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Nicola Sturgeon MSP
First Minister of Scotland
Scottish Government
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Covid-19 – Phased Reopening of Schools from 22 February 2021

Dear First Minister

I am writing to you on behalf of members of the NASUWT (The Teachers' Union) in relation to the announcement by the Scottish Government regarding the staged reopening of schools from 22 February 2021 involving preschool, Primary 1 to Primary 3 pupils and some pupils in the senior phase of secondary schools.

The purpose of my letter is to ask you to not require schools to resume face to face teaching whilst mainland Scotland and some islands remain at Protection Level 4 (very High Risk) with stay at home guidance, pending further evidence of virus suppression and the introduction of additional workplace and public health mitigations to minimise the spread of the virus amongst teachers. It is also the Union's contention that any wider reopening of schools must also be subject to the satisfaction by the individual employer of its health and safety duties to its staff.

It is also worth mentioning that the extension of the Level 4 restrictions on 2 January underscores the high level risk on contracting Covid-19. In fact, the 'Stay at home guidance which came into effect on 5 January 2021 (as last updated on 11 February) states:

"Working from home protects the NHS and saves lives. If you are able to work from home, you must do so wherever possible ... By law, employers must take all reasonable steps to minimize the risk of the incidence of the spread of coronavirus. This includes supporting staff to work from home for those roles that can be undertaken remotely".

The position was reinforced in the statutory guidance published on 19 January 2021 (as last updated on 2 February), which states “*Organisations should make every reasonable effort to make working from home the default position*”..

Although the Scottish Government has it within its power to require schools to be reopened, it must exercise its powers consistently with Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life) of the European Convention on Human Rights (ECHR). The NASUWT’s position on its members’ Convention Rights is clear and unambiguous, namely:

1. If any of its members died from contracting Covid-19 having been required to return to school pre-vaccination, his or her **Article 2** rights would be infringed. This is particularly the case since the Scottish Government has it within its power to provide early vaccination to teachers, including NASUWT members.
2. Having its members placed at risk of catching and transmitting a serious disease to their families/support bubble is a material infringement of their right to family and private life.

Factual Basis

The risks posed to teachers, including NASUWT members, by the resumption of classroom teaching are greater than those faced by most of the rest of the public. In the case of early years teaching this is because of the difficulties of ensuring effective social distancing. In the case of younger pupils, such a risk is greater because of the likelihood of non-compliant behaviour outside of the classroom.

In rare, but realistic instances, a teacher could die and/or contract debilitating long Covid-19. This is not an exaggeration or hyperbole.

Additionally, it is unnecessary to expose teachers to this risk at the present time. The vaccine programme is going well and the government has it in its power to provide vaccinations to teachers in short order.

In addition, online learning has proven to be highly effective and can be continued for all children with the exception for vulnerable children and the children of key workers.

Legal Basis

It is undisputed that the Scottish Government has it within its power to require schools to be reopened (Coronavirus (Scotland) Act 2020). However, it must exercise its powers consistently with Article 2 and Article 8 of the European Convention on Human Rights (ECHR).

Article 2 of the ECHR

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - a) in defence of any person from unlawful violence;
 - b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The NASUWT contends that if any of its members died from contracting Covid-19 having been required to return to school pre-vaccination, his or her **Article 2** rights would be infringed. This is particularly the case since the Government has it within its power to provide early vaccination to teachers.

Article 8 of the ECHR

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is also the Union's case that placing its members at risk of catching and transmitting a serious disease to their families/support bubble is a material infringement of the right to family and private life. For the reasons set out this inference is not proportionate.

Primacy of Employers Duty of Care – Health and Safety

As you will be aware, primary legislation merely sets out a statutory power, which cannot abrogate the duty placed on employers by section 2 of the Health and Safety at Work Act 1974.

The material provisions of section 2 of the Health and Safety at work Act 1974 say:

2 General duties of employers to their employees.

- (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
- (2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—
 - (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
 - (b) ...
 - (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;
 - (d) ...
 - (e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.
- (3) Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.
- (4) Regulations made by the Secretary of State may provide for the appointment in prescribed cases by recognised trade unions (within the meaning of the regulations) of safety representatives from amongst the employees, and those representatives shall represent the employees in consultations with the employers under subsection (6) below and shall have such other functions as may be prescribed.
- (5) ...
- (6) It shall be the duty of every employer to consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.
- (7) In such cases as may be prescribed it shall be the duty of every employer, if requested to do so by the safety representatives mentioned in [F2subsection (4)] above, to establish, in accordance with regulations made by the Secretary of State, a safety committee having the function of keeping under review the measures taken to ensure the health and safety at work of his employees and such other functions as may be prescribed.

Firstly, it is important to note that breach of these duties is a criminal offence.

Secondly, it is for the employer to satisfy itself (and its liability insurer) that there is no unreasonable risk to the health and safety of staff, including NASUWT members, and it cannot be absolved from this duty, which is found in primary legislation by an order, made or action taken, under the Coronavirus (Scotland) Act 2020: *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, which was cited with approval and applied by the Supreme Court in *R (on the application of Unison (Appellant) v Lord Chancellor (Respondent)* [2017] 3 WLR 409 at paragraph 103.

Equality Impact Assessment

The NASUWT wrote to you in August 2020 to emphasise the evidence-based consensus that the risk of injury to health and of death from Covid-19 is significantly higher for those from BAME backgrounds. To date, you have provided not the slightest explanation as to why there is to be no impact assessment either now or before your decision to announce the wider reopening of schools from 22 February 2021.

The NASUWT is very concerned about this and considers it to be inconsistent with scientific evidence of the impact of Covid-19 on the BAME group and for other teachers with protected characteristics.

You will be well aware that the public sector equality duty in section 149 of the Equality Act 2010 applies to you and your Department. The NASUWT considers that the failure to carry out an impact assessment of the decision to reopen schools on 22 February 2021 is unlawful and irrational.

Requested Action

It is our view that you continue the suspension of face-to-face teaching pending further evidence of virus suppression and the introduction of additional workplace and public health mitigations to minimise the spread of the virus amongst teachers.

Given the importance and immediacy of these issues, I trust that this matter will be given your immediate attention and that you will reply as a matter of urgency to the point set out above. Failing which, the NASUWT will consider taking proceedings in the Court of Session, for appropriate declaratory or other relief.

Yours faithfully



Dr Patrick Roach
General Secretary

Cc: John Swinney MSP
Deputy First Minister and Cabinet Secretary for Education and Skills