

THE NATIONAL  
**Direct Payments**  
FORUM



**PERSONAL ASSISTANT  
EMPLOYMENT STATUS  
REPORT**

*Getting It Right • Keeping It Legal • Protecting All*

# FOREWORD

This report has been put together by the National Direct Payments Forum. We are a body that in one form or another have been in existence for over 20 years. We are made up of 'coal face' workers in the field of Direct Payments, where people receiving social care can receive the value of their service as money and then choose and buy the services they need themselves. Our membership comes from people working in Disabled Peoples User Led Organisations, the voluntary sector and the statutory sector. Some of us also use personal assistants (PAs) ourselves.

Although our membership is that of staff working around various aspects of direct payments, from the very beginning we were clear that our mission was to champion best practice, challenge bad practice and advocate for change, all in the interests of furthering the cause of independence, choice and control for Disabled people.

We have always fought to ensure that people receiving and using a direct payment get the full support they need to further their independence, choice and control. We have also sought to ensure that in their activities they are fully legally protected and not put at risk by poor or inaccurate advice.

Our report was put together with these aims in mind. It is important to remember that not everyone who engages the services of a PA will be using a direct payment, paid either by a local authority or Integrated Care System. Some people will use their own funds to do so. However they are still subject to the same laws and regulations that we consider here.

The National Direct Payment Forum have been increasingly aware that many arrangements around the engagement of PAs could well fall outside employment law and/or government regulations. That being the case, many people using PAs were being put in a vulnerable position.

So what is the issue, and why has it arisen?

The issue is about the legal status of Personal Assistants. Traditionally these were overwhelmingly seen as PAYE

employees, with the person using the PA taking on the role of the employer.

Such an arrangement required a well-funded support service, as the tasks involved in employment were not straightforward and unfamiliar to most people who use PAs. The support services therefore offered advice on recruitment, insurance and payroll arrangements, contracts, job descriptions etc.

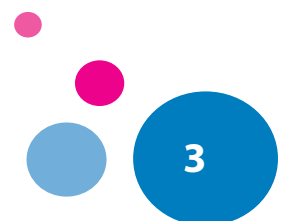
Some local authorities tried to circumvent this, simplifying the process by saying PAs were 'self-employed'. The problem being that in the overwhelming majority of cases, this was a mis-categorisation of the PA and was therefore unlawful, and it was the individual person using PAs and not the local authority that would be vulnerable to prosecution, or employment tribunal findings.

However it was not just local authorities that looked to self-employment as a preferred option, some people who use PAs also greatly preferred it as being a less bureaucratic and cumbersome way to engage PAs. Some PAs preferred the status as well, believing that it provided a higher earning potential.

The problem for everyone is that employment status is not just something you can choose as a preference, there are laws and regulations defining such status. This led some local authorities to refuse to recognise self-employed status for PAs altogether for people who use PAs through a direct payment in their area.

However on writing the report we recognise that many people who use PAs have had long standing arrangements which involved self-employment. These arrangements allow people the care they want from whom they want. They sometimes involve trust and peace of mind built up through working relationships over many years. They work for people, give them continuity and security. To just outlaw these arrangements would be inhuman, and run in direct contradiction of all that the freedom, choice and control of direct payments is meant to create.

Sometimes people who use PAs feel they have no choice when potential PAs who they liked will only take the work on a self-employed basis. Sometimes it is also true that people who use



PAs have denied their PAs the option of being PAYE employees, thus depriving them of their legal rights.

The situation has been made increasingly more difficult over the last two or three years as recruitment has become increasingly onerous and problematic. Post Brexit, a real staff shortage was created, which has been compounded by the Covid pandemic and the cost of living crisis (see recent LGA PA survey, the Forgotten Workforce [here](#)). Other sectors are now offering significantly higher wages for less responsible jobs – it is not uncommon for people who use PAs to be told their PA is leaving for a better paid job in a supermarket. In these circumstances, people desperate to receive care will increasingly recruit on whatever basis is available.

In the light of this, the use of ‘micro providers’ and middle-man agencies offering self-employed PAs has grown, but again often operating outside the scope of regulation.

This report has therefore been put together to both examine how, where and why ‘self-employment’ applies, what being a self-employed PA means in practice and what introductory agencies need to do to ensure they are operating fully within the law. It also crucially aims to protect people who use PAs, and to ensure they are operating fully within regulations.

**It most certainly should not be used to enforce a ‘no self-employment’ policy.**

Instead, we would hope that the starting point for local authorities, introductory agencies, and micro providers will be an acknowledgment of what is working well for people who use PAs.

Now let’s see what we have to do to ensure that the arrangements are fully legal so that individuals can enjoy the continuity and quality of support they need, whilst operating fully within the law.

**Pat Stack**

*Chair, National Direct Payments Forum*

# EXECUTIVE SUMMARY

**We set out on this journey aware that there were two aims facing us.**

- **That PA status is properly acknowledged and understood by all people who use PAs.**

*There are two reasons why this is vital.*

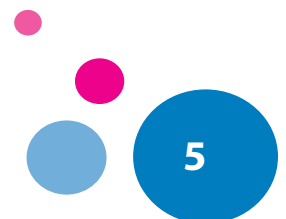
**a)** To ensure that PAs receive the full recognition and entitlement that their role allows, being treated in compliance with tax and employment legislation and receiving full rights and protection.

**b)** To ensure that people who use PAs are receiving correct advice as to the status of their PAs. After all, if they have been mis-categorising the status of their PA, it is the person who uses PAs who could find themselves at risk of an employment tribunal claim or HMRC fine. It is essential that direct payment support services and Local Authorities are clear on these questions and advising accordingly.

- **That people who use PAs can legitimately explore alternative models of engaging PAs because they find the process of being a PAYE employer onerous and difficult. We recognise and understand this as a genuine striving for independence, choice and control by people who use PAs.**

It soon becomes clear that both these aims can be in competition.

We sought to find out if the second aim can be met without contradicting the first – that is, can we ensure PA employment status is properly and lawfully defined and understood whilst allowing people who use PAs to engage with their PA that does not involve employment.



## *How we gathered information*

The information has been gathered after close consultation with many we consider to be key players in helping to establish that people using PAs are meeting legal obligations with regards to PA status.

