



Low Incomes
Tax Reform
Group
A voice for the unrepresented



INDEPENDENT LIVING, DIRECT PAYMENTS AND THE TAX SYSTEM

**A report by the Low Incomes Tax Reform Group of
The Chartered Institute of Taxation**

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Abbreviations

BERR	Department for Business, Enterprise and Regulatory Reform
BIA HO	Border and Immigration Agency of the Home Office
CASC	Community Amateur Sports Club
CD-ROM	Compact Disc – Read Only Memory
CIOT	Chartered Institute of Taxation
CSIP	Care Services Improvement Partnership
DH	Department of Health
DPDF	Direct Payment Development Fund
DWP	Department for Work and Pensions
EIM	Employment Income Manual
ESI	Employment Status Indicator
HMRC	Her Majesty's Revenue and Customs
HSS	Health and Social Services
ILF	Independent Living Funds
LEL	Lower Earnings Limit
LITRG	Low Incomes Tax Reform Group
MSC	Managed Service Company
NCIL	National Centre for Independent Living
NCVO	National Council for Voluntary Organisations
NDPB	Non-Departmental Public Body
NIC	National Insurance contributions
NMW	National Minimum Wage
ODI	Office for Disability Issues
PAYE	Pay As You Earn
TEEL	Targeted Education, Enabling and Leverage
UCT/ILT	User Controlled Trust/Independent Living Trust
VAT	Value Added Tax
WTC	Working Tax Credit

Executive summary

The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented in the tax system. The CIOT is an educational charity and the leading professional body in the UK for tax advisers.

This report is the culmination of a year's research into the tax treatment of direct payments under the Community Care Act 1996. Our interest in this topic was prompted by the dearth of information for recipients about the tax and other regulatory implications of direct payments, which can nonetheless be substantial for those who become employers by engaging a carer.

In the course of our research we have had discussions with government departments, particularly HMRC, and with local authorities, support agencies and service users in order to determine where the chief difficulties lie from the perspective of each.

What are direct payments?

'Direct payments' are cash payments made directly to the bank account of vulnerable people as an alternative to more traditional forms of care, such as in a residential home. Local authorities are now obliged to offer direct payments to all in need of care. Their purpose is to give the recipients (known as 'users') more choice and control over the services they receive, enabling them to live independently in their own home. Direct payments are commonly used to buy community services such as those of a personal assistant or carer.

Direct payments have been widely promoted by the Government. In 2005-06 there were over 45,000 users of direct payments in the UK, including disabled adults, younger persons, carers of disabled children, and older people. The administration of direct payments is shared between a medley of Government departments and bodies. These are the Department of Health, which 'owns' the policy and legislation; the local authorities, which have a duty to offer them to eligible individuals; Her Majesty's Revenue and Customs (HMRC), which administers the PAYE and NIC systems necessary when users employ carers; the Department for Business, Enterprise and Regulatory Reform (BERR) which is responsible for setting the national minimum wage (HMRC is responsible for enforcing it); and the Department for Work and Pensions (DWP) with its interest in disability and carers and the administration of national insurance numbers.

With so many organisations involved, there is little co-ordination of policy and practice across government. In this report, while we concentrate on the tax treatment of direct payments and the part played by HMRC, we also consider how all government agencies involved in direct payments can become more joined-up in their approach.

The tax and other regulatory issues

A consequence of direct payments is that if the money is used to pay a personal assistant or carer, the user becomes an employer and is therefore obliged to operate PAYE and NIC and undertake other obligations of an employer. This is not always made known to users when they have to choose between direct payments or a more traditional form of care.

The technicalities of PAYE, NIC, national minimum wage (NMW), and other aspects of being an employer, present many difficulties for direct payments users. Things are made worse by the lack of customer services targeted for users, and the fragmented nature of government involvement in direct payments policy and administration.

Main problems identified

The main problems identified by our work are these.

- HMRC sees such employers as *non-business micro employers*. Despite categorising them in this way as a separate customer segment, HMRC provides services that are not specific to direct payments users, and generally of variable quality.
- Complex technical questions to do with the payment of the NMW, and which apply specifically to direct payments users – for example whether sleep-ins are counted as working time or not – are not well explained by BERR.
- Most direct payments users are dependent upon support services to help them with their PAYE and NIC obligations. Some councils provide services in-house, others contract them out, yet others have a mixture of in-house and outsourced services. Where services are outsourced, some are provided free, but others are offered to users on the same commercial terms as to any other client.
- HMRC offers a PAYE ‘simplified’ deduction scheme intended for non-business domestic employers, but used mainly by better-off employers with access to advice. It was not designed for the direct payments user and is described by many support services as anything but simplified.
- Status issues – whether a person is employed or self-employed – were the principal concern of support services, councils and individuals whom we spoke to during our research. HMRC clearly finds status issues a difficult area in which to give straightforward advice. Whatever HMRC determines to be the position for tax purposes does not always agree with what an employment tribunal would find given the same facts. Nevertheless, if the direct payments user makes a mistake about the employment status of their carer or personal assistant, they can face the emotional and financial turmoil of an HMRC status enquiry. Appendix B tells the harrowing tale of a vulnerable older person and her daughters becoming caught up in such a process.
- The employment status indicator, or ESI, is a tool provided by HMRC which enables direct payments employers and support services to check the status of a carer on an anonymous basis, but the tool was devised primarily for the construction industry and the difficulty of the language can lead the user to answer questions incorrectly.
- Other problem areas include the correct tax treatment where living accommodation is provided for a live-in carer; the proper analysis for tax purposes of the user-controlled or independent living trusts sometimes used to administer direct payments for users; the question to what extent (if at all) the money laundering regulations apply to payroll agencies in the voluntary

Conclusion and recommendations

We conclude the report with the following recommendations.

A strategic national initiative on tax-related issues

The main government departments including local government should get together to address how tax-related (and employment and wage law) issues fit into the development of independent living, so that solutions are developed as part of the process, rather than being tackled after the policy has already been implemented.

Given the fragmentation caused by the involvement of so many government agencies, Directgov should become the centre of information on direct payments.

However, online guidance must be supplemented by departmentally-integrated hard copy guidance.

A government provided online payroll service

Government should investigate the possibilities of providing an online payroll service as one option for direct payments users.

Better HMRC focus on this segment of its customer base

HMRC should now focus on this segment of its customer base as a matter of some urgency, particularly if the type of care exemplified by direct payments is to grow in popularity with encouragement by government.

The employer helplines must improve their customer service in respect of direct payments employers and provide a level of service that the customer can value.

HMRC should provide information in user-friendly formats, including material about all the issues we discuss above.

1 Introduction

The Chartered Institute of Taxation (CIOT) is an educational charity and the leading professional body in the United Kingdom for tax advisers. In 1998 the CIOT established the Low Incomes Tax Reform Group (LITRG) with the objective of giving a voice to the unrepresented (those who cannot afford to pay for professional advice). The majority of the people involved in LITRG are volunteers.

'Direct payments' are payments made directly to vulnerable people as an alternative to more traditional forms of care, such as in a residential home. Local authorities are now obliged to offer direct payments to all in need of appropriate levels of care. Their purpose is to give users more choice and control over the services they receive, enabling them to live independently in their own home. Direct payments are commonly used to buy community services such as those of a personal assistant or carer.

But direct payments schemes are not without their drawbacks. By the act of paying personal assistants and care workers to look after them, users become in law 'employers' and this brings PAYE and NIC implications in its wake. The reason LITRG became interested in this research project was the lack of information about tax-related issues for people who receive direct payments, particularly those who become employers.

Our research has involved numerous discussions with local authorities and other bodies and individuals involved in direct payments, including both government departments and support services. It was carried out between November 2006 and September 2007.

We received funding from Her Majesty's Revenue and Customs (HMRC) towards the initial phase of the project and the CIOT has funded the remainder of the work. Throughout the life of the project we have had regular meetings with HMRC staff from across the department to discuss emerging issues and possible solutions.

2 Direct payments

2.1 Background

For many years, disabled people and their supporters have been campaigning for a system of social service that enables them to lead a full and independent life. This is often referred to as the right to 'independent living' or 'inclusive living' and is about having the support to gain access to the choices in everyday life that non-disabled people take for granted.

It has been said that direct payments are an essential feature of independent or inclusive living as they provide the means for disabled people to purchase the support they need to go to work; to support their families, to achieve choice and actively engage in community life. Before 2003, local authorities had a power to offer direct payments to all people using community care services¹; in that year, regulations turned that power into a duty. Yet the take up of direct payments in the UK has been slow since then.

However, although local authorities must undertake an assessment of care needs for any qualifying client² this does not automatically result in funding and the opportunity to become a direct payments user. Many local authorities are reviewing their ability to support all of the four care categories³. In England and Wales the percentage of local authorities restricting funding to the highest levels of assessed care needs (critical and substantial) is set to increase from 53% to 62% in 2007 and is predicted to reach 73% by the end of the financial year⁴. There is therefore a substantial amount of unmet assessed need in the moderate and low categories. Some local authorities are looking to go even further and restrict their support to the critical category only.

The London Borough of Harrow recently lost a case in the High Court where the judge ruled that the authority was wrong to tighten up adult care eligibility criteria to meet critical needs only. This decision is likely to impact on other local authorities wanting to cut back on services for residents with disabilities⁵.

People in receipt of direct payments can apply to the Independent Living Funds (ILF) for additional financial support, if they meet the eligibility criteria⁶, see section 2.7.3 for more information about the ILF.

2.2 What are direct payments?

'Direct payments' are payments a local authority makes directly to a person in need of support from the community in lieu of more traditional forms of care, such as in a residential home⁷. The object of direct payments is to give users more choice and

¹ Community Care Services: Services helping people live as full and independent lives as possible. They are intended to help people overcome particular difficulties, and to assist people to live in their own home or local area for as long as possible.

² Essentially people resident within the local authority geographical area.

³ The four categories = critical, substantial, moderate, low – in descending order of priority

⁴ Source: Commission for Social Care Inspection (CSCI)

⁵ See <http://www.mentalhealth.org.uk/information/news?EntryId=52449> for a report from the Mental Health Foundation about the case brought by the Public Law Project against the London Borough of Harrow

⁶ See http://www.ilf.org.uk/making_an_application/eligibility/index.html for details of the criteria

⁷ According to the Department of Health, 'cash payments made in lieu of social service provisions, to individuals who have been assessed as needing services.'

control over the services they receive, enabling them to live independently in their own homes.

Direct payments are usually paid on a weekly or monthly basis directly into an individual's bank account, which has been opened exclusively to operate the payments. The amount paid is effectively means-tested based on the estimated costs of the service that the individual needs less any personal contribution that might be required by the local authority.

