



Guidance to support delivery of the Living Wage Commitment to Care at Home and Housing Support

1. Introduction

This guidance is a tripartite document informed and agreed by Scottish Government, COSLA, and CCPS and Scottish Care on behalf of providers. Its purpose is to support local authorities and providers in their local decision making to help implement the Living Wage commitment as part of a positive approach to fair work practices. The Living Wage commitment was agreed between Scottish Government and Local Government as part of the Local Government Settlement. Moving forward, a tripartite approach is being taken to delivery with the full involvement of providers.

The guidance deals with the particular issue of implementing the commitment to pay all care workers in adult social care regardless of age, £8.25 per hour from October 1st 2016. The guidance does not direct a particular route or mechanism for delivery but rather supports a consistent understanding of the risks that need to be balanced in taking local decisions when implementing the commitment and a description of some of the options which could be used to support the delivery of the commitment.

It is at the same time important to keep in mind when considering options for implementation that the purpose behind this commitment is to value and improve the quality of care. It is an opportunity to invest in social care as a career of choice by addressing one aspect of the recruitment and retention challenge in the sector. However it would be counter to the aim and intention of the investment if this were achieved for example at the expense of fair work practices more generally, including training, development, and broader terms and conditions etc. which influence and underpin social care as a quality career option.

These discussions are an opportunity to ensure that a focus on the quality of care and support and the drive towards continuously improving outcomes for people continues to be at the heart of this agenda. This process may also represent an opportunity in the longer term for Integrated Joint Boards and local authorities in collaboration with partners, to review models of care and revise commissioning, procurement and contract monitoring policies and processes which can support and drive improved and innovative services.

It should be noted that every local authority will need to take a range of local advice in deciding a way forward including legal, financial and professional advice in addition to this guidance. This reflects the fact that the risks present in each local authority will differ due to local circumstance and local employment and market dynamics.

2. Background

The Living Wage commitment made by Scottish Government and Local Government as part of the 16/17 settlement is to ensure that the Living Wage of £8.25 per hour from October 1st 2016 is paid to care workers providing direct care and support to adults in care homes, care at home, and housing support (as per the Scottish Social Service Sector report on Workforce Data). This covers all purchased services, including specialist support services such as those for people with physical disabilities, learning disabilities, mental health difficulties and substance misuse issues. The new rate applies for all hours worked and therefore encompasses sleepovers, travel time and holiday pay and should be achieved as part of a positive approach to fair work practices.

Personal assistants employed via Self-Directed Support (Option 1 – Direct Payment) were not explicitly included in the commitment to deliver the Living Wage of £8.25 per hour for adult social care workers. However, Local Authorities may be at risk of challenge with regards to principles of equal treatment and discrimination if allowances aren't sufficient to pay a personal assistant the Living Wage of £8.25. The Scottish Government will make arrangements to ensure that people supported under the Independent Living Fund are also enabled in this way. We will work with Self-directed Support Scotland, Centres for Inclusive Living and Personal Assistant Employers Network to encourage the payment of Living Wage to all personal assistants. Local authorities will not be accountable for ensuring Living Wage is paid to personal assistants directly employed by an individual.

The Scottish Government and Local Government have provided resources to contribute to this commitment for 2016/17 within the £250m Health and Social Care monies. However, it will be important to bear in mind that as well as the increase to basic pay, employers will incur additional costs including National Insurance contributions, employer pension contributions and adjustment of pay differentials with the organisation. This will affect the total cost of the commitment. Costs are also likely to vary locally depending on local markets including employment, provider business models and on the implementation method adopted.

The agreement to pay £8.25 per hour to adult social care workers from 1st October 2016 is part of an overall Local Government settlement. Within the terms of the 2016/17 settlement, councils are required by the Scottish Government to deliver on a package of commitments. If a council does not deliver on these commitments, including the Living Wage commitment, then the Scottish Government has stated that it reserves its position to take action to remove access to, or recover, the specific funding identified in the settlement letter. This settlement agreement between Scottish Government and Local Government was predicated on providers making a contribution to the overall cost of the Living Wage commitment. Providers were not party to this formal agreement.

