

Response of the Equality and Human Rights Commission to the Low Pay Commission Consultation on National Minimum Wage

Consultation details

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Executive summary

1. The Equality and Human Rights Commission's response to the Low Pay Commission's Consultation on National Minimum Wage is based on the evidence collected for the Commission's review of local authorities' compliance with recommendations of the formal inquiry into older people and human rights in home care. Our response is therefore limited to the areas covered by this review.
2. The Commission recognises that there are significant pressures on local authorities to reduce their spending. Budgets assigned to adult social care, which make up a large proportion of local authority spending, are coming under particular pressure.
3. Our inquiry and review reports provide evidence of the risks to human rights of older people when care workers are poorly paid and supported. To address this, we believe that local authority contracts commissioning home care should include a requirement that care workers are paid at least the National Minimum Wage (NMW), including payment for travel time. This mirrors a recommendation from the Low Pay Commission's 2013 report.
4. To help authorities to ensure that contracts require providers to pay care workers NMW, the Commission has suggested a draft contract schedule which can be used for this purpose (see Appendix A). This will be sent to all local authorities in England in October 2013.
5. The Commission has also recommended that all local authorities commissioning home care in England use costing models which incorporate all essential elements of the actual costs of care. These include workers' pay, National Insurance contributions, training, supervision, travel time, travel expenses and provider overheads. The Commission recommends that local authorities demonstrate transparency about how their home care commissioning rates are calculated by putting these costing models on their websites.

Introduction

6. The Equality and Human Rights Commission (the Commission) has a statutory duty to promote equality and diversity, work towards the elimination of discrimination, promote human rights and build good relations between and among groups. The Commission is a non-departmental public body established under the Equality Act 2006 – accountable for the use of its funds, but independent of Government. The Commission has responsibilities in nine areas of equality: age, disability, gender, gender identity, race, religion or belief, marital status, civil partnership and sexual orientation, as well as human rights.
7. The Commission welcomes the opportunity of responding to this Low Pay Commission consultation. In considering our response, we have had regard to our duties under Section 9(1) of the Equality Act 2006, which requires us to promote awareness, understanding and protection of human rights, and encourage public authorities to comply with Section 6 Human Rights Act 1998 (HRA).
8. The Commission undertook a formal inquiry into older people and human rights in home care in 2011. It subsequently published a review of compliance with the inquiry recommendations in 2013. This response relies on evidence collected for the review. It does not address each question in the Low Pay Commission's consultation, but the information is relevant to the following questions:
 - *How far is there compliance with the NMW? Do particular groups experience problems with NMW compliance (for example apprentices or interns/others undertaking work experience)? Where there is non-compliance are there implications for the NMW rates, or other implications (for example for the quality and accessibility of official guidance on the NMW, or for the enforcement work of HMRC)?*
 - *Are there any other views or evidence you would like to give us about the operation and impact of the National Minimum Wage?*

EHRC Inquiry: Close to Home and recommendations

9. In November 2011 the Commission published *Close to Home*,¹ the findings of its inquiry into older people and human rights in home care. The inquiry was conducted using the Commission's formal legal powers² and extended to older people (over 65) wanting or receiving home care in England.
10. *Close to Home* found that, although half the older people who gave evidence were satisfied with their home care, many others had experienced poor treatment, neglect or patronising, ageist attitudes. The cases of most concern were where older people were not supported to eat and drink or had been left without access to food and water or in soiled clothes and sheets. Some were subjected to financial abuse. In other cases, older people were ignored by care workers rushing to complete tasks, were strip-washed by workers who talked over them, were confined to their bedroom by being put to bed in the early afternoon, or were unable to participate in their community because they received no support to leave their home.
11. Our assessment in *Close to Home* was that many of these examples of poor treatment were likely to be breaches of the human rights of the person receiving care – specifically Article 3 of the European Convention on Human Rights (prohibition of inhuman or degrading treatment), Article 8 (right to respect for private and family life) or Article 1 Protocol 1 (right to peaceful enjoyment of possessions).
12. The *Close to Home* evidence revealed a number of interlinked factors that increased risks to the human rights of older people using home care. These included poor commissioning practices by local authorities and under-investment in care workers.

¹ Equality and Human Rights Commission (2011) *Close to home: An inquiry into older people and human rights in home care* (www.equalityhumanrights.com/uploaded_files/homecareFI/home_care_report.pdf)

² Under Section 16 of the Equality Act 2006

13. Evidence from Close to Home showed that most older people preferred care to be delivered by workers with whom they had built up a relationship and that regular changes of care workers, some of whom might have little experience, carried inherent human rights risks. However, low pay and poor conditions of care workers are likely to contribute to the high staff turnover rate in the home care sector³.
14. To tackle the systemic barriers that Close to Home identified as putting human rights at risk, the inquiry report concluded with a list of 25 recommendations, directed at government departments, the Care Quality Commission, the Local Government Ombudsman and local authorities in England.⁴
15. Several inquiry recommendations are directly relevant to the payment of NMW to home care workers. The inquiry recommended that:
 - Before October 2012 local authorities should review their policies and practice in the light of this inquiry's findings as to the causes of potential breaches of human rights in home care. As a minimum this should include examination of the following:

...the extent to which their commissioning supports the delivery of care by a sufficiently skilled, supported and trained workforce.
 - Commissioning practice needs to balance allocation of resources against assessed home care needs that must be met, to ensure contracted providers can pay at least the National Minimum Wage to care workers, including payment for time spent travelling.
 - The Commission strongly endorses the recommendation of the Low Pay Commission that commissioning policies of

³ On average one in four care workers leave their employer each year (Skills for Care (2013) NMDS-SC Briefings Issue 20 – Meeting the future workforce challenges of adult social care (www.nmds-sconline.org.uk/Get.aspx?id=780048)).