Direct payments are not a replacement for the provision of social services by local authorities but are an alternative to receiving services in the traditional way. An individual in need of services does not have to accept direct payments. The key element is choice.

Statistics show that there are some 45,000 people receiving direct payments. Our research suggests that around 900 of them operate their own PAYE schemes. See Appendix A for more details.

2.3 Who can receive them?

Direct payments have been available in the UK since the introduction of the Community Care (Direct Payments) Act 1996. The Act gave local authorities the power to consider making direct payments to certain individuals they assessed as in need of services. The legislation has been extended over the years and direct payments are now available to:

- disabled adults aged 18-64 who have been assessed as eligible to receive community care services (since 1997);
- disabled people over the age of 64 (since 2000);
- parents of disabled children (since 2001);
- disabled young people aged 16-17 years old (since 2001);
- carers aged 16 or over who provide substantial care for a person aged 18 or over (since 2001) (except Scotland, for further details see section 2.4).

Since 8 April 2003, it has been mandatory for all local authorities to offer the choice of direct payments to all eligible recipients.

However, certain groups are not eligible under the legislation:

- offenders subject to court orders;
- those detained under mental health legislation on leave of absence from hospital;
- people subject to guardianship or supervised discharge.

People who lack capacity as defined by the Mental Capacity Act of 2005 are currently also unable to become direct payments users. The Government White paper '*Our health, our care, our say: a new direction for community services*' published in January 2006⁸ contained a commitment to extend the availability of direct payments to 'those groups who are excluded under the current legislation'. This extension is to be achieved through the Health and Social Care Bill introduced to Parliament on 15

⁸ See

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4127602

November 2007. The Bill allows direct payments to be paid to a 'suitable person' who can receive and manage the payment for the person who lacks capacity.

The Department of Health says that some adults with head injuries, some people with dementia and severely disabled children moving into adulthood where they would lose their direct payments under current legislation will all be helped by the Bill.

2.4 Development of direct payments across the UK

Direct payments are available in each of the four administrations of the UK with only relatively minor variations in the supporting legislation. There is usually a slight delay before legislation is extended to Wales, Scotland and Northern Ireland.

The most significant differences apply in Scotland where direct payments have not been extended to carers and there is currently no timetable for such a measure, but can be used to buy services direct from the local authority, if they are selling them. Direct payments cannot be used for this purpose in the rest of the UK.

The Scottish Executive is looking at relaxing the rules for direct payments employers employing close relatives.

Although direct payments are available throughout the UK their usage has developed at very different rates. There has been one major UK comparative study: *'Disabled People and Direct Payments, A UK Comparative Study (2006)'*⁹. The study found that by 2003 England had twice the rate of take up for every 100,000 adults compared with the rest of the UK. While numbers have increased rapidly in the whole of the UK the differential was still evident in 2005.

2.5 Individual Budgets (IBs)

The Government wants to continue modernising social care and public services by introducing self-directed support and person centred planning to give users and their families more choice and control. As a key initiative in this modernisation programme the Government has introduced Individual Budgets pilots, currently running in 13 local authorities¹⁰.

In the pilots different funding streams are brought together into a single user-controlled budget to buy social care services. The pilots are testing out more flexibility in buying social care services, although one option on offer to the budget holder might be to have a formal direct payment, as a way of meeting some or all of their assessed needs.

The Government wants Individual Budgets to be fully evaluated before policy is changed nationally. Evaluation is in the early stages but some preliminary findings have been published¹¹. Greater complexity is likely to accompany increased flexibility and present HMRC with new tax-related challenges. The desire to be able to use Individual Budgets for 'informal' payments to close relatives in return for care raises questions about the nature of such payments and whether they are taxable in the hands of the recipient.

⁹ See <http://www.leeds.ac.uk/disability-studies/projects/UKdirectpayments/UKDPfinal.pdf>

¹⁰ See <http://individualbudgets.csip.org.uk/index.jsp> for full details of the pilots programme

¹¹ See http://www.ibsen.org.uk/metadot/index.pl?id=2345&isa=Item&field_name=item_attachment_file&op=download_file for early findings

2.6 How joined-up is direct payments policy?

The Department of Health (DH) owns the policy and legislation governing the provision of direct payments for assessed care needs. The local authorities have a duty to offer direct payments as one method of meeting those assessed needs. It is common practice for local authorities to fund independent local or national organisations to support direct payment users with managing their payments, so that the user has contact with and may rely on this third party.

HMRC is responsible for administering the PAYE/NIC system used by direct payment users who become micro, non-business employers. The Department for Business, Enterprise and Regulatory Reform (BERR) is responsible for setting the National Minimum Wage (NMW) policy which applies to carers and personal assistants employed by direct payments users. HMRC is responsible for enforcing NMW policy.

The Department for Work and Pensions (DWP) has an interest in policy to do with disability, the administration of National Insurance numbers and also ensuring that carers' needs are met. The DWP funds the Independent Living Funds (ILF). The ILF were set up as a national resource for the financial support of disabled people 'to enable them to choose to live in the community rather than in residential care'. ILF funds can be used directly to employ carers and personal assistants.

The Office for Disability Issues (ODI) was formed to act as a champion within government of disabled people and to work with all departments to help them better understand and meet the needs and aspirations of disabled people, including independent living. The ODI has led the Independent Living Review, which ran for a year to July 2007 and which is expected to report by April 2008. The review aimed to identify imaginative and practical solutions to supporting independent living for disabled people. Direct payments have been considered during the review.

As more migrants to the UK get involved in the care industry the Home Office policy on the right to work has to be taken into account by direct payment users when they employ people who are not British citizens. There is a shortage of carers and personal assistants and recently an increasing number of migrants from the A8 and A2 accession countries¹² have been filling the gap.

So there are seven government structures involved in a complex relationship at policy level, administering complex legislation, which has to be interpreted in the field by a very wide range of support organisations and by individual direct payment users themselves.

The relationship between the four major players, the Department of Health, the local authorities, BERR and HMRC seems to operate within silos at policy level. We found no evidence that these organisations ever get together to discuss their overlapping responsibilities for the delivery of a successful service for direct payment users who are micro, non-business employers.

Policy experts from the Department of Health commented to us that direct payments policy is too complex to get all the players round the table. When the Department of Health plans policy changes the proposals are notified to other government departments and organisations and the Department of Health receives feedback in response.

¹² A8 = Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovak Republic, Slovenia; A2 = Bulgaria, Romania

HMRC is at the bottom of the chain with the long lines of communication making effective consultation about change difficult. As the Department of Health is the overall owner it is up to them to understand the whole policy and consult effectively.

Direct payments experts from several local authorities and independent support organisations commented to us that the direct payments policy has not been thought through from end to end, as far as users who become employers are concerned.

2.7 National and local government roles

As the responsibilities are shared at the top level we needed to understand which departments are holding the levers of power so that tax-related problems which may emerge during the direct payments user's 'journey' can be addressed. We found that a number of government agencies were active in this area, as we enumerate below.

2.7.1 The Office for Disability Issues (ODI)

The Government has accepted all the recommendations made in the report '*Improving the life chances of disabled people*'¹³ published in January 2005 and has charged the ODI with driving forward the strategy to achieve the vision that:

'By 2025, disabled people in Britain should have full opportunities and choices to improve their quality of life and will be respected and included as equal members of society'.

As the Government considers that independent living sits at the heart of this strategy, an independent living review for disabled people to be led by the ODI was announced in July 2006¹⁴. The review was initially to run for 12 months with a report expected in the summer of 2007. The ODI published their research into independent living in May 2007¹⁵. The Independent Living Review report will be published on the ODI website and in the 2007 ODI Annual Report.

Direct payments have been included in the review, as they are currently the major means for delivering a personalised response to needs.

2.7.2 The Department of Health

The Government White paper '*Our health, our care, our say: a new direction for community services*' identified direct payments as one of the main enablers of independent living but recognised that take-up had been slow during the first 10 years of the policy.

The Department of Health has the lead policy role for increasing take-up and set up a project to provide practical help to local authorities to improve the numbers, resulting in the publication of a guide in partnership with the Care Services Improvement Partnership (CSIP)¹⁶.

¹³ See http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4101751

¹⁴ See <http://www.dwp.gov.uk/mediacentre/pressreleases/2006/jul/fmc078.asp>

¹⁵ See <http://www.dwp.gov.uk/mediacentre/pressreleases/2007/may/drc30-100507.asp>

¹⁶ See http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_063686

The guide *'A self-assessment and action planning guide for local councils with social services responsibilities and their partners'* is designed to help local councils work out what actions they have to take to make access to direct payments a routine activity.

The guide cites adequate and effective support services as one of the most critical factors for successful implementation of direct payments. Our research certainly supports the view that most direct payments users require some level of support, ranging from a little to a lot. The quality of the support makes a big difference to the user's experience of the scheme. A quality support service gives people the confidence to accept the challenge associated with taking on more personal responsibility for managing their own care, rather than deciding the burden and the paperwork are too great.

The Department of Health also provides information about direct payments on a dedicated section of their website¹⁷ including links to relevant publications, regulations and guidance; and links to other organisations, such as:

- Directgov for information for people with disabilities.
- National Centre for Independent Living (NCIL).
- Independent Living Funds (ILF).
- Valuing People Support Team.

2.7.3 Department for Work and Pensions (DWP)

The Secretary of State Work and Pensions is responsible for appointing the trustees of the Independent Living Funds (ILF)¹⁸. The ILF are a Non Departmental Public Body (NDPB) operating in each of the four administrations of the UK.

The ILF have been in operation for a number of years, and in June 2006 the DWP commissioned a review of them, as part of the regular review process of NDPBs. The findings were published in January 2007¹⁹.

In July 2007 Anne McGuire, Minister for Disabled People, made a statement to the House of Commons²⁰ that

'We are now working with stakeholders on the medium term recommendations such as improving customer care, seeking advice from a user-led organisation, improving the consistency of take up and working towards a single assessment process with local authorities.'

A significant number of people with ILF awards use the money to employ people directly, some 11,000 out of the current 18,000 award holders. The ILF website now provides some information to help these people with their responsibilities as an employer²¹ and financial assistance is now available not only for paying for a payroll provider but also to cover National Insurance contributions and holiday pay.

¹⁷ See <http://www.dh.gov.uk/en/Policyandguidance/Organisationpolicy/Financeandplanning/Directpayments/index.htm>

¹⁸ See <http://www.ilf.org.uk/home/index.html> for more information about the ILF

¹⁹ See http://www.ilf.org.uk/cms_media/files/full_ilf_report.pdf

²⁰ See http://www.ilf.org.uk/news/new/ilf_review/index.html

²¹ See http://www.ilf.org.uk/help_and_faqs/advice_for_employers/index.html

2.7.4 Her Majesty's Revenue and Customs (HMRC)

HMRC provides information for employers to help them manage their PAYE & NIC responsibilities. HMRC recognises that direct payments users fall into a customer segment of their own, as non-business, micro employers. Users who manage their own PAYE schemes, rather than using a payroll agency have a 'simplified' deduction scheme, if their employee earns £160 a week or less.

