



## PHS-QUALITY Project

Job Quality and Industrial Relations in the Personal and Household Services Sector - VS/2018/0041



COUNTRY REPORT: UNITED KINGDOM

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## **1. Introduction**

The report 'Quality of Jobs and Services in the Personal and Household Services in the United Kingdom', published in 2015 reviewed the situation in this sector until 2014 in terms of statistical data on the usage of services, care work and its conditions of work, the development of policy towards home care, the introduction of the Care Act 2014 and its implications (Forquality EU, 2015). The report was published before the Care Act 2014 came into force in April 2016. It was based on the analysis of statistical data, policy documents and reviews by home care associations. Our report updates the situation in the past few years and, in addition, used interviews conducted with a range of individuals from trade union, home care associations, charities and academics, as well as some who have worked in the home care and domestic sector, employed home carers and conducted inspections for the Care Quality Commission.

As this earlier report noted, in the UK there is no conceptualisation of the sector as a whole in relation to employment within the household which encompasses home care and support services such as cleaning, cooking or gardening. There is also no specific policy in the UK aiming to develop this sector to promote and expand employment, as in other EU countries. Furthermore, the term Personal and Household Services is not commonly used. So whilst the home care or domiciliary care sector forms part of social care which has been the focus of attention in public policy, personal assistance is not seen as a matter of public concern. Of course some tasks falling under household support such as cleaning and cooking will be part of care packages for those most in need of a high level of assistance in order to remain at home.

There are many different forms of contracts and domiciliary care workers are employed in a number of different ways: some are employed directly by Local Authorities, although this is less and less the case since this type of work has been privatized and contracted out to private care providers or what is categorized as the independent sector. Home care workers can thus be employed through private care companies, trading charities or carer cooperatives; they can be employed as personal assistants directly by the people in

need of care or their families; and, they can be self-employed. Home care workers are also very often not part of unions, as became clear from our interviews.

Home or domiciliary care is seen in the reports used for this UK report and by many of our interviewees to be dysfunctional and a sector in crisis due to high turnover of workers, insufficient workers in relation to demand, low pay, lack of career trajectory, inadequate time to undertake care for individuals and insufficient training and recognition of the skills that are increasingly required. In relation to the high turnover of workers, the National Audit Office gives turnover and vacancy rates for 2016-2017 as 27.8% (National Audit Office, 2018), although many of the interviewees mentioned higher rates than this (35-40%) and some even mentioned that it is now close to 50%. One of our interviewees mentioned that some private care providers have started to claim back money for training, if a care worker leaves within the first 12 months and that this can amount to anything between £50 and £800. Another mentioned that workers are asked to pay for their own training, before they even start earning on the job. This is put in the small print in the contract. One interviewee pointed out that home carers do not always move out of care but move to other providers or to other social care jobs, for example, it is quite popular to become a health care assistant in the NHS (in hospitals) because it means more regular hours and better pay<sup>1</sup>.

Another problem in relation to inadequate time to undertake care and insufficient training is that many care workers now do work that used to be done by district nurses, like administering medicine, cleaning trachea tubes, cleaning and replacing stoma bags, lifting people for washing or out of or into bed. It can be said that they are used as cheap nurses (Hayes, 2017a, 30), but do not get the training this requires.<sup>2</sup> The problems and tendencies have been exacerbated as the population has aged and required more care while the shift to the private sector and reduced public funding through local authorities have put pressure on pay and working conditions. Many interviewees mentioned that the main issue and the root

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<sup>1</sup> Local authorities too pay much higher hourly rates (£9.91) than the independent sector (£8.56) (Skills for Care 2019).

<sup>2</sup> For a good discussion of the many skills which care workers need in present day society see: Hayes *et.al.* 2019, 12-18.

of the problem is the lack of funding from central government to local authorities, which leads to dysfunctional commissioning practices in a vast majority of authorities: price is the most important consideration in commissioning care.

Whilst there is considerable interest and collection of data in the home care sector, we know very little about purely domestic work (cleaning, cooking, ironing) where workers are often undeclared, employed by individual householders and working for cash in hand. It is likely that the household support sub-sector is much more dependent on migrant, including EU migrant, labour. Although some who work for a decent wage as housekeepers, as one of our interviewees did, and those employed by agencies offering employees substantial number of regular hours, many others are paid by the hour and on zero hours contracts, often working for a large number of clients, with no social security, holiday pay etc.

Moreover, as a predominantly female workforce, care tends to be seen as an innate and embodied quality of those providing it and thus undervalued and unskilled. This links to the low pay and lack of career trajectory. Furthermore the new immigration policy post-Brexit as from January 2021 (Home Office 2020), which treats all migrants the same, irrespective of their provenance, will largely get rid of routes for less skilled labour that has been increasingly in the past few years provided by EU citizens. It is likely to make workforce shortage problems worse, especially in London and the South East which tend to be more dependent on migrant labour. This concern is held by many such as Global Futures Think Tank which estimated that with a growing elderly population in need of care, there would be a skills shortage of 380,000 by 2026 instead of 90,000 in 2018 (Matthews-King 2018 as well as other homecare organisations (The Independent February 2020).

In this report for PHS Quality in the UK, we seek to examine **how legal regulation, public policy, and social partners' actions can improve job quality and fight informality in the personal and household services sector**. The data for the analysis is based on desk research of academic and policy literature and statistical sources as well as interviews with a range of respondents, such as academics, trade unions, and homecare organisations. The list of respondents is indicated in Appendix 1 and the key questions and topics raised in the interviews in Appendix 2. In chapter 2 we outline the statistical data and various issues

concerning the labour force, including the difficulties posed by the ending of free movement in 2021 following the Brexit referendum in 2016. In chapter 3 we discuss existing legal provisions and in chapter 4 give some examples of good practice. Chapter 5 proposes some recommendations.

## **2. Labour Force: Statistical Data and Trends**

Data may be collected by occupation using categories from the International Standard Classification of occupations (ISCO) of the International Labour Organization (ILO) or by employment status. In terms of ISCO, category 9111 consists of domestic cleaners and helpers and category 5322 of home-based personal care workers. Data is not necessarily accurate, in part because of the nature of the employment relationship where personal budget holders choose to have their care and support provided by self-employed personal assistants, as opposed to directly employing a personal assistant or purchasing care from an agency. There is also inadequate information concerning the number of individuals directly employing care or support workers as self-funders or via other funding schemes. The organization 'Skills for Care' is contracted by the Department of Health and Social Care to provide information on the social care workforce. It is an independent charity which aims to help create 'a well-led, skilled and valued adult social care workforce'.<sup>3</sup> However, as one interviewee pointed out, only half of all employers/providers in the home care sector are affiliated to Skills for Care. It is a voluntary scheme so it is probably only the better employers/providers who take part in the scheme and are registered with them.

Across England there were 18,500 domiciliary care services registered with the Care Quality Commission (CQC, discussed later) as at September 2018 (Skills for Care, 2019, 21). These care providers had around 1.62 Million jobs between them and the number of jobs in this sector has gone up 22% (290,000 more jobs) since 2009 (ibid). The vast majority of jobs (78%) were in the independent sector, while 7% was directly employed by local authorities. The latter number has dropped by half since 2009, when it was 14% (ibid, 26 and 32). The

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<sup>3</sup> For more information see the Skills for Care website: <https://www.skillsforcare.org.uk/About/About-us.aspx>

workforce employed by direct payment recipients accounted for 9% of all jobs, although, as the report states, 'this estimate should be treated with some caution given the uncertainty surrounding the estimated number of direct payment recipients employing their own staff' (ibid, 26). Around 237,000 adults, older people and carers received direct payments in 2017/18. Skills for Care estimates that around 75,000 (31%) of these were directly employing their own staff (ibid, 24). In 2015, more than 350,000 older people in England were estimated to use home care services, 257,000 of whom had their care paid for by their local authority. A further 76,300 younger people with learning disabilities, physical disabilities or mental health problems were also estimated to be using publicly funded home care (Skills for Care, 2017).

