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GLA LICENSING STANDARDS CONSULTATION RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS

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Introduction

The Gangmasters Licensing Authority (GLA) has published a consultation, open until 28 October 2011, on changes to its licensing standards to come into force in April 2012.

The Association of Labour Providers (ALP) represents over 270 labour providers, all of which are subject to the licensing standards of the GLA. The Association has been heavily involved in the regulation of labour providers over the last five years. It therefore has a major interest in this consultation.

The Association, together with most other stakeholders, acknowledges the significant improvement achieved in labour supply standards within the food and agricultural supply chain in the last eight years. The GLA has played a major role in this improvement.

Legitimate labour providers want, and have a right to expect, a “level playing field” in order to compete fairly within the law. To enable this it is essential that action is taken to prevent rogue businesses from undercutting legitimate labour providers, either through tax evasion, worker exploitation or both. To this end, the industry fully supports an intelligence-led, risk-based proportionate enforcement regime that facilitates a fair, competitive trading environment.

The GLA’s role has changed since it was formed and continues to evolve. The GLA should rightly focus its enforcement activities on the worst cases of worker exploitation and continue to move its compliance regime towards providing a risk based, lighter touch, lower cost effective regulation mechanism.

As the Regulators’ Compliance Code 3.2 states: “Regulators should keep under review their regulatory activities and interventions with a view to considering the extent to which it would be appropriate to remove or reduce the regulatory burdens they impose.”

Summary

The Association considers that:

- A “minded to” stage should be introduced into the Licensing Decision process to ensure that natural justice and the Regulators’ Compliance Code is adhered to.
- The GLA should have latitude to make a range of responses to enable proportionality in decision making.

- Broadly, the current licensing standards have held up well and do not require significant overhaul.
- The standards should be simplified where they can be and minor anomalies tidied up.
- Compliance activity against the Agency Workers Regulations should focus on tackling wholesale evasion rather than minor inconsistencies.

Fairness in the Decision Making Process

The Association recommends that the GLA amends its licensing decision process.

The reason for this is that the current process:

- Does not accord with the principles of natural justice
- Consequently is open to legal challenge.
- Builds unnecessary cost and time delay into the process for both the GLA and labour providers.

The first key principle of natural justice is “Nemo iudex in causa sua”, meaning that no person can judge a case in which they have an interest. The GLA has already recognised this process risk and so to avoid the appearance of a possible bias, even if there is actually none, the GLA has separated its Inspection and Licensing Decision operations. This is the best separation that can realistically be achieved within what is a relatively small organisation.

The second key principle of natural justice is “Audi alteram partem”, this refers to the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. Here the GLA process does not accord with natural justice and needs to be modified.

The current GLA process may be summarised as:

1. Compliance / Application Inspection
2. Inspection Report
3. Licensing team decision
4. Right of appeal

The current GLA Licensing Decision process outlined above is deficient with regard to the second key principle of natural justice. This is because the inspected labour provider is not informed of the allegations against him and has no opportunity to respond to the GLA evidence prior to a decision being made by the GLA Licensing team. This is unfair and has led to a number of inappropriate licensing decisions.

This process, as well as being in breach of natural justice is also contrary to the [Regulators' Compliance Code](#).

Specifically the current GLA process is contrary to the Regulators' Compliance Code at 8.2 as follows: “When considering formal enforcement action, regulators should, where appropriate, discuss the circumstances with those suspected of a breach and take these into account when deciding on the best approach. This paragraph does not apply where immediate action is required to prevent or respond to a serious breach or where to do so is likely to defeat the purpose of the proposed enforcement action.”

The GLA must “have regard to” the Regulators’ Compliance Code which is a Statutory Code of Practice for Regulators and unless outweighed by another relevant consideration must give the Code’s provisions due weight in developing their policies or principles or in setting standards or giving guidance.

