A Bill for Better Regulation - Response by ALP to Cabinet Office Consultation Document

30 September 2005

Introduction

In July 2005, the Cabinet Office published a consultation document **"A Bill for Better Regulation"** .

Comments on the consultation document are sought by 12 October 2005.

The consultation document includes a provision for the government to have a power to effect mergers between regulatory organisations without the need for specific legislation on a case-by-case basis as is currently the position. The consultation document states that among the mergers that could be taken forward through this power is the expansion of the Health and Safety Executive to take on the work of the Gangmasters' Licensing Authority (GLA). It is understood that the decision to do this has already been taken and the administrative work has begun.

This paper sets out the response of the Association of Labour Providers to the consultation document. The Association was founded in January 2004 by 18 labour providers. It now has 131 members each of which anticipates being licensed by the Gangmasters Licensing Authority. The way that the regulatory regime is introduced is of crucial importance to them. This response concentrates on the specific proposal in respect of the GLA, although in so doing it raises some wider issues.

Executive summary

It is intended that the Better Regulation Bill will include a power for the government to merge regulatory bodies and that this power will be used to expand the activities of the Health and Safety Executive (HSE) to embrace the Gangmasters Licensing Authority (GLA).

The GLA has been established to implement a licensing regime under the Gangmasters (Licensing) Act, a Private Member's Bill which became law following the Morecambe Bay tragedy. The Hampton Report, as part of its recommendation to greatly reduce the number of regulators, concluded that the GLA should be subsumed within the HSE.

There was no analysis to back up this decision which is flawed in many respects as there is little or no synergy between the GLA and the HSE.

If it is intended to merge the GLA into another organisation, there are a number of better alternatives, including the Employment Agencies Standards Inspectorate at the DTI and HMRC.

The GLA is still struggling with developing a regulatory regime in respect of a flawed piece of legislation and now is not the proper time to change the regulatory structure.

At no time has the government properly consulted on the decision to merge the GLA into the HSE. The decision has developed a momentum of its own separate from the merits of the issue.

Background

For many years there has been concern about working practices, particularly in parts of the food industry, where extensive use has been made of agency workers. The trades unions have been campaigning on the issue and promoted a Private Member's Bill to regulate "gangmasters", which

was published in December 2003. The government initially did not support the Bill on the grounds that existing legislation was adequate and what was needed was more effective enforcement.

In February 2004, over twenty Chinese cockle pickers died in Morecambe Bay. This changed the climate of opinion such that the government not only decided to support the Bill but rewrote it and then forced it through Parliament with virtually no debate. The legislation did not meet any of the tests of good government with at no time there being any proper consultation or analysis of the options.

The coverage of the Act is limited to agriculture, the food industry, fishing and shellfish. The Act applies to the provision of labour by third party contractors, except in the case of shellfish where direct employment is also covered.

Following the passing of the law, research has now been conducted, all of which should have been done before the law was drafted. The research and other developments show that the Act is flawed in a number of respects –

- The Act covers employment businesses within the meaning of the Employment Agencies Act 1973 and therefore is placing one regulatory regime on top of another.

- The Act has a pejorative and unfortunate title, particularly as the Act does not cover "gangmasters" in the normally accepted sense of the word but rather employment businesses. Thus, gangmasters who put together gangs but do not actually directly provide them as workers to a third party are excluded, whereas large employment agencies, such as Manpower, are included. The Act creates offences not only for employment businesses but also for those who use them, but the title of the Act means that many businesses will not be aware that it applies to them.

- The Act reflects the structure of government not the structure of an industry. The DTI do not accept the needs for such legislation, as a result of which it covers just a small sector of the economy for which Defra has some responsibility.

- The research that has been conducted shows that the government's original plan to exclude food manufacturing is simply impractical because of the overlap of labour provider business between what in its terms is terms primary processing and secondary processing.

