

Scottish Government's Campaign to Develop 'A Fairer Scotland'

The Scottish Government has been campaigning to develop a more equitable society during 2015 and has several initiatives, such as *Creating A Fairer Scotland*¹, where "achieving this will require a strong competitive economy and a fairer, more equal society".

In October 2015 the government published "*Statutory Guidance on the Selection of Tenderers and Award of Contracts: addressing fair work practices, including the living wage, in procurement*"² (the Guidance). The policy applies to tenders for all types of goods and services for publically funded bodies, such as local authorities, and is not confined to the care sector.

Scottish Government's Commitment to High Quality Services

The major theme within the Scottish Government's approach within the Guidance is a strong commitment to "the delivery of high quality services"³ which "can help create a fairer, more equal society"⁴ because "quality levels are often critically dependent on the quality and engagement of the workforce through fair work practices for those engaged in delivering public contracts"⁵.

The Guidance gives a clear indication of the qualities that providers of all goods and services purchased by local and national government must comply with as part of developing a fairer Scotland, which includes providers becoming a Living Wage Accredited Employer.

UKHCA Supports Better Working Conditions for Care Workers

UKHCA has always supported improvements in care workers' employment conditions but insists that this is only likely to be possible when local authorities recognise the actual costs of providing services in the fees they pay for social care, including wage costs.

The Guidance directs public authorities, such as the NHS and local Councils, to include "fair work practices, including the Living Wage"⁶ in the procurement of all public services: there is a set of *guiding principles* which stipulate that bidders for a publically funded contract, such as homecare services, must include in their bids, details of how they, and any sub-contractors, will comply with measures that are designed to improve fair and equal pay, social wellbeing, fair work practices and worker representation.

The Scottish Government is concerned about the part that zero hours contracts play in the economy. There is acceptance within the Guidance that there are a number of situations where zero hours contracts can be justified, because of the variable nature of the work, but that where "there is no specific justification for the use of zero-hour contracts or where they are used to avoid protections afforded by employment law we would consider their use to be inappropriate and potentially exploitative"⁷.

UKHCA's position is that zero hours contracts are an unavoidable consequence of the way that local authorities commission homecare services. UKHCA has consistently criticised local authorities for exploiting its dominant purchasing power with the independent and voluntary

¹ <http://www.gov.scot/Publications/2015/06/4845>

² <http://www.gov.scot/Resource/0048/00486741.pdf>

³ <http://www.gov.scot/Publications/2015/06/4845>

⁴ *ibid*

⁵ *ibid*

⁶ *ibid*

⁷ *ibid*

homecare market in a way that prevents providers from employing care staff on guaranteed hours contracts.

The *guiding principles* do not place any responsibility on public authorities, who are seeking bids for contracts, for them to develop contracts that offer fees which meet the actual costs of providing the service.

UKHCA are concerned that the Scottish Government's *guiding principles* have not addressed both sides of the problem with low pay in contracting for homecare services: a "fairer, more equal society", based on pay and work practices cannot absolve local authority and NHS commissioners of homecare from their responsibility for the low pay that is prevalent in the sector.

The Legal Status of the Scottish Government's Guidance

The Guidance is not a legal requirement but a directive to national and local government departments, including the NHS in Scotland, who must implement the Governments directions when tendering for goods and services.

Earlier advice from the Scottish Government⁸ explains that "there is no legal requirement on employers to pay the Living Wage, unlike the statutory National Minimum Wage (NMW), and it is not possible to make payment of the Living Wage a compulsory condition of publicly procured contracts" under European procurement rules and European Law in some instances. It is, however, possible to include Living Wage considerations in procurement schemes without making payment of the Living Wage a mandatory requirement: remember that the Living Wage is a voluntary arrangement, whilst the National Minimum Wage is a legal requirement.

Members are encouraged to read all the tender documentation when bidding for contracts and if necessary seek expert advice: reviewing Scottish Government procurement websites can also prove useful.⁹

Disclaimer

This briefing is intended as a summary of the current work of the Scottish Government concerning recent developments its approach to commissioning and procuring publically funded contracts and is a briefing only: it is not to be taken as legal advice. UKHCA cannot be held responsible for the actions a member may, or may not, take as a consequence of this briefing. Members are encouraged to seek technical and legal advice before entering into contractual agreements.

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⁸ <http://www.gov.scot/Resource/0047/00475903.pdf> as part of the Scottish Government Social Research 2015 programme

⁹ <https://www.procurementjourney.scot/node/99>