

Proposed Final Guidance

To: Chief Officers HSCPs, LA Chief Executives and third & independent care providers

Guidance on Real Living Wage for Adult Social Care Workers

We are writing to provide updated guidance which underpins our shared commitment to support payment of the real Living Wage to everyone delivering adult social care in Scotland.

We recognise that significant efforts have been made by all parties in implementing the commitment over the past three years. Evidence suggests that it is making a difference, with average earnings of adult social care workers higher in Scotland than the rest of the UK¹. Our commitment is part of a positive approach to fair work practices.

We are, nonetheless, aware that in some areas significant challenges remain, with regards to the agreement of rates and the ability of providers to implement the policy for sleepovers. We are clear that the commitment to pay adult social care workers the real Living Wage for sleepovers should now be in place in Scotland.

Taking account of the learning to date, we are attaching updated guidance to support continued implementation. This has been developed by the Living Wage in Care Implementation Group (LWIG) which was established to support and monitor implementation of our commitment. The group comprises representatives from Scottish Government, COSLA, Coalition of Care and Support Providers (CCPS), Scottish Care, the STUC and Integration Authorities.

We appreciate that this guidance is being issued mid-year, and that in a number of areas, providers and commissioners will already have reached mutual agreement on an uplift or a rate that is adequate to support delivery of the Living Wage. In other areas however, agreement has not yet been reached. This guidance is intended to support a successful conclusion to ongoing discussions where contract negotiations have yet to conclude. It will also help inform discussion going forward in future years.

We recently launched a national programme to support local reforms in adult social care. This includes work on social care commissioning and procurement and supporting social care workforce conditions and skills. The implementation of the real Living Wage and recommendations of the Fair Work Convention report on social care will both be considered within this. There is also relevant work being taken forward by Scotland Excel in consultation with other partners (Local Authorities, Scottish Government, COSLA, Scottish Care and CCPS) to develop a specification that will form part of a national procurement framework for care and support services.

¹ 2018 The Economic Value of the Adult Social Care sector - Scotland

A summary of this work and its relevance to the guidance is included in Annex A.

We greatly value your support in delivering our shared commitment to ensuring people working in social care are valued. We look forward to working with you in continued support of this commitment.

Jeanne Freeman

Cllr Peter Johnston

Guidance to Support Commitment of the Real Living Wage for Adult Social Care Workers

Purpose

1. The guidance supports the continued implementation of the commitment to pay all adult social care workers regardless of age the real Living Wage for all hours worked. It updates [previous guidance](#) that was issued in 2016 and 2017 to support the introduction of the real Living Wage commitment. It also supports the [Procurement of care and support services: Best Practice Guidance²](#), which should also be taken into account.
2. Since October 2016, a commitment has been in place to support adult social care workers to be paid the real Living Wage for waking hours. During 2018/19, this commitment was extended to include those undertaking sleepovers. This guidance provides advice on continuing to support the real Living Wage commitment on a local basis. It encourages full transparency and collaboration between providers and commissioners of services to ensure delivery of the commitment.
3. A focus on the quality of care and support and the drive towards continuously improving outcomes for people continue to be key. There is an expectation both in the review of integration and reform of adult social care programme that collaborative working between partners, including the third and independent sector, is the norm. In line with this, Integration Joint Boards and local authorities, in collaboration with partners, should continue to take forward strategic and operational planning that reviews models of care, procurement and contract monitoring policies and processes which can support and drive improved and innovative services, and enhance fair work practice.
4. The guidance takes account of a range of feedback from providers and stakeholders. It also takes account of recently published [research³](#) conducted by the University of Strathclyde on the experiences of implementing the real Living Wage in adult social care from its inception until early 2018.
5. Putting care and support services in place is complex. It requires special consideration within a local authority's overall approach to the procurement of goods and services. This is because the quality or availability of these services can have a significant impact on the quality of life and health of people who might use these services as well as their carers. With the mainstreaming of self-directed support services are becoming more personalised and need to better meet people's needs and personal outcomes. This has implications for how support is planned and purchased.

² <https://www.gov.scot/publications/guidance-procurement-care-support-services-2016-best-practice/pages/>

³ <http://www.ccpotland.org/wp-content/uploads/2018/11/Univ-of-Strathclyde-Living-Wage-implementation-research-November-2018.pdf>

A local authority should consider key principles which include the protection and promotion of human rights, a personal outcomes approach, support being sufficiently flexible to support people to live more independently and be involved in decision making, continuity of care and respect. It also has a duty of care in relation to people with social care and support needs. The Scottish Government Procurement Guidance on Care and Support Services promotes flexible and responsive procurement approaches⁴.

