

**Introducing Fair Work through ‘soft’ regulation in outsourced public service networks:
Explaining unintended outcomes in the implementation of the Scottish living wage
policy**

Abstract

Using a regulatory analysis from Martinez Lucio and Mackenzie (2014 and 2016), this study contributes to debates concerning the capacity of ‘soft’ regulation to advance employment conditions and outcomes. This study explores the implementation of a real living wage policy for employees in outsourced Scottish social care. Despite employer compliance in implementing the living wage, it had a mixed impact on the income of workers, and did not improve staff recruitment and retention. The theoretical framework challenges recent optimistic views concerning the impact of such regulation by revealing unintended and problematic consequences, such as problems with differentials and providers walking away from contracts. It further reveals how actor roles, interests, power resources and inter-relationships, as well as surrounding structural contextual influences (austerity, marketisation and engrained values and processes in political settlements), interacted to shape these outcomes. Insights from this study include that ‘soft’ regulation was unable to create conditions for actors such as trade unions, employers and non-governmental organisations (NGOs) to colonise or seize the regulatory space to secure the full benefits of the SLW. The political settlement with Scottish Government allowed local authorities to retain coercive control over other actors in the regulatory space. Employers and trade unions were further hindered by lack of unity and continued isolation from decisions, respectively. Surrounding economic and ideological restrictions imposed by central UK government’s austerity agenda, and the retention of powers over employment regulation added to the failure of these ‘soft’ measures to increase pay and improve recruitment and retention in social care.

Key words: living wage, regulatory theory, social care, outsourcing

1. INTRODUCTION

This article contributes to wider studies in the field of regulation and the law about why changes in employment relations do or do not happen. Specifically, it aims to contribute to debates about the value of ‘soft’ regulation as a means of advancing labour market conditions and outcomes.¹ That is regulatory measures that are not enshrined in law and can only persuade rather than compel employers to implement specific practices². The article pursues this objective by exploring the effectiveness of a ‘soft’ regulatory instrument, namely a policy to introduce the ‘real living wage’³ to front-line social care staff that was designed to address low pay and recruitment and retention problems in outsourced providers in the sector.

Analyses of government intervention in employment relations have focused predominantly on the influence of ‘hard’ law.⁴ At the same time, despite recognised limits with regard their impact on policy-making, significant attention has been paid in recent years to how far reflexive regulation⁵ and ‘soft’⁶ non-legally binding forms of regulation can

¹ E. Heery, D. Hann and D. Nash, ‘Political devolution and employment relations in Great Britain: the case of the Living Wage’ (2020) 51 (5) *Industrial Relations Journal* 391-409.

² S. Kuraville and A. Verma, ‘International labor standards, soft regulation, and national government roles’ (2006) 48 (1) *Journal of Industrial Relations* 41–58.

³ The ‘real living wage’ in the UK is distinct from the UK government’s statutory ‘living wage’. It is based on an estimate of the real cost of living for low paid workers and an hourly rate is published each year by the Living Wage Foundation.

⁴ K. Sisson, ‘The Fair Work Wales report: a manifesto for all of us’ (2019) 50 (5) *Industrial Relations Journal* 564–579.

⁵ Reflexive or responsive regulation is where the presence of the law stimulates self-regulation, overcoming the limits of purely voluntarist regulatory approaches and direct legal enforcement. Reflexive regulation entails actors engaging in deliberation to tailor the implementation of legal rules to the local context.

⁶ C. Howell, *Trade Unions and the State* (Princeton: Princeton University Press, 2005). M. Stuart, M. Miguel, M. Martinez-Lucio and A. Robinson, ‘Soft regulation’ and the modernisation of employment relations under the

overcome the inherent complexity and shift towards juridification common with ‘hard’ law measures, while still delivering social change.⁷ In an attempt to enhance the regulation of the globalised labour regime, for example, a variety of soft law initiatives have been introduced to govern labour practices in global supply chains when governments and international institutions are unable or unwilling to do so.⁸ These private regulations have been adopted to respond to pressures exerted by civil society and consumers over concerns regarding employees’ working conditions. Interest in the potential positive impact of such measures continues. In particular, in the UK it has been heightened by the adoption of ‘soft’ ‘Fair Work’ interventions by the devolved governments in Scotland and Wales.⁹

This growth of interest exists, however, alongside evidence casting doubt on whether ‘soft’ regulation can yield positive results. At the international level, ‘soft’ ILO standards have been criticised for lacking the power of enforcement and being characterised by poor effectiveness.¹⁰ Similarly, in recent years, as the EU has turned to ‘softer’ forms of employment regulation, and one of its chosen instruments, the ‘Open Method Coordination’ (OMC), has proved to be a weak substitute for ‘harder’ forms of intervention.¹¹ Efforts to enhance labour standards in global (transnational) supply chains have also met with mixed success due to a combination of factors, including the lack of supportive legal and civil society pressures, inadequate mechanisms of compliance audit and oversight, and a failure to address problematic and countervailing product market dynamics.¹² A similar picture

British Labour Government (1997–2010): partnership, workplace facilitation and trade union change’ (2011) 22 (18) *International Journal of Human Resource Management* 3794-3812; M. Menashe, ‘Private actors as transnational regulators: The case of freedom of association’ (2020) 49 (1) *Industrial Law Journal* 1-34.

⁷C. McLaughlin, ‘Equal pay, litigation and reflexive regulation: The Case of the UK local authority sector’ (2014) 43(1) *Industrial Law Journal* 1-28.

⁸ M.Menashe, n.6 above.

⁹ E. Heery, D. Hann, D and D. Nash, n.1 above. K. Sisson, n.4 above.

¹⁰ B. Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005).

¹¹ M. Gold, (2010) ‘Overview of EU Employment Policy’ in M. Gold, (Ed) *Employment Policy in the European Union: Origins, Themes and Prospects* (Basingstoke: Palgrave, 2020), 1-26.

¹² P, James, L. Miles, R. Croucher and M. Housatt, ‘Regulating factory safety in the Bangladeshi garment industry’ (2018) 13(3) *Regulation and Governance* 431-444.

emerges with regard to pre-austerity soft regulatory efforts to use partnership to encourage union organising in Ireland and the UK. In the former case, national partnership arrangements broke down due to austerity measures but at any rate had not provided the unions with a means of expanding membership.¹³ In a similar vein, New Labour government attempts to use such regulation to promote union organisation, most notably through the encouragement of ‘partnership’ working had little impact outside of the public sector due to employer reluctance to engage with the initiative.¹⁴

Moreover, efforts to introduce ‘soft’ progressive measures through the local state can be difficult because of underlying structural pressures, such as those stemming from the austerity policies introduced by governments after the 2008 financial crisis. These policies were characterised by cuts to public services and entitlements pursued through drives for balanced public sector budgets, the marketization and privatisation of public sector assets, structural reforms of benefits and the reduction of employment conditions (via wage caps and cuts in pensions) and greater flexibility in labour markets.¹⁵ A study of efforts to facilitate a socially inclusive employability policy, for example, identified a process of ‘policy closure’¹⁶ that blocked consideration of progressive alternatives because they were in the shadow of contradictory legally mandated policies which were underpinned by market based values akin to those underlying workfare initiatives from the United States. In particular, key actors exhibited engrained values about the perceived moral failure of unemployed people, and

¹³ T. McDonough and T. Dundon, ‘Thatcherism delayed? The Irish crisis and the paradox of social partnership’ (2010) 41 (6) *Industrial Relations Journal* 585-562.

¹⁴ M. Stuart, M. Martínez-Lucio, M and A. Robinson, ‘Soft regulation’ and the modernisation of employment relations under the British Labour Government (1997–2010): partnership, workplace facilitation and trade union change’ (2011) 22 (18) *International Journal of Human Resource Management* 3794-3812.

¹⁵ S. McBride, ‘Eight things the crisis taught us about austerity’ (2018) *The Monitor*, Canadian Centre for Policy Alternatives. www.policyalternatives.ca/publications/monitor/eight-things-crisis-taught-us-about-austerity. Accessed 8th May 2022.

