Introducing sectoral bargaining in adult social care: a matter of the devil in the details

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1 Introduction

In the Employment Rights Bill of 10 October 2024, the Labour Government committed to introducing a form of sectoral bargaining in adult social care. A lot rests on the outcome. The challenges the adult social care sector faces in tackling the unprecedentedly high vacancy levels are formidable. It isn't just about driving up working conditions, important though that is. It's also about dealing with the damaging knock on effects arising from leaving things to the market that has been Government policy over the past forty years. As the Government's *Final stage impact assessment* of 21 October puts it: 'In a well-functioning market, we would expect pay to have risen to address this excess demand' (p4). But it hasn't. These trends, the assessment very rightly points out, are 'indicative of a market failure'.

There are significant 'negative externalities'. Most obviously, major recruitment and retention problems in adult social care have led to disruption in the functioning of the NHS which relies on care providers to support hospital discharge - a recent House of Commons Briefing suggests one in eight hospital bends is routinely blocked due to the shortage of staff in adult social care. There's also the prospect of an increasingly ageing population adding to the pressure.

If that's not enough, along with other sectors, notably construction and horticulture, recruitment and retention problems have fueled the highly politically charged issue of immigration. Governments have increasingly found themselves between a rock and hard place. They are under growing public pressure to reduce immigration. At the same time, they are faced with demands from employers to increase the number of recruits from overseas to fill the high

levels of vacancies. Complicating matters is that the more the number of recruits from overseas, the more modern slavery and human trafficking pose problems[1].

At stake, too, are the prospects for the roll out of sectoral bargaining more widely. In the House of Commons on 31 October, the Labour MP Ian Lavery congratulated the Secretary of State Justin Madders for bringing in the Employment Rights Bill within the Government's first 100 days. He went on to ask 'Experts say that sectoral bargaining is a force to be reckoned with for both employees and employers, so what plans might the Government have to extend sectoral collective bargaining in other sectors of the economy?'

The Secretary of State replied :

> My hon. Friend is right to say that there is plenty of evidence worldwide that collective bargaining improves terms and conditions and the overall vitality of the economy, but we must start somewhere. About 5% of the entire working population are employed in adult social care, and with a 25% turnover rate and rampant abuse of zero-hours contracts and the minimum wage laws, we felt that that sector needed the most attention first. We must make a concerted effort to drive up working conditions, because those who work in that area have been undervalued and underappreciated for far too long, and that has to change. We must focus on getting it right in adult social care, and we will see where that takes us.

The Secretary of State's 'getting it right in adult social care' is spot on. Introducing sectoral bargaining in this sector is not to be seen as a matter of 'proof of concept'. The logic of sectoral bargaining is long and widely established not only in the UK but also in Scandinavia and Western Europe[2]. Rather, along with their funding, it's the details of the Government's proposals that will matter and getting *them* right decisive. Fortunately, the Government doesn't have to start from scratch: there is much to learn about the devil that can be in the details from the decline of 'voluntary' sectoral bargaining in the UK as well as experience of its 'compulsory' Wages Council counterpart.

The paper begins by looking at the pros and cons of the Government using secondary rather primary legislation to introduce sectoral bargaining in adult social care. The main body goes on to discuss the key details that have yet to be decided: the name, composition and remit of the proposed 'Joint Negotiating

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[1] See Unseen's Who cares? A review of reports of exploitation in the care sector. See also the Government's International recruitment fund for the adult social care sector 2024 to 2025: guidance for local authorities.

[2] For further details, see Keith Sisson. 2024. 'Introducing sectoral bargaining in the United Kingdom: Why it makes sense and how it might be done'. *Industrial Relations Journal:* Volume 55, Issue 6. Pages: 399-491. November.

Body'; the agreement contents - not just pay, but also other critical issues such as career progression and insecurity; the role for 'assisted negotiation' - without which it will be extremely difficult to make progress; and, last but not least, securing adherence to the outcomes of the process. The funding challenges the Government faces are also touched on bearing mind their timing is likely to have considerable impact

Especially important, it's argued, is that the Secretary of State does not use the extensive powers they will have simply to impose a sector minimum wage in adult social care. Rather, they should make the most of them to pressurise the parties to jointly regulate not just pay but also the other key terms and conditions of employment.

Ian Lavery is unlikely to be the last person who asks what plans the Government has to extend sectoral bargaining to other sectors. The annex to the paper therefore lists the strongest candidates. All are in the 'foundational economy' and share many of the characteristics of adult social care. If the Government is serious about extending sectoral bargaining, it will need to keep them in mind in deciding what to do in this first stage.

2 The pros and cons of secondary legislation

Under the Employment Rights Bill, the Government proposes to introduce sectoral bargaining in adult social care through secondary legislation. Basically, it will be adapting an hitherto little known administrative procedure which empowers ministers and civil servants to take the initiative in enabling sectoral bargaining in 'particular sectors'. The procedure, first brought to our attention by the Institute of Employment Rights, has its origins in the Apprenticeships, Skill, Children and Learning Act 2009, Schedule 15, which provided for a statutory School Support Staff Negotiating Body. The Employment Rights Bill itself talks in terms of 'Pay and conditions in particular Sectors'. It also identifies just two sectors for immediate attention - teaching school support staff and social care workers - each of whom is to have its own procedure.

