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**Low Pay Commission**  
**Consultation on April 2022 National Minimum Wage Rates**  
**Response from the Employment Lawyers Association**

**17 June 2021**

## **Low Pay Commission**

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#### **INTRODUCTION**

1. The Employment Lawyers Association (**ELA**) is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.
2. A Working Party Co-Chaired by Emma Burrows and Anna Dannreuther was set up by the Legislative and Policy Committee of ELA to respond to the Low Pay Commission's consultation on April 2022 National Minimum Wage Rates. Members of the Working Party are listed at the end of this paper.
3. The Working Party's responses below are drawn from its members' experiences as business owners and as legal advisers to business owners and individuals. The Working Party has responded to questions where the answers are within its area of expertise (either directly or working with clients, or as active and informed members of the legal profession). It has not responded to questions outside its areas of expertise.
4. In responding, the Working Party has sought to reflect the diverse views and experiences of ELA members. To ensure all views are represented, the Panel has engaged in independent research where necessary, informed by the members' own legal experience and knowledge of employment law. Any references in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters

dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of ELA's membership.

## EXECUTIVE SUMMARY

5. By way of overview, this Response highlights the unique economic working conditions at present, including the impact of Brexit and the Covid-19 pandemic. These conditions have led to an increasing tension between workers and employers on the NMW and NLW rates, in so far as many low-paid workers have been on the frontline providing critical services during the pandemic, yet are not (but wish to be) paid in line with the actual real living wage. Employers, on the other hand, have had to bear large unanticipated costs associated with the pandemic and are currently suffering from the effects of Brexit and the pandemic in terms of staff shortages and recruitment and retention issues. Many are concerned they will not be able to afford rising NMW and NLW costs. This Response highlights a number of technical issues relating to NMW compliance and enforcement, and urgent, pressing issues resulting from the Supreme Court's recent decision in the *Mencap*<sup>1</sup> case relating to the home worker exemption.

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<sup>1</sup> [Royal Society Mencap v Tomlinson Blake \[2021\] UKSC 8 \(19 March 2021\).](#)

## **QUESTION 2**

**What are your views on the economic outlook and business conditions in the UK for the period up to April 2022?**

### **SUMMARY**

6. The panel's expertise mainly relates to the retail and social care sector. The economic outlook for those sectors for the period up to April 2022 is linked to the effects of the pandemic and Brexit, and how these sectors can rise to the challenges presented by both scenarios (and their interrelation). Workers in both sectors have provided essential services at high personal cost during the pandemic. However, staff shortages are reported across both the social care and retail sectors and are likely to continue as the Covid-19 restrictions are lifted and the implications of Brexit and the new points-based system (which prioritises high-skilled higher-paid workers) are felt. The future of the social care sector is precarious due to funding issues from local authorities (who pay care worker contracts). There is a tension between employers, who have experienced difficult trading and operating conditions over the past 16 months and are concerned they will not be able to deliver the proposed increases to National Minimum Wage (**NMW**) in April 2022, and workers, who have undertaken critical frontline work during the pandemic, and for whom the NMW still does not cover the actual cost of living.
7. Please see our responses to the particular areas of interest referred to in the Low Pay Commission's Consultation letter below.

### **THE CONDITIONS IN THE SPECIFIC SECTOR(S) IN WHICH YOU OPERATE**

8. Our work is in a number of sectors and comments on those sectors are:

#### **Retail**

- 8.1. The experience in the retail sector of trading over the last 16 months has been varied, and directly dependent on the nature of the product(s). For example, those on the high street have faced unprecedented difficulties with a need to focus on the bottom line and often to consider restructures in order to keep operating. For other companies, for example the big four supermarket chains, business has, if anything, been stronger than in previous years specifically given that their products have included distress purchases and/or those that have increased in demand during the pandemic. However, the costs of Covid safety measures and the costs of staff illnesses have also contributed to losses. For example, Sainsbury's reported an annual loss of £261 million, as it spent millions

of pounds protecting staff and customers from coronavirus and paid bonuses to staff who worked through the pandemic, as well as for extra staff to cover those self-isolating, amongst other costs.<sup>2</sup>

- 8.2. Nonetheless, regardless of the particular retail area, the view is that there will be an increase in buyer confidence over the coming months, albeit for certain subsectors (including those outside of the food and pharmaceutical sectors) it is anticipated that the increase will be less steep given that a number of consumers will themselves be coming out of periods where they have had reduced disposable income.
- 8.3. In particular, retailers report that they are expecting some growth across the Food, Clothing and Home sectors. High margin food products benefitted from the closure of restaurants. Whilst sales of food products may fall slightly as hospitality reopens, the expectation is that there may be a rise in social eating and barbeques to offset this. Clothing and Home sales both remain challenging but the prediction is that sales will increase as restrictions are relaxed.
- 8.4. There is an acceptance that growth in online sales has taken sales away from the High Street and the operating model for High Street retailers is becoming increasingly difficult. Further store closures are expected as a result of this and a sharp increase in the NMW rates could further increase this risk. The alternative business model would be to run stores with fewer staff, but this will also result in job losses.
- 8.5. The feedback is that it is too early to determine the economic recovery prospects from the effects of the Covid-19 pandemic. The initial response to the easing of lockdown has indicated a gradual return to the High Street. However, city centre stores continue to suffer from lower footfall, especially stores within indoor shopping centres.
- 8.6. Government interventions to support the economy and labour market was of considerable assistance to retailers. Many retailers were concerned that the pandemic could lead to their businesses closing and, whilst there were significant job losses across the retail sector, these would have been considerably higher without the support provided by the Government. The Coronavirus Job Retention Scheme (**CJRS**) and business rates relief helped retailers during their most vulnerable

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<sup>2</sup> Sarah Butler, '[Sainsbury's slumps to £261m loss on back of Covid costs](#)', *The Guardian*, 28 April 2021

periods. Moving forward, retailers have questioned whether the Apprenticeship Levy is working and achieving its aim.

- 8.7. The feedback is that the number of job applicants for each position has increased considerably throughout the pandemic, with one retailer suggesting they had 100+ applicants for each role, but a great number of applicants do not have the requisite experience to do these roles and there is a sense that more investment is needed to help workers to retrain to get the necessary skills that they need. There seems to be a clear distinction between the recruitment market for store / warehouse workers, which is very buoyant, and qualified / professional recruitment, in which recruitment is proving more challenging as the recruitment market is less buoyant. The hospitality sector also appears to be struggling with recruiting sufficient numbers of workers.<sup>3</sup>
- 8.8. Retailers are concerned by the proposed increase in the NMW rates to £9.42 per hour in April 2022. This is considered by many retailers to be a considerable increase. Whilst there is an understanding that the long-term aim is for the NMW rate to hit £10.33 by 2024, this aim was set in 2019 before the Covid-19 pandemic. There is a sense from some retailers that postponing this aim by a year or two and smoothing the rate increases over this longer period would provide a significant boost to retailers. Notwithstanding this, many retailers have found that over the last year they have been able to pay workers above the NMW rates. However, the proposed increase in NMW rates will push retailers' hourly rates back down to (or close to) the NMW rates. This, they feel, will make it difficult to recruit and retain qualified candidates and retailers will find it difficult to differentiate themselves from competitors from a pay perspective.
- 8.9. On the other hand, those representing workers in the retail sector support increasing the national minimum wage to the 'real living wage' of £9.50 (£10.85 in London) and have expressed disappointment in the increase in national living wage on 1 April 2021 by 19p to £8.91. The USDAW (the Union of Shop, Distributive and Allied Workers) General Secretary Paddy Lillis stated:

*"We provided the Low Pay Commission with evidence of why we need a new deal for workers, which includes at least £10 per hour and an end to unjust rip-off youth rates. The Government has missed the opportunity to*

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<sup>3</sup> See e.g., Daisy Jackson, ['There are barely enough staff to run Manchester's pubs and restaurants, and wages are surging as hospitality recruitment turns into a 'battleground'](#), *Manchester Evening News*, 23 May 2021; Richard Partington, ['UK faces labour shortage as Covid and Brexit fuel exodus of overseas workers'](#), *The Guardian*, 17 May 2021

*fully recognise the huge efforts low-paid key workers have made throughout the pandemic. Shockingly the TUC has found that one in three key workers are still earning less than £10 per hour.*

*“Millions of low-paid workers have provided essential services to help ensure the country is fed, healthy and safe through the lockdown and will continue to do so. Usdaw members employed in supermarkets, across the food and pharmaceutical supply chains and the funeral industry welcomed the key worker status, but that respect and appreciation must not fade into the background when this national crisis passes.*

*“There needs to be lasting and fundamental change to the way society views workers. We need a New Deal for Workers: a minimum wage of at least £10 per hour, an end to insecure employment, respect for shopworkers and action to ensure that retail jobs are no longer underpaid and undervalued.*

*“Going to work should mean a decent standard of living for all workers, not least young workers. They are more likely to be paid less than older colleagues, even when doing the same job. They also often work hours that are not guaranteed in their contract, so they really need fairer and better pay alongside protection against insecure work. So reducing the age that National Living wage is paid from 25 to 23 years old is a step in the right direction, but the Government must go much further.*

*“Udaw has campaigned for years to abolish youth rates. We continue to campaign for a national minimum wage of at least £10 per hour for all ages and call on the Government to tackle insecure employment contracts.”*

8.10. In a separate article, Paddy Lillis highlighted that during the pandemic, retail workers have been subject to both reduced income (for example, by being furloughed) and greater job insecurity due to the national restrictions, particularly those in non-essential retail, and that many workers will not have received national minimum wage during furlough.<sup>4</sup>

8.11. As at June 2021, a national ‘labour crisis’ is being recognised, as a result of staff shortages from Brexit and Covid-19.<sup>5</sup> There are reportedly far fewer foreign workers seeking employment in the UK, and many workers have chosen to leave the retail sector due to the precarious nature of the work, highlighted by the pandemic. One estimate is that the UK

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<sup>4</sup> Paddy Lillis, [‘Retail needs support in this lockdown’](#), The Morning Star, November 2020

<sup>5</sup> Laura Onita, [‘Labour crisis deepens as retailers struggle to find enough staff’](#), The Telegraph, 6 June 2021

population will decrease by around 1.3 million as a result of Brexit, which would be the largest fall in UK resident population since World War Two.<sup>6</sup> It is further estimated that another 1.3 million workers have left the UK since 2019.<sup>7</sup> Increasing the national minimum wage in the retail sector could help alleviate this crisis since, as Stacey Kane, business development lead at Easymerchant, told Retail Gazette: “No UK national will turn down an attractive salary package, possible relocation compensation, rapid opportunities for growth, and pandemic-proof safety guarantee and perks”.<sup>8</sup>

- 8.12. The new points-based visa system, which prioritises high-skilled foreign workers, is reportedly problematic for the retail sector, given the “relatively low wage brackets and skill requirements for shop-floor and retail work”.<sup>9</sup> While, in the short term, businesses may see a workforce shortage in areas where they have previously relied on migrant workers, in the long term, employers will need to recruit their staff from the pool of UK nationals looking for work or migrants with EU settlement status or a current visa. This may mean meeting an expectation of higher wages.

### **Social Care**

- 8.13. The social care system is complex and fragmented, with care being provided by around 18,500 organisations working in 39,000 locations with a workforce of 1.5 million. The economic outlook for the period up to April 2022 for the care sector is very poor. Local Authorities are the primary funders for services and the COVID-19 crisis has exacerbated the economic pressure on a sector which was already constrained by austerity and underfunding. The sector cannot look to the future with confidence because it urgently needs sustainable funding for the long-term.
- 8.14. Broadly, workers in the care sector are paid at or near to the National Living Wage (**NLW**), due to the poor levels of funding from Local Authorities. This is something that many charities in the care sector are striving to challenge and change, by advocating for fairer funding for the sector. However, many care providers do not have adequate margins in their contracts to absorb increases in the National Minimum Wage. Therefore, to avoid entering deficit, many providers need Local

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<sup>6</sup> Jonathan Portes & Michael O’Connor, ‘[Estimating the UK population during Covid-19](#)’, UK in a Changing Europe, 14 January 2021

<sup>7</sup> Georgia Wright, ‘[How can retailers combat labour shortages amid Covid-19 and Brexit?](#)’, Retail Gazette, 3 June 2021

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

Authorities to proportionally increase their funding to cover these wage rises.

- 8.15. By example, to meet the costs of this year's NLW uplift in England one charity (the **Charity**) required a 2.1% funding increase to cover the core cost, excluding any other inflationary increases.
- 8.15.1. By 21 May 2021, 25 of 41 Local Authorities served in England had agreed with the Charity an increase to accommodate the increase in the minimum wage, but less than requested; 7 Authorities have offered an increase which is less than the minimum 2.1% required to increase the national minimum wage, and the rest (22%) have not responded.
- 8.15.2. The Charity also serves 14 Local Authorities in Scotland, which have all followed Scottish government advice to offer a blanket 2.2% uplift and colleagues here are already paid the higher rate (£9.50).
- 8.16. In summary, in many cases the price increases agreed with Local Authorities this year will only just cover the increase in NLW and in many cases the increase does not even do this and requires subsidy.

## **WORKERS GENERALLY**

9. We should also report the views of those who represent employees. They would comment that the NLW is set at a very low rate that still means that many workers have to look for support from other forms of wage support from HMRC and also from charitable sectors such as food banks.<sup>10</sup> The Living Wage Foundation notes research findings that while the NLW has significantly boosted pay for the low paid over the last five years, there remains a large gap between the government's minimum wage for over 23s and a real 'Living Wage' based on the cost of living.<sup>11</sup> There is a tension between workers and employers in the level of the NLW and its speed of increase.

## **THE PROSPECTS FOR ECONOMIC RECOVERY FROM THE EFFECTS OF THE COVID-19 PANDEMIC**

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<sup>10</sup> See, for example, for a representation of these views: James Moore, '[It's shameful in modern Britain that National Living Wage doesn't actually pay enough to live on](#)', *The Independent*, 1 April 2021

<sup>11</sup> '[Five Years of the 'National Living Wage': Promising Pay Rises and a £10bn Gap to the Real Living Wage](#)', *The Living Wage Foundation*, 1 April 2021

10. A number of points on this issue have been made above. Suffice it to say, for the vast majority of the retail sector, things will continue to be difficult in short to medium term.
11. Some smaller business clients, many of whom tend to pay around the NLW to their workers, have been significantly affected by the decrease in demand caused by the pandemic and, despite the CJRS, have been forced to close sites/offices to ensure the viability of their business as a whole. For those companies there is little chance of a recovery to pre-pandemic levels.
12. The care sector will take some years to recover from the Covid-19 pandemic and longer if it is not funded adequately.