¹⁶ M. Johnston, M. Martínez Lucio, D. Grimshaw and L. Watt, ‘Swimming against the tide? Streetlevel bureaucrats and the limits to inclusive active labour market programmes in the UK’ (2021) *Human Relations* [tps://doi.org/10.1177/00187267211045037](https://doi.org/10.1177/00187267211045037).

wanted only ‘job ready’ applicants.¹⁷ Income from government and competition with other agencies meant organisations had to abide by these employer preferences¹⁸. In addition, studies of the implementation of ‘soft’ living wage measures in local authority areas, cities or sectors also present a very mixed picture of success regarding their application to sub-contracted workers.¹⁹

The common failure of ‘soft’ regulatory initiatives, therefore, remains their lack of enforceability and related concerns about their inability to instigate reforms that challenge existing economic and political interests, leaving extant power relations and their abuses unchallenged.²⁰ This feature has, in turn, been seen to reflect how far neo-liberal ideas have permeated the ideology of social democratic governments and institutions like the EU and the local state. Indeed, ‘soft’ approaches to regulation are seen to have become the preferred policy mechanism for governments and institutions that support the values associated with neo-liberalism since they do not fundamentally challenge employer interests.

Given these well understood limits, the above evidence has led to a turn away from soft regulation. In the EU there is evidence of some revival in the EU social dimension through recourse to ‘hard’ law.²¹ Several countries have in a similar vein introduced ‘due diligence’ laws as response to the failure of voluntary, and sometimes largely symbolic, buyer ‘codes of conduct’ to significantly improve labour standards at the ends of global supply chains.²² Other scholars focus on the value of ‘soft’ regulation’s interaction with

¹⁷ I. Greer, L. Schulte and G. Symon, ‘Creaming and parking in marketized employment services: An Anglo-German comparison’ (2018) 71(11) *Human Relations* 1427–1453.

¹⁸ M. Johnston, M. Martínez Lucio, D. Grimshaw and L. Watt, n.16 above.

¹⁹ M. Johnston, A. Koukiadaki and D. Grimshaw, ‘The Living Wage in the UK: Testing the limits of soft regulation?’ (2019) 25(3) *Transfer* 319–333.

²⁰ C. McCrudden, ‘Equality legislation and reflexive regulation: A response to the Discrimination Law Review’s consultative paper’ (2007) 36 (3) *Industrial Law Journal* 255–66.

²¹ C. Fagan and J. Rubery, ‘Advancing Gender Equality through European Employment Policy: The Impact of the UK’s EU Membership and the Risks of Brexit’ (2018) 17 (2) *Social Policy and Society* 297–317.

²² See e.g. P. De Lagerie, E. Béthoux, A. Mias and E. Penalva-Icher, ‘Implementing the French Duty of Vigilance Law: When Enterprises drew up their First Plans’. In G. Delautre, E. Manrique and C. Fenwick (eds), *Decent*

‘hard’ regulation.²³ Some, for example, see ‘soft’ and ‘hard’ regulation as complementary²⁴, while others²⁵ point to how the ‘soft’ ambiguous and imprecise language and narratives in measures like the UK government’s *Taylor Review of Modern Working Practices*²⁶ underpin neo-liberal, employer friendly perspectives in regulation, and marginalise union voices.

At the same time, commentators have nevertheless greeted the ‘soft’ ‘Fair Work’ initiatives of the devolved UK governments with considerable optimism, pointing to the commitments they embody to inclusive growth and strong social democratic, rather than neo-liberal, values.²⁷ This is despite that they have been introduced in tandem with the aforementioned austerity in public expenditure. These ‘Fair Work’ initiatives therefore merit investigation, both as a means of adding to what remains a limited body of empirical research relating to the operation of soft regulatory forms of employment regulation and to see how far this optimism has proved to be well-founded about their capacity to advance employment outcomes.

Drawing on a qualitative study of a Scottish government policy undertaken in 2018 to improve the pay levels of outsourced front-line adult social care workers and thereby improve recruitment and retention by ensuring employees are paid the Scottish Living Wage (SLW), this article aims to shed light on 1) the outcomes of this policy as a form of soft regulation, and 2) the factors shaping them, including the role of existing power relations and economic

Work in a Globalised Economy: Lessons from Public and Private Initiatives (Geneva: International Labour Organisation, 2021), 165-184.

²³ R. Locke, T. Kochan, M. Romis and F. Qin, ‘Beyond corporate codes of conduct: Work organization and labour standards at Nike’s suppliers’ (2007) 146 *International Labour Review* 21–40; R. Locke, B. Rissing and T. Pal, ‘Complements or substitutes? Private codes, state regulation and the enforcement of labour standards in global supply chains’ (2013) 51 (3) *British Journal of Industrial Relations* 519–552; C. Inversi, T. Dundon and L.A. Buckley, ‘Work in the gig-economy: The role of the state and non-state actors ceding and seizing regulatory space’ (2022) *Work, Employment and Society*, in early view.

²⁴ T. Locke, B. Rissing and T. Pal, n.23 above.

²⁵ C. Inversi, T. Dundon and L.A. Buckley, n.23 above.

²⁶ M. Taylor, G. Marsh and D. Nicole, *Good Work: The Taylor Review of Modern Working Practices* (London: Department of BEIS, 2017). Available at: <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>

²⁷ E. Heery, D. Hann and D. Nash, n.1 above.

and political interests. In pursuing this agenda, the paper utilises a form of regulatory analysis developed by Black (2002) and Baldwin et al (2010), and latterly applied to the area of employment relations by Martínez Lucio and MacKenzie (2004; 2014 and 2016).²⁸ It does so on the grounds that the approach embodies a form of analysis that allows a focus on how regulatory shifts interact with prevailing markets and economic conditions, and the interests of actors within a regulatory space, to generate particular outcomes.²⁹

To anticipate what follows, the study's findings reveal that despite widespread provider compliance with the encouragement to pay the SLW to front-line adult social care staff, unintended consequences meant that the government's policy failed to improve the incomes of some workers, intensified problems surrounding staff recruitment and retention and undermined the sustainability of some outsourced public sector networks. They further indicate that these failings stemmed from the inability of soft regulation to challenge the power relations between key actors in the regulatory space of outsourced social care. The progressive intentions underlying the SLW policy were as a result disrupted by local political decisions and processes and the ongoing power possessed by local authority funders in a context marked by austerity-driven cuts to their budgets. It is concluded that soft regulatory measures aimed at improving labour market standards and outcomes are unlikely to be effective unless action is simultaneously taken to address features of the surrounding

²⁸ J. Black, 'Regulatory conversations' (2002) 29(1) *Journal of Law and Society* 163-96; R. Baldwin, M. Cave and M. Lodge, 'Introduction: Regulation—the Field and the Developing Agenda' in R. Baldwin, M. Cave and M. Lode (Eds), *The Oxford Handbook of Regulation* (Oxford: Oxford University Press, 2010), 1-14; R. MacKenzie, 'The migration of bureaucracy: Contracting and the regulation of labour in the telecommunications industry' (2004) 16 (2) *Work, Employment and Society* 599–616.; R. Mackenzie and M. Martínez Lucio, 'The colonisation of employment regulation and industrial relations? Dynamics and developments over five decades of change' (2014) 55 (2) *Labor History* 189-207; M. Martínez Lucio and R. MacKenzie, 'The state and the regulation of work and employment: theoretical contributions, forgotten lessons and new forms of engagement' (2016) 28 (21) *International Journal of Human Resource Management* 2983–3002.

²⁹ M. Martínez Lucio and R. MacKenzie, n.28 above.

environment that have acted in the first place to create the labour problems that the policy is intended to address.³⁰

The remainder of the article commences with two scene-setting sections. The first presents the regulatory framework that is employed to analyse the findings obtained from the study. The second outlines the relevance of the framework to the introduction of the Scottish government's SLW policy. The next sections then describe the study's methodology and report its central findings. Finally, the theoretical and policy implications of these findings are discussed.

