The Good, The Bad and The Ugly:

Addressing the Issues of Non-compliance in the Umbrella and Payment Intermediary Sector

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PROFESSIONAL PASSPORT

SETTING THE STANDARDS

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About the Author

Crawford Temple is the CEO and founder of Professional Passport, the largest independent assessor of payment intermediary compliance in the UK. Established in 2007, Professional Passport provides an independent compliance standard for the payment intermediaries market to create a more level playing field across the sector and provide a positive differentiation for those providers operating in line with those standards.

Today, Professional Passport is widely recognised as the benchmark of provider compliance with many in the supply chain now insisting on using Professional Passport accredited providers.

Crawford wrote the first book on operational compliance for umbrella providers and is one of the leading experts on provider compliance in the temporary workers market. As a respected industry expert, Crawford works closely with key Government departments on all matters relating to supply chain compliance in an effort to support and promote the sector and drive up compliance standards.

Crawford Temple
CEO
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Introduction

The world of work has radically changed over the last 40 years. Gone are the days of the 9-5 as we have seen a significant rise in the number of people opting to work for themselves as freelancers and contractors. And, along with the prominence of the contingent workforce has come a proliferation of regulation and legislation as policymakers seek to catch up with the fast-moving pace of the modern working landscape.

A catalogue of legislation has resulted in a series of unintended consequences and much of it has not served to help and support the contracting sector and the whole supply chain for the better. Government has ignored advice and recommendations from stakeholders and industry experts so that the legislation continues to fail to address the underlying issues and challenges that our industry faces, namely non-compliance, transparency and enforcement.

Non-compliance - In a market where all providers should be providing similar returns to workers, as they should all operate within the same tax rules, competition should be on business strength and service levels, unfortunately this is not the case. Non-compliance is fuelled by the complexity of the legislation coupled with a desire for workers to achieve the highest rewards for their efforts. Competition across the sector is driven by the final returns provided to workers and workers select providers on this basis.

Transparency - The levels of complexity and frequent changes to legislation have resulted in workers bouncing from one structure to another. The latest changes, Off-Payroll working, have resulted in many workers operating through a new structure to them, the umbrella company. There are many examples where workers clearly do not understand the arrangements and therefore additional levels of transparency are required to aid the understanding.

Enforcement - The current enforcement strategies do not work. They serve to incentivise non-compliant offerings and fail to support the compliant parts of the sector. The lack of visible enforcement, the lengthy delays in taking any action, and targeting the workers for recovery all serve the interests of those seeking to circumvent, or disregard, the rules.

Crucially, the only way to stop the perpetual cycle of legislation is a radical rethink and simplification of the rules.

The forces and drivers that applied back in the late 1990s are very different today. Contracting and flexible working is now formally part of a company's structure and no longer seen as a way of reducing costs. Contractors provide the flexibility and agility that the modern business needs to survive and thrive.

In this paper, I will reflect on the legislation that has been implemented and imposed on the sector, as well as examine some of the proposals that have been made, and rejected, in a bid to move to a more stable and sustainable environment for businesses. I will go on to make specific proposals and recommendations that will help level the playing field. I will also question whether regulation is the answer to the sector's problems. I don't believe it is but will provide an alternative suggestion.

The last three decades have thrown up many challenges for the sector so it is now more important than ever that the everyone in the compliant supply chain along with policymakers takes a collegiate approach to work together so that we can confidently face the future with our heads held high, knowing that we are striving to do the best for the whole industry to raise standards and drive out those who seek to perpetually break the rules and behave unethically.

Only then will we be able to take a confident step forward, safe in the knowledge that we are all working diligently to support the UK's valuable contingent workforce that politicians purport to support.

Crawford Temple
CEO Professional Passport

Summary and Key Recommendations

The challenges faced today are not new. Over the last 15 years a number of clear warnings and consequences of actions have been highlighted and ignored resulting in the position we find ourselves today.

In considering the issues we have broken these down into the following key areas:

- Short Term Wins
- Removing Incentives
- Wider Review and Simplification of the Legislative Framework

Each of these steps takes the sector forward to a more open, transparent, compliant and orderly marketplace. Big advancements can be made quickly and, in our opinion, easily, but these quick wins must not disguise the fact that a wider review and simplification of the rules will be required to ensure the legislative framework supports the ongoing and future needs of Government and businesses and provide a more stable foundation to build upon.

Short Term Wins

Benchmarked PAYE Rate

All roles advertised should, where the rate offered is not PAYE, use a set formula to create a benchmarked PAYE rate that must also be shown. This allows a worker a common currency of value when assessing roles advertised across any job platform. This will remove distortions and help understanding. When supported by the Key Information Documents there should be little room for error.

A formula already exists and has been used in the PRISM and LITRG Factsheet[1] if required.

Status Indicator

For a contractor to truly assess the value of any assignment offered, they need to understand its status relating to both Off-Payroll and Supervision, Direction and Control. Whilst Off-Payroll status can only be finalised once the worker has also been considered, this should indicate a provisional status. There are many situations where the workers input would not alter the outcome.

BEIS should consider how both these requirements can be developed and implemented through Agency Regulations.

HMRC Umbrella Pay Calculator

HMRC should develop immediately a full function umbrella pay calculator and host on the .gov website.

This calculator should allow for a range of user customisable fields so checks can be made against any illustration provided. These should include Margin and Rate – to include both daily and hourly, days/hours worked, pay frequency, pension in or opted out, apprenticeship levy – yes or no, weeks worked per annum [default 52] and tax code [default to standard].

The output should provide a line-by-line breakdown of all costs, including employment costs. Employment costs should also show as a total so this can be directly compared to providers who fail to provide this breakdown.

This would also afford HMRC the opportunity to highlight common areas where disguised remuneration, skimming or hidden costs could be found, linking to a range of relevant articles and guidance.

The illustrator could also include an anonymous reporting function where users had the option to confirm if the pay illustration that they had been provided with matched HMRC's – yes or no, with further options to name the provider, the agency and the sector. This could provide valuable intelligence to help inform enforcement and significantly level the playing field.

Compliant providers would ensure their illustrator aligned with HMRC's and would promote this heavily to all workers. Where a worker indicated they were going somewhere else on the promise of better returns, all compliant providers would send them directly to this page.

HMRC Umbrella Payslip Checker

In developing the pay calculator, it would be a small step to also provide an umbrella payslip checker. The user customisable fields would need to extend further but all this input data should be evident on a payslip provided to the worker.

This central resource would, once again, be heavily promoted by the compliant providers where workers raised questions.

This would also provide an opportunity for HMRC to promote the Personal Tax Account. Workers checking payslips may have concerns and these could include the validity of the payslip. By promoting the Personal Tax Account and the fact that it will validate the year-to-date information on the payslip as accurately reported to HMRC will be a real incentive for those with concerns. This will help marginalise those providers where false payslips are being produced.

Once again the user should be presented with options to provide the names of provider, agency and sector anonymously. In many cases these may well be completed by compliant providers aware of sham arrangements.

Proactive Use of Existing Data

HMRC should immediately develop a tool to proactively integrate the intermediary reporting data against the RTI data to highlight potential disguised remuneration schemes.

HMRC should consider developing this tool to allow authorised users, with the appropriate authorities, API access to interrogate the data within set parameters. In all cases this should never allow access to any personally identifiable data, only interrogation at a company level.

HMRC should also consider small changes in the data provided within the report to potentially include a specific category for payment intermediaries applying PAYE which could include the name and company registered number.

We have identified that a common situation with non-compliant providers is the rapid increase of workers both within the provider and within recruitment companies; the analysis tool could be built to compare numbers from previous reports to highlight these trends and further inform the enforcement picture.

Work Proactively with Sector Bodies

HMRC, BEIS including EASI, should seek to develop closer relationships with compliance bodies and the wider sector bodies.

Compliance bodies in particular set their own compliance standards and developing a more structured approach would allow the departments to inform and, as importantly, be informed on pressure points in the market.

The nature of the compliance accreditations allows faster reactions to market distortions and would help limit and restrict market access to those who apply these 'have I got a good idea for you' arrangements.

Including the wider sector bodies provides the broadest reach for messaging across the sector.

Protecting the Integrity of the Compliance Reviews

Now that the market seems to be accepting the importance of a compliant supply chain it is becoming critical to ensure the compliance reviews are of the highest standards.

HMRC should seek ways to work with compliance providers and utilise the intermediary reporting versus RTI returns comparison tool to provide a further level of validity to the compliance reviews.

This has already been proposed and Professional Passport has been actively seeking this arrangement for some time.

As with other measures proposed this would provide a significant barrier to entry for non-compliant offerings and with ongoing validations highlight any provider digressions quickly. The compliance review can build this into the standard without having to declare the company non-compliant, but just not meeting the standard.

Define Openly What Compliance Looks Like

Working with the sectors compliance standards provides a benefit to HMRC in being able to agree and publish their views on compliance and what they would expect to see. Transparency is the strongest weapon against non-compliance.

Currently there is almost no information relating to operational processes or procedures anywhere on the .gov website.

Rebalancing Incentives

Employers NI Threshold

We recommend the removal of the Employers National Insurance threshold with all calculated additional income being used to support an overall reduction in the headline rate.

We do not believe that this incentive is delivering on its original objectives in the modern workplace. We actually believe it is providing an incentive to employers to limit workers hours to save employment costs. This results in 2 or 3 workers carrying out a role that would have traditionally been a single full-time job.

This would also remove incentives for zero-hour contracts resulting in their use being limited to where it was appropriate, and employer/employee agreed and not on a financial cost saving basis.

Align Pensions Auto-enrolment

The threshold for Pensions auto-enrolment provides a further financial incentive to suppress workers hours to maintain overall pay below thresholds. We believe this thinking needs to be reversed.

Employers should be required to auto enrol all workers with no thresholds on earnings. Where a worker is below the current thresholds these should be used as a benchmark where earnings below this level do not require an employee contribution, only an employer contribution.

Once earnings reached the threshold and the worker was offered the opportunity to fully enrol, i.e. start making their own contributions, it would only be at this point if a worker opts out that the employer contribution would cease to be a requirement.

Create SATR Style Rules for Enforcement

Perversely there is no incentive current in place for HMRC to proactively seek out disguised remuneration or non-compliant providers. Whilst they have the data they do not appear to be using it.

Rules should be created, similar to those within the SATR regime that only allows HMRC recovery from an individual user for a period limited to 12 months where they hold the data and have failed to act upon it. After this time HMRC should be restricted to recovery from the provider, promoter or any party that is knowingly promoting the arrangements.

Wider Review and Simplification of the Legislative Framework

Simplification of Existing Legislative Framework

The sticking plaster approach to legislation has resulted in a complex, overlapping and cumbersome legislative framework. This has two very negative outcomes:

1. It makes enforcement more complicated and therefore more costly

2. It is the friend of non-compliance, offering those operators greater opportunity for extended periods.

A review of both HMRC and BEIS legislation aimed at the sector should be carried out to identify areas of overlap and complexity and, with the benefit of hindsight, redrafted into a more refined framework.

Consistency of Enforcement

One benefit of the review helps create a simplified approach to enforcement and removes the many short comings and inconsistencies that exist in the market today.

If the idea of the review is rejected a major training and development exercise is needed across enforcement as we are seeing high degrees of variation and interpretation in the few cases that we are aware of.

Consider Alternatives to Off-Payroll

We do not believe IR35 provides a long-term foundation on which to build legislation and we recommend a review of this whole area to find alternatives.

If the existing framework is to remain: we suggest creating a way that Employers National Insurance could be credited directly to a contractors limited company by the recruitment company.

Where recruiters paid a limited company/Personal Service Company (PSC) they would simply be required to credit to that company's PAYE account an amount equal to 13.8% of the invoice value, excluding any VAT. The full invoice amount is paid to the PSC.

Where the PSC paid a salary, Employers NI would be charged but not paid until the credit had been used up. Any unused credit at the end of the tax year would be lost.

This simplifies the payments and allows contractors wanting to operate through their own PSC that choice without any risk to HMRC. It further removes the complexity of accounting practices that result from the current arrangements.

If the existing framework was to be reviewed and replaced: we would suggest a hirer's levy payable on all contingent workers, removing the need for any status checks.

This levy could be set at an initial level of around 3% with a view to increasing over a number of years to an agreed ceiling.

This further simplifies the whole process whilst at the same time protecting tax revenues.

Create Compliance Networks

We would argue that the issue is not solved by regulation as the majority of non-compliance is breaking existing rules. The issue is all about enforcement.

Linking back to the point of maintaining the integrity of compliance reviews, one critical part is their role and responsibility in the supply chain, which at present is silent albeit that many rely on them.

We suggest creating a framework, similar to that in Financial Services, of Compliance Networks. These networks would take on the responsibility of the compliance of their members.

Formalising their role also allows them to be defined within legislation with clear paths of liabilities. Defining a compliance network will be a simpler task as there are already regulatory frameworks in place.

Where compliance networks were adopted, we would suggest they are established for both payment intermediaries and recruitment companies which would make the task of enforcement far simpler and more cost effective. Assessing a compliance network's processes and procedures with random sampling of members would regulate high numbers in a similar time it currently takes to carry out one enquiry on one provider.

Large firms would have the option to register directly, as is the case in financial services, but users of these firms would be required to carry out their own due diligence and take on the role, and liabilities, of a compliance network.

