AN IER BRIEFING

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The 2026 Government Consultation 'Make Work Pay: employment status reform and protections for the self-employed'

by Nicola Countouris, Keith Ewing, Lord John Hendy, Tonia Novitz, and Lisa Rodgers

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The Institute of Employment Rights
4th floor
Jack Jones House
1 Islington
Liverpool
L3 8EG

0151 207 5265
office@ier.org.uk
www.ier.org.uk

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James Harrison
Director, Institute of Employment Rights
November 2026
office@ier.org.uk

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A. Introduction

1. This IER Briefing is based on the IER response to the 2026 Government consultation 'on employment status and protections for the self-employed', submitted in November 2026. The Briefing, as the response on which it is based, reflects the views of its authors, not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

2. The key findings and recommendations emerging from this Briefing can be summarised as follows:

   - Over the years, the personal scope of application of UK labour law has become unduly fragmented and complex, and structural reform that truly 'grasps the nettle' of the problem is needed.
   - The measures being explored in the consultation are unlikely to resolve the problems it identifies. The impact of these proposals is likely to range from the limited to the counterproductive, depending on the detail of their implementation.
   - The new test proposed at page 17 of the consultation paper will not achieve the objective of placing less emphasis on personal service. In fact, it could end up placing greater emphasis on it, by requiring judges to engage with 'personal service' twice.
   - The general presumption of status being proposed is unlikely to be effective. For this to happen it would require a reform of the definitions of 'employee' and 'limb (b) worker', as under the current definitions it would be exceedingly easy for employers to rebut the presumption at trial. It would also require changing the standard of proof from 'balance of probabilities' to a higher standard.
   - The suggestion to give some additional rights to those that the consultation refers to as genuinely self-employed would result in a new 'self-employed plus' status, in effect creating a fourth category of worker and adding to the current complexity.
   - The suggestions advanced by this consultation are too narrowly focused on 'limb (b)' worker status and an undesirable distraction from the election pledge to introduce a new single worker status.
   - There is a strong case for extending worker rights to a greater number of working persons and for simplifying the current regulatory framework shaping the personal scope(s) of application of UK labour rights. We are of the view that the proposals

contained in Lord Hendy's Status of Workers Bill (available in an amended form here) are the best regulatory option to achieve these policy goals.

- The consultation fails to deliver on the promise, contained in Labour's Plan to Make Work Pay, to 'move towards a single status of worker and transition towards a simpler two-part framework for employment status' and to 'consult in detail on a simpler framework that differentiates between workers and the genuinely self-employed'. Government should consult on single status soon.

3. Over the years IER has developed significant expertise on the questions surrounding the personal scope of application of employment legislation and has produced a large body of booklets, papers, policy briefs, and policy proposals on this question, that remains central for labour law. In preparing the response on which this Briefing is based we have referred to the following publications:

    - K. D. Ewing, J. Hendy, and C. Jones (eds), A Manifesto for Labour Law: Towards a Comprehensive Revision of Workers Rights' (IER, 2016), Chapter 5;
    - K. D. Ewing, J. Hendy, and C. Jones (eds), Rolling out the Manifesto for Labour Law (IER, 2018), Chapter 6;
    - Lord Hendy's 'IER Briefing on the Single Employment Status' (IER, April 2026)
    - IER 'Employment Rights Act 2025 Factsheet – The Need for a Single Worker Status' (IER September 2026).

    - The Institute's Chair, Lord Hendy KC, has also introduced a Status of Workers Bill in Parliament on two occasions. Both attracted all party support and progressed through all stages in the House of Lords until lost on each occasion by the prorogation of Parliament. The latest version is available here https://bills.parliament.uk/bills/3538 (and an updated version is available in Lord Hendy's 'IER Briefing on the Single Employment Status' (IER, April 2026)).

4. The Briefing engages with most of the themes and suggestions emerging from the consultation document. In drafting this document, and the responses to the consultation, we noted the Employment Status Options Assessment, accompanying the consultation, although we have chosen not to engage with it directly. Overall, our view is that the measures being explored in the consultation are unlikely to resolve the problems identified by government. The impact of these proposals is likely to range from the limited to the counterproductive, depending on the detail of their implementation.

5. The authors of this Briefing believe that the proposals are premised on a set of partly erroneous and partly misdirected regulatory assumptions that inevitably result in a weak and ineffective, when not counterproductive, set of reform ideas. Among these erroneous and misdirected assumptions, we feel it necessary to highlight the following:

    - **The self-employment bias of 'contingent labour'** – The document states that 'Contingent labour of course plays an essential role in the economy, and engaging the services of self-employed individuals is a key part of that' (page 8). Along similar lines, the document states that 'The ability for someone who is self-employed to

subcontract work is a key feature of self-employment' (page 7). These assertions (and there are other similar ones in the document) are strong indications that the paper embraces a highly unregulated vision of the labour market where employers are able to structure at their pleasure their contractual arrangements for the sourcing of labour, including outside the standard employment relationship domain, and where independent contractors are free to establish labour only subcontracting chains at will.

- What the document refers to as 'contingent' labour can and should normally be serviced through a range of forms of employment (fixed-term, temporary agency work) that are fully located within the contract of employment/standard employment relationship domain. Engaging the services of self-employed, as opposed to employed workers, including through labour only subcontracting chains, is not 'a key' part of contingent labour sourcing, let alone a key part of a fair labour market. Its extensive use in recent years is in marked contrast to sixty or so years of the post-war economy, when employers generally undertook the risk of contingencies and did not generally impose those risks on the workforce. Labour only subcontracting is a distinct regulatory (and political) choice that fundamentally departs from the idea that when employers source '*labour'*, they should do so under legal arrangements that fall within the scope of *labour* law, offering workers all the rights which Parliament has, over the years, considered to be appropriate and necessary protections for those who live by selling their labour. Normalising and internalising the idea that employers can engage at will either employees or self-employed to satisfy their labour sourcing needs as and when required diminishes the labour share of GDP and demand in the economy and runs counter to the government's stated objective of growing the economy. It also has important implications for the type of measures that are being suggested in the consultation document, which are accordingly weak and would fail to constrain such managerial decisions in a meaningful way.

- **The 'core employment rights' fallacy** (e.g. 'The current rights' framework is leaving too many people in bogus self-employment without access to core rights like the National Minimum Wage', page 2). It is clear that these proposals are exclusively preoccupied with the possibility of either enforcing or extending a very limited number of employment rights to working persons who, either because of managerial misclassification practices or even simply because of their being 'genuinely' self-employed, miss out on them. The consultation document is not concerned with delivering on what 'Labour's Plan to Make Work Pay' defined as 'basic individual rights from day one *for all workers*, ending the current arbitrary system that leaves workers waiting up to two years to access basic rights of protection against unfair dismissal, parental leave and sick pay' (emphasis added). It is very peculiar to see a consultation document identifying 'core employment rights' as rights that do not include the right to be protected against unfair dismissal, and all the rights which currently accrue to employees with a contract of employment. Essentially this document is solely preoccupied with ensuring that limb (b) workers can continue to enjoy the very limited rights that Parliament has assigned to them and with extending some rights to what it refers to as the genuinely self-employed. But this is not what this government, and the Labour Party, promised to deliver.