2. A THEORETICAL FRAMEWORK OF REGULATION IN EMPLOYMENT RELATIONS

Martinez Lucio and Mackenzie's approach to regulation³¹ used in this study adopts a broadly-based conceptualisation of regulation which views it as encompassing 'all mechanisms of social control – including.....non-state processes...';³² an interpretation of regulation that includes 'soft' non-statutory measures.³³ It also conceives regulation not as a dichotomous, zero-sum phenomenon, moving between 'regulation' and 'deregulation', but one that moves across different sites, spaces, levels and actors as the state withdraws from, or engages in, particular forms of direct intervention.³⁴ Consequently, the perspective is useful in examining

³⁰ A similar point has been made by Anner and colleagues with regard to the limited impact of attempts to regulate labour standards in global supply chains. See M. Anner, J. Bair and J. Blasi, 'Toward joint liability on global supply chains: Addressing the root causes of labour violations in international subcontracting networks' (2013) 35 *Comparative Labour Law and Policy Journal* 1-43.

³¹ M. Martínez Lucio and R. MacKenzie, "'Unstable boundaries?' Evaluating the 'new regulation' within employment relations' (2004) 33 *Economy and Society* 77-97.
M. Martínez Lucio and R. MacKenzie, n.28 above.

³² R. Baldwin, C. Scott and C. Hood, 'Introduction', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (Oxford: Oxford University Press, 1998), 1-55.

³³ M. Martínez Lucio and R. MacKenzie, n.31 above.

³⁴ R. Baldwin, C. Scott and C. Hood (1998), n.32 above.

outsourced markets, because it adopts the view that within the aforementioned spaces, regulation is shared across multiple public and private actors with competing economic and political interests.³⁵ The state, as one of these actors, is viewed to adopt a steering and coordinating role, relying on cooperation, information sharing, consultation, persuasion and networking to achieve its goals.³⁶

Regulatory actors and the inter-relationships between them are identified as being crucial to understanding the changing patterns and outcomes of shifts in regulation. Actors are seen to actively shape their allocated regulatory roles, drawing on the different pathways and resources and power they have at their disposal. Indeed, in some cases such power and resources can lead to certain actors ‘aggressively colonising’ or ‘seizing’ regulatory spaces.³⁷ At the same time, the power and interests of different actors within these spaces can be re-ordered by regulatory shifts. These regulatory shifts can have negotiated features or be coercive in nature because they are competitive and result in aggressive colonisation and the marginalisation of some actors and the enhanced positioning of others. New actors can also enter the market, capture the regulatory space and disrupt existing relations.³⁸ This process of role re-configuration is considered inherently political and hence potentially unstable because it leaves actors vulnerable to attack from vested interests and pressures for reform on the grounds of their failure to perform in line with expectations.³⁹

It follows that any reconfiguration of actor roles following a regulatory shift may not take a form that is entirely appropriate to achieve the purposes of a policy.⁴⁰ The degree to which firms (or others) take on appropriate regulatory functions, for example, may be limited

³⁵ M. Martínez Lucio and R. MacKenzie, n.31 above; M. Martínez Lucio and R. MacKenzie, n.28 above.

³⁶ G. Majone, ‘The rise of the regulatory state in Europe’ (1994) 17 *West European Politics* 77–101.

³⁷ R. Mackenzie and M Martínez Lucio, n.28 above; M. Martínez Lucio and R. MacKenzie, n.28 above. C. Inversi, T. Dundon, T and L.A Buckley, n.23 above.

³⁸ G. Majone, n. 36 above; R. Mackenzie and M Martínez Lucio, n.28 above.

³⁹ M. Martínez Lucio and R. MacKenzie, n.28 above.

⁴⁰ M. Martínez Lucio and R. MacKenzie, n.31 above.

by political dynamics arising from the varying interests and influence of other actors involved in the aforementioned reconfiguration. Regulation, therefore, can lose sight of its original purpose and lead to unintended, often dysfunctional, consequences emerging from the uneven distribution of resources and power among regulatory actors.

Changes in the boundaries of regulation meanwhile do not necessarily mean a diminution of the power of certain actors. Even following processes of de-regulation that accompany outsourcing, the unintended consequences of such events can lead to the original lead firm in a public supply chain to engage in, or continue with, previous (and now undesired) forms of regulatory intervention. In a study of British Telecomm (BT) it was found, for example, that subcontracting led to uncertainty concerning the adequate supply of labour to the telecoms sector. As a result, the lead firm engaged in a partial re-regulation of the control of labour supply.⁴¹

Finally, the framework recognises that the power and resources of actors when regulating various spaces are shaped by broader structural factors. For example, the state and other actors will interact and act within the ongoing social relations of capitalism, as well as the structural antagonisms underlying employment relations, including those between employers and unions (Edwards, 1986). Meanwhile, the roles, resources and interactions of actors within public service networks can be expected, to be shaped to some extent by the unprecedented period of public service austerity that followed the 2008 financial crises, where local authorities (the main funders of private and non-profit social care providers) are the key location of state efforts to reduce public expenditure.⁴²

⁴¹ R. MacKenzie, n.28 above.

⁴² S. Bach, 'Shrinking the state or the Big Society? Public service employment relations in an era of austerity' (2012) 43(5) *Industrial Relations Journal* 399-415.

3. 'SOFT' REGULATION AS A MEANS OF ERADICATING LOW PAY IN SCOTTISH ADULT SOCIAL CARE

As already mentioned, this study adopts the theoretical perspective of Martinez Lucio and Mackenzie as it provides a framework of analysis that supports a focus on how regulatory shifts interact with prevailing markets and economic conditions, and the interests of actors within the affected regulatory spaces, to generate particular outcomes. The following overview of the Scottish adult social care context traces the changes in the delivery of social care and related shifts in the regulation of pay through this framework. It illuminates the extent to which pay regulation in social care is shared across multiple public and private actors with competing interests and recognises the sector's unintended, dysfunctional outcomes from regulation emerging from the uneven distribution of resources in the social care regulatory space. The Scottish Government's re-engagement with pay regulation through the SLW provides an opportune use of this framework to examine the operation of a soft regulatory form of employment regulation and its impact on pay and recruitment and retention.

Social care represents an example of regulation moving across different sites, spaces, levels and actors in response to the state withdrawing from direct intervention. Previously, social care was predominantly both funded and delivered by local authorities (and therefore the staff employed by them). Today a rather different picture exists within which care is largely provided through local authority funded networks of private and voluntary sector providers.⁴³

⁴³ S. Davies, 'Outsourcing and the voluntary sector: A review of the evolving policy landscape' in I. Cunningham and P. James (eds), *Voluntary Organisations and Public Service Delivery* (New York: Routledge, 2012), 15-36.

This shift in the delivery of social care has been accompanied by a dramatic change in how the terms and conditions of staff are determined. The pay and other conditions of local authority staff have long been determined through national level collective bargaining. These bargaining arrangements do not extend, however, to cover staff employed by private and voluntary sector providers.⁴⁴ The regulation of pay has consequently shifted to non-state actors in social care, notably the outsourced employers/providers, who have, in Martínez Lucio and Mackenzie's terms aggressively colonised⁴⁵ pay regulation by largely abandoning nationally negotiated pay and conditions. In the early 1980s, this shift was facilitated by the first Thatcher government rescinding the Fair Wages Resolution 1946 and the UK Parliament repealing Schedule 11 of the Employment Protection Act 1975. The first of these changes meant that local authorities no longer had to include fair wages clauses in contracts relating to outsourced social care (and other) services, while the second removed the ability of trade unions to apply to the Central Arbitration Committee (CAC) to enforce the terms of multi-employer collective agreements against outside contractors, include social care ones. As a result, such providers have possessed considerable discretion to alter pay and conditions in response to downward pressures on the funding of services by local authorities.

This more devolved system for the determination of staff pay has not operated in the absence of regulation. In the public domain, 'hard' regulation in the form of the statutory National Minimum Wage (NMW)⁴⁶ legislation introduced by the Labour government in 1999 sets statutory hourly NMW rates for both private and voluntary sector providers, albeit this does not stipulate daily, weekly or monthly pay minima.⁴⁷ In excluding these premia, the

⁴⁴ I. Cunningham, *Employment Relations in the Voluntary Sector* (London: Routledge, 2008).

⁴⁵ R. Mackenzie and M. Martínez-Lucio, n.28 above.

