



## **Personal Budgets: Council Commissioned Services**

### **Appendix A: Opinion on legal implications**

**January 2010**

## Introduction

This appendix contains ADASS opinion on deployment options in relation to the legal implications – authorities must seek their own legal advice from contracts procurement and employment legal services.

## Overview – parties and relationships and nature of the services contract

Where a council contracts for the service, it either contracts as **principal**, for itself, or as agent for another (i.e. the service user client, potentially).

A **managed** service is primarily one where the council contracts as principal.

Where the council is the principal, making a contract for a person who has **not** elected to take a direct payment, as part of the sign off of the deployment options for the personal budget, it will be making a public sector contract for public sector statutory services, that is, services governed by statutory provisions. The service user may have rights (i.e. for influence) and responsibilities (i.e. communication) under that contract with the provider, but will not be a party, in the sense that he or she will not be providing any form of consideration known to the law.

An exception to this general principle would be where the parties had chosen NOT to exclude the Contract (Rights of Third Parties) Act, because that Act gives beneficiaries of others' contracts, rights under that contract which they can enforce as if they were a full party.

It would be consistent with choice and independence and respect for service users for councils to cease to exclude the operation of that Act, as a matter of course, in their contracts.

Where the *client* is the principal, and spending the direct payment that they have chosen to convert their budget into, the client is clearly not acting as a public body. The fact that the money came from the council, originally, under Direct Payment functions, and can be withdrawn in certain circumstances, and that the use of it will be monitored by the council's staff, does not make the client a purchaser for anyone else other than him or herself. **The contract then made, for services or goods to meet needs, is a private individual's purchase.**

## Standing orders and public procurement

Where the council acts for itself, the council's standing orders and all relevant public procurement rules applying to social services contracts will apply. Examples may be the rules about registration with the ISA of any staff working with vulnerable adults, and the public contracts regulations, and standing orders about approved providers.

Where the client acts for him or herself, no such rules will attach to the choice of purchaser. The client is exempted from requirements to check to see whether a proposed employee is barred from working with vulnerable adults. The client can choose anyone to work for them, so long as that person has a right to work and the Local Authority has not elected to use its power under the regulations now in force to exclude that person from benefitting from appointment to do the work. Public procurement rules cannot apply to private individuals.

### **Health and Safety**

Where the council contracts with an agency for care workers, those workers' place of work will be the client's own home, for the purposes of Health and Safety obligations owed **by their own employer**.

The same would be so if the client spent their direct payment on an agency service.

But if the client employed the worker, the Health and Safety obligations relating to the workplace do not apply to the worker, as workers in one's own home are excluded from the coverage of the Health and Safety at Work legislation. That does not mean that they are owed no duties, but that similar duties arise from the common law of employment, and occupation of premises, rather than from the statutory framework for Health and Safety.

### **Disputes – debt recovery, complaints etc.**

If there is a dispute relating to the contract for services, the council who has contracted for itself, as principal, will be the party to sue or be sued or become involved in dispute resolution.

Any service user complaint will be a complaint which (after an attempted resolution by the provider, under its own complaint system required under CSA rules,) will be eligible for consideration under the local authority's social services complaints system.

If a client has made a contract for the spending of their direct payment, they and they alone will be liable for payment. The local authority is not a party to the private arrangement made by the client.

Where a direct payment buys the service, the client and the provider are in contract, and that contract will govern the rights and obligations of the parties, in legal terms. Any complaint, after October 2010, will go to the Local Government Ombudsman, directly, under its new private purchasers' jurisdiction in adult social care.

## **Liability for physical mental or physical harm**

Where a service user claims that the negligence of the provider has led to mental, physical or financial loss to the service user, the provider's position will depend on the law of tort and contract.

The law of **contract** cannot found a claim for the client in a council's commissioned or otherwise managed service, because the client will not be a contractual party (subject to non-exclusion of the Contracts (Rights of Third Parties) Act).

However, even in a managed service, the law of tort (i.e. the notion of a duty of care, foreseeable risk, etc) may provide the client with rights against the provider and/or the council. This is a difficult area of law currently subject to developments by the Supreme Court because of the public policy concern about imposing a parallel duty of care in a welfare law context where no action for breach of the **statutory** community care duty can arise.

Councils and registered providers are insured against liability for their own and their staff's negligence, if it causes personal injury or other loss.

Where a client receives a service via a council provided or directly purchased service from an agency, the agency will be insured for harm resulting to the service user.

In a Direct Payment agreement between the client and the provider, any agency with whom the client makes a formal contract for services can be expected to be insured against liability of this nature.

But a worker who is individually directly employed will be unlikely to be insured.

So where a client chooses a direct payment with which to employ a worker directly the client will not have the benefit of anyone else's insurance policy, (unless by chance, under their own personal injury or contents policy), for injury caused to them accidentally or negligently by the worker.

If the worker is self-employed, they may be insured, but it is rare in this sector for HMRC to accept that this is the proper characterisation of the role of a personal assistant.

## **TUPE implications**

When a service provision contract changes, it is the law that the staff can often enjoy protection of their employment terms and conditions, under the regime known as TUPE. If they transfer to the new service provider, they can only be dismissed lawfully under existing current grounds for proper dismissal.

It is unlikely that these rules apply in the context of personalisation, where the change in the identity of the purchasing contractor must mean that the original purchaser has not changed the service provider, but has ceased to purchase a service at all. The taking up of a direct payment arrangement - where genuinely elected by service users or their suitable persons under the new rules, cannot give rise to TUPE transfers of the staff who were employed by the previously contracting purchaser. That purchaser (the council, prior to the direct payment arrangement, or the service user, when a service user elects to give up a direct payment and return to a LA commissioned service) is not changing the service provision arrangements. They are ceasing to be the purchaser altogether. The fact that the funder of the services is the same in both cases, and the fact that the ultimate beneficiary of the services then bought is the same as before, must not be treated as attracting TUPE/service provision change rules, without further legal authority for this proposition. If this were not the case, clients would be stymied in taking choice and control, by the application of employment law.

## **VAT**

Where the council contracts for itself, as principal, for goods or services for the client's care packages, it will be able to reclaim any VAT that might be charged because Councils are themselves registered for VAT.

However, services provided in the welfare field by charities and state-regulated private providers registered with CQC are exempt for VAT purposes.

Should there be any services in the care plan that are not exempt from VAT, a person acting as a private individual spending their direct payment on such services would not be able to reclaim the VAT.