Secondary legislation, the Institute of Government explains[3], has several major attractions. One is speed. Measures can be introduced pretty quickly:

[3] See also the Hansard Society for a review of the issues that arise with the delegation of powers in Bills and the scrutiny of the Statutory Instruments (SIs) .

parliamentary scrutiny is limited and there is no opportunity for amendment. Another is the flexibility to amend the legislation if and when necessary. A third is that it gives the Secretary of State wide ranging powers: especially important in adult social care is being able to extend the terms and conditions of agreements and regulations throughout a sector so that all workplaces are covered.

Secondary legislation has disadvantages, though. There's been growing parliamentary criticism of the process, which the proposed 'Joint Negotiating Body' could conceivably fall foul of [4]. Also, as secondary legislation is not made by parliament, the principle of parliamentary sovereignty does not apply to it. This means that it can be challenged in the courts and potentially struck down.

There could also be 'unknowns' which have yet to emerge. To illustrate, it could not have been predicted beforehand that a procedure designed to promote collective bargaining would have to explicitly state that the 'agreements' the 'Joint Negotiating Body' arrives at are not to be deemed 'collective agreements' under the current legislation[5]. Presumably, this is because, under the Trade Union and Labour Relations (Consolidation) Act 1992 (section 179 (TULRCA), an agreement or arrangement between an employer or employers' association and one or more trade unions covering terms and conditions of employment may be legally binding. But to be so, it has to be in writing and the parties have to state it is to be legally enforceable: there are currently no major examples. Effectively, Clause 519 Subsection (1) would appear to be needed to nullify the requirement that the agreements in adult social care need to satisfy these two conditions if they are to be legally enforceable.

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[4] See House of Lords Secondary Legislation Scrutiny Committee, Government by Diktat: A call to return power to Parliament: Twentieth Report of Session 2021–22 (HL 105), 24 November 2021, https://publications.parliament.uk/pa/ld5802/ldselect/ldsecleg/105/105.pdf. See also House of Lords Delegated Powers and Regulatory Reform Committee, Democracy Denied? The urgent need to rebalance power between Parliament and the Executive: Twelfth Report of Session 2021–22 (HL 106), 24 November 2021.

[5] Clause 519 Subsection (1) in Chapter 2 of the Employment Rights' Bill empowers the Secretary of State by regulations to provide that:

a. Nothing done by the Body or members of the Negotiating Body when acting in that capacity can be regarded as collective bargaining for the purposes of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992; and,

b. Any agreement reached by the Negotiating Body does not constitute a collective agreement as defined in that Act'.

Bearing in mind the possible rollout of sectoral bargaining to other industries, there's another point about primary and secondary legislation that needs to be emphasised. According to the Government's *Final stage impact assessment* (p1):

> Further primary legislation would be required to bring forward a Fair Pay Agreement process in any other sector.

Adding sectors, in other words, isn't going to be quite as straightforward as the initial resort to secondary legislation suggested it might. The upside is that there might in due course be an Act of Parliament (a Fair Work Act or Fair Pay Act?) which, as well as taking on board the lessons from introducing sectoral bargaining in adult social care, might be more encompassing in its scope.

3 Key details to be decided

It's difficult to find the words to describe the process that's proposed. It's much more than the 'compulsory bargaining' associated with the long-standing Wages Council Acts. The Secretary of State has sweeping powers including being able to impose settlements[6]. Also, in the case of outcomes, the primary concern seems to be to produce legal regulation rather than the joint regulation associated with collective bargaining. Perhaps most extraordinary, as already indicated, measures supposedly designed to promote collective bargaining explicitly state that the 'agreements' the negotiating bodies arrive at are not to be deemed 'collective agreements' under the current legislation.

Wide ranging though the powers invested in the Secretary of State are, their exercise is another matter. At one extreme, the Secretary of State could apply the letter of the law insisting on the process coming up with regulations as quickly as possible within the tightly defined limits. At the other, they could see it as an opportunity to foster organisation, joint regulation and social dialogue: they could effectively delegate decision making to the parties, using their considerable powers to pressurise them to reach agreements or else.

Let's assume that the Secretary of State isn't going to use their wide ranging powers as arbitrarily as the arrangements would appear to allow. Let's assume,

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[6] For a detailed discussion of the powers the Secretary of State will have, see the Institute of Employment Rights' 'briefing' on the Employment Rights Bill.

On extending sectoral bargaining beyond adult social care, this 'briefing' also suggests that further primary legislation could be avoided 'by the simple expedient of an amendment to the Bill empowering the Secretary of State to make provision for the establishment of sectoral collective bargaining arrangements in sectors where prescribed statutory criteria are met'.

too, that they will be 'engaging' with the sector as the Government *Factsheet: Adult Social Care Negotiating Body in the Employment Rights Bill* (p1) suggests.

On the same page, the Factsheet usefully gives us a list of the issues the powers in the bill will allow the Secretary of State to make regulations on. 'Among other things', they are:

> • establish an Adult Social Care Negotiating Body, including provision about the appointment of its members
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> • make provision about the remit of the negotiating body (for example, to specify additional matters relating to employment as a social care worker)
>
> • specify how matters are to be considered by the Negotiating Body in its negotiations
>
> • set out the process for dispute resolution and reconsideration of matters
>
> • ratify the negotiating body's agreement so that its provisions relating to workers' pay and terms and conditions are given legal effect; and
>
> • make provision for state enforcement arrangements

3.1 Name of the Joint Negotiating Body

In introducing the Wages Council Bill in January 1945 to update and rename the Trade Boards introduced by Winston Churchill in 1909, the Minister of Labour (Ernest Bevin) opened the debate with these words:

> Many people might ask what is in a name, but as the purpose of the Bill is unfolded it will be seen that the change in the name not only widens trade boards legislation, but is a declaration by Parliament that the conception of what was known as sweated industry is past.