We met regularly with the Low Incomes Tax Reform Group (LITRG), the Independent Living Group (ILG), Think Local Act Personal (TLAP), Somerset Council, Richmond Users Independent Living Service (RUILS), Care Quality Commission (CQC), His Majesty's Revenue and Customs (HMRC) and the Employment Agency Standards Inspectorate (EAS) (part of the Department for Business, Energy & Industrial Strategy).

Working with them has been an enlightening and thought-provoking process. We cannot begin to thank these bodies and individuals enough for the time and effort they have put in to assisting, guiding, and informing us.

Of course, each partner may demure from some, or indeed all, of the conclusions and recommendations made by this report which the National Direct Payments Forum takes sole responsibility for.

## *Personal Assistants (PAs)*

There are multiple definitions of the Personal Assistant role throughout the UK. They all describe a job role whose function is to support individuals who need care and support to live independently (see appendix 1). Many of these definitions simply specify that PAs work privately for individuals who require social care support. Some define the PA role more precisely as an **employed** position.

It is widely considered that employing PAs enables people to assert control over who works for them coupled with control over how and when that work is provided. The concept of the person needing the support having control, in most cases, is therefore crucial to the very definition of the PA role.

In some cases, however, it is explained that Personal Assistants can provide work on a “self-employed” basis. Often the distinction between an employed or self-employed PA is presented as if it were a simple choice determined by the PA or person who engages them.

As self-employment can reduce the costs and obligations on an engager, and as there are some perceived benefits from a worker’s perspective, particularly regarding take home pay, this is possibly not a surprising situation.

Failure to understand or accept responsibility for correctly determining a PA’s employment status is leading to ‘false’ self-employment in some cases. This carries risks for the engager and the PA who will often need guidance and support to make a proper determination.

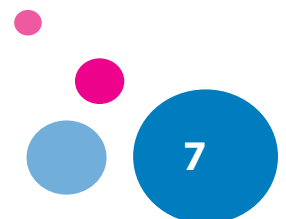
## **Employment Status**

There is evidently a desire to simplify things and minimise the personal liabilities of people who use PAs. However, people who use PAs, whether through a direct payment or not, should not do so in a way that is not compliant with the law or in a way that puts people at risk of being fined or punished if they were scrutinised by the appropriate legal authorities.

See **Fig 1** (following page) for a summary of the tax perspective which explains that employment status is not simply a matter of personal choice.

As described in **Fig 1**, it is necessary to consider numerous indicators when assessing a person’s employment status and the employment applicable as a result. It is also important to consider the different tests and outcomes applicable to a tax determination where you are either employed or self-employed, as opposed to employment law in which a third category of “worker” exists somewhere in between the two.

Where a worker’s employment status isn’t self-evident, assessing employment status with the accuracy that HMRC and the



## **Fig1. The legal framework - from a tax perspective**

The tax legislation does not tell us whether a worker is employed or self-employed, so the distinction between the two is based on HMRC practice and case law. Usually, it is obvious whether an individual is an employee or whether they are in business on their own account as a self-employed trader. However, there is a considerable grey area between the two.

Responsibility for correctly determining whether an individual is employed or self-employed rests with the person or organisation who engages the services of the worker. A worker's employment status – i.e., whether they are employed or self-employed is not a matter of choice.

Recent court cases indicate there is no single satisfactory test governing the question of whether a person is employed or self-employed. HMRC advice is to consider all the factors that are present in, or absent from, a particular case then weigh up those pointing to employment against those pointing to self-employment.

Having done that, a picture will emerge from which employment status can usually be ascertained. The following is a list of the factors to be considered in determining whether a worker is employed or self-employed:

- ***Mutuality of obligation\****
- ***Right of control***
- ***Provision of own equipment***
- ***Right of substitution and engagement of helpers***
- ***Financial risk***
- ***Opportunity to profit***
- ***Degree of integration into the organisation***
- ***Right to terminate the contract***
- ***The number of paymasters.***



**\*An employment law concept. This means when employers are obliged to provide work and employees are obliged to accept the work provided.**

This is by no means an exhaustive list, but it does include the most important criteria.

It is important to determine correctly the status of a worker because the tax and National Insurance Contribution (NIC) treatment of workers who are employees and workers who are self-employed are different.

An incorrect classification of a worker's status will therefore mean that the amount of tax and NICs paid is incorrect and the tax and NICs are paid at the wrong time. It is also unfair that two workers engaged by separate people who perform the same tasks and receive the same pay do not pay the same tax and NIC because of the incorrect classification of one of them.

employment tribunal might expect, can be complex. To do so requires a reasonable degree of sophistication and an understanding of the underlying case law tests.

The current legal framework identifies mutuality of obligation, the right to substitute and control as some of the key factors to consider when assessing employment status. Unfortunately, these indicators are some of the most difficult to understand.

**Those using the services of PAs require access to clear information and guidance to help prevent more cases of false self-employment.**

Better guidance and support would enable the proper development and utilisation of genuinely self-employed PAs in the sector so they could be engaged with confidence.

**The relevant bodies need to develop a consistent, shared definition of personal assistants alongside clear guidance to explain why (both from a principled and practical perspective), engaging the services of a genuinely self-employed PA is fundamentally different to employing a PA.**



For the purposes of this report, and based on our understanding of employment status, we summarise the basic position as follows:

- Genuinely **self-employed PAs** should be free to turn down work and have an **unfettered right (i.e. without restriction)** to send a **substitute** at any time for any reason (which must be grounded in reality – that is, be more than just a right contained in a contractual clause); they will have control over any work they do undertake.
- An **employed PA** is contractually obliged to provide the service they are paid to perform **personally; it is the employer who controls what work is done, how and when.**

Many cases of false self-employment in this sector are simply never examined unless there is another reason for the tax authorities or an employment tribunal to review the situation and take an interest. This apparent lack of oversight and policing has helped to create an environment in which misunderstandings and misinformation over self-employed PAs have spread, often unchecked.

See the relatively recent Chatfield Roberts case in **appendix 2** for an example of a situation that was scrutinised by the employment tribunal when a self-employed live-in PA claimed employment rights and was deemed to be an employee.

