

# Supported Living Sleep-in Fees

Consultation report - May 2019

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# 1. Executive summary

This report summarises the response to Lancashire County Council's consultation on the proposals to reduce supported living sleep-in fees.

The consultation follows a meeting with supported living providers in September 2018<sup>1</sup> and a Cabinet decision in December 2018<sup>2</sup> to reduce sleep-in fees.

Further to the 3 December cabinet decision the county council it was asked if it would formally consult with all affected providers in relation to the proposed changes to sleep-in fees. Ordinarily this is not a decision which the county council would consult on, however, cabinet welcomed the opportunity to hear from providers on what this significant change in legal ruling would mean for people affected.

An electronic questionnaire was developed with the support of an existing service provider. Affected providers were notified via email and provided with a link to the questionnaire.

The consultation opened on 28 January 2019 for eight weeks; closing on 25 March 2019. Supported Living providers had previously been notified of the intention to consult during December 2018 and again in January 2019 via email. A further reminder email was sent to all providers two weeks prior to the consultation closing.

The county council has not consulted service users or their families due to the proposed changes relating to contractual terms and conditions with providers who each have different operating and service delivery models. In turn, as per the terms of their contracts with the county council, service providers will be required to implement any fee changes without impacting on the quality of service provided to individual service users.

The county council holds contracts with numerous providers delivering supported living sleep-in services. However, ten providers deliver almost two-thirds of the value of commissioned sleep-in services. Of these top ten providers six responded (hereafter referred to as top providers<sup>3</sup>).

A total of 22 completed questionnaires were returned. In addition the Lancashire Learning Disability Consortium<sup>4</sup> (LLDC) wrote to the county council expressing their concerns about the level of reduction and asked that their letter be considered as part of the consultation process. The points raised in their letter are not included in consultation response charts presented below. However, the issues raised have been considered alongside the equality impact assessment and responses to the consultation questionnaire.

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<sup>1</sup> In September 2018, the county council held an informal meeting with nine supported living providers to seek their views and potential implications of a reduction in sleep-in fees, resulting from the Court of Appeal Decision. 61 providers were invited; 9 providers attended the meeting.

<sup>2</sup> Further details are provided in the cabinet report of 3 December 2018:

<http://council.lancashire.gov.uk/ielssueDetails.aspx?Id=78250&PlanId=0&Opt=3%20-%20AI62018>

<sup>3</sup> Throughout this consultation paper, the size of a provider is measured according to the financial value of supported living support that the county council commissions with that provider.

<sup>4</sup> The LLDC represents a broad coalition of voluntary sector providers of services to people with learning disabilities in Lancashire.

## **1.1 Key Findings**

### ***1.1.1 Ability to deliver effective services***

Respondents were asked to describe how the proposal would impact on their ability to deliver effective services with a focus on sleep-in services.

20 respondents indicated the proposal will have a negative impact on their ability to deliver effective services. Two respondents did not provide answer this question.

A common theme to responses was low pay leading to recruitment and retention issues combined with staff no longer wanting to cover night time shifts. Four respondents stated that other commissioners were not proposing to reduce their sleep-in fees.

### ***1.1.2 Impact on financial position***

When asked to describe how the proposal would impact on their financial position, 18 respondents indicated that the proposal would have a negative effect on their financial position, with four providers stating it would threaten the sustainability of their business. None of the top providers stated it would threaten the sustainability of their business. However, one stated that they would consider handing back their contract with the county council.

### ***1.1.3 Inclusion of on-costs in sleep-in fees paid to providers***

The county council's current sleep in fee payment does not make an allowance for on-costs other than national insurance and pension costs. Respondents were asked, based on a staff payment of £36.08, to state the percentage of on-costs required in order to recover full costs relating to a Sleep-in Shifts.

18 respondents indicated that the fees need to cover additional staff overheads such as holiday pay and apprenticeship levy and also an allowance for management and profit / surplus. 15 respondents provided information indicating a mark-up in the order of 36% on staff payment is required.

### ***1.1.4 Impact on recruitment and retention***

Providers were asked to describe how the proposal would impact on their ability to recruit and retain staff.

20 respondents indicated the proposal would have a negative effect on their ability to recruit and retain staff. 11 respondents stated their ability to recruit and retain staff was impacted by rates of pay which would be further impacted by this proposal.