The scale and timeframe for implementing the Living Wage means that a collaborative approach between commissioners and providers will be critical. Local authorities will need to engage care providers in negotiations to reach a voluntary agreement and this will be facilitated by a funding process that is fair, transparent and collaborative, and achieves 'buy-in' from providers. This approach in itself should reduce the risk of challenge and increase the likelihood of compliance and a successful voluntary agreement.

It is also important to keep in mind that this commitment is not, as of yet, a commitment to the Living Wage as an ongoing benchmark for wages, but to the delivery of £8.25 per hour from October 1st 2016. Any further commitments would be subject to spending review negotiations for 2017/18 and beyond. However, in implementing this year's commitment local authorities may wish to be cognisant of the potential for further commitments to the Living Wage as these may be driven by local decisions and prioritisation as well as national ones.

3. Implementation

We acknowledge that implementing this commitment will present a number of challenges - some to do with matters of legality around procurement and state aid and others relating to adhering to social care policy legislation and principles. However, these need not be prohibitive and there are a number of options which should be considered so as to minimise any risks which may be present. Some of these are described below although this cannot be taken as universal legal advice and the application of this guidance will need to be judged on a case by case basis by each local authority according to their specific local circumstance. **There is no single answer which will work for all care arrangements and local authorities are best placed to undertake a risk assessment to help them identify the best local solution.**

In this guide we seek to highlight some of the areas of particular vulnerability. The risks associated with procurement and state aid are of particular importance but so too are wider social care policy and principles.

Partners should therefore ensure that their selected mechanism:

- Supports the intention of improving the quality of care by investing in the workforce;
- Supports the recruitment and retention of the right people to support and promote stability and continuity of care and support for the user;
- Prioritises choice and control for people supported by care services;

In addition, the delivery mechanism should take into account the key considerations that a contracting authority should have before and when procuring care and support services, including the key principles of fairness; transparency; and collaboration with partners, those with an interest and those affected. Further details are provided in supporting guidance. It is worth noting that having considered and evaluated these risks transparently before making a decision about which mechanism to choose is in itself a protective measure which, done in collaboration between authorities and providers, is likely to limit the potential for challenge and the risk of a successful challenge to the decisions taken.

While cost is not the only, nor necessarily the dominant factor in commissioning services, affordability will be a key question to address when considering the delivery mechanisms for implementation. It is suggested that if they have not already done so, local authorities formally establish the breadth of the current wage rates paid to care workers by providers in their local area as well as any other costs associated with a minimum wage rate of £8.25. Understanding the full cost of this commitment as thoroughly as possible will help with the immediate implementation and the costing of any future commitments.

4. Procurement and fair work, including the Living Wage

The Scottish Government has obtained clarification from the European Commission on the application of the Living Wage in procurement processes. This confirms that contracting authorities are unable to make the payment of any specified wage rate above the legal minimums enshrined in law a mandatory requirement as part of a competitive procurement process. In the UK, this is the National Minimum Wage and National Living Wage, dependant on age. It is, therefore, not possible to reserve any element of the overall tender score specifically to the payment of the Living Wage.

However, where relevant to the delivery of the contract, it is possible for a contracting authority to take account of a bidders approach to fair work practices which includes, for example, the payment of £8.25 per hour, and to evaluate this as part of the procurement process. Fair work practices will be particularly relevant to consider where the quality of the service being delivered is directly affected by the quality of the workforce engaged in the contract. The Scottish Government has issued statutory guidance on this issue.¹

Evaluation criteria in a tender process must be relevant and proportionate to the subject matter of the contract being let and it is for contracting authorities to determine the balance that meets their requirements for the service. In a sector such as care services, where quality and continuity of service and low staff turnover are likely to be closely related to fair work practices such as recruitment, remuneration and other terms of engagement, the weighting being given to fair work practices will be particularly significant in contributing to the desired outcome for quality of service. A contracting authority therefore does have a significant discretion to set evaluation criteria in a way that recognises the impact of fair work practices on the quality of the services, and therefore a higher percentage weighting for fair work practices, including the payment of £8.25 per hour, is likely to be justified. Where a contract is let in compliance with the relevant legislation, there is limited scope for a tenderer to challenge the weighting which is assigned to evaluation criteria.