#### **THE EFFECTS OF GOVERNMENT INTERVENTIONS TO SUPPORT THE ECONOMY AND LABOUR MARKET**

13. Again, see above for a number of points in this regard.
14. ELA members have varying experiences with CJRS, with some members experiencing the majority of their clients – regardless of size – utilising CRJS, and others with clients providing public or charitable services not desiring to draw on public funds.

#### **THE CURRENT STATE OF THE LABOUR MARKET, RECRUITMENT AND RETENTION**

15. University sector clients have seen a reduction in the talent-pool for senior hires but suggest that that has been driven more by Brexit than the pandemic.
16. Generally speaking, retention has been stronger during the pandemic, no doubt linked to people wanting to retain their jobs and the reduced number of job opportunities. Again, this has been more prevalent in lower paid roles, particularly those in affected subsectors of retail and lower-skilled roles more widely. NMW is often paid for these.
17. Care sector clients are beginning to see a rise in staff turnover and are concerned about the cost of difficulties in recruitment, partially anticipated due to Brexit in London and the South-East. Where recruitment is not possible, care sector clients rely very heavily on agency workers, who are more expensive.

### **QUESTION 3**

**To what extent have employers been affected by other major trends in the economy and labour market: for example, Brexit, the shift to homeworking or any changes in the numbers of migrant workers in the UK.**

#### **SUMMARY**

18. There have been a number of challenging issues for employers over the past 15 months, including Brexit and the Covid-19 pandemic. Brexit has led to issues with recruitment and retention, as overseas workers have left the UK, seasonal overseas workers have not come to the UK for work, and fewer in-bound migrant workers mean a smaller selection pool for future recruitment. Brexit has also led to increased import and export costs and issues with workers' immigration status. On the latter, government guidance and leadership for employers will be beneficial. For many employers, working from home is a way they can mitigate some of the effects of Brexit and the pandemic, as this reduces the cost of renting physical office premises. As a result of the Covid-19 pandemic, workers appear to be prioritising security in their jobs over the quality of their job, and it may be that workers will be looking for protections in their contracts moving forward, including by shifting away from zero hours contracts to those with worker rights protections.

#### **BREXIT – RECRUITMENT / RETENTION ISSUES**

19. Universities and other Higher Education sector client have been greatly affected by both Brexit and the impacts upon (potential) migrant workers. Initially Universities saw a huge “brain drain” with a number of senior academics leaving the UK to return to their native EU countries given the wave of discontent felt.
20. Construction sector clients have also suffered a huge detriment given the strong reliance on labour from Europe, particularly the Eastern European countries. Such workers were often seasonal and came to the UK for work rather than to set up a permanent base here. As such, the turnover is commonly quite high and it has therefore been difficult to refill roles. The domestic workers' pool has been insufficient for this, with a number of clients looking at alternative methods of recruitment such as partnering with local colleges to train up junior (and therefore NMW-paid) workers.
21. There is a concern that after the Covid-19 pandemic is over, many migrant workers will choose not to apply for EU Settled Status (**EUSS**) and will instead return to their home countries. Whilst this population is made up of both skilled

and unskilled workers, it is likely to hit certain business sectors hardest (e.g. transportation).

### **BREXIT – COSTS**

22. Retailers have experienced significant delays and inflation of import and export costs as a result of Brexit.

### **COVID-19 – WORKING FROM HOME**

23. Those clients operating call centres – regardless of specific sector –initially had a number of administrative difficulties when continuing to operate at the levels required by their customers/regulatory bodies during the various lockdowns and the overall increase in working from home. However, since facilitating those employees to work from home, they have had a significant reduction in the number of sickness absence such that their overall attendance rates have been much higher. For one client in particular, where attendance was previously an issue, this has resulted in far fewer capability and/or conduct dismissals. Again, such roles were commonly low paid.
24. Retailers foresee a greater move toward flexible working and homeworking for office-based staff. A decrease in the cost of renting physical premises has helped retailers.

### **BREXIT – LACK OF CLARITY AROUND WORKER IMMIGRATION STATUS & RIGHT TO WORK CHECKS**

25. The experience of one UK-based charity supporting European citizens who are awaiting a decision on their EUSS application is that employers are refusing to hire them since they do not yet have EUSS status and, as such, cannot get a National Insurance number. Many employers are not aware that a National Insurance number is not necessary to begin working. This charity is further concerned that there will be continued confusion after the 30 June 2021 deadline, as there are a number of people who may apply for EUSS after the deadline if they have a good reason but, pending their application, their legal status may be unclear to employers. Clear guidance on this for employers and employees will be helpful.
26. Furthermore, an investigation by *i-news* found several established employers, including Government, who required new job applicants to hold EUSS.<sup>12</sup> This contravenes the Home Office's 'Guide to Right to Work Checks' which specifies

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<sup>12</sup> Chloe Chaplin, '[Home Office says EU nationals do not have to prove settled status amid warning they are being barred from jobs](#)', *i-News*, 18 January 2021

that, during the grace period (ending 30 June 2021), passports suffice.<sup>13</sup> Notably, it presents a major disadvantage for the 340,000 EUSS applications which are still pending according to the latest Home Office statistics.<sup>14</sup>

27. One employment rights charity we spoke with said that they had witnessed how uncertainty about recruitment practices post-Brexit is affecting their beneficiaries. Since March 2020, they have had two cases of people who were rejected from recruitment, and one case of someone who was made to take unpaid time off work, due to employers' lack of understanding of EUSS right to work checks. All three beneficiaries had pre/settled status.
28. Additionally, the charity held concerns about employers', inability to prove the right to work in a digital format. As many as 46% of the people who asked for the charity's help with immigration cases reported being unable to issue a Share Code digitally.

#### **COVID-19 - GROWING INSECURITY**

29. The employment rights charity mentioned above observed a deepening of insecurity among people who were already on precarious contracts. Among zero hours workers, there were reports of considerable, unpredictable reductions in their work shifts and thus in their income, a pressure to work in conditions that felt unsafe and included minimal PPE, for fear of being dismissed, overnight job losses, made fully legal by the fact that workers, rather than employees, have no statutory rights to notice periods.
30. Compared to the year before Covid, the employment rights charity saw a decrease in enquiries related to job quality (i.e. maternity, holiday pay, non-payment), and an increase in enquiries related to job security (ie redundancy) and financial need. Enquiries pertaining to financial need increased threefold (see the employment right's charity's *One Year of Covid* report, p5).<sup>15</sup>

#### **QUESTION 4**

**What is your experience over the past year in the following areas?**

- **Prices and profits**
- **Productivity**
- **Pay structures and differentials**

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<sup>13</sup>Home Office, [An Employer's Guide to Right to Work Checks](#), 17 March 2021

<sup>14</sup> Home Office, [EU Settlement Scheme statistics](#), (last accessed 15 June 2021).