6. The guidance supports the continued implementation of the commitment to pay all adult social care workers regardless of age the real Living Wage for all hours worked. Local Authorities should also take advice, including legal, financial and professional in addition to this guidance, taking account of local circumstances, employment and market dynamics.

Real Living Wage Rate

7. The new real Living Wage rate of £9.00 was announced in November 2018 by the Living Wage Foundation. The Scottish Government has provided funding in the 2019/20 budget for this uplift so that this hourly rate may be passed on to providers to pay adult social care workers. The funding is based on previous estimates of the proportion of staff in the third and independent sectors who were being paid the real Living Wage prior to the introduction of the policy. In line with the Living Wage Foundation's recommendation, the commitment is that, for 2019, the uplift to £9.00 per hour should be paid to all adult social care workers by 1 May 2019. In practice, however, Local Authorities may wish to implement in line with annual contract uprates, as set by the Living Wage Foundation, which typically commence 1 April. The ability of employers in the third and independent sectors to increase pay to this level will largely depend on the adequacy of the rates paid through procurement and contracting arrangements. These should include on-costs and this is addressed in more detail below. Local authorities should seek to take reasonable steps to satisfy themselves, as part of a collaborative process, that the rates paid to providers are adequate to support delivery of this commitment.

Who is covered by commitment?

8. The commitment covers adult social care workers providing direct care and support to adults in care homes, care at home, day care and housing support (as per the Scottish Social Service Sector report on Workforce Data). This covers in-house local authority provision, all purchased services whether commissioned by the IJB or by local authorities alone) and includes specialist support services such as those for people with physical disabilities, learning disabilities, mental health difficulties and substance misuse issues. It does not just apply to day time hours and includes sleepovers, travel time and holiday pay and should be achieved as part of a positive approach to a package of fair work practices.

⁴ <https://www.gov.scot/publications/guidance-procurement-care-support-services-2016-best-practice/pages/>

9. The Scottish Government is committed to fund Independent Living Fund Scotland to deliver the real Living Wage and sleepovers. Also included within the commitment and the resource that has been invested by Scottish Government is an expectation that personal assistants employed by supported people via self-directed support (Option 1 – Direct Payment) should be paid the real Living Wage, including sleepovers. Funding should therefore be provided by local authorities to enable personal assistants to be employed on this basis. The Scottish Government will continue to work with Self-directed Support Scotland, Centres for Inclusive Living and Personal Assistant Employers Network to support this commitment.

Sleepover Commitment

10. Since 2017, the Scottish Government has provided additional funding to extend the delivery of the real Living Wage commitment to sleepovers. The commitment to pay the real Living Wage for sleepover shifts stands, **despite** the Court of Appeal's judgment earlier this year in the joined cases of Mencap v Tomlinson-Blake and Shannon v Rampersad ([2018] EWCA Civ 1641), on the application of the National Minimum Wage to sleepovers. At the time of writing, UNISON has now been granted leave to appeal against this judgment.
11. The real Living Wage should therefore be paid to adult social care workers for hours worked, in practice, we are aware that some areas are taking different approaches in implementing this. For example, some providers are paying the real Living Wage per hour for daytime and sleepover hours, while others may pay a higher daytime rate and average out to ensure the real Living Wage is paid. Regardless of the approach, rates for sleepovers should take full account of the real Living Wage rate of £9 and on-costs as referred to below.
12. We are aware that many Integration Authorities are redesigning overnight support, to take account of advances in technology, improved outcomes for people, different types of available support, as well as addressing the cost implications of the commitment. Best practice for such overnight reviews is that these should be person led, outcome focussed and taken forward in collaboration with providers, service users and their families.

Collaborative working

13. Care and support services should be put in place through collaborative working across sectors taking account of key principles such as respect, continuity of care, promotion of human rights and personalisation of care. Successful collaborative working is built upon openness and transparency, mutual respect and a joint understanding of the roles and responsibilities of each partner and the challenges that they face. To achieve this, as best practice, providers should;
 - be able to evidence the costs of service delivery including on costs
 - be open and transparent with the local authority about challenges that may affect the provision of support
 - work with the local authority to re-design services and become more efficient

The local authority should:

- recognise service providers' contributions to achieving positive outcomes for people who use services;
- involve service providers in the development of local commissioning strategies and local policies and procedures for the procurement for care and support services;
- be proactive in involving service providers in service design and the development of service specifications.

