

Commons Committee Stage Brief on Gangmasters Licensing Bill

Introduction

This brief has been prepared by the Association of Labour Providers to assist MPs in their consideration of the Gangmasters (Licensing) Bill at committee stage. It takes the form of key points followed by the context within which the Bill is being introduced and a clause-by-clause analysis based on the draft “as proposed to be amended”. A few new clauses are proposed.

The ALP has been established by a group of labour providers that wish to improve standards in the industry further, to demonstrate their compliance with the law and to influence the public policy debate on matters of concern to them. Currently, the Association, which was established in February, has 25 members. Full details of the Association’s membership, activities and policies can be found on its website.

Key points

- The legislation is broadly supported.
- The legislation will be ineffective unless there is a substantial increase in enforcement activity by the existing enforcement agencies of existing legislation. There seems no mechanism in the Bill for securing this. The Gangmasters Licensing Authority will have responsibility for regulating those gangmasters that seek a licence; there is no indication of who will police those gangmasters who operate illegally without a licence or who will police the requirement not to take labour from an unlicensed gangmaster, and no suggestion of where the resources will come from for this purpose. There should be a statutory requirement on the Secretary of State to ensure that all gangmasters who should be licensed are licensed.
- The definition of gangmaster in the Bill is very different from a commonsense definition; this is unfortunate and will create practical difficulties.
- There has, of necessity, been little consultation on the Bill. Accordingly, it is sensible for the Bill to set out the framework. This will allow full consultation on the secondary legislation that will fill in the details.
- Most gangmasters are already covered by the Employment Agencies Act; it is important to ensure that that the two pieces of legislation are in harmony with each other. It is not clear how this can be achieved.
- The legislation should specify that the annual report should include information on the effectiveness on enforcement activity and on the effects of the legislation.

Summary of the legislation

- Organisations that provide workers to the agriculture, food processing and packing and shellfish industries, and any organisation that employs labour to gather shellfish, will require a licence.
- A Gangmasters Licensing Authority will be established to oversee the licensing function.
- Licensed organisations will have to comply with rules made by the Licensing Authority and will be subject to regular compliance audits.

- It will be an offence for labour users to take labour from unlicensed gangmasters.
- Enforcement officers, who may be officers of other government departments, will be appointed to police the requirement on gangmasters to have a licence and on labour users to use only licensed gangmasters.
- The Licensing Authority will be able to share information with other enforcement bodies.

The Bill in context

The Bill must be part of a strategy to deal with the problems that are well known and generally accepted; licensing is not an end in itself.

The problem that needs to be addressed is the difficulty of enforcing existing legislation for a group of businesses that operate close to or in the informal economy. The enforcement difficulties arise from a combination of factors, including rapidly changing business structures, employment of unsophisticated workers some of whom may have a questionable entitlement to work in Britain, the fact that work is not done at a fixed location, the fragmented nature of the food supply chain and the substantial cost savings that can be achieved by operating illegally.

In this context the strategy should be informed by the Grabiner Report, commissioned by the Government to study issues surrounding the informal economy. The main recommendations of the report, published in March 2000, were:

- The government should take steps to encourage businesses to become legitimate.
- To prevent people joining the hidden economy there should be a requirement to tell the Inland Revenue as soon as a business is started, procedures for issuing national insurance numbers should be tightened and there should be better controls on the issue and use of birth certificates to prevent their use as proof of identity by third parties.
- To detect people in the informal economy departments must improve and co-ordinate their investigations; there should be a specific Government function or line of work, accountable for detecting and investigating businesses in the hidden economy.
- The range of punishments should be increased, including a new statutory offence of evading income tax.
- Greater use should be made of publicity to deter people from working in the hidden economy.

The Report emphasised the importance of Government departments sharing information, and observed deficiencies in this respect. It also observed that “In many areas, the evidence suggests that departments could achieve better results simply by investing more in their current investigations and through better co-ordination of their activities, rather than through any new approach”.

In its response to the Efra Committee report the Government commented: “Many of the illegal activities of gangmasters fall within the wider informal economy. The Government approach to tackling the problems associated with the informal economy is driven by the [Grabiner] report.”

Title

The legislation has an unfortunate title - “Gangmasters (Licensing) Bill”. The expression “gangmaster” is one that labour providers themselves do not like or use. It is pejorative in tone.

There is a more practical problem. While many labour providers recognise that the term “gangmaster” applies to them, the legislation covers many organisations that do not fit a commonsense definition of “gangmasters” and may therefore consider that the legislation does not apply to them. Those organisations include any organisation involved in gathering shellfish and also employment agencies that in the course of normal employment agency business supply temporary staff to farms and packhouses that cannot be considered to be “gangmaster” activity, for example, providing individuals rather than a “gang”.