### ***1.1.5 Any other comments***

When all respondents were asked if they think there is anything else that we need to consider about the proposal, respondents frequently referenced the financial, recruitment and retention issues that the proposal would cause them as a company. Full details of responses are shown in section 4 however themes referenced include:

- Five respondents indicated the county council should wait to hear the outcome of the Unison appeal<sup>5</sup> before making changes to fees.
- Four respondents stated that alternative service delivery solutions should be found.
- Four respondents stated they were aware of staff at other providers' taking strike action. 1 respondent said they may find that their own staff take strike action. None of the top providers mentioned strike action.
- Three respondents including one of our top providers indicated the fee level should be based on national living wage.
- Two respondents questioned why service users have not been consulted.
- Two respondents stated it was not fair to link the rate to the county councils terms and conditions due to overall terms and conditions being more favourable with the county council.

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<sup>5</sup> The Supreme Court has now granted Unison the right to appeal the Court of Appeal July 2018 ruling but it is unlikely that a decision will be reached before 2020.

## 2. Introduction

The County council is committed to providing the best services we can to the people of Lancashire, particularly to the most vulnerable in our communities. However, the council's financial position remains extremely challenging. Because of this, we still need to make some difficult decisions in order to make further savings.

Lancashire County Council commissions sleep-in services with external care and support organisations for over 1,000 people at an annual cost of approximately £13 million.

Sleep-in services are a mechanism to ensure people who might occasionally require care and support during the night have access to the support they require when they need it. Sleep in shifts are not provided where people require regular night time support. In these situations alternative arrangements are put in place whereby staff are required to be awake during the night.

Sleep-in shifts are typically delivered between 10pm and 7 am, however, this does vary depending upon the needs of the people receiving the service. This consultation relates to sleep-in services (and the associated fee) within supported living where the majority of sleep-in shifts are delivered in households where a number of people require care and share access to the sleep-in support. Sleep-in shifts within residential and nursing care settings do not form part of this proposal due to the fee structure in being different to supported living.

In April 2016, as a result of a change in legislation relating to sleep-in shifts (arising from the case of *Mrs J Whittlestone v. BJP Home Support Ltd*) and consultation with the Lancashire Learning Disability Forum (LLDC), a collective of voluntary sector providers the county council changed the basis of its sleep-in fees to reflect all sleeping hours counting towards national minimum wage. The fee paid for sleep-in shifts changed from flat rate of £37.19 per sleep-in to an hourly rate of £8.58 (equating to approximately £81.50 per sleep-in). The financial impact of this change was to increase adult social care sleep-in costs by approximately £7m in 2016/17.

The £8.58 rate, at the request of the LLDC, reflected national insurance and pension costs only. This rate has been uplifted in subsequent years to reflect the increases in the national living wage.

On 13 July 2018, the Court of Appeal issued a decision that overturned previous rulings in relation to sleep-in shifts. In short "*Care workers who were required to sleep at, or near, their workplace and be available to provide assistance if required, were available for work rather than actually working. Accordingly, they were not entitled to be paid the national minimum wage for the whole of the sleep-in shift, but only for the time when they were required to be awake for the purpose of working*".

This ruling overturned the 2014 Whittlestone ruling and means that service providers are no longer legally obliged to pay staff the national minimum wage if staff are ordinarily asleep for the main part of a sleep-in shift.

Following the 13 July 2018 ruling by the Court of Appeal, the county council reviewed its payments for sleep-in services.

The county council invited all existing supported living providers to engage in discussions relating to the legal ruling and a proposal to change the basis of sleep-in payments. 61 providers were invited and 9 organisations accepted the invitation. A meeting was held on 17 September 2018.

Providers requested that:

- a. The rate paid to providers should consider the impact on staff retention and the ability to deliver safe services and therefore allow them to pay staff £45-£52 per night). All providers indicated an opening offer of £40 payment to providers could significantly hinder their ability to deliver sleep-in services.
- b. The county council should wait to see whether a Unison Appeal would be granted before putting forward a final position (at the time of the meeting it was likely a decision to appeal would be granted/refused by 31 October 2018).
- c. The county council should not implement any changes in the current financial year and April 2019 would be the earliest possible date they could complete a consultation period with affected staff.
- d. The county council consider a phased reduction to prevent a cliff edge effect in terms of the take home pay for staff.
- e. The county council should understand that the change is likely to have an impact on recruitment and retention of staff.

Following the discussions, a recommendation was made to Cabinet reflecting some of the requests above and a decision was taken on 3 December 2018 that from 1 April 2019 the county council would pay providers a sleep-in fee based on the assumption that their staff are paid the same sleep-in rate as county council employed staff. For 2019/20 this was set at £36.08 staff payment and equates to £47.43 provider payment<sup>6</sup>. Cabinet also approved a phasing in period of six months with a top up of £11.73 for the period 1 April 2019 to 30 September 2019 (allowing a payment to staff of £45 night), to allow time for service providers to transition to new staff terms and conditions.