Domiciliary care is a growing employment sector. Between 2012/13 and 2018/9 the number of jobs in domiciliary care services increased from 425,000 to 520,000, an overall increase of around 23%. The rate of increase appears to have slowed between since 2014. An estimated 43% of domiciliary care workers were employed on a zero-hours contract. The percentage of workers employed on zero-hours contracts between 2012/13 and 2018/19 has remained relatively stable, decreasing by one percentage point over this period (Skills for Care, 2019b). Around 83% of workers in domiciliary care services were female and the average worker was 44 years old. In terms of nationality, 84% of domiciliary care workers were British, 7% had an EU (non-British) nationality and 9% had a non-EU nationality. The proportion of EU nationality workers has continued to increase, from 5% in 2012/13 to 8% in 2018/19 (Skills for Care, 2019, 66).

However, the influence of Brexit and the more stringent immigration rules proposed are likely to significantly affect this. EU immigration is at its lowest level since the enlargement of 2004 and is likely to fall further with the ending of free movement in 2021 and as existing EU citizens are subject to UK immigration law is likely to lead to higher levels of departure in the coming years (D'Angelo and Kofman 2018; Lorinc et al. 2018). Above all, the paper (Home Office 2020) published on a post-Brexit immigration policy envisages the ending of free movement and subsequently treating all migrants the same irrespective of their provenance. Whilst EU citizens in the UK up to 31 December 2020 will be able to apply for settled status

(and 3.2 million have done so by the beginning of 2020), those who arrive after this date will be subject to immigration control. The future system proposes a variant of a points-based system (minimum of 70 points) in which skills (a minimum of RFL3 or A level), a good knowledge of English (B1) and a minimum salary (£25,600 per annum but lower for young entrants in the labour market) will apply. As we have seen salaries in this sector are well below the salary threshold and many do not have formal qualifications nor is training provided. Thus most migrant care workers would not qualify. Furthermore the Migration Advisory Committee (2020), which prepared the report underpinning the government thinking has for a long time pushed this sector to improve its conditions of work and pay and not to rely on immigration but as we shall see this is not possible without greater funding being allocated to the sector. MAC's attitude also reflects an inability to see an occupation's worth as being very different to its monetary remuneration, a situation more common among female dominated jobs. And whilst individuals, especially EU citizens, may pass the educational level, the occupation itself would have to stipulate a minimum level of qualification. Yet Colin Angel from the UK Homecare Association commented "Social care doesn't always need new entrants to have previous academic qualifications, but it does need people who have the right values and life experience. We need the government to place front-line careworkers on a shortage occupation list, and design a future points-based system which recognises the contribution that careworkers make to UK society, rather than simply qualifications and earnings." (Woodcock 2020).

Despite the principles expressed by the Conservative Government in 2018<sup>4</sup> in seeking to upgrade the workforce and provide a career pathway, the room for manoeuvre in upgrading the domiciliary sector is slight since the austerity conditions facing local authorities mean that they put pressure on providers to keep costs low. Another possibility is that the current

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<sup>4</sup> The Social Care Green Paper announced in March 2017 has still to be published. Jeremy Hunt, Secretary of State for Health and Social Care, included in his speech on 20 March 2018 seven principles of which one included the workforce in which he praised carers as modern day heroes and spoke of the need to provide a career structure which could lead to other professions in the health service.

COVID-19 crisis might lead to pressure on the government to change its hard line stance towards less skilled EU flows. As a Conservative Member of Parliament Steve Double noted on 23 March 2020 that the crisis is “teaching us that many people that we consider to be low skilled are actually pretty crucial to the smooth running of our country” and asked the UK Home Secretary, Priti Patel, to review the government’s new points-based immigration system “to reflect the things we’ve learned”.

Of course the reduction in the number of available EU migrants will have differential geographical implications. There has been a tendency to present this sector as a migrant dominated one but the national average demonstrates quite clearly that this is not the case. This was confirmed by one of the interviewees. Skills for Care has produced data on the proportion of migrants in the formal social care sector (see table 1), including domiciliary care but it may underestimate those employed directly by households and leave out the undeclared. Some of our interviewees maintain that London is entirely dependent on a migrant work force and that migrants constitute up to 20% outside of London. Regional data highlights the fact that the presence of EU and non-EU nationals varies considerably between London and the South East, on the one hand, and other regions of the UK where this percentage is very low.

**Table 1 Regional Patterns of Employment and Migrant Presence**

Region	No jobs	Perm contracts %	FT	No fixed hours	British	EU	Non-EU	EU with British	EU eligible*
London	155,000	83	52	17	61	14	26	12	59
N. East	62,000	91	53	13	96	2	3	-	-
S. East	181,000	91	52	13	77	12	11	13	49
West Midlands	123,000	92	50	11	87	5	8	30	52
York & Humber	110,000	93	51	10	93	3	4	38	45
S. West	124,000	93	49	12	85	9	6	25	43
N. West	150,000	90	52	10	93	3	4	31	44
Eastern	119,000	90	52	10	82	10	9	18	58
East Midlands	103,000	92	51	10	89	5	6	35	47

\* Eligible for settled status by end December 2020.

Source: Based on data from Skills for Care (2017)

Focussing on the presence of migrants may lead to not taking into account the ethnicised nature of the labour force. Skills for Care does not provide regional data but it does so at the local level. Table 2 indicates the highest and lowest percentages of those declaring themselves belonging to Black and Asian Minority Ethnicity<sup>5</sup>. What this highlights is the strongly ethnicised workforce in some regions and local authorities and suggests that the care workforce also relies on established migrants and those of migrant origin born in the UK. Thus in London a large number of local authorities have well over half of their formal care staff from ethnic minorities and where the minimum is at least a third. At the other end of the spectrum, rural counties and some small towns and cities have very low percentages of an ethnic minority workforce.

#### Percentage of Care workers from Ethnic Minorities

Region	Highest percentage in a local authority	Lowest percentage in a local authority
East Midland	43	5
East	55	6
London	88	36
North East	9	1
North West	27	6
South East	60	4
South West	17	2
West Midlands	46	5
Yorkshire and Humberside	26	2

Source: Based on data from Skills for Care 2019a

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<sup>5</sup> The UK is the only EU state which allows for the collection of data by ethnicity.

There has also been a lot of discussion of the abuse and poor conditions of Migrant Domestic Workers (Kalayaan;<sup>6</sup> Grant and Kelly, 2017; Mullally and Murphy, 2015) but this is a specific scheme for the entry of workers in private households and for diplomats with whom they had worked for at least 12 months prior to coming to the UK.<sup>7</sup> Whilst these domestic workers may generally provide care for children rather than the elderly, they do not consist of the bulk of migrants in the domiciliary labour force. We discuss this in more detail below in relation to the UK's refusal to sign the adoption of the ILO Convention 189 on Decent Work for Domestic Workers which does not only apply to migrant workers.

When work permits ceased to be issued for less skilled work in 1980, a limited exception was made for domestic workers entering with employers they had been with for the previous 12 months before coming to the UK. This was on grounds that it enabled the UK to remain attractive for international skilled migrants. Following extensive lobbying by a number of NGOs supporting migrant domestic workers such as Kalayaan, established in 1987, and the Commission for Filipino Workers, the Labour Government implemented, in 2002, an Overseas Domestic Workers Scheme which would allow workers to change employers. Though they could eventually extend their work permits until they qualified for indefinite leave to remain, they had to do so within the domestic work sector but could not change sectors. In 2012, the Conservative-Liberal Democrat government changed the conditions of the scheme such that migrant domestic workers entering after 6 April 2012 could no longer change employers. It can be argued that this constitutes a form of modern slavery, although it has also been argued that bringing this under this conception has only made it more difficult for migrant domestic workers (Fudge, 2016).

After a campaign and a review of the scheme in 2015 (Ewins, 2015), the Home Office allowed workers to change employers in the categories below:

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<sup>6</sup> Kalayaan is a small London based charity, established in 1987, which works to provide practical advice and support to, as well as campaign with and for, the rights of migrant domestic workers in the UK: <http://www.kalayaan.org.uk/>

<sup>7</sup> 17,000 domestic workers visas were issued for the year ending September 2015.

- a) Domestic workers in a private household who applied for their entry clearance on or after 6 April 2016 are permitted to change their employer and work for the remaining term of their visa as a domestic worker. They do not need to notify the Home Office of any change in employer
- b) As of 24 November 2016, domestic workers employed by diplomats can change their employer and work for the remaining term of their visa as a domestic worker. They do not need to notify the Home Office of any change in employer.

