

Low Pay Commission Consultation 2024

QUESTION 2.1 ABOUT YOU

Please provide information about yourself or your organisation. If possible, include details about your location, the type of job or business (occupation and/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.

QUESTION 2.2 THE NATIONAL LIVING WAGE

What has been the impact of the NLW in the past year, particularly the most recent 9.8 per cent increase to £11.44 in April this year? Our critical interest is in its effects on employment, hours and earnings. We are also interested in the effect of the NLW on any of the areas listed below:

....

- **Job quality and security**

Job quality and the effectiveness of the minimum wage regime are interlinked. Low-waged work cannot be combatted solely by increasing the hourly minimum wage rate. Low pay is driven not only by insufficient hourly wages but also by insufficient waged hours ([McCann 'Losing Pay: The Low Pay Commission, 'Sleep-in' Shifts, and Temporal Casualisation as a Driver of Poverty' *British Politics and Policy at LSE*, 22 March 2022](#)). A range of practices - which I refer to as '[temporal casualisation](#)'¹ - is generating waged hours that are often insufficient for workers and among the drivers of poverty (Joseph Rowntree Foundation [UK Poverty 2022](#)).

The Low Pay Commission should continue to make proposals to combat insecure and insufficient working hours. The Commission has already reflected upon these challenges in its

¹ Deirdre McCann 'Temporal Casualisation and 'Availability Time': Mencap, Uber and the Framed Flexibility Model' (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789540.

2018 report on [One-Sided Flexibility](#). The Commission's 2024 report provides a valuable opportunity to return to this challenge and to highlight the kinds of measures that are needed to ensure decent and secure working time (see further the [Framed Flexibility model](#)²).

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. In this sector, the NLW has a profound effect on workers with protected characteristics under the Equality Act.

The legal settlement on “sleep-in shifts”

As I pointed out in my submission to the Low Pay Commission's 2022 Consultation, the current legal settlement on “sleep-in shifts” is of urgent concern in relation to the wages of care 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 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. 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 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](#)

² Deirdre McCann *Framed Flexibility: A New Model for Working Time Laws* (2020) Policy Briefing, Decent Work Regulation Project, available at <https://www.dur.ac.uk/media/durham-university/departments-law-school/policy-engagement/decent-work-regulation-images/FramedFlexibilityBriefing.pdf>

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.³

My recommendations

I again call on the Commission to recommend legislative reforms to ensure that the minimum wage covers all working hours including “sleep-in shifts.” As I have advocated in my research, a protective legislative model would require the minimum wage for all time spent at the workplace. This ‘unitary model’⁴ ensures that the entire expanse of working time is fully waged. It does not fragment working time into e.g. 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.

Given the Supreme Court judgment in *Mencap*, legislative reform is vital. The Low Pay Commission should call upon the government to urgently address the exclusion of “sleep-in shifts” from the entitlement to the minimum wage. The 2024 report is an opportunity for the Commission to stress that, as a matter of principle, all workers are entitled to at least the minimum wage for all of their working hours. This principle is essential to a sustainable social care system and, more broadly, ensures a coherent and universal legal framework of worker protection.

³ See also Deirdre McCann ‘Temporal Casualisation and ‘Availability Time’: *Mencap*, *Uber* and the Framed Flexibility Model’ (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789540.

⁴ Deirdre McCann ‘Temporal Casualisation and ‘Availability time’: *Mencap*, *Uber* and the Framed Flexibility Model’ (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789540.

QUESTION 2.3 EXPERIENCE OF THOSE ON LOW PAY OVER THE PAST YEAR

What has happened to quality of work recently? For example, have workers experienced changes in contract types, flexibility, workplace harassment and work intensification (e.g. greater expectations for workers to work more flexibly, with greater effort, to higher standard etc).

It is very welcome that the Low Pay Commission is emphasising quality of work. Contract types, working time arrangements, and work intensification are crucial considerations in evaluating the effectiveness of policies to eliminate low-paid work. The Commission recognised a number of the key challenges in its 2018 report on [One-Sided Flexibility](#) including by reflecting upon legal strategies. It is now urgent that the Commission return to calling for laws and other measures to ensure that a robust minimum wage regime is paired with predictable and sufficient working hours, secure jobs, and the wellbeing of workers.

What are the barriers preventing workers from moving to a new job, particularly one that is better paid?

Working time arrangements and wages are interrelated and must be considered in tandem. Barriers to job mobility illustrate this point. Research among low-waged workers shows that a lack of carer-friendly jobs prompts them to prioritise working time arrangements that suit their needs.⁵ Many workers are prepared to endure poorer working conditions to have the working time flexibility that they need, dissuading them from moving to a better-paid job.⁶ These types of trade-offs would be ameliorated by legislative reform to (1) strengthen obligations on employers to consider and grant requests for flexible working and (2) ensure regular consultation between employers and workers' representatives on working time and other working conditions.

2.8 ECONOMIC OUTLOOK

What are your views on the economic outlook and business conditions in the UK for the period up to April 2025?

See my response to Question 2.2 above:

Job quality and the effectiveness of the minimum wage regime are interlinked. Low-waged work cannot be combatted solely by increasing the hourly minimum

⁵ See, for example, Rights Lab, University of Nottingham and School of Law, De Montfort University, Leicester *Fashioning a Beautiful Future? Supporting Workers And Addressing Labour Exploitation In Leicester's Textile And Garment Industry* (April 2022), available at <https://www.nottingham.ac.uk/Research/Beacons-of-Excellence/Rights-Lab/resources/reports-and-briefings/2022/June/Fashioning-a-beautiful-future.pdf>, p 18.

⁶ Ibid.

wage rate. Low pay is driven not only by insufficient hourly wages but also by insufficient waged hours ([McCann 'Losing Pay: The Low Pay Commission, 'Sleep-in' Shifts, and Temporal Casualisation as a Driver of Poverty' *British Politics and Policy at LSE*, 22 March 2022](#)). A range of practices - which I refer to as '[temporal casualisation](#)'⁷ - is generating waged hours that are often insufficient for workers and among the drivers of poverty (Joseph Rowntree Foundation [UK Poverty 2022](#)).

The Low Pay Commission should continue to make proposals to combat insecure and insufficient working hours. The Commission has already reflected upon these challenges in its 2018 report on [One-Sided Flexibility](#). The Commission's 2024 report provides a valuable opportunity to return to this challenge and to highlight the kinds of measures that are needed to ensure decent and secure working time (see further the [Framed Flexibility model](#)⁸).

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⁷ Deirdre McCann 'Temporal Casualisation and 'Availability Time': Mencap, Uber and the Framed Flexibility Model' (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789540.

⁸ Deirdre McCann *Framed Flexibility: A New Model for Working Time Laws* (2020) Policy Briefing, Decent Work Regulation Project, available at <https://www.dur.ac.uk/media/durham-university/departments-law-school/policy-engagement/decent-work-regulation-images/FramedFlexibilityBriefing.pdf>



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