<sup>15</sup> [One Year of Covid: An analysis of migrant workers in the low-paid sector](#), Work Rights Centre, 31 March 2021

- **Wider benefits available to workers (including premium pay and non-pay benefits across the workforce)**
- **Quality of work, including contract types, flexibility and work intensification (e.g. greater expectations for workers to work more flexibly, with greater effort, to higher standard etc)**
- **Progression and job moves**
- **Training**
- **Investment**
- **Business debt**

## **SUMMARY**

31. As legal advisers, we do not feel able to fully comment on all the areas referred to above. It is hoped that fuller answers can be provided by employers' responses to the Consultation directly. Where we can, we comment on these areas below.

### **PRICES AND PROFITS**

32. Using the social care Charity mentioned in Question 2 above as an example, funding increased by 4.3% on average in the past year compared to a rise in wage costs to the Charity of 6.2% in NLW. Workforce costs account for more than 75% of the Charity's cost base, therefore this rise alone resulted in a 4.7% increase in operating costs. Other costs (no labour) have also risen, further exacerbating the Charity's funding deficit.
33. In addition, increases in NLW that are not accompanied with wider structural reform on prices dilutes margins as NLW is a pass-through cost. The Charity is of the view that the care sector may now be looking at 3-5% bottom-line margins in the short term with the medium-term outlook being for further reduction.

### **INVESTMENT**

34. The care sector is suffering from a chronic lack of investment. With even the best performing providers only able to achieve low margins, commissioners only able to meet NLW through service reduction and year-on-year outlooks only showing further downward pressures, the sector is not attractive to significant external investment and internal investment is focused more on survival than development.

## **BUSINESS DEBT**

35. Many have used Government debt solutions effectively to either support additional Covid costs or to invest in business. There is concern about inflationary rises in the short-term future. The unwinding of these solutions will be a precarious time for many providers.

## **QUESTION 5**

**Apart from the minimum wage, what other factors affect workers in low-paying sectors and occupations? Among other things, we are interested in evidence and views on:**

- **The effect on workers of Universal Credit and other rules around benefits and tax**
- **The relationship between the minimum wage and weekly income**
- **Access to transport and the effects this has on working life.**

## **SUMMARY**

36. Our comments in Question 2 about the difference between NMW and the cost of living (highlighted by Paddy Lillis of Usdaw, for example) may be relevant here. In our response below, we focus on the health of minimum wage workers, and how this is generally worse than those with high incomes. We refer to the anxiety felt by many workers on not being able to make ends meet month-to-month, and the health impacts this has. Clearly, this is relevant as the national minimum wage is designed to provide a base income floor for workers and alleviate some of those pressures. We also refer to the evidence as to the life expectancy of lower income workers being lower than higher earners. This is where income may be directly linked to life outcomes.
37. Our response also addresses benefits and how many lower-income earners are excluded from government support. Many turn to fund their living costs through credit cards, or food banks, neither of which, it is suggested, is a sustainable solution to living costs outstripping NMW.

## **HEALTH**

### **Mental health**

- 37.1. Those working in low-income sectors are more likely to have a perspective that their own personal health is worse than those earning more. This is an important consideration, particularly given the spotlight the COVID-19 pandemic has shone on mental health issues within the

general UK population. Many commentators have stressed that how an individual feels about themselves has a direct impact on their mental health.

- 37.2. According to a study undertaken by The Health Foundation in 2020, around 33% of adults in the lower quartile of earnings rated their health 'less than good'. The statistics show that those in the bottom 40% of earnings are almost two times more likely to report the feeling that they are in 'bad health' compared to those in the upper 20%<sup>16</sup>.
- 37.3. There is evidence to suggest that those on low income face a major mental health crisis, fuelled initially by the perception of their own health. One of the key factors as to why those individuals on low income have this view is likely to be stress and there seems to be direct link between income and an individual's ability to manage stress. For example, those on low income are less likely to be able to save, meaning that they face the prospects of living from week to week on earnings. This will increase anxiety around the ability to afford accommodation, food and, where relevant, caring costs. Whilst it is appreciated that these are general anxieties for those in wider society, it is safe to say that these types of stressors and their impact will be heightened in those who work in low income sectors.
- 37.4. Moreover, those with higher earnings are more likely to be able to fund mental health-promoting life choices such as healthier, higher quality food and better coping mechanisms such as access to a gym or living in areas with green spaces. In addition, those in higher income sectors are more likely to be able to fund their own professional mental health assistance if required, whereas those on low income are dependent on the NHS, which is currently stretched beyond capacity. In addition, those on lower incomes may be required to try and minimise the life stressors by less healthy habits, such as excessive smoking and/or drinking,<sup>17</sup> which in turn can have a detrimental impact on their physical well-being.

### **Physical health**

- 37.5. As outlined above, those in low income sectors are likely to have increased stressors, leading to an increased risk of developing issues with their mental health. Therefore, due to this, it can be accepted that those working in lower income are more likely to suffer from physical health issues. The rationale for this is the well-established principle that

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<sup>16</sup>Health Organisation publications – "[Living in poverty was bad for your health long before COVID-19](#)"

<sup>17</sup> Health Organisation publications – "[Living in poverty was bad for your health long before COVID-19](#)"

increased stressors create physiological reactions within the body, wearing it down over time and limiting the capability of the immune system. When this is factored into the possibility of coping strategies which harm the body, such as smoking and alcohol consumption, those on low income are more likely to face an increased risk of physical health issues as a result of their low income.

37.6. Whilst the link between physical and mental health is well established, those on low income also face the possibility that, regardless of their own perception and mental health, they are more susceptible to issues with their physical health than those in higher income sectors. According to the June 2021 report issued by The Health Foundation, men living in higher average earning areas are more likely to have a higher life expectancy, with an increase in salary of £1,000 per year equating to an increase of 0.5 years for life expectancy<sup>18</sup>. A practical example shows the importance of this:

37.6.1. A male (M) aged 26 works, 37.5 hours per week, on the National Living Wage of £8.91. Their gross yearly earnings are £17,374.50. M would have one of the lowest life expectancy based upon income.

37.6.2. Another male (C), aged 26, works 37.5 hours per week, at any hourly rate of £10.00. C's gross yearly earnings would be £19,500.00. C would have an additional 1 year of life expectancy than M, for an additional £1.09 per hour.

37.6.3. W, a man aged 26, earns the average salary for his age bracket £27,220.00<sup>19</sup>. W earns just under £10,000.00 more than M each year and therefore, has around an additional 5 years of life expectancy.

37.7. Even a small increase to wages can increase life expectancy, which is likely to be based upon a better quality of life. The difference between those in lower-paid sectors and individuals earning the average salary is around five years. Clearly those in lower-paid sectors are more likely to suffer from a low quality of life and a lower life expectancy.

### **Affordability of living and debt**

37.8. Those in low-income sectors can face the prospect of living almost day-to-day, only being able to afford the essentials and, in some cases, not

<sup>18</sup> Health Organisation publications – [“Living in poverty was bad for your health long before COVID-19”](#)

<sup>19</sup> [Statistics – Annual pay employees in the UK](#)

being able to afford to cover costs when an emergency arises such as a car breakdown. In addition to obvious economic issues, those individuals may face social issues such as restriction on opportunities for development, inability to afford items/events which can relieve stress and may suffer from stigma and isolation within their community (or at best, the perception that they are subjected to such behaviour).

