

**Post-legislative scrutiny of the Social Care (Self-directed Support) (Scotland) Act 2013
Response from the Low Incomes Tax Reform Group (LITRG)**

1 Introduction

- 1.1 Self-directed support (SDS) in Scotland allows individuals to have more control over their social care and support services, including the option to hire their own personal assistants (PAs) using direct payments.
- 1.2 We, the Low Incomes Tax Reform Group (LITRG), are a national group of tax professionals with insight into the labour market and experience of working with HMRC, rather than social care experts. However, we are pleased to input into this inquiry gathering thoughts on the implementation of self-directed support to date.
- 1.3 It appears that there is a good, coordinated effort by the Scottish government and relevant local bodies to implement SDS, with helpful initiatives to understand and support the landscape.¹ However, there is an issue around employment status of PAs, which is a UK-wide matter. It is this area and this aspect of SDS that we feel able to best contribute on and thus, focus our response.
- 1.4 Giving people the ability to employ a PA is the embodiment of providing individuals with greater choice and flexibility, as there is something like a master-servant relationship² – with the cared-for person being the master and therefore having full control over the way they receive care and support and from whom.

¹ For example, the PA programme board <https://www.sdsscotland.org.uk/pa-programme-board/> and the Workforce survey <https://www.sdsscotland.org.uk/annual-pa-workforce-survey/>

² A master-servant relationship refers to a relationship between an employer (master) and an employee (servant). In this relationship, the master has the authority to direct and control the servant's work and the servant is obliged to obey the master's instructions and perform the tasks.

- 1.5 There are, however, a large number of ‘self-employed’ PAs across the UK,³ including in Scotland⁴ (although we have not been able to find any firm evidence as to the scale of it in Scotland). We understand why the concept of ‘self-employed’ PAs is attractive (both at an individual and at a societal level) – it reduces the costs and obligations of engaging a carer, it increases the potential pool of workers and in the Scottish context, it responds to some of the specific challenges there are – such as around the rural geography. We also appreciate that innovation and diversity in the types of support that are available are a good thing when it comes to wider social and health care strategies.
- 1.6 The large numbers and our own evidence from enquiries to our website lead us to believe that there is a wide-scale problem with ‘false’ self-employment in the PA sector. This is because, due to the personal nature of the work being done, it seems unlikely in many cases that the key hallmarks of being genuinely self-employed (such as an unfettered right of substitution) would be present in many PA cases.
- 1.7 We do not believe that HMRC are currently vigorously policing employment status in the care sector. This has widespread ramifications, including for the entire concept of SDS. Furthermore, gaps in the ‘official’ understanding of, and framework around, self-employed PAs lead us to be concerned that there are broader compliance issues to investigate, such as whether self-employed PAs should be registered under care quality laws. While not directly a tax point, it is one that is interlinked with status issues more generally, which is why we touch upon it in this response.
- 1.8 Overall therefore, while SDS in Scotland seems a generally positive development that has the potential to improve the lives of individuals who require social care and support services, there are specific issues around the PA workforce that need to be addressed. We go into more detail on these challenges in this submission and also take the opportunity to set out some high-level recommendations for improvements (recommendations are highlighted in bold in the text).
- 1.9 In the context of tax and National Insurance contributions (NIC), it is worth noting that the Scottish Parliament only has the power to set rates and bands of income tax on non-savings non-dividend income, the remaining income tax and NIC powers are reserved to the UK Parliament. We have made recommendations in this response relating to better guidance and enforcement of tax rules by HMRC. We think there is a great deal of potential for officials and Ministers in Scotland to try and encourage HMRC’s approach in this area.
- 1.10 If you have any questions, we are very happy to be contacted about any aspect of our submission.

³ We round up some of the latest evidence in our submission to the Director of Labour Market (who has highlighted care as one of her priority areas): <https://www.litrg.org.uk/latest-news/submissions/230908-labour-market-enforcement-strategy-2024-2025-call-evidence>

⁴ <https://www.sdsscotland.org.uk/your-views-on-self-employed-pas/>

2 About Us

- 2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind, and this often makes life difficult for those we try to help.
- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3 Employing a personal assistant (PA)

- 3.1 Employing a PA means that the cared-for person becomes an employer, with all the responsibilities that come with it. The responsibilities are varied, but – importantly – include ensuring that the PA is qualified, trustworthy, and suitable for the role as well as complying with a raft of employment law and tax obligations.
- 3.2 Of course, there is an issue that some of these individuals may not have the necessary knowledge or capability to properly deal with all their responsibilities, which are, by and large, the same as those for an organisation or business employing staff. In particular, operating Pay As You Earn (PAYE) is one area that we know causes great concern. Indeed, for some cared-for people with certain disabilities, it may feel impossible, as this query demonstrates:

"I am a disabled person who as well as a physical disability suffer from a learning disability. I have just found out that I need to have registered as an employer to be able to pay tax, holiday pay etc for my PA. As fast as I am reading information is just disappearing from my brain and I feel like I'm going in circles but am not getting anywhere. Please help me. Are there any companies that support disabled people who are employers with the registration process with the HMRC.... Please help."