Background

The Legislation Snowball

In the 1980s, contractors typically sold their services as self-employed individuals and were very happy doing so. All this changed when HMRC introduced new legislation making an agency potentially liable for any unpaid taxes on contractors operating as self-employed in the form of S44-7 ITEPA of the Income and Corporation Taxes Act in 1988. This change requires agencies to deduct full PAYE and NI from self-employed contractors and an agency that fails to do this can be held liable for any unpaid taxes.

Immediately after the introduction of this legislation, every contractor operating through an agency was required to operate through their own limited company, to protect the agency from complex processes and liabilities. At the same time, we also saw the emergence of the 'Payment Intermediary', where a 'limited company' interposed itself between the agency and worker thus protecting the agency from potential liabilities. Whilst these took on many guises, they can still be seen in the marketplace today with the most common and widely recognised model being the umbrella provider.

This single change set in place a chain reaction of events that are still in place today, some 30 years later, and is responsible for the most complex raft of legislation.

This catalogue of legislation has resulted in a series of unintended consequences. Even today we are seeing this trend continue with warnings from the sector, in their responses to consultations, being ignored and legislation being introduced that just creates further unintended market reactions. A report in April 2021 by The Loan Charge All Party Parliamentary Group supports this view as its report states:

The way that the Government currently ignores such reports and rejects most (if not all) recommendations is troubling and this is proving a demonstrable weakness in our system as any Parliamentary oversight of Government is simply being sidestepped. We believe this is something that should be looked at as part of a proper review and investigation into the lack of accountability of HMRC, something we have recommended previously and still strongly assert as a necessary imperative. [2]

I have often referred to this process as the 'sticking plaster' approach that only works short term. One HMRC official described the challenge as an inflated balloon. When you squeeze the balloon, one part will pop up, when you press that part down another part pops up; and so, the cycle continues. I would suggest the only way to break that cycle is to ensure equal pressure is applied to the balloon so that no part pops up, something that has failed to be achieved so far.

The original change to S44-7 ITEPA has seen a lot of time, resources and money wasted in an effort to make an impossible piece of legislation work. That single piece of legislation has resulted in a snowballing effect on legislation ever since. Legislation costs time and money to implement not just for policymakers and Government departments but for the companies that are compelled to implement any new rules. Let's reflect on the timeline of events that we have witnessed over the years.

Contractors now operating through their own limited companies, having been forced to because of a change in legislation, discovered that there were opportunities to manage their tax affairs more efficiently through this structure. At the time, rules allowed significant contributions into pensions even where low salaries were being paid which provided further tax savings. So, the contractors did what anyone would do, they arranged their affairs in the most tax efficient way for their circumstances.

Very quickly, the Government realised that they now appeared to be receiving less tax than before, as a direct consequence of legislation they had introduced.

At this time, we also saw a boom in contracting with many organisations reviewing their structures and recognising that there were significant benefits to be gained by tapping into a more flexible workforce on an as needed basis. There were also cost savings, as during this period many large organisations operated expensive final salary schemes for their employees. Moving workers to a contractual arrangement saved considerable money, whilst at the same time facilitated an increase in the rate of pay.

The way that the Government currently ignores such reports and rejects most (if not all) recommendations is troubling and this is proving a demonstrable weakness in our system as any Parliamentary oversight of Government is simply being sidestepped. We believe this is something that should be looked at as part of a proper review and investigation into the lack of accountability of HMRC, something we have recommended previously and still strongly assert as a necessary imperative.

Loan Charge All-Party Parliamentary Group Inquiry on How Contracting Should Work April 2021 Report [2]

2000: The Arrival of IR35

The net result of the reduction in tax take, coupled with the boom in contracting, led to the Government reacting and introducing legislation to try and stem the flow of workers into contracting – it was 2000 and it heralded the arrival ofIR35.

IR35, from outset, was heavily criticised by many of the experts. It was universally seen as too complex to produce an outcome with any certainty. There were big questions asked about how it would be enforced as it required an assignment by assignment, worker by worker, analysis for each case. Without effective enforcement it would become a meaningless piece of legislation.

This is a further example where the universal feedback and warnings were ignored.

The market responded, as it has always done, and new structures emerged designed to maximise contractors' returns, many of which relied on the complexity of the IR35 legislation.

At this time, we also saw a proliferation of mass marketed tax avoidance schemes being offered to contractors, and more widely, as the size of the market was growing at a pace.

2003: Self-billing Adopted by Agencies

In this year self-billing started to be used by agencies.

This reduced the administration for umbrella companies with the agencies now producing the invoices.

As agencies were picking up additional administration tasks, thereby making the life of the providers more straightforward, commercial deals were struck where umbrella companies paid the agency for the reduced admin which tended to be in the region of £2.50 per timesheet. This was the start of what has now become known as the 'rebate culture' in the sector.

2004: The Declaration of Tax Avoidance Schemes (DOTAS)

In 2004, The Declaration of Tax Avoidance Schemes [DOTAS] was introduced in an attempt to limit these arrangements.

Whilst it certainly helped to tackle the more aggressive schemes, many remained, claiming to fall outside the reporting requirements. IR35 enforcement was slow with very few enquiries, let alone cases being brought to court. With the perception of high risk and costs if caught but low enforcement, this created the perfect opportunity for insurance underwriters to introduce a raft of IR35 insurance products to the market. They offered insurance against the professional fees incurred in dealing with an IR35 enquiry as well as amounts to cover subsequent tax losses. These products just became a common business expense for any limited company contractor.

The insurance, coupled with a lack of enforcement, further diminished the impact of IR35.

2007: The Managed Service Company Legislation

There continued to be a growing use of structures to maximise contractor returns, all generally based around the use of a limited company and the IR35 legislation and circumventing the DOTAS requirements. This continued growth resulted in a further reaction from HMRC in 2007 with the introduction of The Managed Service Company Legislation.

Originally aimed at limiting the use of a structure that was now becoming prevalent in the market, known as the composite company, by the time it came in to force it had much wider reaching implications for the supply chain.

Many companies offering accountancy services to contractors operating through a limited company had to completely change the way in which they advised and worked with contractors to protect themselves, and the contractors, from potentially significant liabilities.

The legislation also recognised the role that insurance was playing in the market with a specific test that would result in a 'fail' if the products were promoted or facilitated by a provider.

This was another pointer that further change was required as IR35 was not working.

At the time, the sector warned of severe unintended consequences and responses to the consultation all warned of a danger in the increase in the use of offshore structures.

Yet, once again, these warnings were not heeded, and the legislation came into effect.

And the warnings came to fruition and significant numbers of workers were now being engaged through offshore structures.

Also, around this time, HMRC was taking action against a small husband and wife business operating in the contracting sector under an old tax rule known as S660. This was widely seen as a further attempt by HMRC to find a way of applying higher taxes to a contractor's limited company. After a journey through every court HMRC finally lost the case.

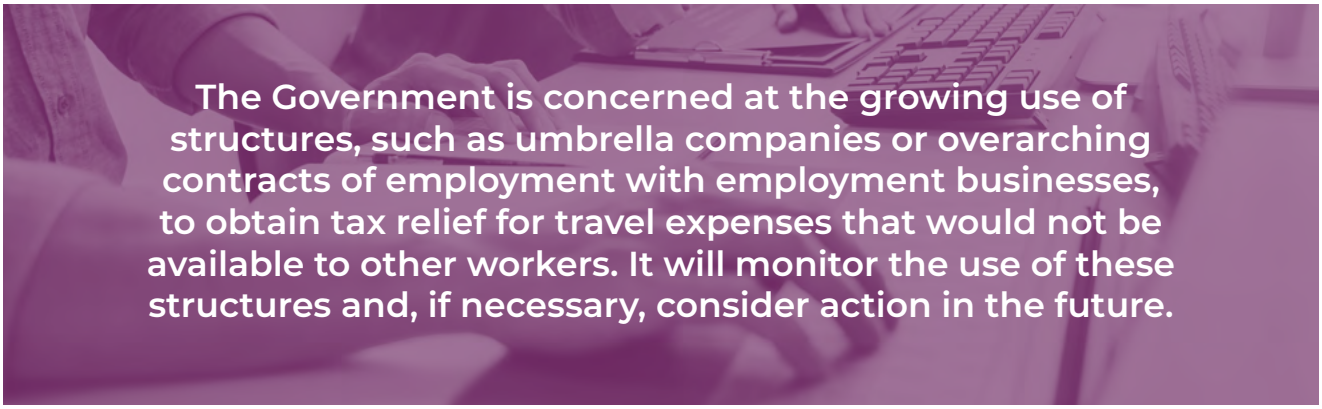
As a knee jerk reaction, and only a matter of days after the case was lost, HMRC attempted to implement new legislation called Income Shifting. Clearly feeling bruised by the loss of the case and finally recognising that IR35 was not working, this ill thought through proposal quickly lost momentum and was ultimately discarded.

A Boom in Umbrella Working

Following the introduction of the MSC legislation, many workers moved across to umbrella companies and we witnessed a real boom for these providers.

HMRC once again failed to recognise this and now found that contractors using the umbrella were able to claim significant expenses and reduce their tax bills. HMRC had provided many of the umbrella companies with expenses dispensations with some being significantly more generous than others. In the rush to secure business, the marketing of the levels of expenses available through umbrella companies became the resounding message to attract more workers.

This focus on expenses resulted in a statement from the Government at the time:



A Consultation Followed

The Pre Budget Report of 2008 confirmed that no further action was being taken at that time.

Many experts did comment that the delay was more than likely due to the economic climate, as the country was in the grip of a financial crisis and a deep recession, as opposed to any other factor. The widespread belief was that this would be revisited in the near future.

In 2009, with the UK still gripped by recession, widely reported as one of the worst in history, the Government's focus was fixed on achieving an economic recovery.

April 2009: Reasonable Care Introduced

In April, new legislation came into force requiring contractors to demonstrate 'reasonable care' when assessing their IR35 status.

Reasonable care was widely considered to be a review of contracts and working arrangements backed by a report outlining the key points that resulted in the status of 'outside IR35'; obviously if the assignment was within IR35, there was no risk assuming the deemed payment calculation was applied. Where reasonable care could not be demonstrated, penalties of up to 100% of the tax assessed could be applied.

Once again, HMRC applied more legislation in an attempt to make badly written legislation more effective, using fear of high penalties. They had to adopt this stance as fewer than 20 enquiries were being opened each year on IR35 as it was extremely difficult, costly and time-consuming to enforce, as had been predicted.

In July, HMRC also issued their findings following their compliance focus on expenses and umbrellas, citing many examples of non-compliance. There was an expectation that action could follow.

This expectation failed to materialise although it was confirmed that this area would continue to be watched and reviewed.

A consultation was also released on 'false self-employment in the construction sector' and although the sector expected some degree of change to be announced, nothing ensued, possibly due to the economic situation at the time. The CBI produced a report on 'The Future Shape of Business' highlighting what it saw as emerging trends for business over the next 10 years. A significant part of the report highlighted and predicted the growing use of flexible workers by businesses. This prediction, as we now know, was correct.

The drive for flexibility was based around sound business practices and in no way was there a suggestion that it was for any cost savings. This view is not one that appears to be shared by current Government thinking that appears to take an anachronistic stance, still convinced that the key driver is financial. This fundamental misunderstanding of the drivers towards a flexible workforce places the Government at odds with business and is likely to result in future changes that miss the mark entirely.

2010: Economic Recession and General Election

The start of 2010 had two key focuses: the economic recession and the General Election in May.

In March, HM Treasury released a consultation aimed at preventing the growing number of payment intermediary companies using a loophole in the National Minimum Wage rules to allocate expenses and pay below the prescribed levels. These offerings were targeting low paid workers. Following the consultation, it was confirmed that amendments to the legislation would be applied to effectively close this loophole and take effect from January 2011.

In April more new rules allowed HMRC to publicly name and shame any individual who had deliberately understated their tax position by over £25,000.

It also allowed HMRC to apply a close monitoring regime on any individual who was found to have deliberately understated their tax position by over £5,000. Fearmongering tactics were applied in an effort to bring more focus to IR35.

A consultation on the Agency Workers Directive draft legislation took place and once this closed, the Government pushed these regulations through to the Statute Books prior to the election.

The Conservatives, not in power at the time, were making promises to revisit the AWR regulations and remove the "gold plating" that had been added.

The General Election produced a result where no party was holding overall control. A frantic 7 days ensued leading to the creation of a Conservatives and Liberal Democrat coalition Government.

2010: The Office of Tax Simplification formed

The new Government almost immediately announced the creation of a new independent body, The Office of Tax Simplification, and tasked it with two initial reviews; a review of Small Business Taxation (including IR35) and a review of all Tax Reliefs. This meant that more time and resources was spent looking at how a bad piece of legislation could be made to work more effectively, or to put it more accurately – how to collect more taxes.

Their objective was to produce a report for the Chancellor on how to simplify the UK tax system whilst at the same time returning broadly the same revenues. The report was to be produced so that the Chancellor could consider its recommendations in time for the 2011 Budget.

The Government also announced that, whilst it intended to review and amend the terms of the Agency Workers Regulations, this was not possible as an agreement could not be reached with the TUC and CBI. Therefore, the legislation would come into effect in October 2011 unchanged. They confirmed that they would use the guidance to clarify a number of the contentious points. As the courts have pointed out on many cases guidance is no more than an opinion and holds no weight in the courts as they work on what the actual rules state.