However, despite these changes, workers 'employed as a domestic servant in a private household' are also excluded from a number of the key limitations on working time, including the maximum average working week of 48 hours (Section 19 of the Working Time Regulations) and from provisions on workplace inspections that apply in other settings (Section 51 of the Health & Safety at Work etc. Act 1974) (Seddaci, 2019). Furthermore, the Home Office has shelved plans to let overseas domestic workers know of their rights simply because a contractor couldn't be found (Financial Times, 2019).

### **3. Existing legal provisions in relation to domestic workers**

In relation to legal provisions in the UK, a preliminary issue needs to be explained. The UK consists of England, Scotland, Wales and Northern Ireland. Some matters are governed from the UK Parliament in London, while other matters are devolved to the different regions. This means that some of the powers from the UK Parliament in London are transferred to the Scottish Parliament in Edinburgh and the National Assembly for Wales in Cardiff. When a matter is devolved, the regional assemblies or parliaments can pass laws for this area. Health and social care is such a devolved matter: in Scotland this is referred to as health and social work and in Wales as health and social welfare. However, employment is an area that is governed centrally by the UK Parliament in Westminster. This means that Scotland and Wales can legislate for health and social care, but they cannot legislate for improvements to care workers labour conditions and standards. This also means that legislators in Scotland and Wales can legislate for social care, including domiciliary care and for improving the standards

of care for service users, but that they cannot directly legislate in relation to care workers' employment rights. However, as some of our interviewees mentioned, improving care through, for example, the compulsory registration and training of care workers can ultimately lead to improved conditions and better pay for care workers. So legislation adopted by the devolved parliaments can indirectly lead to improving domiciliary care workers' employment rights. Wales has now introduced a registration scheme for domiciliary care workers (discussed below in the section on good practice), and Scotland is working on similar registration schemes for this group of workers. A different regime applies to Northern Ireland for health and social services and the Northern Ireland Assembly in Belfast has more powers than the Scottish Parliament and the Welsh Assembly. But Ireland also has a registration scheme for domiciliary care workers.

In England, care services are publicly funded and there is a substantial market for privately purchased care and a heavy reliance on informal care. This includes home care, but help with domestic tasks, psychological/emotional support and help to participate in social activities outside the home are generally not covered (Forquacity EU, 2015, 4-5). The main model over the past 20 years has been a quasi-markets or a purchaser-provider model with, as was mentioned, local authorities increasingly contracting service out to external private providers rather than providing in-house services, after assessment of an individual's care needs by a local authority care manager. A system of personal budgets (PB) or individual budgets (IB) has been introduced, where a person needing care receives direct payments and then organizes their care themselves (ibid, 5-6). Eligibility thresholds vary from one local authority to another. According to several interviewees, social care and especially domiciliary care has suffered disproportionately from government cuts to local authority budgets. This means that local authorities tend to select providers only on costs and contracts go to the lowest bidder. Because of these cuts, less people are eligible for local authority assistance and, thus, more people purchase some or all of their home care services from their own private resources. This not only creates greater reliance on informal carers but it also leads to unmet needs for some people (ibid, 6-7).

In Scotland, the majority of people also receive homecare through local social services, which assess need for help according to certain eligibility criteria. But here, too, the proportion of care delivered by the independent sector is growing although, contrary to

England, here much is still delivered by in-house teams of local authorities. Since 2002, people aged 65 and over are eligible for free personal care. This means that they cannot be charged for such services in their own homes, although they can be charged for domestic services. This policy has contributed to a shift from the use of residential care to homecare. However, budget cuts have led to funding shortfalls and many authorities now have waiting lists for these services (ibid, 7-8). The major difference with England is thus the right to free home care for people of 65 and over.

In Wales, again, most care is received via local authorities but many authorities contract out services to the independent sector. There has been a continued policy emphasis on helping people to remain in their home (ibid, 8). So in all three countries, local authorities assess eligibility (with free home care in Scotland for the 65 and over age group) and then provide care in a number of ways, including through private providers.

In Northern Ireland, care needs are assessed by the social services department of an individual's local health and social care trust. The assessment includes the risks if help is not given. Health and social services teams put together a support package and care plan, which can include home care and which may include services from both private and voluntary organizations and either arranged by the trust or by the care user through direct payments (Northern Ireland Direct).

#### **a. Legal framework: care**

In 2014, the Care Act 2014 was adopted by the UK Parliament. Prior to this act, the Law Commission did a review of adult social care law and recommended a new legal framework organized around notions of choice and well-being (Law Commission, 2011). This report defined the purpose of adult social care 'as promoting or contributing to the well-being of the individual' (ibid, para. 2.7). The first recommendation was for a single statute for adult social care (ibid, para. 3.10). The Law Commission also recommended a code of guidance, which should be prepared after consultation with relevant actors (ibid, para. 3.32). Choice and control were seen as important concepts for the scheme, but choice rather than control should be the key principle (ibid, para. 4.27). The new statute should 'set out a single overarching principle that adult social care must promote or contribute to the well-being of the individual' and that this includes accepting that the individual is the best judge on this,

that their views and individual circumstances need to be taken into account; and, that they must have the opportunity to be involved in decisions on their care (ibid, para, 4.37). There is also a recommendation that ‘the statute should place duties on local authorities to provide information, advice and assistance services in their area and to stimulate and shape the market for services’ (ibid, para. 5.16).

The Care Act 2014, in its part 1, establishes the general responsibilities of local authorities in assessing and meeting care needs; provides for direct payments; and, addresses safeguarding. The Act did follow the recommendation in putting choice and control for the individual care user central. The Act imposes, in section 1, a duty on local authorities to promote an individual’s well-being in exercising their functions under the Act. Well-being includes, according to section 1(2), personal dignity; physical and mental health and emotional well-being; protection from abuse and neglect; control of the individual over day-to-day life; participation in work, training or recreation; social and economic well-being; domestic, family and personal relationships; suitable living accommodation; and, the individual’s contribution to society.

But what does all this mean for care workers? According to Hayes, the Act ‘suggests a cementing of a very different relationship between care workers and the state than that which existed ...’. She continues ‘by redefining care as “well-being” and by setting in train an enhanced programme of marketisation, the statutory entitlements of individuals in need of paid care have been framed in direct opposition to the interests of the care work force’ (Hayes, 2017a, 177-178). During the passage of the Care Bill through Parliament, there was little consideration of the effects - including destabilising wages, health and safety and other labour rights - the Act would have on workers in the care sector (ibid). There is only one explicit reference to the social care workforce in the Care Act 2014: section 5(1) mentions that a local authority must promote the efficient and effective operation of a market in services for meeting care and support needs; and, one of the issues the authority must have regard to (and the last one of six mentioned) ‘is the importance of fostering a workforce whose members are able to ensure the delivery of high quality services (because, for example, they have relevant skills and appropriate working conditions)’ (section 5(2)(f)). The duty is, thus, ‘to have regard to’ and, according to Hayes, this drafting of this ‘is indicative of fragmentation, fluidity and a further informalisation of employment’ (Hayes, 2017a, 179).

The Care Quality Commission (CQC) was set up by the Health and Social Care Act 2008 (HSCA 2008) as the independent regulator of health and social care in England. According to section 2 of this act, the CQC has the following functions: registration of care providers; review and investigation, including monitoring, inspecting and rating services; and, functions under the Mental Health Act 1983.<sup>8</sup> Section 3 HSCA 2008 makes clear that their main objective is to protect and promote the health, safety and welfare of people who use health and social care services. Among the CQC's fundamental values are: person-centred care; dignity and respect; consent, safety, and safeguarding from abuse; and, still in relation to care users well-being, providers should ensure that they have enough suitably qualified staff and that they have fit and proper staff (CQC website).

Section 9(3) HSCA 2008 then explains that 'social care' 'includes all forms of personal care and other practical assistance provided for individuals who ... are in need of such care or other assistance'. Home care providers must register with the CQC and this means that they have to pay annual registration fees, are subject to inspection and meet registration standards. If they fail to do so they are liable to criminal prosecution and a fine of up to £50,000 (section 10(4) HSCA 2008). But there are a number of exceptions: agencies which place domiciliary care workers with individuals and then have no ongoing role in the control of the services are exempt, as are individual care workers who are paid via direct payments to their clients (Hayes, 2017a, 185).