- 3.3 PAYE was introduced for those in employment situations for both practical and principled reasons. We appreciate registering as an employer and operating PAYE sounds daunting and, in some cases, even impossible, but the answer to this is not to try and circumvent it by turning to self-employed PAs. The answer is for HMRC and other responsible bodies to give individuals the information, support, and advice they need to navigate these responsibilities effectively. This may include guidance on recruitment and selection processes, training on safeguarding and employment rights,

and access to resources for managing the administrative and financial aspects of being an employer (including operating PAYE via a payroll provider, where necessary).

- 3.4 In terms of the latter, we have an entire section of our website devoted to helping individual employers, including care and support employers, understand and meet their obligations and we are gratified that our comprehensive factsheet tailored for the sector, is referenced in the statutory guidance that accompanies the 2013 act⁵ and Self-Directed Support Scotland's PA handbook.⁶ However, it is unclear as to whether there is any real oversight or consistency as to how the factsheet is being used and applied in real life across Scotland.
- 3.5 We note that there is very little official, tailored guidance on the care sector from HMRC meaning our resources exist in something of a vacuum.⁷ Given the significant numbers of people being given government funding to engage the services of a PA across the UK,⁸ we think guidance (both for those administering government funding and for those claiming the funding) is the bare minimum required to support the sector. We put the need for such guidance to HMRC at every available opportunity.
- 3.6 Alongside this, given some of the complexities that exist for care and support employers, for example, where the cared-for person might lack capacity,⁹ **we recommend that questions should be asked of HMRC as to how they could support this group of employers better. We also recommend that HMRC could be challenged as to whether they could put any easements in place to make the process of taking on a PA and running a payroll easier.**

4 False self-employment

⁵ <https://www.gov.scot/publications/statutory-guidance-accompany-social-care-self-directed-support-scotland-act-2013-2/pages/10/>

⁶ <https://handbook.scot/article/self-employed-pas/>

⁷ The guidance that there is, is buried in a technical manual: <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm4015>

While it indicates that in their view, most PAs will be employees, HMRC do not do enough to push / highlight this guidance and perhaps it is worded in such a way as to allow people to seize on the one-liner caveat at the end about self-employment being possible where a PA has multiple clients.

⁸ Scottish figures are available here: <https://publichealthscotland.scot/publications/insights-in-social-care-statistics-for-scotland/insights-in-social-care-statistics-for-scotland-support-provided-or-funded-by-health-and-social-care-partnerships-in-scotland-202122/#:~:text=An%20estimated%201%20in%2025,18.9%20people%20per%201%2C000%20population>

⁹ We set out some of these in our news article: <https://www.litrg.org.uk/latest-news/news/230109-hiring-carer-%E2%80%93-5-key-things-you-must-understand>

- 4.1 Whilst we accept there are some genuine self-employment situations in the care sector (see section 5 below), there also appear to be many false self-employment situations, where the PA is working as if in a 'master-servant' relationship but is being treated as self-employed.
- 4.2 This leaves the cared-for person non-compliant with tax law and at financial risk. This is because if someone's PA is not genuinely self-employed (according to the facts and circumstances), but is still paid as if they are self-employed (that is, on a gross basis and not under PAYE), then the law says that that in most instances, HMRC should pursue the employer for any tax underpayment.¹⁰
- 4.3 The other main risk from the cared-for person's perspective is that the PA may take action against them. Given the lack of employment protections for self-employed PAs (including around the minimum wage, holiday, workplace pension and health and safety - particularly in live-in carer situations where there can be serious working time/rest break issues), it is easy to see that PAs may ultimately become disgruntled with the situation. Indeed, often we find that workers are happy enough to go along with self-employed status until something goes wrong, for example, they need to claim benefits, or they get sick and look for statutory sick pay etc, or there is a disagreement about something and the relationship breaks down.
- 4.4 As in the Chatfield Roberts case, an Employment Tribunal claim against the cared-for person may be the ultimate end point.¹¹ Even if this perhaps seems remote (because it relies on individual workers instigating proceedings), HMRC have a minimum wage unit that enforces the minimum wage and we understand that HMRC will consider 100% of complaints they receive. Complaints can be made anonymously by workers and, once received, HMRC may start an investigation against an employer, covering all aspects of National Minimum Wage (NMW)/National Living Wage (NLW) risk, not just the complaint itself. As well as reacting to individual complaints, HMRC minimum wage officers also conduct proactive risk-based enforcement. On the June 2023 'naming' list, six employers were on the list for 'worker status error'.¹²
- 4.5 From the PA's perspective, having false self-employment foisted on them may leave them in a stressful situation, as this summary of a query we received to our website demonstrates:

Person A has taken on a job as a carer for person B. Those in charge of person B's affairs are treating person A as self-employed, even though the HMRC tool says person A is employed. The results have been shown to those in charge of person B's affairs. Person A is desperate for the work, so feels powerless to do anything about the situation. Person A feels they are in such a stressful situation, and feels like they are being bullied into doing something dishonest.

¹⁰ <https://www.legislation.gov.uk/ukxi/2003/2682/regulation/80>

¹¹ https://assets.publishing.service.gov.uk/media/5c3727cf40f0b644631dc832/Mr_J_Chatfeild-Roberts_v_1_Ms_M_Phillips_2_Universal_Aunts_Ltd_UKEAT_0049_18_LA.pdf

¹² <https://www.gov.uk/government/news/more-than-200-companies-named-for-not-paying-staff-minimum-wage>

- 4.6 Furthermore, given falsely self-employed PAs aren't in business on their own account (and are probably not used to dealing with invoices, paperwork, record keeping etc), they may not be well placed to navigate the complex Self Assessment system to pay their taxes. Many will not be able to afford to engage an accountant or tax adviser. There is also a lack of support from official sources. These factors can often result in non-compliance or under-reporting due to ignorance and misunderstanding. Penalties and even bankruptcy can result – which can have devastating consequences for them and their life chances. We set out all sorts of other knock-on effects for workers that can flow from an incorrect status determination in our submission to a 2022 BEIS inquiry on the labour market.¹³
- 4.7 In the long-term, all of this taken together may start to impact on the sustainability of the system. False self-employment also presents a risk to the whole notion of SDS if the 'success' is unearthed as largely illusory – for example, because a good deal of it is based on non-compliant PA arrangements.
- 4.8 So why, against this backdrop, are there so many self-employed PAs? We have written an article providing some further thoughts about what is driving the self-employment phenomenon.¹⁴ One of the key factors is that HMRC aren't noticeably acting or commenting on false self-employment and in the meantime the number of self-employed PAs continues to build. Indeed, self-employed PAs are now becoming such a widely accepted notion that there are new initiatives being bolted on, for instance, introductory agencies¹⁵ and accreditation schemes for self-employed carers.
- 4.9 While we think the majority of these initiatives are being set up by organisations acting in good faith (and are not just opportunists exploiting the situation for example), it strikes us that extra charges and costs, as a result of third parties entering supply chains, eat up budgets and potentially reduce available funds for those individuals in need of support. We are also very concerned that we will soon reach a stage where this problem has been allowed to drift for such a long time that simply enforcing the law around PAYE would be very difficult - with a range of consequences.
- 4.10 As we wrote in our consultation response in 2018 on employment status¹⁶, no-one wants to see heavy-handed PAYE enforcement activity against disabled people and/or good and longstanding PA relationships being unravelled. However, on the other hand, it is obviously important that public money drawn down from one part of government is not being used in a way that is incompatible with the rules of another part of government or in a way that puts people at risk of being fined or punished if they are scrutinised by the appropriate legal authorities.

¹³ <https://www.litrg.org.uk/latest-news/submissions/220908-beis-labour-market-inquiry>

¹⁴ <https://www.litrg.org.uk/latest-news/news/230823-are-you-self-employed-pacarer>

¹⁵ We explain more about the proliferation of introductory agencies in the care sector here: <https://www.taxadvisermagazine.com/article/introductory-agencies-and-self-employed-live-carers>

¹⁶ <https://www.litrg.org.uk/latest-news/submissions/180531-employment-status> - see section 10

- 4.11 Allowing the situation to continue unchecked is not desirable for many reasons. **We recommend that HMRC are encouraged to think about the practical steps that can be taken to address the current proliferation of potentially falsely self-employed PAs – perhaps by focussing ‘upstream’ on the role of the introductory agencies, for example.**