Further to the 3 December cabinet decision the county council it was asked if it would formally consult with all affected providers in relation to the proposed changes to sleep-in fees. Ordinarily this is not a decision which the county council would consult on, however, cabinet welcomed the opportunity to hear from providers on what this significant change in legal ruling would mean for people affected and undertook a formal consultation.

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<sup>6</sup> Allowing for holiday pay, apprenticeship levy, national insurance and pension costs.

### 3. Methodology

An electronic questionnaire was developed with the support of an existing service provider. Affected providers were notified via email and provided with a link to the questionnaire.

61 providers delivering supported living sleep-in services were emailed during December 2018 and again in January 2019 to notify them of the intention to consult.

The consultation opened on 28 January 2019 for eight weeks; closing on 25 March 2019. A further reminder email was sent to all providers two weeks prior to the consultation closing.

The county council has not consulted service users or their families due to the proposed changes relating to contractual terms and conditions with providers who each have different operating and service delivery models. In turn, as per the terms of their contracts with the county council, service providers will be required to implement any fee changes without impacting on the day to day quality of service individual service users receive.

An electronic version of the consultation questionnaire was available online at [www.lancashire.gov.uk](http://www.lancashire.gov.uk). PDF, Microsoft Word, large print, and easy read versions were also available at [www.lancashire.gov.uk](http://www.lancashire.gov.uk).

In total, 22 completed questionnaires were returned online.

The questionnaire included 15 questions. The first 11 questions related to market data covering information such as the amount of sleep-ins delivered, total pay costs sleep-in costs and overhead rates. This information allows the county council to calculate an evidence based impact of the proposal in terms of the proportion of the workforce affected and the associated financial impact to those people. The remaining questions were open questions where respondents were asked to provide further information about the impact of the proposal.

#### 3.1 Background to on-cost questions

The county council changed the basis of sleep-in payments in April 2016 following a change in legislation relating to sleep-in shifts. The fee changed from a flat rate of £37.19 per shift to an hourly rate of £8.58 per hour and reflected national insurance and pension costs only.

At the September 2018 consultation event there was no general consensus amongst providers as to whether the fee should include an allowance for management and profit / surplus.

#### 3.2 Coding framework

In this report respondents' responses to the open questions have been classified against a coding frame to quantify the qualitative data. Coding is the process of



combining the issues, themes, and ideas in qualitative open responses into a set of codes. The codes are given meaningful names that relate to the issue, so that during close reading of responses it can be seen when similar issues relate to a similar code. As the analysis process continues the coding frame is added to and refined as new issues are raised by respondents. All responses to open questions are then coded against the coding frame, and can be subsequently analysed as quantitative data.

### **3.3 Limitations**

In charts or tables where responses do not add up to the total number of questionnaire returned this is due to multiple responses.

Due to the low number of providers delivering sleep-in services combined with the low number of questionnaires returned, figures in section 4 are given as the actual number of respondents and not as a percentage.

## 4. Main findings

The county council holds contracts with numerous providers delivering supported living sleep-in services. However, ten providers deliver almost two-thirds of the financial value of commissioned sleep-in services; the county council spends in the order of £70 million per year of which approximately £44million per year is with these ten providers.

Of these top ten providers six responded. Throughout this section "top providers" refers to this cohort of six respondents.

	All respondents	Top providers
Number of responses received	22	6
Number of providers contacted	61	10
Response Rate	36%	60%
Proportion of supported living sleep-in commissioned spend represented by respondents	51%	40%
Proportion of total supported living commissioned spend represented by respondents	48%	38%

### 4.1 Market analysis

Respondents were asked a series of numerical questions to allow the county council to calculate an evidence based impact of the proposal. 18 respondents (including four top providers) submitted market information to allow this analysis to be completed.

#### 4.1.1 Provider payment to care and support staff for each sleep-in shift

Respondents were asked to provide details of the number of staff completing sleep-in shifts during a specific reference period, the amount paid for sleep-ins during that period along with the average nightly number of sleep-ins during the period.