⁴ www.equalityhumanrights.com/uploaded_files/homecareFI/home_care_report.pdf, p. 95, Conclusions and Recommendations

local authorities should reflect the actual costs of care, including at the very least the National Minimum Wage.

16. Organisations have a legal duty to 'have regard' to these recommendations. The Equality Act (2006) states that 'a person to whom a recommendation in the report of an inquiry... is addressed shall have regard to it' and that a court or tribunal may 'have regard to a finding of an inquiry.'⁵
17. The Commission gathered evidence between November 2012 and March 2013 regarding compliance with these recommendations and issued a report on 8th October 2013 setting out its findings.⁶

Review methodology

18. The Commission engaged IFF Research Ltd to conduct a survey to gather evidence from local authorities. Between 9 November 2012 and 18 January 2013 an on-line survey was sent to 152 English local authorities that commission home care. In total, 101 authorities (66 per cent) responded by our initial deadline and the results cited below are based on these respondents. The full results of the survey are in a research report which can be accessed at http://www.equalityhumanrights.com/uploaded_files/rr89_-_older_people_final.pdf
19. Six authorities submitted information by email following closure of the on-line survey. Their responses were not received in time to be analysed in the survey report. A further 38 local authorities submitted responses in September 2013, which will be analysed in October 2013. Any relevant findings from this can be shared with the Low Pay Commission.

Compliance with recommendations relating to NMW

20. The low status, pay and a lack of investment in care workers was

⁵ Equality Act 2006 Schedule 2 paragraph 18.

⁶ http://www.equalityhumanrights.com/uploaded_files/close_to_home_recommendations_review_web.pdf

identified in Close to Home as a major factor creating risks to older people's human rights. In particular, the Close to Home evidence showed that the skills required to provide quality home care and levels of responsibility expected of care workers are not reflected in their pay and general working conditions. This is likely to influence staff retention and the high turnover of care workers visiting older people.

21. Local authorities were therefore asked to review commissioning practices to assess how effective they were in ensuring the delivery of care by a sufficiently skilled, supported and trained workforce.
22. Compared with other areas, our findings on commissioning for a skilled and supported workforce show that this was the most likely area to have been addressed by local authorities and the area where the highest number had identified opportunities for improvement. Out of the 77 authorities that had taken some action to review their commissioning practices, 70 had assessed their practices to determine whether they helped to ensure a skilled, supported and trained home care workforce. Of these, 40 authorities had identified an area for improvement.
23. However, we were disappointed with the lack of practical examples about what authorities had done, or were planning to do, in order to change their commissioning practices with a view to improving the status and conditions of the local care workforce. For example, although some authorities acknowledged that better training should be available for home care workers and outlined steps that they had taken to support this, only one made reference to the significance of staff terms and conditions.
24. The Close to Home recommendations asked local authorities to ensure that contracted providers pay at least the National Minimum Wage to care workers (including travel costs and payment for time spent travelling) and endorsed the recommendation of the Low Pay Commission that commissioning policies of local authorities should reflect the actual costs of care, including at the very least the National Minimum Wage. The Low Pay Commission has consistently recommended this

25. Close to Home evidence from local authority staff and independent sector home care providers showed that they were deeply concerned about the impact of commissioning at low hourly rates on care workers' pay and conditions and – in turn – on the quality of service delivered. Our survey therefore asked local authorities how they used resources to meet service users' assessed needs while ensuring that care workers could be paid at least the National Minimum Wage. Questions included whether they had asked providers to reduce the cost of the care they provided since Close to Home was published; whether they set maximum or minimum prices for provider bids; and the rates they paid for an hour of day-time home care.
26. Our findings show that of the 101 local authorities that responded to the survey:
- 57 authorities that responded to the survey had not requested or required providers to reduce the cost of care
 - 21 local authorities had increased the rates they were prepared to pay.
 - Seven local authorities had requested a reduction in the rates paid;
 - Eight local authorities had required care providers to reduce the cost of care; and
 - Six local authorities had not yet requested or required a reduction in rates but were planning on doing this during the next year.
27. That only a fifth of the authorities that responded to the survey had increased the rates of pay for home care since November 2011 is perhaps to be expected in the context of severe financial restraint. However, even where authorities kept rates stable, this meant a cut in real terms of the value of the contract to providers because the costs of care have risen since November 2011. One factor contributing to the increased cost of care was the increase in the National Minimum Wage from £6.08 to £6.19 on 1 October 2012.

