

Low Pay Commission Consultation on April 2023 National Minimum Wage Rates

ABOUT YOU

QUESTION ONE

Please provide information about yourself or your organisation. If possible, include details about your location, the occupation or sector you are involved in, your workforce if you are an employer (including number of minimum wage workers), and anything else you think is relevant.

I am a Professor of Law at Durham Law School, Durham University.

My research is in the field of labour law and has a particular focus on working time regulation. My recent research has included analyses of how UK labour law regulates working time under the National Minimum Wage regime.

THE NATIONAL LIVING WAGE

QUESTION SIX

To what extent has the NLW affected different groups of workers, particularly those with protected characteristics (for example women, ethnic minorities and those with disabilities) and migrant workers?

The treatment of 'sleep-in' shifts in social care remains a significant challenge to decent work that the Low Pay Commission should call upon the government to address. In the social care sector, as is well known, a high proportion of workers are entitled to the minimum wage and/or share protected characteristics under the Equality Act.

In March 2021, the Supreme Court judgment in *Mencap (Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad and another)* clarified that 'sleep-in' periods of care workers are likely to be excluded from the coverage of the minimum wage. The outcome of this judgment is that many workers in social care are not legally entitled to the minimum wage during periods at the workplace in which they are entitled to sleep. Certain elements of the UK minimum wage legislation require the minimum wage to be paid during 'availability

periods.’ The minimum wage is not required, however, if a worker ‘by arrangement’ sleeps at the workplace, except when she is ‘awake for the purposes of working’ (National Minimum Wage Regulations 2015, reg 32(2)). The Supreme Court in *Mencap* clarified that these ‘sleep-in’ periods are to be classified as ‘availability.’ Care workers are entitled to the minimum wage during these periods only when actively assisting clients.

Since the Supreme Court ruling in *Mencap*, UK minimum wage law permits unacceptably low wages for care workers. The outcome of the judgment is that care workers – and others – can be paid sub-minimum wages during sleep-in shifts. This can be expected to exacerbate low pay in the social care sector among an overwhelmingly female workforce in which wages are already an urgent problem. These wages do not properly recognise the extent of care workers’ obligations and responsibilities during overnight shifts and the substantial periods that they spend away from their families and other crucial responsibilities and obligations.

The only option is legislative reform. A protective legislative model would require the minimum wage for all time spent at the workplace. This ‘[unitary model](#)’ ensures that the entire expanse of working time is fully waged. It does not fragment working time into proliferating classifications (availability, travel time, waiting time etc.) It recognises that, across all periods in the workplace, workers are at the disposal of the employer, are serving a need of the employer, and are prevented from devoting their time to their families and other responsibilities. This unitary model of waged time was jointly advocated by UNISON and Mencap in a [letter to the Prime Minister in April 2021](#).

The work of the Low Pay Commission was central to the *Mencap* litigation. The Supreme Court considered itself obliged to rely on early [Low Pay Commission](#) Recommendations that workers ‘paid-to-sleep’ should be excluded from the minimum wage. The 2021 Low Pay Commission report considered sleep-in shifts. The Commission recognised the risks of exclusion of sleep-in shifts from the minimum wage and predicted the likely outcome: that workers on sleep-ins will not be paid the minimum wage, triggering a further deterioration in working conditions and quality of care. The Commission concluded, however, that the government is better placed to resolve the treatment of sleep-ins. The rationale was that reform of the legal treatment of sleep-ins is inextricably tied to the government’s plans for the future funding of social care.

It is disappointing that the Low Pay Commission did not advocate, as a matter of principle, that all workplace hours should be paid at least the minimum wage. I am calling on the Commission to reconsider its position and to recommend to the Government that the minimum wage should extend across the full expanse of sleep-in shifts. The 2022 report is an opportunity for the Commission to call for a commitment to decent work - including fully-waged time - to be an integral element of the funding settlement in the care sector, underpinned by legislative support.

Decent Work Regulation



A research paper is available [here](#) and [here](#).

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