As Bevin implies, the name may be trivial. But being a 'declaration by Parliament', the name is important for messaging as well as affecting the remit and scope of the agreement. 'Joint Negotiating Body' hardly slips off the tongue. More appropriate would be 'Council' or 'Forum'. Indeed, there is already a representative Social Care Fair Work Forum in Wales, following the Fair Work Wales report of 2019[7].

[7] As Maree Todd, the Scottish Social Care Minister, pointed out to her Westminster counterart (Stephen Kinnock) on 28 October 2024, there's also a Scottish equivalent: the Fair Work in Social Care Group (FWiSCG) .

It may be that 'Joint Negotiating Body' has to be used because the Government is using administrative procedures rather than enabling legislation. Presumably, though, there's nothing to stop the Government from using 'Council' or 'Forum' as a shorthand in brackets. Or, better still, it could encourage the parties to set up a Social Care Forum as in Wales - and as the TUC recommended in 2022 - with one its functions being to fulfil the remit of the 'Joint Negotiating Body'.

3.2 Composition of the Joint Negotiating Body

In the case of the body's composition, the Wages Councils arrangements might be the starting point. Wages Councils came in for considerable criticism during their lifetime[8]. The composition of the Council itself doesn't seem to be one of them, though. Building on their precedent, there might be a tripartite Adult Social Care Fair Work Forum composed of an equal number of representatives of employers and trade unions, plus three independents with knowledge and experience of the sector These individuals, one of whom would take the chair, would be appointed by the Secretary of State either directly or drawn from a jointly agreed panel.

There are two main advantages of such arrangements. The first is that having an independent chair, especially someone of stature, is the most effective way of ensuring meetings of the body are properly prepared for, conducted efficiently and their decisions followed up without delay. The second is that having three independents gives the body an in-built arbitration process if and when there is a failure to agree the terms and conditions of the sector or a dispute about its interpretation. In the event of these happening, it would be for the three independent members to decide the outcome, the majority view prevailing.

The Secretary of State could decide the issues themselves. Or they could refer them to the Central Arbitration Committee for a decision. Both options would require time for briefing, however, which could lead to damaging delay. Also, in

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Also to be remembered is that sector 'forums' featured in the 2004 Warwick Agreement between the then Labour Government and the TUC. The intention was these 'forums' would seek to improve the lot of the large numbers of 'disadvantaged' workers in several of the sectors listed in this paper's Annex. Sadly, sector forums came to be seen as the 'Trojan Horse' for restoring national bargaining in engineering. The idea was therefore very quickly dropped.

[8] See, for example, the House of Commons Library Research Briefing on the historical background to the National Minimum Wage

the first instance, the Secretary of State unnecessarily runs the risk of exposing themselves to accusations of bias.

Complicating matters when it comes to the appointment of the, let's say, Forum's trade union and employers' representatives is that adult social care is a very large and complex sector involving private, voluntary and community providers. The number of trade union and employers' representatives might therefore be expected to run well into double figures in both cases. In which case the Secretary of State will need to be careful that they don't exclude organisations that feel they have a legitimate claim to be among them.

They might like to look at the composition of the Social Care Fair Work Forum in Wales and its equivalent in Scotland to start with. In the case of the trade unions, they might ask the TUC to coordinate suggestions: Unison, GMB, RCN and Unite spring to mind, but there may be others who feel they should also be involved[9].

Like many sectors, there are no equivalent employers' organisations in adult social care. There are, though, trade and interest associations. There's also an umbrella body that brings together the ten national associations representing private, voluntary and community sector providers. The Care Provider Alliance claims its reach is over 95% of such organisations and says it seeks 'to represent and support providers from the whole sector at a national level ensuring a coordinated response to the major issues that impact the social care sector as a whole'. Possibly, the Alliance would be able to do a similar job for the employers' representatives as the TUC does for trade union ones.

3.3 Remit

The Government *Factsheet: Adult Social Care Negotiating Body in the Employment Rights Bill* (p1) says the powers in the bill will allow the Secretary of State to make regulations that:

> make provision about the remit of the negotiating body (for example, to specify additional matters relating to employment as a social care worker)

[9] The Social Workers' Union is one such possibility. It's a registered trade union and organisational member of the British Association of Social Workers. Its application to join the TUC in 2021, however, was blocked.

Worrying is that it looks as if 'additional matters' have to be specified if they are to be embraced. The implication could be that, if they are not specified, they are ruled out.

Missing, too, is any reference to the objective. This is important in reminding people of the overall purpose of the sector agreement.

A good illustration of what might be done to make the remit as inclusive as possible is to be found in one of the few surviving private sector multi-employer agreements in the UK. The website of the National Joint Council for the Engineering Construction Industry simply says:

> The National Agreement for the Engineering Construction Industry (NAECI) sets comprehensive terms and conditions of employment for hourly-paid engineering construction workers …

It also goes on to to emphasise the why and wherefore of doing so:

> The key objective of the NAECI is to continue to supply a modern, robust and 'fit-for purpose' national employment relations structure that:
>
> (a) enables United Kingdom engineering construction industry employers and clients to remain globally competitive;
>
> (b) provides attractive terms and conditions and greater security of employment for a competent, motivated, productive and competitive industry workforce and
>
> (c) establishes a sound foundation for further improvements to industry productivity, resourcing and employment relations, assuring global clients of the benefits of continuing to invest in United Kingdom projects and sites.