While the case did not examine the tax position, HMRC do set out their position in relation to care provided in a client's home in the employment status manual, [ESM4015](#) as follows:

'The case law tests normally indicate that a care worker who looks after a client in the client's home is likely to be an employee. In particular there will often be a significant right of control, for example the carer required to arrive at a pre-arranged time and perform tasks at the request of the client. On occasions the facts may indicate self-employment. For example, it may be the case that a care worker looks after several people concurrently and has a business organisation in place.'

It is worth noting that tax and employment law are not specifically regulated - HMRC are responsible for the collection and management of tax revenue, and although parliament sets statutory employment rights, it is individual workers who have the primary role in enforcing those rights in an employment tribunal.

For the purposes of this report, we sought to clarify to what extent and by whom genuinely self-employed Personal Assistants are regulated in England.

## **Regulation**

Being regulated means that there are common standards set by a regulatory authority that people must follow or risk facing compliance and enforcement activity. There are two main bodies that are relevant to the self-employed PA market – the Employment Agency Standards Inspectorate (EAS) & the Care Quality Commission (CQC).

Bodies like EAS and the CQC are set up to protect and benefit people and there are important policy reasons behind their requirements and the obligations that people who fall under their remit should meet.

The **EAS** need to know an agency is supplying who they say they are and furthermore that they are qualified to do the work.

The **CQC** regulates most health and social care services in England to ensure the quality and safety of any care provided (including when it is provided in people's own homes).

During our work, we set out to confirm whether a genuinely self-employed PA would be classed as an agency by the EAS and the CQC. This led us to focus on the implications of the unfettered right to provide a substitute; something we knew HMRC look at closely when deciding whether a worker is employed or self-employed.

The right to send a substitute essentially means a PA has an

unrestricted right to provide a replacement worker as and when they see fit. An 'unfettered' right to substitution cannot exist in an employment relationship so will be determinative for self-employment. According to the **Employment Agency Act 1973**, a self-employed PA sourcing and supplying alternative workers to cover for them when they are unavailable (or otherwise acting as a broker of care for a client), falls under the definition of **employment agency** (see below definition) and in some cases, **employment business** (depending on how the business operates). This brings any PA that does source or supply workers to stand in their stead (as it would include a substitute), into scope of the **Employment Agency Standards Inspectorate (EAS)**.

### **Definition of employment agency – [section 13 Employment Agencies Act 1973](#)**

(2)For the purposes of this Act “employment agency” means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of providing services (whether by the provision of information or otherwise) for the purpose of finding [persons] employment with employers or of supplying employers with [persons] for employment by them.

In the [scope or registration](#) document, published in May 2022, the CQC seek to establish who is required to register with the CQC if providing health and social care activities in England. This is based on an interpretation of the Health and [Social Care Act 2008](#). The document clarifies general exemptions from the need to register, which includes people making their own arrangement for personal care, where somebody works directly for them. However, it goes on to confirm that this only applies when they are working wholly under the direction and control of that individual without the involvement of an **employment agency** (as defined by the Employment Agency Act 1973).

**A genuinely self-employed PA** with an unfettered right to provide a substitute is **likely to be an employment agency**

as they will be providing information to other persons with a view to them finding work and providing services. If a substitute PA provided regulated activity, such as personal care, and the primary PA is considered an employment agency – the exemption cannot apply – because the substitute was introduced to the work by an agency.

**It is our view therefore that the PA exemption cannot be applied to genuinely self-employed PAs which brings them back into scope of the CQC.**

We think it would be highly unusual for a PA to be genuinely self-employed for tax purposes and, at the same time, escape regulation by EAS or the CQC.

It is our contention that if a PA is not permitted to or cannot provide a substitute, then there must be an obligation to provide the service personally, suggesting strongly that an employment relationship exists.

### ***Report recommendations***

As a result of doing the work behind this report, we have come to the view that the bodies in place to regulate these activities are not sufficiently resourced to focus on this area. This forces them to prioritise their work based on risk assessments – none of which seem to be flagging this issue. Hence the need for organisations like the National Direct Payment Forum and Low Income Tax Reform Group (LITRG) to highlight the situation and bring it to their attention.

We believe that the lack of resource to properly police and regulate self-employed PAs is not a good enough reason to allow the phenomenon of self-employed PAs in the social care sector to continue unchecked.

The current situation puts people who use PAs at risk and in many cases denies personal assistants access to the statutory employment rights to which they are entitled – both of which must be addressed.

## This report makes the following recommendations.

- Clear and **synchronised guidance** must be provided by HMRC, EAS and CQC, with oversight from the Department for Health and Social Care to prevent false self-employment and address uncertainties regarding the scope of regulation and to confidently support the growing market of self-employed PAs.
- People who use PAs, including direct payment recipients, need **support and guidance** to access PA support safely - whether employed or self-employed, working independently or supplied by an introductory agency.
- **Direct payment support services** require additional resource to help direct payment recipients navigate this landscape and should be engaged by local authorities and integrated care systems to co-produce those services alongside direct payment recipients.

# SELF-EMPLOYED PERSONAL ASSISTANTS

## FULL REPORT

This report examines the use of self-employed Personal Assistants (PAs) in the social care sector, specifically their use by direct payment recipients in England.

### *Background - Direct Payments*

In England there are 3 options available to people assessed as having eligible, unmet needs with a Personal Budget who need to source care and support.

- 1) Traditional care agency services commissioned by the council
- 2) **Direct Payments – cash payments that allow individuals to commission their own care and support**
- 3) Individual Service Fund (ISF) – a hybrid i.e., personally commissioned care and support with help from an organisation to manage the allocated budget and commissioning responsibilities.

Chapter 12 of the [Care Act statutory guidance](#) covers direct payments and confirms that, ***“Direct payments are the Governments preferred mechanism for personalised care and support...they provide independence, choice and control by enabling people to commission their own care and support to meet their eligible needs”***

It goes on to say that direct payments are, ***“designed to be used flexibly and innovatively and there should be no unreasonable restriction placed on the use of the payment, as long as it is being used to meet [eligible] care and support needs.”***

In theory, direct payments can be used to purchase anything that enables a person to meet their assessed need and achieve their identified outcomes.

