

20thth April 2017

Matthew Taylor
By email

Dear Mr Taylor,

RE: Submission to independent review on modern working practices

I am writing to you enclosing our submission to the independent review, which you are running. You may recall that APSCo has attended a couple of consultation events to put forward the view of the professional, flexible labour market in the UK.

We met briefly at a consultation at the beginning of March, at which you said, as an off-the-cuff remark, that you were not interested in the professional self-employed. While naturally your focus is on the intolerable conditions that potentially vulnerable workers can find themselves in, I am very concerned that the review will miss a once in a generation opportunity to examine and provide holistic discussion of the merits and flaws in self-employment for professionals.

As the Resolution Foundation has said recently, the principle growth in self-employment over the last decade has come from higher-end specialist workers. These workers are also very important because they have a large impact on the economy.

The review could also have an important role to play because the debate on self-employment for professionals is so piecemeal. As the recent events on the treatment of Class 4 NICs has shown there is a great amount of heat and not much light.

HMRC and in parts of HMT there is an attitude that tax and NICs are the primary driver for incorporation, and they do not even discuss the possibility that this is not the principal reason for people becoming self-employed or incorporating. As a result the professional self-employed are being buffeted by tax changes and recruitment firms swamped by ever-increasing compliance burdens.

The Review could add much light here by exploring these issues in the round and by not treating large groups as homogenous. Indeed, a modicum of positive rhetoric would go a long way in this debate.

We are very keen that the professional self-employed are not largely ignored, because they are not seen as vulnerable. However, the freedom of such professionals to incorporate and take the risks inherent in that action is being eroded, due to HMRC's view that all individual incorporation is driven by the desire to avoid tax. We would like to see the review considering ways in which independent professionals are able to work as they choose, and pay taxes in a system that treats them appropriately.

APSCo wholeheartedly welcomed this review and your Chairing of it. It is the first credible review of its kind, and we would be enormously disappointed if it neglected the important professional end of the labour market. APSCo would be very happy to provide you with any information, or expand on any issues touched on here if that would be helpful.

Your sincerely,



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Submission to Independent Review of Modern Working Practices

20th April 2017

Summary:

This submission addresses the following points:

1. The flexibility of the labour market is key in fostering productivity, absorbing economic shocks and enabling specialists to supply their services on a "as needed" basis.
2. The recruitment sector plays a vital role in job-matching specialists with work and could be a crucial driver of best practice in helping achieve public policy goals such as fostering good work for all.
3. The 'gig-economy', flexible labour or self-employment are important parts of the economy. They are appropriate for highly-paid specialists but are often inappropriate where workers are vulnerable, that differentiation is critical in maintaining freedom while clamping down on malpractice.
4. APSCo denounces the casualisation of labour for vulnerable, low-paid workers.

Policy solutions

1. Written terms for all. The terms of the Written Statement Directive are currently being revised. In the UK only employment terms and agency worker terms must be in writing. We support the introduction of written terms for workers which could be a simple summary of key terms and rights.
2. Legal clarity on the different types of "gig worker" and the rights and obligations attaching to each status. This should include differentiating highly skilled Personal Service Company employees. Further, urgent review of the employment statuses under common law and taxation law with the intention of codifying a unified status.

3. We see recruitment firms as important. If run well they can be a significant driver of good practice. We think that the review should explore incentives for good recruitment firm practice such as changes to procurement rules.
4. Late payments continue to be a problem for the self-employed. The FSB estimates that 30 percent of its members' bills are paid late, with 9 in 10 of these payments delayed by over a month. This is an issue for recruitment businesses but also of course micro businesses and SMEs in the economy often get caught up in lengthy payment processes.
5. It is clear that the self-employed can find it difficult to access training and may be unable or unwilling to pay for training themselves. Currently the apprenticeship levy means that recruitment firms have to pay it even though they largely recruit PSC or self-employed workers. Due to the constraints of the apprenticeship levy, particularly the minimum length, apprenticeships are not a commercially viable option for agency workers. We think that reforms to the Apprenticeship Levy could help in the provision of training for the self-employed¹.
6. There should be a new status for the PSC employee which offers a positive route for professional workers to be able to sell their services without the stigma of being seen as a tax-avoider. It is clear that flexible working is economically important to the UK economy and has significant intrinsic benefits to workers. The OTS has done a great deal of work in this area and we think that the Government should engage positively with the self-employed in this area.

About APSCo

The Association of Professional Staffing Companies ("APSCo") is the UK's only trade association dedicated to representing the views and opinions of the UK professional recruitment sector.

APSCo members are recruitment organisations engaged in the search and selection of business professionals on behalf of client companies either on a permanent or flexible basis in the UK, the wider EU and globally. Our members specialise in the STEM sectors, education and qualified social work. APSCo reflects the international nature of its membership and has a global structure with APSCo trade associations in Germany, Singapore and Australia.

¹ The Apprenticeship Scheme (financed by the levy) currently woefully ignores workers, agency workers and the self-employed. Much of this levy will not be used by Levy Paying Employers and pass after 18 months to the government. This is a particular concern for recruitment firms as the levy is payable on their agency worker (and IR35 public sector deemed payrolls) but neither the agency worker nor the contractor can benefit from the training. We are advocating the rules should be changed so that the levy is not applied to such payrolls or at the very least it can be transferred to recruitment firm's clients for their use or access broadened to enable diversion of resources into assisting and training the self-employed. We also think that recruitment bodies and firms, alongside Unions, should have more of a role in helping to discern training needs.