Based on this information, sleep-in shift payments to staff are as follows:

	All respondents	Top providers
Max pay per sleep-in shift	£95	£76
Min pay per sleep-in shift	£20	£48
Average pay per sleep-in shift	£67	£67
Median pay per sleep-in shift	£71	£67

### 4.1.2 Sleep-in shift length

Respondents were asked to provide details relating to the length of their sleep-in shifts. When combined with the number of people completing sleep-in shifts the average length of shift and number completed per person per week are as follows:

	All respondents	Top providers
Weighted average length of sleep-in shift	9.19 hrs per night	9.21 hrs per night
Average number of sleep-in shifts	1.42 shifts per worker per week	1.37 shifts per worker per week

### 4.1.3 Provider staff impact

In addition to data relating to sleep-in shifts, respondents were asked to provide details about their overall workforce and pay data during the reference period. Analysis of this information is as follows:

	All respondents	Top providers
Proportion of workforce regularly completing sleep-in shifts	60%	73%
Average annual salary of workers completing sleep-in shifts	£16,000	£16,000
Potential reduction in staff salary	14%	13%
Approximate cash impact to staff completing sleep-in shifts	£2,300 pa	£2,200 pa

## 4.2 April 2016 fee increase

Respondents were asked if they changed the sleep-in rate they paid their employees for council commissioned services following the increase in sleep-in fees paid by the county council to their organisation in April 2016.

Three respondents, all of which were top providers, stated that they did not change the amount paid to their employees. 19 respondents, including three top providers, indicated that they increased the amount paid to staff.

## 4.3 Service Delivery On-Costs

On-costs (also known as overheads) are business costs that are required to support service delivery but do not deliver front line services. For example payroll teams; they do not deliver care but enable the business to function by paying staff.

Respondents were asked, at the proposed nightly rate of £36.08, paid to frontline staff for delivering sleep-in shifts commissioned by the county council, what is the percentage of on-costs incurred by their organisation in order to recover full costs relating to a sleep-in shift.

18 respondents indicated the fee should cover staff costs and an allowance for management and profit / surplus.

Three respondents indicated the fee should cover staff costs but not limited to national insurance and pension. It should include additional items such as apprenticeship levy and holiday pay.

15 respondents provided sufficient information to calculate an indicative level of overheads. Specific overhead categories varied due to individual respondent's circumstances but the following headline categories were consistently referenced:

- National insurance
- Pension
- Holiday pay
- Apprenticeship Levy
- Allowance for management overheads

Respondents indicated that, based on a staff payment of £36.08, on-costs were in the order of 36%; a cost of £12.97 per sleep-in shift.

## 4.4 Impact of the proposed changes

### 4.4.1 Impact on the delivery of effective services

Respondents were asked to describe how the proposed changes will impact on their ability to deliver effective services commissioned by the county council, with specific reference to the delivery of sleep-in services.

20 respondents indicated the proposal will have a negative impact on their ability to deliver effective services citing the reduction in staff pay as the main reason.

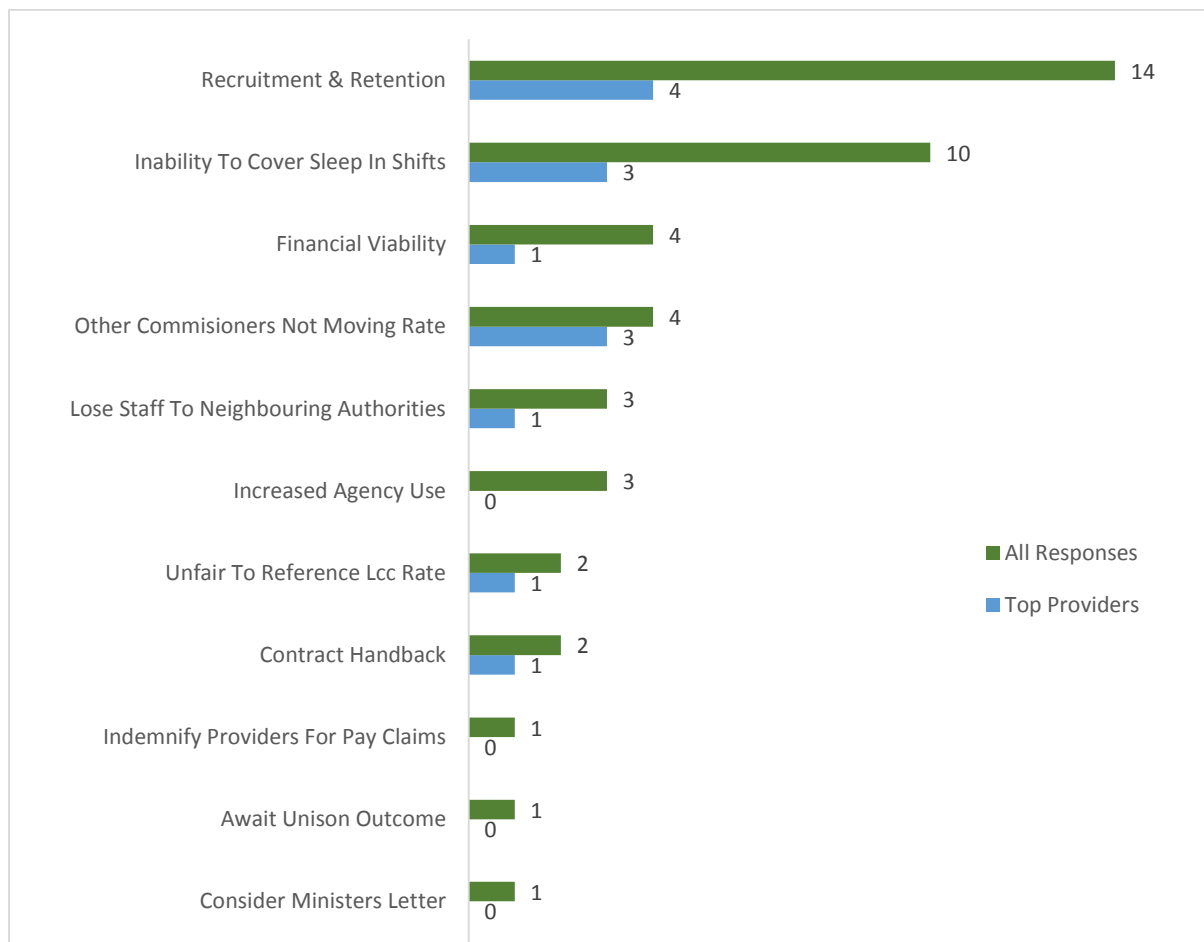
14 respondents (including four top providers) indicated that the reduction in pay would have a negative on affect their ability to retain and recruit staff.

