

## Briefing from Learning Disability Voices, VODG, ARC and Care England on 'sleep-ins' and the learning disability sector – 17/01/2018

### Summary

There remains a very real, and as yet unresolved threat to the sustainability of the social care and learning disability sectors posed by the absence of a Government funding commitment, to pay workers in the sector back pay for sleep in shifts going back six years. The sector, through no fault of its own, finds itself in a potentially dire and uncertain financial position as a result of the ongoing mishandling and confusion around this matter over the last eighteen months.

As a group of leading learning disability and social care providers, Learning Disability Voices (LDV), along with partner organisations, VODG, ARC and Care England has pro-actively sought to cooperate with the Government to achieve a workable solution to the sleep-ins issue. Holding many meetings with relevant officials and ministers and complying fully with the audit carried out by Deloitte over the summer. We have also provided feedback to the Department of Health and to LaingBuisson on the upcoming market analysis exercise being undertaken.

We strongly believe that our workers should be paid fairly, but we are unable to pay the six years of back pay which the Government is demanding, without access to corresponding Government funding. It is important to point out that the sector is not asking for additional funding, simply for the Government to cover the costs of the liability which it has created. If the Government's guidance on sleep-ins had been clearer from the start, then the Government would have already paid out the correct level of sleep-in pay through revised contracts. The Government has already [publicly admitted that its guidance was 'potentially misleading'](#). It is therefore only right that it now funds the NMW/NLW rate for sleep-ins. It has a statutory obligation to do so.

The Government also promised the sector that such funding would be put in place. We were therefore seriously alarmed when the Government launched its [new social care compliance scheme \(SCCS\) on 1<sup>st</sup> November](#) without any commitment to fund back pay, and ignoring the concerns that LDV and partner organisations had raised with the officials of relevant departments in the weeks and months previously.

The Government's failure to commit to funding the back pay liability ahead of the launch of the SCCS leaves the sector in an impossible situation. Our members want to ensure that their staff are paid the back pay they are owed and as quickly as possible and therefore on that basis, we feel that many will join the scheme, out of good faith. But they will be doing so without any certainty over how the cost of the liability will be met and without adequate detail within the scheme on the full extent of the liability being faced.

It is with all this in mind that we seek your support to address these issues with Government, as a matter of urgency. Further background on the sleep-ins situation can be found below. Our key asks are as follows:

### Key asks

- **Government should urgently share the content of the surveys commissioned from Deloitte and King's College, so that the liability and grave financial consequence for the learning disability sector are made clear.**
- **Government should meet its statutory obligation to fund the estimated £400m liability of back pay and ensure that the sector, the vulnerable people it supports, and its staff are not adversely affected by the Government's mismanagement of the sleep-ins issue.**
- **A large part of this additional cost (around 28 per cent or £122m) is made up of tax and national insurance. Government should forego any tax income generated through the Social Care Compliance Scheme and use it to reduce the cost of the liability.**
- **In addition to the estimated £400m required to be paid out to councils so as to fund providers and though them, their workforce for the retrospective liability; substantial additional money, specifically for local authorities to be able to pay sleep-ins, and which takes into account these changes in the workforce, must be met. This will require detailed analysis and consultation with providers and the LGA, and we urge the Government to begin this process as soon as possible.**

### **Background**

Providers in the learning disability sector seek to provide good quality social care on behalf of local authorities, for vulnerable disabled adults with dual diagnoses, learning disabilities, complex needs and challenging behaviour. These individuals are enabled, by this care, to live independent lives at home, in community settings within constituencies the length and breadth of this United Kingdom. This is part of the Government's own Transforming Care agenda, allowing society's most vulnerable people to live independent and meaningful lives with dignity in community settings, rather than in inappropriate institutionalised care.

Due to the complexity of these individual's needs, the level of care can be very high. People supported by the sector require 1:1, 2:1 or sometimes even 3:1 care. At night, support, for those who need it, is provided by members of staff sleeping in these community care settings overnight, so as to be on site to provide care should it be needed during the night. These shifts are known as 'sleep-ins'.

