, through regulations, a discretion on a person dealing with any matter (clause 50(1)) and setting out the various parliamentary procedures required to be followed (clauses 50(2) and (3)).

46. Clause 51 is affected by minimal amendments, changing "the Negotiating Body" to "a Negotiating Body" throughout. This is to reflect Chapter 2 being extended to more than one jurisdiction and the potential for there to be more than one Negotiating Body. Although the provision is not substantially changed, it affects the provisions of Chapter 2 as extended to Scotland as it deals with the status of agreements, differentiating these from collective bargaining in the context of Trade Union legislation.

47. Clause 52 sets out the interpretation of various terms used throughout Chapter 2 and includes a new term "the appropriate authority". This term, along with the new term "enactment" enables Chapter 2 to apply separately to Scotland and Wales in addition to England. In the case of Scotland, "the appropriate authority" means "Scottish Ministers". Amendments to clause 52 also include a new term

“Negotiating Body”. This is intended to capture the various bodies that will be put in place across all jurisdictions. For Scotland, that term will mean the Social Care Negotiating Body for Scotland.

48. Amendments to schedule 7 Part 1 inserts further referenced provisions from the Employment Rights Act 1996 into the relevant labour market legislation. This is to cross reference those provisions referred to in clauses 44(2) and 45(5).

49. Clause 153 deals with regulations to be made under the Bill. Amendments to this clause seek to expand regulation making procedural provisions to account for the Welsh and Scottish jurisdictions. For Scotland, clause 153 has a new provision inserted (clause 153(2)) which makes clear that regulations are to be made by way of Scottish statutory instrument and references section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010.

50. Clause 153(5)(c) makes clear that references to “negative resolution procedure” in the Bill, being a procedure particular to English and Northern Irish jurisdictions, are to be read as references to the negative parliamentary procedure for the purposes of the Scottish Parliament. Clause 153(6)(c) makes clear that references to “affirmative resolution procedure”, again being a procedure particular to the English and Northern Irish jurisdictions, are to be read as references to the affirmative parliamentary procedure for the purposes of the Scottish Parliament. Both of these amendments allow Chapter 2 provisions to properly function in relation to the correct parliamentary procedure.

51. Clause 155 deals with the extent of the Bill. In relation to Part 3, clause 155(1)(b)(ii) provides that Chapter 2 now extends to Scotland (in addition to England and Wales).

Reasons for recommending legislative consent.

52. The Scottish Government has a clear and long-standing commitment to fair work and continues to provide funding to support the real living wage for social care workers providing direct care through commissioned services. The current mechanism is based on contractual arrangements which is limited by the devolution settlement – employment matters are reserved. To that end, having a clear and unequivocal power conferred on Scottish Ministers to address this aspect of fair work through a Social Care Negotiating Body for Scotland would represent a significant development as regards the employment terms and conditions for this workforce.

53. Although the subject matter of social care in Chapter 2 is devolved to the Scottish Parliament, it is recognised that this Chapter and its purpose sit within the reserved subject matter of employment rights and duties and industrial relations as set out in section H1 of Schedule 5 of the Scotland Act 1998. Notwithstanding that position, for the purposes of this memorandum, it is also recognised that the amendment provisions put forward to create a Negotiating Body for Scotland in Chapter 2 seek to alter the executive competence of the Scottish Ministers. Consent is therefore being recommended in relation to each provision set out in Chapter 2,

and the associated amendments, on the basis that they alter the executive competence of the Scottish Ministers. Following discussions between officials on the interaction of the two subject matters, it was also agreed that this approach would be the most appropriate way of recognising the UK Parliament's employment rights reservation in relation to social care workers and industrial relations within the social care sector.

Consultation

54. There has been no broad consultation on this Bill, due to the speed at which it has been introduced and is progressing.

55. However, the Minister for Mental Health, Wellbeing and Sport initiated engagement with the Fair Work in Social Care Group in early November once details of the Adult Social Care Negotiating Body provisions of the Bill were announced. While generally supportive of a Social Care Negotiating Body for Scotland the group, including trade unions and social care providers, raised concerns around its flexibility and the scope, in respect of the exclusion of children's services. The group however did acknowledge the benefits of the legislative underpin the Bill offers.

Financial implications

56. There are no financial implications arising directly from these provisions. There may be financial implications arising from the exercise of these powers. These will have to be considered as such proposals are developed. The UK Government has not produced an impact assessment in relation to these measures.

Post EU scrutiny

57. These provisions are not relevant to the Scottish Government's policy to maintain alignment with the EU.

Conclusion

58. The Scottish Government welcomes the intention of the new UK Government to address the lack of a negotiated and bargaining financial remuneration mechanism in social care. This is consistent with the Scottish Government's approach to drive fair work standards. The Scottish Government recommends consent to all of the relevant provisions.

Draft motion on legislative consent

59. The draft motion, which will be lodged by the Cabinet Secretary for Health and Social Care, is:

“That the Parliament agrees that all the relevant provisions of the Employment Rights Bill, introduced in the House of Commons on 10 October 2024 and subsequently amended in relation to, clauses 36 to 52 in chapter 2 of Part 3 of the Bill, clauses 153 and 155 in Part 6 of the Bill and consequential amendments in Schedule 7 of the Bill, so far as these matters alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.

Scottish Government
April 2025

This Supplementary Legislative Consent Memorandum relates to the Employment Rights Bill (UK legislation) and was lodged with the Scottish Parliament on 3 April 2025

Employment Rights Bill – Supplementary Legislative Consent Memorandum

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