10 respondents (including three top providers) indicated they would have problems covering sleep-in shifts due to staff not being willing to undertake them. One respondent went on to state that sleep in shifts were not contractual and were undertaken on a voluntary basis; a large reduction in pay would lead to staff refusing to cover these duties.

Four respondents, including three top providers stated that other commissioners were not proposing to change their sleep-in fees.

**Table 1 - Impact on the delivery of effective services: Summary**

<i>Impact</i>	<i>All Responses</i>	<i>Top Providers</i>
Positive	0	0
Negative	20	5
No Change	0	0
Not Answered	2	1

**Chart 2 - Impact on the delivery of effective services: Themes**

Base: all respondents (22)

#### 4.4.2 Financial impact

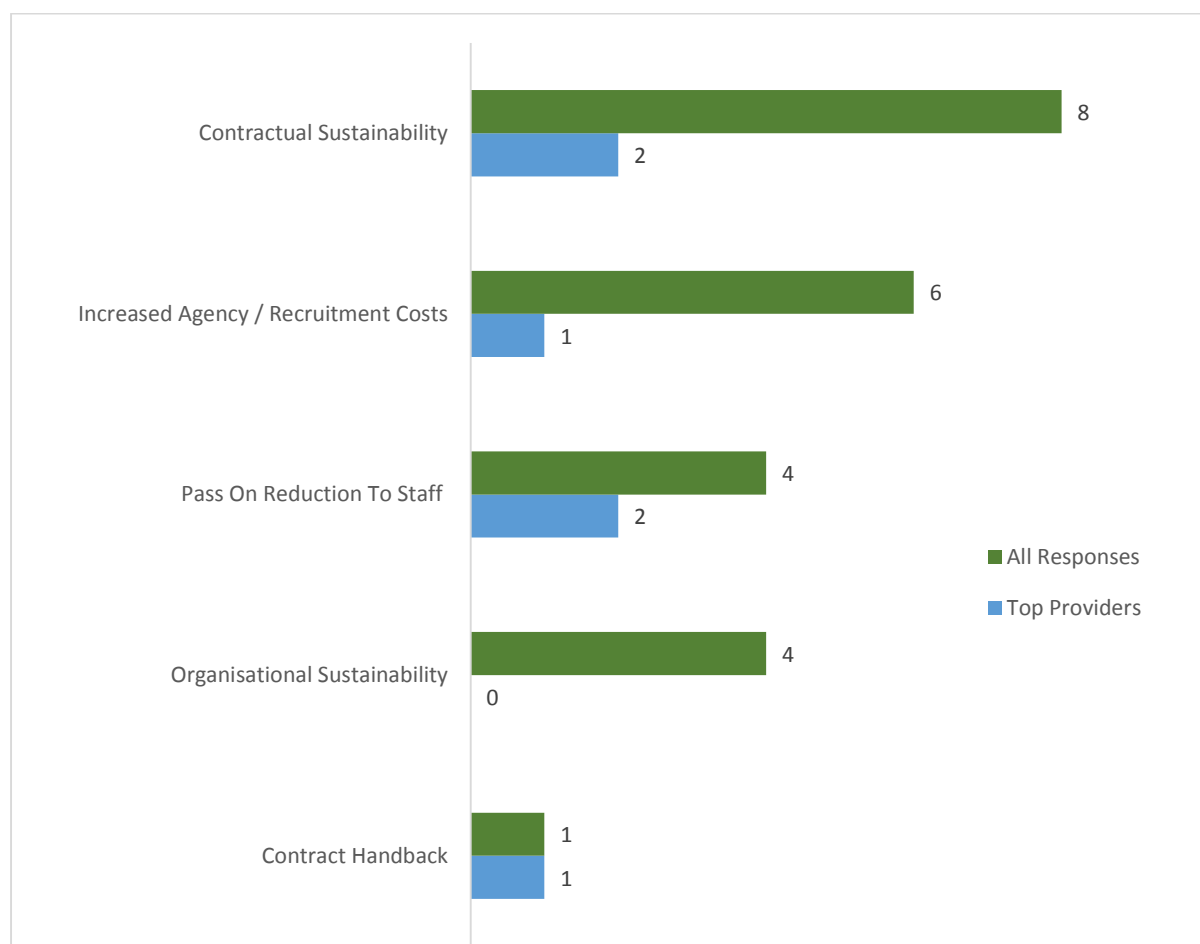
Respondents were asked how the proposal will impact on the financial position of their organisation.