“Licensing of Labour Providers” would be a better title for the Bill. It is understood that it is not possible to change either the short title of the Bill but the unfortunate consequences of this need to be understood and addressed in communications activities.

This brief, reluctantly, uses the term “gangmaster” to refer to labour providers.

Clause 1 The Gangmasters Licensing Authority

This clause provide for the setting up of an Authority which will be responsible for the licensing activity, but not for enforcement activity. Regulations will set out the details on the constitution and status of the Authority.

It is noted that the Authority will not be an agent of the crown. This raises the question of the status of the Authority and its members. Presumably the decisions of the Authority will be capable of legal challenge and ultimately judicial review. What liability will individual members of the Authority have for the decisions of the Authority?

Clause 2 Directions etc by the Secretary of State

This clause provides for the Secretary of State to issue directions to the Authority and to require the Authority to provide information. This is reasonable. However, it is important that there should be transparency. Any directions should be published and included in the annual report on the operation of the Act.

Clause 3 Work to which this Act applies

This clause applies the legislation to agricultural work, gathering shellfish and processing or packaging any produce derived from agricultural work or shellfish, fish or products derived from fish. This definition excludes a large part of gangmaster activity, for example, the provision of labour to the office cleaning, catering and construction industries. While the chosen sectors may have the major problems at present, it needs to be recognised that as controls are imposed on one area then to some extent the problems will simply be shifted to another area. Also, individual gangmasters serve both the sectors covered by the Bill and other sectors.

Clause 4 Acting as a gangmaster

This clause defines acting as a gangmaster as the supply of workers to do work to which the Act applies.

Subsections 3 – 6 seek to prevent gangmasters from circumventing the legislation through devices such as:

- A legitimate gangmaster subcontracting to an illegitimate gangmaster.
- Coming to arrangements with farmers whereby the farmers in effect lease a field of crops to the gangmaster who then harvests them, perhaps selling them back to the farmer. In this way the gangmaster becomes a farmer.

The clause also catches intermediaries. It needs to be recognised that many of these operate outside the UK.

As drafted, subsection (5)(b) seems to define the use of workers to gather shellfish as “gangmaster” activity. Thus a person employing two family members in a shellfish business will be required to register as a gangmaster and be subject to the provisions of the legislation. There are therefore very different provisions for shellfish as opposed to agriculture and packhouses. It is not clear what consultation there has been with the industry and whether this is understood by shellfish gatherers. A clear statement of the intentions of the government in this respect would be helpful to the organisations concerned.

While this is not a matter of concern to the ALP, it is irrational to call one worker a “gang” as Clause 5(2) currently does. It might make sense either in the Bill or in secondary legislation to exclude the provision of less than say five people at any one time to any customer from the definition of gangmaster activity. This would exclude the normal provisional of temporary staff by employment agencies and also small shellfish gathering businesses.

The intent of Clause 4(5)(c) is not clear. There is a case for the Bill covering all workers in agricultural, packaging and processing with exclusions being by secondary legislation. This could be achieved by replacing “following” by “including” in the first line of 4(5)(a). It would be naïve to believe that those farmers and packhouse which knowingly use gangmasters who operate illegally in respect of the employment of workers would not be capable of operating illegally themselves though direct employment.

Clause 5 Territorial scope of application

This clause applies the legislation wherever a person acts as a gangmaster provided it is in relation to work in the UK or in UK coastal waters. The legislation will therefore apply, for example, to Chinese gangmasters who provide labour to the UK market but who never visit the UK. Presumably, the intention is to catch any agent of the Chinese gangmaster in the UK. It is difficult to understand how this will work in practice.

Clause 6 Prohibition of unlicensed activities

Subsection (1) prohibits someone acting as a gangmaster without having a licence.

Subsection (2) provides for regulations to specify circumstances in which a licence is not required.

The intention therefore is to make the scope under the primary legislation as wide as possible without any narrowing to be done by secondary legislation.

Clause 7 Grant of a licence

This clause covers some of the mechanics of granting a licence.

Clause 8 General power of Authority to make rules

This clause provides for the Authority to make rules in connection with the licensing regime. In the normal course of events one would expect some of the licence requirements to be set out in primary legislation. However, it would be unreasonable to do this in this particular case because there will have been no opportunity for consultation. It is essential that there is full consultation with interested parties, otherwise there is a danger that the legislation will not be effective in achieving its objectives. Currently there is only provision to consult the Secretary of State on making rules about fees.

There should be specific provision for consultation on the rules through a new Clause 8 (5):

“The Authority shall consult on any rules made under this section as if it were a government department.”