At the same time, we also saw the introduction of The Bribery Act and whilst many predicted this would help level the playing field in relation to the growing trend of rebates in the sector it had little, if any, impact.

In 2011 The Office of Tax Simplification created a committee of specialists in the contracting market to assist in their review of IR35.

The committee included representatives from all sectors of the market including contractor group representatives, provider representatives, contract review provider representatives and industry experts.

The Office of Tax Simplification submitted their conclusions to the Chancellor which included 3 recommendations:

1. Suspend IR35, with a view to abolishing the legislation permanently

2. Retain IR35 legislation in its existing form but with explicit commitments from HMRC to make specified changes to enforcement.

3. A Business Test

The Chancellor confirmed that an appointed group would look specifically at how the administration and enforcement of IR35 could be improved, effectively a mix between option 2 and 3. Abolishing IR35 was dismissed completely.

HMRC agreed during that review process that enforcement was burdensome, onerous and taking excessive lengths of time, resulting in high levels of stress for anyone involved in an enquiry. It was then agreed that a group would be setup to review how IR35 could be enforced more effectively within the unchanged legislative framework.

The IR35 Forum was then created.

Also, in October of that year the new The Agency Workers Regulations came into force. These provided 'agency workers' with certain rights from day one of an assignment and a right to receive equal pay from week 12.

2012 continued to see further developments around IR35.

2012 also saw a consultation on 'Controlling Persons', a further attempt to bring more within the scope of IR35.

There was an increased focus on the issue of workers in the public sector operating through their own limited company. New guidance and procedures were issued on the procurement of all public appointees and assessment of their tax arrangements.

Contractors operating in this sector experienced significant changes to the procurement policies and were often asked to confirm how they assessed their status.

The BBC ran a programme on offshore companies using the tax rules to retain significant amounts of National insurance. This focussed predominately on the education sector although use by now was widespread.

This was something HMRC had been warned about in 2007 when the MSC legislation was introduced and repeatedly warned about over the next 5 years with no visible enforcement and action to close these down.

This was an embarrassment for the Government as it was directly linked to them whilst at the same time, they were attacking celebrities that had used tax avoidance structures. Whilst tax avoidance was legal it had now been deemed morally unacceptable due to the hardships experienced by many during the recession.

2013-2014: Offshore Employment Intermediaries

As a direct result of the BBC expose, 2013 saw a consultation on 'Offshore Employment Intermediaries' with legislation coming into effect in 2014 to prevent the ongoing use of the structures.

The report also introduced the 'Employment Intermediaries Reporting'.

So, some 7 years after the warnings were issued by the sector, action was taken at the loss of tens of millions of pounds to the Exchequer, which some might rightly call irresponsible. 2014 also saw a consultation looking at 'Onshore Employment Intermediaries' specifically looking at the issue of 'False Self-Employment'.

After the changes in 1988, payment intermediaries, effectively a limited company, were placed between the agency and the worker making the 1988 changes ineffective.

Whilst it prevented agencies engaging self-employed workers directly, they were still able to do this where a payment intermediary was interposed between the parties. This was common in the construction sector.

The construction sector had its own set of rules with the Construction Industry Scheme requiring workers to register with HMRC with set deductions made from their payments as a way to protect the tax revenues. This scheme had been in place for many years and appeared to work well, with the vast majority of workers wanting to operate as self-employed as they had done throughout their whole career in construction.

2014: Supervision, Direction and Control

A new test was applied, Supervision, Direction and Control. Only where none of these elements were present could a worker be classed as self-employed. Further clarification also had to be provided due to potential conflicts with other legislation relating to PSC contractors.

Warnings were made at the time of new structures that would emerge to circumvent the rules but once again, as was now commonplace, the warnings fell on deaf ears with legislation going ahead as originally proposed.

This initially had a significant impact on the construction workers with many workers who had happily operated as self-employed for many years, and saw themselves as self-employed, now being forced into umbrella companies. The umbrella companies came in for widespread criticism from the media over this although it was not their doing and the responsibility lay fully at the door of HMRC.

The new reporting requirements were introduced requiring agencies to report all the monies paid to workers that were not on the agency payroll.

2014: Elective Deduction Model

A new structure emerged which was clearly designed to circumvent these new rules, the Elective Deduction Model. This engaged self-employed workers but applied PAYE tax to their earnings. As the test for false self-employment was when PAYE is not applied, this circumvented this requirement and allowed agencies to use this structure without the risk of liabilities coming back to them.

There are many unsavoury aspects to these structures which generally serve to penalise workers who see a loss in rights as well as no holiday pay and, in some cases, failure to apply National minimum Wage. Aggressive offerings also allowed the claiming of expenses that would otherwise be denied, as well as benefits through the Flat Rate VAT Scheme. The main target of these arrangements appeared to be the lower paid and more vulnerable workers.

To date we have seen no action by any enforcement body against these arrangements and many still operate in the sector today. The hopes that the transparency provided by the new reporting requirements would result in an increase in enforcement and a more level playing field have not come to fruition and still, little, if any, action appears to have been taken in enforcing the rules.

The emerging trend seemed to suggest that using legislation with high risks of penalties would result in a self-policed style environment, reducing the reliance on enforcement. This is clearly not the case as unless the rules are enforced there is no incentive to read them or play by them. During this time there were widespread reports of those attempting to apply the rules as intended suffering significant commercial loss to those that just disregarded them. I attended an HMRC roundtable event where these points were made directly by a number of companies.

As is apparent, the pace of new legislation to address unintended consequences was becoming relentless. The market now had an expectation of the announcement of new consultations annually in each Pre Budget-Report with resulting legislation the following tax year. All of the above, and what is about to follow, can be linked directly back to the 1988 and 2000 changes.

2015 - 2016: New Expenses Rule

2015 and 2016 saw the announcement of new rules on expenses that would dramatically reduce the expenses that umbrellas were able to offer. It was confirmed these would come into effect from April 2016.

There was the introduction of a Supervision, Direction and Control (SDC) test, similar to the one that was introduced in the Onshore Employment Intermediaries, false self-employment. Where SDC was present, then each assignment workplace would be treated as a permanent place of work, which meant that no expenses could be claimed.

There was also a major change to the expenses rules to further restrict umbrella expenses for workers even where they were outside SDC or attending temporary places of work. The way the legislation was structured was a clear attack on umbrella companies.

We also saw ongoing comments, words and promises on tackling disguised remuneration, but no action.

There was the introduction of the Apprenticeship Levy that would impact umbrella companies and costs to the users of these arrangements.

There were also further discussions on how IR35 could be reformed.

2016-2017: Off-Payroll Legislation in the Public Sector

In 2016, the snowball continues to keep rolling and increasing in size as we saw the introduction of the Off-Payroll Rules to the Public Sector from April 2017. This was widely seen as the first step to a much wider change albeit HMRC denied this at the time. There was considerable pressure put on Public Sector bodies to almost wipe out the use of limited company contractors by determining the engagements as 'inside IR35' and blanket banning the use of them.

HMRC were unable to enforce IR35 and in many cases were losing in the courts. So, if they couldn't enforce it, why not make it someone else's problem. Once again, all the warnings were ignored and, as I commented at the time, using flawed legislation as a foundation to build new legislation was at best foolhardy.

Furthermore, warnings on new structures were ignored. New structures emerged to plug the gaps in the legislation. They were structured in a way that made it almost impossible for HMRC to seek recovery of unpaid taxes where the rules were not followed. These arrangements provided significantly higher returns and gained traction very quickly as many workers now faced a cliff-edge drop in income of around 30%-40%.

Despite all the claims of clamping down on avoidance structures, disguised remuneration schemes flourished, once again on the back of the significant drop in incomes where workers used compliant structures.

HMRC had once again ignored all the warnings and, in their desire to fast track this legislation had failed to consider, or address, these warnings adequately.

2017: Flat Rate VAT

Flat Rate VAT also saw changes which came into effect from 2017. Following representations about 'abusive' arrangements that used the Flat Rate Structure (FRS) as a key element, wholesale changes were made.

These changes effectively removed any benefit of FRS to contractors operating through their own limited companies.

During 2016, The Social Market Foundation was engaged by a group of providers supported by trade association, PRISM, to research the whole world of Modern Employment and produce an independent report with specific recommendations. Many attempts had been made to press the Government to carry out this review but as these appeared to fall on deaf ears, the sector took it forward themselves.

Shortly after this, the Government announced its own research into Modern Working Practices to be headed up by Matthew Taylor.

2017: Disguised Remuneration Schemes Prolific

In 2017, new Disguised Remuneration schemes continued to emerge with HMRC issuing 'Spotlight' documents to highlight these and confirming their views that they did not work, but no visible enforcement activity took place.

There also seemed to be little, if any, use of the reports HMRC had been receiving for the past 3 years which, in theory, would be highlighting these abusive arrangements where data was tied to the RTI returns they also held. This becomes an emerging trend and the same is still happening today. HMRC holds all the data it needs to spot a disguised remuneration scheme but is not taking a proactive approach to reviewing the information and acting to close down these corrupt schemes quickly. They still continue to thrive.

HMRC launched CEST, the Check Employment Status for Tax tool. This was a free tool to help assess IR35 status in line with the Off-Payroll requirements. HMRC provided assurances that if CEST was used, and used with reasonable care in the answers, they would not seek recovery if they subsequently disagreed. These assurances were quickly found to be lacking any real meaning with HMRC, in one notable IR35 case, seeking to dismiss the CEST evidence and press ahead with the case.

A flourish of reports on Modern Working was published.

The first was the Social Market Foundation report, an independent report with the research funded by providers, entitled **Rules of Engagement**

This was followed by Matthew Taylor's report on **Modern Working Practices.**

The TUC followed closely with a report entitled **The Gig is Up** and has since published its report on **Insecure Work.**

The Law Society also published a report entitled Better Employment Law for Better Work.[3]

Rather than outline all the points from the reports it was clear that the underlying message within them was that the current arrangements and rules needed to be updated to reflect the modern business structures and ways of working more accurately. The degree of change, and what that change was, varied by report but all concurred that change was needed.

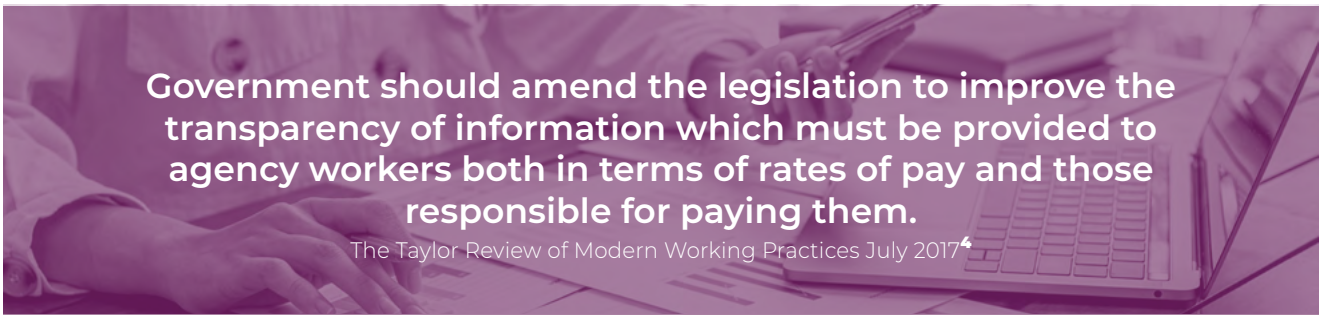
The Off-Payroll rules came into effect and, as predicted, we saw an explosion of schemes when the rules became live. There were many variations, but all had with one common theme – promising to deliver higher take home pay to workers affected by the new legislation. A significant proportion of these failed to have any level of sophistication and merely operated by not reporting some of the income and passing it directly to workers tax free. Whilst many labels were used for this tax-free element of the income, we rarely saw any supporting documents that would align to the categorisation.

Whilst HMRC continued to issue Spotlight documents highlighting the arrangements, these were clearly falling short and still there seemed to be no proactive analysis of the critical data sets it held – RTI returns and Intermediary Reports.

As more workers were operating with umbrella companies it became clear very quickly that these arrangements were not fully understood. In an attempt to help shed some clarification, PRISM, Professional Passport and The Low Incomes Tax Reform Group produced a Fact Sheet in clear simple language for workers to understand the arrangements. This covered all the key areas that the LITRG helpline had been receiving calls on. This report provided much needed clarity and calls to the helpline dropped significantly after its introduction.

The theme of transparency and openness was to become an emerging trend and topic for debate, in fact Matthew Taylor highlighted this point in his 2017 report:

Government should amend the legislation to improve the transparency of information which must be provided to agency workers both in terms of rates of pay and those responsible for paying them.[4]



2017: The Criminal Finances Act

2017 also saw the introduction of the Criminal Finances Act (CFA). This act arguably had the greatest impact on the drive towards compliance.

Since its introduction, we have seen more recruiters moving to only operate with compliant providers, either by relying on one of the accreditations in the market or by carrying out their own due diligence checks. It has also had an impact, all be it limited, on recruitment consultants receiving 'backhanders' from providers. Agencies seem to have recognised that this practice could potentially leave them liable if their consultants failed to report these payments on a Self-Assessment Tax Return (SATR).