Section 1: The flexibility of the labour market is key in fostering productivity, absorbing economic shocks and enabling specialists to supply their services on an “as needed” basis

The flexible labour market is essential to maintain the resilience of the UK economy. Between 2008 and 2011, 88% of individuals moving from unemployment into employment, and 95% of individuals moving from inactivity into employment found work in either an (UK) SME or self-employment².

The UK's freelancing model allows consultants to supply their services and expertise on demand via Personal Service Companies or as self-employed individuals, at a commercial rate, in exchange for assuming business risk and being exempt from receiving employee protections such as maternity leave and pay, unfair dismissal and pension rights from either the client or the recruitment firm. This can be liberating for many and wholly inappropriate for some.

PSCs and self-employed productivity

According to research by Oxford Economics there are 307,000 PSCs in the UK and those PSCs had average revenues of £78,000 in 2015 prices and an average direct contribution to GDP of £69,400, 30% higher than the UK average contribution per worker³.

PSCs had a combined turnover of £24.2 billion during 2015 and from these earnings made a direct contribution to UK GDP of £21.3 billion (1.1 percent). This is larger than the Civil Engineering Sector⁴.

² See *Productivity, Investment and Profits During the Great Recession: Evidence from UK firms and Workers*, C. Crawford et al, Fiscal Studies 34(2), June 2013 and *Small Firms, Giant Leaps: Small Businesses and the Path to Full Employment*, IPPR, April 2014.

³ Data on the different wages offered to contract and salaried workers is very limited. As a result this analysis focussed on data for professionals in IT professions, for which we were able to access robust statistics for 2011 from the Contractor UK Market Report. The equivalent hourly earnings available for permanent staff were taken from the Annual Survey of Hours and Earnings from the ONS.

People working in the 'computer programming, consultancy and related activities' industry and people in 'information technology and telecommunications professions' were used. The total costs that businesses would face were estimates based on Eurostat data on labour costs levels for the UK Information and Communication industry. Having scaled up the costs to account for this, we estimate that there was an average additional cost of employing a contract worker of 19.6 percent.

More up-to-date data for 2015 was available through Contract Eye. However, this considered only advertised roles, rather than the wages of all individuals in work, in addition to focussing on a very narrow part of the sector. We considered this to be an exaggeration of the likely average wage. As a result, this indicated a wage level that was higher than the 2011 data to an unrealistic degree.

⁴ The Economic Impact of Personal Service Companies, Oxford Economics (London, 2016)

The performance of the labour market and growth of self-employment have been among the defining characteristics of the UK's recent economic recovery. The headline employment rate – which fell from 73.0% in Q1 2008 to 70.1% in Q3 2011 – recovered relatively quickly, aided in part by strong growth in self-employment. By Q1 2016, the employment rate had risen to a record high of 74.2%, and just over 4.5 million workers were self-employed. This growth, the strength of employment relative to output and the resulting weakness of labour productivity pose a particular challenge to an understanding of the UK labour market.

Taking the 2008 to 2015 period as a whole, the level of self-employment increased by around 730,000: from 3.8 million to 4.5 million. Of this increase, around half was accounted for by full-time self-employment, and around half was accounted for by part-time self-employment.

While it is tempting to ascribe this development to the circumstances of the economic downturn and recovery – and it may have played a part – many commentators suggest that these trends are better seen as a continuation of an existing, pre-downturn trend. Taking the 2001 to 2015 period as a whole – when the level of self-employment increased from 3.2 million to 4.5 million – roughly half of the increase was accounted for by full-time, and around half by part-time self-employment.

The number of workers in this mode of employment grew by 88% between 2001 and 2015 – compared with 25% for full-time self-employment. As a result, part-time self-employment accounts for 1.2 percentage points of the 1.6 percentage point increase in the share of all employment accounted for by self-employment between 2008 and 2015. While full-time self-employment continues to account for the majority of self-employed workers, but with the exception of a few, specific periods – in 2003 and 2014 in particular – its share of employment and hours has remained relatively stable over the last 15 years.

This is particularly interesting from a productivity perspective. While the data above suggests that freelancers are highly productive in terms of output there are only ONS estimates of GVA that illustrate productivity of the self-employed. These suggest that the downturn triggered a substantial drop off in the productivity of the self-employed. However, productivity amongst the self-employed was significantly higher pre-financial crisis than the full-time employed, suggesting that full-time self employment remains highly productive.

Self-employment as means of providing work for older workers

While part-time self-employment has become considerably more prevalent over the past 15 years, there are several trends which are common to both the full- and part-time modes. Both groups of workers have seen their age profile get markedly older in recent years. Among both sets of workers a growing number work in the finance & business services industry, with changes in usual hours worked following broadly the trends of employees. In both groups the incidence of higher occupations and long-tenures is above that of employees, and both groups are concentrated in the South East and London – with full-time self-employed workers in particular becoming more concentrated in the capital.