True, the language of 'global competition' and 'competitive industry workforce' would hardly be appropriate for adult social care. It would just need a few substitutions and deletions, though, for one of the Secretary of State's regulations to put things into an adult social care context: for example, in (a) 'enabling adult social care providers to produce the highest quality service; in (b) 'competent, motivated and high performing workforce'); and in c) 'further improvements in performance and terms and conditions of employment'.

3.4 Agreement contents: much more than a matter of pay

One of the main reasons for the decline of sector agreements in the UK in the 1950s and 1960s was that they mostly made little provision for terms and conditions of employment other than pay. By no means were they 'comprehensive' in coverage as they are in engineering construction - they were, in the words of the eminent labour lawyer Kahn-Freund, 'a very flexible corpus of substantive rules, rather than a code laid down for a fixed time'[10]. Pay was the overriding focus. Even in this case, treatment was often limited to just one or two basic rates rather than a full set of differentials.

Perhaps hardly surprisingly, the same was true of the Wages Councils which were the 'compulsory bargaining' equivalent. The scope of negotiations was statutorily limited to setting standard hourly rates for the various occupations; differential rates for night work, overtime, waiting time, and travel; hours of work; holidays and holiday pay; and permitted deductions for housing. Following the Wages Councils Act 1986, the councils were restricted to setting a single rate, further weakening their impact[11].

As well as raising expectations that can't be met, the danger of focusing on pay so much is that fundamentally important issues such as employee voice and opportunities for training and development get sidelined because they don't lend themselves to the 'distributive bargaining' that dominates collective bargaining in the UK. The same goes for measures to ensure that there is 'procedural fairness' - that is, 'employees feel protected from arbitrary decision-making and hence insecurity in their jobs'[12]. The most obvious examples are disciplinary and grievance procedures.

The Bill gives a lot of scope to the Secretary of State, which they will hopefully make the most of to ensure that the coverage of the sectoral bargaining being proposed goes considerably beyond the Wages Council model. Because, as things stand, the Fair Pay Agreements that continue to be referred to look too close to the Wages Council model for comfort. 'Other terms and conditions' are

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[10] Kahn-Freund, O. (1959). Labour law. In M. Ginsburg (Ed.), Law and opinion in England in the 20th Century (Vol. 1959, p. 263). Stevens.

[11] Stephen Machin and Alan Manning. 1994. 'The Effects of Minimum Wages on Wage Dispersion and Employment: Evidence from the U.K. Wages Councils'. ILR Review Vol. 47, No. 2 (Jan., 1994), pp. 319-329

[12] The words are those of Gallie and colleagues (p. 2). Drawing on the results of the *First findings from the skills and skills survey 2017*, they remind us that there's a considerable body of research evidence explaining why fairness is a 'central determinant of employee well-being,' with positive links to organisational performance. It has two dimensions: 'an adequate balance between effort and reward' and 'procedural fairness or fairness in the way decisions are taken'.

routinely mentioned, but rarely discussed in any detail. Even the Government's own Final impact assessment stands guilty.

3.4.1 Dealing with pay matters

There seems broad agreement about what needs to be done immediately in the case of pay: 'ensure all social care workers in England are paid at least the real Living Wage, building on the example set in Scotland and Wales'[13]. In the case of publicly funded adult social care, it would mean putting in place sufficient funding, delivery mechanisms and requirements for the commissioners of social care to raise the wages of adult social care workers. Elsewhere it could be guaranteed through provider accreditation.

There are two issues with longer term implications that need to be tackled as soon as possible. One is a standard pay and progression framework such as the Social Care Fair Work Forum in Wales has been preparing. The lesson of Wages Councils is that a single rate is not enough: there needs to be a structure of rates that encourages development and skills acquisition.

The Government's *Final stage impact assessment* (p8) makes the same point in more detail in discussing 'career progression':

> Pay differentials within the sector have also eroded over time. Pay differentials for experienced staff have been eroded from 33p per hour in March 2016 to 6p per hour in March 2023 for care workers with 5 years or more of experience relative to those with less than one year's experience. At December 2023, the hourly rate difference between a top 10% earner (£12.16) and a bottom 10% earner (£10.42) was £1.74 per hour, reflecting a very flat pay structure with limited scope for progression. Limited recognition of staff with more experience or skills can mean that there is reduced incentive for workers to progress or to stay in their roles.

The other issue needing to be adressed is the alignment of adult social care pay grades with the starting salary of the appropriate NHS level. It's difficult to

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[13] See *The Real Living Wage in Social Care: Living Wage Foundation Policy Paper* published in June 2024. See also the Health Foundation and Nuffield Trust's *From ambition to reality: national policy options to improve care worker pay in England* (July 2024) and Skills for Care's *A Workforce Strategy for Adult Social Care in England* (July 2024).

The Government's Final stage impact assessment (p2) reminds us that the Voluntary Living Wage (VLW) is independently calculated by the Resolution Foundation and overseen by the Living Wage Commission in an annual process. The Welsh and Scottish Governments use the VLW to ensure a higher-than-minimum wage in social care where contracts are engaged by local authorities.

avoid a sector by sector approach in matters of pay. At the same time, there's a need to be sensitive to the important role that comparability plays in influencing perceptions of what is fair and unfair. Changes in pay structures in particular have implications for the groups that people compare themselves to: every effort must be taken to ensure that dealing with adult social care doesn't lead to problems elsewhere[14].