It is incumbent upon us to mention here that direct payments are not all about PAs and can also be used to purchase specific pieces of equipment, personalised therapies and activities unavailable via a directly commissioned route. Indeed, one of the great strengths of direct payments is their capacity to unlock services and facilitate a truly personalised approach to meeting a person's support needs.

For many direct payment recipients however, direct payments are still predominantly used to hire or engage personal assistants (PAs) as an alternative to the less flexible services commissioned by local authorities and integrated care systems.

Direct payment recipients have three main options to access personalised care and support when wishing to use personal assistants or carers.

- **Employing a PA** – Delivers the maximum potential for independence, choice, and control. Tends to work most successfully in areas where a well-resourced direct payment support service is available.
- **Engaging a Self-Employed PA** - Minimises the direct payment recipient's legal obligations but allows for personal choice around who provides support. Less independence and control because a genuinely self-employed PA will decide how and when the work they do is provided.
- **Engaging a Care Agency** - Direct payments can also be used to access care agencies sometimes unavailable via the traditional commissioning route in a Local Authority area. The agency is commissioned directly by the direct payment recipient.

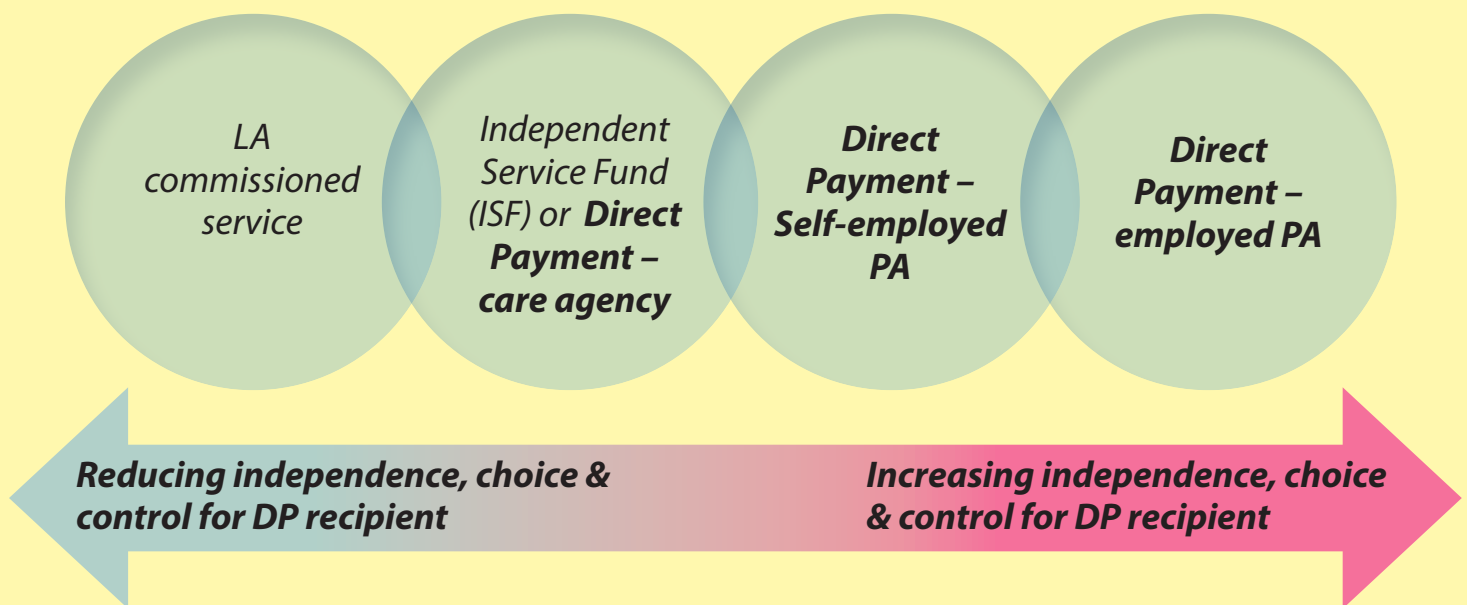


## Engaging a Self-employed PA

Engaging the services of a self-employed PA reduces a person's legal obligations but still allows people to receive a more personalised service than a traditional care agency could offer.

This option was traditionally resisted by direct payment funding bodies (local authorities and integrated care systems) and direct payment support services because of the risks associated with mis-classifying a PAs employment status e.g., HMRC, employment tribunal, pensions regulator etc. **The risks of false self-employment were too great for many initially and not enough was understood about self-employment to advise with confidence.**

**Fig1 - Diagram showing options available to people with assessed eligible needs drawing on social care and levels of independence, choice, and control.**



In some areas however, the use of self-employed PAs was embraced and even encouraged.

Unfortunately, insufficient investment in direct payment support services over a prolonged period has made it very difficult for councils (and the services they contract in) to support direct payment recipients who use PAs sufficiently to

help them navigate this landscape confidently. **This is despite direct payments remaining the government's preferred mechanism for personalised care and support.**

### *Introductory Care Agencies*

The number of self-employed PAs has continued to steadily grow over the last 5 years supporting people who use PAs, both self-funders and direct payment recipients. Many find their work independently and others via one of the many matching or introductory agencies mostly operating free from any CQC or EAS attention.

These introductory and matching agencies claim to source self-employed PAs for clients who are then engaged to provide a range of services including, personal care, home help and live in support.

Introductory care agencies are exempt from CQC regulation unless they have an ongoing involvement in assessing and delivering the personal care required. The CQC clarify what it considers and ongoing role in its document, [\*Personal care: ongoing role, introductory agencies and individual care workers - Care Quality Commission \(cqc.org.uk\)\*](#). This document includes a list of activities that would constitute an ongoing role, which includes continuing to charge for services after applying a one-off introduction fee.

The Employment Agency Standards Inspectorate (EAS) and HMRC are also aware of the growing number of introductory care agencies. However, a proper examination of their legitimacy and suitability has never taken place due in part to resource limitations. The absence of such scrutiny arguably helps to legitimise the widespread misclassification of self-employed PAs while enabling further confusion in the sector.

Due to the brevity of this report, we will not explore these agencies in any depth, except to call for a commitment from the appropriate bodies to ensure the operating model applied by introductory agencies is legally compliant. See **appendix 3** for a list of introductory agencies currently providing and, in some cases, matching self-employed PAs to clients.

