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Business, Energy
& Industrial Strategy



HM Treasury



HM Revenue
& Customs

EMPLOYMENT STATUS CONSULTATION



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EMPLOYMENT STATUS CONSULTATION

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Good Work: The Taylor Review of Modern Working Practices

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Foreword

As we have made clear in the government response to the Review of Modern Working Practices, a strong, well-functioning labour market is essential if we are going to make the most of the opportunities of tomorrow, boosting earning power and improving productivity. That's why we need to examine every element of the labour market to make sure we are best placed to embrace technological change and shifts in labour market practices.

The review rightly identified increasing clarity in the employment status framework as one of the major challenges for public policy.

Employment status is at the core of both employment law and the tax system – it determines the rights that an individual gets, and the taxes that they and the business they work for must pay. But, as the review highlights, the current framework can often fail to provide the clarity and certainty that individuals and businesses need. This is increasingly the case for those who are working in new ways, including those working through digital platforms in the 'gig economy'.

This lack of clarity can lead to some people and businesses wasting time and energy trying to understand the rules, and it allows unscrupulous employers and individuals to game the system in order to save on employment costs and taxes. Ultimately this leaves some people with the wrong employment status, preventing them from accessing the employment rights they're entitled to, and costing the taxpayer hundreds of millions of pounds each year in lost tax and National Insurance contributions.

We therefore wholeheartedly agree with the review's conclusion that there is a compelling case for greater clarity in this area.

In addition, the level of rights and protections individuals are entitled to must keep pace with the reality of modern working relationships - remaining commensurate with, among other things, the level of independence individuals enjoy and the balance of power at work.

This consultation seeks views on a range of options and proposals for achieving these aims. It considers whether codification of the current case law would bring greater clarity and certainty, or whether alternative approaches would better achieve this. It also invites views on how the detail of the employment status tests may need to be updated to reflect modern working relationships.

As highlighted in the review, these issues are both important and complex, and so it is right to give them the careful consideration that they need to ensure that any changes do not lead to unintended outcomes. Employment status has wide reaching effects, and we are clear that the detail of any reforms would need to be consulted on. If the government decides to press ahead

with significant changes, we would of course ensure that businesses and individuals are given plenty of time to adjust and prepare.

We therefore encourage businesses, employers, trade unions, experts, and individuals to all engage openly and constructively in this consultation so that we can ensure that any changes support our goal of delivering an economy that works for everyone.

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General information

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Consultation reference: Good Work: The Taylor Review of Modern Working Practices –
Employment Status

Territorial extent:

England, Scotland and Wales

How to respond:

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Please provide responses to the email address above using the response form that can be found at www.gov.uk/government/consultations/employment-status

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If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on the [GOV.UK website](#). This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the [Government's Consultation Principles](#).

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

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Chapter 1: Introduction

- 1.1 Employment status is at the heart of both employment law and the tax system.
- 1.2 It is the foundation of employment protections in the UK. Individuals and their employers have to know which employment status applies to ensure the right protections are applied – from the National Minimum Wage and holiday pay, to unfair dismissal protection and statutory redundancy pay.
- 1.3 Employment status also affects the taxes that an individual and their employer pay. It is therefore essential in maintaining a clear and effective tax base, with individuals and employers knowing what rates of tax and National Insurance contributions (NICs) are applicable to everyone in their organisation.
- 1.4 It is not surprising, therefore, that employment status was central to the review's findings. One of the review's conclusions was that the current three tier system for rights is still relevant in the modern labour market, reflecting the broad categories of different types of employment relationship. We agree with this conclusion, and this consultation is concerned with how those statuses are defined, and where the lines between them are drawn.
- 1.5 This consultation seeks to explore in a greater level of detail how the options proposed by the review would work, both in legal terms and in relation to the realities of the modern labour market, as well as seeking to understand the potential impacts and implications of those proposals. It also considers whether there are alternative approaches that could better achieve the aims of providing individuals and businesses with greater clarity and certainty. No decisions about whether or how to reform employment status, or to aim for alignment between the tests for tax and rights, have been made. This is an important and complex issue, and careful consideration is needed to avoid any unintended consequences.
- 1.6 This consultation also considers the rules that determine who gets which rights, and who is subject to the rules that currently apply to employees, Limb (b) workers and who is subject to the (very limited) rules that currently apply to the self-employed. It does not consider the issue of reforming the rights themselves or creating new rights: that will be considered in other consultation documents. However this consultation will consider a related issue of what constitutes working time for the purposes of National Minimum Wage/National Living Wage, specifically for those working via an online platform.
- 1.7 For tax, this consultation considers the tests that define the boundary between those currently taxed as employees and those who are taxed on a self-employed basis. While the government acknowledges that some have suggested there should be no boundary at all for tax, that proposition is not considered in this document. This document does also not consider changes to tax or NICs rates or reliefs.

To Note:

- 1.8 We recognise that any work taken forward as a result of this consultation on employment status would potentially have an impact on other government policies. For example, employment status – or the concept of employee, worker and self-employed – is relevant in determining entitlement to social benefits, such as Universal Credit; and entitlement to Statutory Payments and Automatic Enrolment for pensions. We will be working across government departments to understand and mitigate any potential impacts where appropriate and ensure clarity and alignment across policies is achieved.

Chapter 2: The Review of Modern Working Practices

- 2.1. Matthew Taylor (Chief Executive of the Royal Society of Arts) led an independent review to consider how employment practices need to change in order to keep pace with modern business models. He and his review team considered the implications of new forms of work, driven by digital platforms, for employee rights and responsibilities, employer freedoms and obligations, and our existing regulatory framework surrounding employment.
- 2.2. Tax was not part of the review's terms of reference. However, as set out in its final report, the review concluded that it was simply not possible to separate out the two issues entirely.
- 2.3. We agree with the review's finding that the current employment status framework works reasonably well for most people. The majority of people are ordinary employees with no need to consider the employment status tests – they already receive the employment rights they're entitled to and pay the tax that they owe. However, we also agree with the review that, in some cases, the framework does not provide the certainty and clarity individuals and businesses need.
- 2.4. The review suggests a number of recommendations it believes could improve the employment status framework:
 - *Government should replace their minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail.*
 - *Government should retain the current three-tier approach to employment status as it remains relevant in the modern labour market, but rename as 'dependent contractors' the category of people who are eligible for worker rights but are not employees.*
 - *In developing the test for the new 'dependent contractor' status, control should be of greater importance, with less emphasis placed on the requirement to perform work personally.*
 - *In developing the new 'dependent contractor' test, renewed effort should be made to align the employment status framework with the tax status framework to ensure that differences between the two systems are reduced to an absolute minimum.*
- 2.5. This government recognises that employment status is an important and complex issue that is central to both the employment rights system and the tax system, and so it is important to consider both systems in the round. If the government were to decide that action was appropriate, we must ensure it preserved the flexibility in the labour market that, as the review recognises, works well for the UK.

Chapter 3: The current legislation and frameworks

- 3.1. This chapter considers the current employment status legislation for both rights and tax and how the frameworks have developed, including what they mean for businesses and individuals.

What is employment status?

- 3.2. There are countless different working relationships that individuals and businesses can agree to. However, these relationships have to be translated into a limited number of categories for the purposes of assigning individuals rights and protections, and for determining the tax individuals and businesses should pay.
- 3.3. Employment status is the classification of a working relationship between a person providing work and a person carrying out that work. It determines an individual's entitlement to statutory employment rights and provides the employer with a set of responsibilities. It also determines the tax regime that applies to their income and will affect the amount of tax and NICs individuals and the businesses they work for pay.
- 3.4. Employment status is not just a matter of what a written contract states; it is determined by the reality of the agreement between employer and individual taking account of all the circumstances, of which a written contract is one aspect. An individual or employer cannot create a false employment status through a fictitious contract which does not reflect the true reality of the agreement between them. Whether a contract for work is permanent, zero hours, casual, or agency does not in itself affect the general employment rights an individual is entitled to or the tax that is due, though it may give rise to additional employment rights specific to certain categories of worker.
- 3.5. Instead, employment status is based on the nature of the relationship between an individual and the person for whom services are provided. The facts of each individual case must be considered in their own right. For people who are in standard, regular employment, determining employment status is relatively straightforward as they are likely to be employees. However, those with atypical or non-standard work arrangements may face issues when trying to understand what rights they are entitled to or what level of tax to pay as it may be unclear what their employment status is.

Employment status and employment rights

- 3.6. For employment rights, there are two main employment statuses: employee and worker. However, s.230 Employment Rights Act (ERA) 1996 essentially sets out that all employees are workers, but not all workers are employees. Those workers who are not also employees are defined in s.230 (3) (b) and are referred to as Limb (b) workers. This document does not discuss the other statuses for rights such as directors or office holders.

3.7. Employees get the full suite of rights, although some significant rights (e.g. unfair dismissal) only apply after a minimum period of service. Workers are entitled to fewer rights, all of which apply from day 1. This is illustrated in table 1 below.

