

Commissioning and Procurement

Introduction

Commenting on Commissioning in Social Care in 2012¹, Audit Scotland noted that “Commissioning social care is much more than councils organising and buying services. It is also how councils and NHS boards work together to plan services that will meet future demands and make effective use of their combined resources. This joint strategic approach to commissioning (and procurement) can help provide joined-up services to people and prevent, delay or shorten a stay in hospital. Ultimately, jointly planned investment in social care can save expenditure on unnecessary, and relatively expensive, hospital or residential care.” This activity also has a huge impact on the lives of people who need support.

Since 2012 much has been achieved in integrating health and social care and delivering choice of services from low level support such as housing support to 24 hour care in peoples’ homes or care homes. This has taken place against a background of austerity and continuing pressure on budgets, yet issues still persist in relation to investment for preventative services, early intervention, market facilitation and management and sustaining shifting the balance of care and delayed discharge. Nonetheless it is important to understand that the commissioning landscape in social care in Scotland is distinct from arrangements for health. The key distinction is that, while the vast majority of health services are delivered directly by the NHS, many social care services are procured from independent and third sector providers by Local Authorities in response to Strategic Commissioning Plans produced by Integration Joint Boards.

Externalising all social care services is not the route that all areas in Scotland have adopted and each area has a different profile including decisions by some areas to bring services back in house and change their delivery/operational models. The split between directly provided and externally procured services has not always happened because of clear planning and intent but has been a consequence of previous strategic commissioning and budget reductions in local authorities. The approach has improved since the Public Bodies Act requirements to produce strategic commissioning plans, linked firmly to budget planning, has been implemented across all Integration Authorities.

This briefing paper comments on commissioning and procurement processes

- Executive Summary
- Strategic Commissioning overview
- Procurement overview, including Brexit implication

- Social Care Services and commercial considerations
- Perspectives on care

Each of these areas can be expanded if panel members require further information.



¹ https://www.audit-scotland.gov.uk/uploads/docs/report/2012/nr_120301_social_care_km.pdf

Executive Summary

Structures

- Scotland has 31 Integration Authorities and 14 Health Boards. Each Integration Authority is within the boundaries of a single Health Board; several Health Boards have within their boundaries several Integration Authorities.
- There are 31 Integration Joint Boards with responsibility for delivering Joint Strategic Commissioning Plans with a range of local stakeholders.
- Plans must deliver on Scotland's national health and wellbeing outcomes and deliver on outcomes determined at a local level.

Strategic commissioning

- Strategic commissioning describes the activities involved in assessing and forecasting needs, considering options, planning the nature, range and quality of future services, linking local authority budgets to agreed desired outcomes and working in partnership to put these in place.
- Not all commissioning results in decisions to procure services and can result in commitments to develop or expand in house service delivery, to provide a range of grants to deliver new innovative services or to provide funding for projects that deliver outcomes for people out with purchased services.
- Where decisions are made to procure services this is undertaken in line with Scottish Guidance on the Procurement of Care and Support Services which was co-produced and agreed with all stakeholders, people using services, providers, representative groups and partnerships.

Procurement

- A public procurement process is undertaken to establish, through a fair and transparent process, a contract for defined services for pecuniary interest, with a provider or providers. There is clear direction on how this should be undertaken outlined in legislation, regulation and guidance.
- Scottish Government guidance has delivered a continuous and consistent focus on outcomes for people and partnerships and providers are clear on standards, performance measures and outcomes for people (separate briefing paper).
- Competitive tender processes for social care services are heavily weighted to quality, usually in a split of 70 quality to 30 cost or higher, and the majority are based on establishing Framework Agreements of a minimum 4 years duration, with extensions ranging from 1 to a further 4 years.
- In house services are directly managed and delivered by the local authority, but purchased services are managed through grant or contract arrangements ranging from direct contract award (care homes), competitive tender (care at home/supported living), public social partnership, or alliance contracts (both less well used).
- Framework agreements deliver a range of providers across all care settings and supports the ability to offer a choice of service according to a person's individual outcomes.
- Such a diverse provider base can bring challenges in relation to service management and communication and is not responsive quickly to change and co-ordination/ communication in a crisis can be more difficult.

Social Care Services

- In Scotland there are 3781² registered adult care services employing 206,400 workers across a range of services ranging from housing support (mostly older people), care at home (all adults), supported living (mostly adults with learning and/or physical disabilities and mental health issues) and care homes for adults (the largest proportion of which are for older people) the majority provided by the independent / private sectors.
- There is a mix of in house and externally purchased services determined by local Joint Strategic Commissioning Plans and this has led to a range of public, independent and voluntary providers across Scotland.
- The split between publicly delivered / independent and voluntary providers is often historic arising from different commissioning processes and tends to be clustered around certain service types, for example supported living is mainly delivered by the voluntary sector and registered social landlords from the decommissioning of hospital services for people with learning disabilities and people with mental health problems.
- In terms of choosing services, Self-Directed Support offers people a choice of having services arranged and paid for by the local authority or having a direct payment/or individualised budget and arranging services for themselves. This is most used by people with physical disabilities or by the families and carers of people with learning disabilities but less so for other care groups.
- The majority of people who need care home support have a care and financial assessment and then choose a service to meet their outcomes. For other services, like care at home, the common approach is for the local authority to deliver the service or choose the service provider to deliver the care to meet the person's outcomes and undertake care management review to ensure it is delivering their outcomes.
- People's outcomes can be met in other ways, through access to universal services - leisure, libraries – or other groups that are often funded through a range of charities e.g. princes trust. An array of carers services are delivered through this approach some joint funded through grants from partnerships.

Commercial considerations

- Apart from the National Care Home Contract Rate for care home services for older people, there are no national rates for services in Scotland. Prices for service differ across care groups, service types and often from individual to individual. Payment of the price is shared between local authorities and people who receive services based on a financial assessment.
- Local authorities fund care but not non-care service aspects like accommodation (if in a care home or supported accommodation) or non-personal support like shopping. People are charged for the non-care elements of their support. There are charging policies, the principles of which are co-ordinated and agreed through the Convention of Scottish Local Authorities (COSLA), but values can differ across the local authorities.
- It is accepted that providers need surplus/reserves (charity) and commercial return (independent/private). Independent think tanks have produced reports on where

² https://www.careinspectorate.com/images/CI_Stats_Report_Qtr3_19_20.pdf

- the money goes, particularly in large equity backed companies with payments on dividends, sale and lease back and intercompany loans³⁴
- Strategic commissioning plans are there to inform the market on the nature of services, quality and outcomes required, there are also other voices. Commercial business analysts (Knight Frank, Laing & Buisson) provide business advice on shaping the business offering and commercial return.
 - The proportion of people funding their own care is growing, as wealth thresholds for charging have remained fairly static for 30 years, bringing more people into the private pay market.
 - The split between local authority funded and private funded care in the care home market is roughly 70%/30%, in care at home care it is 87%/23%.