One respondent indicated the proposal would have a positive impact on their financial stability. 18 respondents, including five top providers stated that the proposal would have a negative impact on their financial position. Three respondents did not answer the question.

Eight respondents including two top providers indicated the proposal would cause their contract with the county council to become financially unsustainable and four respondents indicated it could lead to their company becoming unsustainable. In both cases this was due to either continuing to pay their staff at the current rates or by increased agency costs. No top providers indicated their organisation would become unsustainable.

**Table 3 - Impact on the delivery of effective services: Summary**

<i>Impact</i>	<i>All Responses</i>	<i>Top Providers</i>
Positive	1	0
Negative	18	5
No Change	0	0
Not Answered	3	1

**Chart 3 - Financial impact: Themes**

*Base: all respondents (22)*

#### 4.4.3 Impact on recruitment and retention

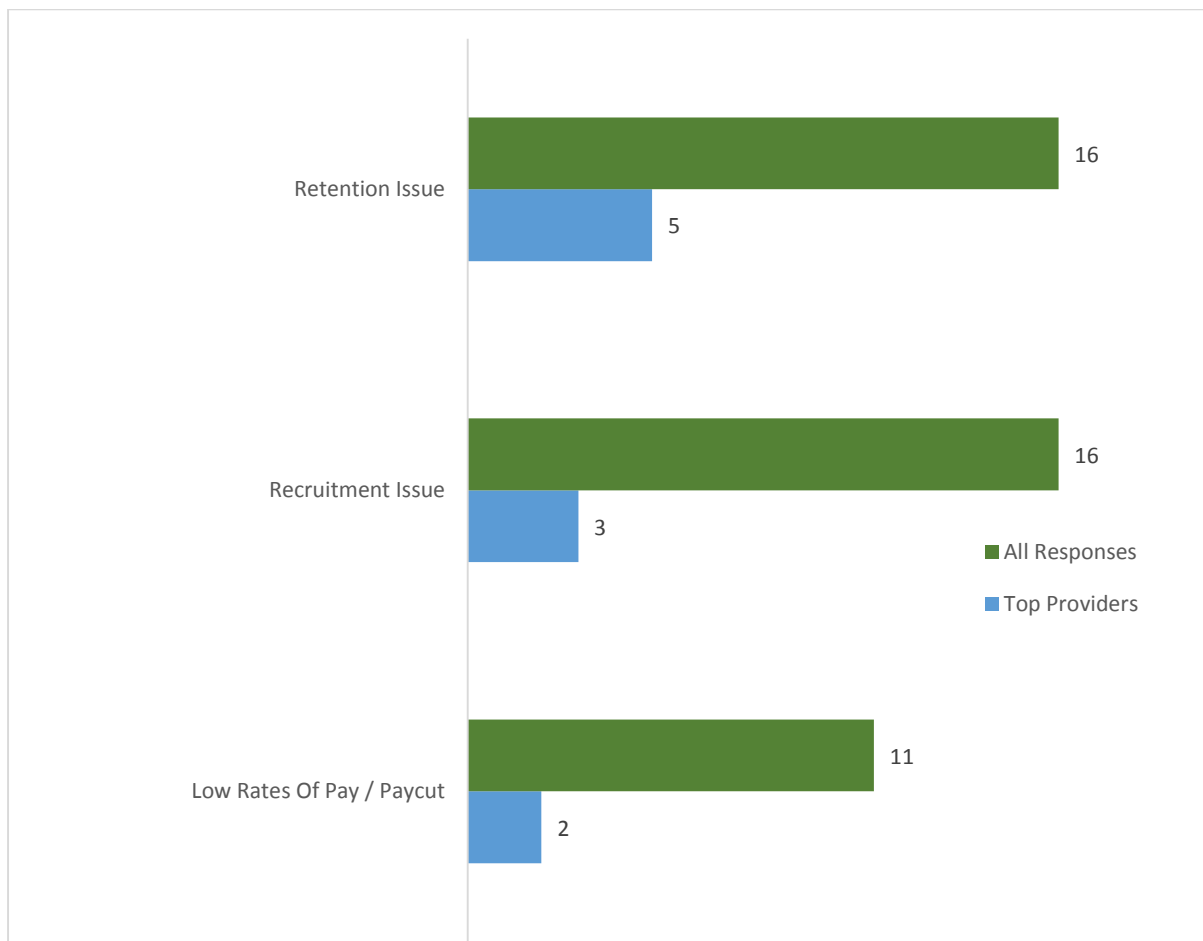
Respondents were asked how the proposal will impact on the ability of your organisation to recruit new and retain existing staff who deliver sleep-in shifts.