Agreeing Rates – On-costs and Transparency

14. We are aware that different models of commissioning and procurement exist and not all Integration Authorities set rates for providers. In some authorities, providers submit bids through a Framework Tender on the basis of what it costs them to deliver the service, rather than the Integration Authority defining the level of on costs. Regardless a collaborative approach between commissioners and providers is essential. A commissioning process that results in rates that, by mutual agreement, are fair, transparent and achieve 'buy-in' from providers will increase the likelihood of compliance and the successful delivery of the Living Wage policy.
15. With respect to the Living Wage policy, the clearest and most transparent cost is the rate of pay itself, which rises from £8.75 to £9 per hour by 1st May 2019. In addition to this basic cost increase, a provider will accrue additional workforce statutory costs as a direct consequence of employing staff. These are generally termed 'on-costs' and include National Insurance Contributions, employer pension contributions, travel time allowances and holiday pay. These costs will rise in direct proportion to any increase in staff pay (including an increase to the Living Wage). These on-costs may vary between providers, depending on pension and holiday arrangements, travel time allowances etc. Providers should be able to evidence these costs as part of the collaborative approach to commissioning. Equally where a Local Authority sets a rate they should be able to evidence that the commitment can be delivered.
16. In addition to direct workforce costs, providers incur a number of indirect workforce costs for example training & development, management support and supervision. Additional running costs include regulatory compliance (eg. Care Inspectorate fees), alongside management and office costs. Most providers do not add these costs to an hourly rate for sleepovers, however they should be considered in the hourly rate for waking hours to ensure the sustainability of the service.
17. As part of any contract negotiation, good practice and the potential for efficiencies should be considered, but when negotiating and agreeing rates and contracts, parties will want to ensure the rates are sustainable and cover not only the basic pay rates but also necessary additional on-costs.

18. The University of Strathclyde research⁵ calls for much greater transparency in the identification and calculation of these costs. Having a shared understanding of the full cost of this commitment is an important part of this process and tools such as the CCPS calculator⁶ and UK Home Care Association (UKHCA)⁷ cost of care model are available to support local partners to establish a sustainable rate for packages of care. Such an approach can help to identify the components of an hourly rate for care and support, including on-costs and can be used to facilitate local negotiations on establishing an hourly rate. Whatever methodology is used to identify and calculate a service rate or pricing rationale, it should be shared between both commissioners and providers.
19. Annex A describes work being undertaken by Scotland Excel which includes an approach to setting rates taking account of on-costs.

Issues for providers working in multiple local authority areas

20. Providers working in multiple local authority areas have experienced particular difficulties in implementing this policy. This is generally because implementation methods and timetables vary between authorities and most providers operate a national pay policy and cannot offer differential pay rates to staff depending on where they are located.
21. Authorities should therefore be aware that even where agreement has been reached on a service rate or uplift, the provider may not be in a position to implement an increase in staff pay until it has reached similar agreements with all (or most) of the other authorities with whom it works. It is therefore unhelpful to apply a time-limit for providers to accept revised rates and/or price uplifts relating to the real Living Wage without recognition to the need to backdate payments to the change in real living wage. However, providers should respond to offers within a reasonable timescale and make the local authority aware of issues to ensure it does not impact on the budget setting process.

Review of contract costs

22. The costs outlined in the paragraphs above may rise as a result of policy decisions, regulatory changes and/or general inflationary pressures. Therefore, provision should be made within the contract on the scope and arrangements for contract review. Relevant review clauses such a Price Adjustment Mechanism, can provide the opportunity to assess these cost increases and to address them within the contract price. Authorities will wish to seek advice in relation to how contracts can be reviewed or varied.