- **The ‘single status of worker’ omission**. The document asserts that ‘We will consider creating a single status of worker as a longer-term goal, while recognising the flexibility that limb (b) worker status can give to workers and business alike’ (page 2).

  In its 2021 *New Deal for Working People* (page 13) the Labour Party promised that:
  - ‘Labour will move towards a single status of worker and transition towards a simpler two-part framework for employment status. Labour will consult in detail on a simpler framework that differentiates between workers and the genuinely self-employed’.
  - ‘This will mean all workers, regardless of sector, wage, or contract type, will be afforded the same basic rights and protections. This includes rights to sick pay, holiday pay, parental leave, protection against unfair dismissal and many others’.
- This was essentially repeated in *Labour’s Plan to Make Work Pay* 2024, which included the pledge to ‘move towards a single status of worker and transition towards a simpler two-part framework for employment status’, effectively abolishing limb(b) worker status. It also proposed to ‘consult in detail on a simpler framework that differentiates between workers and the genuinely self-employed’. In practice the present consultation paper does not even contemplate the introduction of a single worker status in the short term (we are within two years of a general election), nor does it seek to alter the fundamental definitions of ‘employee’ or ‘limb (b)’ worker.
- The words ‘recognising the flexibility that limb (b) worker status can give’ override the commitment expressed prior to the 2024 election to remove this status from the labour law books, and to create a single status that merges the various worker definitions. The employee definition is essentially disregarded, in spite of the fact that that definition is just as prone to the risk of misclassification as the ‘limb (b)’ worker definition is, and in spite of the fact that the limb (b) worker status is defined by courts by reference to tests that are essentially derived from employee status, albeit on a lower bar (as the document acknowledges at page 17).
- It will be impossible to resolve the problems of misclassification affecting limb (b) workers without grasping the nettle of a unified employment status more generally. In fact, the proposals contained in this consultation document do not just omit, but run contrary to the single status of worker pledge and the underlying idea of creating a ‘simpler two part framework’. These proposals create a new ‘self-employed plus’ status, with some self-employed persons given some additional rights (though of a different kind to the ones allocated to limb (b) workers), creating a fourth category of worker and adding to the problem identified in *Labour’s Plan* of ‘a minority of employers using novel contractual forms to avoid legal obligations, while ensuring that workers can benefit from flexible working where they choose to do so’. Instead of reducing complexity, the proposals contained in this consultation would increase it further.
- It is to be noted that the enactment of ERA2025 has further fragmented the British employment status landscape, something that in conjunction with the rise in national insurance contributions, will incentivise employers to avoid employment contracts and instead enter contracts giving lesser status and lesser rights to

workers. This, as the following paragraph argues, has made the need for a simplification more pressing. Yet far from 'intend[ing] to grasp the nettle and create a system that is both fairer and more resilient' (page 2), the proposals in this consultation will worsen the status quo, making the introduction of a single worker status both more urgent, but also more challenging than it already is, by adding to the fragmentation that a new single status will need to resolve.

- **The impact of ERA2025 on employment status fragmentation**. The adoption of ERA 2025 has further complicated the already fragmented galaxy of employment statuses in UK labour law. The Act has introduced an unprecedented number of new individual and collective labour rights but, by and large, these have been addressed to the traditional concepts of employee and worker. The possibility that many of the new rights could have become paper tigers in the absence of a new, comprehensive, single worker status definition must have been apparent to both government and Parliament, that sought to mitigate some of the risks arising from this omission by peppering some chapters of the Act with some novel personal scope definitions. Ultimately, the Act introduces at least three new concepts and definitions that did not exist previously.
  The first one is the new concept of 'zero hours arrangement', deployed in sections 1-8 of the Act, in the context of the new protective regime applying to zero hours workers. The second is the definition of 'relevant contract' in section 24 of the Act, in the context of non-disclosure agreements in discrimination and harassment cases, and introducing a new s. 202A in ERA1996. The third is the definition of 'agency workers who are not otherwise "workers"' in section 51 of the Act, for the purposes of the Act's provisions on adult social care. The implications of these reforms are discussed further in N. Countouris, 'The reform that wasn't there - On the perduring necessity of a 'single worker status' in UK employment law' (2026) ILJ, 729–752. But it is clear that ERA2025 has both made an already complex regulatory landscape more complicated and, as expected by many, exposed itself to several vulnerabilities that only a single worker status could ultimately resolve. The consultation document does not seem to appreciate the additional pressures generated by ERA2025.

6. The authors of this Briefing have identified a number of additional blind-spots in the consultation document, some of which are discussed below in sections B, C, and D. We feel however that it is important to mention a certain, and largely unjustified, insistence on the **nexus between immigration law** and the abuse of employment status and substitution clauses. While it is true that 'bogus self-employment and the use of substitution clauses, […] can enable exploitation at work, [and] illegal working' (page 8), the vulnerability of migrant workers without a right to work is not strictly speaking linked to their self-employed status, but rather to the effects of the doctrine of illegality (that typically applies if somebody is employed, with whatever status, without a valid right to work) voiding any contract and making rights hard, where not impossible, to enforce (although see the limited exceptions carved out by cases such as *Okedina* v *Chikale* [2019] EWCA Civ 1393 and *Hounga* v *Allen* ([2014] UKSC 47)). So simply 'extending the scope of employers required to carry out Right to Work checks to those who engage limb (b) workers or individual sub-contractors, such as those working in the gig economy', including those working as substitutes (page 15), is unlikely to resolve

the problem of exploitation and is likely to result in additional checks being imposed to intermediaries along the sub-contracting chain that are not the real employer (and may actually be 'workers' themselves).

7. We also observe that the consultation has failed to consider other devices utilised by employers to minimise their liability for the rights Parliament has bestowed on workers. One such example is the use of 'personal service companies' (PSC) whereby the real employer refuses to engage the worker other than through a company of which the worker is the exclusive or principal shareholder thus presentationally giving the worker the full rights of the employee but only against their own shell company. The employer's relationship with the worker is via a purely commercial contract with the PSC. We observe that there is a yet further category of worker not considered in the consultation: those with ostensible employee status but denied the benefit of the rights consequent on it by the fact that because of their immigrant status the limitation of their visas prevents sufficient accumulation of service to acquire rights and often precludes effective enforcement of those which they nominally enjoy. Another area of abuse untreated by the consultation is some forms of agency work. A final category of worker whose rights are unclear are foster carers where the authorities are in tension (though a case proceeds to the Supreme Court which may clarify current common law status) and the practice of those local authorities which engage foster carers diverges.

8. The consultation (on page 7) seems to regard limb (b) workers as not self-employed whereas they are, by definition, not employees (to which limb (a) applies) and are self-employed: per Hale P in *Clyde & Co v Bates van Winklehof* [2014] UKSC 32 at [25].

9. The consultation mentions a particular risk to public safety (page 7) from the abuse of substitution clauses but omits the implications for the safety of delivery riders and drivers who are self-employed (whether or not limb (b) workers) and the general public exposed to unsafe vehicles, speeding and other traffic violations by those riders and drivers. It is apparent that the lack of secure employment status is a contribution to this state of affairs where the drivers and riders are obliged to buy (or rent) and maintain their vehicles, and must work as fast as possible to achieve sufficient earnings and security of work to maintain them and their dependents.

10. What follows is the authors' reflections on some of the questions posed in the government consultation in respect of

    - Placing less emphasis on personal service;
    - Creating a presumption of worker status;
    - Granting some new rights to the genuinely self-employed.