It has had little impact on the whole area of timesheet commissions as these are just more widely required at a business level, removing the risks under the CFA.

2018: Optional Remuneration Legislation (OpRA)

2018 saw the introduction of Optional Remuneration Legislation [OpRA]. This prevents tax relief on benefits where a worker was giving up a right to pay.

This further impacted the umbrella sector with many companies now unable to offer mileage expenses. Whilst this was allowed because of the legislation introduced in 2016, OpRA now prevented this. Many umbrellas had to amend their contractual terms to allow these expenses to be claimed. More on the impact of this when we get to 2020.

This year also saw the Government confirm their intention to extend Off-Payroll Working rules to the private sector, although not until 2020.

There was also the introduction of GDPR, not related in any way to the snowball legislation but a significant piece of work for all companies to ensure their compliance.

2019: Build up to Off-PayRoll to the Private Sector Begins

2019 was a year almost entirely focussed on the Off-Payroll extension to the private sector, with countless conferences, webinars and presentations run by the private sector seeking to inform all those companies that would become affected by the rules, including end-clients and agencies.

The draft legislation was released and some of the changes outlined, compared to the original legislation, suggested that HMRC was attempting to correct some of the structures that had been created to circumvent the rules. Giving a much wider ability for HMRC to pass debts back up the supply chain gave greater assurances to HMRC that they could recover more of the debts where fee payers operated incorrectly. They extended the information required on the status determinations in response to the accusations of blanket assessments as well as requiring the status determinations to be passed to the workers as well as the agency. They also initiated an appeals process for workers, although many commented at the time that it lacked any real power.

CEST continued to be in the spotlight with many questioning its ability to accurately assess status in line with court interpretations. This centred around HMRC's view of Mutuality of Obligation which was at odds with the view expressed by the courts.

By now, many commercial offerings of status assessments had entered the market. As these had to be paid for, CEST was still emerging as the main assessment tool. HMRC, in offering this free tool were creating market distortions that we still believe will have repercussions for many in the years to come. I can remember suggesting that CEST should be withdrawn because of the distortions it was creating, driven by the misleading assurances provided, and there were now enough commercial offerings that appeared to provide a far more detailed and accurate assessment.

2020: Key Information Document

We also saw the introduction of the Key Information Document becoming a requirement from April 2020. This requirement was designed to provide greater transparency to workers on their pay arrangements, particularly through umbrella companies as there was still considerable confusion.

The world changed in 2020 with a worldwide pandemic arriving early in the year, the impact of this is fresh in all our memories and still present today.

The Government acted quickly to provide support to workers and businesses and announced the Coronavirus Job Retention Scheme (CJRS). Whilst this scheme worked well for traditional employees, it caused difficulties in the modern employment structures such as umbrella companies. With a significant number of providers amending their contracts in 2018/19 as a direct result of OpRA, to allow the continued claims for mileage expenses, this aspect of the pay appeared to fall outside the pay rules of the CJRS. Clarity and certainty were never provided which led to many different approaches by providers. Providers who decided to offer these arrangements also carried significant costs in doing so which also presented difficulties in the market fully embracing the arrangements.

2020: Off-Payroll to the private sector postponed until April 2021

Off-Payroll to the private sector was confirmed as being postponed until April 2021.

We are now on the other side of the implementation of Off-Payroll into the private sector and many of the problem themes still need to be addressed.

This Is Not New

This Is Not New

Through the raft of discussion documents, consultations and technical consultations predominately issued by HMRC, HM Treasury and BEIS there has been a vast array of suggested routes attempting to limit some of the unintended consequences the market could predict as a result of proposed changes.

The sheer volume of documents produced at one stage resulted in many highlighting that considerable time was being invested in providing full and frank responses with detailed alternatives, as well as attending numerous round table events and presentations, only for those to be dismissed or ignored and the original proposed route adopted. Many experts and stakeholders who I spoke to, began to feel that by the time a consultation was announced, it served to simply pay lip service to the issues and the decision had already been made. Therefore, there seemed little point in investing significant amounts of time and energy in the response.

One of the fundamental changes that needs to occur is for Government departments to recognise and show some appreciation to those who take the time to try and inform them by responding to the documents. All organisations do this for free as they have an interest in making their sector the best it can be.

I would personally suggest the whole area of discussion documents and consultations is considered as part of any review to ensure organisations feel a valued and important part of the process rather than it just being a tick box exercise to show the process was carried out.
Following the flourish of reports in 2016/2017 PRISM, a representative Trade Body for the payment intermediary sector, carried out a 'review of the reviews', entitled The Case for Structural Reform[5].

This aimed to pull together common themes emerging across all the reviews and went on to make specific recommendations for changes. This document was produced in the second half of 2017 and having gone back to read it as part of this process many of the key challenges highlighted then have not been addressed and are still present in the market today.

Whilst we have seen significant changes in legislation these have failed to address the underlying issues and challenges that all these reports highlighted, once again suggesting the Government, or perhaps HMRC, has already decided on the direction of travel and will not deviate.

Complexity, Transparency and Enforcement

The three most common themes across all reports can be summarised as **Complexity, Transparency** and **Enforcement.**

Complexity

Determining whether you are an 'employee', a 'worker' or genuinely self-employed requires the ability to understand complex legislation, which is spread over many Acts, and be aware of a mountain of case law. For individuals, not knowing your employment status means not knowing what employment rights you deserve. For businesses, this situation can lead to uncertainty about their responsibilities and what can be demanded from workers. The situation does not need to be this complicated. [Law Society]

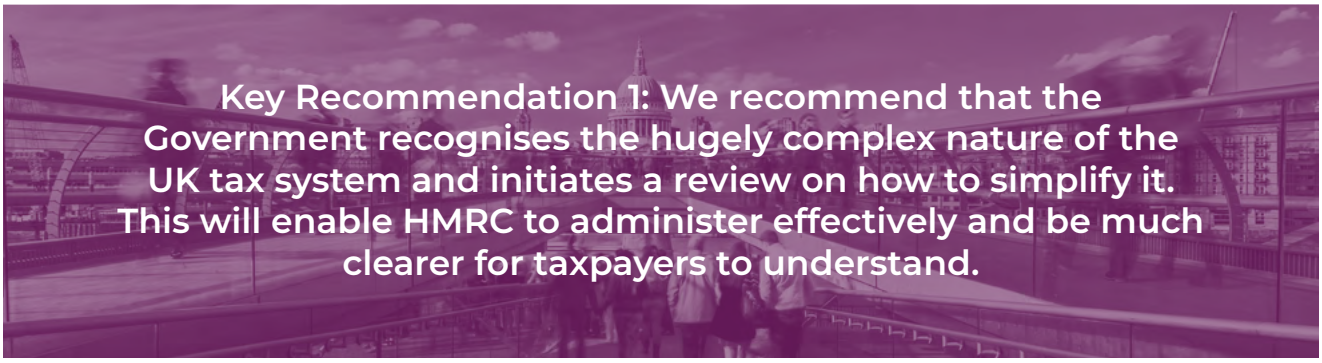
Non-compliance is facilitated by the complexities and uncertainties that characterise employment law and practice. These uncertainties make enforcement simultaneously harder and more necessary. [SMF][6]

So, if we review the latest measures introduced, Off-Payroll Working, under the Complexity test it is clear that these fail on a number of counts.

Firstly, the underlying legislation, IR35, is flawed. It has from the outset been described as complex and difficult to provide an outcome with any certainty. This is supported by the fact that where HMRC has brought cases, and there have not been many considering the level of non-compliance suggested to support these rule changes, many have been lost. If HMRC who own the rules cannot interpret them correctly or with any certainty how will moving the responsibility to another party deliver a better outcome?

Is this really about categorisation of workers correctly or delivering more tax to the Exchequer's coffers, a fair question in light of the overwhelming evidence.

The APPG report of April 2021 highlights many of the complexities and their actions support the issues resulting from the complexities that exist:



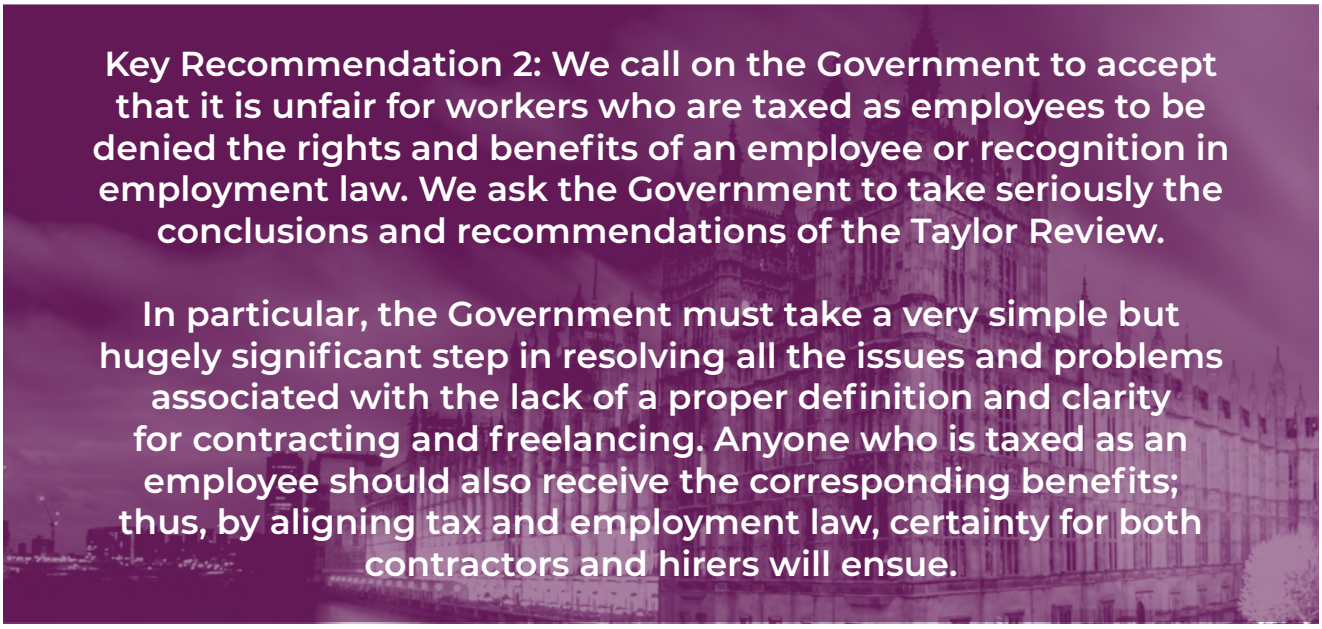
The simple fact is that the more layers of legislation the more complex the situation becomes. Many of the additional layers added to address the unintended consequences of new legislation can be reviewed with amendments made to the original legislation now that a clear picture of the market has emerged. This simple review process would allow many layers of the legislation to be removed.

Every report highlighted the complexity in determining employment status and all recommended a review of this whole area. However, the end result saw no changes with the flawed legislation at the centre of this now becoming the foundation for new legislation. No structure can stand the test of time if its foundations are not solid. On this basis, it is already clear that at some point in the not-too-distant future a review will be required, the question is whether this is done proactively or reactively.

The reactive approach has been tried and tested for many years now and I believe shows that it does not allow the space for the clear blue sky thinking that is required.

There was also the long-standing question of whether there should be a link between employment status and employment rights. This was an ongoing debate following the introduction of the 'deemed employed' status delivered by IR35. The deemed employed status resulted in those caught in this position being required to pay levels of tax as if they were an employee without any of the associated benefits. It is a widely held belief that this approach undermines 'fairness', the main argument used for the introduction of the status.

This question has reared its head again with the APPG report in April 2021 once again recommending:



All the reports from 2016/17 agree that the complexity allows the space for the disguised remuneration schemes to operate.

When coupled with new rules that significantly reduce a worker's take home pay, the perfect storm has been created. Why then has it been a surprise to HMRC that there has been a boom in these arrangements across the sector?

Transparency

The government should encourage increased transparency in the employment relationship. … Agency workers and those working for sub-contractors often do not know who their legal employer is. As a result, they face difficulties enforcing their rights. – TUC[7]

Many agency workers have also raised concerns that they were not always made aware that it would be an intermediary that would become responsible for paying their wages and making deductions, even though the recruitment agency is required by law to make this clear. This situation has not improved and while most employment businesses that originally place the work seeker do provide information about pay rates and methods, this is not always as clear as it should be. More unscrupulous providers can bury important information in the small print of long contracts. [Taylor]

We also believe individuals should have greater choice in the way in which they receive paid annual leave. As a general rule, annual leave entitlement equates to 12.07% of hours worked. We believe individuals should have the choice to be paid for this entitlement in real time – known as "rolled-up" holiday pay. This would result in dependent contractors receiving a 12.07% premium on their pay. So, in the case of someone being paid the NLW of £7.50, their actual remuneration would be £8.41 an hour. Additional safeguards would have to be built in to ensure individuals did not simply work 52 weeks a year as a result, but we believe giving individuals this kind of choice will suit many working in casual arrangements and in the on-demand economy. [Taylor]

… as more employment businesses outsource payroll and other services to intermediaries, such as umbrella companies. In itself, this is not a problem; however, there have been examples of individuals being compelled into these arrangements or signed up to them with the detail hidden in the small print of a contract. This can result in a range of issues from a worker not knowing who their employer is if they want to make a complaint to not fully understanding pay rates. [Taylor]

Now you could be forgiven in thinking these are recent quotes relating to recent issues currently being raised across the sector but these are all quotes from 2016 and 2017 raising issues that are still prevalent today.