When evaluating fair work practices as part of a procurement exercise contracting authorities must consider a bidder's overall approach to fair work and all bids must be treated equally. This should include consideration of all relevant evidence, including (but not limited to) recruitment, remuneration, terms of engagement, skills utilisation and job support and worker representation. A bidder's approach to fair work practices may vary depending on the bidder's size and the scope of the contract and the contracting authority must take a measured and balanced approach based on this.

The statutory guidance states that any decision to include a question on fair work practices should be made on a case by case basis taking into account commitments set out in the contracting authority's procurement strategy. The question should be framed in a way that is consistent with the principles deriving from the Treaty on the Functioning of the European Union: transparency, equality of treatment and non-discrimination.

¹ <http://www.gov.scot/Resource/0048/00486741.pdf>

A commitment to pay £8.25 per hour to adult social care workers would be a strong indication of a positive approach to fair work practices. Payment of the Living Wage is not the only indicator of fair work, however, and it should be emphasised that whilst failure to pay the Living Wage would be a strong negative indicator it does not mean that the employer's approach automatically fails to meet fair work standards. The question should ask bidders to describe the package of measures which demonstrates their positive approach to fair work practices in delivering the public contract. This context further demonstrates the need to progress this commitment as far as possible in collaboration and through the voluntary agreement of providers.

5. State Aid

Entering into a contract following an open and transparent procurement procedure which complies with the relevant legislation would be unlikely to raise any state aid risks. Similarly, varying a contract in a way that is compatible with procurement legislation should not constitute an award of unlawful state aid. Where there are doubts as to the state aid position, additional support to undertakings should be given in a manner that is compliant with state aid requirements.

The state aid position will always depend on the particular factual (local) matrix at hand and there will inevitably be cases where the state aid position is not clear. Where there is a risk that a measure constitutes state aid, appropriate mitigation measures should be taken. This may include awarding uplifts under the general de minimis regulation².

Local authorities will inevitably need to form their own view on the state aid compatibility of any particular locally applied measure.

6. Best Value and Procurement

Generally Scottish Government policy requires that contracts are awarded through a genuine and effective competition which also enables local authorities to evidence best value. However, in relation to contracts for health or social services, the Procurement Reform (Scotland) Act 2014 (Section 12) makes provision for authorities to award contracts without competition where their value is lower than the EU threshold of €750,000 (the relevant guidance provides further detail). Those contracts or framework agreements with a value greater than, or equal to €750,000 can all apply 'light-touch' provisions (described in regulations 74-76 of The Public Contracts (Scotland) Regulations 2015).

Below the EU-regulated procurement threshold the European Commission has confirmed that these services will 'typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects'³. However, it is for a contracting authority to assess whether there is cross-border interest. As such a public body should decide on a case-by-case basis whether or not to seek offers in relation to proposed contracts or framework agreements with a value of £50,000 or more, but less than €750,000. It is important to highlight that the Treaty on the Functioning of the

² Commission Regulation 1407/2013, OJ L352/1, 24.12.2013

³ [EU Directive 2014/24/EU, Recital, 114](#)

European Union fundamental principles should always be considered where relevant.

Public bodies should secure best value by balancing quality and cost and having regard to efficiency, effectiveness, economy, equal opportunities and sustainable development. Public bodies should determine the appropriate quality/cost ratio. When procuring care and support services, greater emphasis should be placed on quality rather than cost as far as practicable.