B. Placing less emphasis on personal service

11. **Chapter 1 of the consultation document teases out a number of ideas and suggestions aimed at placing less emphasis on the personal service**

requirements that statute and case law expect of someone in order to be classified as a limb (b) worker. **These proposals include a new test for personal service** (at pages 17-19 of the consultation), that would be comprised of three steps. Step 1 would ask the question 'does a contract exist?' (and if no then the individual would not be a worker). Step 2 would ask 'does the individual personally provide services and/or are they under a significant level of direction or control by the employer/engager?' (and if no the individual would not be a worker). Step 3 would ask 'is the individual carrying on a business or profession on their own account and is the other party to the contract a client or customer of that business or profession (this would also include an assessment of personal service)'. The document also consults on the role of **factual performance, fettered and unfettered substitution clauses, control, and the power to set pay rates**, as relevant to establishing employment status.

12. Our view is that contractual substitution/personal service should indeed play less of a role in the establishment of both employee and limb (b) worker status. It is however also our view that the proposal for a new test as set out at page 17 of the consultation paper will not achieve the objective of placing less emphasis on personal service. We are of the view that there are indeed ways to reduce the emphasis of personal service on the finding of a limb (b) worker contract or contract of employment, but all require a revision and rewording of the relevant definitions contained in statute. We suggest that there are two options for dealing with this.

13. One option would be to adopt the wording 'personally or otherwise' in the definitions of employee or limb (b) worker, as it is currently the case for the definition of home worker under s.35 of the NMWA 1998 and, since ERA2025, in the new definition of 'relevant contract' under the new s.202A(5) of ERA1996. A yet wider definition is used under the protection of whistleblowing regime: S.43K(1) ERA. These definitions are designed to dispense altogether with the necessity to establish that work is provided personally in order for a contract for work to exist.

14. A second option would be to revise the worker/employee definitions in order to attenuate, rather than exclude altogether, the requirement for personal service, by qualifying it through the use of words such as 'primarily' or 'predominantly' (e.g. a worker is a person 'who relies primarily on his or her own personal labour'), as it is currently the case for the definition of solo self-employed in the EU Commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02). This would allow some degree of occasional substitution as long as, overall, the provision of service remains primarily or predominantly personal.

15. If, however, this second option were to be adopted, it would be necessary to retain the first option or a variation thereof for certain categories of worker, such as homeworkers. This should not be an exercise for diluting rights. Indeed, the position of homeworkers ought to be strengthened by formally extending the definition of homeworker in the NMWA 1998, s.35 to the Employment Relations Act 1999, as well as in relation to blacklisting. Moreover, it would also be necessary to retain the first option or a variation thereof for certain prescribed purposes where the public interest or human rights obligations insist on higher standards, as for example in the cases of equality and discrimination, whistleblowing and blacklisting (on which see below).

16. Overall, we are of the view that some degree of substitution is, and has always been, a normal feature of work. From the college lecturer asking another colleague to deliver their class due to a sudden impediment, to the case of 'home workers' where 'frequently the work will involve, for example, making shoes or clothes, and that work is typically carried out by members of a family or a group of friends' (*James v Redcats (Brands) Ltd* [2007] IRLR 296, per Elias J), a certain degree of substitution has always existed and has been tolerated, allowed, or even encouraged in practice. The law should recognise this, especially as technology increasingly fissurises the workplace. Finally, we are also of the view that the systematic substitution of one person by another should however deny employment status as this type of, in effect, systematic delegation of tasks is likely to amount to the performance of an employer function (where an employer provides work under a work-wage bargain), the person being in effect an employer, and not a worker.

17. **The consultation document queries whether greater weight should be given to the factual performance of personal work rather than whether there is a contractual power of substitution.** While we are of the view that primacy of facts should always prevail over contractual form, including by reference to substitution clauses, it is worth pointing out that UK case law is already cognisant of this principle (although doubts could be cast about its consistent application across precedents). The precedence to be accorded to the facts rather than the form is also emphasised in Recommendation 198 of the ILO.

18. Decisions such as *Kalwak* and *Deliveroo* are good authorities to that effect ('if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship', *Consistent Group Ltd* v *Kalwak* [2007] IRLR 560; 'the label that the parties put on a relationship will not be determinative. Furthermore, the normal rules of contractual interpretation do not apply in that the courts can and must look at how the contract operates in practice', *IWGB v CAC and another* [2023] UKSC 43').

19. So, the problem is not one of giving greater weight to facts over fiction. The problem is twofold. Firstly, that (again to quote Elias LJ, this time in *Quashie v Stringfellows* [2012] EWCA Civ 1735) 'it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive'. Since in most cases the reality of the factual performance of work is far from certain (or there would be no point litigating it), the contractual dimension of the relationship remains crucial to status assessment. And secondly, as pointed out above, the presence of 'unfettered' substitution clauses (with or without an established pattern of use by the workforce to which they apply), invariably defeats the 'strict' personal service requirement that courts have read in the statutory wording of the 'limb (b)' worker definition and in the concept of employee.

20. **The consultation document also seeks views on whether the distinction between fettered and unfettered substitution clauses is helpful and effective in establishing personal service**. We believe that the distinction between fettered/unfettered is both too crude and erroneous. Upon closer scrutiny, there are several definitions of worker in UK labour law, and each attracts a slightly different

concept of 'personality in work' and therefore should be treated differently in terms of the impact that substitution clauses have on them. Furthermore, the courts' approach to substitution is ambiguous and confusing: see the differing views of the Court of Appeal and Supreme Court in *Pimlico Plumbers* and the yet further distinction of approach in *Deliveroo*.

21. Using the 'personal work' requirement as a yardstick, it is arguably possible to identify a spectrum of defining concepts in various UK statutes ranging from the narrower 'employee' concept contained in s. 230(1)-(2) ERA 1996 at the one end, to the much broader concept of 'home worker' contained in s. 35(1) of the National Minimum Wage Act 1998 (NMWA), and the yet broader concept (for whistleblower protection) in S.43K(1) ERA 1996 at the other, opposite, end of the spectrum.

22. Under s. 230(3) ERA 1996, the 'employee' concept is linked to the 'contract of service' notion, which courts have consistently defined as requiring personal performance, so much so that, according to Peter Gibson LJ, a 'clause … entitling [a person] not to perform any services personally, is a provision *wholly inconsistent* with the contract of service'.[1] At the opposite end of the spectrum, the statutory definition of 'home worker' does not impose a 'personal work or service' requirement at all, with s. 35(1) of the NMWA1998 (and we note the different narrower definition of 'home worker' contained in s.13 of the Employment Relations Act 1999) expressly providing that, for the purposes of that Act, the standard 'worker' definition contained in s. 54 shall 'have effect as if for the word "personally" there were substituted " (*whether personally or otherwise*)"'. In his judgment in *James* v *Redcats (Brands) Ltd,*[2] Elias J unambiguously held that 'unlike the worker, it is not necessary that the home worker should personally carry out the work at all. It is the provision of services that is enough, irrespective of who provides them, as long as they are not provided in the course of running a business or profession'. It is therefore possible to argue that the only substitution activity that is excluded from the 'home worker' definition is the type of activity carried out systematically and on a professional or business basis, which effectively amounts to an employer hiring staff for them to perform personal work on his account. The definition of 'worker' under s.43K (1)(b) ERA also similarly dispenses with the personality requirement by reference to the formula 'whether personally or otherwise' (again for 'work to be done in a place not under the control or management of that person'). The newly established notion of 'relevant contract' under the new s. 202A(5) ERA1996 is arguably similar in that sense, while not being limited to work done in a place under the control or management of a person's business.

