

## *Comments: Draft Gangmasters Licensing Bill and RIA*

### **Introduction**

1. On 11 March Defra published the second draft of this Bill and on 15 March it published an Initial Regulatory Impact Assessment and Small Business Impact Test. Comments on both documents are required by 22 March.
2. The Association of Labour Providers was established in February, initially by 18 companies that wish to help improve standards in the industry further and also to have a voice in the many public policy discussions about their industry. The ALP is in the process of introducing a code of practice for its members as an interim measure before the legislation can be introduced. Currently the Association has 24 members. These comments are based on a review of the documents by the ALP Executive Committee at a meeting on 18 March.

### **The consultation process**

3. The importance and urgency of the issues that the Bill is seeking to address are well understood and generally accepted. However, the process being followed is in contravention of the principles of good policy-making, for example the requirement to have a 12 week consultation period. There is no way in which the issues can be fully considered in just one week. The risk is that the policy will be not fully thought through and will have unintended consequences. As it is part of the Bill (the inclusion of gathering shellfish) is a direct consequence of a single event – the Morecambe bay tragedy. Hard cases tend to make bad law.
4. In practice there is little to comment on in the Bill as it simply gives Defra the power to make regulations on almost anything to do with gangmasters and also defines gangmasters in a way different from its generally accepted meaning. The regulatory impact assessment is partly in the nature of a consultation document on the policy options. The comments on the assessment are in practice comments that should be taken into account in drawing up regulations under the Act and in some cases the Bill itself.
5. Having made these points, the ALP has studied the documents in detail and is grateful to Defra for making the documents available at the earliest possible opportunity and for attending and participating in a meeting of the Executive Committee at which this response was discussed.

### **Comments on the draft legislation**

6. It is understood that the title of the Bill cannot be changed. This will cause considerable problems. As it is the expression “gangmaster” is pejorative and has been used by many (including ministers) to suggest that gangmasters in themselves are illegal. The position can be contrasted with other areas. There is an Immigration and Asylum Act not a People Trafficking Act and a Financial Services and Markets Act not a Moneyswindlers Act. The more practical problem is that the legislation catches a large number of organisations and people who do not fit any commonsense definition of gangmaster and who therefore will not think that the legislation applies to them. When they eventually discover that it does they will resent having to register and obtain a licence to be a gangmaster. Alternatively, they will pull out of certain activity which will cause its own problems. Among the organisations labelled as gangmasters are:
  - A person who employs two people in a shellfish harvesting business.
  - A large proportion of employment agencies as they supply temporary staff to the agriculture and fresh produce industry.

- With the Bill as presently drafted all farmers and packhouses, although it is understood that it is intended to exclude these by regulation.

7. The dividing line between gangmaster activity (as defined in the Bill) and employment agency activity is very blurred. In practice, most employment agencies supply temporary workers as well and therefore will be gangmasters (as explained above). In some cases a temporary worker will become a permanent employee. It is important to ensure that the legislation is fully compatible with employment agency legislation. There is little evidence of DTI interest in the subject.

8. It is difficult to see how the provisions of the Act can be applied, say, to a gangmaster in mainland China who never visits the UK and has no place of business in the UK.

9. The legislation will fail unless gangmasters obtain a licence and are prevented from operating illegally. It is a natural tendency of regulators to concentrate enforcement on those who register rather than those who do not. Accordingly, there should be a new clause along the following lines: "The Secretary of State shall take all reasonable steps to ensure that all organisations acting as gangmasters obtain a licence to do so." Clause 18 should be amended by the addition of "This [annual] report shall include details of the number of gangmasters registered, the number of workers they have supplied and the extent to which gangmasters continue to operate without a licence."

10. The licence fee should be sufficient simply to cover the cost of administering the licensing scheme and ensuring that gangmasters are licensed. It should not be used to pay for enforcement by other agencies. It is not clear if Clause 5(3)(e) is sufficiently tightly worded to achieve this.

11. Clause 10(2) makes it an offence for someone to take labour from a gangmaster who does not have a licence. The supermarkets regularly audit farms and packhouses. It would be sensible to put a requirement on any other business with deals with organisations that take labour from gangmasters to report to the licensing authority any evidence they come across of illegal gangmaster activity.