7. Monitoring

Scottish Government will be assured of the use of the allocated contribution via the Integration section 95 officer sign-off process. Local Government will be responsible for ensuring that this commitment is delivered through local contracts and agreements. The settlement agreement between Scottish Government and Local Government was predicated on providers making a contribution to the overall cost of the commitment.

Given that a council cannot direct or stipulate that the Living Wage of £8.25 per hour is paid as part of a procurement process, any agreement to do so would need to be voluntary and agreed in partnership with providers. Where, following a compliant procurement process, a provider emerges as the preferred bidder, they cannot be disqualified on the basis that they do not commit to the Living Wage. However, the main scope for mitigating this risk lies in the contracting authority's ability to take account of a bidder's approach to fair work practices as part of the evaluation criteria as detailed above and working collaboratively and in partnership with providers to seek a voluntary agreement.

Once agreed, the monitoring of that commitment can be a condition of contract and be a part of the contract management process. Effective contract management and monitoring should also ensure that wider fair work practices, as agreed within the contract, continue to be applied throughout the duration of the contract, e.g. by requesting information on the pay, terms and conditions of workers involved in the delivery of the contract. In the longer term, this should also help to monitor the outcomes and impact of increased wages on the quality of services which people receive.

8. Delivery mechanisms - Identifying and assessing risk

The mechanism used to deliver the Living Wage commitment is a matter for local authorities to decide and will depend upon a local assessment of the risks presented by each of the options.

No option is entirely risk free. How the procurement rules apply; what local financial regulation and local standing orders say; and the benefits and risks to service users of each approach will need to be individually assessed according to local circumstance. All these options are equally applicable to self-directed support, including Direct Payments.

The key risks that will need to be considered and weighted against the overall objective include:

1. Social care outcomes
2. Impact on the quality of care
3. Proportionality of the mechanism
4. The impact on local trade and the local market
5. Compliance with state aid and procurement rules
6. Best value
7. Impact on market continuity

(a) Modification / contract variation

There are a number of relevant factors to take into account when determining whether modification of a particular contract is permissible and authorities should take advice in relation to specific contract variations.

Local authorities will need to consider the particular context for each proposed variation and look to provisions of regulation 72 of the Public Contracts (Scotland) Regulations 2015, which provide further detail of the circumstances in which a contract can be varied. The provisions of regulation 72 only apply in a strict sense to contracts valued at €750,000 or above. Contracts below this value are less likely to be of interest to operators in the rest of the EU and contracting authorities are not bound by the restrictions in these cases where there is no evidence of cross border interest⁴.

However, when calculating whether the 10% threshold referred to in regulation 72(5) of the Public Contracts (Scotland) Regulations 2015 has been exceeded, the element which is taken into consideration is that which relates to the monies paid by the contracting authority: any contribution by the provider does not form part of the contract sum. In this context we also draw authorities' attention to regulation 72(1)(5)(a) which requires that any modifications under regulation 72(1)(5) are also below the regulation 5 threshold.

Varying a contract in a way that is compatible with the relevant legislation should not constitute an award of unlawful state aid. Where there are doubts as to the state aid position, additional support to undertakings should be given in a manner that is compliant with state aid requirements.

There are a number of ways that a council can vary the contract in order to pay the Living Wage of £8.25 per hour. These are detailed below, and it may be necessary to adopt a range of approaches or take a staged approach and implement the commitment using one mechanism while considering another mechanism for a longer term approach if required.

⁴ Scottish Government has recently published Guidance on the Procurement of Care and Support Services 2016 (Best-Practice). Public bodies should take account of this guidance which provides further advice on the amending of care contracts below the value of €750,000, in particular see Sections 8.12, S9.9, S9.18, S9.20, S9.26 and S9.63

The main risks of these example approaches are highlighted but should be considered within the wider context of a complete risk assessment and in particular in the context of social care outcomes.