The evidence presented here also suggests that, in general, self-employed workers are broadly content with their labour market status. Among older part-time self-employed workers in particular, there is little evidence of workers wanting a full-time position, of job search or of dissatisfaction with their self-employed status. Analysis also suggests that those moving from employee positions to self-employment tend to

have somewhat higher pre-transition hourly earnings than workers moving to new employee positions: trends which are more consistent with workers making a positive choice, rather than being forced through economic necessity to be self-employed. Among younger and mid-aged self-employed women – in particular those working part-time – the growth in the incidence of self-employment has not been accompanied by growth in the number of people who would prefer to work full-time, nor a clear uptick in the number of workers seeking an alternative job. Among younger part-time self-employed men, however, the picture is less certain. Larger portions of these workers display a greater degree of dissatisfaction with their part-time status and appear to have come directly from unemployment – possibly indicating a choice made under economic hardship. It is among these workers that evidence of under-employment is strongest.

Section 2: The recruitment sector plays a vital role in job-matching specialists with work and could be a crucial driver of best practice in helping achieve public policy goals such as fostering good work for all

Unfortunately, the recruitment industry's representation in the media all too often focuses on examples of worker abuse at the lower end of the agency worker market, hiring pressures on the public sector and the excessive margins of disreputable recruitment firms. This does not reflect the activities of the professional recruitment sector which includes APSCo's members nor does it highlight the positive benefits the industry brings to UK plc and the modern labour market.

The professional recruitment industry is innovative and incredibly responsive to change. This delivers solutions to most forms of modern employment.

Recruitment firms' databases of candidates and business contacts are valuable commodities to the larger economy as dynamic technological innovations enable workers (whether employees, traditional agency workers, workers employed through umbrella companies or incorporated personal service company workers (PSCs)) to be matched with businesses requiring highly skilled experts on demand and 'just in time'.

Recruitment firms, online job boards and other on-demand platforms encourage and support job mobility throughout the UK. Independent workers are far more likely to move temporarily or permanently for a role than permanent staff particularly in key professional STEM sectors such as IT and engineering.

There is no evidence that clients are treating agency workers unfairly, compared with employees in the professional sectors of the market supported by APSCo.

It does benefit agency workers and incorporated contractors to have a third party recruitment firm representing their interests and ensuring the client treats them fairly and within the law.

Recruitment firms are themselves regulated under the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003. The regulations are enforced by the Employment Agency Standards department at BEIS.

The Resolution Foundation in their report entitled 'Secret Agents: agency workers in the new world of work', state that the current number of 865,000 agency workers has grown by 30% since 2011. Those in agency jobs are the "forgotten face" in the recent debate around insecure work, according to the Resolution Foundation. It states that agency workers earn hundreds of pounds less than those in staff jobs, have less rights to sick pay and paternity leave and have little termination of contract protection.

When considering these conclusions, it is important to note that the Resolution Foundation has not considered the application of rights under the Agency Workers Regulations 2010 which provide comparable rights of basic pay and conditions to permanent workers at that client's site alone. The Resolution Foundation may be making broader comparisons across the labour market generally rather than the specific comparison required on a role by role basis pursuant to the Regulations.

However, Citizens' Advice research and the Labour Force Survey⁵ show that of all workers, across the whole economy, agency workers are much better informed about their rights than those on zero-hours contracts, temporary staff, and even part-time employees. Nonetheless, the proportion of workers that are not aware of their rights to paid holiday who work with recruitment firms remain too high; recruitment firms clearly do often promote awareness of worker rights but good practice should be further encouraged.

Recruitment also has a number of bodies who help to lead the industry in terms of driving best practice. APSCo is the leading body for recruiters who work with the professional labour market.

APSCo is passionate about enforcing best practice and its Compliance+ audit programme for the qualified social work and education sectors has been devised specifically to offer members' clients confidence in the safeguarding processes followed by professional recruitment firms. APSCo as a voice of the professional recruitment sector can contribute with others, such as business, trade unions and Government itself to developing a vision and strategy for modern employment including working to make Brexit a success for the UK economy.

APSCo collates up to the minute data on trends across business sectors and the skills demanded by business both in the UK and further afield. STEM professional recruitment demand is a bellwether of changing global skills requirements and data can be fed into wider analysis on demand side trends in business and society, such as demographic changes, migration and developments in technology which drives future skill needs. Associations, unions and recruitment firms are well placed to support the identification of training gaps across the specialist parts of the economy in order to help further create fulfilling, productive, work.

The professional recruitment sector is ideally placed to support the Government in developing new business models and APSCo is already working to provide opportunities for under-represented groups. APSCo's joint initiative with the Business Disability Forum and EY has resulted in a guide to disability confidence for recruitment businesses published in 2015 and a best practice guide to UK business on the Disability - smart approaches to talent acquisition published in summer 2016.

However, recruiters are not obliged to join a trade body at all. We think that it is crucial that trade bodies are further empowered and firms are incentivised further to join trade bodies. For example, public procurement rules could mandate the adoption of Compliance+ certification and/or membership of bodies. That could begin to drive private sector procurement frameworks too.

⁵ Labour Force Survey 2016, Q2 2016

Case Study

Claire supplies her services through her own limited company Personal Services Company (PSC). Her current contract is via a recruitment firm, with the London Borough of Sutton as an Evaluation Lead in a project Sutton are running looking at the adequacy of care provision in care homes throughout the borough. The contract is for 8 months, 10 days per month.