Part 2 of the Care Act 2014 concerns care standards and makes some administrative changes to the CQC. From all this it will be clear that the CQC is concerned with care users and not with the position of care workers. Moreover, one of the interviewees mentioned the CQC does not oversee the commissioning of care by local authorities and also has had budget cuts so cannot work effectively, hence there is a need to invest in regulators. Another interviewee also mentioned that the CQC struggles to keep up with inspections of regulated providers.

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<sup>8</sup> More information on the CQC can be found on their website: <https://cqc.org.uk/>

## **b. UK legal framework: employment**

The UK legal framework in relation to labour standards for domestic workers and home care workers, which applies to all four parts of the UK, does not fully conform to the ILO Domestic Workers Convention 189 (2011), and the UK has not signed or ratified this Convention. The UK opposed the ILO Convention on grounds that this category was already covered by the national legislation. However, it can be said that the legal framework does not adequately recognise paid care work as employment in relation to pay and working time (Hayes, 2018, 92).

### *i. Employment status: workers:*

The most important point in relation to the question whether employment law protection applies to domestic cleaners and home care workers is whether they are considered to be workers and or employees. A definition of 'worker' can be found in Section 230 of the Employment Rights Act 1996. According to this section, a person is generally classed as a 'worker' if (UK Government, *Employment status (worker)*):

- They have a contract of employment;
- They have a contract or other arrangement to do work or services personally for a reward (the contract doesn't have to be written);
- Their reward is for money or a benefit in kind, for example, the promise of a contract or future work;
- They only have a limited right to send someone else to do the work (subcontract). The issue of having to perform the work or services personally, has always been important in establishing whether a person can be classified as a worker or employee or whether they are self-employed. In *Pimlico Plumbers v Smith* [2018] UKSC 29, the UK Supreme Court held that Mr Smith did not have an unfettered right to substitute but could only have a substitute from other plumbers working for Pimlico and, thus, that he tribunal was entitled to hold that the dominant feature of Mr Smith's contract with the company was an obligation of personal performance. So there is a requirement of personal performance with a very limited right to substitution;
- They have to turn up for work even if they don't want to;

- Their employer has to have work for them to do as long as the contract or arrangement lasts;
- They aren't doing the work as part of their own limited company in an arrangement where the 'employer' is actually a customer or client.

If, under the rules above, a person is considered a 'worker' then, if they are 18 year or over, they are entitled to following employment rights:

- The right to be paid the national minimum wage for those who are 25 year old or under; and, the national living wage for those who are over 25 years old (National Minimum Wage Act 1998, see below);
- The right to protection against unlawful deductions from wages (section 13 of the Employment Rights Act 1996); an employer can only make deductions if the contract specifically allows for deductions and this was agreed in writing beforehand; if the employer has overpaid the worker; if it is required by law, for example income tax or a court order; or, when the worker missed work because they were on strike or taking industrial action (ACAS, *Check if your employer can make deductions from your wages*). Accommodation provided by an employer can be taken into account when calculating the National Minimum Wage or National Living Wage and an employer can deduct a maximum of £49 per week, if the worker works full-time. No other kind of company benefit (such as food, a car, childcare vouchers) counts towards the minimum wage (UK Government, *National minimum wage and living wage: accommodation*);
- The right to the statutory minimum level of paid holiday: according to section 13 of the Working Time Regulations 1998, a worker has the right to 5.6 weeks paid leave per year;
- The right to the statutory minimum length of rest breaks: sections 10-12 of the Working Time Regulations 1998 determine that a worker has a right to at least 11 consecutive hours rest in every 24-hour period; that a worker has the right to at least one day off each week; and, that a worker has a right to a rest break of at least 20 minutes if the working day is longer than six hours. It will be clear that these are all minimum requirements and employers can give workers longer rest periods or breaks;

- The right not to work more than 48 hours on average per week or to opt out of this right if they choose: this is laid down in sections 4 and 5 of the Working Time Regulations 1998;
- The right to protection against unlawful discrimination under the Equality Act 2010. This Act covers 9 protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion; sex; and, sexual orientation. The act protects against direct and indirect discrimination, harassment and victimization on the ground of these protected characteristics;
- The right to protection for 'whistleblowing' - reporting wrongdoing in the workplace, which is laid down in sections 43A-43L of the Employment Rights Act 1996;
- The right not to be treated less favourably if a worker works part-time: section 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 states that a part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker (a) as regards the terms of his contract; or (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer. However, according to section 5(2) this only applies if (a) the treatment is on the ground that the worker is a part-time worker, and (b) the treatment is not justified on objective grounds;

There are different entitlements for workers younger than 18 year which can generally be found in the same statutes or in the same sections of the regulations mentioned. Workers may also be entitled to: statutory maternity pay; statutory paternity pay; statutory adoption pay; and, shared parental pay. This is further explained below. At the moment it is not clear what the impact of Brexit will be after 31 December 2021 on worker and employee rights and on their legal protection against, for example, discrimination, as these areas of law have been influenced by EU law and by the decisions of the Court of Justice of the European Union. The government is supposed to pass an Employment Bill setting out workers' rights post Brexit but with the current COVID-19, it is not clear when legislation will be brought before Parliament.

### *3.2.2. Employment status employees*

An employee is someone who works under an employment contract, as Section 230 Employment Rights Act 1996 determines. All employees are workers but not all workers are employees. An employee has extra employment rights and responsibilities that do not apply to workers who aren't employees. Employees have the following rights which workers do not have: statutory maternity leave; statutory paternity leave; statutory adoption leave; and, shared parental leave (UK Government, *Employment status (employee)*) Employees are, but workers are not, entitled to: minimum notice periods at the end of employment; protection against unfair dismissal; the right to request flexible working; time off for emergencies; and, statutory redundancy pay.

Therefore, a worker has less protection than an employee, but the legal provisions appear to be clear about what either category is entitled to. However, establishing whether someone is a worker/employee or a self-employed person is not easy and there is extensive case law on this (Emir, 2018, 43-50). This case law makes clear that this is a question of fact and needs to be established by the evidence in each individual case, but it is the substance of the relationship which counts, not the form (*idem*).

Domestic cleaners are generally employed by a householder on a very ad hoc and informal basis and are paid cash in hand. Therefore, they usually are not considered to be workers/employees. This might be different for cleaners who work for an agency but then they are not usually working for private households and are more likely to do industrial cleaning. However there are also a number of companies who provide domestic cleaners. Domestic cleaners were hardly ever mentioned in interviews, apart from interviewees replying to a question the from interviewer and stating that there are no regulations here and then continuing the interview referring only to domiciliary care workers. One interviewee mentioned, when prompted, that domestic cleaners are hardly ever member of a union, so there is no collective bargaining. When domestic cleaners work for agencies, the agencies often insist that they are self-employed. However, there is a lot of bogus self-employment. And the pay is often cash-in-hand so it is a very difficult sector to regulate. The same interviewee could not see unions do much in this sector, mainly because they cannot recruit in this sector. It must be noted, though, that, generally, domestic cleaners get paid more than the minimum wage and the rate at the moment is £9 to £11 per hour.

As mentioned, domiciliary care workers are employed in a number of different ways: they can be directly employed by a Local Authority, although most Local Authorities are now commissioning home care through private providers so there are few jobs provided directly by them; home care workers can be employed by private care companies or trading charities; they can be employed as personal assistants directly by the people in need of care and their families; and, they can be self-employed (Hayes, 2017b, 11). What complicates matters for home care workers is that they are often 'engaged on a highly individualised basis in which they have no contractual guarantee of work or they enter into arrangements which are entirely private' (ibid). The way care workers are employed is not always the choice of the worker themselves and both zero-hours contracts and self-employment are on the rise. Zero-hours contracts are casual work arrangements; the term 'defines a relationship in which an employer makes no guarantee to provide paid work and, on paper at least, a worker makes no commitment to accept work if it is offered' (Hayes, 2017a, 82). One of the interviewees said that such contracts meant that there is no certainty and no continuity for service users and workers, and that such contracts are open to exploitation. Other interviewees mentioned that, although there is no obligation on the worker to accept work, if a worker does not do so, they are not offered work for a time. This is referred to as 'zeroing-out'. According to Hayes, 40% of people on zero-hours contracts want to be working more hours than made available; and, 'zero-hours contracts are so common as to represent a norm within the homecare industry' (Hayes 2017a, 82-83). Among domiciliary care workers in England they now constitute 50% (Skills for Care 2019b).

