

Scotland Excel

To: Executive Sub Committee

On: 13 May 2016

**Report
by
Director Scotland Excel**

Local Authority Living Wage Commitment – Briefing Paper

1 Purpose

To provide an overview by way of background of the new local authority living wage commitment agreed in the local government settlement for 2016/17 and highlight the impact of this commitment for Scotland Excel contracts, noting that a future Scotland Excel strategy will be produced in relation to applicable existing arrangements.

2 Introduction and Background

Payment of the living wage and other fair work practices are widely regarded as important tools to help improve the quality of social care services. Attracting and retaining high quality care staff enables the delivery of high quality and consistent care to vulnerable individuals but can be difficult to achieve in service areas characterised by low wages.

In order to support fair working practices in some of these areas the 2016/17 Local Government Settlement includes a requirement for local authorities to pay the living wage of £8.25 per hour to all care workers in adult social care from 1 October 2016. This requirement extends to purchased care services as well as in-house (local authority) provision impacting care homes, care at home and housing support services. The commitment does not extend to care workers in children's services or ancillary staff working in social care settings such as catering and cleaning staff.

The Scottish Government has provided resource to contribute to this commitment within the local government settlement monies for health and social care. However it is anticipated that the allowed funds will contribute to the increase in basic pay with local authorities and providers expected to fund the remaining cost. In addition to these costs, funding will also need to be found for the resulting on costs including increased national insurance and pension contributions and as well as the costs of maintaining appropriate pay differentials within organisations. The cost impact will vary amongst local authorities depending on local markets, current rates of pay and provider business models.

While the benefits of paying living wage to care staff is unlikely to be disputed local authorities face a number of complexities in the implementation of the commitment including procurement and state aid concerns. Local authorities will be required to

find appropriate solutions to these issues however as the local government settlement agreement states that the Scottish Government reserves the right to remove access to, or recover, funding specifically linked to the living wage commitment should a local authority fail to deliver on the commitment.

3 Issues and Risks

3.1 Procurement

The requirement to pay living wage also raises some practical issues in terms of procurement both for existing and new contracts.

It is not possible to mandate the payment of living wage in a procurement exercise therefore local authorities will rely on providers voluntarily offering to pay living wage as part of their tender submission. As it is not possible to favour the payment of living wage over other fair working practices local authorities will have to assess any scored elements of a tender process accordingly. It will not be possible to exclude providers from tender exercises solely on the basis of failing to pay the living wage therefore local authorities may find themselves in a situation where a provider is successful in a tender exercise on the basis of other criteria but may not pay the living wage.

For existing contracts where the living wage is not currently paid there is concern about whether a variation to require living wage payment is possible or whether this would result in a material change requiring contracts to be re-tendered. While new procurement legislation suggests a variation within 10% of the contract value could be permissible the cost implications in some areas may exceed 10%. In addition, there is concern around the potential for legal challenge from providers unsuccessful in a tender exercise where the resulting contract is subsequently varied as the successful provider did not offer to pay the living wage. This is likely to be a particular concern, for example, where an unsuccessful provider in a tender exercise lost out due to having higher costs as a result of paying the living wage.

3.2 State Aid

Concerns about whether the implementation of the living wage commitment may result in the award of unlawful state aid to providers have been raised with the Scottish Government State Aid Policy Team. The feedback relating to state aid suggests that entering into a contract following an open and transparent procurement process compliant with procurement legislation is unlikely to raise state aid risks. Similarly, varying a contract in a way which is compatible with procurement legislation is likely to be low risk although individual local authorities may wish to consider any implications of this on a case by case basis.

3.3 Financial Impact

As the commitment to pay living wage does not extend to care workers operating in the children's services sectors or in other parts of the UK this is likely to create issues for providers relating to pay parity where their organisations operate across sectors where the living wage will may be paid.