Workforce

- One of the key differences between NHS and social care staff is that NHS staff are qualified prior to employment. Social care staff often enter the workforce without qualifications, have lower pay, terms and conditions resulting in a higher turnover.
- Unlike the NHS, social care is split across a mixed economy of providers. Collective bargaining is rare in the private and voluntary sector and this infrastructure makes embedding fair work practices difficult.

Perspectives on Commissioning

- At a National Strategic level, the Competition and Markets Authority reported positive progress, Audit Scotland advised that there was more to do in commissioning and procurement and Public Health Scotland advised less delayed discharge in May 2020 than in previous years, although this will have been affected by the pandemic.
- At a National Delivery level, Scotland Excel delivers a range of national frameworks using the Light Touch Regime which takes account of increasing costs and builds in Fair Work Practices. CCPS continue to lobby for a market bound by collectively agreed rules negotiated with providers and/or their representatives arguing the existing system results in a dominant purchaser forcing a race to the bottom on price.
- Local authorities are responsible for complying with care and procurement legislation, implementing strategic commissioning plans set by the IJB, while balancing decision making with the priorities of their local electorate.
- Commissioning decisions are influenced not only by strategy, budget and the needs of their local community, but are affected by the sustainability of the market to deliver the outsourced service.
- Providers of adult social care are operating as a business, the public contract market is a reliable source of funding and can provide a reliable source of business revenue through seeking future contract opportunities and retained contracts to occupy a sufficient share of market.
- This briefing paper does not cover user perspectives on commissioning or procurement which requires a separate briefing.

³ <https://foundationaleconomycom.files.wordpress.com/2017/01/wheredoesthemoneygo.pdf>

⁴ <https://chpi.org.uk/papers/reports/plugging-the-leaks-in-the-uk-care-home-industry/>

Strategic Commissioning overview

1 In 2012, Audit Scotland⁵ reviewed commissioning of social care in Scotland. This recognised that strategic commissioning of social care was complex and challenging impacted by reducing budgets, changing demographics, growing demands and expectations, and moves towards personalised care. This needed better engagement with users and providers and better analysis and use of information on needs, costs, quality of services and their impact on people's quality of life. The report stated that –

- There was a continued focus on people who need intensive support, tightening eligibility criteria and increasing charges.
- Voluntary and private sector providers deliver social care services in addition to in house services and more needs to be done when providers go out of business and on monitoring financial health.
- Users and carers need to be more involved in decisions about social care services and better evidence is needed about the difference services make to quality of life.



2 In 2014 The Public Bodies (Joint Working)(Scotland) Act⁶ was passed by the Scottish Parliament. This provided the framework for the integration of health and social care services in Scotland. This had been introduced to change the way key services were delivered with emphasis on supporting people in their own homes and communities and reducing inappropriate use of hospitals and care homes.

⁵ <https://www.audit-scotland.gov.uk/report/commissioning-social-car>

⁶ https://www.improvementservice.org.uk/__data/assets/pdf_file/0021/8319/em-briefing-public-bodies-joint-working.pdf

3 Integration Joint Boards were set up to be responsible for the commissioning process, but delivery of services is through either NHS or Local Authorities depending on the service to be delivered. Health and Social Care Partnerships are an informal term that describes the three statutory partners working and bringing staff together for delivery purposes.

4 In 2015 Scottish Government published statutory Strategic Commissioning Plans Guidance⁷. The strategic plan is the output of what is more commonly referred to as the "strategic commissioning" process. Strategic commissioning is the term used for all the activities involved in assessing and forecasting needs, linking investment to agreed outcomes, considering options, planning the nature, range and quality of future services and working in partnership to put these in place². Within this guidance, where we refer to the strategic commissioning plan, we are referring to the strategic plan described in the Act.

5 Strategic commissioning is a dynamic activity requiring analysis of needs, resources, service provision and policy/legislation. This underpins the development of the commissioning strategy that Integration Joint Boards must deliver and proper consideration of the models of care and the types of service that can deliver outcomes. Market and provider capacity to address local needs must be assessed and following contract award, monitored. Review of the strategy and outcomes should be continual and informed by consideration of whether outcomes are being met and people are supported. This process involves continuous engagement with people using services and with service providers to ensure that outcomes are being met.

6 Not all commissioning activity results in procurement activity as decisions can be made to commission and develop directly provided services, or develop collaborative services with other public bodies. But where the decision is to purchase services, then the inner wheel describes the procurement activity that flows from that decision.

7 Good strategic commissioning practice keeps people at the centre, continuously checking that outcomes are being met, service delivery is of a high quality and relationships are maintained⁸. This process is mission critical to translating the vision, aims and objectives of the partnerships into real services on the ground connecting with people who are looking for support in their lives.

8 From some perspectives, the Social Care (Self Directed Support) (Scotland) Act 2013 (the Act) challenges this model of organising and delivering care on the ground, in that it does not sufficiently transfer choice and control to people who need to use support services. The Act places a duty on local authorities to involve people in assessment and offer people a range of choice in how they receive support -

- 1 people receive a direct payment and arrange their own support;
- 2 the person selects their support and asks the local authority or third party provider to arrange provision;
- 3 the local authority selects and arranges appropriate support for the person

⁷ <https://www.gov.scot/publications/strategic-commissioning-plans-guidance/pages/2/>

⁸ https://ipc.brookes.ac.uk/publications/Learning_Development_Framework.pdf

4 a combination of these options.

9 This approach requires good conversations and understanding about what outcomes people want to achieve from their support and information about the effect of each option and how to manage support with assistance.

10 Following the introduction of SDS, commissioning practice has evolved changing from directing to enabling, from determining needs collectively to supporting individual outcomes for people and from “managing” the market to facilitating a wide range of options of support. Some health and social care partnerships have embraced processes that

- involve people using services in commissioning and service design;
- involve care providers in design of the commissioning process;
- make use of flexibilities in procurement law such as the light touch regime.