Claire provides time-sheets to the London Borough of Sutton and once approved her company raises an invoice with the time-sheet in support and invoices the recruitment firm. The recruitment firm pays Claire on their payment terms and raises an invoice for Claire's fee plus its own fee to the London Borough of Sutton.

What does Claire bring to the London Borough of Sutton as a contractor?

Claire is an expert in her field. She is a highly qualified mathematics graduate and worked for 15 years as a permanent employee providing healthcare audit services at the Audit Commission, subsequently the Healthcare Commission and Quality Care Commission. She was made redundant around 6 years ago and has been contracting since then.

With her experience both from her permanent role and subsequently contracting in a variety of public healthcare and local authority organisations she brings an external perspective and expertise to internal teams. She calls herself a 'critical friend' as she has no other priorities or interests other than to deliver the best outcome for the project. She rolls out best practice initiatives and prides herself on influencing and expanding the vision of long term employees.

Why does Claire choose to contract?

Claire is a single mother with two school age children. Contracting and working flexibly allows Claire to continue to work in senior roles whilst being able to spend time with her family. She enjoys the variety of 8-12 month contracts working in different organisations, meeting new teams and expanding her knowledge.

What does the recruitment firm bring to the arrangement?

Recruitment firms have up to the minute databases of candidates, are able to effectively search online job-boards and post roles but also become an expert in markets to the point of personally knowing candidates working in a particular area with a particular skill set.

Recruitment is a people business. Consultants work in vertical markets, becoming expert in a quite a narrow skill set, meaning they genuinely do develop working relationships with candidates and clients. This means they can generally find the right person for a role at very short notice.

In addition, increasingly clients in the private and public sectors want a third party to oversee the procurement and payment of off payroll workers, to reduce costs and increase efficiency. Recruitment firms fulfil this function. From 6th April 2017 recruitment firms have been liable for applying the correct tax status of public sector placements such as Claire's and where appropriate will deduct PAYE and employee NICs from Claire's gross income and remit the net to Claire's PSC.

Good work

APSCo agrees that good work should not be an unmet aspiration. We have in other work looked also at fair work and the reports of the Fair Work Convention in Scotland as a source for what people are looking for from modern work. Here we have assessed what research exists concerning how the self-employed feel about their work and to what extent they feel their work possesses the attributes of good work.

Self-employment research⁶ using data from the UK Skills and Employment Surveys has been conducted to compare intrinsic job quality and job satisfaction among employees and the self-employed. It finds that self-employment involves higher intrinsic job quality and job satisfaction than working as an employee, although self-employed people work harder, with less training.⁷

The analysis focuses on:

1. Task quality (including discretion, variety and skill match)
2. Skill requirements (training and learning)
3. Generic skills
4. Work effort (both intensity and hours)

The data show that compared with employees the self-employed have greater task discretion and variety, better skills matching and higher overall happiness. These are all important aspects of good work.

Turning to job satisfaction, the results are even clearer. Compared with employees, the self-employed are significantly more satisfied with their job overall, and with all aspects of it, with the sole exception of job security (with which they are slightly less satisfied than their employee counterparts). While some of these differences are expected, others (e.g. the significantly greater satisfaction of the self-employed with better pay levels) might be regarded as surprising.

It should, however, be noted that there may be unobserved differences in intrinsic job quality which contribute to these differences in satisfaction. It is possible, for example, that self-employed people have different expectations about job quality; and/or that they have less appealing alternative jobs with which to compare.

Self-employment appears to embody a higher job quality on most of the indicators measured than does working as an employee (even taking

⁶ Meager and Baumberg.

⁷ The data they used are drawn from a common data series, which runs from the Social Change in Economic Life Initiative in 1986 right through to the Skills and Employment Survey in 2012, previous skills surveys in 1997, 2001, and 2006, and the Employment in Britain Survey (1992). See: <http://esrc.ac.uk/research/surveys/skills-and-employment-survey.aspx>

into account the differences in the type of person who becomes self-employed and the type of work they do). There are also important differences between the types of generic skills emphasized in self-employment compared with those used by employees (although these differences cannot be claimed to embody 'higher' or 'lower' job quality).

In line with this, and consistent with much of the earlier literature⁸, the self-employed are more satisfied with their jobs as a whole, and with nearly all aspects of their jobs (the major exception being that they are less satisfied with job security than are employees).

The ONS has also conducted some research on the motivations of the self-employed. 'The data presented here suggest that in general, self-employed workers are broadly content with their labour market status. Relatively few report negative reasons for becoming self-employed, few indicate that they are looking for alternative employment and among the part-timers, many respondents report that they would prefer not to work full-time. Evidence of under-employment is strongest among younger, male workers, who display a greater degree of dissatisfaction.'

The number of self-employed workers has risen over the long term as a consequence of stronger in-flows from employment and unemployment offsetting a net out-flow to inactivity. These movements, as well as stronger intra-self-employment flows – movements from full-time to part-time self-employment in particular – suggest that recent growth in aggregate self-employment is in part related to workers managing their retirement in a different way to previously. The ONS has said: 'During the economic downturn, the net flows from unemployment and from among employees fell markedly, but during the recovery which followed these net inflows grew in volume. The outflow to inactivity also declined markedly during the downturn – largely as a consequence of lower net outflows from part-time self-employment. This result is particularly striking given the age mix of the self-employed, which has shifted towards older workers over the recent years.'