## ***Local Authority Schemes***

In one or two areas of the country there are specific schemes supporting the use of self-employed PAs directly affiliated to the local authority such as the trading standards scheme, [\*Support with Confidence\*](#) in East Sussex or the [\*Community Connect\*](#) service in Somerset.

These local authorities are actively supporting and embracing the growth of a local self-employed PA market and to some extent investing in systems to maintain and sustain those markets. In Somerset, for example, Community Catalysts were initially engaged to stimulate the market of self-employed PAs and to help grow a sustainable network of PAs. Under this model, self-employed PAs are referred to as “micro-providers”. Somerset now operate a system to verify self-employed micro-providers in their area to ensure they meet an agreed minimum criteria/set of standards.

[\*Community Catalysts\*](#) continue to support other local authorities and tend to be contracted for an 18 month/2-year period to provide the seeds of growth in an area and support the local authority and growing workforce. One of the benefits of engaging Community Catalysts is the implementation of an agreed set of standards to ensure micro-providers are vetted or verified. This process enables the local authority to be satisfied that micro-providers do at least consider themselves to be genuinely self-employed and understand they are providing a service to clients – as distinct from being in an employed role.

Local authority backed schemes and the Community Catalyst, verified micro-provider model have undoubtedly helped to validate the concept of self-employed PAs. They have also helped to establish some useful minimum standards that are recognised by funding bodies, self-employed PAs and people who engage their services. While this is very welcome, questions about the model do remain, particularly as it doesn't solve the issues identified in this report regarding employment status.

## ***Informal partnerships***

At the other end of the spectrum the use of self-employed PAs is entirely unregulated. For example, there is evidence to demonstrate that a growing number of informal partnerships have developed organically whereby groups of PAs are providing services together, often swapping shifts amongst themselves without any oversight. Often these partnerships utilise WhatsApp groups to share information about clients and available shifts in order to allocate work.

See **appendix 4** for an example (redacted) contractual agreement being used by a team of self-employed PAs operating an informal partnership/unregulated care agency.

It is these inconsistencies, coupled with the uncertainty around assessing employment status, whether through an introductory agency, informal partnership or as a Local Authority, endorsed micro-provider, that provides the backdrop to this piece of work.

See **appendix 5** for a breakdown of some of the different models of support managed by local authorities to support growing network/market of self-employed PAs.

## ***Notes on employment status – what is the wider context***

Recently published Government [guidance](#) seeks to define employment status and how it should be assessed and applied. Relevant in all working relationships, employment status determines a worker's rights and the taxes that they, and the person or organisation they work for must pay.

It is not just a matter of what the written contract says that counts when assessing employment status. The reality of the working relationship between the two parties, engager or employer and worker, is equally important.

There are three main types of employment status for employment rights purposes.

- **Self-employed**

Delivers a service to client, significant flexibility in the way work is undertaken, minimal protection in terms of statutory rights. Increased autonomy but decreased protection.

- **Employed**

Works according to the direction of their employer, access to full gamut of employment rights. Decreased autonomy but increased protection.

- **Worker**

Fewer rights than an employee. Access to some (day 1) statutory rights. Directed by employer but not guaranteed work. Can refuse work when offered.

For tax purposes there are two employment statuses; **self-employed** and **employed**.

### ***Determining employment status***

In determining a workers employment status, the courts apply several tests which are broadly similar across the employment rights and tax frameworks.

The boundaries between the different statuses can often be unclear. In such cases DP recipients are often referred to the Checking Employment Status for Tax (CEST) tool provided by the HMRC. The CEST tool can be used to support a determination with specific regard to a person's status for tax purposes.

Unfortunately, assessing a person's status for employment rights and tax purposes are still essentially separate processes which can add to the confusion.

It is widely acknowledged that there are alternative approaches that could be explored to provide greater clarity and certainty to employers and workers alike. It is also clear that the employment landscape has evolved and continues to change as the gig economy develops. An evolution recognised and documented by the [Taylor Review \(2017\)](#) and the [Good Work Plan \(2018\)](#). The

## Self-employment from a Tax perspective – A view from HMRC

Government guidance states that an individual's employment status is not a matter of choice. It is instead understood by consideration of the facts and terms and conditions under which people provide their work. From a HMRC perspective then, understanding a worker's employment status is important because it affects the amount of tax and National Insurance contributions the worker will have to pay. It can also affect the rights and benefits they are entitled to.

An employee would expect to see tax and National Insurance deducted from their pay, which their employer pays over to HMRC on their behalf. Their employer would also need to pay employer's National Insurance, and maybe the Apprenticeship Levy and pension contributions in relation to that person's employment.

Someone who has been classified as self-employed will receive their pay without any of these deductions or contributions having been made. If that person should (upon the correct determination) have been regarded as an employee, they may have been denied benefits and rights they should be entitled to including the National Minimum Wage and/or Holiday Pay.

HMRC has published two fact sheets on GOV.UK to help people understand and determine employment status.

- **The first is aimed at individuals to help them understand the employment status of their work:**

<https://www.gov.uk/government/publications/employment-status-factsheet-esfs1/employment-status-factsheet-esfs1>

- **The second is aimed at people or organisations employing workers:**

<https://www.gov.uk/government/publications/employment-status-factsheet-esfs1/employment-status-factsheet-esfs2>

These fact sheets reference other guidance which is available for customers to use including the **Check Employment Status for**

**Tax (CEST)** digital service.

HMRC has developed the CEST tool to help customers understand the employment status for tax purposes of the work they do.

There is further and more detailed guidance available **on GOV.UK** which includes the CEST service, and the fact sheets highlighted above.

subsequent consultation response published in July 2022 and can be found [here](#).

Despite the need for greater clarity and alignment between the tax and employment rights frameworks, the consultation response confirms that the Government will not be seeking to reform the employment status system in the UK at this time. The report explains that this is largely due to the Covid pandemic resetting economic priorities, although the government, “remain committed to monitoring changes and working with stakeholders to ensure that the employment status frameworks remain fit for purpose and uphold their policy intent”.