23. If (leaving aside the whistleblower definition) the 'employee' and the 'home worker' definitions represent the two extremes of the 'personality in work' spectrum in UK labour law, then it is possible to argue that the two 'worker' definitions contained, respectively, in s. 230(3)(b) ERA 1996 and s. 296(1)(b) TULRCA 1992, sit somewhere within that spectrum. It is also arguable that the construction and literal interpretation of the ERA's 'limb (b) worker' definition should point to a 'worker' notion that is broader than the 'employee' notion, and narrower than the 'home worker' notion (the consultation paper treats them as identical, but they are not). A limb (b) worker is defined by the ERA 1996 as someone who works under 'any other contract …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'. The Supreme Court judgment

[1] *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 (emphasis added).
[2] [2007] IRLR 296.

in *Pimlico Plumbers* has confirmed that a clause or practice allowing a certain qualified degree of substitution with workers already employed by the company (the 'only right of substitution was of another Pimlico operative'[3]) is compatible with the ERA 1996 notion of 'worker' as long as it does not provide an 'unfettered right to substitute at will'.[4]

24. It is also arguable that the TULRCA's 'worker' definition has been worded by Parliament as providing a broader, more generous personal scope for the purposes of that Act. The TULRCA worker definition covers 'any other contract whereby [the person] undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his', which – in contrast with the ERA limb-b definition – does not refer to the 'business-customer' exclusion but only to the 'professional-client' exclusion. The exact differentiation of these two concepts aside, this is a small, but significant, difference that incontrovertibly points toward a broader definition of the TULRCA's 'worker' concept. With the judgment in *Deliveroo*, UK courts have effectively interpreted the personality requirement in the TULRCA 'worker' definition as being identical to the one in the ERA 1996 notion, concluding that 'the Riders were not workers within the statutory definition of either section 296 TULRCA or s. 230(3)(b) of the Employment Rights Act 1996'.[5]

25. Arguably, the use of two 'worker' concepts by reference to different definitions denotes Parliament's intention that these two concepts cover two different work situations including, in our view, different degrees of personal service. While it would be inconsistent with the TULRCA's 'worker' definition to water down the 'personal work' requirement to the point of collapsing that definition into the NMWA 1998 'home worker' definition, it would be appropriate to identify an alternative understanding of 'personal service' so as to distinguish it from the 'limb (b)', ERA 1996, *Pimlico Plumbers*, definition (and of course from the 'contract of service' definition).

26. The 'personality in work' requirement of the TULRCA 1992 worker definition should in other words be looser than the *Pimlico* 'qualified substitution' power criterion and, at the same time, tighter than the 'unnecessary' *Redcats* 'homeworker' concept. We suggest that any type of qualification that would bring within the concept a personality requirement, however tenuously defined but sufficiently present so as to not make it fall in the 'unnecessary' *Redcats* category, should be sufficient for the purposes of the TULRCA worker definition.

27. There is finally the personal work concept in s.83(2)(a) of the Equality Act 2010 (about which the consultation paper seems to be inexplicably unconcerned), used to define the concept of 'employment' for the purpose of equality rights, that ought to apply to any 'employment under a contract of employment, a contract of apprenticeship *or a contract personally to do work*' (emphasis added). This definition visibly omits any of the 'exceptions' applying to the ERA 1996 and TULRCA 1992 'worker' concepts and is therefore to be understood as underpinning an even broader concept. True, decisions such as *Jivraj v Hashwani* [2011] UKSC 40 have cast this concept in the narrowest of terms, excluding the self-employed. But there is now strong authority emerging from the CJEU to the effect that the scope of application of EU equal treatment legislation ought to be understood as applying to 'a wide range of occupational activities, including *those carried out by self-employed workers* in order to earn their livelihood' and only excluding 'those consisting of the mere provision of goods or services to one or more recipients and which do not fall within that scope'[6] casting serious doubts as to the

[3] *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 para 27.
[4] *Ibid* para 25.
[5] *Deliveroo* (UKSC) para 34, referring to the CAC's conclusions.
[6] Case C-356/21, *TP v JK*, ECLI:EU:C:2023:9, para 44.

correctness of the UK Supreme Court's determination in *Jivraj*. If self-employed workers are indeed covered by equal treatment legislation, then we might expect an even looser 'personality at work' requirement applying to the defining concept framing the personal scope of equality law.

28. In other words, it is arguable that UK labour law distinguishes (or ought to be understood as distinguishing) between five 'personality in work' requirements:
    (i) A (seemingly) 'strong personality' requirement for the 'contract of service' category (but even on this see our recommendation for reform in the previous answer).
    (ii) A 'qualified personality' requirement for the ERA 1996 'limb-b worker' category.
    (iii) An 'attenuated personality' requirement for the TULRCA 1992 worker category.
    (iv) A 'loose personality' requirement for equal treatment legislation. And
    (v) A 'no personality' requirement for the NMWA 1998 'home worker' category (and under s. 43K ERA 1996), where the power to substitute is unfettered and the personal nature of work is not a necessary requirement. The *Deliveroo* judgments have unduly blurred and collapsed the two central 'worker' concepts into one.

29. If this analysis is correct, and we believe it is, then the very crude 'fettered/unfettered' substitution clause approach currently being deployed by domestic courts is not sufficiently nuanced to mirror the much more sophisticated notions of 'personality in work' displayed by the various worker concepts described above.

30. **Some of the questions in the consultation document seem to assume that, currently, control is outside the judicial assessment performed by courts testing for limb (b) worker status, and that the right on the part of a person to substitute their labour is 'the sole or overriding factor in preventing someone from meeting the limb (b) worker test' (page 20).** Both assumptions are misconceived.

31. Control has been applied by the courts as a key (but not decisive) element in the distinction between the employee and the self-employed worker for decades: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, QBD. Modern work has altered the circumstances in which control can be exercised, see Phillips JSC in *Catholic Child Welfare Society and ors v Various Claimants and Institute of the Brothers of the Christian Schools and ors* [2013] IRLR 219, SC, observing that it is no longer 'realistic to look for a right to direct how an employee should perform his duties… Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus, the significance of control today is that the employer can direct what the employee does, not how he does it.' Richards JSC in *Commissioners for HM Revenue and Customs v Professional Game Match Officials Ltd* [2024] UKSC 29, SC, held that some of the traditional aspects of control listed by MacKenna J in *Ready Mixed Concrete* might now be absent from some contemporary work. Nonetheless, it was imperative that 'some sufficient framework of control' is evident, even if only as regards incidental or collateral matters, it is not necessary for the traditional forms of direct day-to-day control to be present in order to establish that the requisite framework of control exists.