11 In 2018 Scottish Government took stock of progress⁹ in implementing Self Directed Support, noting that -

“Whilst changes in social work practice are a vital step towards successful implementation of self-directed support, they are only one aspect of delivery. Commissioning and procurement practices also need to support flexible and person-centred approaches. There is some evidence of change from traditional tendering to collaborative approaches which enhance choice and control for individuals, but it is not yet widely embedded across all areas and services.”

12 Other findings were that while working in partnership was one of the basics of the Scottish approach to commissioning there are a complex array of stakeholders within and outwith authorities, including independent (private) and third sector organisations, supported people.

13 While there is an increasing understanding of the need to work across boundaries, financial constraints, changes in legislation and shifting organisational structures have impacted on progress. However, there is a growing shift to challenging the “more with less” approach and focus on true measures of care quality and sustainability not least around pay, terms and conditions for staff, assisted by funding to promote the Scottish Living Wage and promote Fair Work Practices.

14 Commissioning is a dynamic and complex process with many stakeholders invested in co-production and design, the most important of whom are the people who need support to meet their outcomes. It is against this backdrop that the review takes place.

⁹ <https://www.gov.scot/publications/transforming-social-care-scotlands-progress-towards-implementing-self-directed-support/pages/4/>

Procurement overview

15 Public procurement spend generates around £10 billion of economic activity for Scotland. The impacts of Scottish public sector procurement spend on the Scottish output, GDP and FTE employment represent around 4% of the total Scottish economy.

16 Scotland's local authorities spend around £4.5bn each year on social care services, of which £3.4 billion is spent on adult social care, much of it with third and independent sector care providers. Spend on social care contracts is the second largest category (2nd to construction) and notably from 2015 to 2018, spend on social care and services has risen by 21.7%.

17 Contracting out any care support service is a complex area and requires special consideration given the significant impact services can have on the quality of life and health of people who might use these services as well as their carers.

18 These types of services are able to be purchased differently to other services, by applying the flexibility permitted in the procurement rules to decide how to put in place contracts for these services on a case-by-case basis. For adult social care services, the light-touch regime applies, see below.

19 A local authority can establish adult social care services through other arrangements, these could include, grants, public social partnerships, service level agreements between public services or through a public to public arrangement with another local authority in-house provision.

20 Where a public contract is considered necessary, and as we transition out of European Union, a European wide and Scottish legal framework continues to apply.

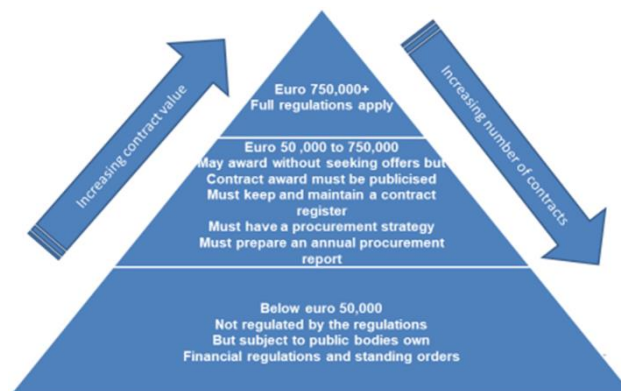
- the fundamental principles deriving from the Treaty on the Functioning of the European Union (TFEU) apply to all decisions, see below.
- A *light-touch regime*, provided in The Public Contracts (Scotland) Regulations 2015, (which derive from European Procurement Directives) applies to adult social care service contracts above €750,000 in value, ie a 5 year contract valued at €150,000 per year will fall within this threshold.
- Court of Justice of the European Union and national case law applies.
- The Procurement Reform (Scotland) Act 2014 introduced additional transparency obligations and the provision for statutory guidance.

21 **Treaty on the Functioning of the European Union - fundamental principles** are: transparency; equal treatment and non-discrimination; proportionality; and mutual recognition.

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22 The Public Contracts

(Scotland) Regulations 2015 describe the detailed procedural rules that apply to the end to end process for awarding a public contract. They include detailed processes and how criteria has to be applied to decide who is best placed to deliver the contract. The Regulations also set out the arrangements where a **legal challenge** can be raised by a bidder on the basis that the rules were not followed and / or the TFEU were not applied. A challenge can result in the payment of damages or the contract not being awarded. Procurement staff must get it right.



23 **Light-touch regime** – represents a relaxation of the procurement rules for contracts for social and other specific services, which include adult social care services, on the basis that there is a *limited cross border interest* in these contract types. These more relaxed rules require: a Contract Notice to invite interested bidders; the application of a transparent process recognising the TFEU principles: due diligence; and publication of a Contract Award Notice to confirm who the winning bidder is.

24 In relation to contracts for health or social services below the €750,000 threshold, procurement regulations do not apply, but the TFEU principles do apply, in these circumstances, many authorities choose to apply a more formal process and a local authority standing orders and local procedures will apply.

25 **The Procurement Reform (Scotland) Act 2014** requires additional transparency obligations, including an obligations to consider how to deliver on improved outcomes for the economy, the environment and society and to promote *Fair Work practices, including payment of the real Living Wage*

Procurement guidance relevant to adult social care services.

26. Recognising the importance of good procurement decision making the Scottish Government worked closely with carers, providers and public bodies to publish **Procurement of care and support services: best practice guidance** - March 2016.

27 Statutory guidance on **Addressing Fair Work Practices, including the Living Wage, in Procurement 2015**, is relevant to the procurement of adult social care services. It requires a public body to include a criterion in a procurement process, which asks bidders to describe their approach to Fair Work practices, including the payment of the real Living Wage. This, supported by Scottish Government funding has enabled local authorities to work with providers to pay those working in the sector the real Living Wage, in a way that complies with procurement rules.

Adult social care procurement activity in practice

28 A public contract for adult social care services can be established through a framework agreement or a public contract. A **framework agreement** is an arrangement with more than one provider.

29 **Scotland Excel** (SE) are the centre of procurement expertise for local authorities. SE put in place framework agreements at a national level for common local authority requirements. Local authorities are free to choose to use a SE framework agreement or not.