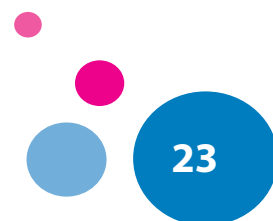
**For the purposes of this work therefore we must navigate the employment status landscape as we find it with very little prospect of it changing significantly soon. The Low-Income Tax Reform Group (LITRG) have produced a comprehensive sector specific guide to help determine a PAs employment status which you will find [here](#).**

### ***Limitations of the CEST tool***

The CEST tool asks a set of questions about a work situation and at the end it provides an indication of the worker’s status for tax.

The tool is not specifically designed for the care sector and when attempts are made to use it, they can be abandoned due to the language used leading some people to believe it doesn’t apply to them.

It is a general tool and does not have the granularity to address





different sectors. This can limit the effectiveness of the tool in the DP sector where clients may find some of the questions difficult to understand or answer. This in turn means they may not get a reliable result.

Crucially the CEST tool asks about the right of substitution. It is doing so to establish whether the PA has the **unfettered** freedom to **send a substitute** in their place if they are unable to perform their duties – for any reason. Unfettered means that the client cannot give permission, 'vet' or in any way restrict whom the PA sends in their place.

Even if this has not yet happened in practice or they do not think the situation would ever arise it is **the right to do so that counts**.

**By virtue of the very personal nature of the relationship between the client and the PA, this is vitally important when assessing whether a PA is genuinely self-employed or not.**

HMRC say that you should be able to rely on the tools answer as evidence of a worker's status for tax and National Insurance contributions, provided:

*The questions are answered correctly and accurately based on the actual terms and conditions under which the worker is providing their services.*

It is clear, that this caveat gives HMRC scope to re-categorise a worker, if they do not agree about the way something has been answered.

**It is our view that the CEST tool is not particularly well suited to deciding a worker's status in the Direct Payment sector where it is either misunderstood or unwittingly misused.**

### ***Implications of being an employment agency or employment business***

According to the **Employment Agency Act 1973**, the sourcing and supplying of alternative workers falls under the definition of **employment agency** and in some cases, **employment business** (depending on how the business operates). As described above,



## **Employment Agency Standards Inspectorate – a view from BEIS**

Agencies in Great Britain are split into 2 categories, employment agencies (who look for permanent work for people) and employment businesses (who supply temporary workers to hirers but are responsible for engaging and paying them). Most people working in the care sector will be supplied as temporary workers by an employment business to work under the direction and control of the client.

Employment Businesses have a duty to obtain information from their clients and their workers, to ensure that they can supply workers who are qualified to undertake the work the client wants done and to ensure the safety of the worker at the clients' premise. There have been many changes over the years about how care is provided and whether a company providing care services is acting as an **employment business**.

A view has been taken by Government that where a person being cared for can ask for their care to be changed on a day-to-day basis or more permanently then it is likely that, if the care provider is a company, they will be acting as an employment business. It doesn't necessarily matter how the service is being paid for, nor the contractual relationship between the carer and the care provider.

Carers can be engaged by an employment business as self-employed, employed, as a limited company, as an apprentice or through another company that employs and pays them (often called an Umbrella Company). They must have been given a Key Information Document that explains how they will be engaged, then a contract or terms if being engaged and paid through the care provider or a contract by their umbrella company. They must also make sure that they check that they have a DBS, obtain 2 written references, and have any qualifications, training and experience needed to undertake the role. The employment business is required to pay for all hours that have been worked by the carer, regardless of whether they have received payment from the client.

If a sole trader provides care to a small number of care users and they go on holiday or are ill, they will normally seek a replacement

*to cover for them. Where they introduce suitable replacements to the care users to choose someone, then the carer will be acting as an **employment agency** for the purposes of the legislation. This is because they will be providing information about a role or job that is available. They don't have to make any money from making the introductions.*

this brings any organisation that does so into scope of the **Employment Agency Standards Inspectorate**.

This is important because employment agencies and employment businesses must operate according to the regulatory framework established by the Employment Agency Act 1973 and associated regulations.

Where non-compliance with the legislation is identified, the Employment Agency Standards Inspectorate (EAS) will, in the first instance, seek to help the individual or business become compliant. A Warning Letter will be issued, setting out where the non-compliance has been identified and the steps that need to be taken to become compliant. If compliance is not achieved, EAS can seek a Labour Market Enforcement Undertaking (LMEU) that will require an agency or business to start or stop doing something, e.g., take up references or stop charging admin fees on DBS'. If an agency or business does not willingly enter a LMEU, then EAS can seek a Labour Market enforcement Order (LMEO) through the courts.

Failure to comply with an LMEO can result in an unlimited fine and/or up to 2 years in prison. EAS can also prosecute offences under its legislation, as the legislation is criminally based, and the fines can be unlimited if successful. A Prohibition Order can also be sought through an Employment Tribunal and if granted, this will prevent someone from owning, managing, or running, or being involved in the owning, managing, or running, of an agency or business for up to 10 years. Breach of a Prohibition Order can be prosecuted as a criminal offence.

Whether properly defined as an employment business or

employment agency, complying with the regulatory framework established by the Employment Agency Act is a legal duty.

It is clear to the authors of this report that this duty is currently not properly understood in relation to independent self-employed PAs and the introductory agencies operating in this sector. **It is our view that a lack of available resource to investigate non-compliance is not a good enough reason to ignore the potential consequences.**

Agencies who do not comply should be investigated by the relevant authorities to clearly establish a trusted list of suppliers. Similarly, clear guidance for self-employed PAs must be created to aid and support compliance if being genuinely self-employed with an unfettered right to substitute may bring them into scope of the EAS.

For more info see Employment Agency Standards, a brief guide for agencies [here](#).

### **CQC Regulation**

It is a legal requirement, under the Health and Social Care Act 2008, to register with the CQC if you intend to provide health or adult social care activities in England. This means it is an offence to carry on those activities (such as personal care) without being registered.

Individual providers are not automatically exempt from registration if they are providing personal care, but the CQC do apply certain exemptions that can bring PAs providing regulated activity out of scope of their regulation.

For CQC, the core issue when determining whether a care provider carries on Regulated Activity (and needs to be CQC registered) is not driven by the employment status of the PA because the definition of 'employed' in Regulation 2 The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 is very broad and says; ***“employment under a contract of service, an apprenticeship, a contract for services or otherwise than under a contract”***.