⁴⁶ National Minimum Wage Act 1998

⁴⁷ See Z. Adams, *Labour and the Wage: A Critical Perspective* (Oxford: Oxford University Press, 2021), Chapter 8.

NMW has been accused of being a complex, ‘bare bones measure’ which does not make it possible to establish a living income for low paid workers, including those in care.⁴⁸ In Scotland there is also the ‘soft’ National Care Home Contract (NCHC) that sets budgets, fees and hourly rates for elderly care homes (largely run by the private sector), as well as recommending a minimum level of pay. Regulation of pay through the NCHC involves consultations and negotiations with private and voluntary sector lead employer bodies (Scottish Care and the Coalition of Care and Support Providers (CCPS), respectively), the local government representative organisation, the Confederation of Scottish Local Authorities (COSLA), the Scottish Government and the Scottish Trade Union Congress (STUC). Voluntary and private sector employers running other adult or children’s services remain outside such regulation with pay determined at the enterprise level.

At the same time, research has shown that the primary role accorded to private and voluntary care providers in their capacity as employers has generated dysfunctional outcomes.⁴⁹ Local authority purchasers, seeking savings, have forced resource dependent providers to move away from basing worker pay on equivalent public sector rates.⁵⁰ Longitudinal studies show how local authorities, under austerity funding, acted to reduce the income of providers through budget cuts, thereby leading them to reduce pay and conditions;⁵¹ reductions that in turn generated unintended outcomes such as recruitment and retention problems.⁵²

⁴⁸ S. Deakin, ‘Failing to succeed? The Cambridge School and the economic case for the Minimum Wage’ (2022) 38(2) *International Journal of Comparative Labour Law and Industrial Relations* 211–236.

⁴⁹ I. Cunningham and P. James, ‘Analysing public service outsourcing: The value of a regulatory perspective’ (2017) 35 (6) *Environment and Planning C – Government and Policy* 958-974.

⁵⁰ I. Cunningham, n. 44 above.

⁵¹ I. Cunningham, A. Baluch, P. James and D. Young, *Benchmarking Pay and Conditions in Social Care Sector*, Report for Coalition of Care and Support Providers Scotland and Scottish Care (Edinburgh: CCPS, 2017).

⁵² S. Mulholland, J. Fawcett and S. Granville, *Recruitment and Retention in the Social Service Workforce in Scotland* (Edinburgh: Office of the Chief Social Work Adviser, 2016).

State re-engagement with pay regulation in Scottish social care has emerged since 2016 as Scotland’s government has promoted job quality through ‘soft regulation’ in the form of its ‘Fair Work Convention’.⁵³ In the light of the trends noted above, social care became one of the first sectors to be the focus of policy proposals developed under the auspices of the Convention. These proposals recommended, along with fair pay, the end of local authority contracting that encourages organisational insecurity and zero-hour contracts.⁵⁴ Meanwhile, in parallel, the Scottish Government introduced guidance on addressing Fair Work practices (including the living wage) in procurement. In the case of public sector supply chains, this states with regard to suppliers that:

“...clarity on workplace rights and responsibilities including on equality, human rights and discrimination, health and safety obligations, recruitment and working hours, pay, and trade unions or other forms of employee representation can make a real difference to employees, to the organisation and to the way the contract is delivered (Scottish Government, 2018, p.3)”.⁵⁵

In an effort to address low wages and poor-quality jobs in publicly funded adult social care, the Scottish Government (in agreement with COSLA) announced that front-line staff working in adult care providers should be paid the SLW. This measure brought a further actor into the regulation of pay, The Living Wage Foundation.⁵⁶ Funding of £56m was made available by

⁵³ K. Sisson, n. 4 above; E. Heery, D. Hann and D. Nash, n.1 above.

⁵⁴ Fair Work Convention. *Fair Work in Scotland’s Social Care Sector* (Edinburgh: Scottish Government, 2019).

⁵⁵ Scottish Government. *Best Practice Guidance on Addressing Fair Work Practices, including the Real Living Wage, in Procurement*, (Edinburgh: Scottish Government, 2018).

⁵⁶ The Living Wage Foundation oversees the calculation of the Real (Scottish) Living Wage and accredits employers that reach its benchmarks.

Government for use by local authorities to help providers pay staff the SLW through the re-negotiation of contract prices. Meanwhile, the government ordered that sleepovers (workers sleeping in a service user's residence and working when called upon) should no longer attract a flat monetary rate, but also be based on the SLW hourly rate from 2018/19 onwards.⁵⁷ Since the outset of the policy and up to the time of writing, the SLW rate has risen annually from £7.85 to £9.90 per hour.

The status of the above measure as 'soft' law was confirmed in the Statutory and Joint non-statutory Guidances.⁵⁸ The latter stated that the Scottish Government had sought clarification from the European Commission on the application of the Living Wage in procurement processes. The advice confirmed that contracting authorities were unable to use binding contractual clauses that legally mandated the payment of any specified wage rate above the legal minimums (currently the UK National Minimum Wage and the National Living Wage for those aged of 25 and over). In line with this, the statutory guidance confirmed that it was not possible to reserve any element of the overall tender score specifically to the payment of the SLW.⁵⁹ This guidance did, however, acknowledge that Fair Work measures could be considered by purchasers in their awarding of contracts, which entails fair and equal pay, including the SLW. At the same time, it was made clear that wages were not the only indicator of Fair Work, and that omission of the SLW did not mean that the employer's bid automatically fails to meet its standards.⁶⁰

⁵⁷ Scottish Government, *Pay Boost for Carers*, <https://www.gov.scot/news/pay-boost-for-carers/> (Edinburgh: Scottish Government, 19 Oct 2017).

⁵⁸ Confederation of Scottish Local Authorities, CCPS, Scottish Care and Scottish Government. *Guidance to support delivery of the Living Wage Commitment to Care at Home and Housing Support*. (Edinburgh: Confederation of Scottish Local Authorities, CCPS, Scottish Care and Scottish Government, 2018).

⁵⁹ Scottish Government. *Statutory Guidance on the Selection of Tenderers and Award of Contracts Addressing Fair Work Practices, including the Living Wage, in Procurement*. (Edinburgh: Scottish Government, 2015).

⁶⁰ Scottish Government. *Statutory Guidance on the Selection of Tenderers and Award of Contracts Addressing Fair Work Practices, including the Living Wage, in Procurement*. (Edinburgh: Scottish Government, 2015).

The above analysis consequently raises the following questions: how effective is a ‘soft’ regulatory approach in introducing the living wage in terms of resolving low pay and recruitment and retention issues in the Scottish outsourced social care sector? How do factors such as the roles, interests and varying power of actors in the social care regulatory space interact to shape the policy outcomes in these regards?

In the concluding discussion section of the paper the theoretical and policy implications arising from the findings obtained in relation to these questions are explored and consideration is further paid to how recent changes in Scottish government guidance on the imposition by local authorities of contractual requirements regarding the payment of the SLW might affect the actors in the Scottish social care market⁶¹ Introduced after Brexit following the removal of Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) from UK law⁶², these changes came into effect on 31 May 2022, and hence subsequent to both the study’s fieldwork and the drafting of earlier versions of the present paper. Under them, local authorities are now given the option of imposing such contractual terms where a number of conditions are met, including the need to comply with international treaty obligations.⁶³

4. METHOD

⁶¹ Scottish Government. *Procurement Reform (Scotland) Act 2014: statutory guidance: Guidance on procurement strategies and annual reports, the sustainable procurement duty, community benefit and Fair Work requirements, tenders and award of contracts. Updated May 2022 to embed an updated chapter on Fair Work First that reflects updates to Fair Work and real Living Wage policy.* Chapter 5, pages 41-48, (Edinburgh: Scottish Government, 2022) .

⁶² Z. Adams, C. Barnard, S. Deakin and SF Butlin, *Deakin and Morris’ Labour Law* (7th ed) (Oxford: Bloomsbury, Hart Publishing, 2021).

⁶³ Some legal uncertainty nevertheless surrounds how far the freedom to impose such contractual terms is constrained by World Trade Organisation laws and the provisions of the EU-UK Trade and Cooperation Agreement. The authors would like to thank the editor for drawing their attention to this point, as well as the wider relevance of Brexit to the production of the revised Scottish government guidance.