On 2 April 2018, a new regulation came in force in Wales (Regulation and Inspection of Social Care (Wales) Act 2016), which provides that employers must offer someone who has been on a zero-hours contract for three months an employment contract with a guaranteed number of hours. The latter is based on the average number of hours worked over the first three months. This does not apply if the work has diminished or the worker has not performed satisfactorily. The worker can stay on a zero-hours contract if they wish to do so. However, this right is not enforceable by the care worker, as it is a care standard measure, a standard for employers, with an inspectorate to check this. So the aim of the measure is to improve care standards and service user safety. This is based on the fact that, as mentioned above,

Wales cannot legislate/ introduce employment regulations as that is not a devolved matter. However, this could provide an indirect route to improving labour standards.

Self-employment is, as mentioned, also on the rise in the area of home care. If a person is self-employed, they are not a worker or employee and will not qualify for the benefits mentioned above. In practice, it is thus not always easy to establish whether someone is a worker/employee or self-employed. The information on the government site about the status of worker states, under the title 'casual or irregular work', that someone is likely to be a worker (with the rights mentioned above) if most of the following apply (UK Government, *Employment status*):

- They occasionally do work for a specific business;
- The business doesn't have to offer them work and they don't have to accept it - they only work when they want to;
- Their contract with the business uses terms like 'casual', 'freelance', 'zero-hours', 'as required' or something similar;
- They had to agree with the business's terms and conditions to get work - either verbally or in writing;
- They are under the supervision or control of a manager or director;
- They can't send someone else to do their work;
- The business deducts tax and national insurance contributions from their wages;
- The business provides materials, tools or equipment they need to do the work.

But here again, this is a list of issues which are taken into account by a court or tribunal to determine whether a person is a worker, but the assessment of this happens on a case-by-case basis. A factor that compounds the difficulty here that domiciliary care work takes place within the private home and that there is a great reluctance of the government to regulate in this private space, as some interviewees pointed out. In fact, the UK representative at the ILO proceedings in 2011, Ms Warwick, stated (International Labour Conference, 2011, 22):

*We do not consider it appropriate, or practical, to extend criminal health and safety legislation including inspections, to cover private household employing domestic*

*workers. It would be difficult, for instance, to hold elderly individuals, who employ carers, to the same standards as large companies.*

As some interviewees concluded: the government's policy is to maintain the home as a deregulated space. An example of this is the exception in section 51 of the Health and Safety at Work Act 1974 (HSWA 1974, which determines that the Act does not apply 'in relation to a person by reason only that he employs another, or is himself employed, as a domestic servant in a private household'. In this section, 'domestic service' is thought to include basic personal care, personal services and other domestic tasks. As Hayes points out, 'if an individual employs a worker to help with washing, dressing and feeding at mealtimes, they would not be an employer under the HSWA as the care would be described as domestic service' (Hayes, 2017b, 13 and footnote 41).

One more factor mentioned in some of the interviews was that enforcement in labour law can be problematic as it is often based on an individual claimant taking a case to a tribunal. This is compounded by the fact that many workers are not aware of their employment rights (Hayes, 2017b, 16; Citizens' Advice, 2016). Hayes writes that 'Britain has one of the weakest employment law enforcement structures in Europe' (Hayes, 2017b, 17). Moreover, enforcement is even more complicated if the employment relationship or employment status is unclear, as it is for many domiciliary care workers.

### **c. National minimum/living wage**

The UK Home Care Association (UKHCA) has calculated that a minimum price for homecare services of £18.93 per hour from April 2019 allows full compliance with the national minimum/living wage and the delivery of sustainable homecare services to local authorities and the National Health Service (NHS) (UKHCA, 2019, 34), but in their response to the

Migration Advisory Committee (MAC)<sup>9</sup> consultation on shortage occupations they stated that only £16.12 was paid on average (UKHCA, 2018, question 27).

A worker aged 25 and over is legally entitled to at least the national living wage. From 1 April 2019 the national living wage is £8.21 per hour and this will go up to £8.72 per hour from April 2020. If you are a worker aged under 25, or an apprentice, you are legally entitled to at least the national minimum wage. From 1 April 2019 the rates are: 21 to 24: £7.70 (from April 2020: £8.20); 18 to 20: £6.15 (from April 2020: £6.45); and, under 18: £4.35 (from April 2020: £4.55). So for workers age 25 and over, the minimum wage is now called the national living wage, for workers under 25, the minimum wage is called the national minimum wage. It doesn't matter how small an employer is, they still have to pay at least the correct minimum wage. It is illegal for an employer to pay a worker below this and contracts for payments below the minimum wage are not legally binding. A worker should also be paid the national living wage for travel time between clients, or between a client and the office.

The minimum wage legislation applies to part-time workers as well. It is enforced by the tax authorities: Her Majesty's Revenue and Customs (HMRC). However, several interviewees mentioned that the number of employers who are picked up on not paying the minimum wage is not very high. One mentioned that, at the moment, the chance of getting inspected by HRMC is very low (about once in 500 years), unless there is a specific complaint (when it is once in 50 years). So this is not an incentive for employers to stick to the law and pay minimum wages.

Therefore, here again, the law seems to be clear. However, in practice, there are quite a number of problems. The Low Pay Commission has expressed concerns about non-compliance with the national minimum/living wage (NMW) in this sector: 'The evidence suggests that some groups are at greater risk than others of not receiving their entitlement to the NMW. Of particular concern is social care: HMRC's report on their recent investigations supported other evidence which had indicated that NMW non-compliance in this sector was

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<sup>9</sup> The Migration Advisory Committee (MAC) is an independent, non-statutory, non-time limited, non-departmental public body that advises the government on migration issues: <https://www.gov.uk/government/organisations/migration-advisory-committee#content>

higher than average' (Low Pay Commission, 2014, XV, point 18). And, a report by the Resolution Foundation highlighted the potential scale of underpayment in the UK social care sector. There are around 160,000 care workers (out of 1.4 million) who are paid less than the national minimum/living wage 'when all working time' is considered. The average loss for these workers is around £815 over the course of 2013-2014 (Gardiner, 2015, 3). This was mentioned by our interviewees as well. Moreover, they also mentioned that the national minimum/living wage is not set at the level of the real living wage which has been calculated by Citizens UK as £9.30 outside of London and £10.75 in London.

Apart from the problems with determining whether a home care worker is a worker pointed out above, there are a number of other issues that make this more complicated in practice. First of all, there is a list of workers who are not entitled to the national minimum/living wage. Of this list, the following categories could be applicable to domestic and home care workers: self-employed people running their own business; family members of the employer living in the employer's home; and, non-family members living in the employer's home who share in the work and leisure activities, are treated as one of the family and are not charged for meals or accommodation (UK Government, *The National Minimum Wage and Living Wage*). For the latter two categories see section 57 National Minimum Wage Regulations 2015.

Second, the calculation of hours worked for determining minimum wage is highly complex and technical. This is compounded by the fact, as pointed out by some interviewees, that not all employers issue written payslips, although the unions are lobbying for this. As an interviewee mentioned, you might expect that if you pay someone by the hour, you want a record of how many hours that person has worked, but some employers just make a guess. Another interviewee mentioned that Wales has new regulations that employers must provide a written record of work for each day the care worker works.

Third, there is an issue with paying domiciliary care workers only for contact time, for the time they spend in people's homes and not for time spent travelling between appointments or waiting for appointments to start. According to some interviewees, this appeared to be the single biggest issue affecting the pay of home care workers. In practice, the work done must average out so that the worker gets paid at least the national minimum/living wage. This means that it is not unlawful for care workers to have their travel

time between appointments unpaid, so long as their total pay averages out at or above the appropriate minimum wage rate once travel time is factored in (Low Income Tax Reform Group, *Issues facing paid care workers*).

According to one of the interviewees, Wales has introduced regulations that employers must provide a written record of work for each day and of travel time and must give enough time for visits. This can be found in Section 8 Regulation and Inspection of Social Care (Wales) Act 2016. Such a written timetable makes it easier to make calculations regarding the national minimum/living wage. In Wales, the minimum visit duration time has been put up to 30 minutes (with exceptions possible). This is to drive down the use of 15 minute visits. But here again, the aim is improving care and safety standards for care users.