32. In one of the key cases on substitution clauses, *Pimlico Plumbers* v *Smith* [2018] UKSC 29 the Supreme Court expressly noted 'On the other hand, there were features of the contract which strongly militated against recognition of Pimlico as a client or customer of Mr Smith. *Its tight control over him* was reflected in its requirements that he should

wear the branded Pimlico uniform; drive its branded van, to which Pimlico applied a tracker; carry its identity card; and closely follow the administrative instructions of its control room'. Similarly, in *Uber v Aslam* the Supreme Court insisted on the presence of indicia linked to the control test ('First and of major importance, the remuneration paid to drivers for the work they do is fixed by Uber and the drivers have no say in it'; 'Second, the contractual terms on which drivers perform their services are dictated by Uber'; 'Third …. a driver's choice about whether to accept requests for rides is constrained by Uber', 'Uber exercises control over the acceptance of the request by the driver in two ways', and so on) so it is clear that courts already consider control, alongside other tests. So the problem is not, as the new test proposed by the consultation seems to imply, that control is not being taken into account by courts.

33. The problem is also not that 'personality' is the sole or 'overriding' factor in preventing someone from being a limb (b) worker. Except if the courts find that there is no personal service at all, it is then 'unnecessary to consider other features of the contractual relationship' (para 28 in *Deliveroo*). It is not the sole, but as put in [77] of *Deliveroo*, it is 'an indispensable feature of the employment relationship'. 'Personality' has become for limb (b) workers what mutuality of obligation has been, for decades, for employees with a contract of employment: an 'irreducible minimum' of the limb (b) definition (though with the difference that personal service is a statutory requirement whereas mutuality is a common law requirement). So, if the requirement of personal service is not there it is 'fatal' to the finding of a limb (b) worker (as it is fatal to the finding that somebody is an employee), in the same way 'mutuality' is for contracts of employment. Other factors, including control, will be considered, but personal service is 'indispensable'. None of the proposals contained in this consultation try to make it dispensable. For it to become 'dispensable' it would either have to be removed from the definition (as per s. 35 of the NMWA1998 home worker definition) or would need to be toned down by means of the concept of 'predominantly personal', as suggested above.

34. We note that control is increasingly a concept with diminishing heuristic returns, as also acknowledged by the consultation when it says 'The government recognises that there can be circumstances where it appears the engager/employer is relinquishing some aspects of control to the individual and that can mean transferring cost and risk to those who are providing the service' (page 19). Technological surveillance and algorithmic management tools increasingly allow for highly diffused, but effective, forms of control that the traditional control test may or may not be able to capture. So according to the authors of this submission, adding a focus on control is not the correct or even relevant (since the courts already apply it) direction to address the problem of misclassification of workers stemming from substitution clauses.

35. Two more points are worth mentioning. The new test as proposed at page 17 is unhelpful and by and large is likely to place more, not less, emphasis on the 'personal service' requirement. This is so because under the new test employers would get, in effect, two bites at the 'personality' cherry. A first one in Step 2, in the context of the explicit personality part of the test (alongside control, but that is not a novelty, as argued above). A second one in Step 3 of the new test (the consultation says expressly 'this would also include an assessment of personal service'), in the context of what is, for all purposes, a version of the existing 'business reality' test (which at least for now is not tainted by 'personality'). We also note that the wording 'client or customers' should be used carefully and in light of the taxonomy we presented in paragraphs 21-28.

36. The second point we would like to make is that this test does not fundamentally change the notion of 'personal work' or 'service'. Unless that notion is changed (either by making it dispensable or by attenuating it along the lines suggested above) simply reorganising the way the traditional tests have been used will not help resolve the problems identified by the present consultation document.

37. **Other questions in the consultation explore the viability of the power to set the rate of pay or negotiate pay is a key factor in differentiating between limb (b) workers and the self-employed.** While we broadly agree that this is the case, it is important to point out that the way in which the consultation document frames this issue can be improved. Elias LJ produced a more felicitous and effective formulation in *Day v HEE* [2017] EWCA Civ 329, which the Institute has further developed and used in its publications (see sections 6.19 and 6.20 in https://www.ier.org.uk/wp-content/uploads/RollingOutTheManifestoForLabourLaw.pdf), by reference to the concept of 'terms of engagement' being 'substantially determined'. This formulation is more inclusive than the one suggested in the consultation document. The one set out in the consultation may exclude several workers in the gig-economy who are seemingly able to set their rates of pay, without the platform controlling any key aspects of their work performance, but with labour platforms in effect substantially determining them through forms of algorithmic oversight (such as matching services that indirectly compress the rates of pay, or algorithmic management systems that while not directly deplatforming or penalising workers that decline jobs, indirectly affect their potential for future income by prioritising more compliant couriers for future roster bookings) that fall short of the traditional understanding of direction and control. We note that there is a preliminary reference pending before the Court of Justice of the EU that clearly exemplifies the complexities arising from placing too much emphasis on control (Case C-505/26, *GlovoApp23 v Tesorería General de la Seguridad Social* [2026] OJ C (pending)).

38. **The consultation also explores whether lowering the bar required to satisfy what the courts consider to be personal service would be of any** assistance (for example, by stating that any right of substitution limited only by the need to show that the substitute was as qualified as the contractor to do the work would be consistent with personal service).

39. Although we believe that a similar intervention could prove helpful to some workers to begin with, employers would quickly redraft contracts to remove that requirement and simply shift any liability to the worker. For instance, by adding clauses such as 'it is the contractor's responsibility to ensure that the substitute is capable of performing the job to the standards expected', which could be seen as distinct from 'showing that the substitute was *as* qualified', in that the substitute could be *less* qualified but still capable to perform the job to the expected standard.

40. Essentially, we believe that there is no shortcut to resolving the challenge posed by substitution clauses. Without addressing directly, the employee and worker definitions, and the concept of personality that underpins them, any efforts that focus on the extent to which substitution may be more or less fettered are simply going to result in an 'army of lawyers' rewording substitution clauses in contracts in order to fit them around the notion of personality in work underpinning those definitions. As pointed out above, dealing with substitution clauses requires dealing with the concept of personality, and

that can be done in two ways: either by removing personality altogether (through the use of the 'personally or otherwise' formula) or by scaling it down by reference to the concept of 'predominantly personal work'.

41. While we believe that personal service should receive less emphasis (see above), we are also of the view that control is a test with diminishing returns in terms of its ability to locate personal work relations within the protective scope of employment legislation. Managerial control and direction can increasingly be exercised through subtle ways that depart from the traditional ideals of direct or bureaucratic control underpinning the control test. Employing entities, increasingly through technological means, are capable of monitoring the performance of work without recurring to express or implied terms (such as prescribing how and when the work should be performed, disciplinary sanctions, duties of obedience, etc.), that have traditionally informed the control test. They are also capable of splitting various aspects of control and direction between several entities (from agencies to platforms to customer feedback) in ways that challenge the traditional unitary notion of control as performed by a single employer. Beyond the very broad concept that we have set out above (substantially determining the terms of engagement), we think that control (and subordination generally) is less and less capable of shepherding modern work relations back into the scope of employment rights.

42. Ultimately, as noted above there are two ways to achieve the regulatory objectives explored in Chapter 1 of the consultation. Either removing personality altogether (as per s.35 of the NMWA1998), or scaling it down in the relevant definitions and guidance (by reference to the concept of 'predominantly personal work relation'). The new worker definitions should be aligned as closely as possible across a broad range of employment statutes, including TULRCA 1992 and the Equality Act 2010, ensuring that all workers can enjoy all labour rights (and not just those that the document mistakenly defines as 'core'), and are protected from employment status misclassification tactics. Simply renaming employment statuses (the way the consultation also appears to propose) will be of no use unless the changes are substantive. The Labour Party has committed to introducing a new unified worker status and that should, in our view, remain the regulatory priority and central focus of this government. Employment status is too important and complex a topic to reduce it to a question of semantics.