Table 1 – Employment Status and Associated Rights				
Statutory right/protection		Employee	Worker	Qualifying period
Worker rights	Unlawful deductions from wages	✓	✓	Day 1
	National minimum wage	✓	✓	Day 1
	Paid holidays	✓	✓	Day 1
	Right to be accompanied at a grievance/disciplinary hearing	✓	✓	Day 1
	Whistleblowing	✓	✓	Day 1
	Discrimination	✓	✓	Day 1
	Equal treatment for part-time workers	✓	✓	Day 1
	Protection from detriment for trade union membership	✓	✓	Day 1
Employee rights Day 1	Maternity leave	✓	✗	Day 1
	Adoption leave ¹	✓	✗	Day 1
	Time off various activities and duties (paid and unpaid)	✓	✗	Day 1
	Equal treatment for fixed-term contract staff	✓	✗	Day 1
	Unfair dismissal (or certain <u>automatically</u> unfair reasons) ²	✓	✗	Day 1
	Itemised pay slip	✓	✗	Day 1
Employee rights	Written particulars of employment	✓	✗	1 month
	Minimum period of statutory notice	✓	✗	1 month

¹Employees do not need 26 weeks' continuous employment for adoption leave in respect of children placed for adoption after 5 April 2015.

²For employees whose continuous employment started on or after 6 April 2012, a claim for ordinary unfair dismissal can only be brought after two years' service. But certain 'automatically unfair' dismissals can be brought from day 1, e.g. unfair dismissal connected to pregnancy/maternity does not require a qualifying period.

Medical suspension pay	✓	✗	1 month
Guaranteed pay ³	✓	✗	1 month
Shared Parental Leave and Paternity leave	✓	✗	26 weeks
Adoption pay, shared parental pay and maternity pay	✓	✗	26 weeks
Right to request flexible working	✓	✗	26 weeks
Right to request time off for study or training ⁴	✓	✗	26 weeks
Parental Leave	✓	✗	1 year
Unfair dismissal (ordinary ⁵)	✓	✗	2 years
Written reasons for dismissal	✓	✗	2 years
Statutory redundancy pay	✓	✗	2 years

- 3.8. Although self-employment or self-employed is often referred to as being an employment status, it is not defined in legislation and therefore not a statutory employment status. It is a category for those who run and manage their own business, including partners in partnerships. A genuinely self-employed person cannot be an employee or Limb (b) worker for the purpose of employment rights. Self-employed individuals generally receive no employment rights as they are in business for themselves and providing a service to a client. Clearly, an individual running their own business does not need legal protection to ensure that they treat themselves fairly.
- 3.9. It is useful to note here that a contractor or a freelancer could be either self-employed, a Limb (b) worker or an employee depending on whether they work for a client and the reality of the relationship, or if they are employed by an agency. Therefore, a contractor or freelancer could be entitled to the rights associated with the worker or employee status.

³An employee may be entitled to a Statutory Guarantee Payment, as set out in section 28 of the Employment Rights Act 1996, for up to five “workless” days in a three-month period.

⁴Right to paid time off to look for work / arrange training where notice of dismissal by redundancy has been given requires 2 years’ continuous employment.

⁵Unfair dismissal for a reason relating to capability, conduct, redundancy, a statutory duty or restriction prohibiting the employment, or some other substantial reason requires 2 years’ continuous employment, as does a claim for unfair dismissal under TUPE by reason of the transfer or a claim connected to a dismissal.

Employment status and tax

- 3.10. By contrast, for tax and NICs (i.e. the tax regime), employment status is binary: individuals are generally either employees or self-employed⁶. As mentioned above, an individual's employment status determines the tax regime that applies to their income. Like with employment rights, self-employment for tax is not a statutory employment status.
- 3.11. The main differences between the tax regimes that apply to self-employed and employment income are set out in table 2 below:

Table 2		
	Employment income	Self-employment income
Income tax	Charged on remuneration paid by the employer	Charged on the profits of the trade, profession or vocation
Employee / Self-employed NICs		
Employer NICs		N/A
Tax deductible expenses	Tax relief is available for expenses incurred wholly, exclusively and necessarily in the performance of the duties of the employment. Tax relief is also available for a number of other specified expenses, e.g. certain travel and subsistence expenses.	Tax relief is available for expenses incurred wholly and exclusively for the purposes of the trade, profession or vocation.
Losses	Some limited provision for losses is available, but in practice is rare for an individual to make a loss from an employment.	Trading losses can be offset against other income in the same year (or previous years in certain cases) or carried forward against future profits of the same trade.

Employment status in legislation

- 3.12. There are separate pieces of legislation defining employment status for employment rights, income tax, and NICs. Employment legislation, which defines employment status for the purposes of most employment rights and protections, is set out in the Employment Rights Act 1996 (see box A below).

⁶As with rights, there are some other statuses such as 'Director' and 'Office holder', but these are not discussed in this document.

BOX A: Employment Rights Legislation – Employment Rights Act 1996, section 230

‘Employee’:

- (1) *In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
- (2) *In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

‘Worker’:

- (3) *In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
 - (a) *a contract of employment, or*
 - (b) *any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.*

- 3.13. Income tax legislation defining employment status is set out in the Income Tax (Earnings and Pensions) Act (ITEPA) 2003 and NICs legislation defining an employed earner is set out in the Social Security Contributions and Benefits Act (SSCBA) 1992 (see boxes B and C below).

BOX B: Income Tax Legislation – ITEPA 2003, section 4

Employment includes:

- *Any employment under a contract of service;*
- *Any employment under a contract of apprenticeship; and*
- *Any employment in the service of the Crown.*

In addition to this, ‘office holders’ are also subject to the employment income regime, regardless of whether they would ordinarily be considered to be in employment.

BOX C: National Insurance Contributions Legislation – SSCBA 1992

Employed earner:

“a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elected office), with earnings...”

Contract of service:

“any contract of service or apprenticeship whether written or oral and whether express or implied.”

Dispute process for employment status

- 3.14. As well as separate legislation, the first two tiers of courts that determine employment status for rights and tax are also separate.
- 3.15. For employment rights, a dispute is first heard at the Employment Tribunal (ET). An ET can make a decision on employment status by looking at how the employment relationship between the person and the business works in practice. An appeal to the Employment Appeal Tribunal (EAT) can be made if the person disputing the ET decision thinks the ET has made an error in law⁷.
- 3.16. For tax, the first stage in a case would usually be HMRC deciding an individual's employment status and raising a tax assessment on that basis. That decision would generally be first appealed to the First-tier Tribunal (FTT). Decisions of the FTT may be appealed to the Upper Tribunal (UT) on a point of law if the FTT or UT gives permission.
- 3.17. If an EAT or a UT decision is disputed, the decision can be appealed to the Court of Appeal or Court of Session in Scotland. Finally, if the decision is still disputed, it can be referred to the Supreme Court – the final court of appeal for UK civil cases. Any final decision made by a court higher than the ET or FTT becomes precedent for future cases, although EAT decisions are only binding on the ET, and UT decisions will only set precedent for FTT.

Employment status case law

- 3.18. The legislation defining employee for both tax and rights ultimately relies on whether a contract of service exists. No further definition or clarity is provided in the legislation. As a result, over time the courts have interpreted the legislation and developed tests to determine an individual's employment status. These tests are contained in a number of key precedent cases, including a mixture of employment rights and tax judgments, although it should be noted that the courts may apply the case law precedents differently depending on whether the case being considered concerns employment rights or tax.
- 3.19. These precedent cases have developed over a number of decades. In particular, the 1968 case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* is often referred to as a starting point when determining whether a contract of employment or service exists, and therefore whether someone is an employee, across both tax and rights. This case established that in order for a contract of service to exist, three conditions must be present or fulfilled:
 - (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

⁷ This includes if the ET has wrongly applied a principle of law, misunderstood a statute, reached decisions that no reasonable tribunal could reach, or come to conclusions that were perverse since there was no evidence whatever to support it.

- (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
 - (iii) The other provisions of the contract are consistent with its being a contract of service.
- 3.20. The core tests established in this case are often known as the irreducible minimum. This has developed into the following main characteristics (which are discussed in more detail in chapter 5):
- Mutuality of obligation – a commitment between the two parties. An employer's obligation to provide work, or to pay for work done, and the employee's obligation to perform that work.
 - Control – whether control, or the right to control exists over the individual.
 - Personal service – requires the individual to be obliged to personally provide their services.
- 3.21. If these three characteristics are present, the courts will then consider other criteria (discussed in chapter 5) relevant to the case that are consistent with a contract of employment or service, and make a decision based on the overall picture of the individual case. There is no formula that the courts will use to determine if the test is met. The courts or tribunals will consider the reality of the working relationship and will ignore written documentation if it does not reflect this.