This will require the Authority to comply with the Cabinet Office code of practice on consultation to which all government departments are subject.

The Authority will make rules on fees to be charged. The Initial Regulatory Impact Assessment envisages a licence fee of £500 - £750 with licences having a life of 2 – 3 years. The fee for the compliance audit would be £1,000 - £1,500 with the life linked to the licence life. The ALP’s views on these points are –

- While a licence may be for three years the compliance audits should be undertaken annually.
- At first sight the licence fee looks high for a fairly straightforward administrative task. By contrast the licence fee under the Security Industry Act is £190.

Clause 8(2)(f) allows the Authority to grant provisional licences “before it has determined whether the requirements for the grant of a licence are met”. There is no point in such an arrangement. This will allow disreputable gangmasters to operate with a government licence with no checks at all. The subsection should be deleted.

It is not clear how a new business can be established when the law is fully in effect.

Clause 9 Modification, revocation or transfer of licence

This clause allows licences to be modified, revoked or transferred.

Clause 10 Appeals

Clause 10 makes provision for regulations to establish an appeals procedure in respect of decisions to refuse, modify or revoke a licence or conditions attaching to a licence.

Clause 11

Clause 11 provides for a register of licences, which shall be accessible to the public.

It is important to establish the purposes of the register. A principal purpose should be to aid enforcement by existing enforcement agencies. The register should therefore include such information as Inland Revenue number and VAT registration number.

One of the purposes of information being on the public register must be to enable labour users to verify that a gangmaster they are employing is licensed and thereby to avoid committing an offence under Clause 13. The obvious solution is to have a web-based register. However, this will not be sufficient. A farmer or packhouse will typically phone a gangmaster to ask for a certain number of workers. The gangmaster can simply claim to be registered and use a name on the register. Alternatively, the registered gangmaster may subcontract to an unregistered gangmaster. While the gangmaster commits an offence it is not clear how a labour user can be expected to know that this is occurring and therefore has a defence under Clause 13(2). Further thought needs to be given to this point.

Clause 12 Offences: acting as a gangmaster and being in possession of a false licence

Clause 12(1) makes it an offence to act as a gangmaster without having a licence. Clause 12(2) makes it an offence to use a false document that seeks to convince a third party that the gangmaster is licensed.

Clauses 12(3) and 12(4) provide for penalties which can for up to ten years in prison for a third offence.

Clause 13 Offences: entering into arrangements with gangmasters

Clause 13(1) is crucial and is the principal means by which the legislation will be self-enforcing. It will be an offence to enter into arrangements to be provided with labour by a gangmaster who does not have a licence. Clause 13(2) provides a defence based on the labour user taking reasonable steps. Labour users that have regular arrangements with gangmasters should have no difficulty complying with Clause 13(1). However, to be certain of complying they will need regularly to check that a licence has not been revoked.

There are other areas that will concern labour users and which will need clarification in due course. The key point is what does “reasonable” mean, for example, in respect of:

- What steps will users have to take to ensure that the gangmaster has an up-to-date licence with no special conditions? The labour user cannot rely on seeing a licence because it may have been revoked. The labour user cannot assume that the licence does not have conditions attached to it.
- Does the labour user have to take steps to ensure that a gangmaster is not subcontracting work to someone who is unlicensed.
- Will the labour user have to verify that the gangmaster has a licence before contracting for the provision of labour – as Clause 13(2)(a) implies. It is difficult to see how this will work in practice.
- Will a labour user have to check that a licence exists every time he takes labour from a gangmaster?
- How will small new business know about the law before they need gang labour?

These points lead to two conclusions:

- The legislation should only catch the provision of gangs in the true sense of the word – say above five or ten people.
- It would be unwise to assume that this provision will be wholly effective in stopping unlicensed activity.

Clause 14 Offences: supplementary provisions

This clause is consequential.

Clause 15 Enforcement and compliance officers

Clause 15(1) allows the Secretary of State to appoint enforcement officers or to deal with unlicensed activity. Clauses 15(2) and (3) allow officials of other government agencies to be appointed as enforcement officers.

There is no indication of who the enforcement officers will be and no suggestion that any funding will be available for this work. The fees raised by the Authority cannot for used for this enforcement activity.

The concern clearly is that those gangmasters which become licensed will be subject to strict regulation and have to pay high fees while unlicensed gangmasters will continue in operation with

no enforcement activity against them. It is analogous to requiring people to pass a driving test and then having no mechanism to ensure that only people with driving licences are able to drive cars.

