Dear Sarah Wollaston MP, Clive Betts MP and Rachel Reeves MP,

Response to the letter of 18 January 2019 from Select Committee chairs

Thank you for your letter of 18th January, highlighting United Response’s concerns over providing overnight ‘sleep-in’ support.

You raise concerns about the severe financial and operational difficulties for care providers. We recognise that representatives of learning disability and other types of care provider have expressed concern about rapid price reductions for sleep-ins by commissioners that risk destabilising the social care market. Commissioners of adult social care were given market shaping duties by the Care Act and must work with providers to determine a fair rate of pay for fair work based on local market conditions. This judgment should not be used as an opportunity to make ad-hoc changes to the fees paid to providers without consultation. The Department for Health and Social Care recently wrote to Directors of Adult Social Services to communicate this view.
The Government has continued to invest in the sector, with an additional £2bn of funding for care in the Spring Budget 2017, in part to support a sustainable market. The ongoing cost of paying for sleep-in shifts at National Minimum Wage/National Living Wage rates was acknowledged as a pressure on local care markets, and the Government took account of these costs in deciding to provide this sum of additional funding.

The Government subsequently provided a further £150 million of adult social care support grant in the 2018/19 Local Government Finance Settlement to help manage market pressures. In addition, the Government has announced £650 million of new money at Budget 2018 for social care in 2019/20. In total we have given Councils access to £10 billion more dedicated funding that can be used for adult social care from 2017/18 to 2019/20.

Regarding the request for New Burdens’ funding, the Government position is that a different legal interpretation of an existing law would not be a New Burden. In any case, the revised interpretation of the law, as set out in the Court of Appeal judgment, is that employers are not required to pay National Minimum Wage for sleep-in shifts in the specific circumstances defined by the Court.

You also refer to legal uncertainty resulting from legal judgments. The Court of Appeal judgment in the case of Mencap v Tomlinson-Blake overturned the prevailing interpretation of the law over whether “sleep-in” shift workers are entitled to the National Minimum Wage.

However, the Supreme Court has now agreed to consider Unison’s appeal. Its judgment is unlikely to be issued before mid-2020 (unless expedited). It could bring back historic liabilities and we appreciate that this gives rise to some uncertainty. However, the Court should take a view on the legislation as it stands. Making legislative changes ahead of any Supreme Court consideration would be premature, as the subsequent judgment might bear in unforeseen ways upon the interpretation of the amended legislation.
Until the Supreme Court has considered Unison’s appeal, the Court of Appeal judgment constitutes the authoritative interpretation of the law. All employers must comply with minimum wage law as it stands but are free to pay more than the law dictates.

The long-term stability of the social care system is a vital Government priority. We recognise that the work carried out by the social care sector provides a vital role in our society, and workers in the sector should be fairly rewarded for what they do. Ultimately, it is in the interests of commissioners, providers, and recipients of care services to have a stable, functioning care sector.

KELLY TOLHURST

CAROLINE DINENAGE

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From Dr Sarah Wollaston MP, Chair, Clive Betts MP, Chair and Rachel Reeves MP, Chair

Rt Hon Matt Hancock MP  
Secretary of State for Health and Social Care

Rt Hon Greg Clark MP  
Secretary of State for Business, Energy and Industrial Strategy

Rt Hon James Brokenshire MP  
Secretary of State for Housing, Communities and Local Government

18 January 2019

Dear Secretaries of State,

We enclose a letter which we have received from Learning Disability Voices, on behalf of organisations in the learning disability care sector, expressing continued concern about the issue of “sleep-ins”.

As you will see, they argue that wages for staff who provide overnight “sleep-in” support continue to be subject to uncertainty because of legal judgements, and policy changes on the part of Government. They have told us that this uncertainty has created severe financial and operational difficulties for care providers, with worrying implications for the vulnerable people they support and for dedicated support staff.

We share the concerns expressed by United Voices and request a detailed response from the Government to the issues and questions set out in their letter. We would expect to publish your response.