3.4.2 Other terms and conditions

In the case of other terms and conditions, there's no shortage of examples of agreements and frameworks to draw on. In the first instance, as well as engineering construction already mentioned, there are the sectoral agreements in the NHS and local Government. In the second there are the proposals in the TUC's *A stronger voice for workers* (p23) and in the *Fair Work Wales* report (pp18-23) published in the same year (2019).

Key issues needing to be embraced in adult social care are training and development, along with the requirements for professional registration seen to be needed to recognise the status of adult social care workers. As the GMB Union puts it:

> The GMB has always recognised that the social care workforce are professionals. The perception that the role is just a caring role and that anyone can do it, is outdated and insulting. Social care work has changed considerably over the last two decades. GMB sponsored an All Party Parliamentary Group (APPG) in 2019 to look into the care system, funding and the state of staffing in the sector. Professionalisation of the workforce was right at the centre with recommendations calling for a workforce strategy to address this. The APPG also called for an effective model of registration for England, in line with Wales, Scotland and Northern Ireland. Professional recognition such as a Royal School for Social Care could provide advanced training, development and genuine career progression, improving the lives of the workforce and those that need for care to be delivered.

Another issue is security. In the words of the Government's *Factsheet: Adult Social Care Negotiating Body in the Employment Rights Bill* (p9):

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[14] The Local Government Association, for example, emphasises that:

> While many of the details of the ASCNB have yet to be finalised, it is important that existing national collective bargaining arrangements in the local Government sector are given due consideration …
>
> A particular concern in this respect is that the SoS could make regulation on pay which doesn't consider the wider reward packages available to local authority staff, including access to the Local Government Pension Scheme.
>
> It is important that local authorities can input to, and make representations on, proposed agreements.

> The ASC sector is also characterised by unstable employment, with 22% of workers in ASC in England on Zero Hours Contracts (ZHCs), including 32% of care workers, compared to 3.4% in the wider economy. This is even more pronounced for domiciliary care workers, where 50% were on ZHCs in 2022/23. The use of agency work and zero hours contracts is partly in response to high vacancy rates.
>
> Although some workers benefit from the flexibility that ZHCs provide, general employment uncertainty reduces labour supply overall. Furthermore, those on ZHCs have a higher turnover rate than other care workers (38.2% turnover rate in 2022/23 for care workers on a zero-hour contract compared to 31.1% for other care workers

It may be felt that it's too much to expect the sector agreement to include the details of issues like these. If so, they might be dealt with in the guidance and codes of practice that the Employment Relations Bill gives to the Secretary of State power to create (Clause 38: 496). As well as enabling the contents to be expressed in the language of employment relations rather than that of lawyers, a major advantages is that the guidance or codes of practice would be able to finesse key employment rights legislation to suit the circumstances of the sector[15]. An obvious example in adult social care would be the security the Government's Final impact assessment cites.

Guidance and codes also offer the opportunity to raise awareness of the importance of employment matters and help to diffuse good employment practice and workplace innovation. The evidence from ACAS surveys and advisory workplace projects suggests that many SMEs not only struggle to keep up to date with employment legislation and find difficulty in implementing complex statutory provisions[16]. They are also unfamiliar with the many ways in which relatively simple changes in working practices can make a contribution to improving performance.

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[15] It might be added that an employer criticism of many of the measures in the Employment Rights Bill is that they are too inflexible. For example, here's how Shevaun Haviland, Director General of the British Chambers of Commerce, was quoted in *The Times* on Tuesday 8 October 2024 in discussing the Employment Bill's proposal on flexible working:

> There is no one-size-fits-all solution here. Any legislation must be broad enough to accommodate the diverse range of business types and job roles across our economy. Solutions should be based on mutual agreement between employers and workers, recognising the unique needs of different industries and organisations.

She almost certainly wasn't thinking of sectoral bargaining at the time. She was, though, unwittingly making one of the strongest arguments for it.

[16] See, for example, Keith Sisson. 2014. 'The UK Productivity Puzzle - is employment relations the missing piece?' *Acas Policy Discussion Papers.* See also John Forth and Alex Bryson. 2015. 'Building Productivity in the UK - *(Acas)* Policy Paper*'.*

The idea of sector agreements taking on an educational role may appear far-fetched. There is nevertheless already an excellent UK example: it's to be found in another of the industries where sectoral bargaining is the norm: electrical contracting. The Joint Industry Board for Electrical Contracting involving the Electrical Contractors' Association and Unite publishes a *Handbook* that not only gives details of the various 'agreements' between the two parties. It also has sections covering the 'main provisions' of employment law along with codes of 'best practice' and 'good practice'.

3.5 'Assisted negotiation': making the most of the opportunities

The agenda suggested is a tall order especially bearing in mind the need for urgency and the sector's relative lack of experience of collective bargaining. In these circumstances, the Secretary of State would do well to make the most of the opportunities for 'assisted negotiation' that existing agencies make possible.

To help deal with settling pay in the medium term - and perhaps the longer as well - the Secretary of State might set up a temporary Pay Review Body for the sector. Critically important is that Pay Review Bodies[17] are supported by the Department of Business and Trade's independent Office of Manpower Economics. Its expertise would be particularly valuable in advising on two of the issues that will be critical in achieving a successful outcome in adult social care: a standard pay and progression framework and the alignment of these pay grades with the starting salary of the appropriate NHS level.