Such a significant shift in policy for adult social care is likely to have a knock on effect on children's services with providers expected to begin increasing staff rates to ensure equity between staff in adults and children's services and to ensure staff retention. While the benefit of paying living wage in other areas of social care is widely recognised and often encouraged, the current funding arrangements do not extend to cover increases in these service areas.

The funding from Scottish Government to contribute to the payment of living wage is linked to the 2016/17 local government pay settlement with further funding to support the commitment in the longer term to be agreed in future settlement agreements. Despite the short term nature of the funding a move away from payment of the living wage in the event funding is not continued seems unlikely.

4 Guidance

Questions regarding the issues highlighted above have been posed to the Scottish Government, the responses to which are currently being drafted into a guidance document by COSLA in collaboration with the Scottish Government and provider representatives, Scottish Care and the Coalition of Care and Support Providers (CCPS), for publishing to local authorities in early May 2016.

This guidance will provide some options for tackling issues highlighted however local authorities will require to make decisions and seek their own legal advice on how to best honour their commitments depending on their individual contracts and local circumstances. Working collaboratively with current and potential providers within the terms of applicable legislation, contract terms and standing orders is likely to be key to successfully delivering against the living wage commitment.

5 Impact on Scotland Excel Contracts

Scotland Excel currently has a role in three areas of social care contracts for adults/older people:

- Care home services for older people
- Social and care agency workers

- Care homes for adults with learning disabilities

5.1 Care Home Services for Older People

While Scotland Excel has begun work on the development of a new strategy for the procurement of care home places and monitoring of the care home market, the existing National Care Home Contract (NCHC) continues to operate. Led by COSLA, the fee negotiation process was concluded in March this year setting the rates for the remaining financial year. The conclusion of the negotiation process agreed an increase of 2.5% to take effect from April 16 with a further increase of 3.9% to take effect from October 16. Included in the negotiation agreement is the payment of living wage to care staff therefore no further changes to this arrangement will be required from October 16 in response to the living wage commitment.

5.2 Social and Care Agency Workers

The Scotland Excel framework for social and care workers was designed and implemented to support payment of the living wage. In order to ensure suppliers were not penalised for offering a fair rate of pay to agency workers the commercial evaluation of the tender was based on evaluating the supplier's fee element of the rate. This creative approach meant that suppliers were under no pressure to reduce pay rates in order to be 'competitive'. Suppliers submitted minimum and maximum rates, which incorporated the living wage, ensuring best value for local authorities and allowing them to engage agency workers at a living wage pay rate.

Where required agency worker payment bands have been adjusted to reflect annual changes to the living wage rate ensuring the current living wage can be incorporated. This approach has been widely recognised as good practice with the agency worker framework winning in the innovation categories of both the Scottish and national GO awards.

No further changes to the framework are required ahead of the Oct 16 deadline.

5.3 Care Homes for Adults with Learning Disabilities

The most recently awarded framework is the framework for care homes for adults with learning disabilities. This is a first generation contract covering a small and specialist area therefore only a limited number of placements have been made under the framework to date.

Of the 26 providers party to this framework nine currently pay living wage to all of their staff with a further five committing to becoming accredited by the Living Wage

Foundation as part of the tender process. Scotland Excel will continue to work with providers to increase the uptake of the framework and to identify which of the remaining providers pay living wage to their care staff.

It is anticipated that there may be some providers not paying living wage to care staff therefore Scotland Excel will need to explore options for addressing this with local authorities and providers to ensure the framework supports the local authority commitment going forward.

6 Conclusion

Scotland Excel will produce a strategy to review and manage necessary changes to the framework for care homes for adults with learning disabilities.

In addition to the guidance, there are several examples whereby local authorities have successfully implemented payment of the living wage within key social care contracts despite the complexities involved. Sharing case studies and examples of good practice amongst local authorities will help support implementation.

7 Recommendation

The Executive Sub Committee is requested to note the update provided, and support the development of a Scotland Excel strategy to support applicable existing arrangements.