- 37.9. From the Government, individuals may be able to access the benefits system, including Universal Credit for those working on low income. This system replaced legacy benefits and is means tested. Below is an example benefit entitlement calculation created using entitledto.co.uk, one of the Government's recommended benefit calculators:

Two individuals, living together in the BS1 area. Both with an income of 17,374.50 per year (37.5 hours worked a week at the National Minimum Wage). Living in private rented accommodation, which is a Tax Band of B:

Eligible rent for the calculation purpose is £195.62  
Benefit entitlement £0.00 per week

- 37.10. The individuals in this example are likely to be the mainstay of low-income individuals. However, they are not entitled to receive any state benefits.
- 37.11. What are the other options for individuals to subsidise their living costs? The option chosen by many is to use credit cards and loans to either afford the basic requirements of life or increase their quality of life. Regarding the latter, there is an increasing ease of access to seeing wealth on social media but this has had a social impact. Such wealth may be seen as the required standard of living, which has led to individuals thinking that they need to live their life in a certain way. Often the only viable means to achieve this is to use credit. Regarding the former, if there are no state benefits, credit and loans are one of the only viable options an individual has, which is within their control to a degree. Other options, including charity supplements and food banks, are all essential, however using credit seems to be the preferred option.
- 37.12. However, this is not a long-term fix for those on low incomes because of course credit and debt has to be repaid, sometimes at high interest rates. Moreover, the access to credit is far more extensive than it has been previously, with a significant amount of companies offering loans, credit, payment structures. Adverts for these populate the majority of media format in the UK, ranging from TV ads to promotions sent straight to an

email inbox. There are also ‘buy now pay later’ schemes, such as Klarna, marketed on many online retailers’ websites. Klarna, a female-focused buy now pay later debt company, is used by more than 200,000 retailers, with over 10 million customers (average age 33).<sup>20</sup>

37.13. Therefore, when these factors are brought together, many individuals will become subject to the pressure of debt management and therefore be left with a choice of struggling with day-to-day life or having a large debt, alongside the relevant stressors.

37.14. Low income will most likely lead to individuals being in debt, sometimes substantially. Many will be faced with an ever-increasing debt, which will increase anxiety and stress, creating a cycle of low income, debt and poor mental health.

## **QUESTION 7**

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

38. There is a concern that migrant workers are not always paid the NLW.

## **QUESTION 9**

**The Government’s remit for the NLW is based on achieving a target of two-thirds of median earnings by 2024. Based on forecasts, our current central projection for the April 2024 NLW rate is £10.33. What are your views on this target?**

## **SUMMARY**

39. The panel has some expertise in the care sector and provides commentary on this below. In short, due to the underfunding of local authorities, who pay for contracts with care providers, the care sector will find it difficult to meet a rising NLW unless local authorities fund the increase. Low-paid workers and unions will generally consider the projection to be too low, as such increases are not in line with the real living wage.

40. The care sector is struggling with the increases in NLW when compared with funding from local authorities (see case example above). The views of the panel are that an increase of this amount will mean that many care providers

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<sup>20</sup> Eva Wiseman, [‘Debt for women has been rebranded as a naughty little treat’](#), The Guardian, 13 June 2021, available

providing social care will be unable to continue those contracts unless local authorities fund the increase.

41. Most charities in the care sector seek to pay workers increases in line with the external market and, as said above, have aspirations to pay above the NLW. However, the increases need to be flagged well in advance as this will allow for better planning. It is worth noting that given the NLW increases, the differences in pay between staff on rates at or close to the level of the NLW and their immediate superiors have been constricted or gone altogether.
42. Without reform of the sector, any further above-inflation increases to the NLW could be difficult for charities in the care sector to absorb, and therefore ample time to prepare for increases in pay is needed.
43. As stated above, many unions will support the increase in NLW, but will consider it insufficient as against the real living wage rates released by the Living Wage Foundation. See, for example, UNISON assistant general secretary Christina McAnea's comments in November 2020 on the real living wage rates of £9.50 (£10.85 in London) being released by the Living Wage Foundation:

*"Today's increase also means thousands of the lowest paid health workers employed by the NHS – cleaners, domestics, porters, security staff and drivers – no longer earn a living wage.*

*"Their colleagues working on outsourced NHS contracts fare even worse. Most employed by private contractors are on the minimum wage, and lowly statutory sick pay if they get the virus or need to isolate.*

*"It's time the government did the right thing and gave a well-earned pay rise to all those caring for us, running essential local services and keeping us safe while the virus rages."<sup>21</sup>*

44. See also Paddy Lillis from USDAW's comments quoted in Question 2 above.

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<sup>21</sup> ["Living wage increase leaves many thousands of health and care staff behind"](#), Unison, 9 November 2020

## **QUESTION 15**

**What is the outlook for the recruitment and employment of apprentices?**

### **SUMMARY**

45. As legal advisers, our experience of apprenticeships is limited, but we have a general sense from our work that apprenticeships will be increasingly used due to lower labour costs. We have direct experience of apprenticeships working well within law firms.
46. It is anticipated that there will be an increased use of apprenticeships, in part given that there is a lower cost for such labour and the benefit of such arrangements being seen as long-term investments where the apprentice will progress through the company. There is a lot of pressure on avoiding recruitment costs and the engagement of apprentices will be very helpful for that.
47. Pre-pandemic, apprentices were being used more widely than might traditionally and historically have been the case. A number of professional services firms have begun to engage apprentices, including the law firm Pinsent Masons where Solicitor Apprentices have, for the last 3 years, been engaged. Such programs are seen as an alternative to the standard solicitor qualification routes of the LPC and ILEX, offering the ability for individuals would otherwise not have been able to apply for solicitor roles to work towards that qualification whilst gaining significant and invaluable experience along the way.

## **QUESTION 18**

**What issues are there with compliance with the minimum wage and what could be done to address these?**

48. Questions 18 and 19 are answered together below.

## **QUESTION 19**

**What comments do you have on HMRC's enforcement work and the guidance available to employers?**

### **SUMMARY**

49. The panel has been able to address a number of technical issues with the legislation and compliance mechanisms, which are fully set out below. In short, employers express the following concerns:

- 49.1. **Salaried hours calculation:** Changes to the salaried hours work calculation in April 2020 have made the calculation highly complex, such that internal payroll teams are struggling to perform accurate calculations.
- 49.2. **Salary sacrifice schemes:** The Department for Business, Energy and Industrial Strategy (**BEIS**) and HM Revenue and Customs (**HMRC**)'s position on salary sacrifice schemes is that the worker's NMW is reduced by a corresponding amount to the non-cash benefit. Employers therefore prohibit lower-paid workers from using a salary sacrifice scheme (so they are not paid below NMW), which disadvantages workers. Employers are of the view there are significant advantages and no clear negative consequences for low paid workers if the policy were to change so that sacrificed portion of salary does not reduce NMW.
- 49.3. **Mandatory training cost deductions:** Where an employer makes a deduction from a worker to recover the cost of a mandatory training cost, HMRC and BEIS take the view those deductions will reduce NMW. This incentivises workers not to complete courses, because their pay will be reduced as a result of doing so. Employers are more hesitant about putting workers through such courses.
- 49.4. **Business dress requirements:** Clear guidance is required as to when NMW is reduced as a result of a worker having to purchase a required uniform.
50. Workers express the following concerns:
- 50.1. They must enforce NMW compliance themselves unless they work for one of the few businesses subject to HMRC inspection.
- 50.2. They are unlikely (realistically) to be protected from detriment for doing so, as employers who avoid paying NMW are least likely to care about protection other employment rights (such as protection from detriment rights).
- 50.3. The cost barriers to legal advice and representations are high as against the individual sums at stake.