Qualitative methods of data collection and analysis were used for the study. Empirically, the study provides insights from the perspectives of the full range of actors involved in the regulatory shift in pay and employment relations prompted by the government's SLW policy, including government, funding bodies and NGOs. The research team adopted an inductive data-driven approach⁶⁴ and conducted interviews with a wide range of respondents to ascertain multiple actors' views on the outcomes of SLW policy.

The data collection took place from January to April 2018. Semi-structured interviews were held with a total of 14 voluntary and independent sector providers. Two focus groups with four and two voluntary sector providers respectively were also held to draw out any similarities and differences in their experiences with the consequences of implementing the SLW policy. Following a purposive sampling strategy,⁶⁵ providers were selected to reflect a range of characteristics that included organizational size, location in the voluntary or private sectors, engagement in the provision of residential care or care at home services, and geographical (urban, semi-rural and rural) setting of service provision.

To gain the perspectives of local authority partners, interviews were conducted with contracting and commissioning authorities in five local authorities, including Chief Officers and representatives from the Integrated Joint Health and Social Care Boards (IJBs), and procurement and finance managers. Furthermore, confirmatory and factual interviews were conducted with civil servants, representatives from COSLA, lead bodies of employers (CCPS and Scottish Care) and a senior trade union representative. Finally, perspectives of the Living Wage Foundation which recommends the annual rises in LW rates were captured through

⁶⁴ D. Gioia, K. Corley and A. Hamilton, 'Seeking qualitative rigor in inductive research: Notes on the Gioia Methodology' (2013) 16(1) *Organizational Research Methods* 15-31.

⁶⁵ M.Q. Patton, 'Two decades of developments in qualitative inquiry: A personal, experiential perspective'.(2002) 1(3) *Qualitative Social Work* 261-283.

two additional interviews. Table 1 shows that in total 29 interviews were undertaken that involved 40 respondents.

Insert Table 1 here

The interviews were conducted confidentially, and recorded and transcribed verbatim. All four members of the research team analysed the interview transcripts independently. Data analysis occurred by identifying central themes emerging from the interviews concerning the experiences of providers and commissioning/contract authorities with the consequences of implementing the commitment to pay the Living Wage. These findings were supplemented by further analysis of the interview data to draw out further themes in iteration with the study's theoretical perspective, i.e. the different regulatory sites, spaces, levels and actors, and the shifts in relationships between these actors.

5. FINDINGS

The study's findings are presented in two sections. The first addresses the issue of how far the government's SLW policy was successful in introducing the living wage and in doing so resolving low pay and recruitment and retention problems among adult social care workers in private and voluntary sector providers. The second explores the factors that influenced the policy's outcomes in the light of the inter-relationships between the roles of actors, existing power relations and the influence of established economic and political interests as outlined in the theoretical framework of Martinez Lucio and Mackenzie.

A. The Outcomes of the SLW Policy

The majority of providers were found to be paying the hourly SLW rate to front-line adult care workers in line with the government's policy. Overall, respondents reported that from the introduction of the policy in 2015-16 to the end of this project 2018, the average increase across the providers' front line hourly rates of pay increased by an average of 8%. Ironically, however, this achievement was seen by all types of interviewees to have had a mixed impact on worker pay, and not to have significantly improved staff recruitment and retention. These failures were primarily viewed as the product of a simple fact – the level of the SLW, as well as the sizes of the pay increases it generated, were insufficient to significantly change the dynamics surrounding the conditions of care work. Providers continued to compare care work unfavourably with other competing sectors in the economy.

“So ironically a policy designed to increase recruitment and improve retention is having the opposite effect, not least, surprise, surprise that nobody quite worked out that the rest of the community and retail and hospitality in particular would increase salaries to meet the challenge of more people in social care getting better terms and conditions” (Private Sector provider).

Indeed, the policy was found in some respects to have created further difficulties through the generation of a number of unintended consequences. Several organisations reported how they did could not, due to reasons of affordability, pay relief or other casual workers the SLW. Providers further reported that as the SLW became the 'going rate' for care, so workers were becoming reluctant to be recruited into complex services in which

service users displayed challenging behaviour when they could secure identical pay for posts in less challenging environments.

“It’s a reasonable question people have raised of having a simpler life, less complicated, less somebody threatening to punch me and those kinds of things, why should I put up with that when actually I get paid the same wage as a less complex service” (Voluntary sector Provider).

Moreover, for some care workers a consequent reduction in numbers of sleepover shifts, due to the increased costs associated with them now being paid at the level of the SLW, had meant a significant drop in income and led to decisions to quit.

“The danger is that workers who were providing sleepovers actually go home with less pay because they haven’t got their sleepover payment, which all feeds into the issue about recruitment and retention, because effectively people’s salaries reduce” (Voluntary sector Provider).

Worsening recruitment and retention were also reported among team leader/ first-line supervisor grades due to a narrowing of wage differentials between such staff and those they supervised.

“Because there’s been nothing in terms of differential, there’s a whole thing about morale, with people in management levels saying ‘why am I managing for effectively the same money or very little difference?’” (Voluntary sector Provider).

In some cases, supervisory staff reported earning less than front-line adult care staff on SLW rates once the receipt of sleepover payments was taken into account. Differentials were similarly squeezed in those organisations that employed support assistant and support worker grades or support and senior support workers, with those on the higher level seeing those with less experience or skill catching up in terms of salary. Moreover, respondents feared that a widening of pay differentials between domestic and catering staff and front-line care workers would exacerbate existing recruitment and retention issues among the former, especially in the context of continued competition for labour from sectors such as hospitality.

There were also concerns among providers relating to the relationship between the SLW and wider HRM levers that contribute to Fair Work, such as sickness absence policies and wider benefits. Providers and lead body representatives reported that where funding fell short in particular local authority areas, they feared there would be an expectation that it was met by employers being asked to make savings and efficiencies in other terms and conditions.

Meanwhile, another unintended consequence was the undermining of purchaser – provider relations, including the partial disintegration of outsourced networks because providers were withdrawing from contracts on the grounds that contract prices were insufficient to support the payment of the SLW.

B. Explaining the Policy Outcomes

The above outcomes reflected the influence of a range of, inevitably inter-related, factors. In this section these influences are discussed in line with the adopted theoretical framework. Attention is first paid to how the policy's implementation had been influenced by its regulatory form. The analysis then moves on to explore how the contextually embedded interests of, and distribution of power between, the key actors occupying the regulatory space of outsourced social care interacted with central features of the SLW policy to shape its outcomes.

(i) *Form of regulation*

As already made clear, the SLW policy did not have legal force. Rather, it was the outcome of a non-legally binding agreement between the Scottish government and COSLA. A further feature of the policy was that it constituted a form of soft supply chain regulation in that it had been agreed with the funders of services rather than their providers.⁶⁶

Furthermore, as will be discussed in more detail below, guidance on the implementation of the policy drawn up by an Implementation Group comprising provider representative organisations, such as Scottish Care and CCPS, and trades unions, via the Scottish Trade Union Congress (STUC) was in a number of areas rather vague. This meant in turn that much was left to the interpretations and discretion of local authority funders, leaving open the possibility that financial considerations would loom large in shaping how they approached the policy's implementation.

Yet, the fact remained that the policy was essentially a government one. As a result, whatever the failings of local authority implementation, this status, when combined with the funding support some providers received and informal pressures exerted by funders,

⁶⁶ I. Cunningham, A. Baluch, A.M Cullen and P. James, *Implementing the Scottish Living Wage in adult social care: An evaluation of the experiences of social care partners, and usefulness of Joint Guidance*. Report for Coalition of Care and Support Providers Scotland and Scottish Care (Edinburgh: CCPS, 2018).

undoubtedly encouraged provider compliance with the policy. In this respect, although ‘soft’ regulatory initiatives by definition do not have the force of law, the study’s findings suggest that they cannot sensibly be discounted as a potential source of influence – a point that the authors return to in the concluding discussion.