Fourth, there has also been an issue with pay for time care workers spend on sleep-ins at the home of care users and whether such time must be taken into account for calculating the hours worked in relation to the minimum/living wage. In July 2018, the Court of Appeal, in *Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad (t/a Clifton House Residential Home)*[2018] EWCA Civ 1641, held that care workers who were required to sleep at, or near, their workplace and be available to provide assistance if required, were available for work rather than actually working. Accordingly, they were not entitled to be paid the national minimum/living wage for the whole of the sleep-in shift, but only for the time when they were required to be awake for the purpose of working. The Court of Appeal based this on regulation 15(1A) of the National Minimum Wage Regulations 1999 and regulation 32(2) of the National Minimum Wage Regulations 2015.<sup>10</sup> UNISON, the public service union, believes that 'this is wrong, and is at odds with legal precedents and a common sense understanding of what counts as work. Most care workers on sleep-in shifts aren't sleeping. Most nights they have to get up to care for people, are on constant call, and are not free to come and go from their place of work' (UNISON, *Care workers: your rights*). On 18 February 2019, UNISON was granted leave to appeal the decision to the Supreme Court. The case was

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<sup>10</sup> One of the cases fell under the 1999 Regulations, the other under the 2015 Regulations, but the sections referred to were similar. The 1999 Regulations were repealed by the 2015 Regulations. For an analysis of the case and of the previous case law, see: Calden, 2018.

heard by the Supreme Court on 12 and 13 February 2020 but the judgment has not been delivered yet.

Problems with pay in the care sector are clearly illustrated in the 2018 report of the Care Workers Charity, a charity that supports care workers with hardship grants, but only those that work or have worked for registered providers. 27% of their hardship grants are given to help with daily living costs, while 28% are given for household appliances and repairs and 13% to prevent eviction and provide moving costs (Care Workers Charity, 2018, 7). These hardship grants are thus mostly given to deal with many normal day-to-day costs of families, which many care workers cannot meet. As an interviewee mentioned, care workers are often on or below the breadline.

#### **d. Social Security**

Some of the benefits discussed here are dependent on whether someone is an employee or a worker or neither and this brings with it the above described problems for domiciliary care workers.

##### *3.4.1. Statutory sick pay*

According to the provisions of section 151-163 of the Social Security Contributions and Benefits Act 1992 and the Statutory Sick Pay (General) Regulations 1982, only employees are entitled to statutory sick pay for the first 28 weeks of absence through sickness. The amount of this is £94.25 per week (2019). A worker is thus generally not entitled to sick pay, unless their contract states that they are.

##### *4.4.2 Maternity leave and maternity pay*

Maternity leave rights are regulated by the Maternity and Parental Leave Regulations 1999. These rights are only available for employees, not for workers, unless this is specified in the contract. Statutory maternity leave is 52 weeks and consists of ordinary maternity leave and additional maternity leave, both of 26 weeks. An employee does not have to take maternity leave, but she must take the 2 weeks after the birth of her baby off.

In relation to statutory maternity pay (SMP) a woman can get SMP if she is an employee or worker, such as a casual or agency worker, and her employer pays her through PAYE and deducts any tax or national insurance contributions and she meets the qualifying conditions, which are, according to Section 164 of the Social Security Contributions and Benefits Act 1992:

- She must have been employed by the same employer for at least 26 weeks by the end of the 15th week before her expected week of childbirth.
- She must be still employed in the same job in the 15th week before her expected week of childbirth.
- She must actually receive at least £118 (before tax) per week in earnings, on average in the eight weeks (if she is paid weekly) or two months (if she is paid monthly) up to the last pay day before the end of the 15th week before her baby is due.
- She must give her employer at least 28 day notice.
- She must provide proof of her pregnancy (Maternity Action, *Maternity pay questions*; UK Government, *Maternity pay and leave*).

Women who do not qualify for statutory maternity pay may be entitled to Maternity Allowance which is paid directly to the woman by Jobcentre plus. Maternity Allowance is paid for 39 weeks at a rate of £148.68 per week (from April 2019) for 39 weeks or 90% of your average earnings if that is less. A woman qualifies for Maternity Allowance if she is employed but cannot get statutory maternity pay; or, if she is self-employed and pays Class 2 National Insurance (including voluntary National Insurance); or, if she has recently stopped working. But, in the 66 weeks before the baby is due she must also have been employed or self-employed for at least 26 weeks; and, earning (or classed as earning) £30 a week or more in at least 13 weeks - these weeks do not have to be together. If a woman is self-employed, she must have paid Class 2 National Insurance for at least 13 of the 66 weeks before her baby's due to get the full amount of Maternity Allowance (The Maternity Allowance and Statutory Maternity Pay Regulations 1994; Maternity Action, *Maternity pay questions*).

### 3.4.3. Paternity leave and pay

Like maternity leave, entitlement to paternity leave is linked to being classed as an employee unless a worker has a contract that contains the right to paternity leave. Employees (male or female) whose partner is having a baby, adopting a child or having a baby through a surrogacy arrangement may be entitled to paternity leave of 1 or 2 weeks (their choice, but the weeks must be continuous and they cannot take odd days off) and if they give the correct notice and have been continuously employed by their employer for at least 26 weeks up to any day in the qualifying week, which is the 15th week before the baby is due. If a person adopts a child they must have been continuously employed by their employer for at least 26 weeks by the 'matching week', which is either the end of the week you're matched with the child (UK adoptions) or the date the child enters the UK or when you want your pay to start (overseas adoptions) (The Paternity and Adoption Leave Regulations 2002; UK Government: *Paternity leave and pay*).

In relation to paternity pay, both employees and workers can be eligible if they are employed by their employer up to the date of birth; earn at least £118 a week (before tax); give the correct notice; and, have been continuously employed by their employer for at least 26 weeks up to any day in the 'qualifying week' or the 'matching week'. The statutory weekly rate is £148.68, or 90% of the person's average weekly earnings (whichever is lower) (Social Security Contributions and Benefits Act 1992; UK Government, *Paternity leave and pay*).

#### 3.4.4. Adoption leave and pay

To be eligible for statutory adoption leave, a person must be an employee; give the correct notice; and, give proof of the adoption or surrogacy - if their employer asks you for it. Statutory adoption leave is 52 weeks – 26 weeks of ordinary adoption leave and 26 weeks of additional adoption leave. In case of adoption leave, only one person in a couple can take the leave (The Paternity and Adoption Leave Regulations 2002: UK Government, *Adoption pay and leave*).

Both employees and workers can be eligible for statutory adoption pay. To qualify the adopter must have been continuously employed by their employer for at least 26 weeks by the week they were matched with a child; earn on average at least £118 a week (before tax); give the correct notice; give proof of the adoption or surrogacy; and, they must have

elected to get statutory adoption pay and not statutory paternity pay (Social Security Contributions and Benefits Act 1992; UK Government, *Adoption pay and leave*).

#### 3.4.5. Shared parental leave and pay

The Shared Parental Leave Regulations 2004 give the mother the choice of converting part of her maternity leave (not the compulsory part) to shared parental leave which she can share with her partner. The mother or their partner must be eligible for maternity pay or leave, adoption pay or leave or Maternity Allowance (The Shared Parental Leave Regulations 2004; UK Government, *Shared parental leave and pay: employer guide*). Both employees and workers can be entitled to statutory shared parental pay. The requirements for this are the same as the requirements for statutory maternity and paternity pay (Social Security Contributions and Benefits Act 1992; UK Government, *Shared parental leave and pay: employer guide*).

## 4. Examples of good practice

An example of good practice which is linked to devolution is that Wales has now introduced a registration scheme for domiciliary care workers, which links in with training for these workers. A registration scheme also operates in Northern Ireland and Scotland is working on such a scheme, but England is lagging behind. In Wales, registration is, at the moment, voluntary but it will become compulsory from April 2020. The scheme covers domiciliary care workers and these are defined as ‘workers who are employed by a domiciliary support service to provide care and support. Domiciliary support services are registered with the Care Inspectorate Wales (CIW)’ (Social Care Wales, *Domiciliary care workers registration*). It is made clear, that job titles may vary but that, if a worker provides care and support to people in their own homes and the place of work is registered with CIW, they will need to register (ibid).

