

Low Pay Commission

Consultation on April 2022 National Minimum Wage Rates

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 an analysis of the regulation of working time in social care, in which a high proportion of workers are entitled to the minimum wage and/or share protected characteristics under the Equality Act.

QUESTION SEVEN

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

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 the *Mencap* judgment is that many in the social care workforce are not 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, then, only when actively assisting clients.

The risk, in the wake of the Supreme Court ruling in *Mencap*, is unacceptably low wages for care workers that do not properly recognise the extent of their obligation and responsibilities during overnight shifts and the substantial periods that they spend away from their families and other crucial responsibilities and obligations.

In *Mencap*, 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.

It is therefore very much to be hoped that the Commission will call upon the Government to reform the legislative framework. A more sophisticated model of working time should be adopted that encompasses overnight shifts and entitles social care and other workers to the minimum wage across the full expanse of their working hours.

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