12. The legislation, like any legislation, should be comprehensible. Clause 2 does not meet this test. Clause 2(5) defines packhouses and farmers as gangmasters as well as shellfish gatherers. It is understood that the intention is to include all shellfish gatherers within the licensing regime but to exclude by regulation farmers and packhouses. This illustrates the complex boundary lines issues. Clearly it is inappropriate for a farmer employing 2 full time workers to be classified as a gangmaster. It is less clear that a farmer who uses a Chinese contact to employ 30 Chinese labourers for four weeks should not be classified as a gangmaster. A fundamental problem with the legislation as drafted is that it attempts to catch activity undertaken by a specified group of businesses rather than undesirable activity as such.

13. Otherwise the ALP is supportive of the legislation – subject to the points made in the following section. In particular, it welcomes the provisions designed to catch subcontracting and devices to circumvent the legislation, the provisions for sharing information and placing an obligation on labour users to satisfy themselves that gangmasters they deal with are licensed. Bearing in mind the short consultation it also agrees that it is not appropriate to include licensing conditions on the face of the Bill. This is an area where it is essential that there is full consultation.

### **The wider context**

14. This legislation cannot be viewed in isolation. It will be counterproductive if the only result is that disreputable gangmasters who already operate outside the law are able to do so with the added benefit of a government licence. There must be a substantial increase in the enforcement of existing legislation by the existing enforcement agencies irrespective of whether this legislation is enacted. The Government should indicate how a "joined-up" approach will be implemented both now and after the legislation comes into effect and the additional resources that will be made

available for this purpose. In doing so it should recognise that dealing with a problem in one area is likely to mean that the problem will shift to another. For example, from 1 May there will be less money to be made by trafficking workers from Poland and other new EU member states; those who make money from trafficking will therefore source their workers from elsewhere. And if there is less money to be made from supplying workers to agriculture they will be supplied to other sectors such as catering with existing legal suppliers being undercut.

15. There should be full consultation on the regulations to be made under the legislation and this consultation should be in accordance with Cabinet Office guidelines on consultation.

16. There should be a reasonable lead-in time before any regulations apply.

17. The regulations should not impose significant obligations on gangmasters that are not imposed on farmers or packhouses unless there is good reason.

18. The regulations should not require complex record keeping by gangmasters some of whose activity will be regulated under the legislation but other activity (such as supplying labour to the construction industry, employment agency business or direct farming) will not be.

19. The gangmaster problem is linked to the problem of illegal working in Britain. An obligation is placed on all employers to satisfy themselves that their employees are legally entitled to work in Britain. The Home Office has recently issued new guidance in the form of a draft 24 page "leaflet". Employers are expected to be able to recognise for example a Lithuanian passport; indeed they are expected to be familiar with about 30 documents. It is well known that forged passports circulate easily and the average employer (and probably also immigration officer) simply cannot identify these. There is a simple, easy and practical solution to this problem. The Government should establish a network of offices with staff specially trained to establish right to work who would issue a single right to work document to anyone who wishes to start employment in the UK and who do not have a British passport. Employers would therefore have to identify just two documents. The present arrangement is simply an inefficient and ineffective cop-out by Government.

20. The Seasonal Agricultural Workers Scheme (SAWS) is already much abused and probably unnecessary. It is understood that it allows scope for benefit fraud. If the gangmaster legislation is effective, disreputable gangmasters will use the scheme as a device to continue their illegal activities. Ideally, the scheme should be abolished. At the very least it should be reviewed in the light of the gangmaster legislation.

### **Regulatory Impact Assessment (RIA) and Small Firms Impact Test**

21. The RIA has more about the legislation than the draft Bill. Some of the comments in this section are relevant to the Bill itself but for convenience are included in this section as they are raised and discussed in the RIA. The RIA is generally helpful and informative. The ALP has the following specific comments:

- The calculation of the minimum cost of employing someone on the minimum wage or the agricultural minimum wage is helpful and it is certainly the case that any packhouse paying less than £5.85 an hour and any farmer paying less than £6.70 an hour is condoning illegal working. However, these figures should not be taken to be figures which can actually be paid. As the RIA itself acknowledges they make no allowance for management costs or for profit; ie they assume the gangmaster is acting as a charity. A more reasonable way of doing the calculation is to have a fixed mark up over the minimum wage of 35 – 40% (£5.85 - £6.30 for a packhouse). There has been insufficient time to develop this point in detail.