However, the information available online to help users is distinctly limited, is not written in user friendly language and is hard to understand²². On the other hand Directgov, where HMRC owns the guidance in Money, Tax and Benefits, does provide some employer-related information for users²³, although this is not specific to them but is for general use by people employing others in their own home. Directgov also provides general material about direct payments²⁴ and has information specifically targeted at carers who may be entitled to a carer's assessment²⁵ and for people with parental responsibility for a disabled child²⁶.

HMRC provides support to new employers by means of a telephone helpline. However, our research has shown that the quality of advice from the helpline is variable. HMRC's Targeted Education, Enabling and Leverage teams (TEEL) who exist to support the business community are not resourced to provide support at a one-to-one level. However, they are very willing to look for ways to reach several direct payments users or their support services at the same time, taking advantage of a 'multiplier effect' by using scarce resources to reach as many people as possible in one go.

HMRC also provides the Business Link website to support the business community. The site contains extensive information for employers, but as the name suggests, the focus is very much on the business employer rather than the non-business employer. The direct payments user therefore falls into the definitional cracks.

2.7.5 Department for Business, Enterprise and Regulatory Reform (BERR)

BERR has responsibility for the policy on the National Minimum Wage (NMW). Direct payments users who are employers are required to pay their personal assistants and care workers at least at NMW rates. HMRC is responsible for policing the NMW and investigating any complaints from people who claim to have been paid less than their entitlement.

Our research has shown that where direct payments users choose to employ personal assistants and care workers directly, the level of funding provided by the local authorities always meets NMW requirements and in some locations is considerably more, particularly where local wages are high.

BERR provide extensive information online²⁷, but the rules about the NMW are complex and some direct payments users and some support services struggle with particular technical questions relating to payment for sleep-ins, accommodation and travelling time.

²² See <http://www.hmrc.gov.uk/manuals/pommanual/PAYE23010.htm>

²³ See http://www.direct.gov.uk/en/MoneyTaxAndBenefits/Taxes/WorkingAndPayingTax/DG_10027015

²⁴ See http://www.direct.gov.uk/en/DisabledPeople/FinancialSupport/DG_10016128

²⁵ See http://www.direct.gov.uk/en/CaringForSomeone/CarersAndEmployment/DG_4000206

²⁶ See http://www.direct.gov.uk/en/CaringForSomeone/MoneyMatters/DG_10018531

²⁷ See <http://www.berr.gov.uk/employment/pay/national-minimum-wage/index.html>

The detailed NMW guide is hard to digest and is not produced in a particularly user-friendly format²⁸.

2.7.6 Border and Immigration Agency of the Home Office (BIA HO)

The BIA HO is responsible for the policy on immigration and the right to work²⁹. Direct payments users who become employers are drawn into this area of government because they are required to check that their personal assistants and care workers are able to work legally in the UK.

Our research has indicated growing competition for the employment of well-qualified, competent personal assistants and care workers. There is currently a gap between demand and supply, which is being met largely by migrant workers, mostly from Eastern European countries. Although many of these migrants have every right to work in the UK, it does mean that there is a growing need for direct payments users who become employers to be aware of their responsibility not to employ employees who have no right to work.

On 16 May 2007 the BIA HO announced talks with industry on the implementation of tough new legislation designed to crackdown on such employees³⁰ where the penalties for employers breaking the law are financially severe.

BIA HO provides a link to information on the Business Link site about employing migrant workers³¹ and direct payments employers need to follow the guidance to make sure that they do not fall foul of the law.

2.7.7 Local Authorities

There are 150 local authorities in England with social services responsibilities, 22 in Wales, 32 in Scotland and 11 HSS Trusts in Northern Ireland. All these authorities have a duty to offer direct payments as a means of meeting assessed needs.

England

The councils in England all have websites providing information for potential direct payments users. Each council has developed its own website with the result that the material available differs enormously from website to website.

In practice, the way in which individual local authorities in England promote and support direct payments varies enormously too.

In 2003 the Department of Health provided funding of £9 million over 3 years (2003-04 to 2005-06) in the form of the Direct Payments Development Fund (DPDF)³² which was set up to assist in delivering agreed government priorities for direct

²⁸ See <http://www.berr.gov.uk/files/file11671.pdf>

²⁹ See <http://www.bia.homeoffice.gov.uk>

³⁰ See <http://press.homeoffice.gov.uk/press-releases/rogue-illegal-working-crackdown?version=1>

³¹ See <http://www.businesslink.gov.uk/bdotg/action/detail?r.l1=1073858787&r.l3=1073981874&type=RESOURCE&itemId=1073791948&r.l2=1079568262&r.s=sc>

³² For more information see http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4108760

payments in England. However, none of the funds seem to have been directed towards designing something to prevent re-invention of wheels on a national scale.

Successful bidders to the DPDF were partnerships between voluntary organisations and councils who demonstrated how they would practically affect direct payments take up, how they would support users in managing the scheme, how they would target under-represented groups and how they would share and disseminate best practice. All the organisations had to have an exit strategy for when the Department of Health funding ended. However, exit strategies have not removed funding worries in the longer term for many of the voluntary organisations still providing services. Worries about sustainable funding sources were a constant feature of our discussions with providers.

The DPDF affected direct payments take-up and the development of support services in England with some councils being in a better position to form partnerships with local voluntary organisations than others. Similar funding was not made available at the same time in Wales, Scotland or Northern Ireland, so it is unsurprising that take-up was somewhat slower in those administrations.

Some councils provide support services in-house, some have fully contracted out all aspects of their support services and some have a mixture of in-house and outsourced services. The experiences of direct payments users who choose to become employers therefore differ depending on the particular practice of each local authority.

Some councils insist that direct payments employers must use the recommended payroll services, others permit them to use a 'simplified' PAYE deduction scheme in their own right, others allow them to find their own payroll provider.

Where local authorities are funding external organisations to provide support services the approach to the provision of payroll services is again very mixed. Some organisations provide a payroll service as well as support services and insist on it being used while others allow PAYE or 'simplified' deduction schemes or the use of other payroll agencies.

Some support services recommend particular payroll agencies; others insist that they can only provide a list of agencies and cannot recommend anyone. The payroll agencies listed or recommended range from specialist agencies providing free services to direct payments users only to commercial businesses with a range of charges where the direct payments employer is treated exactly the same as any other client.

Wales

The position in Wales is not dissimilar from that in England, except that direct payments take-up and support service development have been somewhat slower.

The Welsh Assembly Government website provides information about direct payments³³ and put out a statement about their use by local authorities and health organisations in January 2006³⁴. The Welsh councils all have websites providing a varying amount of information about direct payments and the support services

³³ See http://new.wales.gov.uk/topics/health/socialcare/direct_payments/?lang=en

³⁴ See http://new.wales.gov.uk/docrepos/40371/403823111/Direct_Payments_and_Health_1.doc?lang=en

available. The support services differ in their practices in the same way as in England.

Scotland

In Scotland development of the direct payments scheme did not originally receive the same level of endorsement from politicians as in England. Trade unions were also wary of the policy. However, there is evidence that Unison's position has softened over time with their statement about their views of the employment of care staff by direct payments employers³⁵.

The Scottish Government website provides information on direct payments³⁶ and £1.8 million was allocated for 2006-07 to development of the scheme, with £2 million a year thereafter.

UPDATE, Scotland's national disability information service provides extensive information about direct payments to organisations and members of the public on its website and by means of a telephone helpline³⁷.

Support services in Scotland also vary in their practices and support for direct payments employers.

Northern Ireland

In Northern Ireland the provision of social services is in transition. Currently the Department of Health funds four Regional Boards (North, South, East & West). In turn the Boards fund eleven local health Trusts, which are the equivalent of local authorities in the rest of the UK and assess individual needs and provide services on the ground. By April 2008 the number of local health trusts will be reduced by the formation of 5 new integrated Health and Social Services Trusts, combining acute and community health with social services, and the four Regional Boards will be replaced by a single Health and Social Services Authority.

The Northern Ireland Government website provides information about direct payments³⁸. In September 2006 the Primary & Community Care Directorate put out a circular to the Chief Executives of the HSS Trusts and HSS Boards with the aim of 'ensuring that users, carers & personal assistants receive the training & support they need to maximise the opportunities for people to access direct payments'³⁹.

Take-up of direct payments in Northern Ireland had developed rather more slowly than in the rest of the UK until recently when the numbers have increased dramatically⁴⁰. Support services for users have similarly been slower to develop. The Centre for Independent Living Belfast (CILB) expects to provide the support services for the whole of the Health and Social Services Authority⁴¹.

³⁵ See <http://www.unison-scotland.org.uk/news/2007/mayjune/0105.htm> for the statement

³⁶ See <http://www.scotland.gov.uk/Topics/Health/care/VAUnit/InfoDP>

³⁷ See http://www.update.org.uk/staff/web_faq_public_list_directpays.php

³⁸ See <http://www.dhsspsni.gov.uk/directpayments-about>

³⁹ See http://www.dhsspsni.gov.uk/hss_eccu_5-2006_final.pdf

⁴⁰ From 25 six years ago to around 650 in 2007. Source Centre for Independent Living Belfast (CILB)

⁴¹ At the time of our research CILB had contracts with the Eastern and Southern Boards, had come to an agreement with the Western Board and expected to be in a strong position to compete for the Northern Board's tender.

CILB operates a payroll service for which it receives funding from the Eastern and Southern Boards and offers this service to any users who become employers from those two sources. However, CILB identified that there was a need for payroll support, from employers from the other two Boards, and people with funding from the ILF. CILB therefore offers the service but charges for it. CILB is aware of other direct payments employers who operate their own payroll and of a few, who use a local bookkeeper.

3 Tax-related issues

3.1 Background

We carried out extensive research between November 2006 and September 2007. Key points and a summary can be found in Appendix A. Various tax-related issues have been directly drawn to our attention during our research and others have emerged during the process of understanding the direct payments scheme.

It is clear from our research that the responsibility of becoming an employer still acts as a barrier⁴² for many in deciding whether or not to accept a direct payments scheme. Many direct payments support services also consider that the full PAYE regime is too much to expect users to cope with. Many users who become employers need to be able to rely completely on their support services. This is not at all surprising when one considers all the different obligations placed on an employer. See Appendix C for details.

3.2 PAYE 'simplified' deduction scheme (DOME or Q schemes)

HMRC's 'simplified' deduction scheme has been in operation for many years. It is not necessarily simpler than operating a normal PAYE scheme.