30 SE has established framework arrangements across Adult social care services. They also manage and lead the negotiation for the **National Care Home Contract** which has been a long standing arrangement for setting a nationally agreed rate for care homes across Scotland. This approach has been commended by the Competition and Markets Authority in their recent Care Home Market Study¹⁰ More recently they have also established the **National Care and Support Flexible Frameworks** for care at home and supported living / housing support services, (£560m estimated value).

31 Other Scotland Excel frameworks for adult social care services are for **Care Homes for Adults with Learning Disabilities Including Autism** (£106m) and **Social Care Agency Workers**, for agency workers for care, professional and ancillary roles (£80m).

Brexit and the procurement rules

32 Immediately after Brexit, at the end of the Transition Period, the current procurement legislation will continue to apply until such time as new legislation is introduced. The UK Government is taking steps to preserve the UK's interest in EU markets and vice versa through membership involvement in the World Trade Organization (WTO) General Procurement Agreement (the GPA) on the same terms that currently apply.

33 This means that whilst future Scottish procurement legislation no longer needs to adhere to EU procurement Directives, it will as a minimum, be required to adhere to the more limited procedural rules contained in the GPA and act in a way consistent with general principles of transparency, fairness and non-discrimination.

Post Brexit procurement legislation

34 The Light Touch Regime (LTR), which is a construct of EU law, is not found in the GPA, so in effect by joining the GPA there will be no requirement for the regulation of the procurement of health social and other services, other than the requirement to act transparently, fairly and not to discriminate. Though arguably this in itself would require local authorities, when choosing to outsource these types of services to undertake some form of process to decide who is best placed to deliver the contract rather than directly awarding a contract.

35 Leaving the EU provides scope to change the procurement rules in the UK and the Scottish Parliament has devolved competence on these matters. The UK Government and the devolved administrations have agreed to co-operate and align procurement rules wherever possible, particularly to support international trade agreements, but recognise that policy divergence may be necessary.

¹⁰ <https://www.gov.uk/government/publications/care-homes-market-study-summary-of-final-report/care-homes-market-study-summary-of-final-report>

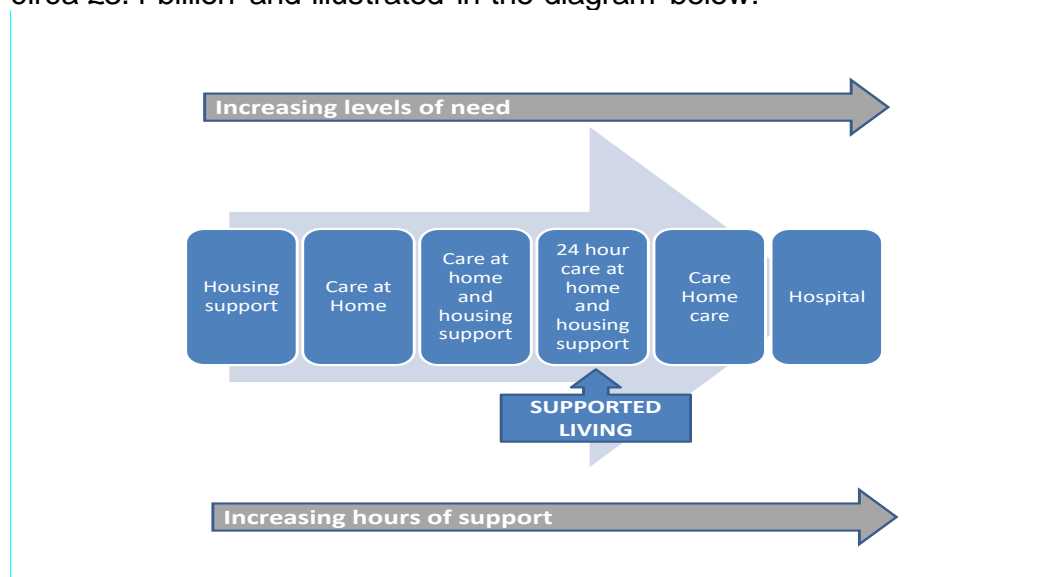
The social care market

36 The Community Care Act 1990 introduced a purchaser/provider split, but Scotland stopped short of extending compulsory competitive tendering to social care services. In Scotland, the preferred approach was a Best Value analysis seeking best quality and best price regardless of which sector delivered the service. The Local Government in Scotland Act 2003¹¹ required local authorities (and applies to Integration Joint Boards) to deliver:

“the duty of Best Value, being to make arrangements to secure continuous improvement in performance (while maintaining an appropriate balance between quality and cost); and in making those arrangements and securing that balance, to have regard to economy, efficiency, effectiveness, the equal opportunities requirements and to contribute to the achievement of sustainable development”

37 This led to a mixed economy of care provided by public, third sector and independent/private providers. Public bodies could choose to retain or develop in house services as long as they met the criteria above. The balance of service provision between sectors is partly the product of these commissioning decisions and partly the product of historic decisions. For example, supported living services for people with learning disabilities grew from the need to decommission large institutional hospitals. Working with a range of stakeholders, people living in hospital settings, key staff and housing providers, commissioners delivered a range of 24 hour supported living settings with a mix of funding from Health, local authorities and benefits. Many of the providers of these services still support people today, services are worth approximately £470 m per annum and the majority of services are provided by charities/third sector providers, many of whom are represented by the Coalition of Care Providers Scotland.

38 An extensive range of services has been commissioned in just 30 years from low level housing support (sheltered housing), to care at home (variable hours), supported living 24 hour care in own tenancy and care homes. The market is worth circa £3.4 billion and illustrated in the diagram below:



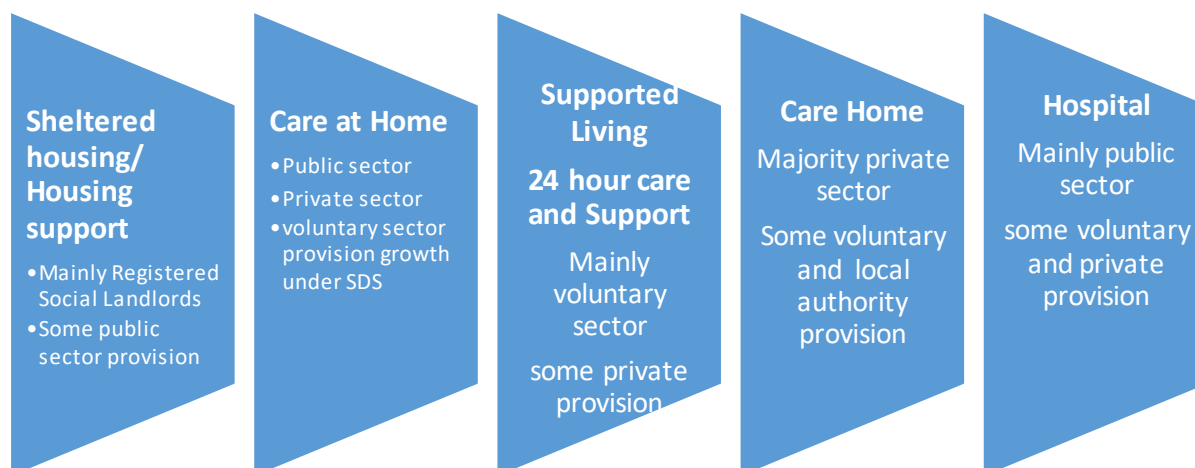
¹¹ <https://www.gov.scot/publications/best-value-guidance/>

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39 Care providers can be from any of the sectors undernoted

- Public sector – Local Authorities and NHS Boards
- Registered social landlords
- Voluntary sector (third sector)
- Private/Independent sector

But the splits in provision differ from service to service as shown below



40 Spikes Cavell is used at a national level to approximate the spend on services in Scotland. Across all adult social care services

- no organisation features in the top 10 18/19 spend in more than one service type category.
- the private sector are dominant in outsourced care homes and care at home services, which represents 84% of all 18/19 spend on adult social care (£1.12 billion)
- Charities are dominant in all other service types, including mental health, learning disabilities and housing / homelessness services 16% of the 18/19 spend on adult social care services (£215 m)

41 By sector the value and market concentration of purchased services is as follows–

<i>Service Type</i>	<i>Total value</i>	<i>Largest providers</i>	<i>%market share</i>	<i>Sector</i>
<i>Care Homes</i>	£695,805,970	£227,852,410	32.76%	9 private/1 public
<i>Care at home</i>	£424,476,604	£244,170,818	57.52%	6 private/2 charity
<i>Supported Living*</i>	£130,009,527	£ 95,857,371	76.03%	4 private/4 charity
<i>Sheltered Housing/Housing support</i>	£ 23,172,916	£ 15,367,319	66.31%	1 private/7 charity
<i>Other</i>	£ 38,738,349	£ 22,330,939	57.65%	1 private/7 charity

42 Typically, procurement approaches are very different across these markets

Care homes	<ul style="list-style-type: none">•National common shared terms and conditions contract-direct award•Annual national negotiation on rates
Care at Home	<ul style="list-style-type: none">•Competitive tender•National Framework including Fair work practices
Supported Living	<ul style="list-style-type: none">• initial competitive tender and then contract re-award• Limited tendering for individual complex care•significant use of Self Directed Support - Direct Payments/ Individualised Budgets
Housing/Sheltered housing	<ul style="list-style-type: none">•Mix of competitive tender and contract award (sheltered housing)

Social Care Workforce

43 The most significant cost driver in delivering social care is that of frontline staff engaged in health and social care. It is also the most significant driver of quality together with leadership and management.

44 In 2019 the Scottish Government published a Health and Social Care Workforce Plan¹² covering the present and future workforce. National workforce planning demanded a range of responses to supply and demand challenges and the report contrasted the very different circumstances of people working in health and social care. This covered all health and social care staff, including childcare.

45 Some of the key statistics are

- the health and social care headcount totals 368,000 people across all care groups
- Allowing for different hours delivered this equals 291,000 Whole time equivalent (NHS workforce/SSSC official statistics)
- SG Medium Term Financial Framework estimates that to address demand requires 1.3% more NHS and 1.7% more social care employees 2023/24 equalling around 20,000 more staff
- This will be challenging in a short time frame and Brexit consequences have not been factored into this report.

46 One of the key differences between NHS and social care staff is that NHS staff are qualified prior to employment. social care staff often enter the workforce without qualifications, have lower pay, terms and conditions resulting in high turnover.

47 The Fair Work in Scotland Report¹³ focuses only on the social care workforce and advised that as at February 2019, 202,090 Whole time equivalent staff were employed in social care

- 83% were women
- £3.92 billion was the economic value from adult social care
- 13% of the workforce work over 50 hours a week
- 20% are not on permanent contracts
- 15% of social care workers work unpaid overtime
- 11% are on zero hours contracts
- £9.79 per hour average pay

48 Unlike the NHS, social care is split across a mixed economy of private and voluntary providers, often with lower terms, conditions and pay than public sector provision. Collective bargaining is rare in the private and voluntary sector and the report comments that this infrastructure makes embedding fair work outcomes difficult. Change needs to come from sector-wide, coordinated, national initiatives, and through systems-wide interventions.

¹² <https://www.gov.scot/publications/national-health-social-care-integrated-workforce-plan/pages/3/>

¹³ <https://www.fairworkconvention.scot/wp-content/uploads/2018/11/Fair-Work-in-Scotland's-Social-Care-Sector-2019.pdf>

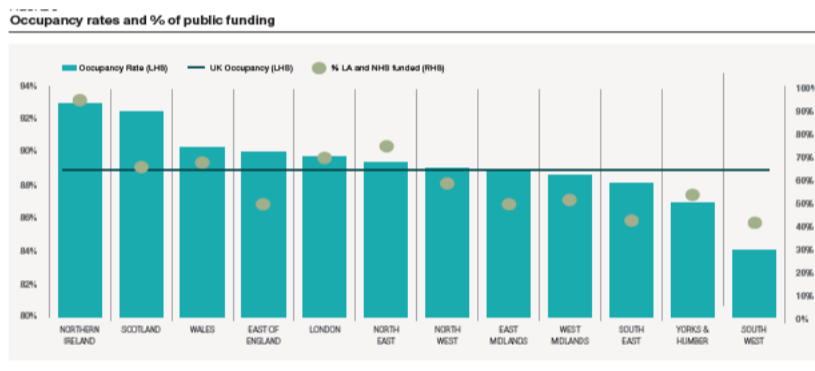
Commercial considerations

49 Business and financial analysts provide reports for the care sector that enables them to plan services and make decisions. There are a number of sources of advice to care sector business including Laing & Buisson and Frank Knight.¹⁴ These are useful ways to understand the key dynamics in the market and to follow the investment from the public purse in contracted services. For other accommodation based services where property represents a person's home, it also represents an asset, which in some cases can be used to leverage additional business investment. Reports focusing on this approach which used to be a feature of mainly larger providers are useful complimentary sources to understand the reasons for direction of business decisions¹⁵

50 The Frank Knight Care Home Trading Performance Review 2019 gives a range of useful information for Scotland contrasted with the UK. The care home trading performance index (CHTPI) provides industry leading benchmarks on occupancy rates, average weekly fees (AWF), major costs and profitability. As well as comparing performance across regions and care types, this years' review also compares trading performance by funding type (local authority vs private pay). This is drawn from data surveyed from 82% of the care providers across the UK including Scotland.