The reasons for introducing registration are that it provides recognition and support for care workers and that ‘it gives people receiving care, and their families, the confidence a

worker has the skills and qualifications to do their job in a professional, compassionate manner'. A registered domiciliary care worker will have to follow the Code of Professional Practice in Social Care.<sup>11</sup> So it is, according to the 'Social Care Wales' website, about building trust and confidence, valuing social care workers and making sure people are safe. This includes ensuring that domiciliary care workers are trained. It also means that workers, if they are not fit to practice, can be removed from the Register by the Fitness for Practice team, but this can only be done when a complaint has been received. If a worker is removed, they will no longer be able to practice anywhere in Wales (Social Care Wales, *Domiciliary care workers registration*). According to one of the interviewees, this could also be seen as a disadvantage for care workers: that the Register could be used to discipline people.

The domiciliary care workers register is already open for registration and there are a number of ways a worker can register. They can do so if they have a qualification Level 2 or 3 in health and social care (Diploma, QCF (Qualifications and Credits Framework) or NVQ (National Vocational Qualifications) certificate or equivalent. A domiciliary care worker can also register based on experience if they do not have the required qualifications. In that case, they need to have worked for three of the past five years in a domiciliary care worker role. Managers will assess these workers against the required competencies and will provide a signed declaration to confirm their competence as a lawful, safe and effective practitioner (Social Care Wales, *Domiciliary care workers registration*).

In one of the interviews, the Registration scheme was mentioned. When it was first proposed, domiciliary care workers could only register if they had the required qualifications. But it was then pointed out that the requirement of qualifications could lead to the loss of a number of domiciliary care workers with many years of experience who did not want to study for a qualification. This is why the second way of registering was introduced: it is a way in which experience can be accredited and in which experienced workers can be given trained status. The interviewee referred to this as 'grandfather rights', or acquired rights.

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<sup>11</sup> For this Code of Practice see: <https://socialcare.wales/fitness-to-practise/codes-of-practice-and-guidance>

There is a third way of registering: If a person does not have the required qualifications or experience, they can register by completing an on-line course. This will give them a certificate with which they can register. But they will then have to complete the required qualification by the time their registration comes up for renewal (which is after three years) (ibid).

All registered domiciliary care workers will need to renew their registration every three years. To do this, they have to show that they have completed at least 90 hours of Post Registration Training and Learning. Care workers have to pay for registration: the fee was £15 in 2018, but this has been increased to £20 in 2019-2020, and will further increase to £25 in 2020/2021 and £30 in 2021/2022. Once registration becomes compulsory, domiciliary care workers cannot work if they are not on the Register.

According to Social Care Wales, employers will need to make sure workers are fit to practise and follow the Code of Professional Practice for Social Care. This includes making sure that workers have the right qualifications or can work towards them; have the chance to learn and develop in their work in a variety of ways; and, know about the Code and how it applies to them. Employers also have a responsibility to follow their own Code of Professional Practice for Social Care Employers. This states that they must keep in touch with workers and give them guidance and support; they must understand how the service is working and they must address unsatisfactory performance or misconduct by workers (ibid).

The registration scheme in Wales was mentioned as an example of good practice by several interviewees, and one pointed out that the goal of this was to professionalize this sector. However, it was also mentioned by several interviewees that the idea was that training domiciliary care workers would lead to increased pay, but it was questioned whether this will happen if the present lack of funding continues. The scheme can only lead to increased pay if the government provides more funding.

One of the interviewees mentioned that a compulsory registration scheme has been very successful for the security industry and has led to higher standards for security guards. In that area something was done because there were some dodgy characters and sometimes even organized crime involved. Moreover, because of electronic developments in this area, people needed to be trained. This was a low paid industry, but registration has helped with training and has led to professionalization and has raised wages.

In Scotland, registration with the Scottish Social Services Council (SSSC) has been introduced for workers in care home services for adults and for workers in day care of children services, with registration of workers in housing support services and workers in care at home services to follow, but the date this will be done is yet to be announced, although the registration of domiciliary care workers is expected in 2020. However, there is as yet no information on the date on which this will be introduced. Registration here is, like in Wales, linked to training and a code of practice (Scotland, Care Inspectorate, *Workforce registration with the SSSC*).

In Northern Ireland, registration for workers in social care was introduced in phases, with domiciliary care being included since 31 March 2017. All new workers should apply for registration as part of induction to their new post. Here, registration is also linked to training and to a code which sets standards for conduct and practice (Northern Ireland Social Care Council, *registration and standards*).<sup>12</sup>

UNISON, the public service union, polled its members in the social care sector and 94% were in favour of a professional register for care workers. This would lead to more respect and more status for care workers and might, in the long run, lead to more pay. Therefore, Wales and Northern Ireland have a registration scheme for domiciliary care workers in place and Scotland working on registration schemes for this group of workers and all three are linked to training and a professional codes of practice.

However, as Hayes *et. al.* (2019) point out, the object of professionalization is not uniformly recognized as beneficial. Many care workers are keen to acquire formal accreditation, but there is also a significant proportion of the existing care workforce who do not want to engage with this; and, there is fear that workers in this sector might quit their jobs if they feel pressured into getting qualifications (Hayes *et. al.* 2019, 1). The same authors also point out that professionalization is 'not a panacea for concerns about poor quality jobs and service-user safety' because 'greater emphasis on training and skill cannot reverse the damage done to care quality by inadequate funding and low wages' (ibid). One of these

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<sup>12</sup> For more information on registration, training, professionalization and Codes of Practice in England, Scotland, Wales and Northern Ireland, see: Hayes *et. al.* 2019.

authors key findings was that 'adequate funding for adult social care must be restored as a first step in recognising care work as a profession' (ibid, 4).

On the other hand, the registration schemes, as they bring with them training and professionalization of the sector, could, as was mentioned in some of the interviews, even though they are not primarily aimed at improving the labour standards of work for domiciliary care workers – labour law being an area where the devolved governments do not have competence - indirectly improve working standards for workers in this sector. So this is an indirect route (via care standards) to improve labour standards. There are, at present, no plans to introduce any form of registration in England. However, in England, care workers can acquire a Care Certificate, which is given after a 12-week induction training course developed by Skills for Health, Skills for Care, and Health Education England, but there is no legal requirement for employers to ensure that their employees/workers engage with this (Hayes *et. al.* 2019, 20-22).

Hayes has suggested that sectoral collective bargaining is needed to improve the employment situation, create decent work and raise care quality in the home care sector (Hayes, 2017b). Sectoral collective bargaining is 'a system for setting terms and conditions or employment across industries'. The two sides of industry come together and make a collective agreement which includes minimum standards for workers, including regarding training, and which is enforceable in law (ibid, 3). Some of the reasons given for sectoral collective bargaining are that 'hands-on care work is highly skilled and increasingly complex' (ibid, 8) and that 'poor quality jobs mean poor quality care' (ibid, 14). Some of our interviewees supported this idea. Hayes and some of our interviewees pointed out that sectoral collective bargaining has had a positive effect in other industries. However, as some interviewees pointed out, home care workers are not often members of a union, especially those employed in the private sector and those who are directly employed by the service user. There is also no right to collective bargaining in the UK.

One of our interviewees mentioned that, in relation to the NHS, there has been, since 2006, a good social partnership forum, a tripartite dialogue between unions, employer organizations and the government, which is functioning very well. It has subgroups, including a workforce group. The interviewee suggested that this could be an example of good practice that could be extended to become a health and social care forum or a separate, similar forum

could be set up for the social care sector. Interviewee wondered if things would change now the title of the ministry is 'Health and Social Care', rather than Ministry for Health, so social care has now been brought into the Ministry's title.

UNISON, the public services union, has an Ethical Care Charter which is their main tool to improve things for people working in the home care sector. This Charter aims to provide support for both workers and for service providers. UNISON asks local authorities to sign up to this charter. If they do they have to end zero-hours contracts and end the 15 minute care visits which are the norm in this area. The Charter sets down minimum guarantees only (UNISON, Ethical Care Charter). More than 40 local councils across England have signed up to the Charter.

Another example of good practice might be the establishment of care cooperatives: groups of care workers with a linear structure, a structure on equal footing and without a hierarchy. There is often one registered manager who is a mentor and trains others. These cooperatives cut out the middle management and all carers are equal. Sometimes there are micro-enterprises which work in the same way. We tried to get an interview with someone from a cooperative, but the person was too busy and had had too many requests for interviews already while the other cooperative we contacted never replied.