It was originally designed to cater for non-business employers with 'domestic' employees, typically cooks, gardeners, chauffeurs and nannies. This category of employer is often relatively well off and able to afford professional advice and assistance with their responsibilities as an employer. The PAYE burden for them is one of time demands rather than financial cost.

Direct payments employers have now joined the ranks of the PAYE 'simplified' deduction scheme users. As a customer grouping their characteristics are very different from those people employing 'domestic' staff in the traditional sense, and their support needs from HMRC too may be very different.

Our research has shown that there are three main reasons why direct payments employers choose to operate their own 'simplified' scheme or full PAYE rather than using a payroll provider:

1. Because they want to exercise choice and control, demonstrate a further dimension of independent living and they want the intellectual challenge.
2. Because they can – largely professional people, former civil servants, accountants and so on.
3. Because of cost. Not all local authorities fully fund the costs of being an employer so the direct payments user can save money by operating their own payroll and make their funding go that much further.

Several support services commented to us that the 'simplified' deduction scheme is 'anything but simplified', with the material being in 'HMRC speak', not helped by the small print size.

⁴² See http://www.csci.org.uk/PDF/direct_payments.pdf Commission for Social Care Inspection August 2004 report featuring barriers

The HMRC material for employers using a 'simplified' deduction scheme is produced to support the employment of 'domestic employees' on a 'one size fits all' basis and there is nothing specifically supportive of the direct payments employer. The web material is also on a 'one size fits all' basis⁴³. In practice most users fall into ordinary PAYE because their support services use a payroll with automated software for P schemes. This is a fortunate outcome as the 'simplified' deduction scheme is paper based and is more difficult for both employer and employee than an electronic P scheme.

Support services have commented to us that they sometimes have to spend a lot of time trying to sort out code numbers for personal assistants and care workers with multiple employments, particularly where a 'simplified' deduction scheme is involved. Sometimes personal assistants spend long periods on a BR tax code, suffering tax at 22% while waiting for their tax codes to be rationalised.

From April 2008, a single, national computer system - the 'PAYE Service' - will replace the current PAYE computer system that has handled PAYE processing for more than 20 years. This major change will lead to the creation of a single record for each taxpayer, irrespective of the number of employments or pensions. There is therefore hope that the accuracy of taxation for people with multiple sources of income will improve next year.

There is some evidence that direct payments users with small packages of care who employ their personal assistant or care worker for only a few hours a week may not be operating PAYE when they should. They are paying well below the Lower Earnings Limit (LEL)⁴⁴ but have not always asked the right questions about other sources of income. They have concluded mistakenly that no PAYE scheme is required; see section 3.3 for details about the form (P16A) to be used for a new employee in a 'simplified' deduction scheme.

HMRC produces a CD-ROM to help employers cope with their PAYE responsibilities. While this CD-ROM currently does not provide any assistance with the 'simplified' deduction scheme HMRC has indicated to us a willingness to consider the feasibility of doing so. Research currently being undertaken by HMRC will explore whether direct payments employers have access or the skills to use such a computer based solution.

3.3 PAYE New Employer helpline

The new employer helpline operates seven days a week and is there for new employers with less than three years experience. More experienced employers are expected to use a different helpline, also in operation seven days a week.

During our research we heard comments that the helpline staff are 'too technical' for some users who try dealing with HMRC directly. There was some evidence that the helpline sometimes gives contradictory advice. One organisation told us that they feel they have to check up on the advice given directly to users because of the potential for misunderstandings. Users sometimes struggle to make themselves understood and in turn struggle to understand what they are being told.

We were also told that helpline staff did not seem to understand the direct payments scheme and what it is like to be a direct payments employer, which makes

⁴³ See http://www.hmrc.gov.uk/simple_deduction/index.htm

⁴⁴ LEL = Lower Earnings Limit for calculating national insurance contributions, £87 a week for 2007-08

communication more difficult, although following this feedback at working group meetings HMRC has taken steps to review adviser guidance and awareness.

On a technical level there certainly does seem to be some confusion over what makes a direct payments employer need a PAYE 'simplified' deduction scheme. When LITRG enquired what the current rules are we were told that if the employee does not have another job and is paid below the LEL no PAYE scheme is needed. The only requirement is to keep a form P46 (for a new employee who starts without a form P45 from the previous employment) until such time as the employee earns above the LEL.

This advice is confusing, as the 'simplified' deduction scheme does not use form P46. When we enquired how the employer gets hold of a P46 without having a scheme, the answer was to get it off the web or ring the Orderline.

There is certainly a need for clearer information for direct payments employers about how the 'simplified' deduction scheme works because an increasing number of them are likely to be employing personal assistants or care workers on a part-time basis. Payments are below the LEL, but still with a need to operate PAYE because the employee has another job, or commonly because the employee has another source of taxable income such as the state retirement pension.

Form P25⁴⁵ in the section on 'new employee' says that if you take on a new employee, who earns more than the LEL, or your employee has another job, fill in form P16A. However, many retired people will answer the question 'do you have another job?' quite honestly as 'no', although they do have another source of income, which means that the direct payments employer should be operating PAYE. Form P16A⁴⁶ is silent on the LEL issue and gives no guidance. However, HMRC is now intending to improve form P16A to include a reference to pension income.

It would be helpful if the helpline provided additional information when direct payments employers do not need a PAYE scheme because their employees are without other taxable income, do not have another job and are paid below the LEL. The user is still an employer for employment law purposes, if not for PAYE scheme purposes and the helpline should not lead callers to think that because they do not need a PAYE scheme they do not need Employer's Liability Insurance and need not think of themselves as employers.

3.4 Business Link

The Business Link website⁴⁷ (now managed by HMRC) provides extensive employer-related material which would be useful for direct payments employers, if it were more targeted on their circumstances. As the name suggests, the material is business-related, and not focused on the non-business employer.

3.5 Information provided by HMRC – online and in paper

There is little information targeted specifically at direct payments users on HMRC's website, so 'Direct Payments' do not feature as an item in the 'A-Z'.

⁴⁵ See <http://www.hmrc.gov.uk/forms/2007/p25.pdf>

⁴⁶ See <http://www.hmrc.gov.uk/forms/2007/p16a.pdf>

⁴⁷ See <http://www.businesslink.gov.uk/bdotg/action/home?r.l1=1073858805&r.s=m>

When the search engine is used for 'Direct Payments' the eleventh hit brings up the PAYE online manual, which is written for HMRC staff and not for direct payments users⁴⁸.

Directgov does have material targeted at direct payments users⁴⁹ and at their role as an employer⁵⁰ but it does not provide answers to questions about the day-to-day operation of the PAYE 'simplified' deduction scheme.

HMRC has agreed that the guidance on direct payments currently available internally to staff for relaying to customers and intermediaries could be clarified or amplified. HMRC has expressed willingness to work with LITRG to improve the material.

Although our research did not suggest that there are any serious problems with the employment of migrant workers by direct payments users we have noticed a lack of accessible information for direct payments employers on this important topic. There is also the potential for migrant workers to be supplied by agencies to users as 'self-employed' workers. Of course if the agency is operating PAYE correctly the direct payments user will not have a problem, but difficulties may arise if the agency does not operate PAYE.

There is also a general lack of accessible information for direct payments employers and their employees without English as their first language, about tax-related issues applying to the direct payments scheme.

3.6 Status

Status issues (are you employed or self-employed?) were the number one concern of support services, councils and individuals whom we spoke to during our research.

Status issues are notoriously complex and HMRC finds it impossible to give straightforward advice in this difficult area. When we suggested that direct payments employers are particularly vulnerable when things go wrong HMRC said the best guidance on employment status they could give was available on the HMRC website⁵¹ where there is also a link to the 'Employment Status Indicator tool'.

Status issues also impact the National Minimum Wage (NMW). There are some similarities between the approach required to investigate a person's status for tax and National Insurance contributions (NIC) and that required for NMW purposes. But the definition of a worker for NMW purposes is more wide-ranging than that of an employee as used for tax and NIC purposes. Consequently, a person considered not an employee but self-employed for tax and NIC purposes can still be a worker for NMW purposes.

The HMRC website material about status is extensive but is hard for the layman to digest. Employers, particularly inexperienced ones managing their own 'simplified' PAYE schemes, do not always realise the significance of status issues until it is too late, as the example at Appendix B demonstrates. The impact of a status enquiry by HMRC can be emotionally devastating as well as financially severe.

⁴⁸ See <http://www.hmrc.gov.uk/manuals/pommanual/PAYE23010.htm>

⁴⁹ See http://www.direct.gov.uk/en/DisabledPeople/FinancialSupport/DG_10016128

⁵⁰ See http://www.direct.gov.uk/en/MoneyTaxAndBenefits/Taxes/WorkingAndPayingTax/DG_10027015

⁵¹ See www.hmrc.gov.uk/employment-status/index.htm

HMRC also confirmed that the law for tax, NIC and VAT does not define employment or self-employment. The working terms and conditions determine the employment status. This is based on case law and HMRC interpret that case law in giving a view, for tax, NIC and VAT purposes, as to whether a person is employed or self-employed. HMRC is not the final arbiter of whether a person is employed or self-employed and the HMRC view can be challenged before the tax appeal commissioners and the courts.

Even where HMRC accepts that someone is self-employed it does not necessarily mean that an employment tribunal will view the matter in the same light, as a recent employment appeal tribunal ruling demonstrates⁵².

As status is such a difficult area it is not surprising that we were told that direct payments employers and support services sometimes receive conflicting advice from HMRC. For example a direct payments employer who moved from the west coast of Scotland, to the east coast was told by HMRC in the west that his personal assistant could be self-employed but in the east that he could only be employed.

The view of many of the support services is that personal assistants and care workers are employees, because this arrangement fits in with the philosophy of independent living and taking control. Engaging self-employed personal assistants and carers fits more with receiving traditional services from social services or through agencies.

One support service told us that they protect their direct payments employers from status difficulties by getting self-employed personal assistants and carers to sign a form giving their self assessment (SA) reference⁵³. But we are concerned that such an arrangement may offer no level of protection whatsoever in an HMRC status dispute situation or in front of an employment tribunal. As for status issues each case needs to be considered on its merits, proof of a personal assistant's self-employment in respect of other arrangements is not conclusive. The ruling in *Demibourne Ltd*⁵⁴ shows that in normal circumstances HMRC would seek recovery from the employer, which leaves the direct payments employer in a very vulnerable position.

HMRC is currently reviewing status issues and LITRG has been included in the organisations to be consulted on personal assistants and care workers.

3.6.1 Leaflet IR56 'Employed or self-employed? A guide to employment status for tax and National Insurance contributions'

HMRC produces a general leaflet IR56⁵⁵ on employment status, but it has not been updated since July 2004 and is insufficiently well targeted at direct payments employers to provide adequate guidance.