- The research that has been conducted shows a high level of satisfaction among workers and indeed little justification for special measures in respect of agriculture or food, bearing in mind the availability of powers under other pieces of legislation.

- The financial operations of the Authority have been based on 4,000 gangmasters being licensed. The latest research suggests that the figure is more likely to be well under 1,000 making the GLA financial unviable.

All of these points mean that actually what is needed is a fundamental review of the scope and nature of the legislation in the context of malpractice in the labour market generally. Compounding one poor piece of policy-making by another, that is merging a body with an illogical remit into a body with which there is no synergy, is not the appropriate policy response.

There are three elements of the structure of the GLA relevant to the decision to subsume it within the HSE –

- A representative and large board of nearly 30 members. The decision to have such a board was taken after a thorough consultation process and lengthy discussions between ministers, and was felt essential in order to tie in the various stakeholders.

- Top quality people as chairman and chief executive of the Authority who can provide outstanding leadership in tackling major issues. The chairman is a former chief constable and the chief executive is a former major general in the Army.

- Co-location with Defra enforcement officers who will enforce the offence of acting as a gangmaster without a licence. In practice the enforcement officers will be under the control of the GLA.

The functions of the GLA relevant to the decision to subsume it within the HSE are –

- To operate a licensing system for labour providers. This will involve designing a licensing system, receiving and vetting applications and monitoring labour providers. The emphasis will be on vetting individuals and financial information (such as income tax and VAT payments and payment of the minimum wage).

- Keeping under the review the operation of the Act and "gangmaster" activity in other sectors.

- Sharing information with other government departments and enforcement agencies, of which in practice the most important will be HMRC, but also the police, the Immigration and Nationality Division of the Home Office, the Department for Work and Pensions and the Serious Crimes Agency.

The overriding objective of the GLA is to reduce illegal working practices, not to issue licences.

The rationale of subsuming the GLA into the HSE

The decision to subsume the GLA into the HSE was taken as part of the government's acceptance of the conclusions of the Hampton report ("Reducing administrative burdens: effective inspection and enforcement", Philip Hampton, March 2005), published on Budget day.

There is much in the report which is very welcome to regulated institutions and which the GLA should take on board in devising its regulatory arrangements. The section on risk assessments is particularly valuable.

The section of the report on the right regulatory structure gives the rationale for a substantial reduction in the number of national regulators. The review believed that the principal problems caused by the current regulatory structure are –

- Multiple inspections – the average business has dealings with at least seven regulators each year.

- Overlapping areas of responsibility.

- Duplicated efforts.

- Difficulties of regulators working together.

- Organisational problems of small regulatory bodies.

The Hampton conclusion is that there should be a smaller number of larger regulatory agencies. The benefits of this are seen as being –

- Fewer business-regulator and regulator-regulator interfaces.

- More complete risk assessment.

- Consolidation of forms and data.
- Fewer inspecting agencies and hence fewer multiple inspections.
- Internalising conflicting regulations.
- More strategic regulation.
- More flexible regulation.

Seven thematic groups are identified, for each of which it is proposed that there should be a single regulator: consumer protection and trading standards, health and safety, food standards, environmental protection, rural and countryside issues, agricultural inspection and animal health.

The section of the report dealing specifically with health and safety is reproduced below.

"4.52 The review believes that the Health and Safety Executive, whose remit extends to the safety of workers and the public in workplaces, should expand to cover other bodies with a similar remit, including aspects of public safety.

4.53 The review believes that the Health and Safety Executive should expand to take in:

· The Adventure Activities Licensing Authority (currently funded by the Department for Education and Skills, but with policy direction already from the HSE);

· the soon to be established Gangmasters Licensing Authority;

· The Engineering Inspectorate, part of the DTI, whose remit is the safety of overhead power lines; and

· the inspection functions of the Coal Authority, six staff from the organisation whose remit is competence in mining operations.