C. Creating a presumption of worker status

43. **The central idea contained in Chapter 2 of the consultation document is that the government should create a presumption of worker status by reversing the burden of proof.**

44. We are of the view that a general presumption of status, enshrined in statute could assist with employment status classification subject to two key conditions. Firstly, it would require a reform of the definitions of the employment statuses it is designed to presume. As the current definitions of 'employee' and 'limb (b) worker' stand, it would be exceedingly easy for employers to rebut the presumption at trial. Since employers control the legal construction of contracts of employment and work, they will continue to insert clauses that are designed for the purpose of defeating the mutuality of obligation and personality tests as currently emerging from case law. A presumption of

status is only as effective as the status it seeks to protect is solid in terms of its internal legal construction. As the definition of the key employment statuses currently stand, we predict that the presumption envisaged in this document will be easy to rebut, generating a new body of case law that will quickly frustrate the good intentions of government in this domain.

45. Secondly, a rebuttable presumption of employment status is only as strong as the evidentiary rules that need to be met in order to rebut it. If a rebuttal can happen on a pure 'balance of probabilities' (as the paper suggests at p. 22), then the rebuttal will happen on a more or less regular basis as employers will be able to design contracts with clauses that will readily assist them with this task at trial. So, the standard of proof needs to be adjusted and heightened. A useful example in that sense can be derived from Norway's use of legal presumptions of status, under the Norwegian Working Environment Act (*Arbeidsmiljøloven*). Section 1-8 of that Act establishes that anyone performing work for and under the subordination of another is assumed to be an employee, placing the burden on the employer to prove it is "highly probable" (*svært sannsynlig*) that the worker is a genuine independent contractor. 'Highly probable', to use the example made in the consultation document to illustrate the concept of 'balance of probabilities', would require the employer to demonstrate that the evidence is considerably more than 51%-49% in their favour. The EU Directive on Platform Work 2024/2831, which in Article 5 introduces a 'Legal presumption' for platform workers, provides that this should be 'an effective rebuttable legal presumption' (Article 5(2)) and that 'effectively make it easy for the persons performing platform work to benefit from the presumption' (Recital 31). We believe that if a 'balance of probabilities' rule resulted in an ineffective application of the presumption, one that is routinely rebutted by putative employers, then it would be reasonable to adjust the standard of proof accordingly.

46. But overall, the authors of this Briefing note believe that as currently envisaged and set out at page 22 of the consultation document, the presumption of worker status will likely be of no practical use and may even trigger the development of a new corpus of jurisprudential precedents further weakening the legal construction of the employee and worker categories in UK law. If such a tool were to be deployed it would need to be accompanied by a new standard of proof acting as a deterrent against formulaic rebuttals based on 'defeat clauses' inserted in contracts, and would need to be referred to more robust definitions of worker and employee.

47. Aside from the suggestions made above, the authors of this Briefing collectively support the idea of single status of worker and the Worker Status Bill presented by Lord Hendy that offers a comprehensive package to address the concerns raised in the present consultation. We believe that only such a comprehensive solution can 'grasp the nettle' of this problem, and that the ideas put forward in this consultation paper fail to 'grasp the nettle' (the expression used in the Foreword to the document, at page 2).

    - A revised and updated version of the Institute's proposal can be found in 'IER Briefing on the Single Employment Status' (IER, April 2026)

D. Granting some new rights to the genuinely self-employed

48. Chapter 3 of the consultation document largely focuses on the idea of **extending certain rights (and not just labour rights) to the self-employed, including the right to a written statement and the right not to be blacklisted, some health and safety rights**. While in our submission we responded to the relevant questions in a selective way, generally speaking we have strong reservations about an approach that seeks to extend certain worker rights and protections to the self-employed on a piecemeal basis. This is for two reasons. The first one is that this approach runs contrary to the more coherent solution of introducing a single worker status. As the consultation document acknowledges at page 28, the approach that is being suggested here 'would avoid the need to introduce a general definition in employment legislation and would clearly apply only for the purposes of the specific rights'. For the reasons explored in the government consultation, we firmly believe that such a 'general definition in employment legislation' is necessary. Especially since the adoption of ERA2025, the government genuinely needs to grasp the nettle on this issue.

49. The second reason is that, broadly speaking, extending certain worker rights to some self-employed persons on a piecemeal basis would worsen the problem that the government is trying to tackle (and that a single worker status would address in a more definitive way): 'a minority of employers using novel contractual forms to avoid legal obligations, while ensuring that workers can benefit from flexible working where they choose to do so' (the wording in Labour's Plan, 2024, pages 7-8). These proposals would in effect create a new 'self-employed plus' status, adding to the palette of employment status options that unscrupulous employers can draw from in order to source, but also mask and misclassify, their labour sourcing needs.

50. We note, while opposing the proposal explored in the consultation document, that the list of rights being considered is clearly incomplete and at the very least should include anti-discrimination legislation in order to rectify the infelicitous situation generated by the SC decision in *Jivraj* v *Hashwani* [2011] UKSC 40.

51. Instead of the proposed piecemeal extension of randomly selected rights to the genuinely self-employed, we are firmly of the view that the only way in which the concerns explored in the consultation documents can be addressed is through the introduction of a new single worker status, modelled on the proposals advanced in a number of the Institute's publications and by Lord Hendy's Bill. This is for two reasons, the first one linked to the complexity of defining which self-employed workers are to be included and which should be excluded and why. The second one linked to the effect that ERA2025 has had on this area of the law.

52. As for the first reason, the consultation document acknowledges that 'There is currently no definition of a self-employed individual in UK employment law' (page 27), this being in effect a residual category. In order to avoid engaging with this problem (that the consultation fears would 'add further complexity') the paper suggests that the government could extend the meaning of 'worker' for the specific rights and protections that the government is proposing to introduce, and could do so in the way s.43K ERA 1996 extends whistleblowing protection legislation beyond its core worker definition to include 'some groups of specific self-employed people, including self-employed doctors, dentists, ophthalmologists and pharmacists working in the NHS' (p 28). It is not clear whether the document refers to s.43K(1)(a)(i)-(ii) and (b) (which includes a broad definition of worker that dispenses with personality and arguably with certain elements

of contractuality, and which the Institute generally approves of, as stated above), or whether it refers to the long list of professions contained in (ba)-(d). Some sentences in the consultation document ('avoid the need to introduce a general definition in employment legislation'; 'make it easier to apply the new rights and protections to targeted groups of the self-employed'; 'It includes some groups of specific self-employed people, including self-employed doctors, dentists, ophthalmologists and pharmacists working in the NHS', all at page 28) would seem to suggest that the government would deploy the second approach, where certain rights are extended to certain specific categories of self-employed workers.

53. But this approach would both further complicate the law (which the consultation also acknowledges 'there is a risk that this approach could lead to a more complicated framework as it could result in each specific right being applied to different groups of self-employed people') and likely lead to arbitrary extensions and arbitrary exclusions.