HMRC is currently reviewing the leaflet and LITRG are consulting on revised content and material.

⁵² See UKEAT/0644/06/MAA & UKEA/0367/06/MAA; Judgment handed down 25 July 2007 http://www.employmentappeals.gov.uk/Public/Upload/FINAL06_0644fhRCMAA06_0367fhRCMAA.doc

⁵³ A self assessment reference number is a unique 10 digit identifier given by HMRC to self employed individuals in the SA tax system

⁵⁴ See *Demibourne Ltd v HMRC SpC 486*, June 2005

⁵⁵ See <http://www.hmrc.gov.uk/pdfs/ir56.pdf>

3.6.2 Employment Status Indicator (ESI) tool

The ESI tool⁵⁶ provides a means for direct payment employers and support services to check the status of a personal assistant or care worker on an anonymous basis. However, the language employed in the tool can be difficult to understand, and this might cause the user to answer questions incorrectly. It was devised primarily for the construction industry so it is unsurprising that it does not easily fit in with some of the subtleties that exist in the caring environment. There are not too many part-time working or retired mothers in the construction industry!

Direct payments employers and their support services need a more certain way of establishing status than putting reliance on the ESI tool.

However, HMRC is looking at the ESI tool as part of the status review and LITRG are providing feedback in respect of care workers, as part of the consultation process.

3.7 Benefits in Kind: living accommodation and board and lodging

There is some evidence that direct payments employers struggle to understand whether they provide 'living accommodation' or 'board and lodging' for taxation purposes when they employ a live-in personal assistant or care worker and do not charge them for living in.

From the direct payments employer's perspective it is essential that the personal assistant or care worker live in the property, particularly when providing 24-hour care. This is their main consideration and not any tax technical questions.

As the taxation position of 'living accommodation' is different from 'board and lodging' the direct payments employer may find that they need to provide forms P11D to cover the benefit in kind provided by 'board and lodging'.

Direct payments employers can find information on this important topic in HMRC's Employment Income Manual⁵⁷. But the material is not written for the non-expert reader and is therefore hard to follow.

There also needs to be clarity about staff meals or food costs for any personal assistant or care worker, as there may be concerns about anything being provided for free being a taxable benefit.

3.8 National Minimum Wage (NMW)

There were three particular topics relating to the NMW where there was confusion for direct payments employers and their support services. There is guidance in 'A detailed guide to the Minimum Wage'⁵⁸ produced by BERR but the booklet is not written from a direct payments employer's perspective, which makes the material less accessible and more difficult to follow. HMRC also provides some limited background information on the topics⁵⁹. However the material requires publicity.

⁵⁶ See <http://www.hmrc.gov.uk/calcs/esi.htm>

⁵⁷ See <http://www.hmrc.gov.uk/manuals/eimanual/EIM11300.htm>

⁵⁸ See <http://www.berr.gov.uk/files/file11671.pdf> 'A detailed guide to the National Minimum Wage'

⁵⁹ See Appendix A for the details

3.8.1 Sleep-in payments

'Sleep-ins' are a common feature of the working lives of some personal assistants and care workers. Direct payments employers and their support services need to be clear about the NMW rules in this area because they are aware that workers must be paid at least the NMW for their working hours but it is determining exactly what constitutes a 'working hour' which is causing the problem.

The interaction between the NMW Regulations⁶⁰ and the Working Time Regulations⁶¹, as far as a working hour is concerned, is particularly complex for direct payments employers who have to obey both sets of regulations. It may be possible for direct payments employers to meet one set of regulations while breaching the other set⁶². There are certain circumstances in which the care worker can be asleep and yet treated as working for the purposes of the Working Time Regulations, while in order to satisfy the NMW regulations in those same circumstances the care worker has to be awake.

HMRC has confirmed that there is NMW legislation covering 'sleep-ins'⁶³, and have told us that:

'Workers must be paid at least NMW rates for every hour worked. Whether a worker is entitled to be paid NWM for 'sleep-ins' depends on the type of work they are performing for NMW purposes. There are special provisions in NMW legislation relating to time when a time worker or salaried worker is required to sleep at or near their place of work. An unmeasured worker's entitlement to NMW depends on whether or not there is a 'daily average' agreement in place. A daily average agreement is a written agreement which sets out the time a worker is likely to spend performing the tasks required under their contract. If there is a valid 'daily average' agreement in place between the worker and the employer, the worker is entitled to NMW for the hours specified in the daily average agreement. In the absence of a valid 'daily average' agreement, a worker would be entitled to NMW for any time spent during the 'sleep-in' period performing their contractual duties.

This explanation demonstrates the level of complexity involved. There is also confusion as to how these rules interact with rules now used by HMRC to define working hours under the tax credits regime.

In all guidance the language is hard to follow and there is an obvious need for some publicity and clear guidance about the 'sleep-ins' requirements, with some examples specifically related to personal assistants and care workers.

3.8.2 Benefits in kind: accommodation

Direct payments users naturally want to make their funding go as far as possible, so those who provide accommodation for their personal assistants and care workers need to understand about the special rules applying to this benefit.

⁶⁰ See Statutory instrument 1999 Number 584 Part III

⁶¹ See Statutory Instrument 1998 Number 1833 Part II (as amended by later provisions)

⁶² European Court of Justice ruling 3 October 2000: Case C-303/98(SiMAP v Conselleria de Sanidad y Consumo de la Generalidad): residential on-call time where the care worker has to be on the premises in case they are needed counts as working time for the Working Time regulations, even if the person is asleep

⁶³ See Chapter 11 paras 136-137 of 'A detailed guide to the National Minimum Wage'

Providing accommodation can count towards the NMW, whereas no other benefits in kind (such as providing meals, fuel or a car) do⁶⁴. However in many cases there is no charge and BERR produce a guidance note on where this might apply.

Employers may make a specific deduction for accommodation from the worker's pay or may charge a specific amount once the worker has received payment.

There is a limit on how much the employer can count towards the NMW, currently the 'offset rate' is £4.30 for each day that the employer makes the accommodation available, with the maximum weekly amount being £30.10 (7 x £4.30). BERR produces a guidance note⁶⁵ but the calculations are quite complex.

Again there is a need for publicity about this topic and clear guidance about the requirements for accommodation counting towards the NMW, with some examples specifically related to personal assistants and care workers.

3.8.3 Working hours and travelling time

Working hours and travelling time is a complex area for NMW purposes. Direct payments employers will want to make their funding go as far as possible and so will want to know the rules for when the NMW must be paid and for when it does not have to be paid. The legislation is complex. Business Link provides some guidance for employers but it is not in a format that personal assistants and care workers are likely to find helpful⁶⁶.

Personal assistants and care workers will want to make sure that they will be paid for travelling time whenever it is appropriate, as the cost of providing their own transport which may be essential, particularly in rural areas, will influence their decision about taking any particular engagement.

Again there is a need for publicity about this topic and clear guidance about the requirements for travelling time, with some examples specifically related to personal assistants and care workers⁶⁷.

3.9 Travel buddy schemes

Travel buddy schemes are an innovative way for people with learning difficulties to find work and support other people with learning difficulties. We found evidence of well-established schemes running successfully around the country.

There are potential tax-related issues in respect of payments made to buddies for going for days out or on holiday using money with direct payments funding.

However, HMRC has offered the following guidance:

'There may of course be a range of arrangements that exist within this description [of travel buddy scheme]. If a disabled person (A) needed help to go on holiday and an employee (B) of a company providing support in these circumstances goes on the holiday with A to help them, then no benefit would arise to B in

⁶⁴ See Chapter 9 of 'A detailed guide to the National Minimum Wage'

⁶⁵ See <http://www.berr.gov.uk/files/file38769.pdf>

⁶⁶ See

<http://www.businesslink.gov.uk/bdotg/action/openpopup?type=ONEOFFPAGE&itemId=1074730469>

⁶⁷ See Chapters 10-14 of 'A detailed guide to the National Minimum Wage' for existing guidance

respect of the cost of B's travel/accommodation/subsistence costs. B is not on holiday but is working to support A on holiday. B is simply acting as a carer.'

An employee going on holiday with their direct payments employer as carer would be in the same position as the employee of a company providing support in the above example.

HMRC has confirmed that the technical guidance in the Employment Income Manual (EIM) will be updated to include 'Travel buddy' information. However, the topic needs wider publicity, as it is important to reassure people that there are no tax-related problems with such arrangements.

3.10 User Controlled/Independent Living Trusts (UCTs/ILTs)

In the direct payments context UCTs/ILTs are usually set up for users who cannot manage their payments without a significant amount of help from people who know them well or have their best interests at heart. Otherwise they would not be able to take advantage of what a direct payment offers. Sometimes such trusts are set up for people who communicate non-verbally or whose willingness to accept a direct payment has to be interpreted from behavioural signs.

Some councils provide information about setting up a trust for direct payments, Devon County Council, for example⁶⁸.

The local authority has to be sure that anyone accepting a direct payment is both 'willing and able' to manage the scheme. The vast majority of people will be able to show some level of preference and so can be considered for the direct payments scheme, if they have the right level of support to manage the payments.

UCTs/ILTs take on all the responsibilities for managing the individual's direct payments including the role of employer.

There are potentially complex tax-related issues arising from the operation of such trusts and LITRG is concerned at the lack of information and guidance available from HMRC or Directgov, particularly about who will be held responsible for any tax and NIC if PAYE payments fall into arrears. Will HMRC 'look through' the trust and hold the direct payments recipient liable, as being the true employer? The 2005 look-through provisions for trusts for the vulnerable, if applicable, should protect the majority of direct payments users.

Fundamental to the issue is the beneficial ownership question. The Department of Health has recently confirmed that direct payments funding remains public money until such times as it is spent on qualifying services in accordance with the social care assessment⁶⁹.

At our prompting and following discussions in the project working group HMRC has carried out further research on UCTs/ILTs status in relation to the trust tax regime. HMRC advises that as no one model is in use for the drawing up of trust deeds, each case must be considered on its merits as the tax consequences will vary depending on the type of trust used.

⁶⁸ See http://www.devon.gov.uk/setting_up_a_user_controlled_trust_for_direct_payments-6.pdf

⁶⁹ See page 50

http://www.dh.gov.uk/prod_consum_dh/idcplg?IdcService=SS_GET_PAGE&siteId=en&ssTargetNodeId=566&ssDocName=DH_078092

HMRC advises that if the beneficiary of the trust (the person whom it was set up to help) is not entitled to income from the trust, then the UCT/ILT may have discretionary trust status. HMRC has also confirmed that as direct payments are cash in lieu of services any interest accruing on the direct payments account would not be the property of the beneficiary.