Local authorities decide the care hour rate to pay providers for their staff who tender this care. Traditionally, sleep-in care workers used to be paid at a flat rate – they have enjoyed a separate legal status ever since the introduction of the national minimum wage. This means that sleep-in staff were paid at the flat rate with a normal hourly rate kicking in if staff had to be woken in the night to provide care.

In February 2015, in response to a number of tribunal judgements, the Department for Business, Innovation and Skills changed its guidance on 'sleep-in' shifts. However, all that happened was the inclusion in the updated BIS guidance of a reference that a worker who was asleep 'could be deemed to be 'working''. This ambiguous change was not flagged in the introduction to the guidance, and was not the subject of any public announcement or communication to employers or their representative bodies. This included guidance and compliance structures from HMRC and CQC as part of their regular inspection of providers.

This new guidance in February 2015 was not adhered to by HMRC when inspecting providers, so that providers were not subject to enforcement on sleep-ins commensurate with the NLW until as late as November 2016. Critically, local authorities, which are the only source of custom for providers, did not pay sleep-in rates commensurate with the NLW during this time. Local authorities did not, and

many still do not, reflect this change to guidance, or the fact that sleep-ins are subject to the NLW in the care hour rates paid to providers.

Many providers who have been paying rates commensurate with the NLW have been forced to, and continue to run at a loss, as this additional money is not provided by local authorities, which has clear financial consequences for the sector.

Furthermore, until earlier this year, the sector was repeatedly told that HMRC would not be pursuing retrospective liability on sleep-ins, even though HMRC had begun this process. It took the sector, and the influence of the Department of Health with additional questions from MPs in Parliament, for a cross departmental Ministerial meeting to take place, and for Government to realise the consequences of the mishandling of this matter in May this year.

Despite these errors, HMRC began enforcing BEIS guidance on all employees with sleep-in staff and have asked for backdated payments for the last six years (despite the disputed guidance only changing two years ago). The bill is estimated to be £400 million and will have a catastrophic impact on the care sector. As stated above around £122 million (28 per cent) of cost will be paid to the HMRC in the form of tax and National Insurance.

Individual disabled people using council-funded Direct Payments/Personal Budgets to commission their own care are also being charged.

### **Suspension of HMRC activity**

Following months of lobbying by organisations such as LDV, the Government announced on 26<sup>th</sup> July that it would be suspending HMRC enforcement activity, whilst a solution to the sleep-in issues was found. This action was repeated on 28<sup>th</sup> September.

During this time LDV and partners organisations proactively worked with Government officials to find a workable solution to the liability issue.

Providers complied fully with a Government audit of the sector by Deloitte and DH over the summer. Whilst DH has failed to respond to our requests to publish the findings of the Deloitte survey, officials have confirmed that the liability is at least as much as £400m, and potentially higher.

We took part in several working groups with officials from DH, BEIS/HMRC, where compliance and funding were discussed. This included discussions around the establishment of a Government funding pot to meet the costs. It was made very clear by us that a compliance scheme would only work if it was coupled with Government funding to cover the liability – a liability which the Government has a statutory duty to meet. The Government indicated that a funding solution would be found. In its [announcement of 28<sup>th</sup> September](#), the Government highlighted that it was looking at the evidence base to ensure that any intervention was “proportionate and necessary” and was considering how this was affected by State Aid rules.

### **The November announcement**

On 1<sup>st</sup> November, and without prior consultation with the sector, the Government announced its Social Care Compliance Scheme (SCCS). The SCCS was launched without any clarification from the Government on how providers were to pay any back pay liability that the scheme deemed them to have. Furthermore, information published about the scheme failed to clarify the extent of the liability being faced.

We have since found out that any organisation that joins the SCCS will be required to calculate back pay for the 6 years prior to the date it enters the scheme. This is despite [the Government confirming in a document on enforcement](#), which it published alongside its November announcement that guidance provided to the social care sector on the payment of the NMW/NLW for sleep-ins was “potentially misleading” prior to February 2015.

Officials have also confirmed in subsequent discussions that any decisions over funding back pay will take at least six months to finalise. The stated reason for this is that EU State Aid rules apply. However, we have received advice that State Aid rules would not apply if the payment is intended to be compensation for misleading guidance. In any event the Government first raised the State Aid issue in August 2017 and has not yet finalised the specification for the market report required to support an application for State Aid clearance let alone commenced the work required to complete the report. We are concerned that this indicates an unacceptable lack of urgency in seeking to address the issue.