⁵ <http://www.ccpscotland.org/wp-content/uploads/2018/11/Univ-of-Strathclyde-Living-Wage-implementation-research-November-2018.pdf>

⁶ <http://www.ccpscotland.org/wp-content/uploads/2017/06/Understanding-the-Cost-of-Adult-Social-Care-in-Care-at-Home-and-Housing-Support-settings-Template.pdf>

⁷ <https://www.ukhca.co.uk/CostingModel/>

Fair Work

23. The Scottish Government considers the payment of the real Living Wage to be a significant indicator of an employer's commitment to fair work practices and that payment of the real Living Wage is one of the clearest ways that an employer can demonstrate that it takes a positive approach to its workforce.
24. European rules mean 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 real Living Wage. This is why a collaborative approach with providers is critical to the success of this policy, because payment of the real Living Wage can only be implemented through a voluntary agreement.
25. That said, 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 the £9.00 per hour real Living Wage rate of pay, and to evaluate this as part of the procurement process. Fair work practices will be particularly relevant to consider and the Scottish Government has published best practice [guidance](#)⁸ for public bodies and suppliers on how to address fair work through a public procurement process. The guidance supports the practical application of, and must be considered alongside, the [statutory guidance on Fair work practices and the award of public contracts](#)⁹. The [research](#)¹⁰ on implementation of the real Living Wage recommended that there is greater consistency of approach in applying fair work practices within the procurement process, with procedures that accord due weight to workforce matters, including 'fair work principles'. Following the [recent Fair work Convention report on social care](#)¹¹, further work is underway to explore how there might be greater emphasis on the fair work principles in social care procurement. This includes the Scotland Excel procurement framework project described in Annex A.
26. Fair work practices will be particularly relevant where the quality of the service being delivered is directly affected by the quality of the workforce engaged in the contract. The continuity and quality of care and support services are likely to be closely related to a provider's approach to its workforce in respect of matters relating to, for example, recruitment, remuneration and other terms of engagement. Fair work practices are therefore particularly relevant in care and support services.

⁸ <https://www.gov.scot/publications/addressing-fair-work-practices-including-real-living-wage-procurement-best/>

⁹ <https://www.gov.scot/publications/statutory-guidance-selection-tenderers-award-contracts-addressing-fair-work-practices/>

¹⁰ <http://www.ccpsscotland.org/wp-content/uploads/2018/11/Univ-of-Strathclyde-Living-Wage-implementation-research-November-2018.pdf>

¹¹ <https://www.fairworkconvention.scot/our-report-on-fair-work-in-social-care/>

27. The nature of care and support services means that the quality of these services is highly dependent on whether a provider has a diverse workforce and whose staff are well-rewarded, well-motivated, well-led and who have appropriate opportunities for training and skills development. This means that a provider's approach to fair work practices would normally be expected to include fair and equal pay (including a commitment to support the real Living Wage) and should be evaluated during the procurement process along with other relevant criteria. Again, a provider's ability to adopt an appropriate approach to fair work practices will be heavily influenced by a contracting authority's own approach to commissioning, procurement and contract price.

Sources of Guidance on Fair Work and Procurement

- Fair work practices and the award of public contracts: Statutory guidance – Provides guidance to public bodies to help evaluate fair work practices when selecting tenderers and awarding contracts.
<https://www.gov.scot/publications/statutory-guidance-selection-tenderers-award-contracts-addressing-fair-work-practices/pages/1/>
- Chapter 6 of Statutory Guidance under the Procurement Reform (Scotland) Act 2014, which details special considerations for procurement for health or social care services
<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/03/guidance-under-procurement-reform-scotland-act-2014/documents/00496919-pdf/00496919-pdf/govscot%3Adocument>
- Best Practice Guidance on Addressing Fair Work Practices, including the real Living Wage, in Procurement - provides guidance to help to develop and adapt Fair Work practices at the relevant stages of the procurement process - <https://www.gov.scot/publications/addressing-fair-work-practices-including-real-living-wage-procurement-best/>
- A Toolkit has also been developed which includes information sheets and practical tools. including : What is Fair Work and What is the real Living Wage
<https://www.gov.scot/publications/fair-work-practices-in-procurement-toolkit/>

Contract monitoring

28. Commissioners will want to assure themselves as part of the contract management process that they are aware of, and where necessary provided evidence of, how providers are delivering the contract and ensuring wider fair work practices are adopted, including relevant terms and conditions. This extends to contract monitoring, where the principles of fair work are also relevant.
29. The Living Wage in Care Implementation Group will continue to support the successful implementation of this policy.