Definition of workers for employment rights

- 3.22. The definition of worker set out in s.230 of the Employment Rights Act 1996, covers both employees and Limb (b) workers – who receive what are known as day 1 rights, i.e. rights the individual is entitled to from the first day of employment. Limb (b) workers are not entitled to the full employee rights including those that require a qualifying period, for example, the right to claim unfair dismissal, which generally requires a two year period of continuous service.
- 3.23. A Limb (b) worker must be working under any other contract (other than a contract of employment) where the person agrees to do the work personally, and the relationship between the parties to the contract is not akin to a client or customer of any profession or business relationship. As with the definition of employee there must be a contract and personal service. The third requirement is for the individual to not be carrying on a business or profession, and that the other party to the contract is not a client or customer of that profession or business. If the individual is deemed to be carrying on their own business, they are self-employed and not a Limb (b) worker.
- 3.24. However, when the courts are considering whether an individual is a Limb (b) worker, they are in effect considering a less strict version of the test, or lower benchmark, to determine whether an individual is an employee: a contract to personally do work. This requires the court to consider similar factors as determining whether a contract of employment exists – personal service, control, mutuality of obligation and any other relevant factors. The difference is that for a Limb (b) worker, the pass mark needed to establish a contract to personally do work is lower than that which is required to establish a contract of employment.

- 3.25. The blurred line or boundary between an employee and a Limb (b) worker is illustrated by the 2001 case of *Byrne Brothers (Formwork) Ltd v Baird & Others*. The judgment stated that drawing the distinction between a Limb (b) worker and the self-employed involves “all or most of the same considerations as arise in drawing the distinction between a contract of service (employment) and a contract for services”, but with a lower “pass mark”. In other words, the same factors are considered when determining if someone is an employee and a worker, but with a higher threshold for an employee. The weighting of each factor will vary depending on the relationship in question and is a judgement based on the whole picture.

To Note:

- 3.26. The case law for employment status evolves constantly as new cases and appeals are heard and new precedents are set. This is particularly the case currently for the definition of Limb (b) worker, where, at the time of publication of this paper, a number of high profile cases are under appeal. As such, the government will take into account any significant changes in the case law precedents as work in this area progresses.

Chapter 4: Issues with the current employment status regimes

- 4.1. In the vast majority of cases, such as those employed in a standard, regular way, determining employment status is relatively straight forward. Where an individual's employment status is in dispute it can only be resolved by a court, with legislation playing an underpinning role. This approach allows the courts to be flexible and adapt to changes in the labour market. The coalition government's 2015 Employment Status Review and the Review of Modern Working Practices both considered the employment law framework in detail and concluded it has adapted well over time to the challenges placed before it, while some commentators also feel that aspects of the current system work well.
- 4.2. However, as the labour market has developed and evolved, the application of employment status to new ways of working has been less clear for more people and, for rights in particular, the boundary has blurred between a worker and someone who is self-employed. This is the key issue the review raised with regard to greater clarity in the law. We also recognise that it is not helpful that the boundary is blurred between an employee and a Limb (b) worker.
- 4.3. In this chapter we want to explore the issues with the current employment status regime that stakeholders have raised and whether the same issues apply to both rights and tax. Drawing on research, reviews, case law, engagement with stakeholders and commentators, the key issues for employment status can be summarised as:

Open to interpretation

- Employment status is dependent on the interpretation and application of case law against the specific facts of each case, making it difficult for some individuals to predict their status.
- This ambiguity in the rules can be used by unscrupulous employers to justify miscategorising their employees or workers as self-employed for their own financial gain (e.g. paying less NICs).

Complexity

- For some, particularly those in atypical work, employment status can be a complex issue – requiring them to interpret and apply tests from several case law precedents.
- An individual's employment status can be inconsistent between employment rights and tax.

- There is a lack of clarity around the boundary between employee and Limb (b) worker employment statuses for rights, as well as between the Limb (b) worker and self-employed categories.

Difficulties resolving disputes

- Only a court or employment tribunal can definitively decide someone's employment status where a dispute arises.
- HMRC enforcement of employment status for tax purposes can be costly and time consuming for both HMRC and the businesses involved due to the fact-specific nature of the tests.

Open to interpretation

- 4.4. As described in Chapter 3, determining employment status requires the tests set out in case law to be applied to the facts of each individual case. These tests are generally intuitive when applied to traditional employment, but can be more difficult to apply to atypical or non-standard work arrangements, for example, some types of casual work.
- 4.5. The UK labour market has always included casual and flexible work arrangements. For example, zero hours contracts are not a new phenomenon but have previously existed as 'on call' contracts or 'casual work'. However, the nature of some of these arrangements has changed. In particular, with the emergence of the gig economy, where digitalisation has been used to allocate work, there are individuals whose employment statuses are not straightforward to determine because doing so requires tests developed decades ago to be applied to these new arrangements.
- 4.6. These tests are open to interpretation, and commentators such as the Office for Tax Simplification (OTS)⁸ and the Institute of Chartered Accountants in England and Wales (ICAEW)⁹ have criticised this minimalistic approach to legislation that relies on interpreting and applying case law.
- 4.7. This also makes it easier for unscrupulous employers to miscategorise their workers and employees as self-employed. As highlighted by the review, both the cost to business in providing employment rights and the requirement to pay employer NICs generally make it cheaper to engage individuals on a self-employed basis, rather than as an employee or as a Limb (b) worker. These incentives can cause businesses to attempt to design the terms on which they engage their workforce in such a way that they can argue that they are in fact self-employed, in order to reduce administrative burdens and costs.
- 4.8. As well as denying the individuals involved the employment rights they should be entitled to, these practices also affect UK taxpayers more generally, as

⁸ [OTS Employment Status Report 2015](#)

⁹ [Future world of work and rights of workers - written evidence from ICAEW](#)

miscategorisation of employees as self-employed for tax purposes costs the Exchequer hundreds of millions of pounds in lost revenue every year.

Complexity

- 4.9. The nature of the rules and the need to apply potentially several different case law precedents to the facts of each case can also be a barrier to individuals understanding their employment status. Indeed, the Low Income Tax Reform Group (LITRG)¹⁰ highlight that this complexity means individuals are “often not aware of their employment status.” The Law Society¹¹ has also pointed out the complexity of the current system, saying that to determine employment status “requires the ability to understand complex legislation, which is spread over many Acts, and be aware of a mountain of case law.”
- 4.10. This complexity is compounded by the fact that, even if an individual knows their employment status for rights, that does not necessarily tell them what their employment status for tax should be, or vice versa. For example, even in cases where an individual has been determined to be an employee for tax by the courts, that decision does not necessarily force their employer to provide them with employment rights. The review concluded that this was a “source of confusion for organisations, individuals and the wider public.”
- 4.11. Additionally, it is not always easy to distinguish between Limb (b) workers and employees for employment rights purposes, creating further confusion for individuals and businesses.

Difficulties resolving disputes

- 4.12. For those facing disputes about their employment status, the only way to obtain a definitive decision is through the courts. In addition, the outcome of such a court case will only be binding on that case, not to other individuals working for the same employer under a similar arrangement.
- 4.13. From a tax perspective, to combat miscategorisation of employment status – both intentional and inadvertent – HMRC carry out enforcement activity to ensure correct employment status determinations are being reached. However, as outlined above, this requires case law judgements to be applied to the facts of each individual case. This can make resolving employment status cases complex and time consuming, increasing costs for individuals, businesses and the taxpayer generally, especially if the case is later taken to tribunal or the courts.

¹⁰[Independent Review of Employment Practices in the Modern Economy - LITRG response](#)

¹¹[Independent Review of Employment Practices in the Modern Economy - Law Society Response](#)

Q1: Do you agree that the points discussed in this chapter are the main issues with the current employment status system? Are there other issues that should be taken into account?

Chapter 5: Legislating for the current employment status tests

- 5.1. As discussed in the previous chapter, a number of the issues with the current system are rooted in the fact that employment status is based on case law tests.
- 5.2. This chapter will discuss the current criteria and factors that the courts consider when determining if someone is an employee, and will explore the possibility of legislating the main principles of the current tests. We consider alternative approaches, both legislative and non-legislative, in chapter 6. The worker status is then considered in chapter 7.

Legislative change

- 5.3. The current employment status frameworks for employment rights and tax are based on a number of criteria or factors that have developed over time. As the way businesses engage labour or take on staff changes and evolves, case law develops and the courts consider the relevant factors of each case; this creates the flexibility in the current system. However, despite there being some consistency across cases, there is no comprehensive code, tick list or formula to help an individual or employer to determine their status. This can create uncertainty.
- 5.4. The review recommended that “government should replace the minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail.” The government wants to seek views on whether this is the right approach, how this might work in practice, what the ‘main principles’ would be, and whether it would achieve the intended aim.
- 5.5. The aim of this approach would be to provide clarity and greater certainty to individuals and businesses by placing the employment status tests developed by the courts into primary legislation. In the remainder of the document we refer to this approach as codification. Codification could be achieved in a number of ways - from simply transposing the case law directly into primary legislation, or transposing only selected points of the case law.
- 5.6. As mentioned above, the current case law-based framework allows the courts to be flexible when applying the employment status tests to the facts of each case they consider. Therefore, the benefits of any legislative approach would have to be considered against any reduction in flexibility and the risk of making it easier to get around the legislation.