Whilst we appreciate that any organisation opting to join the compliance scheme will not have to meet its back pay liability earlier than 31<sup>st</sup> March 2019, this provides little comfort to organisations, that have already been subject to HMRC activity and which have, therefore, only being given 30 days to decide whether or not to join the scheme, and no clarification on who will ultimately fund their liability if they do.

The new compliance scheme therefore achieves little in terms of resolving the critical issues facing the sector, the vulnerable people we care for and our staff, in terms of the sleep-ins issue. Many other organisations, including Unison, have also criticised the scheme for failing to meet the purpose for which it was intended.

We would strongly argue that the compliance scheme is simply unworkable without the Government providing assurances to providers that it will meet the cost of the liability, which has come about through the Government’s mismanagement of the sleep-ins issue. We believe that it has a statutory duty to do so.

### **The future**

As a result of the Government’s failure to commit to funding back pay, we are in stalemate situation, where no progress can be made and providers and the vulnerable people in our care remain uncertain about the future of the care that we provide. For our staff, there is doubt over when they will be paid any back pay that they are owed.

Without a resolution of the funding issue, the future of the sector remains uncertain. The Care Quality Commission already believes services to be at a ‘tipping point’. Local authorities and Clinical Commissioning Groups do not have the resources to meet the funding gap, The Local Government Association has been very clear that none of the additional funding announced for social care in 2017 has been allocated to meet the financial pressures arising from the issue of ‘sleep-ins’ in the learning disability sector.

The significant increase in delivery costs will inevitably lead to a reduction in services, with less overnight support, less specialisation and fewer providers. As services close, commissioners will struggle to find residential places for vulnerable people.

People who have been allocated a health or social care personal budget, or a direct payment, will be unable to afford the same level of sleep-in support. Cost increases will also damage the growing self-funded market, leading to further pressure on local authorities and CCGs.

This constitutes a serious threat to the learning disability sector, as well as the wider impact on health and social care. Failure to resolve the issue has profound implications for people with disabilities in the UK, as it will severely damage the ability of the sector to support people to live ordinary lives in the community undermining Chapter 4 of the Care Act and the Government's Transforming Care Agenda.

### **Costs**

In assessing the future costs to the sector of the move to paying NLW/NMW for all social care sleep in shifts, the costs will exceed the minimum uplifts that workers are entitled to, so as to top up their salary to the applicable rate of NLW/NMW over future pay periods because:

- If the effect of the change is to require time spent asleep to be considered working time under Working Time Directive then some current shift patterns (for example where a worker carries out a day shift, sleeps overnight and then carries out another day shift the next day) may no longer be compliant with the working time directive and additional workers will be required to cover one or more of those shifts. This will increase the demand for workers in a sector which already struggles to recruit and is likely to drive up costs because additional agency staff will be required.
- The change means that workers are paid the same to be asleep as awake, this means that recruiting for waking night shifts (during which sleeping is not permitted) will become much harder. We are already experiencing this impact and this will lead to a need to pay workers for waking nights at a rate in excess of NLW/NMW to compensate them for the additional workload compared to sleep in workers.
- Similarly, senior workers are understandably reluctant to work sleep-in shifts if they only receive a top-up to NLW. Because they are more highly paid than their more junior colleagues they would receive less per shift (on a top up basis) than their junior colleagues for the sleep-in. This also reduces the salary uplift a junior worker would expect on promotion to a more senior role and there reduces the incentive for them to take on the additional responsibility. This means senior workers who carry out sleep in shifts will need to have their salaries increased by more than the amount required on a top up basis.
- Employers are obliged to pay holiday pay for time spent asleep. This is an additional on cost.

### **Conclusion**

All of the parties involved in current discussions have a shared interest in ensuring that workers across the sector are fairly remunerated for the work they do to support thousands of vulnerable people every day, including round the clock sleep in cover. This cannot happen, however, without sufficient funding being made available from the Government to cover the liability – a liability which it has created.

The Government must clarify the funding position as a matter of urgency. Failure to do so leaves the social care market in an unstable position, and providers and the Government unable to guarantee the future provision of care to those who need it.