51 Some key highlights from the 2019 trading performance report relating to the adult care home sector are shown below at UK level

Occupancy



Scotland has the second highest occupancy in the UK and the fifth highest level of public funding.

Profitability

52 Typically care homes accepting mainly local authority funded people (in Scotland the National Care Home Contract Rate of £740 for nursing and £635 for residential care) have lower levels of profitability compared to the private pay market (self funding) with average EBITDARM margins of 38% compared to 20% average for local authority funded homes. Although fees are between 40 to 50% higher in the private pay market, these homes are able to achieve in excess of 86% occupancy.

¹⁴<https://content.knightfrank.com/research/548/documents/en/care-homes-trading-performance-review-2019-6698.pdf>

¹⁵ <https://chpi.org.uk/papers/reports/plugging-the-leaks-in-the-uk-care-home-industry/>

53 EBITDARM¹⁶ is Earnings before Interest, Taxation, Depreciation, Amortization, Rent and Management fees and is used by investors to make decisions about investment opportunities. In the private pay market, Scotland ranks third in the UK, attracting returns in excess of 40%. While in the local authority market, Scotland ranks 6th with profitability just over 20%. This will include some self-funding return, as most care homes have some self-funding people and will normally charge more than the national rate.

54 There are other interesting insights in the report with detail on staff costs and quality in Scotland in comparison with the UK. For example, they report that staffing remains the number one challenge for care home operators both in terms of costs and recruitment. Average UK staff costs have increased by 50% over the last decade, averaging £25,938 in 2018/19 and in Scotland the Care Home Cost Model which underpins negotiation on the NCHC national rate has benchmarked these costs over the last 3 years keeping pace with these cost drivers.

Tax Haven Status

55 Time limited Emergency Legislation passed during the COVID 19 pandemic relates to the provision of grants to provider organisations with ultimate parent companies in tax havens. It is important to distinguish that some companies may be registered offshore but not necessarily in tax havens.

¹⁶ <https://www.bing.com/search?q=EBITDARM+definition&src=IE-SearchBox&FORM=IESR3S>

Care at home

56 The most accessible information on the market is provided by UKHCA: An overview of the domiciliary market in the UK¹⁷. The information from this is complimented by the separate financial briefing paper prepared for the panel. The table below contrasts Scotland against the UK the report in terms of number of people, purchased hours, expenditure, direct payments and registered service locations.

57 Notably, Scotland supports 17.8% of the total number of UK people using purchased care at home services and delivers 400 hours per person per annum contrasted with 356 in England and Wales. The split between local authority and self-funding people is 77%/23%. This represents more people receiving local authority funding than in the care home sector which is approximately 70/30% perhaps due to the free personal care policy within Scotland.

58 In terms of Care quality in 2018/19 , 89% of care providers were rated as Good or above by the Care Inspectorate with 8.5% rated adequate and 1.9% weak.

59 UKHCA notes that total expenditure figures are not published routinely so figures are estimated by totalling the number of purchased hours multiplied by average hourly rate obtained through FOI and totals £601m. The report notes that SG has committed to payment of the Scottish Living Wage but questions whether the rate provides sufficient to cover this.

60 SSSC figures accessed by UKHCA show that the vast proportion of staff are engaged in direct care delivery and that on average £16.54 per hour was charged in 2017/18, which they estimated is too low to cover SG commitments to Scottish Living Wage and lower than UKHCA costed minimum at £18.93. They estimated a funding gap in 2018 of £53m per year and that would be without inflating up to 21/22 levels and including some of the issues discussed above in terms of levelling up pay and conditions with other health and social care staff employed in the public sector i.e. for pension, full pay while sick and cover for travel time and mileage.

¹⁷ <https://www.ukhca.co.uk/downloads.aspx?ID=611>

Perspectives on adult social care**The adult social care landscape affected by commissioning and procurement.**

61 The parties involved or who have commented on adult social care commissioning and procurement systems and practices have varying perspectives, each of which raise challenges.

National strategic perspectives

62 **National government, Scottish Parliament and regulators** - Through national adult care, local government finance and procurement regulation; national and local government funding decisions; strategic commissioning frameworks for IJBs and care services; a national inspection regime; and keen public interest and expectations - local delivery partners operate within a complex environment, and are provided with a high degree of flexibility to respond to local factors to meet personal needs of those requiring care in their communities.

63 The challenge is balancing all these obligations and interests in a way that creates a sustainable market that is flexible and responsive to provide adults with the quality care they need.

64 **External bodies**, including the Competition and Market Authority's [Care homes market study 2018](#) notes positive Scottish progress in commissioning practices, unlike progress on integration in England and Wales. Reporting that Scotland recognises the need and has taken action on accurate and informed planning (commissioning) to enable greater certainty for investment:

- Scotland Excel, CoSLA, and Scottish Care have developed a cost of care model to underpin the national negotiation on rates, reducing the risk that fees to providers are too low and commercial return too high.
- IJBs are now looking at developing models to meet future needs in the next ten to twenty years

65 **Audit Scotland's** [Report on Health and Social Care Integration - Nov 2018](#) reports more action to improve commissioning that is necessary: "Financial planning is not integrated, long term or focused on providing the best outcomes for people who need support." "Strategic planning needs to improve and several significant barriers must be overcome to speed up change. These include: a lack of collaborative leadership and strategic capacity". This was explored as part of the Ministerial Strategic Group for Health and Community Care review of progress with integration and recommendations made for improvement across strategic planning and commissioning activities.