As trust tax consequences may differ for each UCT/ILT, HMRC says they cannot give prescriptive guidance: it is up to the trustees and beneficiary to self assess correctly.

UCT/ILT trustees may well need help and guidance from HMRC to enable them to 'self assess correctly'. HMRC has told us that they will be very happy to include information on these trusts in their trust guidance and also to carry any messages that LITRG would want to say to people with an interest in them.

3.11 Managed Service Companies (MSCs)

As part of our research HM Treasury asked us to see whether there was any evidence about care workers being drawn into MSCs, following the publication of their document '*Tackling Managed Service Companies*' in December 2006⁷⁰.

During our research we came across no evidence that MSCs have been an issue for anyone we consulted.

3.12 Third Money Laundering Directive

HM Treasury has been consulting on the implementation of the Third Money Laundering Directive⁷¹.

Implementation of the Directive would make HMRC responsible for the regulation of businesses operating as payroll agencies, which may have a direct impact on direct payments support services, if they operate a payroll service.

Complying with the Money Laundering Regulations would be another administrative burden for support services, but if they are exempt they need to know that they have no worries.

If the support services are funded and commissioned by the local authority to provide services to those who receive direct payments, it seems that they do not undertake payroll activity 'by way of business' and are therefore unlikely to be caught by the Money Laundering Regulations.

HMRC is drafting guidance for voluntary organisations providing tax advice or accountancy services about the need to register with HMRC as an Accountancy Service Provider (ASP). The guidance is likely to cover local community and voluntary groups, registered charities, foundations, trusts and other bodies established on a not for profit basis. Where the tax advice or accountancy service is free to the end user the organisation is not likely to fall within the scope of the regulations and there will be no obligation to register with HMRC.

⁷⁰ See http://www.hm-treasury.gov.uk/media/B/2/pbr06_managedservicecompanies_453.pdf

⁷¹ See http://www.hm-treasury.gov.uk/consultations_and_legislation/money_laundering_directive/consult_thirdmoney_index.cfm

However, we remain concerned that the scope of generic phrases like ‘tax’ or ‘accountancy’ advice is enormous and is therefore likely to have a much wider impact than perhaps HMRC currently appreciates. We are therefore continuing to consult with them in order to resolve this complex issue. HMRC have offered to set up a meeting with Her Majesty’s Treasury to discuss LITRG’s concerns, which we welcome.

3.13 Value Added Tax (VAT)

Organisations receiving funding for the provision of support services to assist the implementation of the independent living initiative need to understand their VAT responsibilities.

In May 2006 the Treasury published *‘Improving financial relationships with the third sector: Guidance to funders and purchasers’*⁷². It provides specific advice on charity funding and public service delivery including flagging up the possibility of a VAT impact arising from the move from grant funding (outside the scope of VAT) to service procurement (potentially within the VAT regime). It advises that where appropriate the funder and/or recipient should not assume that funding is outside the scope of VAT but, where applicable, should approach HMRC for confirmation of the correct treatment. HMRC’s own guidance covers this area and, for those organisations that require further advice, HMRC operates a helpline providing charity-specific tax advice.

As part of our research we reviewed HMRC’s helpline material. We started with VAT, as that seemed to be a logical place to begin, but one has to read several paragraphs before finding out that the VAT helpline does not answer questions about VAT from third sector organisations. As there was no other signposting it was not immediately obvious that it is the helpline for Charities that deals with the issue.

The HMRC website says

‘Welcome to HMRC Charities’⁷³:

These web pages are intended to provide you with a single reference point for information about tax and VAT for charities and Community Amateur Sports Clubs (CASCs) along with information about tax reliefs for charitable donations.’

But there is web-based information about Charities and VAT under VAT too. It was therefore not at all obvious as to where the information about third sector funding might be found.

For clarity the material requires rationalisation with clear links to any information about funding.

Secure funding is a major concern for the third sector, particularly for the smaller organisations. During our research uncertainty about the sustainability of funding was mentioned time and again. Research by the National Council for Voluntary Organisations (NCVO)⁷⁴ shows that government funding to the voluntary sector has

⁷² See <http://tinyurl.com/2jo3hs>

⁷³ See <http://www.hmrc.gov.uk/charities/index.htm>

⁷⁴ See ‘The UK Voluntary Sector Almanac 2007’ published by NCVO 6 June 2007

increased by only 1.5% since 2001. But it also shows that grants represented 52% of government funding to charities in 2001-02, but only 38% in 2004-05, whereas contracts (potentially with VAT consequences) have increased from 48% in 2001-02 to 62% in 2004-05.

Third sector organisations are in fierce competition for scarce funds. The NCVO research shows that larger organisations appear to have benefited most from the switch to contracts. Therefore the smaller organisations need as much clear information as possible to help them compete for funding and HMRC can play their part by making the relevant VAT related material more accessible.

3.14 The Disabled Persons (Independent Living) Bill

The Disabled Persons (Independent Living) Bill⁷⁵, a Private Members Bill introduced by the Lord Ashley of Stoke, provides for a rights based framework for independent living, including accessible information.

Should the Bill become law, it will be of interest to HMRC in respect of the support the Department offers to direct payments users who become non-business micro employers choosing to operate their own PAYE employer schemes.

The Bill was listed for its second reading in the Commons in October 2007, but unfortunately it was listed at number 26 and the session closed before it was heard. The Bill was subject to ballot procedures in the new parliamentary session with interested parties lobbying successfully to get it into the top 10 so that the parliamentary process will continue in 2008.

3.15 Bank accounts and forms R85

Users are required to have a separate bank account for their direct payments. Such accounts usually take the form of a current account.

Certain banks offer much higher interest rates on their current accounts than others.

Given that the rules permit ILF money and direct payments to go into the same account there can be significant throughput, as funds rarely come in and go out on the same day.

While in the overall scheme of things the amounts of interest accruing are small there is still the question of whether tax should be deducted from the interest.

Or would it be legitimate for the user to sign a form which allows the bank or building society to pay the interest gross (form R85) and so boost the amount of money in the account, by however small the tax on the interest payment may be?

Beneficial ownership is likely to be fundamental to the resolution of this issue. The implication is that the funds accruing the interest are public money and the account holder cannot do with them just as he or she pleases, so the interest is not theirs either. Some local authorities claw back amounts unspent or not spent appropriately. In some cases they seek to recover everything in the direct payments account, including any interest.

⁷⁵ See

http://www.publications.parliament.uk/pa/pabills/200607/disabled_persons_independent_living.htm

As there is no guidance available on this topic it seems unlikely that anyone will prevent a direct payments user from signing a form R85 or that HMRC will pick up the account for investigation as part of any compliance programme.

However, the issue does require consideration and there should be guidance for users and their support services so that everyone knows what the correct process should be.

3.16 Working Tax Credit: variable hours

One of the characteristics of the world of disabled people, and those who help them live independently, is uncertainty. Routines are frequently disrupted and flexibility has to be built into care arrangements. This leads to demands for changes at short notice. Variable hours of work are commonplace.

The question 'what is a working hour' has already been shown to be a difficult one to answer. But it also raises its head when a disabled person or their carer has to consider whether they are entitled to Working Tax Credit (WTC) (administered by HMRC). The WTC rules are strict on the number of hours a week a person must 'normally' work in order to qualify. Moreover, if the 'normal' pattern of weekly working varies from 30 hours a week or more to below 30, or from 16 hours a week or more to below 16, it must be reported to HMRC within one month on pain of a penalty.

Now for a person with working hours that fluctuate from week to week, it is well nigh impossible to determine any 'normal' weekly pattern, still less to predict what hours the person will work in the future. Yet the WTC rules are predicated on the assumption that someone is able to forecast accurately what their future working hours will normally be.

In the world of direct payments such certainties are often absent; yet we have known HMRC compliance officers take an inflexible and hard-line approach to the reporting of working hours. We believe that HMRC could be more flexible and understanding in their approach to the issue, given the uncertainty endemic in these situations.

There is also a need for more straightforward advice, co-ordinated between the DWP and HMRC, about the implications for disabled people in taking employment and using their direct payments to support that objective.

4 Conclusions and recommendations

4.1 A strategic national initiative on tax-related issues

Government policy supports independent living and people taking more control over the care that they receive. Nevertheless, our research has shown the need for a balance between the individual with locally provided services supported by local organisations, and the national requirements which provide a measure of uniformity for all service users, no matter where they live within the UK. This is so for tax-related matters, and particularly so for direct payments non-business micro employers who have to comply with a national tax system not open to local negotiations.

We could have provided a range of micro-solutions to each problem we encountered but we do not think that trying to solve problems in departmental silos is the right way forward. Every government body has a duty under the Disability Discrimination Acts and under its own Disability Equality Scheme to remove barriers for disabled people.

We recommend that the main government departments including the ILF and local government should get together to address how tax-related (and employment and wage law) issues fit into the development of independent living, so that solutions are developed as part of the process, rather than being tackled after the policy has already been implemented.

Any such strategy must include details of how HMRC will interact with and assist the support services from the voluntary sector, and how HMRC will support individuals who choose to manage their own care and responsibilities.

Also we recommend that a central website providing information on direct payments, together with proformas and best practice, could make significant costs savings and give better and more consistent advice. Although HMRC classes 'employers' as 'business' it should recognise that direct payment employers are not 'in business' in the true sense but see themselves as individuals. Directgov is the main location for information for individuals, so we recommend Directgov becomes the centre of information on direct payments. There may however be a case for government to fund the development of a complementary website, for example by NCIL⁷⁶, to cover those areas where government feels that the voluntary sector has unique insights.

Regardless of better guidance online it must be recognised that many recipients of direct payments will not have online access and therefore **we recommend the issue of hard copy fact-sheets to help users make sense of the complexities we have identified. The temptation to write these in government silos should be overcome and they must be written from the perspective of the users, so crossing over departmental boundaries.**

4.2 A government provided online payroll service

We conclude that a reliable payroll service is extremely important to direct payments users who choose to employ personal assistants and care workers but who cannot face managing their own PAYE scheme. **We believe the time has come for**

⁷⁶ National Centre for Independent Living. For more information see their website at <http://www.ncil.org.uk>

government to think seriously about providing an online payroll service, and recommend that they investigate the possibilities for doing so as one option for direct payments users.

Other countries provide help with the payroll, for example the Netherlands. The Dutch Care Allowance (persoonsgebonden budget or pgb) is a type of individual budget for people with a variety of assessed needs such as domestic care, personal care and so on. The Social Insurance Bank (SVB)⁷⁷ offers budget holders free help with administrative tasks including a payroll service⁷⁸. Per Saldo, a Dutch association of people with a pgb provides background information in English about the scheme⁷⁹.