## 5. Recommendations

Based on the above and especially the examples of good practice mentioned, the following recommendations can be made:

1. The UK should sign and ratify ILO Convention concerning decent work for domestic workers, 2011 (Convention No 189) as soon as possible.
2. Stronger enforcement of the national minimum/living wage legislation is needed.
3. England should introduce a registration scheme for home care workers, linked to training and to a code or charter of professional practice, similar to the schemes in Wales, Northern Ireland and Scotland. However, as Hayes *et. al.* point out, 'training, occupational registration, concern for safeguarding, terms and conditions of work and funding are intricately connected and improvements must be made on all fronts to recognise and reward the skills and professionalism of care workers' (Hayes *et. al.* 2019, 4).

4. Sectoral collective bargaining should be introduced for the whole social care sector.
5. A tripartite social care forum should be established, or, as an alternative, the Health forum should be extended to include social care
6. New forms of organizing domiciliary care should be explored, like care workers cooperatives or micro-enterprises.
7. There should be an increase in labour inspections in order to protect workers from being exploited, as the EU Fundamental Rights Agency suggests (Fundamental Rights Agency, 2018). This would increase the protection of all workers and would thus also help domiciliary care workers.

For all of the above, it is important that funding should be made available. The House of Lords Economic Affairs Committee brought out a report in 2019 entitled 'Social care funding: time to end a national scandal'. In this report, the Committee states that it has found that social care has not been adequately funded for many years and that the Government should make funding in this sector a top priority (House of Lords, 2019, 3 and 39). This funding should come from general taxation (ibid. 6). The Committee also recommends that personal care be made universally available free of charge at the point of access within the next 5-6 years across the UK (ibid, 45, para. 160). However the long awaited Green Paper has still to be published. It looks unlikely in the current circumstances of a log jam of legislation due to Brexit and now COVID-19.

The poor conditions of employment and low pay contribute to the fact that the sector is experiencing shortages of staff which need also to be urgently addressed, especially at a time when the ending of free movement of labour working in less skilled sectors will lead to further shortages. The value of its crucial role to societal well being has also to be recognised.

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### **Appendix 1 List of Interviewees:**

- UNISON (public service union) policy officer
- UNISON development officer
- Care worker (MDW), linked with Unite the Union and Justice for domestic workers
- UK Home Care Association (employers/providers)
- NACAS: National Association for Care and Support Workers/interviewee was care worker
- Academic, research into this area and former trade union employee
- TUC (Trade Union Congress) policy officer, international, social and economic rights
- Care Workers Charity (hardship grants and policy work)
- Researcher from King's Fund, a policy think tank, who has written report on care workers
- Person who is a researcher, has undertaken inspections for the Care Quality Commission and who has herself employed care workers
- Labour Market Enforcement Directorate

No replies:

Worker from care workers co-operative

Local Authority commissioning officer

The UK data comprised 11 expert interviews. The respondents were selected on the basis of their knowledge of the topic and their organisation. The starting point was to cover all required authorities in the field (state-level, trade union level, civil society level). It was in some cases difficult to arrange interviews with very busy persons. Contact with a local authority was disrupted because of the May 2019 local and European elections.

The interviews were conducted between December 2018 and May 2019. During the interviews, the respondents could concentrate in the questions that were most in line with their expertise. Seven of the interviews were conducted face-to-face, and four via skype or on the phone, with interviews lasting from 45minutes to one and half hours. Whilst we followed roughly the schedule (Appendix 2), some of the interviews ranged more widely.

### **Appendix II Questions and Topics for interviews**

***The main research question was: How can legal regulation, public policy, and social partners' actions improve job quality/quality of services and fight informality in the personal and household services sector?***

***Sub-questions:***

1. How are the various types /forms of work in the PHS sector shaped in practice as well as in formal legal terms in the selected ten Member States?
- 1.2. Which are the levels of formal and informal work in the sector? What is the shape of the sector (degree of informality/invisibility/vulnerability)?
2. Which distinctions can be made by the type of worker, employer, and type of contract (employment contracts, hybrid contractual forms, self-employment, atypical forms of employment (i.e. mini-jobs) or other forms of legal relationship)?
3. What has been the impact (if any) of the international regulation on domestic work (ILO Convention 189 and Recommendation 201) for the protection of the workers?
  - For the countries which have ratified the ILO Convention a main question to be addressed is how the process of implementation has taken place? Have the ILO minimum standards being properly reflected in the national implementing legislation? (Compare the list of social rights recognized by the ILO legislation (Convention and Recommendation) with the national legal framework)
  - For the countries which have not ratified the ILO Convention the questions to address are: How has been the discussion at Parliamentary level on the ratification of the Convention (reasons/arguments against ratification)? Has the adoption of the ILO Convention triggered legislative/policy developments at the national level?
4. What is the position of workers in the PHS-sector with respect to social security?
5. To what extend legal/public policy measures at national level try to achieve a minimum level of social protection for these workers (taking as a reference the minimum standards of protection set forth in ILO Convention 189 & Recommendation 201)?
6. What is the role of social dialogue/social partner initiatives in the evolving regulatory/policy framework of the PHS sector?
7. Are collective bargaining agreements covering the workers in the sector? To what extend? Are all workers in the sector covered or only some of them?

8. What are the responses of the social partners (if any) aiming to improve labour rights/social protection/ social security of PHS sector workers)? In which ways industrial relations actors, and in particular trade unions, influence job quality in the sector?

9. If an improvement in the job quality/ improved working conditions/social rights for the workers in the PHS-sector has been noticed. Has that improvement also impacted in the quality of the services (for clients/consumers)?

**Interviews with social partners – in broad sense (trade unions, employers, professional organizations/associations linked to workers in the PHS sector, representatives of lobbying groups:**

*I. Impact of international labour standards (ILO Convention and Recommendation on domestic work) on labour law/social security protection of workers*

(For interviewers: Briefly define the scope of the PHS-sector and the two sub-sectors chosen per land – one should be domestic work-cleaning services at home) as used in your national study for the respondent) For the other case study each national research team is flexible to choose the most relevant case for the sector taking into account national level particularities.

1) In your opinion, how/to what extent are workers in the PHS-sector protected by regular labour law or by other legal framework (specific regulation on domestic work/self-employment regulation)?

2) In your opinion, how/to what extent are workers in the PHS sector sufficiently covered by social security legislation?

*II. Reactions of social partners to challenges of the PHS-sector (i.e. high informality, vulnerability, low wages, low job quality, lack of social protection...)*

*II.a. Reactions to changes in industrial relations*

3 a) have been or Is your organization currently involved in any campaign/initiative aimed to improve the labour/social protection of domestic workers?

If yes,

3 b i) how is your organization dealing with the challenge of low social protection of workers in this sector?

If no,

3 b ii) how is your organization achieving to start any action to protect this kind of workers or stimulate their participation in workers' organisations and/or collective actions?

*II.b. Role of social dialogue initiatives in delineating working conditions in the PHS-sector*

**NOTE: Q4- ask only of Trade Unions.**

4) In social dialogue with employers (trade unions), how has your organization reacted to the often reduced labour law and low social protection of workers in the PHS-sector:

5 a) What kind of issues have you been discussing?

5 b) What have been the outcomes?

6) What initiatives do you expect (in the area of social dialogue) in the near future?

*II.c. Role of collective bargaining in regulating working conditions in the PHS-sector*

7 a) How has your organization reacted to the often vulnerable position (low employment security, few labour rights, low wages, low participation in workers' organisations, lack of social security rights...) of workers in this sector?

7 b) How has your organization reacted to the adoption of international labour standards (ILO legislation) in collective bargaining?

8 a) What kind of issues have you brought up in collective bargaining?

8 b) What results have emerged from raising these issues?

9) What initiatives/issues do you see for upcoming collective bargaining rounds?

*II.d. Interaction with new actors in industrial relations in this sector*

10) Which new actors in industrial relations have emerged in relation to the PHS-sector?

11) How do you see their role in addressing the needs of workers in this specific sector?

*III. Effects of government regulation, social partners' initiatives, and view on options for future regulatory initiatives.*

12) What effects do you think have regulation efforts (if any at national level) had on the level of protection of workers in the PHS-sector?

13) In your view, have these efforts to regulate affected the numbers of workers/their job quality in this sector?

14) What options do you see for future regulatory efforts by legislation, collective agreements, or in other ways?