The ALP believes that a fair and workable process (excepting where immediate action is required) that complies with natural justice and the Regulators’ Compliance Code should be:

1. Compliance / Application Inspection (as now)
2. Inspection Report (as now)
3. Licensing team “minded to” notification letter (other than where immediate action is required) outlining allegations and supporting evidence. This should be issued within four weeks of an inspection or an interim notification provided. It is not acceptable for the GLA to have provided no response to a labour provider, as regularly happens, many months after an inspection (new)
4. Right of written response within a four week period (new)
5. Licensing team decision (as now)
6. Right of appeal (as now)

There should also be clarity around the point at which those organisations having conducted Active Checks on licence holders are notified and the wording used in such notifications so that unreasonable commercial risk is not caused.

The reasons why the GLA should amend its licensing decision process to that outlined above are:

- It would be in accord with the Regulators’ Compliance Code.
- It adheres to the principles of natural justice in providing a fair opportunity for a labour provider to challenge the evidence presented by the GLA, to summon witnesses and to present evidence, and to have counsel, if necessary, in order to make its case properly prior to a decision being made.
- It would reduce the GLA’s and labour provider’s legal fees as more issues would be resolved at a pre-legal stage.
- It would demonstrate an evolution towards lighter touch regulation without limiting the powers that the GLA has at its disposal.

Proportionate Decision Making

The Association was increasingly concerned following the introduction of the revised licensing standards in April 2009 and through to mid-2010 regarding the apparent disproportionate sanctions being applied by the GLA in relation to the non-compliances identified. The punishment far outweighed the crime in a number of licensing decisions.

This was also identified by Appointed Persons in appeal decisions where the GLA lost appeal cases due to the disproportionality of the decisions taken.

This matter was raised as a key concern by the Association and the GLA took a constructive approach to the representations made by the ALP. Decisions seen by the Association during late 2010 and 2011 on the whole, but not in all cases, seem to be taking a proportionate line.

The GLA will be mindful of the Hampton Principle detailed in the Regulators' Compliance Code that: "Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection."

A licence revocation either significantly damages or destroys a business. Licence revocation is a strong, but necessary, power that should be used only sparingly by the GLA.

Currently the GLA is restricted in its ability to make proportionate licensing decisions by its own rules. The GLA should amend its licensing decision regime to provide itself with the latitude to take decisions on a proportionate basis as fit the situation of the case.

The Association proposes the following amendments:

- Where a score of less than 30 points exists, the process of issuing Additional Licence Conditions (ALCs), which must be corrected within a defined period, continues (as now).
- Where a score of more than 30 points exists, the GLA may take a range of responses based on the scale and seriousness of their findings as follows:
 - Where the breaches are relatively minor or technical in nature, the GLA should issue ALCs but not revoke the licence of the business. The ALCs must be corrected within the defined period. If the licence holder fails to comply with an ALC the licence may be revoked as is allowed under Licensing Standard 1.3. If the licence holder disagrees with one or more of the ALCs, s/he may appeal to an Appointed Person whilst trading continues.

On this latter point the GLA should ensure that the appeal process does not provide a mechanism for licence holders to continue trading whilst clearly and grossly operating in a non-compliant manner.
 - Where the breaches are more serious, to revoke without immediate effect allowing the licence holder to appeal and apply for a new licence (as now).
 - In the case of a "significant risk" of serious damage to human health, revocation without notice is likely to be appropriate (as now).
- The "fit and proper" bar, which effectively prevents those named from trading for two years, is a major sanction that should be used only where applicants or licence holders have demonstrated significant breaches of the licensing standards and fail to show the competence or willingness to comply with the licensing standards.

This change to the licensing decision regime should be made for the following reasons:

- It would provide latitude for the GLA to make proportionate decisions when there have been relatively minor or technical breaches of critical licensing standards.
- It would reduce the GLA's and labour provider's legal fees as more issues would be resolved at a pre-legal stage.
- It would demonstrate a move towards lighter touch regulation.
- It would comply with the Regulators' Compliance Code, specifically 8.3: "Regulators should ensure that their sanctions and penalties policies are consistent with the principles set out in the Macrory Review. This means that their sanctions and penalties policies should:
 - aim to change the behaviour of the offender;
 - aim to eliminate any financial gain or benefit from non-compliance;

- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance.”