### **ANSWERS TO QUESTIONS 18 AND 19**

51. BEIS is responsible for NMW compliance and enforcement policy and HMRC enforces the NMW Act 1998 on behalf of BEIS. In practice, Inspectors from

HMRC write to employers to open enquiries and then investigate whether there are any working or pay practices that could create NMW underpayments.

52. There are four issues with compliance with and the enforcement of NMW that the panel has experienced in respect of employers that they feel deserve attention. These are:
  - 52.1. the unforeseen impact of the change to the salaried hours work conditions in April 2020;
  - 52.2. the unintended consequences of salary sacrifice deductions reducing NMW pay;
  - 52.3. the unintended consequences of training cost deductions reducing NMW pay; and
  - 52.4. a lack of guidance on the business dress requirements that could impact on NMW pay.
53. There is one overarching issue for enforcement in respect of workers, which we deal with below.

#### **UNFORESEEN IMPACT OF THE CHANGE TO THE SALARIED HOURS WORK CONDITIONS IN APRIL 2020**

54. In the experience of one client's working group working with employers, the vast majority of employers want to pay their staff in line with the NMW requirements. However, over the last few years, employers have been penalised because of inadvertent technical NMW underpayments. This is especially true where employers pay staff an annual salary.
55. This is because until the NMW Regulations were changed in April 2020, it was very rare for a worker to meet the four conditions of salaried hours work and so the vast majority of workers in receipt of a salary were performing unmeasured work. The NMW calculation for a worker performing unmeasured work is relatively simple - it involves dividing the relevant pay for a pay reference period by the hours worked in that period. However, where a worker's salary is relatively low, this means that in months with higher than average working days, a worker can be paid below the NMW.
56. As a result of this issue, over the last few years, many employers discovered that they had inadvertently paid workers below the NMW, despite the fact that when a worker's annual salary was divided by the annual number of working hours, the hourly rate this produced was above the NMW. This resulted in

substantial liabilities for a number of large employers. As a result, many employers raised concerns with BEIS and HMRC about this issue to seek a solution. Whilst one solution was to change pay practices to pay workers by the hour, instead of a set monthly salary, employers found that this is not what workers wanted. The vast majority of workers prefer to receive a salary than be paid by the hour because they know exactly how much they will earn each month and this can help them with obtaining mortgages, paying bills and managing their cash flow.

57. The proposed solution was provided in the NMW (Amendment) (No. 2) Regulations 2020 (the **2020 Regulations**) that came into effect on 6 April 2020. The 2020 Regulations amended the conditions that needed to be satisfied for a worker to perform salaried hours work. In doing so, it meant that the majority of workers in receipt of a salary will now meet the conditions of salaried hours work. Helpfully, the 2020 Regulations provided employers with a two year transitional period to switch workers from performing unmeasured work to salaried hours work. However, any workers that joined a business after 6 April 2020 were not caught by these transitional provisions and so, if they met the conditions, they started performing salaried hours work from their date of joining. This caused issues for employers because a salaried hours work calculation is complex and was not the solution to the NMW concerns that employers had raised.
58. The salaried hours work calculation is a combination of three separate calculations. These are:
  - 58.1. employers need to do an NMW calculation in each pay reference period to assess whether pay in each period is enough to cover the average number of hours a worker is expected to work in that period (e.g. for a monthly paid worker, employers would divide the NMW pay for a month by 1/12 of the worker's annual hours and make adjustments for absences paid at below the normal level of pay);
  - 58.2. employers need to keep a cumulative record of every hour of work and absence over a worker's calculation year to ascertain whether a worker has worked all of their basic annual hours; and
  - 58.3. once a worker has worked all of their basic annual hours, an excess hours calculation is required (the **Excess Hours Calculation**). This calculation is highly complex. In essence it involves counting both the hours worked in a pay reference period and the hours expected to be worked in that period (i.e. it double counts the hours).

59. The Excess Hours Calculation can be the cause of significant NMW liabilities for employers. As an example, a worker that earns £30,000 per year and works one additional unpaid hour each working day would have a circa £500 NMW liability arising in their final pay reference period as a result of the Excess Hours Calculation - there would be no NMW underpayment in any of the previous 11 months. It is important to note that the same worker would not have had an NMW underpayment if they were performing unmeasured work.
60. This means that employers have moved from a position where workers were performing unmeasured work, which required a simple NMW calculation to check compliance, to a position where workers are performing salaried hours work, which requires calculations so complex that almost all payroll providers and internal payroll teams of the UK's largest employers are currently unable to accurately perform the calculations.
61. As an example, challenges arise where a worker has a change in contractual hours and also leaves employment part-way through a calculation year. The NMW Regulations are unclear as to how this should be dealt with and there is more than one legitimate interpretation of what is required. However, neither HMRC or BEIS has outlined how they interpret the legislation or how they would expect employers to perform the calculations in this example.
62. This leaves employers in a difficult position because they are trying to work through the complexities of NMW compliance without clear guidance and they fear that if they interpret the legislation differently to BEIS or HMRC, then in a future NMW enquiry, HMRC could identify NMW underpayments and penalise that employer. This would then lead to public naming by BEIS as an employer that pays its staff below the NMW.
63. This problem is compounded as there is no clear mechanism for BEIS or HMRC to provide clarification on employer queries in individual cases. There is a particular challenge where legislation is ambiguous but enforced by HMRC without room for discretion. There is clear precedent for the approach that could be adopted: elements of the CJRS scheme were expressly given over to the employer to determine, with the only test being whether they were unreasonable. That same approach would work well in the NMW context. Employers would welcome an acknowledgment by BEIS that in situations where clear guidance is not in place and employers have performed their NMW calculations reasonably, penalties would not be levied and public naming would not take place.
64. One specific issue with the 2020 Regulations that employers are also concerned by is the inability to change a worker's calculation year more than once in a six year period. This puts employers in a particularly difficult position,

especially where a worker's calculation year has been set and that worker then TUPE transfers to a new employer. The transferee is currently stuck with the calculation year set by the previous employer until the end of the six year period. It would help businesses considerably if BEIS determines that in these specific circumstances, the rules can be relaxed and employers are able to change workers' calculation years.

### **THE UNINTENDED CONSEQUENCES OF SALARY SACRIFICE DEDUCTIONS REDUCING NMW PAY**

65. BEIS and HMRC's position is that where a worker takes part in a salary sacrifice scheme, their NMW pay is reduced by the corresponding sacrificed amount. This puts workers on low incomes at a disadvantage to their higher paid colleagues. This is because employers are having to prohibit workers earning below a certain threshold from using a salary sacrifice scheme. This then means that workers on low incomes cannot benefit from the same employer benefits (e.g. employer car schemes) as their higher-paid colleagues.
66. There appears to be significant advantages and no clear negative consequence for a low paid worker if BEIS' policy in relation to salary sacrifice schemes is amended so that the sacrificed portion of salary does not reduce NMW pay in these situations.