Yours Sincerely,

Clive Betts MP  
Chair, HCLG Committee

Dr Sarah Wollaston MP  
Chair, HSC Committee

Rachel Reeves MP  
Chair, BEIS Committee
Dear Committee Chairs,

I would like to express serious concerns from the learning disability care sector that wages for staff who provide overnight ‘sleep-in’ support, continue to be subject to uncertainty because of legal judgements, and policy changes on the part of Government. This has created severe financial and operational difficulties for care providers, with worrying impact on vulnerable people they support and pay for dedicated support staff.

We have been pressing Government for a solution for over three years. On 8th November, NMW guidance for ‘time spent asleep and available for overnight care’ issued by BEIS was changed for the third time in as many years. Yet this is not the end of the matter, as the judicial process continues in the Supreme Court.

The law as it stands means that ‘time spent asleep and available for overnight care’ no longer attracts NMW. Yet in correspondence to providers (enclosed), the Minister for Small Business, Consumers and Corporate Responsibility states that the Government (the Department for Health and Social Care) is in the process of directing Local Authorities that the judgment and guidance should not be used as an opportunity to make ad-hoc changes to the fees paid to providers without consultation. This (DHSC) directive is still forthcoming, six months after the CoA judgement in July, when LAs first began renegotiating rates.

The Minister maintains that Government encourages employers to pay more than the minimum wage wherever possible and alludes to uplifts in social care funding in the 2017 Spring Budget. The reality is that cash strapped LA commissioners are reducing rates for ‘sleep-ins’ below NMW without consultation. For example Maidenhead Council in the Prime Minister’s constituency gave providers one months’ notice last November that they were reducing overnight care rates to a flat rate below NMW.
Ongoing problems for providers are twofold: Firstly they are contracted to continue paying existing staff contracts at NMW, whilst LAs have already reduced funding so that these providers are running at a loss (and have been for some time). In neighbouring LAs, providers pay staff in one area at NMW, while staff in the next authority will have to move onto a flat rate contract.

Secondly, providers are being forced to enter new consultations with their workforce and unions on reducing salaries. This will not only affect the quality of care provision through demotivating the workforce, but will make improving recruitment and retention impossible. This comes at a time when the 2018 CQC State of Care report confirmed that demand is rising and sustainability is challenging.

Meanwhile there is clear evidence that vulnerable disabled people are suffering as Transforming Care services have been put on hold until a solution is found. To be clear, the absence of a solution for sleep-ins is undermining investment in the Transforming Care agenda because the threat of six years of back-pay still hangs over providers and LAs pending on the Supreme Court. Furthermore, regardless of back-pay, providers who are running at a deficit could become financially unviable resulting in profoundly disabled people losing their homes and moving back into inappropriate institutions.

We believe the crux of the matter is ‘new burden funding’ for local authorities to pay overnight care rates commensurate with NMW rates.

The Minister alludes that LAs can pay overnight care at NMW rates using additional funding uplifts for social care in recent years. This, despite the fact that local authorities were only informed (by former Ministers at BEIS and DHSC) of this in October 2017 – several months after the social care funding in the 2017 Spring Budget, which the Minister refers to in her letter, was announced.

Local Authorities may well maintain that there was never any earmarked funding to pay sleep-ins at NMW as part of these social care uplifts. And providers can quite honestly state they can only pay staff rates they receive from local authorities. This is, after all, how social care works.

Colleagues in the sector estimate this additional ‘new burden’ to pay sleep-ins at NMW to be c.£100m per year.

However, you may be aware that DHSC and BEIS conducted two surveys in collaboration with the sector and Deloittes in 2017 and LangBuisson /Frontier Economics in 2018; so as to give an accurate picture of new burden funding required to pay sleep-ins commensurate with NMW. The sector were promised sight of these surveys by Ministers yet they have not released them, and they have not been published.

Given that this issue is a cross-Departmental matter, would it be possible for your Committees to jointly question the Government on the amount these surveys calculate annual ‘new burden’ for LAs to pay sleep-ins at NMW to be, and how local authorities should find the funding to pay this going forward?
Given the additional and ongoing problems for providers, their workforce and vulnerable people they support set out in this letter, could you question the Government on what its response to this ongoing crisis is?