GLA Licensing Consultation Questions

1. Do you agree that the policy for automatically refusing future applications should be expanded to include other Critical failures and scores of 100 points or more?

The Association disagrees with this suggestion. It is unnecessary.

The current rules adequately allow the GLA to take a “fit and proper” decision on a case by case basis according to the circumstances. That is sufficient.

This rule adds nothing to the GLA powers and restricts its ability to be a proportionate regulator.

To have a blanket rule of automatically refusing future applications would be contrary to the Regulators’ Compliance Code in that it does not allow the GLA to be:

- responsive and consider what is appropriate for the particular offender and regulatory issue;
- proportionate to the nature of the offence and the harm caused;

2. Do you agree in an explicit reference to paragraph 6 of the schedule to the Gangmasters (Licensing Conditions) Rules 2009 in Licensing Standard 1.1?

The ALP disagrees with this proposal as written.

The GLA already has criminal enforcement powers in this area. Under Section 18 of the Gangmasters Licensing Act, a person commits an offence who:

(a) intentionally obstructs an enforcement officer or compliance officer who is acting in the exercise of his functions under this Act, or

(b) without reasonable cause, fails to comply with any requirement made of him by such an officer who is so acting.

Paragraph 6 of the schedule to the Gangmasters (Licensing Conditions) Rules 2009 requires that “a licence holder must permit the Authority to inspect the business at any reasonable time”.

It is proposed to make explicit in the Licensing Standards that failure to comply with this requirement may lead to a breach of standard 1.1, the Fit and Proper test. Once an applicant is found to be not fit and proper the GLA will usually refuse applications for at least two years from the date of that fit and proper decision unless the applicant can show exceptional circumstances to justify being granted a licence.

A licence revocation with a two year bar from holding a licence is a disproportionate sanction in this case.

The circumstances as to why a licence holder has refused the Authority access to inspect the business should be sought before a decision is taken. The licence holder should have the opportunity to demonstrate whether or not they had “reasonable cause”.

Once the licence holder has had opportunity to present their evidence, and the GLA has considered this, should the GLA take a proportionate decision on a case by case basis.

Depending on the circumstances this does not preclude the GLA from taking a fit and proper decision but for this to be a blanket rule would be disproportionate.

3. Do you agree with failure to notify the GLA of change in Principal Authority should be a Critical standard with a score of 30 points?

The ALP disagrees with this proposal. This is a process point not a point of substance.

The current penalty of 16 points is sufficient.

If the failure to notify is deliberate, because for example the principal authority has a criminal record, then the “fit and proper” criterion can be used if this is proportionate.

As a separate point the Licensing Standards are not clear as to who the Principal Authority is. It should be made clear in the Licensing Standards that the Principal Authority is the “individual responsible for the day-to-day management of a business” and explain how this should be interpreted in practice.

4. Do you agree with introducing 8 penalty points for failing to notify the GLA of changes to contact details, directors, company secretary, partners, other individuals named on the licence?

No, this is a process point. To penalise a business for clerical errors is disproportionate.

Related to this is the issue of the clear definition of who should be a named person. This is unclear in the GLA Licence Standards and is interpreted inconsistently.

5. Do you agree it should be a Critical requirement for licence holders to notify the GLA that they are in administration, liquidation or gone bankrupt?

Yes, but subject to practical issues, such as who is the licence holder when a company is in administration or has been liquidated; what needs to be communicated to the GLA and when; and what exactly constitutes non-compliance.

6. Do you agree with the revised wording of Licensing Standard 5.7?

The ALP agrees that Standard 5.7 be redrafted to make specific reference to the protected characteristics set out in section 4 of the Equality Act:

7. Do you agree Licensing Standard 5.7 should be classed as “Critical”?

The ALP disagrees with this proposal.

Discrimination can be very minor, not deliberate and of no practical significance. The law is highly complex in this area and evolving as case law establishes around the Equality Act.

To class Licensing Standard 5.7 as “Critical” would be disproportionate and unnecessary.

Serious discrimination may already be addressed through the “Critical” Licensing Standard 3.1: Physical and Mental Mistreatment – “A worker must not be subjected to physical or mental mistreatment and threats must not be made to the worker or others.”