### **THE UNINTENDED CONSEQUENCES OF TRAINING COST DEDUCTIONS REDUCING NMW PAY**

67. Where an employer makes a deduction from a worker to recover the cost of a training course they have been provided with, HMRC and BEIS' position is that those deductions will reduce NMW pay in all circumstances if the course was mandatory. The difficulty with this position is that employers can find themselves in a position where they have employed a worker, paid for the worker to do a course and then the worker does not complete the course. This is because, if the employer seeks to recover the wasted costs from the worker, this will reduce the worker's NMW pay and likely lead to NMW underpayments. This is the case even where an employer has an explicit contractual right to make the deduction.
68. The scenarios where employers may want to recover these sums are where a worker has committed gross misconduct or opted to resign from the employer part way through a course (or even just after a course has started). In these situations, the employer could have spent a considerable amount of money to help the worker obtain a qualification and then find that the money was wasted, with no means of recovering the money from the worker without this causing NMW breaches.

69. As a result of this, employers are now more hesitant about whether to put workers through qualifications where they know there is a risk that they may not be able to recover the costs of these qualifications in the circumstances outlined above.
70. The EAT was clear in *Commissioners for HM Revenue and Customs v Ant Marketing Limited [2019] 10 WLUK 845* in 2019 that the NMW Regulations support HMRC's view on this. However, it would benefit employers if the NMW Regulations are amended so that in the circumstances set out above (i.e. where a worker commits gross misconduct or resigns part way through a course), employers are able to recover the wasted costs from workers without this reducing NMW pay.

#### **A LACK OF GUIDANCE ON THE BUSINESS DRESS REQUIREMENTS THAT COULD IMPACT ON NMW PAY**

71. HMRC and BEIS' position is that if an employer requires a worker to purchase specific items, such as overalls, then any deductions made from pay or payments made to the employer in respect of those items will always reduce NMW pay. Similarly, if a worker makes a payment to a third party for required uniform items the payment will also reduce NMW pay since it is expenditure incurred in connection with the worker's employment. However, HMRC and BEIS' position is not clear on when this applies and when it does not.
72. As an example, the position appears to be that where an employer states that a worker needs to wear black shoes, the cost of shoes will reduce NMW pay. However, where an employer states that a worker needs to wear dark shoes, the position is less clear on whether this is specific enough to reduce NMW pay.
73. In addition, where HMRC determines that a worker has had to incur expenditure in connection with their employment, the amount that HMRC requires to be deducted from NMW pay varies from one inspector to the next; there is no consistent treatment between employers on the cost of these items. This means that some employers are more harshly treated than others, despite having the same or very similar business dress requirements.
74. The strict position under the NMW Regulations 2015 is that a worker's pay is reduced by the cost that individual has incurred. Regulation 13 states:

*Subject to the exception in paragraph (2), the following deductions and payments are to be treated as reductions if the deduction or payment is paid by or due from the worker in the pay reference period—*

*deductions made by the employer as respects the worker's expenditure in connection with the employment;*

*payments—*

*paid by or due from the worker to the employer as respects the worker's expenditure in connection with the employment, or*

*to any other person on account of such expenditure.*

*The payments referred to in subparagraph (1)(b) are not to be treated as reductions if the expenditure is met, or intended to be met, by a payment paid to the worker by the employer.*

75. This means that the amount of each notional deduction from workers' pay is determined by how much each individual has actually incurred. This creates two main problems. Firstly, where HMRC is investigating a large employer, it cannot determine how much each individual has actually incurred and the amounts incurred will vary from person to person. Secondly, given that each individual could purchase a different item to comply with a business dress requirement, it is unclear what an employer should do where the amount incurred by a worker is well above what needs to be incurred. A worker could, as an example, purchase the cheapest shoes they could find, whereas their colleague could buy designer shoes for considerably more. The common sense approach must be that employers are not required to reduce NMW pay by an amount that is above the level a worker is required to incur, but it is not clear whether this means that the amount by which NMW pay should be reduced by is equivalent to the cheapest item that meet the business dress requirements.
76. Employers would like further clarification of these issues and desire more consistency from HMRC so that there is uniformity of treatment between employers.

## **WORKERS AND ENFORCEMENT**

77. Firstly, unless workers are fortunate enough to work in one of the few businesses that is subject to HMRC inspection on NMW compliance they are left to enforce the NMW themselves. This is difficult and complex.
78. Secondly, whilst there is protection from detriment for pursuing such NMW complaints against employers it is those employers who fail to observe the NMW who are also more likely to fail to be deterred by such protections. The protections will only lead to damages claims succeeding, with the delay in Employment Tribunals, many months into the future. That operates as a

significant disincentive for workers whose contracts will have been terminated immediately.

79. Thirdly an individual claim may be relatively small but the barriers in complexity of the law and cost of advice are high. Both the cost of enforcement and the low sums at stake threaten the rule of law in respect of the efficacy of the NMW protection in some sectors. The solution to this issue is two fold:
- 79.1. to ensure that HMRC and the future Single Enforcement Authority both have the budget so that they can pursue enough investigations and enforcement activities so as to deter non compliance with the NMW.
- 79.2. the enforcing authority should ensure that the rights which it enforces are publicised in the low paid workforce which it operates and to ensure that complaints in respect of individual employers can be made by workers anonymously.
80. See also our section on the *Uber* decision below (Question 22), regarding the reality that certain contractors or employers do not know that they employ workers (considering them to be independent contractors), further complicating the relief available for workers (if their employer is denying them worker status in the first place).

## **QUESTION 21**

**Under section 57(3) of the National Minimum Wage Regulations 2015, work done by a worker in relation to an employee's family household is exempt from the NMW if the worker lives with the employer and is treated as a member of the family. What evidence do you have on the use of this exemption? We are particularly interested in evidence on the characteristics of workers affected; and the prevalence of its use.**

## **SUMMARY**

81. Our limited evidence on this issue showed that all users of the exemption (e.g. the worker) are women. Greater clarity is needed on the exemption in workers' contracts and through publicly-available information and guidance.
82. Clients have reported that some workers have contracts which incorporate the family household exemption, but this is not explained to them or clear from their contracts. The reports from clients are that greater clarity and public information on this exemption would be helpful, particularly if it could be translated into foreign languages, as a number of individuals working in these roles speak English as a second language.

83. With Brexit effectively meaning the end of the use of au pairs in the UK, and the consequent likely increase in use of this exemption, it would be sensible for guidance to be given around the use of this exemption, including clear advice to employers and employees. The guidance could stipulate that employers are encouraged to explain the nature of the exemption to prospective workers.
84. We received limited evidence on the types of users of the exemption, but from the evidence the panel received, all workers to whom the exemption was applied were women. We do not refer to ongoing cases in our consultation response but note the adverse impact of this section on women.