C. Actor Roles, Interests and Power

The SLW policy was introduced into a regulatory space marked by the central presence of three sets of actors: local authority funders, voluntary and private sector service providers and (somewhat more marginally) trade unions representing care sector staff. In line with the analytical framework put forward by Martinez Lucio and MacKenzie, the findings obtained show how the policy’s outcomes were intimately connected with how far and in what ways, it had acted to reorientate the roles, operational behaviours and interactions of these three groups within a surrounding context of austerity funding.⁶⁷

(i) Local authority funders

A key reason for the above unintended consequences related to how the SLW policy failed to reduce the regulatory power of local authorities at either the national or local levels. Other actors (trade unions, employers and LWF) were unable to seize control of the regulatory space. The local government representative organisation COSLA had input into key strategic decisions, such as the financial resources to be provided in support of the SLW policy, and the criteria for estimating the level of need across the 32 local authorities. For the providers interviewed, the latter had led to some dysfunctional outcomes. This was because COSLA’s

⁶⁷ In highlighting the ‘operational’ impact of the policy in this regard, this is not to discount the fact that these groups, albeit to varying degrees, also played a part in shaping the development of the SLW policy itself, as well as the implementation guidance issued in support of it.

view of need was based on overall measures of deprivation in an area, not on the extent of social care outsourcing or low pay. As a result, the distribution of government funding was not necessarily being concentrated on authorities where the costs of complying with the SLW policy were highest.

The failure to tackle local authority power was further linked to a concordat between the former and Scottish government⁶⁸. Specifically, the ‘soft’ guidance accompanying the SLW policy did not significantly compromise local democracy. Nothing in the guidance overrode local authority responsibility for budget setting, as they continued to be constitutionally accountable only to their electorates. A Civil Servant explained this situation as follows:

“...every council will have their own way of justifying and they’re ultimately not accountable to anybody other than their electorate, so each council will have its own justification for, for example, not encasing their hourly rate within the contract by the exact same number of pence that the Living Wage has gone up that year...”

The implementation guidance also preserved local authority independence with regard to the timing and method of distributing the government funding to providers. Indeed,

⁶⁸ The Concordat represents another piece of ‘soft’ regulation which is designed to ‘free up’ local authorities and their partners to meet local needs and circumstances. It places increasing onus on local authorities to reach decisions on where money should be spent, while Scottish Government stood back from micro-managing what local government did and spent their resources on. At the same time, local democracy ensured local authorities would remain accountable for these decisions.
<https://researchbriefings.files.parliament.uk/documents/SN04713/SN04713.pdf>

authorities could if they wished use some of the provided SLW funding to offset overspends elsewhere.

“Some authorities are saying we’ll give you 2.9 per cent or 3.1 per cent. But the actual requirement is 4.4 per cent. So somewhere in the mix some very senior local authority finance managers are holding back. That’s what they do, they hold back money to offset expenditure pressures elsewhere” (Voluntary sector Provider).

Although provider respondents did report some positive experiences with funders, local authority control over the amount of resources provided and related issues, like estimates of hourly rates of care, and payment timings and methods, created many of the unintended consequences. There were reports, for example, of local authorities basing their figures for hourly rates on estimates of provider payroll costs that were two years out of date. The ability of local authorities to delay funding was further reported to create both recruitment and retention and internal employment relations problems:

“Delays don’t help with recruitment issues. So, if we take last year, the living wage increase from 1st of May, well, xxx didn't pay us until November. So, you can't advertise jobs at living wage” (Voluntary sector Provider).

“As a national organisation, even if one local authority said they would pay, if the rest were saying no, we couldn’t implement the change for one local authority...that has involved quite a challenge for us with the staff group, not really appreciating. What we’ve had to try and do is explain quite complex budgets to main grade staff, and

we're relying on the fact that they trust us enough to realise that the service would no longer be viable" (Voluntary sector Provider).

Variations in the scale and timing of payments were found to create particular problems for providers with multiple funders. In particular, multiple local authorities providing variable percentage payments threatened the viability of current internal pay structures. Although several local authorities were sympathetic to provider concerns regarding the above, others were less understanding:

"for us... for the sake of preserving local democracy, or the autonomy of local authorities, then that needs to be the case and providers need to kind of deal with it, because local democracy trumps, like, life being easy for a payroll manager" (Local authority Official).

Additionally, despite the implementation guidance containing an agreed template/cost calculator for determining a rate for an hour of care for particular services, its non-statutory nature meant that local authorities could retain their own approaches. Indeed, one voluntary sector provider reported that the cost calculator that had come with the Implementation Group's non-statutory guidance had been '*put away in the drawer*'. Respondents also doubted the accuracy and competence of competing unpublished local authority estimates of the cost of an hour of care. The result was that hourly rates often did not allow for management costs, staff on-costs or the extra expense of challenging service provision.

“Where officers have made assumptions about viable hourly rates, the calculations are less than competent, arithmetic errors, an assumption of statutory terms and conditions, necessary time and tasks omitted from the calculation, and if used a complete misinterpretation” (Voluntary sector Provider).

These actions of local authority funders were clearly and intimately connected to the challenging funding environments they themselves were facing as a result of government austerity policies, thus bearing out the role that external structural factors can play in shaping the impact of regulatory shifts on the actions of affected actors.⁶⁹

Austerity funding meant that despite the SLW policy, local authorities continued to demand savings and efficiencies from providers and so enforce hourly rates that were not in themselves supportive of providers paying the SLW:

“...that gets into quite difficult negotiations where the local partnership has probably been told they have to find a ten per cent saving, we have that internally as well, so you tend to pass these on down the line. So, they might be saying to the provider, well, we’ll give you a 28p increase, but we’ll expect you to find efficiency savings (Local authority respondent).”

More widely, local authorities were unable to pass on the cost of protecting wage differentials. Organisations could not, in turn, fund this shortfall by drawing from their

⁶⁹ M. Martínez Lucio and R. MacKenzie, n.31 above; M. Martínez Lucio and R. MacKenzie, n.28 above.

financial reserves and so faced a squeeze on differentials causing recruitment and retention problems among domestic workers, those workers dealing with complex and challenging needs, and among team leaders/supervisory grades. In relation to the first of these, one private sector provider made clear the implications if providers did not resolve this issue:

“You can’t run a home without domestics, catering and gardeners... if people walk in and its effectively a dump... and if you have people who are disenchanting then that affects the quality of what you are doing, the quality of their contribution...they understand the pound in their pocket...they don’t feel part of a team when they’ve been done down” (Private Provider).

(ii) *Service providers*

In contrast to the regulatory power of local authorities, providers drew attention to a number of ways in which their voice had been marginalised in the development and operationalisation of the SLW policy, with the result that they had been unable to challenge aspects of it that were seen to be problematic and which subsequently contributed to the policy’s unintended consequences.

Membership of the Implementation Group by Scottish Care and CCPS did admittedly allow provider voice into the implementation guidance and so represented a mechanism through which their lead bodies could attempt to ensure local authority compliance. However, it was noted that no consultations had taken place in the Implementation Group over issues like the funding of wage differentials and ‘on costs’ (additional national insurance, pension and apprentice levy costs), the need to retain domestic and catering workers, the differences

in skill required of staff dealing with complex conditions, and the implications of including sleepovers in the policy.

Providers further expressed frustration at how the LWF's control over SLW rises had removed sovereignty from them as independent employers and resulted in annual increases that took no account of either their capacity to pay them or the adverse implications of them doing so. In addition, it was noted that providers had not had any say over the financial resources allocated to fund the SLW, as this was exclusively the subject of negotiations between the Scottish Government and COSLA, as noted earlier.

Similarly, providers reported a loss of power to the other new actor entering the regulatory space, namely the Integrated Joint Health and Social Care Boards (IJBs). IJBs distributed the funding to local authorities and providers reported remoteness among IJB decision-makers from the sector's concerns:

“It's (creation of IJBs) been a huge negative for us, to be honest, within our industry because we primarily dealt with local authorities and we had really good access to decision makers...It's been a big negative for us. They (IJBs) don't care about us: not interested. We're at the bottom of the pile” (Private Provider).