Q2: Would codification of the main principles – discussed in chapter 3 – strike the right balance between certainty and flexibility for individuals and businesses if they were put into legislation? Why / Why not?

Q3: What level of codification do you think would best achieve greater clarity and transparency on employment status for i) individuals and ii) businesses – full codification of the case law, or an alternative way?

Q4: Is codification relevant for both rights and/or tax?

Principles for codification into primary legislation

- 5.7. Legislating, or codifying, the main principles of the current employment status framework requires us to identify what the main principles are, what they mean and how they might be legislated for in primary legislation.
- 5.8. It is also important to consider whether these are the right principles for the modern labour market, or if they need to be amended in any way to ensure the right balance between protections and flexibility, as well as providing greater clarity and certainty. If government decided to codify the main principles into primary legislation, we would also need to consider the level of detail and how to make use of secondary legislation in order to keep legislation relevant.
- 5.9. As we have previously seen, when determining whether an individual is an employee the courts have considered that there is an irreducible minimum of factors which are a key consideration for determining employment status in tax and rights cases. Before a court considers whether the other provisions of a contract of service are present, it will look at three main factors:
- (i) Mutuality of obligation
 - (ii) Personal service
 - (iii) Control

Q5: Should the key factors in the irreducible minimum be the main principles codified into primary legislation?

Mutuality of obligation

- 5.10. The broad concept is that mutuality of obligation exists if the employer has an obligation to provide and pay for work and the individual has an obligation to carry out that work. Mutuality of obligation can be considered in different ways, depending on the circumstances.
- 5.11. As outlined in the 2015 OTS Employment Status Report¹², there is ambiguity as to what mutuality of obligation actually means. The Report also outlines how mutuality of obligation can give a different result depending on whether it is being considered for tax or rights purposes.

¹²[OTS Employment Status Report 2015](#)

- 5.12. For an individual to be deemed an employee for some employment rights, continuity of service needs to be established as this is required in order to be entitled to some rights, such as statutory redundancy pay, where a period of continuous employment must be accrued to access the right. This means that the courts will consider the existence of mutuality of obligation to provide and to perform work when the individual isn't working between contracts, in order to establish whether a 'global' or umbrella contract exists across the whole time the individual has been working for the employer.
- 5.13. For tax, if mutuality of obligation exists, this simply establishes whether a contract exists; the courts will then need to establish if this is a contract of service through the existence of other factors. Generally, if an individual is paid for services that are personally performed by them, mutuality of obligation exists. This means that tax tribunals will usually focus on a single assignment or payment, as they don't generally need to look at what happens between contracts.
- 5.14. However, for both tax and rights it can be difficult to be sure of mutuality of obligation in atypical or casual working arrangements where there is no obligation to accept work or to have work offered. This raises the question as to whether this is still an important factor that should be considered in today's modern labour market.

Q6: What does mutuality of obligation mean in the modern labour market?

Q7: Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?

Q8: If so, how could the concept of mutuality of obligation be set out in legislation?

Personal service

- 5.15. Personal service is broadly where the employer requires the individual to undertake the work themselves. The first criteria of the Ready Mixed Concrete case implies that for a contract of service to exist, mutuality of obligation and personal service must both be present.
- 5.16. The courts have established that where an individual is able to send someone else to perform their duties, this will be inconsistent with personal service, except in limited circumstances. Therefore, a limited power of delegation or substitution does not necessarily prevent personal service. However, a genuinely unlimited right to delegate the work to someone else will most likely mean that the individual is not an employee.
- 5.17. We have seen evidence that some businesses deliberately add in substitution clauses in individuals' contracts to make it seem as if personal service is not present, even though in reality the clauses cannot be exercised. In addition, some employers unwittingly add inappropriate substitution clauses into contracts as it is commonplace in model or template contracts available. Without taking the matter to a court these mismatches between the contract and the working practices are difficult to resolve.

Q9: What does personal service mean in the modern labour market?

Q10: Should personal service still be relevant to determine an employee's entitlement to full employment rights?

Q11: If so, how could the concept of personal service be set out in legislation?

Control

- 5.18. Historically, the test to determine the level of control of the employer over the individual was based around supervision of the work. This is relatively simple to establish when the individual is performing basic tasks and is in a regular, standard work arrangement. However, as the 2015 OTS Employment Status Report¹³ acknowledges, “where the individual is highly skilled or expert, the engager may not be able to control ‘how’ the work is done, but may still be able to control what, where and when this may tip the balance.”
- 5.19. Whether control is present in a working arrangement is increasingly shifting away from whether there is day-to-day supervision over the worker, and now tends to focus more on the right to control, even if that right is not exercised.

Q12: What does control mean in the modern labour market?

Q13: Should control still be relevant to determine an employee's entitlement to full employment rights?

Q14: If so, how can the concept of control be set out in legislation?

Other provisions

- 5.20. As well as the irreducible minimum tests of mutuality of obligation, personal service and control, the courts are also able to consider other factors that pertain to each individual case to determine whether a contract of service exists.
- 5.21. As already discussed, there is no tick-list or prescribed list of factors that the courts look at when considering this wider picture. However, a number of the factors that the courts may consider are explored below.
- 5.22. One indication of self-employment in many cases can be where financial risk exists. In general terms, the greater the financial risk (e.g. purchasing assets to use, undertaking own training etc.) the stronger the pointer towards self-employment. The absence of financial risk doesn't automatically mean the person is an employee, but its presence may point towards self-employment.

¹³[OTS Employment Status Report 2015](#)

Q15: Should financial risk be included in legislation when determining if someone is an employee?

5.23. Another indication that someone is an employee is whether they are ‘part and parcel of the organisation’ or an ‘integral part of the business’. This can be present where, for example, the individual has a manager in the business, they take part in work allocation, or are able to advise and assist other members of a team in the business.

Q16: Should ‘part and parcel’ or ‘integral part’ of the business be included in legislation when determining if someone is an employee?

5.24. A further consideration when determining whether a contract of service or employment exists is the provision of equipment. While not necessarily decisive on its own, evidence that the engager provides the equipment necessary to do the job can be a pointer towards employment. For example, in *R W Proffitt Ltd v Secretary of State for Social Security*, television salesmen were found to be employed and one important factor in this decision was that they were supplied with cars by the employer.

Q17: Should the provision of equipment be included in legislation when determining if someone is an employee?

5.25. Finally, in some cases the parties’ own characterisation of the relationship, or the ‘intention’, can be important. What the parties consider their relationship to be is not conclusive; it is the reality of the relationship that matters. However, the intention can be decisive where the relationship is ambiguous and where the other factors are neutral.

Q18: Should ‘intention’ be included in legislation when determining if someone is an employee in uncertain cases?

Q19: Are there any other factors that should be included in primary legislation when determining if someone is an employee? And what are the benefits or risks of doing so?

Secondary legislation

5.26. The review also suggested that in order to maintain a relevant legislative framework able to adapt to future changes – for example as technology continues to develop, or as some employers develop new ways to attempt to avoid costs and their responsibilities – secondary legislation could play a role.

5.27. The review proposed that, if primary legislation were to set out the key principles, secondary legislation could set out in more detail the factors that demonstrate an individual either meets or does not meet these principles. This might include examples of when a substitution clause may or may not be reasonable, or what control could look like in a modern labour market.

- 5.28. The nature of secondary legislation means it can be amended or adapted without an Act of Parliament – as government can change secondary legislation through the Statutory Instrument process. However, we fully expect that changes to employment status legislation, whether in primary or secondary legislation, would require scrutiny by Parliament.
- 5.29. If codification were pursued as an option the government would consult further on the detail of any secondary legislation.

Q20: If government decided to codify the main principles in primary legislation, would secondary legislation: i) be required to provide further detail on top of the main principles; and ii) provide sufficient flexibility to adapt to future changes in working practices?

Q21: Would the benefits of this approach be outweighed by the risk of individuals and businesses potentially needing to familiarise themselves with frequent changes to legislation?

Chapter 6: A better employment status test?

- 6.1. Although the review included the recommendation that the government should broadly put the current employment status tests into legislation, a number of commentators have suggested that the current employment status framework or high level principles used by the courts could be refined into a simpler, clearer, more coherent test.
- 6.2. The OTS¹⁴ state, in their 2015 Employment Status Report, that a statutory employment test “that could apply ‘across the board’ – especially to employment rights – is very attractive. It would be transparent: the rules would be known and understood.” This recommendation has also been backed by the Social Market Foundation¹⁵ who believes government should look to establish “a new legal definition of employment status which is simpler and easier to enforce.”
- 6.3. The government recognises that it would clearly be beneficial to have a system that can be understood and applied by all; a well-designed statutory test or provision could make decisions around employment status easier for businesses and individuals, as well as being easier to enforce. However, to realise these benefits any new test would either need to be simpler or more precise than the current case law tests.
- 6.4. This approach would involve trade-offs. The complexity of the current framework provides the nuance that allows it to apply to a vast number of different circumstances, which are inevitable in the labour market, while the case law approach gives the courts the flexibility to adapt to changing working practices over time. Nevertheless, given the potential benefits the government considers this to be an approach worth exploring.