Ongoing work

Introduction

The recently launched national programme to support local reform in adult social care has a number of workstreams relevant to the real Living Wage. These include the workstreams on investment, consistency experience and expectations, workforce and commissioning and procurement. A project under the commissioning and procurement workstream being taken forward by Scotland Excel is developing a national procurement framework for care and support services. This will include work on price schedule.

Scotland Excel Care and Support Procurement framework

A national procurement framework for care and support services is being developed. Following an extensive period of engagement, a technical group has been involved in developing a tender specification. This includes a specification around fair work practice for which UNISON have been advisors. The approach to rates will set an expectation of a fair hourly rate for workers, sufficient time and resources for training, travel and supervision. Scottish Care, COSLA and local authorities were involved in developing the approach to rates. It is anticipated that this work will support greater consistency in calculating rates and in ensure appropriate consideration is given to fair work during the procurement process.

Fair Work Convention report on social care

The [Fair Work Convention](#)¹² published their report on 26 February 2019 on a review of working practices in Scotland's social care sector. The report suggested that the social care sector is not consistently delivering fair work. Some social care employees don't have secure employment and are expected to work excessive hours in order to take home a fair wage. The Convention recommended that urgent interventions are required improve the quality of employment for the 200,000 strong workforce. It suggested that this should include the establishment of a new sector-level body which would develop a minimum Fair Work contract / standards for social care commissioning and procurement and, in time would develop a sectoral collective bargaining role.

The guidance refers to Fair Work. We are aware that there are different approaches taken to the consideration of fair work in the procurement process for example the weighting attached to fair work in evaluating tenders. Authorities will wish to consider that sufficient weighting is attached to Fair Work and be aware that the Scottish Government is working with COSLA and other stakeholders such as the STUC, care providers and the Fair Work Convention to finalise the process which will support the consideration and implementation of these recommendations. This includes consideration of the recommendations around minimum fair work contract/ standards in procurement. A statement of intent in relation to this process will be published later in 2019.

¹² <https://www.fairworkconvention.scot/our-report-on-fair-work-in-social-care/>

On-costs

The guidance refers to on-costs (paragraphs 14-18) and it is recognised that these will form an element of negotiations. While examples of direct and indirect workforce on-costs were included, an exact figure was not. This is mainly because it is recognised that on-costs may vary between providers, depending on a range of factors include size of the organisation and pension and holiday arrangements, travel time allowances etc. In calculating the cost of the uplift Scottish Government analysts used 29.8% on-costs – employers national insurance of 13.8% and holiday pay of 13% (representing an additional 6 weeks over 46.2 weeks) and pensions at 3% against a baseline of people who were not originally paid the living wage. Concerns have been raised about the longer term affordability of the policy. An examination of the implications of the longer-term commitment to the Living Wage policy for adult social care is currently underway by a short-life working group. The review, which will be reported to the Living Wage group, will link with the Scotland Excel work on national procurement framework for care and support services.

Definitions in the Context of this Guidance

Adult social care workers: This commitment specifically applies to adult social care workers providing direct care and support to adults in care homes, care at home, day care 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.

The Real Living Wage is set by the [Living Wage Foundation](#) and promoted by the Scottish Government. The rates are announced in November and up-rated annually. Employers should implement the rise as soon as possible and within 6 months, meaning all employees (over 18) should receive the new rate by 1st May the following year. The 2019 rate is £9.00 per hour (previous rate was £8.75).

The Scottish Living Wage is a specific term that is used regarding Public Sector Pay Policy in Scotland. It is used to reflect Ministers' expectation that employers covered by the public sector pay policy apply the real Living Wage hourly rate as an annualised amount.

The National Minimum Wage is the [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 £7.70 per hour from April 2019. (Previous rate from April 2018 was £7.38.)

The National Living Wage is the [minimum wage for over 25s](#). This means that all employers must pay their staff that are over 25 a minimum of £8.21 per hour from April 2019. (Previous rate from April 2018 was £7.83)

Age group	Nationally defined legal minimum wages (from April 2019)
25 and over	£8.21
21 - 24	£7.70
18 - 20	£6.15
16 – 17	£4.35
Apprentices	£3.90

Sleepover – (commonly held interpretation) where a care worker sleeps in the home of someone they support or in work premises, so that they are on hand in case of an emergency or any other issue during the night.

Questions

If you have any questions, please do not hesitate to contact Fiona Hodgkiss in the Adult Social Care Policy Team in the Scottish Government: fiona.hodgkiss@gov.scot