In the case of other terms and conditions, the Secretary of State might ask Acas to work with the parties in adult social care to produce the guidance or codes of practice that the Employment Relations Bill makes provision for. Acas might meet with the parties separately in the first instance to get their views and opinions on contents. It might then produce a draft for discussion with the parties in meetings of the tripartite council leading to their agreement and issue of regulations by the Secretary of State.

The advantage of involving Acas is that it would enable sector agreements to be more quickly drafted: Acas officials have the knowledge and expertise that's

[17] Pay Review Bodies, which typically have between six and eight members appointed by the Secretary of State, are independent advisory non-departmental public organisations which provide evidence-based advice and recommendations on levels of pay for their respective remit groups. There are currently eight Pay Review Bodies making recommendations impacting 2.5 million workers (around 45% of public sector workers).

unlikely to be available in the Department for Business and Trade itself. It means, too, that many of Acas' advisory materials dealing with employment law, HR processes and good practice at work could be referenced and/or annexed in the guides and codes that the Secretary of State issues, along with their associated template letters, forms and policies.

3.6 Securing adherence

The Government's *Factsheet: Adult Social Care Negotiating Body in the Employment Rights Bill* (p1) says the Employment Bill will enable the Secretary of State to make regulations that:

• ratify the negotiating body's agreement so that its provisions relating to workers' pay and terms and conditions are given legal effect; and

• make provision for state enforcement arrangements

In the case of pay, things look reasonably clear. Effectively the Employment Rights Bill enables the Secretary of State to 'enforce the remuneration terms of an agreement or regulations by applying specific provisions in the National Minimum Wage Act 1998'. In which case enforcement would the function of the proposed new Fair Work Agency in the same way as minimum wage legislation is currently enforced by HMRC[18]. Compliance by employers would be essential to avoid penalties, which could include fines, public exposure, and back pay requirements.

Not so clear from the Government Factsheet is how the other terms and conditions the 'Joint Negotiating Body' comes up with will be enforced: the same looks to be true of the Final impact assessment and the Employment Rights Bill itself. The omission is hardly likely to be an oversight. Most probably it's the result of the Government favouring secondary over primary legislation like an Act of Parliament.

As already emphasised, resorting to this procedure means the Government will be able to tackle the issues in introducing sectoral bargaining in adult social care much more quickly. Another downside, it seems, is that it limits the options

[18] Clause 505 sets how the Secretary of State may enforce the remuneration terms of an agreement or regulations made under section 37, namely by applying specific provisions in the National Minimum Wage Act 1998 (with or without modifications) in regulations.

available for securing adherence to terms and conditions other than pay: the specific provisions in the National Minimum Wage Act 1998 will be able to deal with 'remuneration' but not much else.

One thing the Secretary of State might do is introduce a regulation expressly requiring Employment Tribunals to take the terms and conditions of the sector agreement into account in considering claims from individual employees dealing with the relevant subject matter. It would be similar, in other words, to the arrangements for encouraging adherence to Acas Codes of Practice.

Also not to be forgotten is that there are other ways in which public policy can help to secure adherence to sector agreements. Many of these are spelt out in the 2024 report from UNI Europa, the European service workers' trade union federation, entitled *How policy can strengthen (multi‑employer) collective bargaining in Europe*. Along with provisions for extending the terms and condition of sector agreements, perhaps the most important is what is known as 'conditionality'. In broad terms it means that one of the conditions of companies being awarded public contracts is that they must respect the terms and conditions of their sector agreement. In the specific case of adult social care in the UK, as Kessler and his colleagues remind us, the Government has considerable regulatory power over the performance of providers through a variety of arms‑length bodies such as the Care Quality Commission and the NHS Standard Service Contract. Conformity to the terms of the sector agreement might be expected to be a requirement of registration with these bodies.

4 Funding challenges

Introducing sectoral bargaining in adult social care, it's easy to forget, doesn't just pose operational challenges, but funding ones as well. The initiative offers the benefits of improved terms and conditions for many thousands of care workers, much higher recruitment and retention rates, a reduction in reliance on immigration and a better all-round adult social care service. Few of these paybacks will be immediate, however. The funding challenges could have a profound effect on the process. This is above all true because of the timing of these challenges.

In the short run, to spell out just some of the details, the Government will have to decide whether to match the commitments of its Scottish and Welsh

counterparts to introducing the Living Wage Foundation's Voluntary Living Wage, thereby ensuring a higher-than-minimum wage in social care - the net cost is estimated to be £330 million, which would add 2% the social care budget for the coming year. In the medium term, it will have to decide how much it will contribute toward funding the as yet unkown costs of introducing the contents of the sector agreement as a whole. In this case, it will have to take into account the likely response of the mostly private adult social care providers (many disgruntled by the Government's failure to exclude them from the increase in employers' National Insurance contributions in the autumn 2024 budget[19]), cash-strapped local authority representatives responsible for commissioning services and the many individuals who have to self-fund their currently extremely expensive care[20]. In the longer term, it will have to come up with proposals for the long-term funding of adult social care overall: one of the first decisions of the incoming Chancellor of the Exchequer was to set aside the formula due to be implemented in 2025 involving a lifetime cap on adult social care costs and a more generous financial means test. The political reality is that these will have to be on the table by the summer of 2029 and the latest date for the next election.