54. As for the second reason, it must be acknowledged that the coming into force of ERA2025, in the absence of a 'single worker status' reshaping and giving unity and coherence to the scope of application of all UK employment rights, has further complicated and fragmented an already complex landscape. Ultimately, the Act introduces at least three new concepts and definitions that did not exist previously.

- The first one is the new concept of 'zero hours arrangement', deployed in sections 1-8 of the Act, in the context of the new protective regime applying to zero hours workers. This status is defined (with very broad brushes) in s.6 of the Act. The definition has two parts. One part that defines the word 'arrangement' as 'an arrangement (whether contractual or non-contractual) other than a worker's contract' (new s. 27BZ2(1) ERA 1996). And a second part that defines the entire expression 'zero hours arrangement' as 'an arrangement under which (a) an employer and an individual agree terms on which the individual will do any work where the employer makes it available to the individual and the individual agrees to do it, but (b) the employer is not required to make any work available to the individual, nor the individual required to accept it'.

- The second, as already noted above, is the definition of 'relevant contract' in s 24 of the Act, in the context of non-disclosure agreements in discrimination and harassment cases, and introducing a new s. 202A in ERA1996. This part of the Act seeks to void any agreements between an employer and a worker where they seek to prevent the worker from speaking out about 'relevant harassment or discrimination' or their 'employer's response to the relevant harassment'. But this particular section of the Act also gives the Department for Business and Trade Secretary of State the power, in the future, to expand the group of people who these new measures apply to, beyond the standard definition of "worker" of ERA1996. It does so by reference to an individual who is not a worker but 'has entered into, or works or worked under, a relevant contract of a specified description'. This 'relevant contract' is then defined, in the following subparagraph (the new s. 202A(5) of ERA1996) as 'any contract, other than a contract of employment, whether express or implied and (if express) whether oral or in writing, by which an individual undertakes to do or perform (whether personally or otherwise) any work or services for another party to the contract whose status is

by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'. This formula is nearly identical to the 'limb b' worker definition, except for the words in brackets 'whether personally *or otherwise*'. The term 'otherwise' has been presumably included to address the concerns raised by judicial decision such as *Deliveroo*, where the presence of a 'genuine' substitution clause was seen as denying the personal nature of the provision of work and services, and therefore of 'worker' status. The words 'personally or otherwise' appear, as noted above, in the 'home worker' definition of s.35 NMWA 1998, and it is quite clear that this would have been the source inspiring Parliament, as typically equality statutes in the UK appear to insist on personality, for example s.83(2) of the Equality Act 2010. But while this new definition is designed to deal with the abuse of substitution clauses it is not capable of dealing with the absence of contractuality (especially when linked to mutuality) that afflicts several working arrangements in the UK labour market.

- The third one is the definition of 'agency workers who are not otherwise "workers"' in s 51 of the Act, for the purposes of the Act's provisions on adult social care. Given the very high incidence of employment agencies and other type of labour intermediation structures in the provision of personnel to the social care sector, it was perhaps unavoidable that ERA2025 would dedicate some specific attention to agency workers. ERA2025 has thus gone to great lengths to ensure that the new rights on 'social care worker's remuneration', contained in some of the earlier provisions of the Chapter on social care, also benefit agency workers, including those workers who, while supplied by an intermediary to a principal are not, technically speaking, 'workers' due to 'the absence of a worker's contract between the individual and the agent or the principal' (s.51(1)(b)). As long as they are not caught by the following paragraph (c), i.e. they are not professionals or businesses offering their work or services to clients or customers, these workers will be treated as agency workers in respect of their substantive rights and entitlements.

55. These three new concepts, and the accompanying sets of provisions, have been clearly introduced with a worker protective purpose at heart. But all three had to be introduced precisely because the Act fell short of embracing a new, broad, single worker definition. Their adoption has therefore added to the complexity of the existing legal framework. These new provisions have provided tailored solutions to a limited number of personal scope problems, but also solutions that are micro-targeted to specific new rights (in the context of zero hours contracts, NDAs, and social care workers remuneration) and that offer no relief to the generalised problem of unscrupulous employers circumventing other important obligations contained in the labour and discrimination law statute books, including other obligations introduced by ERA2025.

56. Against this increasingly complex landscape, the proposal to extend on a piecemeal basis certain rights to certain self-employed persons would simply add more complexity and fragmentation. A system already under strain would become unmanageable for everyone, other than for the specialist legal experts that are able to navigate through it with some degree of confidence. Admittedly *Labour's Plan* does expressly say that these 'genuinely self-employed' will be granted some 'rights and protections'. In principle this should not be a problem when done (as Labour's Plan suggests) in parallel with the introduction of a single worker status, as long as those rights are not labour

rights. If these 'genuine self-employed' were granted some labour rights, then in reality, they would quickly emerge as a new and additional 'intermediate category', a group of 'self-employed plus', located between the worker definition and proper businesses undertakings providing services to clients and customers (that could not possibly attract any labour rights, on account of being, well, genuine businesses). This would contribute to a new rise of bogus 'genuine' self-employment or 'self-employed plus', unscrupulous employers once again exploiting the complexity of the UK's framework to deny people their legal rights.

57. The interests of 'freelancers' and of the other categories of self-employed workers that the government is keen to protect would be best served by including them, where appropriate, in the new 'single worker status' definition, as many 'freelance' journalists, artists, and construction workers would no doubt advocate. Most of them want the protections afforded by labour and social law, including paid holidays, pension rights, and protection against unfair dismissal. But – as things currently stand - they also need the tax status that is associated with self-employment (and the tax deductions that come with it), not because they want to 'free ride' the system, but because without those deductions they can simply not make ends meet, and risk being pushed further into poverty.[7] It is worth noting that it is technically possible to devise a single worker status for the purpose of employment law reform without impinging on tax and social security matters.[8] The best way to give labour rights to the self-employed would be to include them, wherever possible (i.e. when they are not proper businesses), in the new 'worker definition'.

58. **Although we only responded selectively to the questions contained in Chapter 3, we felt it important to engage with the issue of blacklisting in particular**. The current protection under the Employment Relations Act 1999 (Blacklists) Regulations 2010 does not clarify sufficiently the scope of protection available to those at work who are regarded as having different kinds of employment status. A notable problem under the regulations relates specifically to regulation 9 which enables any person to complain about a detriment caused by an employer. The regulation is misleading in suggesting that any person can bring a complaint of blacklisting. They can do so only in relation to an employer. For this purpose, it appears that the employer of an employee is to be defined by reference to TULRCA 1992, s 295, and that the employer of a worker is to be defined by reference to the Employment Relations Act 1999, s 13.[9] The definition of a worker under s 13 includes a requirement of personal service.[10]

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[7] Cf. Joseph Rowntree Foundation, *UK Poverty 2026 The essential guide to understanding poverty in the UK* (JRF 2026), reporting that 'Part-time self-employed workers faced the highest in-work poverty rates (28%). Notably, self-employment is associated with the highest poverty rates across both full-time and part-time work', page 101.

[8] Currently UK employment and UK tax employment status definitions are not aligned. Article 5 of the new EU Directive 2024/2831 on platform workers OJ L, 2024/2831, introduces a legal presumption of employment status, but also clarifies that 'the legal presumption shall not apply to proceedings which concern tax, criminal or social security matters'.

[9] See Employment Relations Act 1999, s 3(5) and (6).