A more precise test

- 6.5. There are two ways in which a test could be more precise:
 - (i) It could have more precise criteria, i.e. based around more objective criteria such as the length of engagement; or
 - (ii) It could have a more precise structure, i.e. based around a clear order, hierarchy, or weighting of the criteria.
- 6.6. The government would like to seek views on the types of criteria that may be suitable for such a test, and the way in which those criteria could be weighted or structured. For example, some types of criteria which could be used include:
 - The length of time an individual works for a specific engager, with an engagement over a certain length being automatically classed as an employment relationship. This approach is currently used in Greece and the Netherlands.

¹⁴[OTS Employment Status Report 2015](#)

¹⁵<http://www.smf.co.uk/wp-content/uploads/2017/06/5600-SMF-PRISM-Report-WEB-AW-FINAL.pdf>

- The percentage of an individual's income that comes from one engager. If an individual received more than a certain proportion of income from one engager, the relationship could be considered an employment relationship.
- Where the individual carries out the work. For example, if the individual is required to carry out at least a certain percentage of the work on the premises of the business, this could be taken as an indication of an employment relationship. Tests similar to this can be seen for example in the USA's "ABC" test (see box E), where the individual has to prove that the work is performed outside the company's place of business in order to show that contractor status applies.

Q22: Should a statutory employment status test use objective criteria rather than the existing tests? What objective criteria could be suitable for this type of test?

- 6.7. A statutory test could be structured in a number of ways, for example with a hierarchy of criteria or a points based test. There are a number of existing tests and international comparisons which provide examples of how this could be done, which vary in complexity. One example of this is the German social security test (see box D below).

BOX D: German social security employment status test:

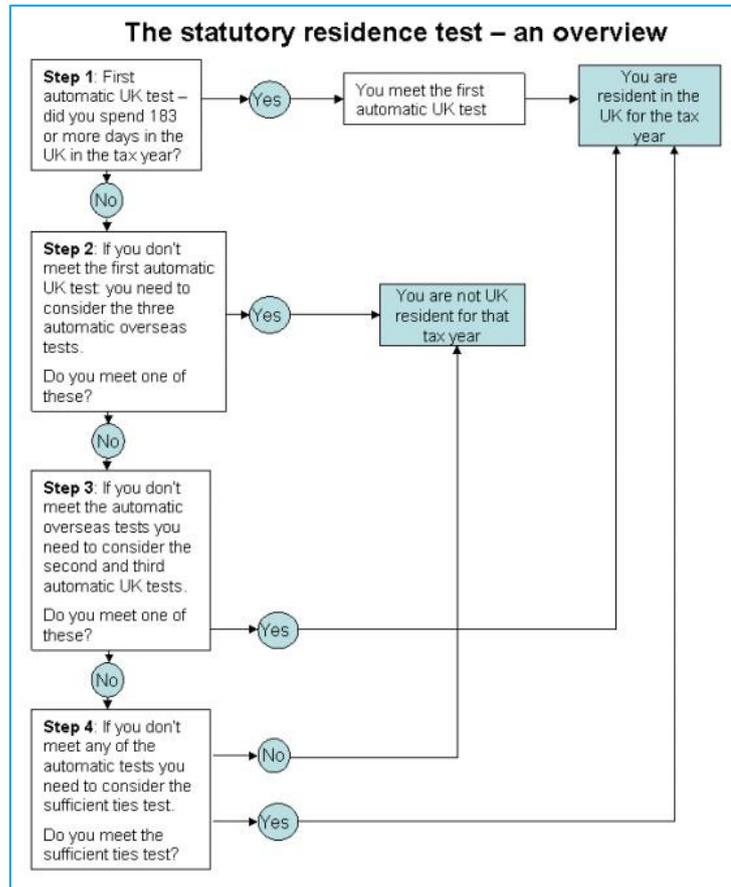
In 1999 Germany introduced a test for self-employment for social security purposes. This test combines a range of criteria, with the requirement for a minimum number of the conditions to apply. If an individual fulfils three out of five of the following conditions, they would be classed as an employee for social security purposes:

1. Does not employ other workers at wages above DEM 630 per month (including family members);
2. Depends on one employer for a long time;
3. Is employed with tasks for which the employer usually employs dependent workers;
4. Does not act as an entrepreneur;
5. Is employed with the same tasks by the same employer for whom he or she previously worked as an employee.

- 6.8. The Statutory Residence Test¹⁶ (SRT) for tax is another example of a test which incorporates a range of criteria. It is more complex than the German social security test, including both a simple test based around length of time spent in the UK and the more complex automatic overseas and UK tests, as well as a sufficient ties test. The

¹⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/547118/160803_RDR3_August2016_v2_0final_078500.pdf

tests sit in a hierarchy, so that the more complex tests are only considered if the result is not determined by the simple test around length of time spent in the UK. An overview of the SRT can be seen below:



Q23: What is your experience of other tests, such as the SRT? What works well, and what are their drawbacks?

Q24: How could a new statutory employment status test be structured?

A less complex employment status test

- 6.9. Another approach would be to create a less complex test by reducing the number of factors to consider. This approach would still be based on criteria that could be open to interpretation like the current test, for example, whether the individual is working under the control of their engager. However, narrowing down the number of factors that need to be considered would mean businesses and individuals would be able to focus on a smaller number of criteria when deciding employment status. Several other countries take this approach for employment status, including the USA's ABC test and Germany's "3 out of 5" test.
- 6.10. In the UK, a simplified employment status test is already used as one of the criteria to determine whether individuals working through agencies should be taxed as employees. That legislation relies on the test of whether the individual is working under "supervision, direction or control" (SDC), rather than the full employment status test.

BOX E: The ABC test for contractors in the USA

The ABC test is different to an ordinary employment status test, in that it begins with the presumption that a contractor is an employee, and requires that the company or contractor proves that certain conditions apply, in order to be classed as a contractor. The tests are open to interpretation, but limited to three main criteria:

- (a) The contractor is free from the company's control in performing the services;
- (b) The contractor performs work outside the usual course of the company's business or outside the company's place of business;
- (c) The contractor is engaged in an independently established business.

Q25: What is your experience of tests, such as the Agency Legislation tests for tax, and how these have worked in practice? What works well about these tests in practice, and what are their drawbacks?

Q26: Should a new employment status test be a less complex version of the current framework?

- 6.11. One concern that has been raised by some commentators is that creating a simplistic test may create perverse incentives for businesses to restructure their workforces in order to achieve specific outcomes from the test. It could also create cliff edges around the boundaries, increasing incentives to use some business models and reducing the attractiveness of others.

Q27: Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?

Non-legislative approaches

- 6.12. As mentioned in chapter 5, legislative change is not necessarily the only way to provide greater clarity and certainty on employment status. Instead, these aims might be achieved by helping individuals and businesses understand the current rules more easily.
- 6.13. One proposal made by the review was to create an online tool that provides individuals with an indication of their employment status for rights, similar to the existing Check Employment Status for Tax tool.
- 6.14. As set out in the government's response to the review, we agree in principle with this proposal. However, an online tool could either complement, or be an alternative to legislative change on employment status. Therefore the government will consider this proposal further once we have decided whether legislative change is the right approach.

Q28: Are there alternative ways, rather than legislative change, that would better achieve greater clarity and certainty for the employment status regimes (for example, an online tool)?

Should tax liabilities still depend on being an employee?

- 6.15. Many of the ideas in this chapter would move the definition of employee away from the traditional reliance on there being a contract of service, essentially redefining what it means to be an employee in the 21st century. However, for completeness, it is also useful to consider whether someone's tax liabilities should still depend on whether they are an employee at all, or whether there are other tests that should determine which of the two current tax regimes (set out in table 2) should apply.
- 6.16. The fact that employees are subject to a different tax regime to the self-employed has been part of the tax system in some form for over 200 years. Both the courts and other commentators have pointed out that the concept of an employee has changed significantly in that time, and, in most cases, is no longer the same master and servant relationship that it was at the turn of the 19th century.
- 6.17. Also, the differences between the two regimes have evolved organically over time, and a number of commentators, including the Office for Budget Responsibility, have highlighted that those differences now come at a significant cost to the public finances.
- 6.18. In addition, several commentators in their submissions to the review, including the Federation of Small Businesses, have pointed out that the self-employed in particular are a very diverse group. Others, such as the Institute for Fiscal Studies have argued that this means the tax advantages which currently apply to the self-employed are poorly targeted, implying that the specific tax treatments (e.g. expenses regimes, class of NICs) should be based on something other than whether an individual is an employee or self-employed.

- 6.19. Indeed, the review recommends that the tax system should be changed so that the tax regime that currently applies to employees should instead apply to individuals who are either an employee or a dependent contractor for rights.
- 6.20. However, it should be noted that most submissions to the review suggested that the government should look for ways to reform or clarify employment status, rather than replacing it completely. For example, the Confederation of British Industry¹⁷ (CBI) said that “The UK’s employment status framework has served businesses and workers well”.
- 6.21. Moving away from a test based on whether someone is an employee would obviously be a fundamental change that would have very wide reaching implications for the tax system. At the same time, we would not truly be being open minded in our approach if we restricted ourselves to just clarifying or revising the definition of employee. Therefore, for completeness, we are interested in views in this area, while recognising the significant challenges that this approach would pose and respecting the clear commitments the government has made. In particular, the government has been clear that there are no plans to make any changes to Class 4 NICs.