HMRC itself goes some way towards it with the issue of appropriate software, but it is a small step where a large one is needed.

Such a service should be open to the support services as well as to individuals.

4.3 Better HMRC focus on this segment of its customer base

We conclude that HMRC has not previously focused sufficiently on this segment of its customer base and recommend that it now does so as a matter of some urgency, particularly in the light of the potential for growth in the number of employers if Individual Budgets are introduced nationally.

We also recommend that the employer helplines improve their customer service in respect of direct payments employers and provide a level of service that the customer can value.

We conclude that there is a lack of accessible tax-related information, guidance and advice for both individuals and support services.

We recommend that HMRC should provide information in accessible and user-friendly formats written in a style suitable for the target audience, including material about all the issues listed in section 3 of this document. All the relevant tax-related information should be pulled together in a definitive guide which should be produced after consultation with users about their information needs and after consultation with others who support direct payments, such as the National Centre for Independent Living (NCIL).

The material should be accessible through several routes, such as from Directgov and Business Link, as well as being clearly signposted from the HMRC website. We suggest that HMRC should join with governmental colleagues in contributing towards the direct payments website referred to in 4.1.

⁷⁷ The SVB is an independent administrative body that implements social security schemes for various government agencies in the Netherlands

⁷⁸ See <http://www.svb.nl/internet/uk/index.jsp> for more information about the SVB in the Netherlands (although the section on the PGB does not appear to have been translated into English)

⁷⁹ See <http://www.pgb.nl/showpage.php?pa=234>

Appendix A The research

The research methodology has been a mix of visits and discussions with a sample of local authorities in the UK, encompassing urban, metropolitan and rural authorities and their support service 'partners'. The research has also included discussions with other organisations involved in the direct payments initiative.

We have also reviewed the websites of many organisations actively involved in direct payments policy.

Local Authorities/Councils

We consulted 11 councils in England and Scotland⁸⁰ about direct payments employer-related issues. Eight of the 11 provided support services in-house, two had fully outsourced all support, and one had a mixture of in-house and outsourced. But the pattern of in-house and outsourcing is constantly changing, as the individual councils review their budgets and decide what arrangements will provide best value for money when contracts come up for renewal.

All the councils said that the vast majority of direct payments employers used a payroll service, although a small minority, estimated at about 5% manage their own PAYE scheme. The payroll services are either provided in-house or by the support service or direct payments employers were pointed towards a free payroll provider or a local one.

All the councils described their relationship with HMRC as good and without any serious issues. However, one or two did comment that some staff in HMRC did not always seem to be fully aware of what direct payments are all about, that most direct payments employers do not want the responsibilities of being an employer and do not welcome the paperwork. One commented that HMRC did not appreciate the complexities of direct payments particularly when speaking directly to a user rather than a support service.

We also reviewed the websites of six councils in England with very active and well-developed direct payments schemes⁸¹. Four of these six councils have extremely well developed websites with clear, well-organised, accessible information for the direct payments employer with plenty of links to other sources of information. One has a well-presented site but without additional information on topics such as employment law and record keeping, and one has limited information containing the bare minimum.

Support Services

We consulted 52 support organisations, two social workers, one advice worker and one independent living consultant about direct payments employer-related issues⁸².

The vast majority of the support organisations said that they had a good relationship with HMRC, few felt they had any very serious issues and most felt that on the whole PAYE ran reasonably smoothly.

⁸⁰ See list in Appendix A for details

⁸¹ Councils referred to by the Department of Health at a meeting on 9/05/07, see list in Appendix A for details

⁸² See list in Appendix A for details

However, some themes were mentioned more than once:

- PAYE ‘too complex’ – described as ‘over the top’ to expect direct payments users who become employers to manage the same responsibilities as someone in business. One organisation supporting older people commented that if they were not there to help, most of their clients would abandon direct payments. There was also a comment that the ‘simplified’ scheme is not simple at all and that problems are sometimes experienced by people who choose to manage their own PAYE scheme and then run into trouble because it all gets too much for them.
- Inconsistent advice from the New Employer helpline – described as ‘mostly helpful’, but could become aggressive when things went wrong and did not always give consistent advice about issues.

These issues are included in section 3 of this report.

Other organisations

We consulted 15 organisations with an interest in direct payments policy about employer-related issues and reviewed the websites of ten others for information about direct payments⁸³.

They raised a variety of tax-related issues relevant to direct payments employers, which are included at section 3 of this report.

Personal assistants/care workers

As part of our research programme we asked the people and organisations we consulted about employment and tax-related issues for personal assistants and carers working for direct payments employers. Four topics were mentioned several times and are included at section 3 of this report:

- Status – described as a ‘serious’ issue by those who had experienced difficulties with self-employed personal assistants⁸⁴.
- NMW issues: confusion over the rules for sleep-in payments; benefits in kind: accommodation; working hours: travelling time payments.
- Difficulties with getting code numbers right for personal assistants and carers with more than one employment, particularly when using the ‘simplified’ deduction scheme.
- Potential difficulties for direct payments users with small care packages failing to deduct tax from personal assistants and carers who work for only a few hours but who have other sources of taxable income such as other jobs or pensions.

⁸³ See list in Appendix A details

⁸⁴ See Appendix B for an example of status going wrong in a care worker situation

Migrant workers

As part of our research programme we asked the people and organisations we consulted whether they considered that there were any tax-related issues for direct payments users who employed migrant workers.

For the most part the employment of migrant workers was not thought to be causing direct payments employers any particular concerns. However, they do require accessible information to enable them to meet their obligations to make sure their employees are working legally.

Take up of the direct payments scheme by ethnic minorities

As part of our research programme we asked the people and organisations we consulted about their perceptions of take up rates by ethnic minorities.

Take up across the UK varies considerably depending on whether the councils and support services have had the resources to pump into targeting ethnic minorities in their local area to improve take-up rates.

Where funding has been available targeted activity has produced long lasting results, as once awareness has been raised in the particular community it tends to become self-sustaining, as information spreads by word of mouth.

For example, in an area with a high south Asian population a particular support organisation bid successfully for some Department of Health funding from the Direct Payment Development Fund (DPDF), specifically to increase the take-up of direct payments by the ethnic population. They recruited an adviser who speaks the south Asian languages and promoted direct payments vigorously at luncheon clubs and other venues, generally raising awareness enormously.

The south Asian community locally has very strong family networks so once the availability of direct payments became embedded, the take up increased significantly. For south Asians locally there is cultural stigma attached to going to Social Services but direct payments take away that stigma and the south Asian community has become very comfortable with them.

Locally there are very few south Asians who do not have an extended family to help and support them. Through family and friends the organisation is able to support south Asians who do not speak any English at all, and who cannot read and write. It works very successfully as many users do have a carer in mind so any issues of discrimination are avoided. The organisation has a lot of experience in working in the human resources field and understands the complex legal issues surrounding employment law. They can provide as much or as little support as is needed by a direct payments user who becomes an employer.

Lack of joined up policy making

Several of the people and organisations we contacted during our research expressed the view that direct payments policy has developed piecemeal and has not been thought through end-to-end, particularly as far as the impact on users who become employers is concerned.

The sentiment generally was that there needs to be much more co-operation between government departments, including local government. Developments in

direct payments policy and practice, which may affect tax-related issues, particularly employer-related ones, need to be considered from the outset and not left to be sorted out after the policy has been implemented.

Statistics

There are very limited statistics available nationally about the number of people who have chosen to receive direct payments rather than traditional services. The four administrations do not gather their statistics for direct payments users on precisely the same basis and the level of detail made available on the Internet varies between them. No figures are gathered about the number of users who are employers

Number of direct payments users in 2005-06 (the most recent year available)

	Direct Payments Users	2005-06
England	Physical Disability (aged 18-64)	15,095
	Learning Disability (aged 18-64)	4,785
	Mental Health (aged 18-64)	1,610
	Older people (aged 65 and over)	10,180
	Disabled Children (aged 16-17)	650
	Carers of disabled children (parents etc)	4,170
	Young Carers (aged 16-17)	240
	Carers (for carers services)	5,105
	Total	41,835

	Direct Payments Users	2005-06
Wales	Physical and Sensory Disability/Frailty (aged 18-64)	539
	Learning Disability (aged 18-64)	150
	Mental Health (aged 18-64)	19
	Mental Health Dementia (aged 18-64)	1
	Substance Misuse (aged 18-64)	1
	Other Vulnerable (aged 18-64)	16
	Physical and Sensory Disability/Frailty (aged 65 and over)	148
	Learning Disability (aged 65 and over)	7
	Mental Health (aged 65 & over)	15
	Mental Health Dementia (aged 65 and over)	7
	Other Vulnerable (aged 65 and over)	12
	Total	915

Scotland	Total	1,829
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N Ireland	Elderly	221
	Mental Health	21
	Learning Disability	141
	Physical Disability	249
	Total	632

	UK Total	45,211
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The ILF have some 18,000 people who use their funding to buy their own services: of these some 11,000 employ personal assistants and care workers. There is no detail available as to how many of these employers run their own PAYE schemes, have a

family member or other supporter running the PAYE scheme for them, or use a payroll provider.

From speaking to individual local authorities and support organisations we are confident that most direct payments users who become employers prefer to use a payroll agency of one kind or another rather than deal with the PAYE themselves. So HMRC can take some comfort that the vast majority of direct payments micro employers are at no more risk than the vast majority of represented micro employers who have someone administering their payroll for them.

However, because of the wide variation in the practices surrounding payroll provision it may well be preferable for HMRC to understand the level of risk involved, if things go wrong for this particularly vulnerable section of the micro employer base.

Our research suggests that around 40% of direct payments users with funding through Social Services become micro employers compared with ILF fund holders where they number more than 60%. Of that 40% our research also indicates that the vast majority, some 95%, use a payroll provider leaving only 5% running their own payrolls.

As our research is not statistically valid we can only use the findings in an indicative way to suggest that of 45,000 direct payments users in 2005-06 somewhere around 900 of them used a 'simplified' deduction scheme.

HMRC has limited information about the number of 'simplified' deduction schemes in 2005-06, advising us that there were some 13,700. This would suggest that direct payments users are likely to represent around 6-7% of the total, although the number of ILF fund holders with 'simplified' schemes is unknown and may increase the percentage figure.

The number of direct payments users nationally is low but for 2007 there has been a major drive to increase take-up⁸⁵. In addition, if Individual Budgets are rolled out nationally it seems likely that the number of direct payments users, and consequently employers is only likely to grow.

Department of Health statistics for 2005-06 show that there were 651,000 assessments completed in the year for new clients and that 1,162,000 review assessments were completed for existing clients. The number of new clients assessed each year has remained stable for the last three years at around 650,000 although the number of assessments for existing clients has been on the increase⁸⁶.