Twenty respondents, including five top providers indicated the proposal would have a negative impact on their ability to recruit and retain staff. 11 respondents indicated that rates of pay are a key factor in recruiting and retaining staff and that this proposal will reduce staff pay making recruitment and retention more difficult.

**Table 4 - Impact on the delivery of effective services: Summary**

<i>Impact</i>	<i>All Responses</i>	<i>Top Providers</i>
Positive	0	0
Negative	20	5
No Change	0	0
Not Answered	2	1

**Chart 4 - Impact on recruitment and retention: Themes**



*Base: all respondents (22)*

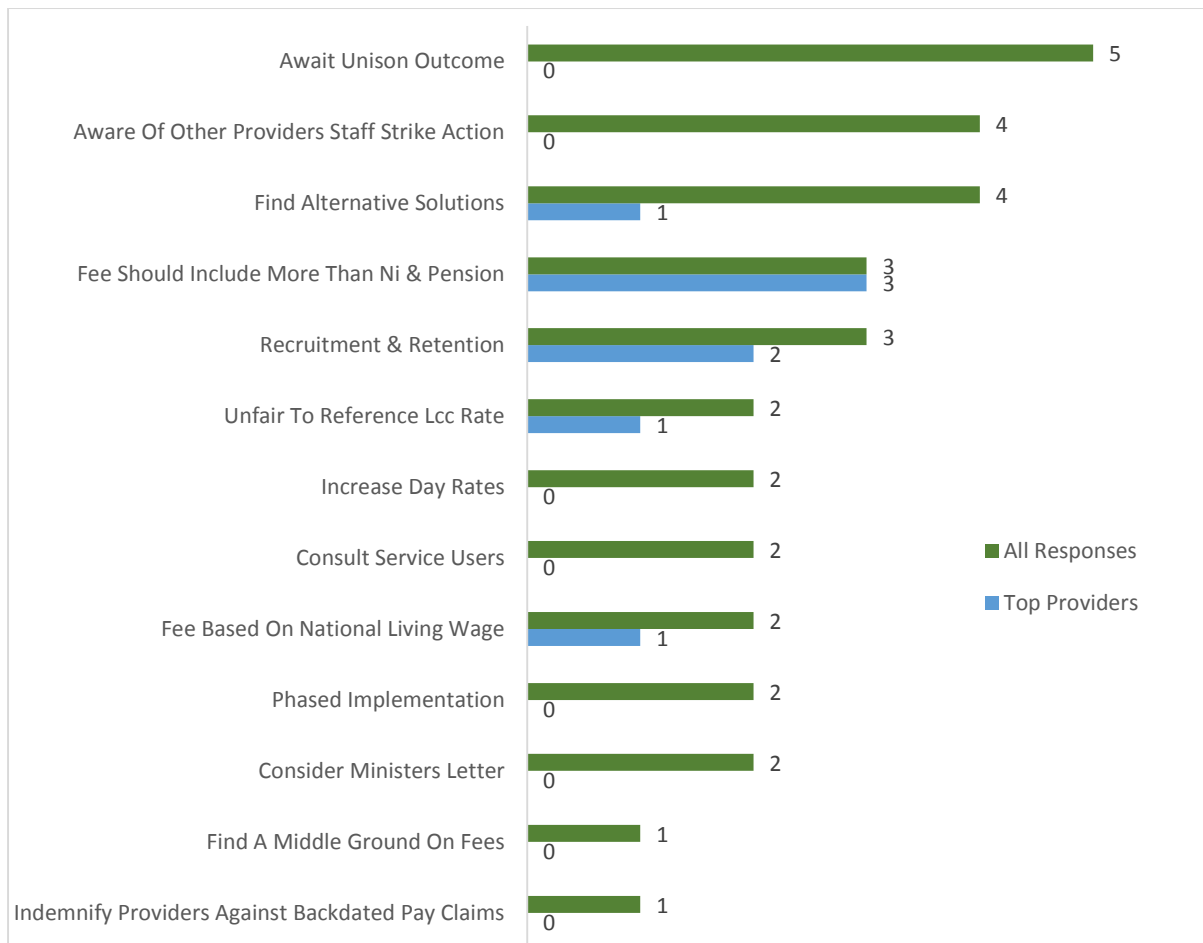


#### 4.4.4 Any other comments

All respondents were then asked if they think there is anything else that we need to consider about the proposal or that could be done differently. The most common responses were to wait for the outcome of Unison Supreme Court hearing (five respondents), to find alternative solutions and that the fee needs to include overheads in addition to national insurance and pension (three respondents, all of which were top providers).

It should be noted that 4 respondents said they were aware of other providers' staff taking strike action, however, only 1 respondent said they may find that their own staff take strike action. None of the top providers mentioned strike action.

**Chart 5 - Any other comments**



*Base: all respondents (22)*

## 5. Other responses

### 5.1 Lancashire Learning Disability Consortium

The county council received a letter from the Lancashire Learning Disability Consortium (LLDC) requesting that the points raised within be considered as part of the consultation process.

The LLDC represents a broad coalition of voluntary sector providers of services to people with learning disabilities in Lancashire. They did not submit a response via the consultation questionnaire but wrote to the county council in February 2019 expressing their concerns about the level of reduction and requested their letter be considered as part of the consultation process. Within their letter they stated:

- 1) "There has been no uplift to the current rate of £9.42 per hour to enable full cost recovery<sup>7</sup> should providers continue to pay the National Living Wage by the hour for the sleep-ins."
- 2) "The level of cut is too great to be managed safely."
- 3) "At the meeting held on the 17<sup>th</sup> September there was a broad acceptance that the market had to change and adapt but it was unanimously agreed that a flat rate fee should be sufficient to allow a payment to staff of £50 to £55 per night equating to a fee to providers of around £70."