4.54 The Security Industry Authority (SIA) currently regulates door supervisors and mobile vehicle clampers and will soon regulate private security guards. Although the review believes there is a case for the SIA transferring into the HSE, the SIA is in the process of developing an appropriate regulatory regime, and it would not be right to merge it into another body at this stage: a final decision on the SIA should therefore be made in two years' time."

The rationale for larger regulatory agencies and the general thrust of the conclusions of this part of the report are accepted. The Association's concern is the jump from the macro level to the specific conclusion that the GLA properly belongs in an enlarged HSE.

There is no analysis of this decision, no regulatory impact assessment, and no evidence of alternatives being considered. The decision to subsume the GLA into the HSE does not meet any of the benefits sets out in the Hampton report itself. The decision is flawed in a number of respects. Most important is that the GLA is not primarily concerned with the safety of workers and the public in workplaces, which is the argument given as to why the GLA should be subsumed into the HSE. When workers provided by labour providers are at their place of work they are under the control of the labour user. The HSE has virtually no role in inspecting labour providers as such but only a role in inspecting labour users. Also, as has already been demonstrated, the purpose of the Gangmasters (Licensing) Act is not to do with public safety but rather to do with exploitation of workers and tax evasion.

ALP members have virtually no contact with the HSE, and HSE matters are of little relevance to them. The ALP has not issued a single communication to its members on health and safety matters and there have been few queries on health and safety matters from members. Perhaps the Review has been influenced by the Morecambe Bay tragedy which precipitated the enactment of the gangmaster legislation.

The original version of the Gangmasters Licensing Bill did not cover shellfish. The Bill was therefore hastily amended with the intention of covering what happened at Morecambe Bay. However, it now transpires that what happened at Morecambe Bay may not have been covered anyway by the legislation as the cockle pickers were not being employed by anyone but rather were working on a self-employed basis. (They were also illegal immigrants.) While there is no doubt that several laws were broken at Morecambe Bay, and indeed a trial is under way, there is no evidence that the Gangmasters Licensing Act would do anything to prevent a recurrence of the tragedy.

The HSE comes under auspices of the DWP, whereas the GLA is under Defra. This is not a problem in itself. Indeed, one problem with the Gangmasters (Licensing) Act is that it is actually an Act confined to gangmasters who deal in sectors for which Defra has some responsibility. However, Defra will continue to have the enforcement responsibility of ensuring that those labour providers who need a licence actually have one.

Subsuming the GLA into the HSE will not contribute to the objective of reducing overlapping regulators, the number of inspections and the number of regulators with whom labour providers have to interface. The main regulators as far as labour providers are concerned are the Inland Revenue and Customs (now HMRC), the Immigration and Nationality Division of the Home Office (IND), VOSA (in respect of minibuses) and local authorities (in respect of accommodation). By subsuming the GLA into the HSE all that would happen would be the substitution of one regulator for another.

This reflects a more general weakness in the Hampton report in that it is partial. It is not a review of regulators but rather a review of some regulators. Annex A to the review states that “The review has therefore not made recommendations on the work of regulators that did not have interactions with business or that have no inspection or enforcement role.” The review has also not considered HMRC. In fact the review has ignored a number of regulators that do have interactions with business and that do have inspection or enforcement roles, such as IND. In general, the review has taken little account of the regulators relevant to labour providers which are listed in the previous paragraph. It is significant that in the listing of non-departmental public bodies considered within the scope of the review, no department is indicated alongside the GLA, whereas a department is indicated alongside every other regulator. This perhaps indicates that the review was uncertain where the GLA fitted currently.

Consequences of the decision

The government has accepted the recommendations of the Hampton review and the assumption should therefore be that the GLA will be subsumed within the HSE. The current intention is that detailed plans for mergers should be in place by September 2006 and that the mergers themselves should be completed in all aspects by the start of April 2009.