This marginalisation of providers' regulatory influence was exacerbated by divisions of interest among them, which meant that they were unable to systematically and collectively seek to counter it. Providers competed with each other for contracts, preventing them from sharing information. They also had different interests and priorities according to sub-sectors and product market, which further undermined efforts to project a unified voice. For example,

compared to the voluntary sector, the issue of resourcing sleepover payments was not as relevant to providers running care homes or care at home for the elderly. Similarly, the private residential care home sector was regulated through the NCHC and received funding for the SLW via an agreed rate relevant to all providers in this sub-sector. They were, therefore, not as exposed to the uncertainty of individual local authority decision-making. At the same time, they were more likely to experience tensions with domestic, catering and maintenance staff over the widening differentials with direct care staff because they employed more of them. Yet another difference were divisions regarding efforts to determine a fair and reasonable national hourly rate for care. Here, providers reported disagreements across private and voluntary lead bodies over whether the latter needed to have a higher rate because they dealt with more complex and challenging conditions and behaviours.

In a similar vein, several respondents in private care at home organisations pointed to emerging differences of interest with residential care home providers. Several factors were reported to have contributed to this. One related to the lack of a national agreement similar to the NCHC. A second concerned the narrowing of pay differentials flowing from the SLW and how this had led to the poaching of staff from care at home employers by residential care homes.

Faced with the aforementioned financial insecurity and loss of limited regulatory influence, a last option for some providers was to exercise market power and withdraw from contracts. One provider, for example, reported:

“Eventually there was an offer which was not enough... they stuck to their guns and said, nope, and so we withdrew from the contract, because it was impossible to

deliver the service and meet the Scottish living wage requirements” (Voluntary sector Provider).

In explaining their power to exit unsustainable contracts, organisations invariably reported that they were not wholly dependent on single local authorities for income and so they had alternative sources of income to, if not compensate them, at least enable them to continue to operate. Local authorities meanwhile responded to threatened withdrawals in different ways, including: revisiting contracts to ensure that providers did not exit; bringing in alternative providers; and taking services back into in-house provision.

(iii) Trade unions

Unions and the STUC had long campaigned for fairer pay in the sector, and welcomed the SLW policy. The STUC representative felt that the union presence on the Implementation Group had been useful in terms of ensuring provider compliance. The same trade union representatives, however, indicated that they felt the SLW was isolated from their regulatory influence.

More particularly, officials drew attention to a lack of union influence over both the talks that took place between the Scottish Government and COSLA, and then between local authorities and providers around funding discussion and decisions. Meanwhile, negotiations between providers and unions were reported to be very much constrained. Unions were recognised in just seven of the 11 voluntary sector providers in the study and in none of the private sector ones. Furthermore, where there was recognition, union input was reportedly largely concerned with ensuring that the SLW was implemented in a way that the provider

found timely and affordable, and so fell short of ‘traditional collective bargaining’. In addition, further limits to their ability to regulate pay were apparent from union representative reports of their limited capacity to deal with the problems of differentials or to secure the extension of the SLW to unregulated workers and other staff that were ineligible, especially within private care settings among domestics, and catering staff. Indeed cases were reported where employers had withdrawn from negotiated commitments to pay above the SLW due to the adverse impact of local authority funding decisions.

6. DISCUSSION AND CONCLUSION

This article has sought to contribute to debates about the value of ‘soft’ regulation as a means to bring about change in employment conditions and outcomes. It has done so by exploring the capacity of ‘soft’ fair work regulation to introduce the living wage into Scottish adult social care and thereby address low pay and staff recruitment and retention issues. Previous research has cast doubt on the effectiveness of such regulation due to the lack of enforcement powers stemming from its non-legal status.⁷⁰ This article has attempted to provide an in-depth picture of the factors influencing the operation of a ‘soft’ regulatory initiative by exploring its effects through the lens of an analytical framework that focusses attention on actor roles, interests, power resources and inter-relationships, and surrounding structural contextual influences. More specifically, it has pursued two empirical questions: how effective was the soft regulatory approach in introducing the living wage in terms of resolving low pay and recruitment and retention issues in the Scottish outsourced social care sector; and what factors had acted together to shape these outcomes?

⁷⁰ B. Hepple, n.10 above; M. Gold, n.11 above; P. James, L. Miles, R. Croucher and M. Housatt, n.12 above.

Overall, the study found that the majority of providers were paying the SLW, with this high level of compliance reflecting the influence of several factors: a supportive attitude on the part of providers, the financial support provided to them, and, perhaps above all, the fact that, although not a legal measure, the SLW policy was a government one. The study therefore found the policy to have had a regulatory impact. At the same time, however, the policy had a mixed impact on low pay and was found to have done little, if anything, to alleviate ongoing staff recruitment and retention problems. Despite evidence of hourly rates of pay of front-line adult social care workers increasing, the policy had not always improved staff incomes due to a trend towards reducing sleepovers because of their increased costs at the SLW rate. Furthermore, the policy, restricted as it was to one category of staff, compressed and disrupted existing pay differentials while not providing providers with the resources to address this problem. As a result, providers generated disgruntlement among adversely affected staff and, more narrowly, an unwillingness to take on supervisory and management roles. Unlike existing research on minimum or 'real' living wage policies, the study also found that at times the effect of the policy was to worsen the relative pay of the lowest paid staff (in this case, relief or other casual workers, catering and domestics), while having questionable effects on staff recruitment and morale.⁷¹

Concerning the factors that contributed to these last outcomes, the study revealed how the roles of actors, along with their varying power and the influence of established economic and political interests⁷² within the social care regulatory space, had together acted to shape

⁷¹ D. Metcalf, *Executive Summary: United Kingdom Labour Market Enforcement Strategy 2019/20*, (London: Her Majesty's Stationery Office, 2019 July); R. Dickins and A. Manning, 'Has the national minimum wage reduced wage inequality?' (2004) 167 *Journal of the Royal Statistical Society* 613-626; G. Giupponi and S. Machin, 'Changing the Structure of Minimum Wages: Firm Adjustment and Wage Spillovers' (London: *Centre for Economic Performance Discussion Paper No.1533*. London School of Economics and Political Science, 2018); D. Farris and M. Reich, 'The impact of Living Wage Policies: Introduction to the Special Issue' (2005) 44(1) *Industrial Relations* 1-13; S. Luce 'Living wages: A US perspective' (2017) 39(6) *Employee Relations* 863-874.

⁷² M. Martínez Lucio and R. MacKenzie, n.31 above; M. Martinez Lucio and R. MacKenzie, n.28 above; M. Johnston, M. Martínez Lucio, D. Grimshaw and L. Watt, n.16 above.

the dynamics of the inter-relationships between them, as well as their outcomes. At the same time, these dynamics were found to themselves have been shaped by structural features of the surrounding operational environment – the presence of resource dependency; the impact of austerity-driven public expenditure cuts; and political factors such as the primacy of local democracy and the way in which SLW policy implementation was isolated from potentially important broader mechanisms of support.

Adding to prior work relating the failures of ‘soft’ forms of regulation to their inability to challenge existing economic and political interests, the framework drawn on in the study was useful for shedding light on how the power and priorities of established actors can be disruptive to the progressive aims of ‘soft’ regulatory interventions. The analysis revealed, for example, how the ‘soft’ SLW regulation did not challenge existing power relations in the form of the regulatory settlement between central and local governments and instead allowed the latter to sustain their influence despite contributing to past failures in pay determination. This outcome was the result of a political settlement around principles of local democracy and accountability between central government and COSLA. Subsequently, local authorities were able to advance their interests and undermine the impact of the SLW policy through exerting control over the timing and methods of payments and the determination of an hourly rate of care, which simultaneously created insecurity and threats to organisational survival among providers. Other actors, such as employers and trade unions were unable to colonise or seize⁷³ the regulatory space to influence the policy in a way that would have secured more progressive outcomes, i.e. full funding of differentials, on-costs and national insurance, and SLW payment for casualised care workers and non-care workers (domestics, catering and maintenance).

⁷³ R. Mackenzie and M. Martinez-Lucio, n.28 above; C. Inversì, T. Dundon and L.A. Buckley, n.23 above.