These are not new issues, but they will continue to attract news headlines until and unless action is taken to address the underlying reasons. Many of the changes we have seen implemented over the last 15 years seek to address the resulting effects rather than identifying the underlying cause and addressing the real driving force of the issue.

Actions have been taken independently by the sector, and those with an interest in it, to address some of these issues of transparency.

In addition to the work previously highlighted that PRISM and LITRG carried out Professional Passport amended its compliance standards to include requirements on transparency of information to workers in key areas of misunderstanding, seeking to *remove the arguments of hiding behind contractual terms where it was well known workers failed to read or understand their contracts. These changes have also resulted in far fewer questions to Professional Passport in these areas.*

But this is still falling short and more needs to be done.

Enforcement

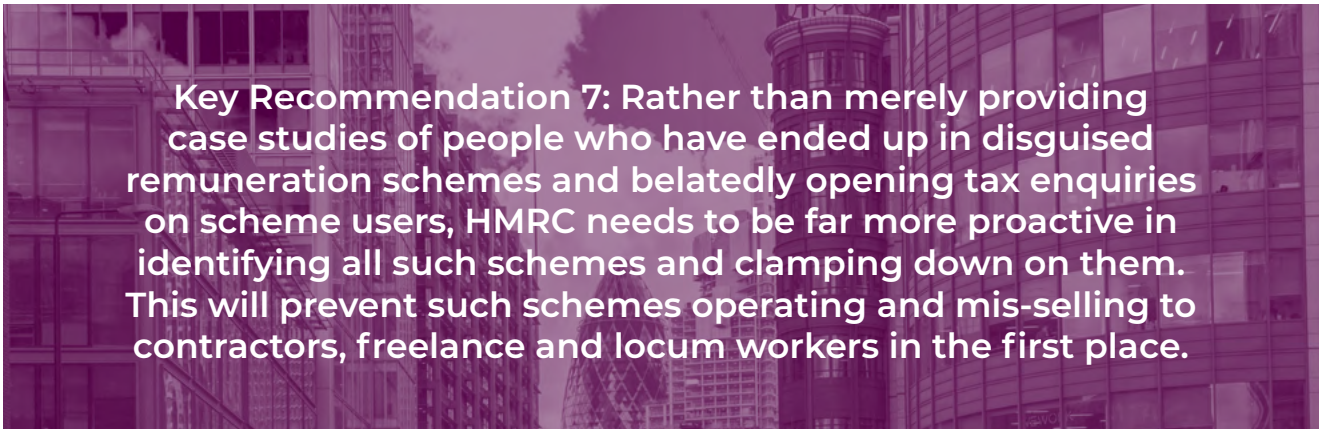
For as long as I can remember every response I have made to any proposed changes to legislation, or introduction of new legislation, has included the essential requirement of effective and visible enforcement.

Without effective and visible enforcement there is little incentive to read or abide by the rules and hands a real commercial advantage to those operating with a disregard to the rules. As the market has grown significantly over the years this commercial incentive provides significant financial gains to those that are prepared to flaunt the rules. More importantly it severely impacts those businesses that are attempting to apply the rules as intended, risking losing the hearts and minds as a culture of 'if you can't beat them join them' begins to emerge, often as a business survival mechanism.

Throughout many round table events, and following the introduction of new rules, we regularly hear from companies, both providers and agencies, that have lost major parts of their business as a direct result of non-compliance.

HMRC has encouraged reporting instances of non-compliance and we are aware of many reports being made, some by ourselves, where the company reported continues to operate in the market many years later.

HMRC issues Spotlight documents highlighting areas of non-compliance but takes no action against those operating the schemes and it seems more of a PR exercise. The APPG commented on this:



There seems to be an emerging trend that new legislation, coupled with the risk of personal liabilities for directors, is being used as a way to redress the risk reward balance but without an effective enforcement regime supporting this these words are meaningless.

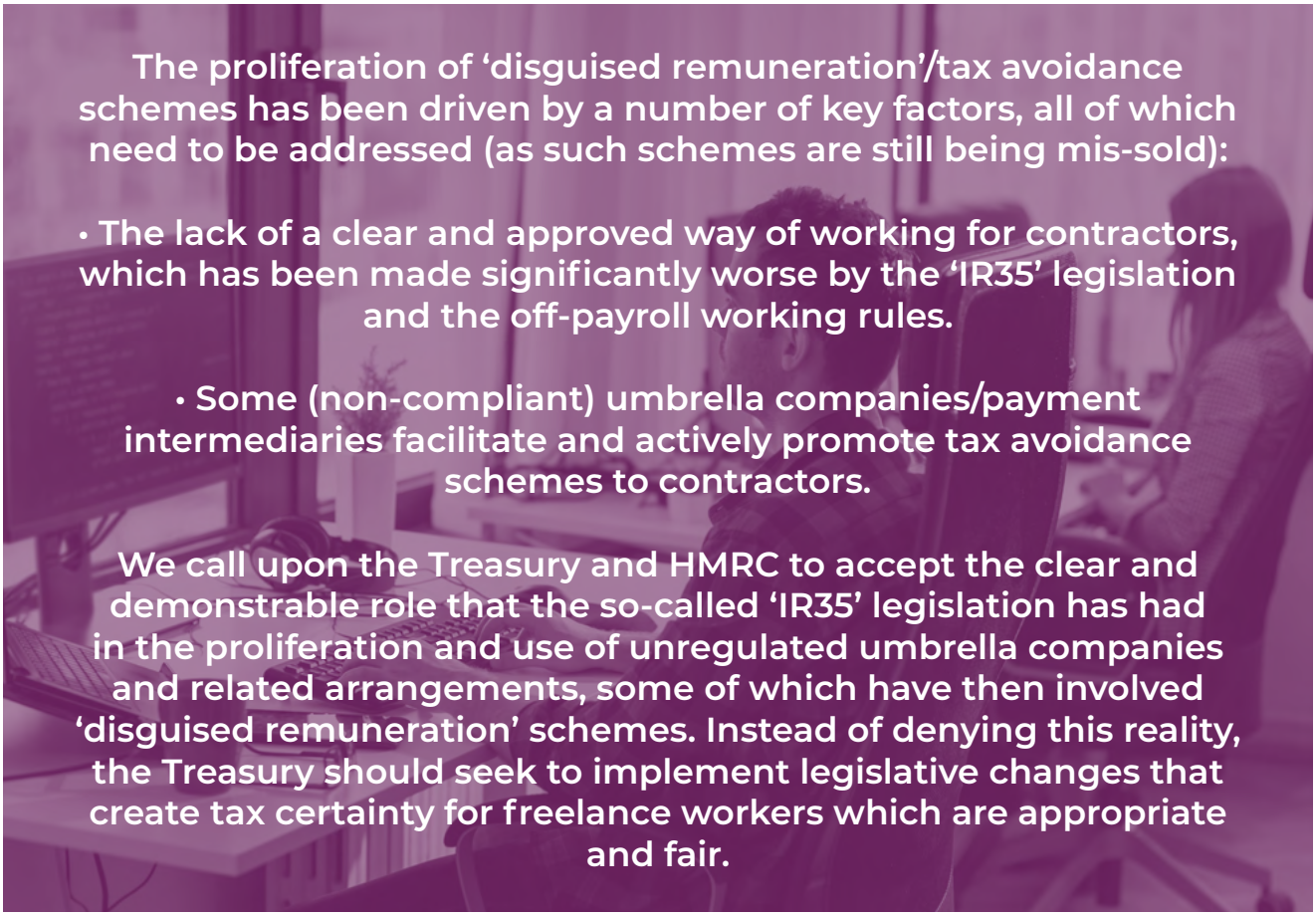
There have been many new requirements placed on businesses at significant cost under the guise of enforcement but once again these still seemed to be used reactively and are not delivering a more level playing field across the market.

There have also been many Budget announcements about the Government's drive to crack down on areas of non-compliance with increased resources in enforcement but once again we have no increased visible activity in the market. Whilst I am sure there will be activity, and HMRC are always prevented on disclosing this, unless this is visible it provides no deterrent to the non-compliant operators.

Recent HMRC enforcement activity on non-compliance, the most visible being the Loan Charge, has failed to take any action on the promoters and has been centred on the individual taxpayer. Whilst it could be argued that it should provide a deterrent for those considering becoming involved in 'schemes' it actually provides an incentive to the promoters of schemes. Promoters know their scheme will have a limited shelf life but ensure they have enough traction to make significant amounts of money for themselves knowing that HMRC will pursue the individual taxpayer. This low hanging fruit approach to enforcement will do little to reduce the proliferation of disguised remuneration schemes, in fact I would argue that it is likely to result in an increase.

This approach coupled with rule changes that deliver a cliff edge drop to workers' earnings have created perfect market conditions for these unscrupulous providers to operate.

The APPG report in April has also reached this conclusion:



The proliferation of 'disguised remuneration'/tax avoidance schemes has been driven by a number of key factors, all of which need to be addressed (as such schemes are still being mis-sold):

• The lack of a clear and approved way of working for contractors, which has been made significantly worse by the 'IR35' legislation and the off-payroll working rules.

• Some (non-compliant) umbrella companies/payment intermediaries facilitate and actively promote tax avoidance schemes to contractors.

We call upon the Treasury and HMRC to accept the clear and demonstrable role that the so-called 'IR35' legislation has had in the proliferation and use of unregulated umbrella companies and related arrangements, some of which have then involved 'disguised remuneration' schemes. Instead of denying this reality, the Treasury should seek to implement legislative changes that create tax certainty for freelance workers which are appropriate and fair.

And, in a debate in Parliament on May 24th that sought to secure amendments to the Finance Bill[8] to address malpractice in the umbrella sector, David Davis MP said:

"The Government policy to date has triggered the increased proliferation of mini umbrella companies. The fact that policies in this area are flawed is proven beyond doubt.
The frauds involved here cost the taxpayer hundreds of millions of pounds every year in lost tax, but as well as that, the boom of these non-compliant companies means that legitimate umbrella firms are being run out of business by them. These contractors, remember, are not fat cats, big bankers or city slickers. They are hard-working, decent people such as locum nurses and supply teachers—contractors whose work is vital. One of the flaws that HMRC exhibits is that although it very often has real-time information on the issues, it acts only much later. Umbrella companies should meet five strict requirements: they should pay all holiday pay due; maintain all employment rights; ban kickbacks to third parties; end the skimming off of excess profits through sleight-of-hand tactics; and, finally, ensure that the worker himself has no material interest in the umbrella company....."

A key part of enforcement is the consistent application of the rules. The complexity of the existing framework is clearly demonstrated by the number of instances we are seeing, where HMRC applies different interpretations through their enforcement team during an enquiry.

This inconsistency fuels further market distortions as well as throwing up questions over the required standards of compliance reviews; we have come across instances where a process has effectively been signed off by HMRC that we are unable to, as it falls short of our standards. When checking these conflicts with the enforcement team it was confirmed our standards are correct.

By taking a collegiate approach we have a better chance to close down any inconsistencies in enforcement.

The Short Term View

The Short Term View

The APPG calls for a series of reviews to understand these issues more fully. The key point here is that there have already been many reviews with the introduction of The Office for Tax Simplification, The Taylor Review as well as various reviews on specific legislation by the relevant Government Departments.

Recommendations from many of these reports have not been adopted and so the question is whether future reviews will provide the required actions to properly address the issues. We believe that some of the proposed actions will be difficult to impose, particularly where these suggest removing current legislation and creating a new framework. This would signify a major U-turn just after major new reforms had been introduced at significant cost to businesses. It begs the questions, is there really an appetite for this?

The other key point with reviews is timing. Reviews take considerable time and the process from announcing the reviews, considering and investigating proposals and recommendations through to implementation can take years.

This not only results in a prolonged period of uncertainty in the market at a time when businesses need to forge ahead and recover from the impact of Covid but also provides a 'sell by date' for non-compliant operators which is likely to result in a greater number offering dubious schemes.

Then there are the calls for regulation of the sector. As I have commented previously these are not new and started to emerge in 2006 at the time of the MSC Legislation. Regulation takes years to implement and must be supported by effective enforcement. Effective enforcement means significant resources, and these are not cheap.

Having spent a significant part of my career in the Financial Services Sector in operations and compliance during the time that regulation was emerging I have first-hand experience of this.

Whilst the concept is correct, I believe there are other real alternatives, some of which have emerged after decades of adjustment in Financial Services, more on this later.

So, if we are to embark on this journey of 'discovery', it would seem prudent to identify areas where short term changes can be easily made to provide more certainty, stability and assurance to create a more level playing field. This will help protect the market and limit the opportunities to the unscrupulous providers.

What we have seen in recent years is the growing acceptance by the supply chain that compliance is a key aspect. Some legislation, particularly the Criminal Finances Act, has been a driver supporting this.