The ONS Analysis also suggests that those moving from employee positions to self-employment tend to have somewhat higher pre-transition hourly earnings than workers moving to new employee positions: trends which are more consistent with workers making a positive choice, rather than being forced to be self-employed. Among younger and mid-aged self-employed women, in particular those working part-time, the growth in the incidence of self-employment has not been accompanied by growth in the number of people who would prefer to work full-time, nor a clear uptick in the number of workers seeking an alternative job. Among younger part-time self-employed men, however, the picture is less certain. Larger portions of these workers display a greater degree of dissatisfaction with their part-time status and appear to have come

directly from unemployment – possibly indicating a choice made under economic hardship. It is among these workers that evidence of under-employment is strongest.

Professional self-employed 'are highly skilled individuals who work for themselves but do not employ others. They range from journalists and designers to ICT specialists and consultants.'

They make up a significant segment of professional working generally, making up 25% of all those working in professional, scientific and technical work and 22% of all those in arts and entertainment.'

'No longer can work be defined simply in terms of working for a big corporation, public sector employer or an SME. The professional self-employed with their different approaches to work and distinct philosophy, have the ability to be flexible and innovative, and provide value-added to businesses and economies.'

Research confirms that there has been a major change in the attitude to work and the way it is carried out. A shift from having a job to working for clients.

Self-employed professionals in regulated professions regard professional bodies highly, in particular for training purposes. However, in less heavily regulated areas reject the need for such organisations and look to less formal and contemporary forms of professional support such as online training, social clubs, and interdisciplinary facilities. The lack of continuing professional development amongst them is an important policy issue.

Why do self-employed professionals matter? Because they facilitate a more specialist division of labour. Their independence allows their specialist skills to be available more flexibly and adaptively across the economy. Perhaps that manufacturer couldn't afford to employ an IT consultant but needs a specialist in a niche area for a project.

By working with different clients over time self-employed professionals can command strong fee rates and yet cost less to each of their clients by working for a range of organizations, flexibly.

Why become self-employed if you are a professional?

The limited research available suggests that there a wide range of reasons for why people become self employed but that those reasons are remarkably consistent.

Where job security and promotion used to be principal drivers in career decisions the factors which are important for self-employed professionals are now changing.

According to a poll from 2010 well over a third of the European workforce would prefer independence over employment. For many independence is linked to self-fulfillment. This very much includes the ability to take up interesting work. More practically, the prospect of greater control over the time, place and pace of working is also an important factor. Another important element in the quality of work is that

people can balance work with other priorities. Other research suggests that poor work relationships can lead to major health and well-being issues. Motivations for becoming a self-employed professional include;

- Self-employed professionals motivation
- Rejection of employee status
- Priority of focusing on skills
- Wanting autonomy
- Financial incentives

APSCo would say that these studies reflect its own experience of the professional labour market. It cannot comment on the wider market.

It is clear that people do value job security but that this is balanced with a number of other aspects of work. Forcing people through punitive rules into employment would curtail these freedoms and be highly damaging.

Section 3. The 'gig-economy', flexible labour or self-employment are important parts of the economy. They are appropriate for highly-paid specialists but are often inappropriate where workers are vulnerable, that differentiation is critical in maintaining freedom while clamping down on malpractice

Labour market regulation and employment rights are complex and often interact poorly with tax rules.

To assist with understanding, firstly we have produced a diagram at the end of this document in which we attempt to explain the routes an individual has into the UK labour market. Broadly, these are employment, self-employment, agency worker, limited company contractor (PSC).

Secondly we have attached a flowchart of a recruitment business chain of supply, again highlighting routes a worker can supply his/her services, depending on the role and the worker's status. These are agency worker, self-employed, umbrella employed worker or limited company worker (PSC).

The legal picture is complex.

"Employee", "Worker" and "Agency Worker" are all defined in law but can be under different statute. "Contract for service" and "contract of service" are not defined in statute and there is extensive case law examining them. Legislation protects workers and many enjoy freedoms as a result of new ways of working, but the unscrupulous can seek to exploit the gaps between these definitions or simply choose to label a worker as "self employed".

The term "worker" is defined in law under s230 (3) Employment Rights Act (ERA) as an individual who has entered into or works under a contract under which he undertakes to do or perform personally any work or services for the other party, provided that the worker is not in business on his own account and the other party is not his customer or client:

"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; and any reference to a worker's contract shall be construed accordingly;

The term 'agency worker' is defined in law under the Agency Worker Regulations 2010:

An agency worker (often referred to as a 'temp') is someone who has a contract with the TWA (an employment contract or a contract to perform work personally) but works temporarily for and under the direction and supervision of a hirer. The unique tripartite relationship between agency

worker, agency and hirer is a key feature of these Regulations and who is covered by them. The key elements required for someone to be an agency worker are:

- there is a contract (an employment contract or a contract to perform work personally) between the worker and a TWA;
- that worker is temporarily supplied to a hirer by the TWA; and
- when working on assignment the worker is subject to the supervision and direction of that hirer; and
- the individual in question is not in a business on their own account (where they have a business to business relationship with the hirer who is a client or customer).