66 **Public Health Scotland**¹⁸ report on Delayed Discharges in Scotland and timely discharge from hospital is an important indicator of quality and the effectiveness of integrated health and social care. Figures will have been impacted by the pandemic and therefore is unlikely to be a reliable indicator at present of progress in integrating

¹⁸ <https://beta.isdscotland.org/find-publications-and-data/health-and-social-care/delayed-discharges/delayed-discharges-in-nhsscotland-monthly/7-july-2020/>

health and social care. In May 20 the average number of occupied beds by people who should have been discharged was circa 600 compared to 1400 in May 2019.

National delivery perspectives

67 **CCPS [Handing Back Contracts - May 2019](#)**, explores the reasons for a growing trend for providers terminating, handing back or choosing not to bid for care contracts. It found that “The trend towards contracting for services on an individualised and spot basis compounds the problems inherent in a monopsonist market where market leverage sits with a dominant purchaser (the local authority) or as can be seen above a dominant provider. This may add weight to the view that there is a need to counter this power through the establishment of a market bound by collectively agreed rules negotiated with providers and/or their representatives. “ It is important to recognise that this was a small scale study when compared to the number of providers, services and contracts for care.

68 **Scotland Excel**, funded by local authority, housing association, transport authority and other public body membership have a leading role to respond to national collaborative procurement requirements for their members and provide capability support.

69 In establishing national framework contracts for adult social care, SXL must balance national standards and market conditions, while securing vfm savings with individual member needs and local priorities for flexible and responsive services. Local authorities however are under no obligation to use these frameworks to provide their local services

70 The National Care Home Contract is an example, where national negotiations take place with provider representative organisations to establish rates and terms for care homes, which balance provider expectations re affordability and profit margins and member expectations re quality, value for money, efficiencies.

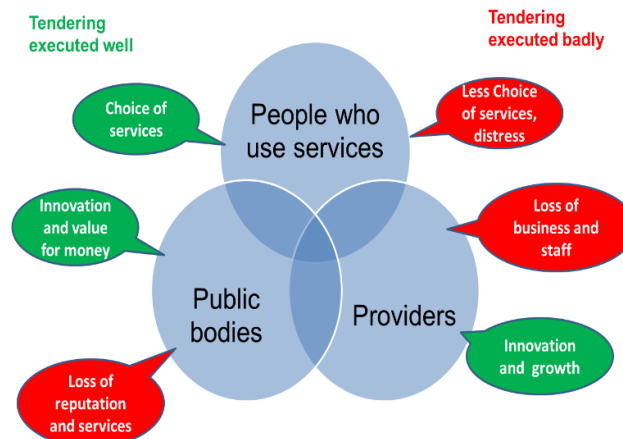
Local delivery perspectives

71 Procurement undertaken well presents an opportunity to refresh / expand and support sustainable markets, stimulate innovation and drive best quality. The alternative narrative cites the pre-existing requirement for competition as one factor which undermines quality by driving down costs and negatively impact on maintaining continuity of care.

72 Local authorities are responsible for complying with care and procurement legislation, implementing strategic commissioning plans set by IJB, while balancing decision making with the priorities of their local electorate. Commissioning decisions are influenced not only by strategy, budget and the needs of their local community, but are acutely affected by the sustainability of the market to deliver the outsourced service.

Independent Review of Adult Social care Commissioning and Procurement – background briefing

73 Procurement processes can be flexible, focus on outcome based criteria, but the decision on who to award a contract to, must be transparent and comply with the legislation. The winning provider(s) will be determined by the process that was used, the criteria applied, the market and how individual providers respond in their bid.



Providers of care services

74 Providers of adult social care are operating as a business, the public contract market is a reliable source of funding and can provide a reliable source of business revenue through seeking future contract opportunities and retained contracts to occupy a sufficient share of market.

75 Delivery of the public contract will be balanced operationally by balancing quality with profitability, responding to fluctuating volume demands, as these cannot be guaranteed and the market, while (in their reported view) responding to increasing demands expected by government – real Living Wage

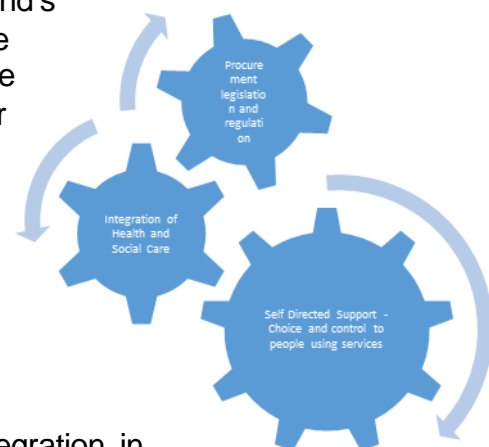
Users' perspective

76 This briefing does not cover user perspectives on commissioning or procurement processes but this could be part of a separate briefing if the panel make this request.

Legislative and Policy context

Over the last 10 years the level of national policy and legislative change has been significant across all care groups and services in addition to local policy and implementation plans. This section examines three of the major impacts on commissioning and procurement activity at national and local levels.

Integration of Health and Social Care has been one of Scotland's major programmes of reform. At its heart, health and social care integration is about ensuring that those who use services get the right care and support whatever their needs, at any point in their care journey. Integrated Joint Boards were established to implement the Integration of Health and Social Care following legislation - The Public Bodies (Joint Working) (Scotland) Act. The Boards are responsible for the delivery of strategic commissioning plans which need to be implemented through a combination of published market facilitation and procurement strategies.



The most recent report by Audit Scotland on the progress of integration in November 2018 found that there was more to be done.

While some improvements have been made to the delivery of health and social care services, Integration Authorities, councils and NHS boards need to show a stronger commitment to collaborative working to achieve the real long term benefits of an integrated system.'

The report has four key messages:

1. Integration authorities have started to introduce more collaborative ways of delivering services but there is much more to be done.
2. Financial planning is not integrated, long term or focused on providing the best outcomes for people who need support.
3. Strategic planning needs to improve, and key barriers overcome including: collaborative leadership and strategic capacity; turnover; governance; disagreement; and inability / unwillingness to safely share data.
4. Change cannot happen without meaningful engagement at national and local level, all partners need to work together to be more honest and open about the changes that are needed to sustain health and care services in Scotland.

Scottish Government introduced **The Social Care (Self-directed Support) (Scotland) Act 2013**, which came into force on April 1, 2014 and places a duty on local authority social work departments to offer people who are eligible for social care a range of choices over how they receive their support. Self-directed Support allows people, their carers and their families to make informed choices on what their support looks like and how it is delivered, making it possible to meet agreed personal outcomes. This has implications for how commissioning and procurement is undertaken and desired outcomes of that process.

