

# Update on Payments for Sleep-in Shifts in Social Care February 2019

## About the LGA

1. The Local Government Association is a politically-led, cross-party organisation that works on behalf of councils to ensure local government has a strong, credible voice with national government. It aims to influence and set the political agenda on the issues that matter to councils so they are able to deliver local solutions to national problems.

## Introduction

2. The purpose of this briefing is to update councils on latest developments regarding payment of overnight sleep-in shifts in adult social care. Although this briefing focusses on adults, the issue is also relevant to children's services.
3. Significant confusion has arisen because of the interpretations by the tribunals of the 2015 National Minimum Wage Regulations and 2015 and 2016 Government guidance on sleep-in payments. This frustrating lack of clarity has caused uncertainty in the provider market and a great deal of anxiety for care workers and those who receive care.
4. The LGA supports care workers being paid fairly for the work they do. Since 2016, we have highlighted to Ministers the likely consequences across the system should there be no Government funding to deal with historic, current and future higher costs from sleep-in payments.

## Royal Mencap Society Court of Appeal Case

5. The Court of Appeal has overturned the decision of the EAT in the case of *Royal Mencap Society v Tomlinson-Blake*.
6. The Court held that workers doing sleep-ins were to be characterised for the purpose of the National Minimum Wage (NMW) Regulations as available for work rather than actually working, and so fall within the exception provided by regulation 32(2). Therefore, only time when the worker is required to be awake for the purposes of working would count for the NMW.
7. The LGA successfully applied for permission to intervene in the Royal Mencap Society's appeal. We emphasised that we support fair pay for all care workers, but the financial consequences for councils could be significant if the court decided that the law required sleep-in care workers to be paid the NMW for their entire shift in view of the significant funding pressures facing social care.
8. In November 2018 the Department for Business, Energy and Industrial Strategy (BEIS) published updated guidance on calculating the NMW for sleep-in shifts. This takes account of the Court of Appeal ruling that providers do not have to pay the national minimum wage for sleep-in shifts.

9. HMRC's 'social care compliance scheme', which was set up in November 2017 to help employers identify sleep-in back payments, has not been suspended and employers remain uncertain about their status in relation to the scheme.
10. On 13 February 2019, the Supreme Court granted Unison leave to appeal the Court of Appeal judgment. We have been informed that the Supreme Court hearing will not take place before October 2019, but the actual timetable is yet to be confirmed.

### Implications for councils

11. The Court of Appeal ruling came as a relief to care providers and councils because it removed the immediate considerable uncertainty and a potential considerable unfunded burden on top of already significant financial pressures on the adult social care sector.
12. The LGA issued an employment law update to councils in August that highlighted the considerable uncertainty still faced by councils given the Unison application to appeal.
13. Confirmation that leave to Appeal has been granted means that councils face a further prolonged period of uncertainty, and the threat of crippling back payments and higher ongoing costs once again hangs over the sector. This remains the case despite the updated BEIS guidance.
14. Although each authority will determine its own response to the Court of Appeal's decision, given that the Supreme Court has agreed to hear Unison's appeal, maintaining the status quo may be the most appropriate course of action.
15. If authorities do continue to pay the NMW for sleep-ins, it would be advisable, where this had been made subject to a caveat around a change in the law, to make it clear that this will be subject to the Supreme Court's decision. Authorities who have not yet done so, may wish to use this period to calculate their potential liability and plan accordingly in case the Supreme Court does reverse the decision and determines all time spent during sleep-ins counts towards working time for the purposes of National Minimum Wage.
16. Should the Government wish to change the law on payments for sleep-ins, we would expect it to honour the New Burdens Protocol and make appropriate new funding available to ensure that such liabilities can be paid for with-out adversely affecting councils, providers and those who rely on them for essential social care services.

### Next steps

17. Whatever the outcome of the Supreme Court case, we still need to find a sustainable funding solution to attract and retain decent staff now and in the future and to enable care workers to be paid fairly for the work they carry out. A thriving workforce is essential for achieving our shared vision of high quality integrated health and care support tailored to the needs of individuals, families, carers and communities.
18. We continue to argue that Government must fully fund the £3.5 billion funding gap facing adult social care by 2025 to maintain current service levels so that providers can plan with more confidence to ensure all people can receive reliable, high quality, care and support when and where they need it.

### Background

19. The LGA has always taken the view that carers should be paid fairly for the work that they do and that all legal requirements should be fully met by councils and providers

of social care. Councils have historically not required the National Minimum Wage/National Living Wage ('NMW/NLW') to be paid for sleep-ins because that was their understanding of the legal position as set out in the National Minimum Wage Regulations. Our May 2018 briefing summarised the legal context to the Royal Mencap Society appeal.

20. Years of significant underfunding of councils, coupled with rising demand and costs for care and support, have combined to push adult social care services to breaking point.
21. The Government's decision to delay its long-awaited green paper on the issue until the autumn, prompted local government to take action and publish its own and public consultation.
22. We received more than 540 submissions - from the general public, service users, councils and dozens of other interested parties. Our final report - which forms the basis of our 14 recommendations to government - contains a summary of responses, including an overwhelming recognition of the importance of adult social care and a consensus that the system is unsustainable in its current form.
23. We are arguing for both new funding to tackle the immediate consequences of significant funding pressures and a sustainable long-term solution. For the former, the Government must take urgent steps to close the core social care funding gap that builds to £3.56 billion by 2024/25 and work with the sector to agree a clear figure for the cost of unmet and under-met need in time to feed into 2019 Spending Review discussions. For the latter we are being clear that Government must make the case for increases in national taxation.