5 Genuine self-employment

- 5.1 Some of the main factors pointing to employment (for tax purposes) are that a PA has to carry out the work personally, takes orders as to how, where and when to do it, has to work set hours and is paid a regular salary or wage. Factors pointing to genuine self-employment (for tax purposes) are that a PA controls how, when, and where to do the work, provides his or her own significant equipment (gloves and aprons etc. are not enough), regularly works for several different people, and is free to draft in others to do the work as and when they please. This final point - an ‘unfettered’ right of substitution - is one of the key indicators of genuine self-employment.
- 5.2 It is important to understand that this term (an unfettered right of substitution) doesn’t encompass the situation where an agency provides a substitute for holiday/sick leave or where the original PA merely recommends a substitute whom the cared for person takes on. What is meant by it, is that *at any time* the self-employed PA has the unfettered or unrestricted right to provide a substitute of their choosing to complete the job in his or her place. The cared-for person can make sure the substitute is equally qualified, but beyond this they have no say in who turns up to do the work, as long as the work gets done.
- 5.3 Due to the very personal nature of much care work, it seems very unlikely that there is a right of unfettered substitution in many cases. And, although this is just one of the tests, it makes it quite hard to be self-employed if the PA doesn’t meet it – hence our concerns discussed in section 4 above about the potential level of false self-employment in the sector. However, to the extent there *are* some PAs that genuinely do meet the test, there are potentially questions to be asked about the knock-on effects of these arrangements.
- 5.4 If a PA is genuinely self-employed, not only is there an unfettered right of substitution, but the PA is likely to be in control of what tasks are carried out, when and how. This may result in less accountability and oversight. **We therefore recommend that HMRC do more to police employment status in the care sector so that everyone involved is clear on what genuine self-employment looks like and what to expect from different types of PAs. Not only would this ensure the correct tax and NIC treatment, but it may also serve the wider purpose of helping people to better understand the contractual arrangements they have with their PAs.**
- 5.5 We also think there needs to be a more coordinated effort between the authorities concerned to understand the landscape and to consider how the law on care quality applies to genuinely self-employed PAs. In this respect, the Scottish government may be interested to read a new report on

‘Personal Assistant Employment Status’ by the National Direct Payments Forum,¹⁷ which explores self-employed PA arrangements (mainly from an English perspective). The report highlights the potential for ‘false self-employment’ in the care sector. However, in discussions relating to the report, another issue surfaced: the suggestion that genuinely self-employed PAs may actually fall outside the scope of the exemption for direct provision of personal care, set out by the Care Quality Commission (CQC).¹⁸ This is because the exemption only applies where a person, or a related third party on their behalf, makes their own arrangement for personal care and the care worker works directly for them and *under their control without an agency* or business involved in managing or directing the care provided (our emphasis in italics).

- 5.6 Per our comments above, there may not be control, or the right thereof in genuine self-employed PA arrangements. Moreover, if PAs are coordinating with other PAs to schedule work or to arrange cover when they are otherwise unavailable, then this could make them an ‘employment agency’ under the Employment Agency Act 1973 (as they are providing information to other persons with a view to them finding work).
- 5.7 Neither HMRC, the Employment Agency Standards Inspectorate nor the CQC appear to have appreciated these complexities. If it is correct, this is quite a serious matter as it means that genuinely self-employed PAs, when providing the regulated activity of providing personal care, would need to be registered with the CQC. This is obviously a legal burden that employed PAs do not have and could shift incentives around status in the marketplace considerably given that, again, there is an expectation that direct payments are not used to procure arrangements that are not compliant with the law. There also may be less incentive for PAs to structure their working arrangements so as to be self-employed for tax purposes if they understood that this might mean they are required to be registered with the appropriate authorities in relation to quality of care. While not a tax point, therefore, and one in relation to which we are not experts, it is possible to see that there are wide-ranging consequences of structuring arrangements in a certain way and that all parties need to understand the rules in the round, rather than focusing on only the tax and employment law aspects of engaging a PA.
- 5.8 Having checked the wording of the equivalent legislation in Scotland¹⁹, (‘the provider is an individual who *personally and solely* gives the care or support in question’ – our emphasis in italics), **we recommend the Care Inspectorate in Scotland confirm the position as soon as possible so that genuinely self-employed PAs are not inadvertently providing unregulated services and cared-for people are not using direct payments to buy in non-compliant care.**

¹⁷ <https://www.nationaldirectpaymentforum.org.uk/>

¹⁸ <https://www.cqc.org.uk/guidance-providers/registration/personal-care-ongoing-role-introductory-agencies-individual-care>

¹⁹ <https://www.legislation.gov.uk/asp/2010/8/schedule/12>

LITRG
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