5 Summary and conclusion

[19] See Mithran Samuel 'Social care providers face £2.8bn bill from wage and tax rises next year, analysis finds' in CommunityCare. The Nuffield Trust adds that:

> … the [Employment Bill'] new rights and any changes to pay will need to be implemented carefully because social care is in such a precarious state after decades of neglect. Many employers are so financially squeezed that suddenly requiring guaranteed hours and additional rights without support could push some into bankruptcy. We know that local authorities are already dipping into their reserves to service adult social care services: they have less than no room to absorb new costs.

[20] The Institute of Fiscal Studies explains that:

> Eligibility for Government support towards adult social care costs in England is subject to both a financial means test and a needs test. That is, publicly funded adult social care is rationed in two ways: only those with limited financial resources and assessed social care needs above a certain threshold qualify for support from their local council. Both the means test and the needs test have become more stringent in the last 15 years. There is no cap on the costs that an individual can incur. Around one-in-seven 65-year-olds can expect to incur lifetime care costs of more than £100,000, but individuals have limited ability to protect themselves against extremely high care costs. This is the 'insurance problem' in social care.

The Government's *Final stage impact assessment* (p2) adds that:

> While employment conditions in the ASC sector are linked to Local Government finances, simply increasing Local Government funding would not solve these issues. Briefly, this increase in funding may not increase the fees which Local Authorities pay social care providers and, in turn, providers may not spend any increased fees on employment conditions. An ASC FPA provides a means to negotiate for better pay and conditions in the ASC sector as a whole and provides levers to ensure the negotiated outcome is honoured.

A lot rests on the outcome of introducing sectoral bargaining in adult social care. The challenges the sector faces in tackling the unprecedentedly high vacancy levels are difficult to exaggerate. At stake, too, are the prospects for sectoral bargaining more generally. Especially in need of sectoral bargaining are other sectors in the 'foundational economy' featured in the Annex. These sectors are also plagued with recruitment and retention problems which have considerable implications for service delivery and immigration arrangements.

Important to emphasise is that introducing sectoral bargaining in adult social care is not to be seen as a matter of 'proof of concept'. The need for sectoral bargaining has long as well as widely been established. Much more important in determining whether or not the initiative in adult social care is a success will depend on how the Secretary of State handles the devil in the details.

To begin with the most basic, it may be that the label 'Joint Negotiating Body' has to be used because the Government is resorting to an administrative procedure rather than primary legislation. But, as well as hardly living up to the message that might be expected of a 'declaration by Parliament', it runs the risk of adversely affecting the remit and scope of the agreement. Better would be to encourage the parties, as in Wales, to set up an Adult Social Care Forum whose responsibilities encompass the 'Joint Negotiating Body' remit.

As for the remit, the regulations need to be inclusive and include a statement of the objectives such as in The National Agreement for the Engineering Construction Industry. The agreement contents also need to be as comprehensive as possible if they are to make a real difference. There need to be provisions - if necessary in the guidance or codes of practice that the Employment Relations Bill gives to the Secretary of State power to create - for employee voice and collective representation, security and flexibility, opportunity for access, growth and progression (including national training standards and registration), flexible working and a safe, healthy and inclusive working environment (including the proposed right to disconnect).

In the case of securing adherence, the proposed Fair Work Agency is essential. It will need, though, to be properly resourced. 'Conditionality' also has an important role to play in adult social care, given the Government has considerable regulatory power over the performance of providers.

It's a tall order. In view of the complexity and the need for urgency, the Secretary of State is encouraged to make the most of the opportunities for 'assisted negotiation' that existing agencies make possible. A temporary pay review body might be set up enabling the Department of Business and Trade's independent Office of Manpower Economics to advise on a pay and progression framework and the appropriate alignment of its pay grades with other public services. Similarly, in the case of other terms and conditions, Acas might be asked to assist in drawing up the guidance and codes of practice that the Employment Relations Bill gives the Secretary of State power to create.

If there's one single message for the Secretary of State, it is to ensure that the sectoral bargaining they introduce in adult social care amounts to much more than the Wages Council model of yesteryear. In doing so, they will hopefully take the opportunity to stress that collective bargaining is about a lot more than an annual haggle over pay; that it's a process of joint regulation; and that it's about securing not only 'an adequate balance between effort and reward', to recall the words of Gallie and his colleagues, but also 'fairness in the way decisions are taken'. They might add that collective bargaining stands comparison with legal regulation. Indeed, as the OECD in its *Facing the Future of work: How to make the most of collective bargaining* has come to recognise, collective bargaining offers a 'more flexible and pragmatic but fair manner than labour law' in helping to adapt pay, working time and work organisation to new needs.

Annex

Attending to the 'foundational economy'

This annex lists the other sectors where there is a particularly strong case for introducing sectoral bargaining. Like adult social care, all are in the 'foundational'[21] or 'every day' economy. Also like adult social care, they share a mismatch between the key role played in delivering essential services, on the one hand, and the very poor state of the terms and conditions of employment, on the other. Major problems in recruitment and retention similarly threaten delivery of services. In many of the sectors these problems have considerable implications for the highly politically charged issue of immigration.

For example, in their House of Commons Library Research Briefing in May 2024 Niamh Foley and Nerys Roberts summarise the situation in child care like this:

> In the Spring Budget 2023, the Government announced it would be expanding entitlement to free childcare, which would support "hundreds of thousands more working parents". The Department for Education (DfE) has estimated there will need to be an extra 40,000 workers …in childcare by September 2025 to support the entitlement roll-out. This is an 11.5% increase on the number of paid childcare staff in 2023.
>
> In a 2024 report, the National Audit Office said this increase was "ambitious given the workforce only increased by 5% between 2018 and 2023". In its 2024 childcare survey, the charity Coram found the "vast majority (87%)" of local authorities said the childcare workforce was a barrier to expanding free childcare. In response to the survey, local authorities also said the whole childcare sector is facing difficulty in attracting and retaining high-quality staff.