8. Do you agree that Licensing Standard 6.4 should be revised to include explicit reference to vehicles with 8 passenger seats or less?

The Association agrees that standard 6.4 be revised to make clear that where vehicles with 8 passenger seats or fewer are used for hire or reward that appropriate insurance should be in place to cover such use.

9. Do you agree with moving the wording in standard 7.3 that relates to fees and service into standard 7.1?

The ALP disagrees with this proposal.

The issues in point are standard 7.1 are regarded as “Critical” matters.

The points referred to in 7.3 are largely administrative matters. To convert these into “Critical” issues for the sake of tidying up the standards would be disproportionate.

10. Do you think the Licensing Standards should cover the Agency Workers Regulations?

The Association believes that there is a place for the GLA monitoring whether the Agency Workers Regulations 2010 are being applied.

However to be clear, the GLA should not embroil itself with the detail of any individual cases. In such cases, those affected have a right of remedy to the Employment Tribunal.

The GLA should limit its activity to monitoring whether there is wholesale evasion of the Agency Workers Regulations by a licence holder, for example through the use of bogus self-employment models. Specifically:

- The GLA should pay no attention to provision of “collective facilities” or vacancy posting, as these are obligations which fall upon the hirer.
- The GLA should not concern itself with whether the detail of the Agency Workers Regulations is being complied with. This is new law, complex to interpret and beyond the remit of GLA inspectors to be able to interpret correctly.
- The GLA should concern itself only with gross evasion of the Regulations. The ALP supports this position from the perspective of ensuring that legitimate labour providers are able to avoid unfair competition from licence holders who ignore or deliberately flout these Regulations.
- Evasion of Agency Workers Regulations should be an eight point non-compliance. Non-payment of minimum wage is a “Critical” non-compliance. To make evasion of the Regulations a “Critical” non-compliance would be disproportionate. The ALC process under Licensing Standard 1.3 will ensure that compliance is resolved.
- Gross avoidance of the equal treatment, pregnancy and maternity entitlement provisions should be included as an additional line in Licensing Standard 2.3: Wages and Benefits.

11. Do you think the Standards should include requirements relating to the changes in pensions law?

This should be included and explicitly stated in Licensing Standard 2.3.

12. Do you think there are any standards which could be removed in order to better focus the GLA’s work?

No.

Licensing Standards 1.1, 6.4, 7.3 and 7.4 can be made clearer.

13. Do you think any of the scores associated with the standard should be reclassified?

There are matters within standards 4.1 and 6.4 that should not be classed as “Critical”. These standards should be redrafted to make this clear.

14. Do you agree that the GLA should adopt an alternative approach for dealing with breaches of standard 2.2 and 3.3 by adding a condition to the licence requiring the licence holder to pay amounts owed to the workers within a specified timescale?

The Association accepts that this proposal is in line with the Regulators’ Compliance Code 8.3 that: “sanctions and penalties policies should... aim to eliminate any financial gain or benefit from non-compliance and...aim to restore the harm caused by regulatory non-compliance, where appropriate”.

The Association also accepts that this may be a useful alternative sanction to licence revocation.

The Association would seek further clarification from the GLA:

- whether it has the legal power to apply such a sanction
- in what circumstances it would apply such a sanction
- how far back it would apply
- how it would apply this sanction
- how it would enforce this sanction.

15. Do you think there should be any change to rule 5 of the Gangmasters (Licensing Conditions) Rules 2009?

Rule 5 of the Gangmasters (Licensing Conditions) Rules 2009 states that “A licence expires if the licence holder’s registered number (if it is a company), Unique Tax Reference or Value Added Tax number change.

The GLA should have scope to allow a business to:

- Transfer licences where advance notice of legitimate business structure changes is provided
- Transfer licences where advance notice of VAT changes for legitimate business reasons is provided.

16. Do you agree with merging Licensing Standards 5.3 and 5.4?

Yes.

17. Do these Standards as worded properly reflect the legal rights for Trade Unions and their members?

The Association has no comment to make on this.