We would suggest that there are a number of relatively simple changes that can be made to support and boost this increased recognition of compliance. These fall under three main headings:

- Use of Existing Data
- Protecting the Integrity of Compliance Reviews
- Transparency

Use of Existing Data

Seemingly, there is a lack of proactive use of existing data to identify issues quickly and use existing powers to prevent the proliferation of these arrangements.

In the evidence we provided to the APPG Loan Charge Group, which they have specifically picked up on, we highlighted that, in 2013, Real Time Information Reporting on all PAYE payments made to employees was introduced. This provides HMRC with the exact amounts paid to employees under PAYE and the taxes applied. Then in 2014 Intermediary Reporting was introduced providing HMRC with quarterly data on the amount that every recruitment company paid to all workers where they themselves did not operate PAYE.

So, on one side HMRC receive quarterly information on the amount paid for each worker, identifiable by the National Insurance Number provided in the report. They then have the RTI submission on how much was paid to that worker through PAYE. The categorisation of the workers and where the payments were made also differentiates between payments to a contractor's limited company and a payment intermediary.

How difficult can it be to build a reporting tool that cross checks these two datasets to provide HMRC with real time information on where unexplained, and significant differences occur, certainly not 7 years of development time which is how long this has been in place.

By proactively using this data, we believe that identifying potential disguised remuneration schemes should be straightforward.

Once a provider is identified as a potential disguised remuneration scheme operator there are many powers that HMRC can apply to protect themselves, and the workers, from future losses or liabilities. The most obvious one is the use of Security Notices. HMRC already has the power to issue a security notice where they believe there is the risk of loss in PAYE or VAT, something that clearly is the case with these operators. Whilst minor amendments to the regulations may be required, these could be implemented quickly and, if worded correctly, without much resistance from the market.

So why hasn't this happened already?

At a guess, could it be that HMRC has no incentive to proactively find these arrangements, as whenever they are found they can seek recovery from the individual taxpayer, which has been the case with recovery of taxes under the loan charge. This approach ruins the lives of the individual taxpayer and leaves those that have offered and promoted the arrangements, and made significant amounts of money in doing so, free to keep all the money they have made through their false promises and reassurances.

This point was highlighted by David Davis MP to Parliament on May 24th when he replied to his colleague Sammy Wilson MP who questioned why those providers operating tax avoidance schemes are not held to account.

David Davis said: *"One of the flaws that HMRC exhibits is that although it very often has real-time information on the issues, it acts only much later. That doubles or quadruples the problem for the ordinary person who is effectively a victim of these schemes, who suddenly finds years later that they have vast sums to meet—and, indeed, the shame of being held up as a tax avoider, if not evader.*

"The Treasury and HMRC's confused approach to the whole sector enabled the shameful loan charge scandal with thousands of people in financial ruin, families torn apart and seven people so trapped that they tragically ended their own lives. Failure to act on the mis-selling and illegitimate operation of umbrella schemes risks another scandal on a similar scale. That cannot be allowed to happen. We have a duty to act. Just as our key workers have protected us over the past year, it is time we started protecting them."

This dynamic also needs to be addressed to ensure HMRC is motivated to proactively identify these arrangements and be encouraged to penalise the promoters and not the individual taxpayer. This will prevent further damaging loan charge style cases in the future. We believe the answer to this is simple – and lies within the rules around Self-Assessment.

Under Self-Assessment, where a return is made with full disclosure, HMRC has a limited period of time to open an enquiry. If they fail to do so, their opportunity is lost, unless they can show that some information was missing and, had they been provided with this they would have reached a different answer, known as Discovery.

If a similar rule was put in place around the correlation and use of HMRC data, we believe the situation would change.

We would propose that a new rule is implemented that where HMRC has all the data and has failed to follow up on this they should be prevented from seeking recovery from the individual taxpayer and recovery should be limited to the promoters of the arrangements.

The definition of promoter already exists in tax avoidance legislation and would seem a good starting point. We would also suggest that the rule prevents recovery from the individual taxpayer if action is not taken within a year.

This time limiting factor prevents individuals being in a scheme for a prolonged period and facing huge future liabilities at some point in the future. It would also mean that many could be notified within a few months of entering the arrangements meaning the tax liabilities do not become life changing amounts of money.

HMRC know it is more difficult to seek recovery from the promoters as they have resources to fight the case and challenge HMRC's interpretation, something that the individual taxpayer will not be able to do.

The current HMRC approach would seem to circumvent all the protective measures that are in place to hold HMRC accountable as these are costly for an individual. So HMRC maximises its returns using this enforcement strategy, but that doesn't make it right.

HMRC was being pressured by the APPG Loan Charge Group to find a way to exclude workers who had been 'duped' into using these arrangements. It was considered too complex to draft legislation that clearly identifies and segments those duped. Our proposal, we believe, is delivering the solution to that problem by approaching it from a different perspective.

We would also advise an update to the Intermediary Reports so that umbrella companies used are specifically referenced in the report.

We have identified situations where non-compliant providers gain a foothold in a market and very quickly acquire high levels of workers through word of mouth. Whilst recruiters should be in a position to identify where this is happening and raise red flags this is not always the case.

By extending the specific reporting requirements in this area, HMRC will be provided with further information that can be used to identify potential disguised remuneration schemes. Coupled with the matching of RTI returns on a quarterly basis will severely hamper market access for these providers.

Protecting the Integrity of Compliance Reviews

The Criminal Finances Act has arguably had the most significant impact in moving compliance in the supply chain up the agenda. We are now in a position where many recruitment companies and end clients are requiring some form of accreditation before allowing providers to enter the supply chain. The two market leaders currently are Professional Passport and The Freelancer and Contractor Services Association.

Now that the market has moved compliance up the agenda it is becoming increasingly important that the integrity of the compliance reviews is upheld. With commercial and financial gains in the market being so significant, unscrupulous providers will continue to find new ways of disguising the reality of what they are doing in an attempt to gain an accreditation. The accreditation provides much greater access to the market and therefore greater rewards. The rewards are not only for providers offering these arrangements, but recruiters can also achieve significant market share growth where they can present higher returns to workers whilst at the same time meeting contractual obligations to use accredited providers.

So, in the worst-case scenario you have a recruiter looking to gain commercially and financially, a provider seeking to gain commercially and financially and a worker seeking to gain financially by increased take home pay. These incentives should not be underestimated and require a new approach and new thinking to minimise risks. This also needs to be coupled with visible enforcement. If the answer is not found, compliance accreditations will lose their appeal and the market would return to the unstructured environment we saw previously. It is in the interests of the unscrupulous providers to make that happen.

I do believe this is not a difficult one to solve in the short term and, if solved, will considerably limit the access to market for these disguised remuneration providers. That in turn makes it less attractive for them to operate. I will also cover in the longer-term view actions that can be taken to further strengthen the position.

HMRC holds 2 key sets of data:

1. How much money a recruitment company sends for each worker where the worker is not on the agency's own payroll.

2. The RTI submissions demonstrating how much income has been reported under PAYE.

Creating a tool to 'match' these datasets will immediately highlight where potential issues could exist.

To enhance this further, clarity could be provided on the categories, or even by creating a new category for umbrella providers, with an addition of the name and registered company number of that provider. This simple addition to the reporting requirements would further improve HMRC's ability to identify these arrangements in a timely manner.

Where this analysis was available it would be very simple for compliance accreditations to require providers to supply authorities for the compliance accreditation to obtain information directly from HMRC. This information would have no personally identifiable data and therefore is not an issue from a data protection perspective.

Parameters of acceptability could be agreed where the intermediary reporting information supplied by the recruiters is within a tolerance of the PAYE return on the worker made by a provider. And, where there would undoubtedly be instances where contractors making significant pension contributions could throw the system, an alert could be raised to carry out more detailed look.

This pass or fail response from HMRC to the compliance standards allows HMRC a significant level of control in the process without all their usual constraints. As compliance accreditations set their own standards the test boils down to whether a provider meets that standard. It in no way confirms that anyone who doesn't meet a set standard is automatically seen as non-compliant.

We could go further to protect tax revenues by extending the permission granted by a provider seeking accreditation to include the ability for HMRC to automatically inform the accrediting body of any late payments, under payments, surcharges or penalties relating to both PAYE and VAT. This often signals problems within a provider's operations. It could also allow for the accredited body to be informed if an enquiry was opened.

This simple but much enhanced reporting with closer working between parties will, I believe, significantly limit the disguised remuneration offerings in the market as well as their ability to access the market.

Transparency

Transparency is a critical element to achieving an orderly marketplace. Generally, the market operates like a 3-legged stool, there are the contractors, the providers and then the upper supply chain made up of recruitment companies and end clients. Balancing all of these is essential.

Taken as a whole, there are many dynamics that exist within these groups and much of the recent activity has come as a direct result of the implementation of the Off-Payroll rules.

There is clear emerging evidence that the cliff edge drop in earnings has created a perfect storm in the market, which should come as no surprise, as it was predicted.

Disguised remuneration providers have recognised that their target market has significantly increased with many workers unable to deal with the significant drop in earnings and so are seeking out solutions that lessen that impact. This has had a wider impact, as those who have found such providers will tell their friends and work colleagues and will often boast about their increased levels of take-home pay. There seems to be a growing number of workers prepared to accept the assurances of the providers. It is unclear how many 'knowingly' enter these

arrangements and how many are duped and I would suggest that the numbers who are duped is decreasing. There is significant commercial benefit for recruiters if they can find ways for their workers to access these arrangements as they will often take market share from their competitors.

This dynamic creates a vacuum for the compliance standards as, in the past, it was often recruiters that highlighted and questioned dubious arrangements whereas now it is in many of their interests to turn a blind eye. And, obviously the workers do not highlight or question the arrangements as they are being provided with what they want – higher incomes.

We often see workers suddenly become concerned when they receive a letter from HMRC as they realise that the reassurances provided at the time they entered into the arrangements are now shown as false. At this point they frantically try to find a way out and we often hear from them. Many seem to be aware that what they were doing was not right but felt it helped bridge the gap and viewed it as a short-term answer to address the drop in income.

This has resulted in these offerings now hiding in plain sight knowing that the majority of sectors aware of the arrangements will keep quiet and ignore the malpractices as it provides commercial benefits and advantages.

Reporting of these arrangements now falls on a small number of recruiters who have been commercially impacted by competitors allowing these schemes to enter the supply chain and, in the majority of cases, by the compliant providers who are suffering the greatest losses. If we look at the contractor's view:

HMRC's current approach is to inform and educate through media campaigns and their 'Spotlight' documents although the reach of these is questionable.

Whilst many organisations, including Professional Passport, publish these and highlight them through social media we still find a significant part of the market is completely unaware of their contents. Also, the technical nature of the documents often makes it difficult for contractors to understand or engage with the information.

We believe there are simpler steps that can be taken that will have a greater reach:

1. HMRC Umbrella Pay Illustrator

HMRC to produce an official umbrella company pay illustrator. The illustrator should have the ability for a user to input their specifics such as rate, umbrella margin, and even tax code. This would then produce a true illustration and the illustration will outline some very simple and understandable key points relating to where they are being offered income higher than this.

Where HMRC work closely with the compliance standards it could be made a requirement within those standards that any web page with an illustrator on a provider's site should also contain a link to the HMRC official illustrator.

We also believe that providers who are operating as the rules intend would actively promote this to workers to validate their offerings as well as counter the disguised remuneration schemes claims. This could have a significant impact and is possibly the simplest change as it requires no legislation.

2. Benchmarked PAYE Rate

What we have learned over the years is that contractors are very interested in their take home pay when looking at the value of assignments. One area attracting much coverage at present is the whole issue of the 'uplifted' rate. We believe this can also be easily resolved to prevent market distortions.

Where a contractor is looking at potential assignments, often using Job Boards, there is currently no way a contractor can understand the value of the rate being offered. There is no indication at this point whether the rate is an 'uplifted' rate or agency PAYE rate. In fact, at the time of Off-Payroll being implemented in the Public Sector, umbrella companies unfairly came under attack as contractors did not realise this difference and, in some cases, would have been better off taking the assignment through a different recruitment company as their rate, all be it slightly lower, would have provided a better net income.

With all the changes that have happened over recent years we suggest there are two key areas that need clarity at point of advertising a role:

a. The rate

b. The status of the assignment

The rate, where it is not a PAYE rate, should have a standard uniform calculation applied to create a 'Benchmarked PAYE rate'; this was suggested in our response to a BEIS consultation that resulted in the introduction of The Key Information Document. Whilst this is a valid document and has its place, it does come too late. However, when coupled with the Benchmarked PAYE rate, the combination of the two documents provides the correct flow of information to a contractor.

Creating the calculation for this is not overly complex, although will need updating annually in line with tax rates and threshold changes. The Low incomes Tax Reform Group and PRISM have already created this for their fact sheet 'Working through an umbrella company'.

Next we turn to status. With Off-Payroll now implemented, the status of an assignment is key to a contractor's decision to evaluate assignments to consider. There is a significant difference in the returned value of an assignment deemed 'inside IR35' to that which is 'outside

IR35' and yet at no early point is this highlighted to the contractor. Whilst I accept that a final determination can only be achieved where the contractor's situation is considered there are many instances where this will have little, if any, impact. Therefore, it seems reasonable for an initial status determination to be provided at the point of marketing a role. Many of the commercially available assessment tools would easily cope with this, as would CEST.