A 'self-employed' PA therefore, may still be considered to be 'employed', under the terms of the Health and Social Care Act ('HSCA'), for the purpose of delivering regulated activity, which even extends to volunteers.

The determinant, under the HSCA, is:

- 1) *the person carries on Regulated Activity and, if they do;*
- 2) *whether any exemption applies which takes them back out of scope.*

**Regarding 1)** it is the person who has ongoing direction and control of the activity who carries it on.

**Regarding 2),** under para 1(3)(c) of Schedule 1 of the HSCA, exemption covers;

*"the services of a carer employed by an individual or related third party, without the involvement of an undertaking acting as an employment agency or employment business, and working **wholly** under the direction and control of that individual or related third party in order to meet the individual's own care requirements."*

PAs are therefore exempt when they are working wholly under the direction and control of an individual, i.e., without the involvement of an **employment agency** or **employment business** (as defined by the **Employment Agency Act 1973**). While the intention was to ensure that PAs working directly for individuals (providing personal care) would not need to register with CQC, **genuinely self-employed PAs must be viewed differently to those who are employed directly.**

It seems contradictory to suggest that a genuinely self-employed PA could be working wholly under the direction and control of the client they are supporting if (in fact and by definition) they retain an unfettered right to decide who provides the service at any time meaning that they fall under the definition of an agency.

Similarly, if they relinquish the right to substitute, it follows

that they are unlikely to be seen as genuinely self-employed according to the applicable legal tests.

This report contends that a genuinely self-employed PA with an unfettered right to substitute is (by definition) an employment agency or employment business as defined by the Employment Agency Act 1973 (a definition, we were able to confirm is shared by CQC). **It is our view therefore that the PA exemption cannot be applied to genuinely self-employed PAs which brings them back into scope of the CQC.**

Although an informal care agency, made up of micro providers working together to form a company, was prosecuted by CQC in 2021 for providing unregulated services, this is the exception rather than the rule. It is our view that more resource is needed to facilitate further regulation in this area.

For more information about that case please see the link in **appendix 6**.

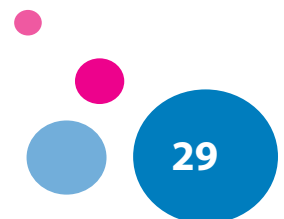
## **Conclusion**

Determining a PAs employment status for tax and employment law purposes is specific to each field. While the common factors do overlap and harmonise to an extent, understanding employment status and making a sound determination is complex and driven by the facts in each case. It is not a matter of personal choice, nor is it determined by the existence of a written statement to assert a position. If the reality suggests something different it is those facts that really count.

**The relevant regulatory authorities, HMRC, CQC and the EAS have not yet focused any coordinated resource to understand the Direct Payment/Personal Assistant sector.**

Current legislation in adult social care fully supports the use of direct payments to enable people to have choice and control over the way their care and support is commissioned and delivered. It remains the government's preferred mechanism for providing personalised care and support.

**This report calls for the Department of Health and Social**



**Care (DHSC) to consider working in collaboration with the regulatory authorities, HMRC, EAS and CQC to support a better understanding of employment status and its application in this sector. We offer our support and willingness to contribute to that piece of work.**

We are aware that Skills for Care have recently commissioned SCIE to help them decide whether they should support the growing workforce of self-employed PAs (alongside the resources they already provide for employed PAs) and we look forward to seeing any outcomes from that piece of work.

Recipients of Direct Payments who use PAs need support to navigate the care market safely and relatively risk free. PAs that want to become (and those that are) self-employed service providers require better guidance to ensure they are compliant with the relevant legislative frameworks in place to protect them, their workers, and the clients they serve.

People who use PAs should be able to decide for themselves if they are happy to relinquish some control and use genuinely self-employed PAs but be clear around the implications, e.g., that the PA will be free to send a substitute whenever they please.

Introductory agencies hiring and matching self-employed PAs to clients must also be supported to ensure they are operating within the legislative frameworks identified to regulate agencies and care providers.

The ability to work as self-employed, falsely, without the fear of HMRC, CQC or EAS providing any oversight to enforce the powers they already have, but appear under resourced to use, is not a good enough reason for this situation to continue.

Without further direction and support many people who use PAs are vulnerable to falling foul of the relevant regulatory frameworks that apply to them while simultaneously failing to provide the correct protections to their PAs. Supporting direct payment recipients in this context, without clear guidance or nationally shared definitions is a potentially unmanageable task for the

increasingly under resourced direct payment support services working across the country.

As the Care Act Statutory guidance points out, this support is crucial:

**4.47 Local authorities should help people who fund their own services or receive direct payments... This should include facilitating organisations that support people with direct payments...to recruit and employ personal assistants and to assist in overcoming problems and issues. This activity should help to match people's wider needs with services.**

### **This report makes the following recommendations.**

- Clear and **synchronised guidance** must be provided by HMRC, EAS and CQC, with oversight from the Department for Health and Social Care to prevent false self-employment and address uncertainties regarding the scope of regulation and to confidently support the growing market of self-employed PAs.
- People who use PAs, including direct payment recipients, need **support and guidance** to access PA support safely - whether employed or self-employed, working independently or supplied by an introductory agency.
- **Direct payment support services** require additional resource to help direct payment recipients navigate this landscape and should be engaged by local authorities and integrated care systems to co-produce those services alongside direct payment recipients.



## **Appendix 1**

### **What is a PA?**

#### **Department of Health and Social Care**

Personal care assistant - A personal care assistant is an entry-level role, where you'll help an individual with various aspects of their daily lives. You'll be employed directly by them, supporting them to live more independently.

#### **Social Care Wales**

Personal assistants are employed directly by individuals to assist them with care and support. Personal assistants are included in this framework to provide information about appropriate recommended qualifications.

#### **Skills for Care**

Personal assistants usually support individuals in their own home or to go out in the community.

You'll be employed directly by an individual. You can be employed directly by one employer or work for several different people.

#### **Kingston Centre for Independent Living KCIL**

A PA is a carer who works privately for a disabled or older person, so that they are in control of who works for them and how they are supported. A PA can help with all sorts of daily tasks at home, including domestic tasks, personal care, shopping, sorting out paperwork and can also support their employer to get out and about.