'Worker' as defined in s230 (3) is not used consistently in subsequent legislation. This is most likely due to a desire or need (arising out of E.U. legislation) to broaden the protection offered to individuals. It is useful to provide some examples:

Whistleblowing: S43K (1) ERA The definition of worker is broader and includes agency workers (who are not covered under s230 (3)), where the terms on which they work are substantially determined by the person for whom they work or by a third person, or both. Their employer is the person that substantially determines the terms on which the 'workers' for the purpose of whistleblowing are engaged.

Statutory Sick Pay and Statutory Maternity Pay: 'qualifying employees' are more widely defined in this context than under the normal employment status tests and include all those whose earnings are liable for class 1 National Insurance contributions, which include 'agency workers'.

Apprenticeship Levy coming into force April 2017: qualifying employees defined as those whose earnings are liable for class 1 National Insurance contributions. The effect of this is that the 0.5% levy will be applied across an agency workers' PAYE payroll and an IR35 deemed employment payroll (applied to those incorporated contractors working in the public sector inside the tax rule IR35 after April 2017). This is despite the fact that neither agency workers nor incorporated contractors can gain any benefit from the levy as apprenticeships only apply to those in employment.

Transfer of Undertaking Regulations (TUPE) Regulation 2(1): Defines an employee, for the purposes of TUPE, as 'any individual who works for another person, whether under a contract of service or apprenticeship or otherwise'. It does not specifically refer to a 'contract for services' although such contracts could fall within the 'otherwise' as potentially could 'agency workers' where there is a clear transfer of service.

Equality Act 2010 s83 (2): Discrimination law protects those who are in or applying for 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'. This definition covers employees, workers, agency workers and some individuals who are technically self-employed. It does not expressly exclude those providing services in the course of practising a profession or running a business.

Common Law

A key point in question is determining whether someone is employed or whether there is an agreement to provide services. However, there is no definition at common law of a 'contract for service' versus a 'contract of service'. The latter refers to a relationship of employment and the former to a worker relationship or a looser agreement to provide services.

The definition of worker was considered by the Employment Appeal Tribunal in *Byrne Brothers (Formwork) Ltd v Baird and others* 2002 ICR 667. They concluded the intention was to create an intermediate class of protected worker, not an employee but not carrying on a business. Protection was required because the worker was in a 'subordinate and dependent position vis-a-vis their employers' and needed protection in regard to working hours and pay.

They determined the test to determine whether an individual was 'carrying on a business undertaking' and whether the 'employer' was a 'customer was similar to the test around contract 'of' or 'for' service. They recognised this was different to HMRC's decision in respect of self-employment.

In the Supreme Court case of *Bates van Winkelhof v Clyde and Co LLP and another* (2014) 1 WLR 2047 when considering the self-employed who enter into contracts to perform work or services for others it was stated that 'One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them....The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else and work' as an integral part of the principal's business."

The recent Employment Tribunal judgment of *Aslam and others v Uber BV and others* ET/2202550/15 is an example of parties choosing to interpret the statute and common law in a certain way to construct a relationship of self-employment, primarily supported by a complex series of contractual agreements between the self-employed worker and the party in practice providing their services. This case is subject to Appeal but the Employment Tribunal was very clear in its disregard for the contractual arrangements in light of the factual position- 'the terms on which Uber rely do not correspond with the reality of the relationship between the organisation and the drivers. Accordingly, the Tribunal is free to disregard them'.

The Uber case demonstrates how, without a coordinated approach across statute, common law and HMRC legislation, a party can seek to effectively make the law fit circumstances for its own benefit.

It may be more appropriate for the same definitions of 'employee', 'worker', 'agency worker' to be applied across all statutes including HMRC legislation where practicable and for the statutory definition to take into account and be consistent with existing common law and EU law to the extent it applies. This statutory definitions would need to be updated periodically to remain relevant.

However, this will only work if there is a similar clarity around the 'genuine self-employed' in business on their own account, whether incorporated or not. There is currently no definition of an incorporated worker, or a 'personal services company' in HMRC's language either in

statute or common law. This leads to highly skilled professionals, whether supplying services directly to clients or working via a recruitment firm, being grouped into the same bracket as the workers needing protection as defined in the case of Byrne.

The term 'gig economy' is used broadly to define independent or self-employed workers engaged on flexible or short term contracts. It has been unleashed by technology and global trade, creating complexity but also opportunities for individuals, businesses and recruiters.

It has maintained a high profile due to the current uncertainties in the law around employment and self-employment. The gig economy is in action both at the high end of the market with independent professionals who use recruitment consultancies or market themselves directly through websites such as freelancer.com and at the bottom of the market with self-employed and zero hour models.

The latter are, quite rightly, currently under the spotlight due to the abuses uncovered at companies such as Sports Direct leading to it and its supplier recruitment companies moving away from zero hour contracts.

The balance of benefits between workers, agency workers and employers is acceptable if the law as it stands is applied correctly and fairly.

As stated previously the 'gig economy' has a broad, undefined non legal meaning. Skilled, educated independent IT and design contractors work in the 'gig economy' but have completely different needs to a seasonal casual worker in the retail industry – both seem to fall within the common phrase 'gig economy'.