By no means will all of these assessments ever lead to direct payments being taken up. But as the shift from the health model to the social care model becomes embedded in local authority practice the potential for more people taking up direct payments and becoming non-business micro employers is evident.

Councils consulted about direct payments employer-related issues

Bracknell Forest Borough Council
Brighton & Hove City Council

⁸⁵ See

http://www.dh.gov.uk/prod_consum_dh/idcplg?IdcService=GET_FILE&dID=70717&Rendition=Web

⁸⁶ Department of Health figures show an increase of 65,000 from 2003-04 to 2004-05, and by 76,000 from 2004-05 to 2005-06

Essex County Council
Fife Council
Halton Borough Council
Kirklees Metropolitan Borough Council
Liverpool City Council
Medway Council
North Tyneside Metropolitan Borough Council
Rotherham Metropolitan Borough Council
Wigan Metropolitan Borough Council

Council websites reviewed

Essex County Council
Hampshire County Council
Kent County Council
Wigan Metropolitan Borough Council
Worcester City Council
York City Council

Support services consulted

Age Concern Camden
Age Concern Cheshire
Age Concern Nottingham
Age Concern Ormskirk
Age Concern Wigan
A4e East Sussex
Bedfordshire Disability Resource Centre
Centre for Independent Living Belfast
Brighton & Hove Federation of Disabled People
Buckinghamshire Direct Payments Support & Advice
Caledonia Direct Payments
Cheshire CIL
DACE (Disability Association Carlisle & Eden)
ECC Independent Living Advocacy Essex
ECC Service Brokerage
Essex Coalition of Disabled People
Flintshire - Penderels Trust
Mr F Welfare Rights Adviser in Scotland
Forth Valley DPSS (Falkirk District Council)
Gateshead Crossroads
Glasgow Centre for Independent Living
Living Independently in Gloucestershire
Hampshire Centre for Independent Living
Hampshire Enhan
Hampshire Carers Together (Children's Services)
Hertfordshire Centre for Independent Living
Disablement Association of Hillingdon (DASH)
HomeCareDirect
Mrs H Social Worker
Kent's DPSSS
Lothian Centre for Independent Living
Ms L Advice Worker
MCCH Society Ltd

Independent Living Norfolk
Leonard Cheshire Plymouth
Mr C Social Worker
PROdisability Poole
Rhondda Cynon Taff & Merthyr Tydfil County Borough Councils- RCT Centre for
Independent Living
The Rowan Organisation
Ideas for All Sandwell
Scottish Personal Assistant Employer's Network (SPAEN)
Scottish Helpline for Older People (SHOP)
Sefton Carers Centre
Southampton Centre for Independent Living
Southwark Disablement Association
Disability Solutions, Stoke
Surrey Independent Living Council
Sutton Centre for Independent Living
Mr T freelance direct payments and independent living consultant
Wilf Ward Family Trust East Riding
West of England Centre for Independent Living (WECIL)
Wired (Wirral Information Resource for Equality and Disability)
Worcester City Council - Penderels Trust
York Council for Voluntary Services

Other organisations consulted

Association of Directors of Adult Social Services (ADASS)
Age Concern England
Brandon Trust **WEB**
Care Services Improvement Partnership (CSIP) **WEB**
CarersUK **WEB**
Contact a family **WEB**
Council of Ethnic Minority Voluntary Organisations (CEMVO)
Department of Health
Office for Disability Issues (ODI)
Enable Payroll
Equalities National Council **WEB**
Essex Racial Equality Council
Ethnic Minority Foundation (EMF)
Professor G (Consultant neurologist)
Help the Aged **WEB**
Independent Living Funds (ILF)
In Control
National Centre for Independent Living (NCIL)
The Princess Royal Trust for Carers **WEB**
RNIB
RNID (**BY E-MAIL**)
Social Care Institute for Excellence (SCIE) **WEB**
TaxAid
Tizard Centre at University of Kent **WEB**
Toucan Employment
UPDATE **WEB**

Appendix B When things go wrong with HMRC

Background

Two daughters decided to manage their mother's direct payments because she had Alzheimer's Disease and was unable to manage for herself. They obtained power of attorney and employed a carer to look after their mother. One daughter took on the responsibility of dealing with the PAYE the other of visiting and caring for their mother because she lived locally.

Experience

A 'simplified' PAYE scheme was set up and all went well until the mother's condition deteriorated and she needed someone to sleep in. The carer said that as she was altering her hours and conditions she wanted to go self-employed and be responsible for her own tax/NIC.

In February 2006 the daughter let HMRC know that she would not need the P37 Employers Annual return and P12 for the tax year to 5 April 2006. The employee had left to become self-employed on 1 April 2005 and at that point became responsible for her own tax and NI.

In July 2006 HMRC employer compliance began asking for the daughter to attend a meeting to discuss the position of the carer. In August the daughter attended a quite intimidating interview where the purpose was to establish the terms and conditions of the engagement of the carer by the daughter.

The daughter was asked whether she had considered approaching HMRC or anyone else for advice on the issue of status and the reply was no, she was unaware such advice was available locally within HMRC.

The daughter did not know she needed advice, because the carer had been perfectly plausible and the proposition seemed very reasonable.

The daughter was advised by HMRC about the charging of a penalty and the abatements available and her rights under the Human Rights legislation with regard to co-operation. The daughter expressed her desire to co-operate to bring the matter to a close as soon as possible in view of the potential underpayment for which she would be held responsible.

HMRC told the daughter that the carer would be contacted for her side of the story before an opinion could be reached.

The daughter asked for some points in the notes of meeting to be clarified because two important issues had been omitted.

In December 2006 HMRC provided an opinion that the carer had been employed since 6 April. The letter was technical and formal and invited the daughter, if she disagreed with the contents to tell HMRC as soon as possible why and provide further relevant information or documentation.

The daughter disagreed with the detail/accuracy of some of the points made and asked for the status opinion to be reviewed.

In February 2007 HMRC responded justifying their decision and giving unrelated examples to demonstrate the issue – an airline pilot and a doctor working in a hospital. The letter confirmed the opinion and asked for agreement. Later in February HMRC wrote again enclosing a computation of the tax and NIC due for the 2005-06 year (more than £6K), plus interest calculated to the middle of March (more than £400).

At the end of February the daughter pointed out that the carer had been paid gross and was therefore obliged to pay the tax and employees NIC. The daughter sent a cheque for the employer's NIC and asked for a calculation of any interest due by return.

The daughter was by now confused about the investigation and thought she had agreed that she would only be responsible from August 2006 because she could then start deducting tax and NIC again, as the year had not ended. She thought she had agreed this with HMRC in a telephone conversation back in August.

In March HMRC responded with another technical letter telling the daughter that a telephone conversation they had had back in August 2006 in no way confirmed the daughter's responsibility from this date only for the operation of PAYE, merely that it was a reasonable action in the circumstances. The letter went on to say how much remained outstanding and recalculated the interest to slightly later in the month.

In March the daughter responded that it now became clear that HMRC was holding them responsible for all the tax and NIC due between 1 April 2005 and March 2007 and said that they were still extremely unhappy about this position. They had not previously appreciated the full implications of what the investigation was doing.

The carer had told them she was aiming to be a self-employed professional carer and her contractual arrangements made it clear and in fact they reminded her at every pay period. They felt there had been dishonesty on the carer's part in that for the period she had made no payments to HMRC, despite telling them that she was making the arrangements.

The daughter terminated the carer's contract.

The HMRC action caused grave financial implications for the care arrangements for their mother. The whole family was distraught and felt the carer had associated them with a situation that they would never knowingly have put themselves into.

In mid March HMRC wrote another technical letter warning that another meeting would be required to discuss the monetary penalty. But first the daughter was asked to agree to the amounts due about how she wished to deal with 2006-07 tax year. Her response would determine whether a revised computation to include that year would be required.

The daughter provided further information about the payments made between August 2006 and February 2007 and confirmed details of the employment termination. She asked for full working details by return, which HMRC provided two days later along with a request for a further meeting to discuss monetary penalties.

Outcome

The daughter paid all the sums asked for by HMRC out of her mother's savings. Previously her mother was not eligible for direct payments because her capital was

higher than the means-tested threshold, but now that she had had to pay HMRC several thousand pounds she would become eligible and the state would pick up the bill.

The carer had been a trusted employee, the daughter did not know she needed advice about self-employment and had no appreciation of the potentially devastating results of a status investigation.

Appendix C Obligations of the direct payments user as an employer

An employer must:

- Obtain an enhanced check with the Criminal Records Bureau to satisfy themselves that the job applicant is not a threat to the person in need of care.
- Examine passports and other documents of the potential employee to satisfy themselves that the individual is who they say they are and that they have the right to work in the UK at the activity being offered. The documents should be scanned, copied and retained. A failure to do these things can be a criminal offence.
- Give an employee a written statement of the main particulars of employment within two months of the beginning of the employment. It should include, among other things, details of pay, hours, holidays, notice period and an additional note on disciplinary and grievance procedures.
- Deduct income tax and National Insurance contributions from salary or wages; provide payslips and year-end summaries; report benefits in kind and account to HMRC for the amounts deducted.
- Allow pregnant employees paid time off for antenatal care and maternity leave of at least 52 weeks. The pregnant employee is also entitled to maternity benefits and protection against unfair treatment or dismissal, and the employer must act in accordance with health and safety considerations.
- Allow adoption (including overseas adoption leave) and paternity leave.
- Pay statutory sick pay.
- Provide the appropriate statutory period of notice when terminating a contract.
- Put in place appropriate dispute resolution procedures and ensure that they do
- Pay statutory redundancy pay in appropriate circumstances.
- Pay at least the appropriate national minimum wage and keep records to establish that they have done so.
- Make student loan repayment deductions from pay, if an employee has an outstanding loan and earns more than the annual threshold (currently £15,000).
- Give appropriate rights under the Working Time Regulations, including rest breaks, paid holiday and limits on night work.
- Ensure against unauthorised deductions from pay.
- Protect against less favourable treatment because of being part-time.

(continued)

Appendix C (Continued)

- Protect against less favourable treatment if the employee makes a disclosure in the public interest is given (whistle blowing).
- Provide a safe environment for the employee to work.
- Not discriminate unlawfully against the employee or potential employee.

Appendix D Bibliography

Section 2: for background reading on direct payments see 'Developments in Direct Payments' edited by Janet Leece and Joanna Bornat published by The Policy Press 2006

Section 2: for background reading on support schemes see 'Wider Options report of a research project into Intensive Support Schemes for Direct Payments' by Laura Luckhurst published by NCIL 2005

Section 3: for background reading on UCTs/ILTs see 'Trusting Independence' by Andrew Holman and Catherine Bewley published by Community Living and Values Into Action 2001