Q29: Given the current differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than when an individual is an employee?

¹⁷[Independent Review of Employment Practices in the Modern Economy - CBI response](#)

Chapter 7: The worker employment status for employment rights

- 7.1. This chapter concerns the worker employment status for rights that does not apply to tax.
- 7.2. Here we will consider and seek views on the current definition of the worker status and explore the specific recommendations in the review that relate to this, including that of renaming the worker status (or Limb (b) status) to 'dependent contractor'.

Is the worker status still relevant for employment rights?

- 7.3. The review concluded that the current three tier approach of the employment status framework for rights, which includes the worker status, is still relevant in the modern labour market. As mentioned in Chapter 1, we agree with this assessment.
- 7.4. The majority of the labour force is made up of employees in regular, standard, permanent work arrangements. Generally, people in this type of work arrangement do not dispute their employment status, but may dispute their individual rights, e.g. against unfair dismissal. Although a tribunal will need to determine whether the individual is an employee to ensure they can consider the right being disputed, it is relatively straightforward for a tribunal to do so for an individual in a regular, standard job.
- 7.5. The review has identified the blurred line between the worker status and being self-employed as the key issue with employment status for rights. This is where the majority of disputes about employment status lie and is where the lack of clarity and certainty is most evident. It is the government's view that those working arrangements that are based on a more casual and flexible relationship, regardless of its size in relation to the labour market as a whole, should also benefit from greater certainty about their employment protections.
- 7.6. The emergence of the gig economy, which many individuals value for the flexibility it offers, highlights why the worker status remains relevant. It is important that individuals who work in flexible and casual work arrangements can still benefit from the Day 1 protections such as NMW, holiday pay, leave etc. where appropriate (which they currently should if they are a Limb (b) worker). As technology develops and the nature of working arrangements evolve we want to ensure all those in the labour market receive the protections they deserve.

Q30: Do you agree with the review's conclusion that an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?

Is the definition structured in the right way?

- 7.7. As set out in chapter 3, the worker definition in legislation covers employees and Limb (b) workers. The review found the fact that all employees are workers confusing and that this may be an issue that is contributing to the lack of clarity.
- 7.8. Recent tribunal cases and representations made to government and to the review have indicated the key issue is where individuals are misclassified as self-employed when in reality they are Limb (b) workers. As the review notes, it is the line between whether someone is a Limb (b) worker or is self-employed that is disputed the most, rather than the distinction between employees and Limb (b) workers.
- 7.9. One option government could consider might be whether the worker definition in legislation could benefit from drawing a clearer line between the Limb (b) worker category and both the employee and self-employed categories.

Q31: Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employees and Limb (b) workers?

Q32: If so, should the definition of worker be changed to encompass only Limb (b) workers?

Q33: If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?

Are the tests for the worker employment status right?

- 7.10. As we are considering the employment status framework as a whole, we want to take the opportunity to seek your views not only on whether the worker definition in legislation can have a clearer boundary between the worker and self-employed line, but also to consider the boundary between the worker and employee status. However, in considering this, we would not want any action to have an unintentional impact on the employee status. Employee status applies to the majority of the labour market and works well – we do not want change this.

Q34: Do you agree that the government should set a clearer boundary between the employee and worker statuses?

Q35: If you agree that the boundary between the employee and worker statuses should be made clearer:

- i. Should the criteria to determine worker status be the same as the criteria to determine the employee status, but with a lower threshold or pass mark? If so, how could this be set out in legislation?
- ii. Should the criteria to determine worker status be a selected number of the criteria that is used to determine employee status (i.e. a subset of the employee criteria)? If so, how could this be set out in legislation?
- iii. Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation?

Q36: What might the consequences of these approaches be?

The tests for worker

- 7.11. Here we will consider each test developed by the courts to determine employment status, whether they are relevant for the worker status, and if so whether they need to be adapted to reflect the reality of the modern labour market.
- 7.12. As discussed earlier, the definition of worker covers employees and Limb (b) workers. This means that all employees are workers but not all workers are employees. The definition of Limb (b) worker is someone who:
- Works under a contract;
 - Provides a personal service; and
 - Is not carrying out a business or profession and the other party to the contract is not a client or customer of that profession or business.
- 7.13. On the face of it the definition of worker in legislation provides more detail than for an employee. However, in practice the approach to determine a worker is essentially the same as for an employee, but with a lower bar.

Mutuality of obligation

- 7.14. Chapter 5 explains the principle of mutuality of obligation in relation to an employee.
- 7.15. Some case law has indicated that mutuality of obligation is a necessary element in assessing whether a person is a Limb (b) worker, as well as an employee, in establishing whether there is a contract. It has also been held that the lack of any continuing mutual obligations to provide and perform work during periods when an individual is not working may also be a factor in determining whether a person is a Limb (b) worker or self-employed. However, there has been a growing commentary on

whether mutuality of obligation is actually relevant to determine worker status. A number of commentators have argued that it is not necessary for this principle to be applied to workers as there is no need to demonstrate continuity of service. It is only necessary to demonstrate mutuality or a continuous relationship for an employee.

Q37: What does mutuality of obligation mean in the modern labour market for a worker?

Q38: Should mutuality of obligation still be relevant to determine worker status?

Q39: If so, how can the concept of mutuality of obligation be set out in legislation?

Personal service

- 7.16. Personal service is discussed in more detail in Chapter 5. One of the key issues raised regarding personal service in the context of worker status is that of substitution. Where personal service is not present, an individual will not be a worker, regardless of how strongly other factors, such as control, are present. The review concluded that too much weight is given to personal service in the current definition, and suggested that “less emphasis should be placed on the requirement to perform work personally” in order to determine worker status.
- 7.17. We know there are instances where employers have inserted substitution clauses into contracts to give the impression to the individual that they are self-employed, even though in practice the clauses may be impossible to invoke. However, only a court can decide whether the right to substitution is unfettered or unrestricted when determining status and will consider the reality of the relationship.
- 7.18. In general, an unfettered right means the right exists without any restrictions or criteria as to how and when it can be used. This is likely to be inconsistent with personal service and which would mean the individual will not be a worker.
- 7.19. If the right of substitution states that the replacement to carry out the work can only come, for example, from a list of people provided by the employer, then the substitution right is fettered or limited. Depending on the circumstances this may or may not be consistent with personal service. For example, an arbitrary restriction by the employer will usually point towards personal service, whereas a requirement such as having appropriate security clearances usually would not.
- 7.20. The Court of Appeal in *Pimlico Plumbers Limited, Charlie Mullins v Gary Smith* summarised the five applicable principles to the requirement for personal service, which are set out in box F.

Q40: What does personal service mean in the modern labour market for a worker?

Q41: Should personal service still be a factor to determine worker status?

Q42: Do you agree with the review’s conclusion that the worker definition should place less emphasis on personal service?

BOX F: Outline of 5 factors for personal service from Pimlico Plumbers Limited v Charlie Mullins and Gary Smith

1. An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.
2. A conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the extent to which the right of substitution is limited or occasional.
3. A right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance.
4. A right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance.
5. A right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.

Q43: Should we consider clarifying in legislation what personal service encompasses?

Q44: Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?

Control

- 7.21. Chapter 5 explains the principle of control.
- 7.22. When considering worker status or whether the individual is self-employed, the issue of control is relevant in determining whether the working relationship is like a relationship between a client and customer.
- 7.23. The review suggested that the worker status (or dependent contractor if the recommendation to rename the status is taken forward), should place greater importance on control.
- 7.24. We have already discussed how the control test applies to employees in chapter 5. However, we consider separately here what factors encompass control for a worker. Recent court cases to determine whether an individual is a worker or self-employed have shown that there are specific factors that are relevant, including:
 - Who assigns the work
 - Whether the individual must be signed up to an app to get work assigned
 - Who negotiates the rate of pay for each assignment
 - Who provides the equipment to help complete the task
 - Whether the individual has to wear a uniform or use specific branding

Q45: Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?

Q46: What does control mean in the modern labour market for a worker?

Q47: Should control still be relevant to determine worker status?

Q48: If so, how can the concept of control be set out in legislation?

In business on their own account

7.25. The courts, when considering who is a worker, also consider whether the individual is in business on their own account. If the courts find the individual does not meet this test then they are a worker.

7.26. We could consider providing this definition in legislation. However, a balance would need to be found to ensure a definition is not so prescriptive that it encourages manipulation or gaming of the system. Factors that indicate an individual is in a business on their own account might include:

- Who is responsible for the success or failure of their business and can the individual make a loss or a profit?
- Who can decide what work they do and when, where or how to do it?
- Can someone else be hired to carry out the work?
- Who is responsible for fixing any unsatisfactory work in their own time?
- Can the individual negotiate a price for their work? Or is it fixed by the work provider?
- Does the individual use their own money to: buy business assets, cover running costs, and provide tools and equipment for their work?
- Can they work for more than one client?
- Who carries the financial risk?