#### **Devon County Council**

##### ***Pinpoint community services in Devon***

A personal assistant (also known as a PA) is employed by someone who needs social care, either because of their age or disability, to enable them to live as independently as possible.

Personal assistants (PAs) are currently not regulated by the Care Quality Commission (CQC) even if they are providing intimate personal care.

Some PAs work on a 'self-employed' basis or some PAs are employed by the person needing care and support.



## **Appendix 2** – Chatfield Roberts Case – [Link here](#)

### **Appendix 3**

#### **List of Introductory care agencies**

[Care & Companions](#)

[Care with Choices](#)

[Care Leaf](#)

[Country Cousins](#)

[Curam Care](#)

[Elder](#)

[Good Life Sorted](#)

[IP Home Care](#)

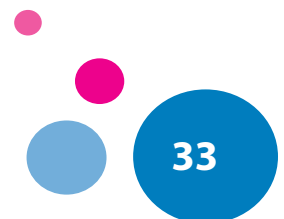
[KeBears](#)

[Prime Carers](#)

[CarersDirect.org](#)

[CareSisters](#)

[Care Match](#)



## Appendix 4 - Informal partnership of unregulated PAs – contract example

### ██████ care in the community Client Contract and Agreement

This agreement made on the ( ) day of ( )Month/ ( )Year, between [██████s care in the community] (hereafter referred to as “Caregiver”), and, client- \_\_\_\_\_

**Purpose.** The purpose of this agreement is to set forth the terms and conditions under which Caregiver will provide assistance with day to day living for \_\_\_\_\_ in his/her home in exchange for reasonable compensation.

#### 1- Offers of work-

- I make every effort to fulfil any offers of work, but make no agreement that i can always succeed
- ██████s care in the community can arrange care with up to four weeks advance notice, if care cannot be given every effort to cover will be guaranteed, ██████s work with a range of self employed care givers, who will ensure every effort is made to cover any unfulfilled shifts.
- Some exception to emergency's, we cannot guarantee definite cover
- If pre planned allocated work is terminated by the client without 48/72 hours' notice, with the exception of client admission to hospital or an emergency, the pre book shift will still be billed due to staff loss of earnings without adequate/pre agreed notice.

#### 2- Method of Payment and timings-

Payments will be requested weekly by bank transfer to the Nominated ██████ Account

- Name- ██████
- Sort code ██████
- Account Number ██████

Hours worked will be charged as per the rates below.

- *Monday to Friday 08:00-20:00 £17ph*
- *Monday to Friday Evenings 20:00-22:00 £19ph*
- *Saturday and Sunday Day 08:00-20:00 £19ph*
- *Saturday and Sunday awaking night 20:00-08:00 £24ph*
- *Sleeping nights are charged at a standard rate of £120 dependant of timings normally 22:00-07:00 (Outside of these hours, the above rates will apply)*
  
- *Bank Holidays/Christmas and New Year starred dates.*
- *24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 31<sup>st</sup> of December £30ph day rate*
- *New Year's Day £45ph*

## Appendix 5

### Breakdown of different models adopted by Local Authorities to support growing network/market of self-employed PAs

Scheme and Area	Initial Vetting / Checking	Quality Assurance/ Governance	Advice and Guidance	Areas Covered Further Information
<b>Support with Confidence (SWC)</b>	<ul style="list-style-type: none"> <li>● Online Application Form</li> <li>● Enhanced DBS Check</li> <li>● References</li> <li>● Insurance</li> <li>● Training requirements</li> <li>● Commitment to Code of Conduct</li> </ul>	<p>All members commit to <b>Code of Conduct</b>.</p> <p>Support with Confidence reasonable efforts, including monitoring customer comments and carrying out checks and reviews, to check that members comply with the terms of the scheme and treat customers safely and fairly - see <b>Terms and Conditions Support With Confidence</b>.</p>	<p>SWC is a registration, monitoring and directory service only.</p>	<p>Bracknell Forest, Brighton &amp; Hove, East Sussex, Nottinghamshire, Surrey, West Berkshire and Wokingham</p> <p><b>Find Local Services – Support With Confidence</b></p>
<b>Community Catalysts</b>	<p>Face to face support for enterprises/ self-employed care workers. Signed Commitment to quality standard and self-disclaimer that have documentation in place. No vetting / approving/ checking.</p> <p>Face to face support to people setting up a new or developing a community micro- enterprise. This may include a sole trader working on a <i>self-employed</i> basis. People have to sign up to a commitment to meet <i>Doing it Right Standards</i>. No vetting / approving/ checking.</p>	<p>Catalyst will support with quality assurance and offer support to Local Aut</p> <p>Locally employed Catalyst supports the enterprise leader through an advice framework which focuses on the regulatory/ legislative aspects such as CQC/HMRC that may affect a <i>care based</i> enterprise. Signpost to other organisations for relevant training/ DBS/ insurance <b>and also</b> provide relevant templates for <i>policies</i> and procedures. Workers then self-disclose that they have met the <i>Doing it Right Standards</i>.</p>	<ul style="list-style-type: none"> <li>● Face to face advice Framework for self-employed care workers.</li> <li>● Workshops and Face to face.</li> <li>● Supports Local Authority to offer appropriate advice and guidance.</li> </ul> <p>Face to face/ virtual Advice and guidance through local catalyst.</p>	<p><b>Where we work - Community Catalysts</b></p> <ul style="list-style-type: none"> <li>● Help people understand customer requirements within a personalised marketplace.</li> <li>● Support to overcome bureaucratic barriers.</li> <li>● Support with marketing/ other resources via Small Good Stuff <b>Small Good Stuff – A free directory of community micro-enterprises who offer care and support locally</b></li> </ul>
<b>Somerset Council Community Connect Scheme</b>	<p>Verification includes DBS, Public Liability Insurance, <i>Contracts, Complaints Procedure, Support Plan Templates</i>. Annual Revalidation to include documentation</p>	<p>Local authority quality assurance scheme</p>	<p>Local Authority offers appropriate advice and guidance.</p>	<p>Somerset County Council</p>

**Appendix 6** – Provider ordered to pay £16,322 for running Somerset Care agency illegally – see link [here](#).

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