This level of transparency addresses many of the negatives, and confusion, currently expressed by many contractors.

Now turning our attention to the Providers; A search of the .gov website looking for information relating to compliant umbrella operations reveals very little information. There is a small part on mutuality of obligation through overarching employment contracts which, to many, would mean very little and in light of all the recent changes means the benefits of overarching have been eroded.

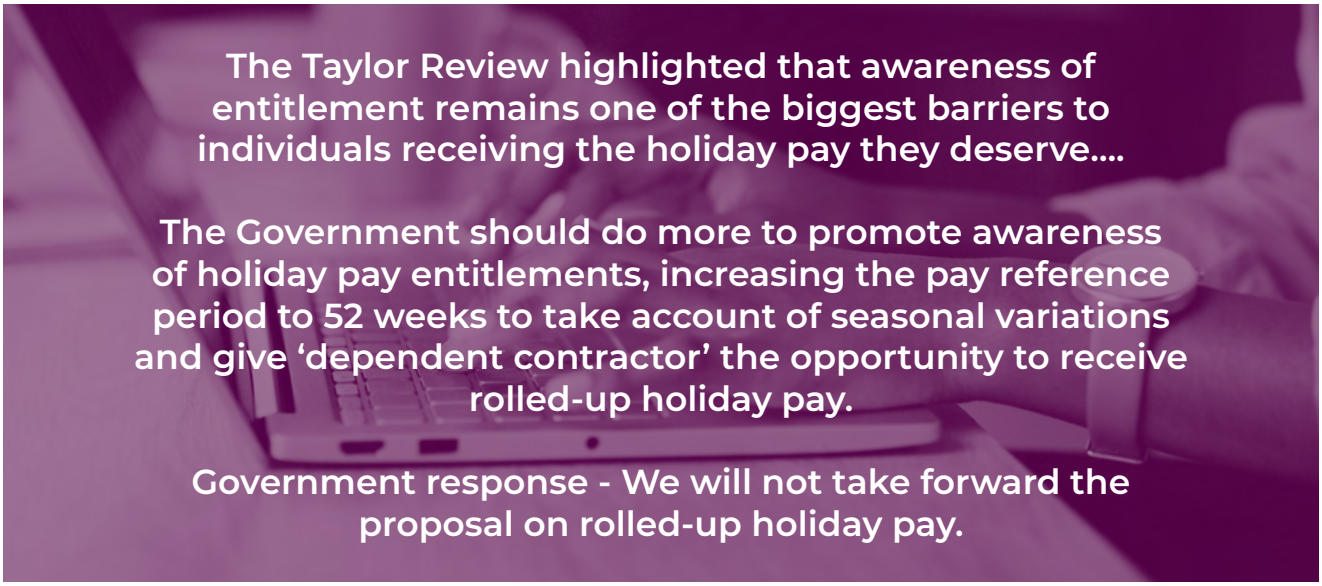
Why are umbrella company compliant operational procedures a secret? HMRC obviously has their own view, and coupled with Employment Agency Standards Inspectorate, it must be possible to produce some high-level guidance.

This would also allow links and references to all the relevant pieces of legislation that needs to be considered, something that without the specific knowledge would be almost impossible to do. This also allows HMRC the ability to clarify key areas where the enforcement team is seeing shortfalls and provide a more level playing field through this transparency.

In creating this reference material, it could be written from a provider's perspective, helping those in the market, or looking to enter the market, to create a solid foundation. It could also include a section to assist the supply chain in carrying out due diligence with key pointers; this could cover contractors, recruitment companies and end clients. This could also link to our previous suggestion of an official pay illustrator. Then there is the issue that seems to be grabbing the headlines at present which can be summarised as 'legal but morally questionable'.

Whilst an umbrella company is no different to a 'normal' employer and their main contractual terms are very similar to the standard terms in every employee's contract it is widely recognised that the workers do not fully understand the relationship and often just see the umbrella as a way to get paid. This lack of understanding by contractors can leave them exposed to practices that whilst legal are clearly obfuscating on this lack of detailed understanding and allowing the less scrupulous umbrella to profit. We have always felt that the only way to prevent this is to bring an additional level of transparency to the market that shines a clear light on these areas and limits the opportunist umbrella. One area that has come under the spotlight recently has been holiday pay.

In his 2017 report, Matthew Taylor recognised this issue and proposed changes in an attempt to rebalance this in the contractor's favour:



Whilst I appreciate all the reasons why the Government may not want to take the recommendation forward, based on current evidence, there needs to be much clearer guidance for umbrella companies and their workers, coupled with a robust enforcement.

Professional Passport has addressed this issue through its compliance review by implementing a series of checks and balances that bring unrivalled levels of transparency. This is another example where if HMRC were working closely with compliance standards in the market a more robust approach could be taken without the need for further legislation.

Legal but Morally Indefensible; This is an area that presents a challenge in the sector.

There are many that will hide behind the fact that they are not doing anything illegal but are also aware that they are seeking to profit from a lack of transparency and understanding. Ensuring legislation considers this wider aspect is a key component in making it work for all and driving up standards.

Whilst visible enforcement activity has been low, we are aware of additional low levels of enforcement that have been happening in the background.

.Feedback we have received on this seems to suggest that even the enforcement officers are finding the rules too complex as we are seeing

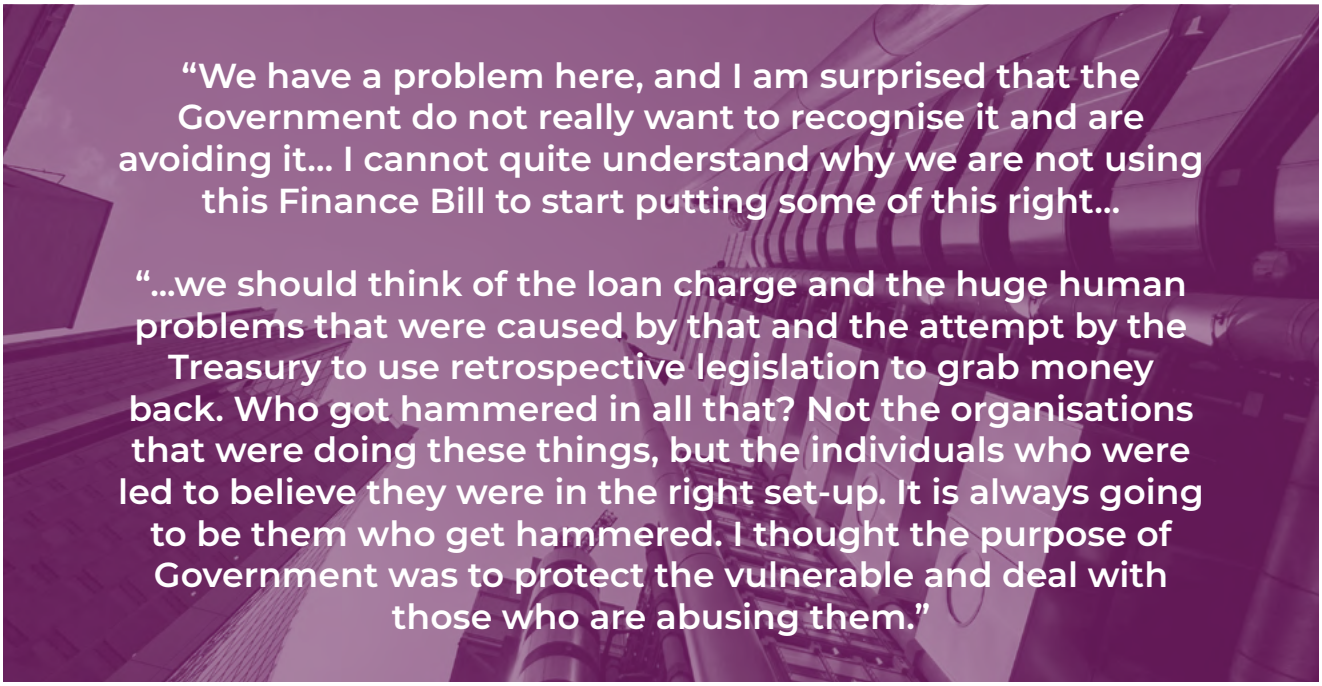
'sign offs' in situations where companies would not pass our accreditation standards, even where these standards have been discussed and confirmed through HMRC enforcement.

Where this happens it often becomes widely known and risks a wider contagion in the marketplace and a lowering of the standards of compliance in the marketplace generally.

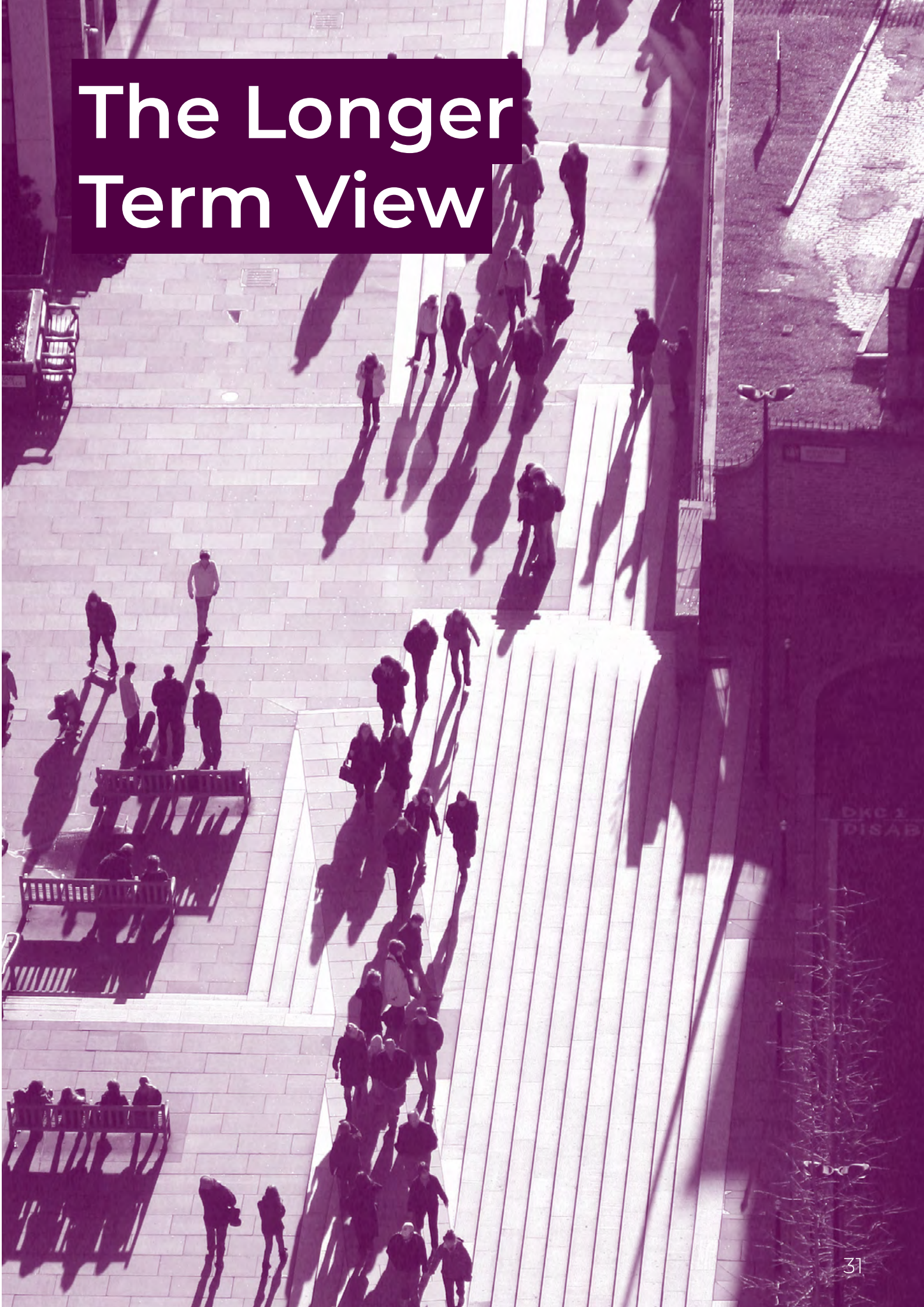
If HMRC and the compliance standards groups worked more closely together, a common and agreed approach could be taken with complete transparency in the market. This would provide the certainty that the compliant providers seek. It would also serve to remove many market distortions and allow clear communications and a joined-up approach to the rest of the marketplace. It would also provide a more simplified platform for enforcement officers to ensure a consistency of approach.
This high level of transparency would further marginalise the non-compliant offerings.

We believe that these short-term changes would have a significant impact across many of the issues faced in the market today and provide the time to implement a long-term solution that addresses the causes rather than the effect.

Debating in Parliament on May 24th, Iain Duncan-Smith MP pointed out:



The Longer Term View



The Longer Term View

The million-dollar question.

This area has been subject to many reports, reviews, discussion documents, and consultations with no common agreement resulting in the ongoing sticking plaster approach to fix distortions.

This approach has resulted in overlapping legislation, overly complex rules that are widely misunderstood, and expensive enforcement.

There is no easy answer, but there are a range of questions and issues that need to be fully understood and considered as part of any review.

We have also made a series of recommendations that could be considered as part of a wider strategic review.

Is the Tax System Driving Behaviours?