Problems arise when the law is ignored, wrongly applied or not enforced.

We consider there is adequate protection and support for agency workers. We also consider there is adequate protection and support for those who are not employees if they are correctly assessed as self-employed.

Governmental resources are naturally limited and it is important to focus on the vulnerable workers, by type, industry or sector rather than apply a broad brush approach. The latter results in unnecessary red tape and is extremely costly to oversee effectively.

We note the new role of Director of Labour Market Enforcement and we are interested to see the steps taken by the Director in this new role. We note the transformation of the Gangmasters' Licensing Authority (GLA) into the Gangmasters' and Labour Abuse Authority under the Immigration Act 2016. and we are broadly supportive of the GLA scope being expanded to cover other vulnerable groups of workers such as retail supply chain workers, although this is not relevant to our members.

APSCo represents the professional staffing sectors and candidates and contractors in white collar professional roles in all but the most unusual cases are contracted on a basis recognized in law.

Members' organisations such as APSCo have codes of conduct and complaints procedures to offer redress. Candidates, contractors and indeed clients can complain directly to the Employment Agency Standards team at BEIS. APSCo cooperate with BEIS on many initiatives such as Safer Jobs and further with other key stakeholders in the industry. We often promote standards that go beyond legislation.

What differences should there be between levels of Government support for the self-employed and for employees, for example over statutory sick pay, holiday pay, employee pensions, maternity pay? How should those rights be changed, to ensure fair protection for workers at work?

Workers already have statutory protection in respect of sick pay, maternity and similar rights.

The AWR provides agency workers with the right to equal pay and basic conditions.

However, many professional, specialist, workers do not want these "rights" as they are in a "seller's market". This means that the AWR, in their case, is merely red tape and a compliance burden.

It is clearly important to protect vulnerable workers but it is important to ensure that one size is not made to fit all which would be unnecessarily costly for the economy.

Tax and self-employment

Whilst we understand that taxation is outside the scope of the review we are also aware that that taxation and employment status are strongly linked.

Currently, too often, employment status is shaped by taxation rules not by employment law.

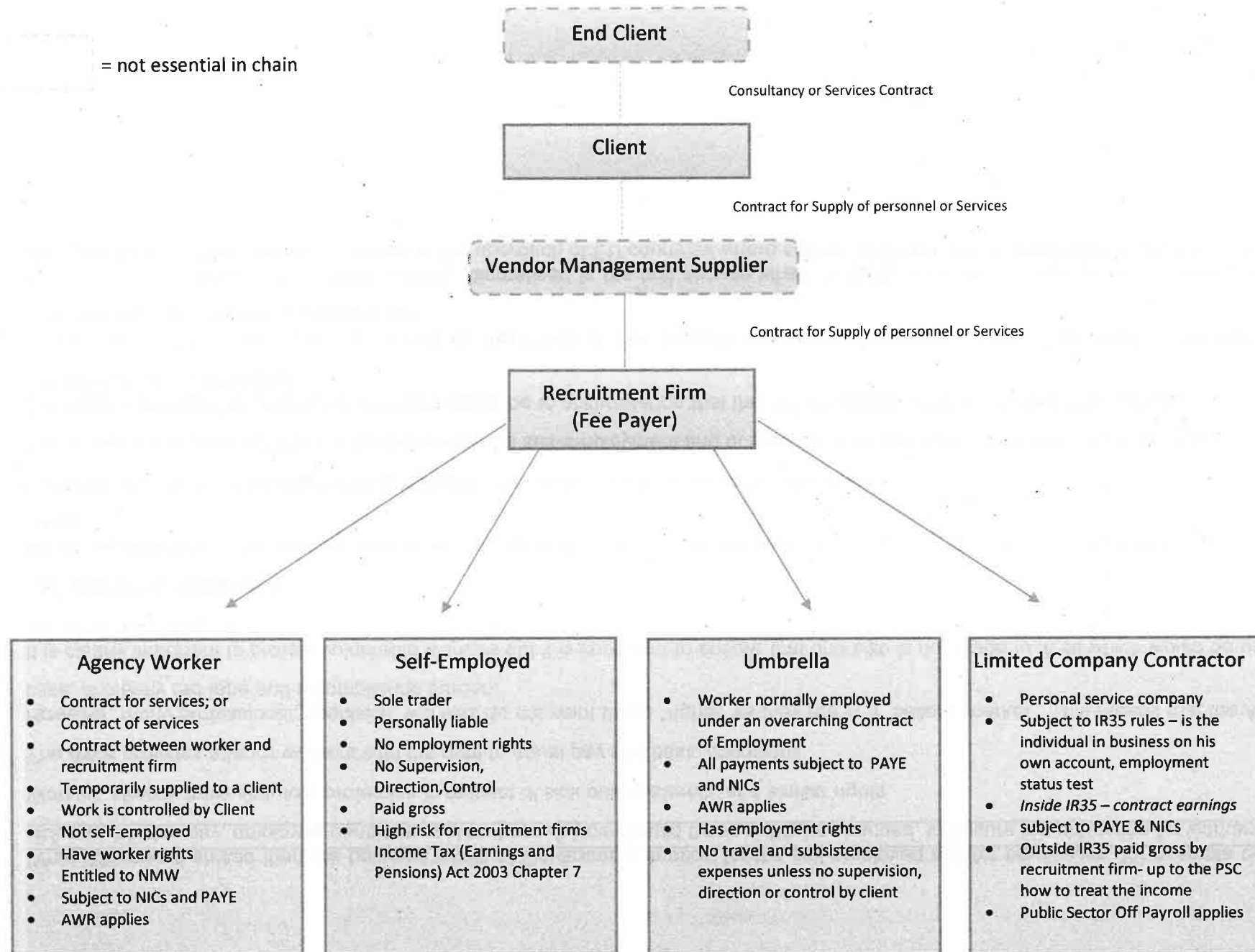
Firstly, we would point out that the tax advantages of self-employment and of incorporation are significantly lower than commonly thought.