This is an unsatisfactory arrangement. There should be an additional sub-clause in Clause 15 along the following lines:

(7) The Secretary of State shall take steps to ensure the enforcement officers ensure that all gangmasters who should be licensed under the Act are licensed and that action is taken to ensure that offences under section 13 are detected and prosecuted. The Secretary of State shall report annually to Parliament on the steps taken under this subsection, such report including an assessment of the extent of unlicensed activity.

More generally, Defra should explain how the division of responsibilities between compliance and enforcement will work in practice and how enforcement activity is to be funded.

Clause 15(4) provides for the Authority to appoint compliance officers who will be responsible for determining compliance by licence holders with the terms of a licence and the requirements of the Act. This activity is quite different from the enforcement activity and these provisions would be better included in Clause 1 (the Gangmasters Licensing Authority).

Clause 16 Powers of officers

Clause 16 gives enforcement and compliance officers extensive powers to seek information and explanations from gangmasters, those supplied with workers by gangmasters and employees or agents of either of these two categories.

Clause 17 Entry by warrant

Clause 17 makes provision for enforcement officers to obtain a warrant from a JP to enter premises to ascertain whether there has been a contravention of section 6.

Clause 18 Obstruction of officers

Clause 18 creates an offence for failing to co-operate with compliance or enforcement officers.

Clause 19 Information relating to Gangmasters

This clause has sweeping provisions to allow for any information held for the purposes of the Act to be supplied to any other person and for any information held by other government bodies about gangmasters to be supplied and person have functions under the gangmaster legislation for purposes connected with the discharge of those functions. These provisions are fully supported by the ALP. Unless there is such sharing of information, enforcement is very difficult.

Clause 20 Application of the Act to bodies corporate

Clause 20 makes special provisions for the application of the legislation to bodies corporate.

Clause 21 Application of the Act to unincorporated associations

Clause 21 makes special provisions for the application of the legislation to unincorporated associations.

Clause 22 Application of the Act to partnerships

Clause 22 makes special provisions for the application of the legislation to partnerships.

Clause 23 Annual report

Clause 23 provides for an annual report on the operation of the Act. The lack of detail on this contrasts with the detail and power to make regulations in other parts of the Bill. It would seem appropriate to add a sub-section:

“This report shall cover both the activities of the Gangmasters Licensing Authority and enforcement activity and shall include –

- (i) The number of licences issued, revoked or for which special conditions apply.
- (ii) The nature of the work taken to ensure that no unlicensed activity takes place.
- (iii) An estimate of the extent of unlicensed activity.
- (iv) A summary of the results of compliance audits.
- (v) Details of enforcement action under the Act or as a result of information shared with other enforcement authorities.
- (vi) An evaluation of the effects of the Act and enforcement and compliance activity.
- (vii) Any directions to the Authority by the Secretary of State under section 2(1)”.

Clause 24 Financial provision

This clause allows the Secretary of State to make payments to the Authority.

Clause 25 Regulations, rules and orders

This is a standard clause.

Clause 26 Meaning of “worker”

This defines a worker in such a way as to include people who have no right to work in the UK. This is sensible.

Clause 27 Exclusion of other controls relating to employment business

This clause seeks to ensure a satisfactory relationship between this Bill and the employment agency legislation. It is far from clear that it succeeds in doing so.

Most gangmasters are employment businesses within the meaning of the Employment Agencies Act 1973 and are therefore subject to the regulations made under that Act (which have just been revised following a lengthy consultation process). Many gangmasters (and certainly most of the larger ones) do not confine their labour provision to the sectors covered by the Bill. They will therefore continue to be subject to the employment businesses provisions of the Employment Agencies Act. The regulations under the Employment Agencies Act are not confined to the relationship with the hirer but also cover the relationship with the worker. A gangmaster who takes on workers with a view to supplying them to any employer who seeks labour will have to meet the provisions of both sets of legislation. Also, is it really intended to exclude from workers doing work covered by the gangmaster legislation safeguards such as employment businesses not prohibiting or restricting their workers in any way from entering the direct employment of the hirer. And the restriction from supplying workers as a direct replacement for employers in an industrial dispute would also be excluded. Similarly, how does a gangmaster comply with the advertising regulations under the Employment Agencies Act; can he ignore them if he intends to supply only workers covered by the gangmaster legislation? The interaction of the gangmaster legislation and the employment agency legislation has not been thought through. One solution would be to replicate the regulations under the Employment Agencies Act in the rules to be made by the Licensing Authority. However, gangmasters would then be subject to the two separate government agencies enforcing the same basic regulations.

Clause 28 Application of Act to Northern Ireland

This clause brings in Schedule 2 which has three and a half pages of provisions specific to Northern Ireland.

Clause 29 Commencement and transitional provisions

These are the usual provisions.

Clause 30 Short title and extent

This is the usual provision. The comments about the Title apply equally to this clause.