What this means for the GLA is, first of all, a distraction, and secondly in its planning it should work on the assumption that it will be subsumed within the HSE. This should influence decisions on staffing, IT and inspections. In practice, the GLA is already in the process of implementing plans on location, staffing and IT and is unlikely to reconsider these as this would threaten its timetable. Any transfer to HSE in accordance with a timetable that takes no account of the special circumstances of the GLA would be highly disruptive.

It is significant that the review considered whether the Security Industry Authority should not be subsumed within the HSE. It noted that "The SIA is in the process of developing an appropriate regulatory regime, and it would not be right to merge it into another body at this stage; a final decision on the SIA should therefore be made in two years' time." The GLA is also developing an appropriate regulatory regime and indeed sensibly should be looking to the SIA as a model. It is not clear why the logic that applied to the SIA did not also apply to the GLA (perhaps indicating that the Home Office seems to have been off limits to the review whereas Defra has clearly been central to it).

Alternatives

There are a number of alternatives to the GLA being subsumed within the HSE –

- A merger with the Employment Agency Standards Inspectorate of the DTI. This would seem to be logical as labour providers are all employment agencies within the meaning of the Employment Agencies Act 1973 and therefore are subject to DTI regulation anyway. The Gangmasters (Licensing) Act disapplies the Employment Agencies Act regulations in respect of business covered by the Act, but the intention is to reapply the main provisions through regulation. Also, given that the Gangmasters (Licensing) Act applies to only a small part of employment business activity, the majority of labour providers regulated under the Act and certainly all the larger ones will still be subject to regulation by the Employment Agency Standards Inspectorate. Thus a labour provider servicing the food processing and packing industry will be subject to both the GLA and the Employment Agency Standards Inspectorate, in some cases even when supplying labour to the same client in the same factory. There is an obvious case to remove this duplication by merging the agencies. However, there is also a problem. The Employment Agency Standards Inspectorate is very small and relies on complaints. Employment agencies and businesses do not have to be registered and there is no auditing system. By contrast, the GLA will be comparatively large, labour providers subject to it will have to be licensed and there will be an intrusive auditing system. It also seems that the DTI is not over-enthusiastic about the gangmaster legislation on the grounds that licensing has not worked very well in the past and also to some extent this is treading on its territory. This option would probably be feasible only as part of an overall review of employment agency regulation.

- The Security Industry Authority, while covering a different area, is fairly similar in concept, scope and functions to the GLA and has developed a great deal of experience which can be relevant to the GLA. However, there is no overlap at all in respect of the businesses covered.

- HMRC. Illegal gangmasters exist to make money and they do this largely by tax evasion. HMRC is therefore very relevant to the issue. Interestingly, HMRC now has over 160 staff dedicated to dealing with labour providers. An essential part of the work of the GLA must be helping to make these 160 people more effective. For example, the GLA will be able stop activity immediately where there is evidence of tax evasion whereas HMRC is unable to do this. There would be a case for making the GLA a specialist unit within HMRC.

- The Serious Crimes Agency. While at first sight this seems a wholly inappropriate regulatory body for labour providers, there is some relevance because at one extreme the industry lends itself to serious crime. Also, as with the SIA, there will be some similarities in the nature of the two organisations.

- The stand alone option as has been accepted for the SIA for the time being.

Whichever option is selected it is important that the activity with which the GLA is concerned is within an NDPB rather than be part of a government department. Being an NDPB gives it a cutting edge by having a high profile independent chairman, fresh thinkers from outside the

parent body, and the autonomy to innovate in a way that is not easy within departmental line management.