- The favoured option is statutory licensing linked to compliance with the law. It is not clear why there should be a code of conduct as well. This would mean imposing conditions on labour providers that would not be imposed on any other employers.
- The charge for administering a licence without any auditing of £500 - £750 seems hugely excessive. This figure needs to be justified in comparison with other schemes. A reasonable comparator is the annual fee for licensing under the Security Industry Act. This has been set at £190 and covers, according to the SIA website, –
  - Licensing services - the costs of issuing licences, the systems, processing, administration and criminality checks.
  - Enforcement and compliance
  - Communications – the cost of raising awareness about licensing and making sure that everyone within the industry knows what to do and how to get a licence.
  - Infrastructure - the cost of maintaining offices and staff costs.
  - Research and development – the money spent on researching the industry and how better to support it in the future.
- The cost of the initial and renewal audits is reasonable but only if every single aspect of compliance with the law is examined. There is no reason why this should be the case. The audit should concentrate on the areas where there is most concern - employment of illegal labour, paying under the minimum wage, illegal deductions from pay, abuse of workers and VAT, NIC and income tax evasion. There is no reason why matters such as data protection, pensions, accommodation, transport and employment of young persons should be checked as part of this audit. The proposals envisage that gangmasters alone of all businesses in Britain should have a specific audit of every aspect of their business where there are legal requirements. For example why should gangmasters have to "provide evidence that workers have been given details about a pension scheme that they can join if they wish" when no other businesses have to provide such documentary evidence let alone have it inspected. A gold plated kitchen sink has been thrown in. By concentrating on the areas where there is abuse specifically by gangmasters the problems will be addressed and the cost of audits can be reduced substantially below the proposed figures.
- The nature of the business is such that annual audits are essential. It is recognised that this will impose an additional cost on gangmasters. However, this should enable the need for monitoring by packhouses, farmers and supermarkets to be reduced. It also emphasises the need to reduce the cost of audits by concentrating on the key points.
- It is argued that the preferred option "would ensure all gang workers enjoy the minimum terms and conditions of employment laid out in statute". How? These are already legal requirements. They are not enforced now. The compliance audits should assist enforcement but only if the existing enforcement agencies are prepared to act to deal with abuses. There is nothing to indicate that the enforcement agencies are willing to fund the enforcement needed.
- Similarly, exchequer losses will be reduced only if there is enforcement of existing legal requirements.
- Generally the complex set of circumstances that have led to the present abuses will be not be dealt with by a licensing scheme costing £2-3 million a year.

- The proposal to allow a provisional licence is unwise. Regulators in other sectors (eg Security Industry Authority and Financial services Authority) have long since learned that such grandfathering is dangerous. It enables organisations to say that they are government licensed with no checks being made on them at all. This gives every impression of trying to get the arrangements in place as soon as possible regardless of whether they are effective and reflects an unwillingness to commit to initial auditing within a specific timetable. It would be more sensible to require gangmasters to register by a specific date and for a subsequent date to be specified by which time all gangmasters must have a full licence following an initial audit.
- The section on consultation makes little mention of consulting gangmasters.
- The papers assume a significant reduction in subcontracting. The nature of the business is that subcontracting is essential. It is accepted that all subcontractors should be licensed. However, vigorous enforcement will be needed to ensure that subcontracting to illegal gangmasters does not take place.
- The small firms impact test asks the question "Would you be able to make any savings to mitigate against the increased costs?". Labour providers are already being severely squeezed as the papers acknowledge - the notion that they should make savings in other directions (where - given that almost all the costs are labour costs?) to meet a legislative requirement is wholly illogical. One could equally turn this back to Defra "Are you able to make savings to mitigate against the increased cost of running the licensing scheme" therefore requiring no charge to be made for licences.
- The questions in the small firm impact test are illogical and do not lend themselves to sensible answers. The basic question is how much would compliance with legal requirements cost. The simple answer for a gangmaster complying with the law now is zero. However, the cost of complying with the documentation requirements and looking after inspectors would be substantial but indeterminate until it is clear exactly what form the auditing will take. For example, requiring documentary evidence of risk assessments, the state of condition of accommodation, consent of a local authority to the employment of children and data protection compliance would all be costly.