Zero-hour contracts have been in the headlines for a number of years with Matthew Taylor commenting that there was a place for them in certain circumstances:

Whilst data suggests that there have been large increases in the number of people on zero hours contracts since 2012, this increase is, at least in part, due to an improved recognition of this type of contract. This means that we cannot know with certainty that zero-hour contracts are on the rise and in fact reported numbers have stabilised in recent periods. [Taylor]

However, their use could be driven by wider issues meaning there are significantly more roles with these arrangements than there needs to be. The tax system has several driving factors that could be motivating the widespread use of the arrangements, as The Social market Foundation commented in its report:
..thresholds apply to Employer NICs: below £157 weekly wage no employer NICs are paid. There is therefore an incentive for firms to engage two people part time rather than one person full-time so as to avoid making these payments. [SMF]

The TUC added:
The limited working hours guaranteed to such workers mean that earnings fall below the thresholds for National Insurance contributions and for income protections such as statutory sick pay and statutory maternity pay. [TUC]

1. Employers National Insurance Threshold
With Employers National insurance starting at over £170 per week, below this there is no cost to the employer, this is the first incentive to hold a worker's hours down. In the case of a worker on the National Minimum Wage of £8.81 this allows for 19 hours a week with no employer costs.

This was introduced as an incentive to encourage employers to take staff on although current evidence suggests that it is no longer an incentive to take people on but more an incentive to drive hours down.

2. Pensions Auto Enrolment
Pensions Auto Enrolment also contains a threshold where beneath this the employer escapes the employer costs of the scheme. Where workers earn less than £520 per month they do not qualify.

3. Statutory Sick Pay
Eligibility to SSP starts at earnings of £120 per week, or 13 hours for a National Minimum Wage worker.

These three thresholds present an incentive to engage more than one person in a low paid role, removing protections that are designed to help these workers. Considering the Global Pandemic and the economic impact this has had, now may not be the right time to make sweeping changes, but it provides an ideal opportunity to examine the market and understand key drivers allowing future intentions to be clearly signposted, as opposed to limited notice of change which has been common recently.

We would suggest, subject to supporting evidence:

1. Removing the Employers National Insurance Threshold

The headline rate payable under Employers National Insurance could be reduced as more Employers' NI would be collected. If the figures were calculated correctly then companies with 'traditional' engagement methods would see a drop in their overall cost of Employers' NI. Only those companies seeking to exploit this gap would see an increased cost.

Where workers had more than one job, the tax collected from businesses would be the same as a single job employee and, in turn, help achieve the stated objective of people doing the same job paying the same levels of tax.

The problem of aggregation of earnings would be addressed.

By addressing these anomalies, and inbuilt tax incentive, we are able to differentiate between the tax costs to the individual, which would remain the same, and the tax collected through the employer contributions.

2. Reverse the Rules on Employers' Contributions for Auto Enrolment

Employers should be required to make the employer contribution, for Pensions Auto Enrolment, for all non-eligible job holders regardless of whether they have opted in or not. If the workers earnings reached a level where they became an eligible jobholder and decided to opt out, then the employer would no longer need to make the employer contributions.

These two changes remove the incentives for employers to manage workers hours and earnings to save tax. As a result, we are more likely to see the end of abusive arrangements and workers being forced to accept these arrangements. It would also help rebalance the access to income protection measures such as SSP for low paid workers.

The sticking plaster approach typically involves finding answers within the current constraints of the system that can be implemented quickly, as distortions need to be corrected as fast as possible. This will rarely deliver any long-term sustainable answer and, as has been clearly demonstrated, leads to increased level of complexity.

The most recent example of this would be:

1. Off -Payroll Working
Ignoring the rights and wrongs and just by looking at the principles we believe the most complex answer has been achieved.

The driving force behind this was to collect the Employers NI that was often missed when a worker operated through their own limited company, paying him or herself a low salary and mainly dividends. The tax benefits of dividends has already been eroded so it centred now on the Employers NI.

With that being the case why not just put a requirement on the Fee Payer to pay 'Employers NI' on the monies paid to the limited company, removing complex PAYE calculations, reducing the incentive for disguised remuneration schemes, removing the accounting complexities and ensuring it was paid by the person who was meant to pay it.

Simple – Employers NI has to be allocated to an individual and there is no way of associating this to a company.

With the system upgrades achieved during the Coronavirus pandemic I struggle to see why a different, more simplified, approach was not adopted.

Many of the recent changes would appear to be overthought or over engineered leading to increased complexity. Complexity only benefits those that seek to exploit the rules and results in costly and prolonged enforcement.

Any review carried out needs to consider both HMRC and BEIS regulations with a view to aligning and simplifying, including identifying areas of overlap across legislation, resulting from the sticking plaster approach.

The Longer Term View

Knowing what we now know, we certainly would not start from where we currently are. Within employment law there are 3 recognised statuses:

1. Employed
2. Worker
3. Self-employed

Within tax law there are 2 main status:

1. Employed
2. Self-employed

There is a third status of 'deemed employed for tax purposes only' specific to certain arrangements under Off-Payroll working.

So, the first question in this area is – should the level of employment tax drive the employment status and associated rights?

Then there is the question of whether a worker who is genuinely self-employed or genuinely running a business should pay the same levels of tax as an employee?

The constraints of the current system drive much of the commentary and thinking, and we believe a 'clean sheet of paper' approach is needed. The reports of 2016/17 all highlighted the area of complexity with determining status and the risks to each party for incorrect determinations.

This has also re-emerged in the debates around Off-Payroll working with many questioning the fairness of paying employed levels of tax without any associated benefits.

These arguments are not new and simply serve to illustrate that the underlying 'cause' has never been addressed. Without addressing this and ensuring legislation aligns to the answer, complexity, uncertainty and expensive enforcement will continue to exist. This is not good for business or the economy.

The common themes that emerged from the 2016/17 reports included:

- **Lack of clarity or certainty of status**
- **Determining status is too complex**
- **Complexity allows some to exploit the rules or workers**
- **The need for change and updating the rules is both urgent and important**
- **Tax and employment costs are key drivers in employers' engagement decisions**
- **Non-compliance creates contagion across sectors**
- **Control is a common theme in establishing status**

We would suggest these are still the main themes present today.

Each of the Reviews came up with a variety of suggestions on how the issues could be addressed with some areas of agreement.

We would recommend a formal review of the reviews with a representative working group, including all parties that carried out reviews, to make recommendations in this area.

This must include a review of current legislation, including Off-Payroll Working, to identify areas of conflict as alignment is a key part of achieving clarity.

Regulation

The calls for the sector to be regulated are growing as a result of increased non-compliance. Many state that self-regulation has failed. I'm not sure the sector has ever self-regulated; there are two prominent compliance standards but neither of these could be seen as self-regulation, nor should they be.

Professional Passport's compliance standard is supported by an insurance for agencies and end clients who suffer a loss due to debt transfer rules and where Professional Passport has been negligent in their assessment of compliance. The Freelancer and Contractor Services Association also makes clear in their mandatory code for all members[9] that:

The Code of Compliance review ("the Review") is a sample review of certain transactions of an Accredited Member's or prospective member's business within a defined period, based upon the signed declaration of the Code and the information/documentation and explanations (together, "the Information") supplied by the business in question. In conducting the review, FCSA's assessors will rely on the information supplied by the business in question and will not conduct any independent verification as regards the accuracy or completeness of this. Accordingly, the FCSA and its assessors accept no responsibility whatsoever for any error or inaccuracy contained in the information, or for any loss or damage suffered by any person who relies on such information. For the avoidance of doubt, the FCSA (and its assessors) review does not constitute any form of independent audit of the business in question and should not be held out to be, or be taken, as such. The review cannot, in itself, guarantee current, past or future compliance with relevant legislation, regulations and appropriate industry practices and neither should it be taken to mean that HMRC or any other professional or regulatory body will not enquire into any matter that is subject to the requirements of the FCSA Code of Compliance. Any prospective or current member is at all times responsible for ensuring its compliance with relevant legislation, regulations and related industry practices and the FCSA (and its assessors) accept no responsibility to them or any third parties whatsoever in this regard.

So, the sector has never self-regulated.

But is it right that companies whose compliance assessment is being relied upon have either limited or no liability?

Regulation has been called for since the introduction of the Managed Service Company Legislation in 2007. It has always been rejected as it is very expensive to carry out effectively and putting the regulatory framework in place takes considerable time.

Recently there were suggestions of bringing enforcement of umbrella companies under the Employment Agency Standards Inspectorate although I would suggest that many do already fall under that body and its current scope.

Many umbrellas operating through over-arching employment contracts can often be within their remit.

Then there was the suggestion of a single enforcement body and whilst comments are still made on future intentions, I would say that actions speak louder than words. The removal of Matthew Taylor as the Head of Labour Market Enforcement clearly indicates a lack of motivation and commitment to bring this forward at speed.

The calls for regulation also centre on Umbrella Companies. An umbrella company is, as yet, not defined in any legislation and so this would be a critical first step. In my opinion, and based on how the sector has reacted historically, if an umbrella company was defined in law, within a matter of days many would adjust their models to fall outside that definition thus missing the mark. I have always said that if this moved forward it should target payment intermediaries. A payment Intermediary is a body that interposes itself between the agency and the worker. In my opinion this would be much harder to circumvent and catch a much wider segment of the market.

Regulation is the first step which then has to be supported with a robust enforcement regime. With the payment intermediary market amounting to probably in excess of 1,200 companies this would be a significant investment. Adding these 1,200 to the 30,000 recruitment companies that The Employment Agencies Standards Inspectorate already regulates would not work, as they don't currently have the resources to cover their existing marketplace.

I am not convinced that regulation is the answer but fully understand why it is called for.

It is the principle of regulation and what it is perceived to deliver is what I think people are calling for.

The industry wants to hold someone accountable for provider compliance in the market and protecting workers from being duped into arrangements that result in future significant losses.

I believe the financial services sector holds a clue to what could work.

Within Financial Services there are Networks where the network takes responsibility for the compliance of its members. Along with this responsibility they hold the risk of significant fines and penalties if they are not assessing and maintaining strong compliance within their network. The network members also hold risks of fines and penalties where they fail to maintain their own systems.

This would result in a much smaller number of 'compliance networks' which are individually responsible for their members compliance, with all the associated risks that come with this.

This seems a logical first step as currently there are many companies relying on compliance accreditations where those accreditations avoid any reference in legislation, side stepping the debt transfer liabilities. That begs the question - is that right?

With compliance moving up the agenda and many agencies relying on compliance accreditations I believe a new framework could be implemented with the rules easily adapted from the Financial Services Sector.

The concept at a high level is quite simple:

1. If you are a compliance accreditation body you are responsible for the compliance of your members and where one fails, and you have not taken adequate steps then you could be held liable.

Yes, this would significantly increase costs to providers as the current regimes would have to adapt significantly to this, but the increased opportunities would rebalance the increased costs.

2. Supply chains could either rely on the compliance standards knowing that due diligence has been carried out or conduct their own due diligence. Where a supply chain has carried out its own due diligence they would take the role of the 'compliance network' with associated liabilities, many of which they already hold in legislation.

If recruiters took any payments from payment intermediaries, they would assume joint liability with the 'compliance network'.

This would be a significant change and provide a more level playing field across compliance networks and their members.

It would assist in enforcement as many of the 1,200 payment intermediaries would be operating under a compliance network. Those not wanting to operate through a compliance network would be required to register directly with the enforcer, possibly EASI.

It would also allow for a framework for some form of compensation scheme for the sector with all providers required to input based on their turnover. This would help workers where they suffered losses.

One of the key components to make this work is HMRC and BEIS working closely with the networks and establishing a clear framework of operational processes, most of which already exist on an informal basis. It would then also align enforcement with the standards and ensure a far more robust and joined up approach.

Enforcement

The previous section covers the greater points on enforcement and the correct framework although I would just like to highlight the following:

1. Error or Blatant Abuse?

The current framework for enforcement fails to differentiate between a ‘mistake’ and a disregard for the rules. A breach is a breach and where there is a complete disregard for the rules this should hold far more punitive measures than mistakes.

2. Enforcement Must Happen and Cover All Aspects.

I don’t think it is any surprise that there is a direct link between enforcement and compliance. For many years, holiday pay was not enforced actively by any of the bodies. During this time holiday pay was often kept by companies as workers had very low awareness. Now it is being enforced but not to a high enough level making it still prevalent in the market.

Conclusion

Conclusion

From this whistle-stop tour over the last four decades, it is clearly time for a major rethink and simplification of the rules.

The good guys in the industry need to take a collegiate approach to working with the policymakers so that any legislation that takes effect in the coming years is quick, effective and properly enforced.

Only then can the industry confidently move forward knowing that it is striving to do its best for the whole supply chain, raising standards and driving out those who seek to perpetually break the rules and behave unethically.

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4. The Taylor Review of Modern Working Practices July 2017
5. PRISM The Case For Structural Reform A review of the reviews on Modern Employment
6. The Social Market Foundation Rules of Engagement Reviewing Self-Employment and Employment in the UK June 2017
7. TUC The Gig is UP: Trade Unions Tackling Insecure Work
8. Hansard Finance Bill Debate Monday 24th May 2021
9. The Freelancer and Contractor Services Association Code of Compliance Mandatory for All Applicants