28. A fifth of local authority survey respondents paid providers £11.00 or less for an hour of day-time home care. The lowest rate was £8.98.
29. It is difficult to see how some of the lower hourly rates reflect the actual cost of care, as a major part is made up of worker's wages, which must be at least the National Minimum Wage.
30. The Commission recognises that there are significant pressures on local authorities to reduce their spending. Budgets assigned to adult social care, which make up a large proportion of local authority spending, are coming under particular pressure. The latest survey from the Association of Directors of Adult Social Services (published in May 2013) highlights a reduction of £2.68 billion in adult social care spending since 2010, with further reductions expected.⁷ At the same time, demand for adult social care is growing owing to the rapidly ageing population.
31. To control the costs of care, around a third of the authorities that responded to the survey set maximum prices they are willing to pay for care services. Local authorities assume this allows providers to quickly assess whether or not they should submit a tender. However, unless the maximum price reflects the actual costs of care, this approach may risk the human rights of service users. A maximum price may create incentives for providers to reduce the quality of care or to pay care staff below the National Minimum Wage. The maximum hourly contract rates set by some local authorities are low enough to make this risk a reality.

Living Wage

32. Of the 101 local authorities that responded to the Commission's survey, 22 stated that future contracts will ensure that external providers employing home care staff pay the local Living Wage as the minimum wage level.
33. This is a welcome development. However, some authorities committed to supporting the local Living Wage commission home

⁷ www.adass.org.uk/index.php?option=com_content&view=article&id=914&Itemid=489

care from providers at rates that appear unlikely to cover this cost, in addition to other necessary elements such as training, supervision and provider overheads.

Inclusion of clauses requiring payment of NMW in contracts for home care

34. Currently only 20 local authorities include a clause in their contracts requiring providers to pay workers an hourly rate in line with National Minimum Wage legislation, including travel time.
35. 27 local authorities indicated that they will definitely not be doing this in the future, with the rest either committed to including such a clause (28) or unsure about inclusion (46).
36. To help authorities to ensure that contracts require providers to pay care workers at least National Minimum Wage, we have suggested a draft contract schedule for this purpose (see Appendix A).

Use of costing models

37. During the Commission's review of compliance with the inquiry recommendations, it received evidence that some local authorities pay rates which do not appear to cover the actual costs of care, including payment of NMW to care workers.
38. Costing models should ensure that all necessary cost elements are included in the calculation of the final rate to be paid to external providers. These include workers' pay, National Insurance contributions, training, supervision, travel time, travel expenses and provider overheads. The model calculates how much is allocated to each of these.
39. The use of costing models comes in the wake of recent judgments in legal challenges to rates used by local authorities when commissioning residential care home placements. The most recent

case⁸ establishes that, in this sector, the actual cost of care must be conscientiously considered by local authorities with reference to evidence and, if this is to be done using a cost tool, that tool must be defensible and include all relevant factors.

40. It is encouraging that some local authorities are starting to use costing models to calculate how much they should pay for commissioned home care.
41. The United Kingdom Homecare Association has developed a costing model,⁹ originally designed to assist their members in the calculation of a fair price for social care services. This is now also freely available for others to use, including local authorities.
42. The Commission recommends that all local authorities commissioning home care in England use costing models which incorporate all essential elements of the actual costs of care, including the NMW. In addition the Commission recommends that these local authorities demonstrate transparency about how their home care commissioning rates are calculated by putting these costing models on their websites.

Equality and Human Rights Commission
3rd October 2013.

⁸ South Tyneside Care Home Owners Association & Ors, R (on the application of) v South Tyneside Council, Court of Appeal – Administrative Court, June 28, 2013, [2013] EWHC 1827 (Admin).

⁹ www.ukhca.co.uk/CostingModel/

Appendix A: draft contract schedule on the National Minimum Wage

In response to requests from a number of local authorities, the Commission – with advice from Counsel - has drafted a model contract schedule relating to the National Minimum Wage. This schedule may be adapted by local authorities for use in their contracts with home care providers.

The schedule would make it a fundamental term of the contract that the contractor pays the National Minimum Wage to all eligible employees, and to keep records as required by the National Minimum Wage Regulations 1999.

1. National Minimum Wage Schedule

Duty of Contractor to pay National Minimum Wage

A. It is a fundamental term of the contract that the [Contractor] pays the national minimum wage under the National Minimum Wage Act 1998 to all eligible employees. The [public authority] may terminate this contract without notice or compensation in the event that the [Contractor] breaches this term.

Duty of Contractor to keep proper records

B. It is a fundamental term of the contract that the [Contractor] keeps the records required by the National Minimum Wage Regulations 1999. The [public authority] may terminate this contract without notice or compensation in the event that the [Contractor] breaches this term.

Audit

C. The [Contractor] shall produce and send to the [public authority] a written annual audit of an anonymised random sample of employees demonstrating that the national minimum wage has been paid. In particular, the audit shall demonstrate that the national minimum wage has been paid taking into account travel time under Regulation 15 and training under Regulation 19 of the National Minimum Wage Regulations 1999.