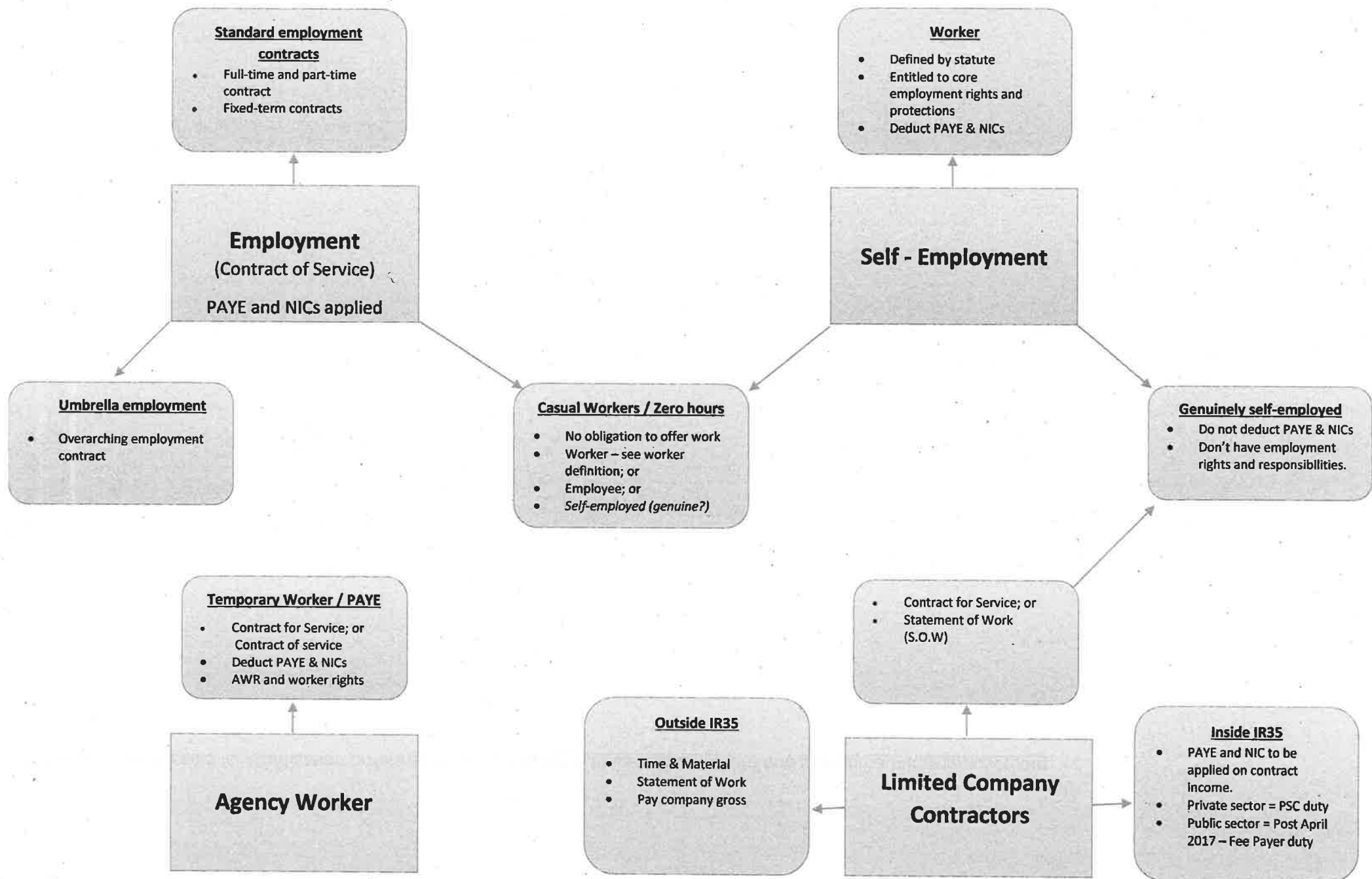
Our second principle for taxation of this area would be to acknowledge that the self-employed, contractors and PSC workers are not in a like for like position as the employed.

In the case of PSCs we support proposals by the Office of Tax Simplification to 'look through' a PSC. This would mean that a corporate structure was not a means of avoiding tax.

PSC workers in particular have been unfairly stigmatised in the last decade when in reality they take on risk and have helped drive the UK economy forward. This stands in contrast to the approach of EU countries where self-employment and incorporation levels are much lower.

= not essential in chain





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