[21] The term has come to be associated with The Foundational Economy Collective, which is a loose grouping of mainly European researchers. Essentially, it sees an economy comprising different groups. Unlike, say, the automotive and pharmaceutical sectors, which are competitive and tradeable internationally, the 'foundational economy' is largely immobile and shielded from international competition. Made up of a mix of public enterprises and private businesses, and accounting for about 40% of total employment, it provides two types of essential services: the 'material', for example, the utilities, banking, food and so on, and the 'providential', for example, care, education and health. Also sometimes included are sectors in the 'overlooked economy': those whose goods and services are culturally defined as essential and require occasional purchase, such as hairdressing, leisure and tourism, and hospitality.

Main (private) sectors in the 'foundational economy'

Agriculture	467,000
Adult social care	1.7m
Child care	350,000
Cleaning services	1.47m
Construction	2.4m (including ⅓ self-employed)
Food & drink manufacture	456,00
Hospitality	2.8m
Logistics (distribution and warehousing)	2.7m
Retail	2.7m

NB Numbers are for the UK. Sources are to be found in the links: they're drawn from House of Commons Research Briefings, trade press and industry bodies, bearing in mind that the published ONS statistics make it difficult to distinguish 'foundational economy' sectors.

The overall numbers speak for themselves. They don't reveal, however, the importance the 'foundational economy' plays at the local and regional levels. Regions which have lost their manufacturing base and/or struggle to compete with high-growth sectors for attention and investment are especially dependent on 'foundational economy' jobs. The Welsh Government in particular has put considerable emphasis on supporting and developing its 'foundational economy'. The same is true of the Glasgow and Greater Manchester regions.

A recent report in *Construction Today* in September 2024 gives a flavour of the situation in that sector:

> The UK construction industry is facing a crisis. With labour shortages reaching critical levels and the post-Brexit immigration system restricting access to foreign workers, the sector is grappling with challenges that threaten its growth and sustainability. Construction projects are delayed, costs are soaring, and the skills gap is widening - all while the demand for new infrastructure and housing continues to rise.

It goes on to emphasise the importance of immigration arrangements:

> At the heart of these issues lies the need for comprehensive immigration reform. For the UK construction sector to flourish, a more flexible and targeted approach to immigration is not just desirable - it is essential.

As in adult social care, the expectation that terms and conditions would improve in these and the other sectors in the light of substantial labour shortages has not been fulfilled. The reasons for the 'market failure' are the same as in adult social care. Not only are there few barriers to entry in most cases, but also products and services are easily substitutable. Notable too is that most of the processes are very labour intensive, jobs are pretty similar from one employer to another and many require few formal qualifications. There are significant numbers of SMEs as well, making it very difficult for trade unions and employers to organise and take collective action on their own.

Especially poignant is that the significance of these characteristics, along with the recognition that sectoral bargaining has a key role to play in the policy response, has long been recognised. Indeed, they go back to Winston Churchill's days at the Board of Trade in the early 1900s. By the 1940s most of the sectors listed were covered by Wages Councils involving a form of 'compulsory' collective bargaining similar to that the Employment Rights Bill proposes to introduce in adult social care[22]. There were Agricultural Wages Boards in England, Scotland, Wales and Northern Ireland (and still are in Scotland, Wales and Northern Ireland). There were Wages Councils in the then 'Catering' and 'Retail' sectors with subdivisions between 'Licensed' and 'Non-licensed' and 'Residential' and 'Nonresidential' in the former and 'Food' and 'Non-food' in the latter. There was also a Wages Council at the core of what has come to be known as 'Logistics' (warehousing and distribution) - it covered 'Road Haulage'.

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[22] In construction, voluntary sectoral bargaining was and is the norm, albeit 'labour only subcontracting', the so-called 'lump', has posed a long standing challenge to its effectiveness. There are currently two significant sector agreements involving joint councils: the Construction Industry Joint Council and the National Joint Council for the Engineering Construction Industry.

Adult social care, it might be added, was once part of the public sector: in 1980 the proportion of private facilities was 18%; by 1990 it was 85%. As the Nuffield Trust explains, there were two key developments. The first was the recommendation of the Griffiths Commission in December 1986 that local authorities be brokers and care managers, but not necessarily direct providers - something the Trust says was 'revolutionary' at the time. The second was the Care Act of June 1990, which introduced a requirement for local authorities to promote the independent social care sector.

It was only in 1993 that the last 26 Wages Councils were controversially abolished by the Major Government with matters being left to 'the market'[23]. There had been criticism of the detailed operation of Wages Councils as indicated in the main body of the paper. Essentially, though, the reason for abolition was ideological. In Shackleton's words,

> by setting a common wage across the sector they [sector arrangements] reduced the possibility of new market entrants undercutting pay and staffing arrangements. They were thus anti-competitive from the off.

[23] As Dickens and his colleagues argued at the time, there was little evidence for the Major Government's case for doing so: (1) that they did little to alleviate poverty, (2) that they reduced employment (3) and that the problems of poverty were no longer relevant. For further details, see Dickens, R., Gregg, P., Machin, S., Manning, A., & Wadsworth, J. (1993). Wages councils: Was there a case for abolition? *British Journal of Industrial Relations*, 31(4), 515–529.