As you are aware, a succession of Ministers made the moral case in Parliament that ‘sleep-ins’ should be paid at NMW as part of the Government’s own policy agenda. While Unison are seeking to appeal the CoA judgement, the Supreme Court has made it known that is likely to be sometime before a decision is made; and the outcome of this decision could lead to further years of impasse. During this time the spectre of crippling back-pay could return.

We understand that Government could solve this crisis by using statutory instrument to confirm that ‘time spent asleep and available for overnight care’ will become subject to NMW regulations once again, while ensuring that funding to foot ‘new burden’ for local authorities will be forthcoming.

We firmly believe that Government does not need to wait for a decision from the Supreme Court to avert this crisis; that it has a duty of care for some of the most vulnerable people in society, a responsibility to fund decent wages for the dedicated carers who support them, and an obligation to ensure continued viability for the organisations who provide this care.

Yours sincerely,

John J C Cooper

Head of Public Affairs & Policy
United Response / LD Voices
Thank you for your letter of 26 November 2018 to the Rt Hon Greg Clark MP, on behalf of your constituent, John Cooper of United Response regarding sleep-ins shifts and the National Minimum Wage. I am replying as this matter falls within my Ministerial portfolio.

I am pleased to say that Government guidance clarifying the implication of the Court of Appeal judgment in the Mencap case was published on 8 November. The judgment overturned the prevailing interpretation of the law over whether “sleep-in” shift workers are entitled to the National Minimum Wage. In the Court of Appeal’s judgment, employers are not required to pay the National Minimum Wage for “sleep-in” shifts in the specific circumstances defined by the Court. Those circumstances are where workers are contractually obliged to spend the night at or near their workplace on the basis that they are expected to sleep for all or most of the period. The judgment covers both arrears and future payments.

As you may be aware, Unison has asked the Supreme Court for leave to appeal against the Court of Appeal judgment. In the meantime, the Court of Appeal judgment constitutes the correct interpretation of the law, and all employers must comply with it as it stands. It would be premature to make any legislative changes ahead of any Supreme Court consideration.

There appears to have been some initial confusion about the future of HMRC’s Social Care Compliance Scheme following the Court of Appeal judgment. HMRC wrote to employers about the Scheme to keep them informed about developments. HMRC then decided to keep the Scheme open to allow employers to apply the new test set out by the judgment and to enable them to self-review and pay any arrears (most likely for non-sleeping time arrears). If sleeping time was an employer’s only risk and the terms of the judgment matched the circumstances of their business practices, the employer would be able to submit nil return.

Several employers on the Scheme are the subject of worker complaints, also for non-sleep-in issues, and HMRC are obliged to consider all worker complaints. I should like to make clear, however, that there is no question of employers being expected to pay arrears in line with the previous interpretation of the law.
A number of representatives of care providers, including United Response, have expressed concern about price reductions for sleep-ins by local authority commissioners in light of the judgment that risk destabilising the social care market. The Government is sending a clear message that the judgment should not be used as an opportunity to make ad-hoc changes to the fees paid to providers without consultation. Commissioners and providers should be working together to determine a fair rate of pay for sleep-in shifts to fit their local labour market conditions.

The Government encourages employers to pay more than the minimum wage wherever possible, and we have continued to invest in the sector. The Government gave councils £2bn of additional funding for care in Spring Budget 2017, in part to support a sustainable market.

We also provided a further £150m of adult social care support grant in the 2018/19 Local Government Finance Settlement, to help manage market pressures. In addition, the Government has announced £650 million of new money for social care in 2019/20.

We remain committed to the long-term sustainability of the social care system, and the Department for Health and Social Care is working on its Green Paper. The Government recognises that the social care sector plays a vital role in our society, and workers in the sector should be fairly rewarded for what they do.

Yours ever,

KELLY TOLHURST MP
Minister for Small Business, Consumers & Corporate Responsibility