- **Apply a percentage increase across the board: uplift all contract values/hourly rates by uniform amount on condition that providers volunteer to pay £8.25 to care workers.** This approach would be relatively easy to administer and would remove any competitive disadvantage between providers who may or may not already have invested in workforce wages. However Local Authorities will need to satisfy themselves as to the overall affordability of this option (depending on local circumstance and against their allocated resource) and be content that there would not be others interested in the terms of this contract, if this had been the basis of the original tendering process.
- **Apply a differing percentage increase per provider, through individual negotiation based on their particular costs.** This may be a more bureaucratic process dependent upon how many contracts and providers there are in each council. There may also be issues around the overall transparency of the process which, as noted, will be important for provider 'buy-in' to this initiative. It would however target the resources available to the purpose of addressing low pay and delivering the Living Wage commitment. If this approach were pursued then Local Authorities would need to be clear that in order to comply with state aid, providers could not be treated inequitably.
- **Set a standard rate for each local authority within which the £8.25 per hour wage for care workers is affordable.** To deliver this approach the rate would have to be set at a level adequate to cover all costs, not just the Living Wage commitment. The desirability and affordability of this approach would need to be assessed on a case by case basis. More generally this option can be insensitive to the fact that costs may legitimately vary depending on level of need, service model, skill mix of staff, quality of service and would also be insensitive to other justified variation of cost within local authorities where rurality and employment market dynamics impact on viable business models. This option may also include state aid and procurement issues around the equitable treatment of providers which would need to be assessed locally.
- **Set a suite of rates.** This option, whilst addressing the issue raised (above) regarding legitimate variation in service costs, goes beyond the requirement to implement the Living Wage commitment. The desirability and affordability of this approach would need to be assessed locally and in line with longer term commissioning agendas. Negotiating and implementing such an approach across Local Authorities, particularly if supported by service specifications, could be lengthy and so consideration on whether this is deliverable by October the 1st would also be required.

(b) Undertake a new procurement of services in line with new statutory and best practice guidance on social care and ‘Fair Work Practices’

Generally, entering into a contract following an open and transparent procurement procedure which complies with the relevant legislation would be unlikely to raise any state aid risks. Retendering may therefore be an option for some Local Authorities – particularly for those who were otherwise expecting to need to tender for adult social care services regardless of this commitment and depending on the assessed risk of a challenge to the other models of contract variation. However this mechanism has to be balanced against the time, expense and potential disruption (to providers and clients) that a retendering process could bring. Additionally, bearing in mind that the overarching intention of this initiative is to invest in and value the workforce, the potential impact of retendering on that workforce will need to be carefully considered before proceeding.

9. Definitions

The National Minimum Wage: is a legal minimum wage for 21-24 year olds. This means that all employers must pay all of their staff that are between 21 and 24 a minimum of £6.70 per hour.

The National Living Wage: is an enhanced legal minimum wage for over 25's. This means that all employers must pay all of their staff that are over 25 a minimum of £7.20 per hour.

Age group	Nationally defined legal minimum wages
25 and over	£7.20
21 - 24	£6.70
18 - 20	£5.30
16 – 17	£3.87
Apprentices	£3.30

The Living Wage: set by the Living Wage Foundation is currently £8.25 per hour. This is up-rated annually and a new rate will be announced in November.

The Living Wage commitment: agreed as part of the 2016/17 Local Government settlement is to pay all adult social care workers the current Living Wage rate of £8.25 per hour from October 1st 2016. There is no requirement on local authorities as part of this agreement to increase wages to the new Living Wage rate when it is announced in November.

Adult social care workers: This commitment specifically applies to care workers providing direct care and support to adults in care homes, care at home and housing support settings (as per the Scottish Social Service Sector report on Workforce Data). This covers all purchased services, including specialist support services such as those for people with physical disabilities, learning disabilities, mental health difficulties and substance misuse issues.