The timing issue is also relevant. The Gangmasters (Licensing) Act is not the most logical piece of legislation, inevitably so given its origin. It is already apparent that the coverage of the Act is unsatisfactory, covering many organisations that are not gangmasters and not covering many that are, and covering just one industry. If the GLA is effective it should work itself out of its present job within three years. Illegal activity will have been removed from the areas for which the GLA is responsible, being displaced sideways (to other sectors), upwards (to farmers and packhouses) and downwards (to real gangmasters outside the UK). In the longer term the need is for an agency to take responsibility for combating illegal working throughout the economy. (There is in fact an Illegal Working Stakeholder Group convened by the Home Office. The GLA and HMRC are not represented on this. In a paper prepared for a review of the role of the Group it was revealed that just 1% of enforcement actions by immigration officials are in the sector covered by the Gangmasters (Licensing) Act.) Within three years the GLA may show itself to be the appropriate body to form the basis of such an agency. Planning to subsume it into the HSE in that timescale makes little sense when the whole of rationale for the GLA will need revisiting in the same period.

Process

The process by which the decision was taken to subsume the GLA into the HSE is unsatisfactory.

The GLA itself has been established after an exhaustive consultation period involving a number of government departments and a full consultation exercise. The outcome, one was assured, reflected the decisions of government as a whole. Many of the points made in the consultation exercise have been taken into account. There has been no consultation, no publication of options and no regulatory impact assessment in respect of the conclusions of the Hampton Report. Similarly, the Government accepted all the conclusions of the Hampton Report without consulting any of the interested parties.

The process has been continued with the publication of the consultation document. The intended merging of the GLA into the HSE is simply presented as a fait accompli on which a decision has already been taken and there seems no intention to consult on it.

In other words in seeking to pursue a “better regulation agenda” the government is ignoring its own rules in respect of policy making and consultation and is seemingly not interested in the views of those who from their practical experience can help the government achieve its better regulation objectives.

The reality is that the decision to subsume the GLA into the HSE was a mistake caused by failure to analyse the situation properly and failure to consult interested parties. The decision is being implemented because the government accepted the conclusions of the Hampton report, again without any analysis or consultation, and is not prepared to change a decision because this would imply that a mistake has been made.

The proposed mechanism

The government is proposing to include within the Better Regulation Bill a power to merge regulators. The subsuming of the GLA’s activities into the HSE is given as an example of the mergers that could be handled in this way. It is intended that there will be two major safeguards: the powers would be used only to transfer regulatory functions to the newly merged regulator and proposals for mergers would be properly scrutinised by Parliament and other stakeholders.

The power would be exercised using the affirmative resolution procedure.

The Association has no objection to the power in principle. However, given the way that decisions have been taken in respect of the GLA so far (no analysis, no consultation and no regulatory impact assessment) it has no confidence that the proposed safeguards are adequate. There is no indication of how the proposals would be scrutinized either by Parliament or by other stakeholders. The affirmative resolution procedure does not allow for scrutiny as the proposal cannot be changed by Parliament – only accepted or rejected.

To ensure adequate safeguards it is suggested that any merger proposal should be accompanied by a full regulatory impact assessment and be subject to the normal three month consultation period. In addition, the proposal should be considered by the Deregulation Committees of the Commons and the Lords in the same way that Regulatory Reform Orders are considered.

It might be argued that such safeguards are unnecessary because the basic law is unchanged and all that is happening is that an activity is being transferred from one regulator to another. However, structures are important; the effectiveness of a regulatory regime depends primarily on the competence and expertise of the organisation delivering it. It is not a given that merging regulatory bodies (or any other bodies) will result in greater efficiency and effectiveness. There are countless examples of mergers between companies which have destroyed rather than created shareholder value, and not all mergers of government departments have been resounding successes.

The point has already been made that the HSE is not the appropriate partner for the GLA at any time, and certainly not now while the regulatory regime is still being created. The Association is concerned that the process which has resulted in the decision being taken to subsume the GLA into the HSE will be continued and that this will happen without there being at any stage any analysis of the reasons for the merger, the costs and benefits, or any consultation with interested parties. The requirement to have a full RIA, proper consultation exercise and meaningful scrutiny by Parliament would provide the necessary safeguards.