## **QUESTION 22**

**Is there any other evidence, not touched on in the questions above, which you wish to share on issues relating to the NLW/NMW?**

### **SUMMARY**

85. The Low Pay Commission's recommendations are of critical importance, as was highlighted in the Supreme Court's decision in the *Mencap* case (see below), where its recommendations were heavily relied upon for the Court's finding that workers are not entitled to NMW for the full duration of their sleep-in shifts. We suggest the Low Pay Commission revisit its guidance on sleep-in shifts. We note that in practice a number of providers have stopped paying *any* allowance for such shifts, relying on the *Mencap* decision.
86. Furthermore, the ELA is concerned that the *Mencap* decision may not just be applied to sleep-in workers, but that it may be extended to all home workers. It could be used by employers to found an argument not to pay home workers when they are 'available' for work but not performing duties for their employer. Addressing this issue is urgent given the increase in working from home due to the Covid-19 pandemic, and in order to prevent unnecessary, costly litigation on the point.
87. In the panel's experience, a number of employers are not aware that they employ workers, relying on contracts styled as 'independent contractor agreements'. Post the Supreme Court's decision in *Uber* such employers / contractors may need to re-assess the working conditions of their workers / independent contractors, to determine whether, for example, they need to be paying NMW. Public information about this would be helpful.

## MENCAP DECISION

88. In March 2021, the Supreme Court in *Royal Mencap Society v Tomlinson-Blake* held that employees are not entitled to the NMW for the full duration of their sleep-in shift. This decision means that providers in the care sector no longer face the financial toll of significant back-pay liabilities, which would have potentially forced many employers in the sector into insolvency.
89. Many in the care sector, however, wish to pay staff a proper wage for work, especially following one of the most challenging periods for the sector.
90. Care still needs to be provided to those that require sleep-in support. This requires workers to sleep away from home in care services or in the homes of those they support. Although the Supreme Court stated that a sleep-in allowance would be good practice, there is no statutory requirement to pay an allowance for sleep-ins. In our experience, some providers are using the Mencap case as a justification to allow them no longer pay an allowance and some local authorities are not funding these allowances based on the Mencap decision. We consider that this step is not a proper application of the Mencap decision which endorses the practice that an allowance is to be agreed for sleeping hours and then the NMW is to be paid for working hours. The decision in Mencap has allowed care providers to require care workers to provide this service for nothing, only paying for the time when the worker is awake and providing the service (typically less than one hour a night). This approach would be unjust and exploit workers to provide something (the sleep ins) for nothing. Many care providers would like to pay an allowance for a sleep-in shift but the financial position of care providers makes that increasingly difficult.
91. In coming to its decision, the Supreme Court, like the Court of Appeal before it, referred to the recommendations of the Low Pay Commission in its report published in June 1998, which the Government largely accepted at the time. It concluded that the report was an important aid to the interpretation of the NMW Regulations, which deal with the calculation of the NMW. The report, which refers to those required to be on-call who sleep on their employer's premises, states:  
  
*"For hours when workers are paid to sleep on the premises, we recommend that workers and employers should agree their allowance, as they do now. But workers should be entitled to the National Minimum Wage for all times when they are awake and required to be available for work."*
92. The Court concluded that the objectives of the provisions of the NMW Regulations designed to deal with the calculation of hours for sleep-in work are those identified by the Low Pay Commission. This meant that work should

normally include time for which a worker was required to be available for work at the place of work. However, in the Court's view "(by implication) that would not apply if the worker was not at the place of work but at home (the home exception). It would also expressly not apply to workers who were required to be on call and to sleep at their employers' premises".

93. The Supreme Court clearly states in its decision that, "To be available for work a person must be both awake for the purposes of working and not simply awake for his own purposes. This meant that the hours that he is permitted to sleep do not form part of the calculation of his hours for NMW purposes (unless he is woken for work reasons)."
94. We suggest that the Low Pay Commission revisit the guidance it gave on this subject in the report in June 1998 and in particular addresses whether it is appropriate to require workers to work sleep-ins, when employers are no longer in a situation where they can afford to pay any allowance to workers.

## **22.1 - THE HOME WORK EXEMPTION**

95. The Mencap decision is far reaching. It affects more than just sleep-in workers. The same exemption that applies to sleep-in workers provided for sleep-in workers with suitable facilities applies to all workers who work at home.
96. This means that any person who is 'available for work' from home but is not working could be exempted from the NMW for the 'availability' time. The BNA case that the Supreme Court overruled as being a case that now should not be followed was about a call centre that operated at home. This is now common as a result of the pandemic. In BNA the call centre employees, although at home, were working throughout the shift. This should now be replaced by the test set out above. However, this test does not apply just to a 'sleep-in' worker but also to a person who works from their home. They are covered by the same exemption.
97. An employer might argue that a worker waiting to answer a call is only 'available' for work and therefore not working. The worker will argue that they are working throughout the shift. As a result of Mencap, the answer is no longer clear that the worker is working throughout the shift. This could result in a worker who has to be 'available' at home to answer the phone only being paid for the 10-20 minutes of answering the telephone in an 8 hour shift.
98. As Lord Carnwath noted in Mencap that home-working "*may well become important in other cases, particularly arising out of the period of the Covid-19 lockdown.*"

99. There is a real risk that those who are using low paid workers currently from their homes may argue that the NMW should not be payable when their workers are not performing duties for the employer. There are conflicting statements from their Lordships about whether such an argument would succeed.
100. Lady Arden stated at para 59: “*The further effect of the home exception is that he is outside the extended meaning of work in regulation 15 and so, for his time to be included in the calculation for NMW purposes, he has to show that he is actually working. He can do this **when he is actually performing duties as part of his employment.***” (emphasis added)
101. However, Lord Kitchin later stated at para 99: “*This does not mean to say that a person cannot be performing time work within the meaning of regulation 3 just because the tasks she is required to undertake are intermittent, however. As Underhill LJ explained at para 56 of his judgment and I agree, there are no doubt many kinds of work which can be and are performed from home and in which tasks only come up intermittently but where a person is still performing time work in the periods between those tasks.*” He considers that the busier periods of the night shift in BNA could possibly have fallen in this category. He continues: “*Nor is a finding that a person is actually working necessarily inconsistent with that worker making a cup of tea **or even having a nap between tasks.***” (emphasis added)
102. The need for action and clarity is urgent given the shift to homeworking and the real potential for injustice to low paid home-workers who perform their work at home. Unless either the Low Pay Commission or the Government acts, there will be uncertainty and litigation which results in depressed earnings of the lowest paid in society.

## 22.2 - UBER DECISION

103. In the panel’s experience, many employers are unaware that they employ workers rather than independent contractors. Both types are self-employed, but one has a greater dependency on the employer. This is relevant because workers are entitled to the national minimum wage, whereas independent contractors are not. Guidance for employers / contractors on when someone is a worker would likely help employers and employees identify the relevant rights at stake.
104. This is particularly important in light of the Supreme Court’s decision in *Uber BV v Aslam* [2021] UKSC 5,<sup>22</sup> handed down on 19 February 2021, which clarified

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<sup>22</sup> [Uber BV v Aslam \[2021\] UKSC 5 \(19 February 2021\)](#)

that the starting point in determining whether someone is a worker is to look at the words of the statute (or regulations, as applicable), and all the factual elements at play in the working relationship, to determine whether the statutory criteria is fulfilled, rather than to start with the contract. In light of this, employers / contractors may have to review their working arrangements to re-assess whether they employ workers and therefore need to pay NMW.

### **Members of ELA Working Party**

Emma Burrows	Trowers and Hamblins LLP	Co-Chair
Anna Dannreuther	Field Court Chambers	Co-Chair
Rachel Giles	CIC	
Shuabe Shabudin	Pinsent Masons	
Matthew Shelley	PWC	
Victoria Speed	South West London Law Centres	
Matthew Warren	Wards	