- 4) "The proposal does not allow for full compliance with the full terms of the judgement as there it does not address the issue of payment for disturbed hours i.e. where staff are not sleeping."
- 5) Point 4 is "further exacerbated with concerns around the length of sleep overs<sup>8</sup> and the problem that should there be any tasks (currently carried out during the sleep over time) which would need to be performed by staff after such a proposed changed; these would need to be paid at the National Living Wage. In addition, sleep overs are not a cost free activity and attract costs in terms of administrating and arranging them, in addition to providing suitable sleeping facilities including beds and bedding."
- 6) "It is unfair to link provider sleep-in fees to in-house<sup>9</sup> staff payments due to in-house staff hourly rates being sufficiently high to prevent the need for top-up payments."
- 7) "In light of transparency, honest and partnership working it would be a positive move to share the true rates paid to the Council's in house staff and then increase the day time fees to allow providers to pay in line with these rates."

<sup>7</sup> Full cost recovery means ensuring an organisation recovers the full cost of delivering a service or project.

<sup>8</sup> The LLDC refers to sleep overs and is taken to mean sleep-ins.

<sup>9</sup> In-house staff refers to staff employed by Lancashire County Council delivering services where the county council is the registered provider.

## 5.2 Letter from the Minister of State for Care

Some respondents referenced a letter from the Minister of State for Care, sent to all local authorities, in response to the Court of Appeal decision. The county council received this letter in February 2019 whilst the consultation period was open.

Key points from this letter, included for context, are as follows:

- "..... Commissioners of adult social care were given market shaping duties by the Care Act, and must work with providers to determine a fair rate of pay based on local market conditions....."
- "Whilst I recognise that local authorities have many competing pressures on resources, this judgment should not be used as an opportunity to make ad-hoc changes to the fees paid to providers without consultation, or in a way that destabilises the sector....."

The letter also set out that "in the Spring Budget 2017, an additional £2 billion of funding was made available for local authorities to fund adult social care (via the Better Care Fund). A key purpose of this new funding was to support the social care market. The Government took account of the cost arising from enforcement of national minimum wage for sleep-in shifts going forward in deciding to provide this sum of additional funding".