Q49: Do you consider that any factors, other than those listed above, for 'in business in their own account' should be used for determining worker status?

Q50: Do you consider that an individual being in business on their own account should be reflected in legislation to determine worker status? If so, how could this be defined?

Q51: Are there any other factors (other than those set out above for all the different tests) that should be considered when determining if someone is a worker?

Renaming the Limb (b) worker category

- 7.27. The review suggested renaming the Limb (b) category of the worker employment status to dependent contractor. This section only discusses the potential benefits or issues of changing the name of this status for employment rights.
- 7.28. The review felt that renaming the worker status – whether to ‘dependent contractor’ or another term – would make the status clearer in some way to individuals and business and therefore help achieve the overall aim of clarity and certainty about employment status
- 7.29. As set out in Chapter 1, we believe that the three tier system for rights remains appropriate, and so we have not considered making ‘dependent contractor’ an additional status.

Q52: The review has suggested there would be a benefit to renaming the Limb (b) worker category to ‘dependent contractor’? Do you agree? Why / Why not?

Chapter 8: Defining working time

- 8.1. New business and employment models - and the opportunities they bring – are crucial to the future competitiveness and growth of the UK economy. Government must make sure it addresses changes in the world of work to ensure the rights and protections framework is fair for everyone.
- 8.2. As outlined in Chapter 2, the review considered the implications of new forms of work on our existing employment regulatory framework. An example of a new employment model that has tested employment law is app-based or online digital platform working, and specifically the boundary between the ‘worker’ employment status and the self-employed category. App-based working has been novel in its approach; focusing on an on-demand, remote relationship between the app-operator who allocates the work, and individual who carries out the work.
- 8.3. A key concern raised around new employment models is whether the individuals carrying out such work are genuinely self-employed when they have been classified as such by the engaging business. This has been discussed in more detail particularly in Chapter 7 on the worker employment status for rights.
- 8.4. We want to ensure that the legal framework is relevant and effective in relation to business models which engage workers through app-based or online platforms. A business engaging workers (and not genuinely self-employed people) would be responsible for the payment of the National Minimum Wage and National Living Wage (NMW/NLW) and provision of other worker rights. The government is committed to ensuring that all workers are paid the NMW/NLW for every hour that they work. We do not wish to consider any changes to that.
- 8.5. However, in order to apply the principle of the NMW/NLW to innovative business models, it is necessary to consider the concept of ‘working time’: measuring ‘working time’ for NMW/NLW purposes can become more complex in this context. We want to ensure that workers in these environments who are due the NMW/NLW are paid it, and that the rules are simple and can be enforced, while retaining the flexibility of platforms which workers and consumers value.
- 8.6. It should also be noted that we are not consulting on the definition of ‘working time’ for the purposes of the Working Time Regulations 1998¹⁸ (which implement the EU Working Time Directive 2003/88/EC)

¹⁸ For further information about this definition, please see <https://www.gov.uk/maximum-weekly-working-hours/calculating-your-working-hours>

The existing legal framework

- 8.7. The current law relating to what constitutes working time for the purpose of NMW/NLW for app-based workers is derived from legislation and case law, and is explained in associated NMW/NLW guidance entitled ‘Calculating the National Minimum Wage’¹⁹.
- 8.8. In the Employment Appeal Tribunal (EAT) case *Uber BV and others v Aslam and others*, UKEAT / 0056 / 17 / DA, 10 November 2017, the judge found that app-based workers are working, and thus should be paid the NMW/NLW, when:
- i. They have the app switched on,
 - ii. They are in the territory in which they are licensed to use the app, and
 - iii. They are ready and willing to accept tasks
- 8.9. This EAT ruling only applies to the individuals whose cases were heard and does not automatically extend to the working arrangements of Uber (or other app-based platforms) drivers more generally. However it does represent a very recent precedent of what constitutes work for app-based platform workers - and thus when they should be paid the NMW/NLW.
- 8.10. An employer is required by law to pay the NMW/NLW to its workers. This is a net payment, so if they require the worker to buy tools, uniform or any other item to complete their job it must be factored into their hourly wage. That is, their wage should increase to ‘net off’ the payment the worker must make for their tools or uniform, for example. For some platforms employing app-based workers this may have far reaching effects.

Principles behind the definition of working time

- 8.11. The fundamental principles of what constitutes working time apply consistently across all sectors, occupations and places. However, the rapid growth of app-based working represents a significant change within the labour market and it is right we consider the interaction between those general principles and new and emerging business models.
- 8.12. This will help us to understand whether a general set of principles can be applied across all workers whether app-based or not, or alternatively whether the platform based economy is sufficiently distinct to justify a specific approach to defining what “working time” is for its workers. We recognise that it is essential that any definition of working time for the purpose of NMW/NLW fully protects workers and allows innovative business to flourish.

¹⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/605397/nmw-nlw-calculating-minimum-wage-guidance.pdf

- 8.13. For that reason we want to understand the practical impact of the existing legal framework. In the context specifically of app-based platform working, one of the issues arising is how time spent waiting for tasks while logged into the app is classified. Worker representatives have argued that waiting for tasks while logged onto the app is a necessary part of the job and that time should be paid at the NMW/NLW. Otherwise, the risk of low demand is faced by the worker rather than the employer – what the review called “one-sided flexibility”.
- 8.14. Employers have expressed concerns that such an interpretation is unfair because they could be forced to pay the NMW/NLW to individuals who open multiple apps simultaneously, or who log into an app knowing there will be no tasks available, or where individuals might open the app to receive the NMW/NLW but refuse to accept tasks. However, some platform based employers require individuals to accept a certain percentage of the tasks offered to them or risk being dropped from their app, to mitigate this scenario.
- 8.15. Emerging case law (for example, the E AT case Uber BV and others v Aslam and others, which is referred to above) is changing and developing the legal interpretation of what constitutes working time for app-based workers.

Q53: If the emerging case law on working time applied to all platform based workers, how might app-based employers adapt their business models as a consequence?

Q54: What would the impact be of this on a) employers and b) workers?

Q55: How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?

Q56: Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?

Q57: What are the practical features and characteristics of app-based working that could determine the balance of fairness and flexibility, and help define what constitutes work in an easily accessible way?

Q58: How relevant is the ability to pursue other activities while waiting to perform tasks, the ability of workers to refuse work offered without experiencing detriment, requirements for exclusivity, or the provision of tools or materials to carry out tasks?

Q59: Do you consider there is potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and also to ensure fairness in the determination of work for the purposes of NMW/NLW?

Chapter 9: Defining self-employed and employers

Self-employed

- 9.1. Individuals are self-employed for employment law purposes if they are neither an employee nor a worker, and are usually taxed as a self-employed person if they are not an employee for tax purposes. However, the term self-employed is not defined in legislation for employment law, and is only defined for NICs purposes²⁰ as:
- “a person who is gainfully employed ... otherwise than in employed earner’s employment”.*
- 9.2. A view has been raised by some commentators that self-employed should be defined and made into a statutory employment status to make it clearer as to who should fall into that category.
- 9.3. One potential risk of defining self-employment in legislation is that it could result in a court not being able to make a judgement on someone’s employment status as their circumstances might not fit into any of the statutorily defined employment statuses.
- 9.4. Others have raised the risk that defining self-employed in legislation provides unscrupulous employers the opportunity to game the system by designing contracts or work practices to fall within the letter, but not the spirit, of that definition.
- 9.5. The government recognises and agrees with these risks, and therefore, on balance is not attracted to the idea of defining an additional category of self-employed in statute.

Q60: Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?

Employers

- 9.6. Tax legislation does not specifically define an ‘employer’, and NICs legislation, for the purposes of Statutory Sick Pay, defines the employer to be the person responsible for secondary contributions²¹. The Employment Rights Act 1996 not only sets out what an employee or worker is, but also sets out what an employer is. It states that an employer in relation to an employee or worker means:
- “the person by whom the employee or worker is (or, where the employment has ceased, was) employed.”*
- 9.7. As we are considering the employment status framework, we should also consider if this minimalistic definition of an employer for employment rights is still appropriate for

²⁰Section 2(1)(b), Social Security Contributions and Benefits Act 1992

²¹Section 163(1), Social Security Contributions and Benefits Act 1992

the modern labour market. This has not been considered during the Department for Business, Energy and Industrial Strategy's Employment Status Review or as part of the Review of Modern Working Practices. However, new business models and new working arrangements and relationships have been emerging, including umbrella companies, gig working, and the use of technology to allocate work assignments. These emerging ways of working are blurring what an employer is.

Q61: Would it be beneficial for the government to consider the definition of employer in legislation?