Another key insight arising from the study is the way in which the regulatory failures identified were intensified by patterns of resource dependency and economic hardship brought about by austerity that further enhanced the power of purchasers (local authorities) over providers. Thus, austerity along with a limited reconfiguration of existing power relations meant that local authorities could coerce (rather than negotiate with) providers to accept underfunding of the SLW through calls for efficiencies which acted to limit resources available to cover differentials, on costs, and payments for sleepovers. This finding illustrates the theoretical framework's usefulness for the analysis of 'soft' regulation for understanding its limits in changing the balance of coercive or negotiated process among actors in a regulatory space.

Provider vulnerability to this continued local authority power was exacerbated by divergences of interest and priorities across subsectors of the regulatory space, preventing a unified voice to government. Again, this adds to theory by identifying how actors within a regulatory space such as employers do not, as is the case in other public service markets,⁷⁴ exhibit unified, homogenous goals, which subsequently hinders their influence.

Several forms of institutional isolation in the SLW policy's development and introduction were further found to have exerted an influence over its outcomes.⁷⁵ Key actors were found to have been marginalised with little or no engagement in the establishment of significant elements of the policy. Individual providers and their representatives were not directly involved in either the development of the policy or the determination of the funding to support it. Trade unions organising in the sector had been similarly excluded, compounded at the local level by the limited extent of their recognition by employers. In addition, where

⁷⁴ M. Johnston, M. Martínez Lucio, D. Grimshaw and L. Watt, n.16 above.

⁷⁵ M. Johnston, A. Koukiadaki and D. Grimshaw, n.19 above; M. Johnston, M. Martínez Lucio, D. Grimshaw and L. Watt, n.16 above.

recognition existed, union involvement was only in narrow negotiations around the implementation of the new pay rates to front-line care workers, with limited ability to influence the impact on differentials.

The above factors led not only to a degree of policy failure but also to the partial disintegration of some outsourced networks. In the latter case, a further point of significance to emerge from the study was the need to draw a distinction between regulatory and market-based sources of power. The study's findings highlight that these two sources of power will often be highly related, but subject to imbalances across the parties. Local authorities possessed high levels of regulatory and market-based resources: the latter through controlling funding. Providers/suppliers less so. Nevertheless, the study's findings showed how in public service networks, providers do potentially possess a market-based power of disruption that bears little resemblance to their regulatory position, namely the power to exit. Evidence of the disintegration of social care networks is not isolated to this study,⁷⁶ but this is the first to highlight the use of such actor agency as a means of responding to problematic re-regulation and underfunding.

These observations carry clear implications for those authoring 'soft' regulatory reforms of outsourced networks. They highlight that policy developments of this kind have to be informed by detailed analysis of current regulatory structures that encompasses the influence of existing distributions of interest and power, the way in which these potentially impact proposed policy changes, and how these changes relate to the nature and dynamics of prevailing employment relations arrangements. In identifying this, the study importantly therefore highlights the potential value of engaging with the diversity of actors in a regulatory

⁷⁶ Coalition of Care and Support Providers Scotland (CCPS), *Business Resilience Survey 2017: Summary of Results* (Edinburgh: CCPS, 2017) <http://www.ccpscotland.org/hseu/wp-content/uploads/sites/2/2017/12/BusinessResilience-Survey-2017.pdf>

space in order to secure, as far as possible, an understanding of the logic and detail of the desired change and an acceptance of it, while also recognising the capacity of their interests to conflict. These lessons are relevant to the programmes of fair work under the devolved regions of the UK and, more generally, to efforts to regulate employment standards in outsourced networks.

As with other studies that have highlighted the way ‘soft’ regulation can actually undermine efforts to regulate in favour of vulnerable workers⁷⁷, there also needs to be a recognition that policies need to account for the influence of surrounding ideological realities. In particular, whatever the aspirations of social democratic regimes among federal or devolved administrations,⁷⁸ it needs to be recognised that retention of powers over employment regulation by the UK government means that its political ideology, and underpinning economic policies, retain a fundamental influence over the probability of success, or otherwise of such progressive policies as the SLW, as well as fair work in general. This observation in turn points to the fact that the success or otherwise of soft regulatory measures is inevitably tied up with how far they are accompanied by measures that address the wider factors that have created the need for them in the first place.

As previously mentioned, at the time of writing, as part of its ‘Fair Work First’ policy, the Scottish government had changed its guidance on whether local authorities can use contractual terms requiring providers to pay the SLW and in doing so stated that it is an option for them, providing certain conditions are met.⁷⁹ This policy change is designed to drive progress towards fair work and inclusive growth across the Scottish labour market. The likely effects of this change are, however, open to question. A positive reading of the

⁷⁷ C. Inversi, T. Dundon and L.A. Buckley, n.23 above.

⁷⁸ E. Heery, D. Hann. D and D. Nash, n.1 above; K. Sisson, n.4 above.

⁷⁹ Scottish Government (2022), n.61 above.

development is that it will result in local authorities having greater powers to exclude employers who do not pay the SLW, with the result that current non-compliance will fall and/or those tempted to withdraw from compliance on financial grounds will re-consider. A less positive, and arguably more realistic, reading is that it will have a limited impact for three reasons. Firstly, because the change in guidance is only facilitative of the use of such contractual terms, it is left to individual authorities to decide whether to make use of them. Secondly, this study's findings highlight how most providers are probably already paying the SLW to their adult care frontline staff. Thirdly, and more generally, the greater use of such terms would not address the difficulties revealed in this study concerning the erosion of differentials. Problems with differentials were widespread— between new front-line workers, and more longer serving senior colleagues; those working in challenging services, compared to those operating in less dangerous and complex environments; and team leaders/supervisors and their staff. Doubts also remain about how competitive a better enforced SLW pay rate is compared to the attraction of sectors with similar pay levels, but less challenging roles (such as retail and hospitality). In other words, notwithstanding the new guidance, the SLW policy will remain but an isolated measure to resolve low pay.

In the case of the Scottish government's policy on the payment of the SLW to frontline adult social care workers, the issue of whether it takes the form of 'hard' or 'soft' regulation can consequently be argued to be something of a sideshow. Indeed, and somewhat ironically, there is arguably a risk that the more rigorous application of the policy could serve to accentuate the tendency noted for outsourced networks to disintegrate in the face of financial pressures. Overall, what therefore seems clear is that, in the social care sector, progressive policies like the SLW will struggle to generate desired labour market outcomes unless measures are introduced to reduce the kind of market and austerity based price competition all too often pursued by local authorities and which underlies the sector's

recruitment and retention problems. For example, collaborative contracting that shifts the regulatory power of key actors, including weakening the power of local authorities and reducing the subservience of providers, could potentially reduce the types of funding ‘shocks’ that currently characterize social care markets, act as a downward pressure on pay, undermine purchaser-provider relations and disrupt workers’ lives. In this regard, it is striking that a move to such contracting forms a central plank of the reforms recently advocated in a report on the future of social care commissioned by the Scottish Government.⁸⁰ Moreover, and again, in line with the recommendations of the aforementioned report, the establishment of sector level collective bargaining would go some way to end the imbalance in influence and power of workers and their representatives in the face of more powerful local government and employer interests.⁸¹

Funding: We would like to thank the Coalition of Care and Support Providers Scotland CCPS for funding this project.

Acknowledgements: We would also like to thank the journal’s Editor, Professor Simon Deakin, and the anonymous referees for their constructive comments on earlier drafts of this paper.

Tables

| Table 1: Profile of respondents | |
|--|--------|
| Respondents | Number |
| | |

⁸⁰ D. Feeley, *Independent Review of Adult Social Care in Scotland*. (Edinburgh: Scottish Government, St Andrew’s House, February 2021).

⁸¹ D. Feeley n.80 above.

| | |
|---|---------------------|
| Voluntary sector providers | 11 (15 respondents) |
| Independent sector providers | 3 |
| Focus group of providers | 2 (6 respondents) |
| Representatives of lead employer bodies | 2 |
| Union officials | 2 |
| Contracting and commissioning authorities | 5 (7 respondents) |
| Civil servants | 2 (3 respondents) |
| NGO Living Wage Foundation | 2 |