Commissioning and procurement of support under SDS should enable choice and there has been a significant rise in the use of Framework Agreements which allow for

the selection of several care providers. The Act is underpinned by a set of principles clearly designed to maximise choice and control for supported people. Provided that the person's choice does not place them at risk of harm; and meets their personal outcomes they should be able to choose freely. The future procurement of health and social care services needs to take account of the requirement to provide the maximum choice for people who use services, while still ensuring best value for the public body against the constraints of reducing public funding. This was recognised in the Audit Scotland report Commissioning Social Care Services¹⁹, which recommended that *“The Scottish Government, the Care Inspectorate and COSLA should consider whether there is a need for periodic expert assessment of the social care markets to support commissioning bodies in managing these markets and in monitoring the financial viability of large operators”*.

Fair Work in Social Care is one of the key priorities in the joint Scottish Government and COSLA Reform of Adult Social Care Programme launched in 2019. The Scottish Government have also provided additional funding to support for the real Living Wage. The Fair Work in Social Care Group was established to take forward the recommendations of the Fair Work in Scotland's Social Care Sector 2019 report by the Fair Work Convention. The group will provide an interim report on their proposals in September 2020.

Work in relation to improving terms and conditions and recruitment for the social care workforce has been progressed at pace to respond quickly to emerging issues that were identified.

[Statutory Guidance on Addressing Fair Work in Procurement, including Living Wage](#) provides the authority to include Fair Work, including payment of the real Living Wage as a criterion which determines who the winning bidder is.

All procurement criteria must be proportionate and relate to the way the contract is performed. The quality of adult social care services is considerably affected by the workforce and workforce costs make up the significant majority of the operating costs, it is therefore relevant that a higher weighting can be attributed to a fair work criterion for adult social care services than for other non-person centres services

¹⁹ http://www.audit-scotland.gov.uk/docs/health/2012/nr_120301_social_care.pdf

Public procurement legal framework

Where a public contract is considered necessary, and as we transition out of European Union, a European wide legal framework continues to apply.

- All public procurement decisions, with a *cross-border interest*, no matter their value must take account of the fundamental principles deriving from the Treaty on the Functioning of the European Union (TFEU), see below.
- Public contracts above certain thresholds, with a cross-border interest must comply with national procurement legislation - The Public Contracts (Scotland) Regulations 2015, which derives from European Procurement Directives. For social and other specific services, a *light-touch regime* applies, which includes adult social care services, the threshold is €750,000, ie a 5 year contract valued at €150,000 per year will fall within this threshold.
- Court of Justice of the European Union and national case law applies.
- The Procurement Reform (Scotland) Act 2014 introduced additional transparency obligations and the provision for statutory guidance.

Treaty on the Functioning of the European Union - fundamental principles are: transparency; equal treatment and non-discrimination; proportionality; and mutual recognition. These principles establish a fairness of approach to procurement decision making, which apply to all procurement of *cross-border interest*, i.e. where an organisation in the European Union has an interest in bidding for a contract.

The Public Contracts (Scotland) Regulations 2015 describe the detailed procedural rules that apply to the end to end process for awarding a public contract. They set out requirements to advertise the opportunity and describe a set of six procurement processes that can be used to award a contract (e.g. restricted or negotiated procedure) and the scope of criteria (exclusion ground, selection and award criteria) that can be applied to decide who is best placed to deliver the contract.

The Regulations also set out the arrangements where a **legal challenge** can be raised regarding the outcome of the procurement process. Fundamentally would be on the basis that the rules were not followed and / or the TFEU were not applied. A challenge can result in the payment of damages or the contract not being awarded. Procurement staff must get it right.

Light-touch regime – represents a relaxation of the procurement rules for contracts for social and other specific services, which include adult social care services. This is because there is a *limited cross border interest* in these contract types. These more relaxed rules came into effect in Scottish legislation in April 2016 and require a local authority to:

- publish a Contract Notice to invite interested bidders;
- apply a process that recognises the TFEU principles (no requirement to apply one of the six procurement processes);
- a more limited set of criteria (mandatory exclusion grounds only);
- publish a Contract Award Notice to confirm who the winning bidder is.

An organisation can still challenge whether a procurement process complied with these more limited procedural rules.

In relation to contracts for health or social services below the €750,000, procurement regulations do not apply, but a public body should decide on a case-by-case basis whether in order to comply with the TFEU principles a competitive process is necessary and a local authority standing orders and local procedures will apply.

The **Procurement Reform (Scotland) Act 2014** requires additional transparency. All public bodies must publish a contracts register and those with procurement activity of £5 million or more must publish a Procurement Strategy setting out ambitions and report on progress annually. The Act also expects of procurement activity to enable access to contracts for SMEs and third sector organisation and deliver on improved outcomes for the economy, the environment and society through for example community benefits and the promotion of *Fair Work practices, including payment of the real Living Wage* for those working on public contracts

Procurement guidance relevant to adult social care services.

Recognising the importance of good procurement decision making the Scottish Government worked closely with carers, providers and public bodies to publish [Procurement of care and support services: best practice guidance](#) - March 2016.

Statutory guidance on **Addressing Fair Work Practices, including the Living Wage, in Procurement** 2015, is of particular relevance to the procurement of adult social care services. It requires a public body to include a criterion in a procurement process, which asks bidders to describe their approach to Fair Work practices, including the payment of the real Living Wage.

This, supported by Scottish Government funding has enabled local authorities to work with providers to pay those working in the sector the real Living Wage, in a way that complies with procurement rules

Brexit and the procurement rules

Immediately after Brexit, at the end of the Transition Period, The European Union (Withdrawal) Act 2018 preserves “*EU-derived domestic legislation*” which means that *current* procurement legislation will continue to apply until such time as new legislation is introduced. After Brexit, procurement obligations will be governed by international agreements and as procurement is regarded as a key enabler of these relations, the UK Government is taking steps to preserve the UK’s interest in EU markets and vice versa through membership involvement in the World Trade Organization (**WTO**) General Procurement Agreement (the **GPA**) on the same terms that currently apply.

This means that whilst future Scottish procurement legislation no longer needs to adhere to EU procurement Directives, it will as a minimum, be required to adhere to the more limited procedural rules contained in the GPA and act in a way consistent with general principles of transparency, fairness and non-discrimination.

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14 September 2020