Chapter 10: Alignment between tax and rights

- 10.1. Currently, the employment status frameworks for tax and rights do not fully align. This is clearly evidenced by the existence of a third category for rights, meaning it is not possible for both the terms employee and self-employed to have the same meaning across both systems without also introducing a third category for tax.
- 10.2. The government is aware that there are different views on whether the employment status tests used for tax and rights purposes should be the same. In particular, the review noted that the lack of alignment between the two systems causes confusion for individuals and businesses, and recommended that the definition of self-employed should be aligned as far as possible in the longer term, by having both individuals who are employees and those who are workers or dependent contractors being subject to the employment tax regime.
- 10.3. Additionally, some commentators have suggested that having the same terms meaning different things across rights and tax can be problematic. For example, the Trade Union Congress (TUC) stated that “the use of different, albeit overlapping, status tests in employment, tax and social security laws can lead to confusing and sometimes unfair outcomes, particularly for those in non-standard and insecure jobs”²². The TUC and other commentators have suggested that the government should, in the long-term, aim for alignment between the tests for tax and rights.
- 10.4. However, other commentators have pointed out that the two systems are trying to achieve different objectives: one deciding who is entitled to certain employment rights and the other determining the tax regime that applies to the income they receive. Therefore, aligning definitions across the two systems could create steeper cliff edges and stronger incentives for miscategorisation.
- 10.5. This has been considered a number of times in the past, including by the OTS in their 2015 review of employment status. As some commentators have pointed out²³, this recommendation would result in all workers – i.e. Limb (b) workers and employees – paying tax on the same basis as employees. At present, Limb (b) workers are usually taxed on a self-employed basis, and so this would be a significant change for impacted individuals and businesses. Therefore the impacts of this proposal would need to be carefully considered.

Q62: If the terms employee and self-employed continue to play a part in both the tax and rights systems, should the definitions be aligned? What consequences could this have?

²²<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-energy-and-industrial-strategy-committee/future-world-of-work/written/44647.html>

²³<https://www.ft.com/content/0830fa82-664b-11e7-9a66-93fb352ba1fe?mhq5j=e7>

Deemed employees

- 10.6. There are some instances where the tax system will disregard the structure that an individual uses to offer their work (e.g. their own limited company) and instead deems or treats them as an employee for tax purposes. Examples of this include individuals who work through their own company but who, in their working practices, would be employees for tax purposes if they had been engaged directly, and certain 'salaried members' of limited liability partnerships.
- 10.7. However, while these individuals may work in a very similar way to employees, and may be treated as employees by the tax system, there is no similar provision in employment rights legislation that explicitly allows the courts to disregard the structure that an individual works through. This can mean that individuals who are taxed as employees, and who work in a very similar way to employees, are treated as self-employed for employment rights purposes, just because of the structure they work through.
- 10.8. It is possible for the courts to disregard the structure of an engagement in limited circumstances. For example, there is case law precedent in *Catamaran Cruisers Ltd v Williams 1994* for the courts to look through a limited company structure. However, generally such judgements have been limited to egregious cases of disguised employment.
- 10.9. Some commentators have questioned why individuals can be deemed employees for tax purposes but not be granted any employment rights. While individuals can seek employment rights through the courts in such cases, the courts will consider all aspects of the working relationship, including the structure that the individual has chosen to use.
- 10.10. Given the views raised by stakeholders, while we are considering whether employment status definitions for employment rights and tax should be aligned, we want to use this opportunity to address the views raised by stakeholders to also consider whether these deeming provisions for tax should be reflected in employment rights legislation.

Q63: Do you agree with commentators who propose that employment rights legislation be amended so that those who are deemed to be employees for tax also receive some employment rights? Why / why not?

Q64: If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?

Employment status consultation questions

Consultation Questions	
Chapter 4: Issues with the current employment status regimes	
1.	Do you agree that the points discussed in this chapter are the main issues with the current employment status system? Are there other issues that should be taken into account?
Chapter 5: Legislating the current employment status tests	
2.	Would codification of the main principles – discussed in chapter 3 – strike the right balance between certainty and flexibility for individuals and businesses if they were put into legislation? Why / Why not?
3.	What level of codification do you think would best achieve greater clarity and transparency on employment status for i) individuals and ii) businesses – full codification of the case law, or an alternative way?
4.	Is codification relevant for both rights and/or tax?
5.	Should the key factors in the irreducible minimum be the main principles codified into primary legislation?
6.	What does mutuality of obligation mean in the modern labour market?
7.	Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?
8.	If so, how could the concept of mutuality of obligation be set out in legislation?
9.	What does personal service mean in the modern labour market?
10.	Should personal service still be relevant to determine an employee's entitlement to full employment rights?
11.	If so, how could the concept of personal service be set out in legislation?
12.	What does control mean in the modern labour market?

13.	Should control still be relevant to determine an employee's entitlement to full employment rights?
14.	If so, how can the concept of control be set out in legislation?
15.	Should financial risk be included in legislation when determining if someone is an employee?
16.	Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?
17.	Should the provision of equipment be included in legislation when determining if someone is an employee?
18.	Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?
19.	Are there any other factors that should be included in primary legislation when determining if someone is an employee? And what are the benefits or risks of doing so?
20.	If government decided to codify the main principles in primary legislation, would secondary legislation: i) be required to provide further detail on top of the main principles; and ii) provide sufficient flexibility to adapt to future changes in working practices?
21.	Would the benefits of this approach be outweighed by the risk of individuals and businesses potentially needing to familiarise themselves with frequent changes to legislation?
Chapter 6: A better employment status test?	
22.	Should a statutory employment status test use objective criteria rather than the existing tests? What objective criteria could be suitable for this type of test?
23.	What is your experience of other tests, such as the Statutory Residence Test (SRT)? What works well, and what are their drawbacks?
24.	How could a new statutory employment status test be structured?
25.	What is your experience of tests, such as the Agency Legislation tests for tax, and how these have worked in practice? What works well about these tests in practice, and what are their drawbacks?

26.	Should a new employment status test be a less complex version of the current framework?
27.	Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?
28.	Are there alternative ways, rather than legislative change, that would better achieve greater clarity and certainty for the employment status regimes (for example, an online tool)?
29.	Given the current differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than when an individual is an employee?
Chapter 7: The worker employment status for employment rights	
30.	Do you agree with the review's conclusion that an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?
31.	Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employees and Limb (b) workers?
32.	If so, should the definition of worker be changed to encompass only Limb (b) workers?
33.	If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?
34.	Do you agree that the government should set a clearer boundary between the employee and worker statuses?
35.	<p>If you agree that the boundary between the employee and worker statuses should be made clearer:</p> <ul style="list-style-type: none"> i. Should the criteria to determine worker status be the same as the criteria to determine the employee status, but with a lower threshold or pass mark? If so, how could this be set out in legislation? ii. Should the criteria to determine worker status be a selected number of the criteria that is used to determine employee status (i.e. a subset of the employee criteria)? If so, how could this be set out in legislation? iii. Or, is there an alternative approach that could be considered? If so,

	how could this be set out in legislation?
36.	What might the consequences of these approaches be?
37.	What does mutuality of obligation mean in the modern labour market for a worker?
38.	Should mutuality of obligation still be relevant to determine worker status?
39.	If so, how can the concept of mutuality of obligation be set out in legislation?
40.	What does personal service mean in the modern labour market for a worker?
41.	Should personal service still be a factor to determine worker status?
42.	Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?
43.	Should we consider clarifying in legislation what personal service encompasses?
44.	Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?
45.	Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?
46.	What does control mean in the modern labour market for a worker?
47.	Should control still be relevant to determine worker status?
48.	If so, how can the concept of control be set out in legislation?
49.	Do you consider that any factors, other than those listed above, for 'in business in their own account' should be used for determining worker status?
50.	Do you consider that an individual being in business on their own account should be reflected in legislation to determine worker status? If so, how could this be defined?
51.	Are there any other factors (other than those set out above for all the different tests) that should be considered when determining if someone is a

	worker?
52.	The review has suggested there would be a benefit to renaming the Limb (b) worker category to 'dependent contractor'? Do you agree? Why / Why not?
Chapter 8: Defining working time	
53.	If the emerging case law on working time applied to <i>all</i> platform based workers, how might app-based employers adapt their business models as a consequence?
54.	What would the impact be of this on a) employers and b) workers?
55.	How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?
56.	Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?
57.	What are the practical features and characteristics of app-based working that could determine the balance of fairness and flexibility, and help define what constitutes 'work' in an easily accessible way?
58.	How relevant is the ability to pursue other activities while waiting to perform tasks, the ability of workers to refuse work offered without experiencing detriment, requirements for exclusivity, or the provision of tools or materials to carry out tasks?
59.	Do you consider there is potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and also to ensure fairness in the determination of work for the purposes of NMW/NLW?
Chapter 9: Defining 'self-employed' and 'employers'	
60.	Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?
61.	Would it be beneficial for the government to consider the definition of employer in legislation?
Chapter 10: Alignment between tax and rights	

62.	If the terms employee and self-employed continue to play a part in both the tax and rights systems, should the definitions be aligned? What consequences could this have?
63.	Do you agree with commentators who propose that employment rights legislation be amended so that those who are deemed to be employees for tax also receive some employment rights? Why/why not?
64.	If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?