[10] By virtue of s 13 defining a worker in part by reference to the Employment Rights Act 1996, s 230(3).

59. There is no definition of an employer of someone who is neither an employee nor a worker. It is thus unclear whether a substitution clause would defeat the operation of the blacklist regulations. If it did so, such an effect would be incompatible with ECHR, Art 11 if the ECtHR were to follow the reasoning in relation to the right to bargain collectively of the European Committee on Social Rights in its unequivocal decision in ICTU v Ireland (case 123/2016) 12 September 2018, at [38]-[39], and the ILO Committee of Experts in its General Survey of 2012 at 2012 General Survey para. 209.

60. The right not to be blacklisted for trade union membership and activities is yet more fundamental than the right to bargain and cannot turn on whether the worker is subject to a substitution clause. We note nevertheless that in paragraph 73 of the *Deliveroo* judgment, the Supreme Court found that the riders whose contracts were affected by the substitution clause 'do not fall within the scope of an employment relationship within Article 11' ECHR. So, there are some interpretative tensions between different national and supranational sources that domestic legislation ought to reconcile.

61. The position needs to be clarified: the protection from blacklisting should be as extensive as possible. As a result, the term worker in this context should be widely defined to exclude the personal service requirement. In addition, there should be no doubt about whether the blacklist regulations apply to people engaged by contractors and sub-contractors alike, as these terms are widely defined.

62. The case of *Smith v Carillion* [2015] IRLR 467 (CA) concerning blacklisting of an agency worker demonstrated how easy it is for precarious employment status to be regarded as indicative of independent contractor status. It is vital that contemporary features of the current 'gig' economy do not enable blacklisting to be masked. For example, it is evident that in platform work trade union representation by the GMB (see https://www.gmb.org.uk/private-sector/taxi-and-private-hire-hub/uber-noticeboard) or the Independent Workers Union of Great Britain (see https://www.iwgb.org.uk/e5-bakehouse-union-recognition) has in practice been aimed at improving terms and conditions for workers not usually regarded as eligible for protected trade union membership. This anomaly needs to be addressed urgently.

63. Moreover, the ability of employers to defeat limb (b) worker status by inserting 'genuine' substitution clauses into a contract with those whose labour they hire must be addressed. This means at least removing reference to 'personal' performance of work or services from any limb (b) worker definitions/interpretation sections.

    However, it would be better to ensure that all 'persons' affected by blacklisting, whether this involves detriment in work or termination of work receive protection under blacklisting legislation. This would be consistent with ILO supervisory jurisprudence regarding the right of self-employed workers to freedom of association, including participation in trade union activities (see Tonia Novitz, 'Collective Labour Rights for Working People: The Legal Framework Established by the International Labour Organization' in The Cambridge Handbook of Labor in Competition Law, eds: Sanjukta Paul ; Shae McCrystal ; Ewan McGaughey. Cambridge University Press, 2022. pp. 11 – 26); and with the European Social Charter jurisprudence as established in *Irish Congress of Trade Unions v Ireland* No.123/2016, 12 September 2018.

64. We note that the European Committee of Social Rights (ECSR), in its Conclusions 2025 report for the United Kingdom (published on January 23, 2026 and available here https://rm.coe.int/conclusions-xxiii-1-2025-united-kingdom-en/48802a4af8), found the UK in non-conformity with Article 5 of the European Social Charter. A central pillar of this ruling focused on the lack of collective bargaining rights for gig economy and platform workers, drawing explicitly on the legal context surrounding *Deliveroo* riders, holding that 'no measures have been taken to encourage or strengthen the positive freedom of association of gig workers' (page 10).

65. **Once more** we would like to refer to the IER Briefing on the Single Employment Status by Lord John Hendy KC, 15 April 2026: 'Those who are genuinely self-employed and in business on their own account, with their own clients or customers, are to be exempt…' Otherwise, blacklisting should cover any person who— (i) seeks to be engaged by another to provide labour, (ii) is engaged by another to provide labour, or (iii) where the employment has ceased, was engaged by another to provide labour, and is not, in the provision of that labour, operating a business on the employee or worker's own account.

E. Conclusions

66. Overall, the authors of this Briefing have found the approach and content of the government consultation largely unhelpful. Its main focus is on reducing the risks of misclassification between 'worker' status and 'self-employment' status, by means of a (counterproductive, in our view) new personal work test and an (ineffective, in our view) status presumption. Far from 'grasping the nettle' of what is admittedly a complex - but not intractable - problem, the consultation contains proposals and ideas that fall short of the circumstances.

67. The consultation fails to deliver on the promise, contained in *Labour's Plan to Make Work Pay*, to 'move towards a single status of worker and transition towards a simpler two-part framework for employment status' and to 'consult in detail on a simpler framework that differentiates between workers and the genuinely self-employed'. Instead, it consults on a different idea, that bears some resemblance to the 2017 '*Good work: the Taylor review of modern working practices*' recommendation that 'The focus should be clarifying the line between 'worker' status and self-employment as this is where there is greatest risk of vulnerability and exploitation' (page 32).

68. But, as noted above, the pledge made by the Labour Party prior to the 2024 election was however a different one: the introduction of a new single worker status. The Foreword of the government consultation now suggests that 'We will consider creating a single status of worker as a longer-term goal, while recognising the flexibility that limb (b) worker status can give to workers and business alike'.

69. The proposals contained in the consultation are, however, an unhelpful distraction from the delivery of a single status of worker and a 'transition towards a simpler two-part framework for employment status'. Introducing a single worker status is crucial to the rights contained in the Employment Rights Act 2025 being enjoyed by British workers, and the government achieving the macroeconomic objectives it associated with what is admittedly the single most important labour law reform in a generation. The proposals

contained in Lord Hendy's Status of Workers Bill (an updated version is available in Lord Hendy's 'IER Briefing on the Single Employment Status' (IER, April 2026)), offer an actionable blueprint to deliver on those promises.

70. The authors of this Briefing are aware that government action on employment status reform is facing strong opposition from employers, [11] but we remain of the view that reform, along the lines of the single worker status pledge, remains essential.

71. Without a single worker status, the majority of the substantive rights conferred by ERA 2025 to employees and workers will likely continue to be circumvented by unscrupulous employers and by newly emerging business models, including platform work, that appear to have been designed to defeat the traditional tests used to classify working people as employees under contracts of employment. To deploy a metaphor used by PM Burnham (to argue against the Right to Buy), giving new rights to workers without resolving the vexed question of employment status is tantamount to 'trying to refill a bath without being allowed to put the plug back in'.[12]

72. Government should consult soon on the introduction of a new single worker status and deliver on that pledge within this Parliament.

London and Liverpool, 24 November 2026

[11] As reported in the CBI's 'Half year impact report' in October 2026 'A proposed single worker status risked reducing businesses' flexibility to respond to customer demand and offer different working arrangements. Following sustained CBI engagement, the government is now only considering narrower changes aimed at ensuring 'genuine self-employment''. Available at https://www.cbi.org.uk/membership/impact/ (last accessed 19 November 2026).
[12] A. Burnham, 'I will build at least 10,000 council homes. As for right to buy – suspend it for new properties', The Guardian, 7 May 2024, available at https://www.theguardian.com/commentisfree/article/2024/may/07/council-homes-right-to-buy-new-properties