Draft Gangmasters (Appeals) Regulations 2005 - Response by the Association of Labour Providers, 21 June 2005

Response by the Association of Labour Providers to Defra Consultation Document

Introduction

On 30 March 2005, Defra published a consultation on the Draft Gangmasters (Appeals) Regulations 2005, accessible at **http://www.defra.gov.uk/corporate/consult/gangmaster-appealsregs/index.htm**.

The regulations will be made under the Gangmasters (Licensing) Act 2004. This will make provisions for appeals against the decisions of the Gangmasters Licensing Authority (GLA) not to award a licence or to impose conditions on a licence. Comments on the consultation document are sought by 1 July 2005.

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 over 100 members each of which anticipates being licensed by the Gangmasters Licensing Authority. It is unlikely that any of the members will wish to appeal against a decision of the Authority, but they will be expected to meet part of the costs of running the appeals mechanism. For this reason, the draft regulations are relevant to them.

Executive summary

In general, the proposed arrangements for appeals are satisfactory. For a labour provider exercising its right to appeal they are fair in relation to process and cost.

The Association believes that there will be very few appeals, partly because there is likely to be little room for judgement in decisions by the Licensing Authority. However, the consultation is premature in that as yet there is no indication of what the licence conditions will be.

More importantly, having a licence is not a licence to trade, as those labour providers who are refused a licence or who feel that they will be unable to obtain one can simply conduct a similar business in other sectors of the economy or other parts of the food supply chain.

The probable small number of appeals means that there is a risk that high fixed costs of running an appeals mechanism will fall disproportionately on licensed labour providers. Accordingly, the fixed costs should be kept to a minimum.

The proposed arrangements for appeals

The Act requires regulations to be made for an appeal against any decision of the Authority –

- To refuse an application for a licence.
- To impose conditions to which a licence is subject and the terms of the conditions.
- To refuse consent to the transfer of a licence.
- To modify or revoke a licence.

The regulations must make provision for an appointed person to determine the appeals and for the procedure to be followed in connection with appeals. The proposed procedure is –

- The labour provider sends notice of an appeal to an appeals secretariat, the notice then being sent to the GLA, which has the option of accepting the appeal or defending it, in which case it must answer each of the grounds for appeal.

- The appointed person may take a decision without a hearing unless one of the parties requests it. Any hearing would be in public.

- The government will bear the cost of providing the appeals secretariat and paying the fee of the appointed person.

The number of appeals

The concern of the Association is the cost which will fall on those labour providers that do not appeal rather than those that do. It is therefore necessary to analyse in some detail the assumptions in the consultation document on the number of appeals and their cost.

The key assumptions are that there will be 9,000 licence applications in the four years from January 2006, of which 4,000 will be initial applications, and that 10% of applications are rejected or the conditions are considered unacceptable by the labour provider, and half of those affected appeal. This leads to a total number of appeals, in round terms, of 700 over four years.

The Association believes that this is likely to prove a gross overestimate, perhaps by a factor of 20. The first point is that it seems unlikely that there will be as many as 4,000 licence applications, although this does depend on the scope of the Act which has yet to be determined. The conventional wisdom is that there are over 3,000 labour providers. But, if this figure is correct, many of them are very small and will not wish to become licensed labour providers, particularly as they have the option of doing business in other sectors which will not be regulated. It is significant that fewer than 600 labour providers have registered with the Temporary Labour Working Group code of practice which covers similar ground to the legislation. If there are only 1,000 initial applications rather than 4,000, then retaining the assumptions about proportions the number of appeals would be nearer 175. In this context the Association notes that the GLA is now working on the assumption that there will be only 1,000 labour providers who will seek licences.

More importantly, the Association does not see any reason why a labour provider would wish to appeal against a decision of the GLA. Generally, a labour provider will apply for a licence only if it believes that it will get one. No doubt, as in every other area, some licence applications will be incomplete and will require additional information. There may well be cases where, on the basis on the information provided, the GLA will decline to give a licence.

In this context, it must be noted that the consultation is premature because, as yet, there has been no indication from the GLA as to what the licence conditions will be. This exercise is therefore being conducted in the gloom if not wholly in the dark.

However, it seems likely that the licence conditions will be fairly clear cut and will not require subjective assessments of whether people running labour providers are fit and proper. If a labour provider is evading tax it is difficult to see that they are going to appeal against refusal to grant a licence on these grounds.

The position would be rather different if a licence under the Act was in effect a licence to trade because not having a licence would deprive people of their livelihood. But this is not the case with the legislation because it covers such a narrow area. If a labour provider wishes to operate without registering under the Act it can do so by, for example, serving other sectors such as construction, catering and office cleaning. It is also wrong to assume that there are people who are disreputable labour providers; rather there are disreputable people who will make money wherever they can. If they cannot make money by direct provision of labour they may make it in other ways. There is

already some evidence of abuse of workers from the Accession States by their own nationals who charge them a fee for bringing them to Britain and provide them with accommodation but do not actually act as labour providers.

The Act will therefore lead to a displacement of illegal activity to outside the regulated sector, something which is well understood, generally accepted and will require careful monitoring and possibly further action by government. However, a necessary consequence of that is that appeals against decisions of the GLA are very unlikely as they would serve little useful purpose to the labour provider who will be able to ply his trade elsewhere without hindrance.

The general conclusion is that rather than there being 700 appeals in a four year period if there are 4,000 licence applications or 175 appeals if there are only 1,000 applications, there are unlikely to be more than 50 appeals a year and it is conceivable that there will be none. In this context, it would have been helpful if the consultation document could have outlined the experience of other regulators, in particular the Security Industry Authority whose remit has some similarities with that of the GLA.

Costs of the appeals procedure

The government will bear the cost of providing the appeals secretariat and paying the fee of the appointed person. The Association welcomes this, and its members have no financial interest in considering the matter further. However, as good citizens and as taxpayers, members of the Association wish to see the cost kept to the minimum. The consultation document estimates the cost over four years at £879,000 if the appointed person has discretion to hear cases without a hearing and £1,465,000 if there is a requirement to have hearings. Broadly speaking, the costs per case with no oral hearing are estimated to be £430 and if there is an oral hearing £2,080.

For the most part, these costs are all variable but there must be an element of fixed costs in setting up the necessary systems and paying a retainer to one or more appointed persons. The Association believes that, as far as possible, fixed costs should be kept to a minimum and certainly there should be no assumption that there will be hundreds of appeals. The secretariat and systems should be planned accordingly.

The Authority will have to meet its own costs in respect of dealing with appeals. These costs are estimated at £300 per case where there is no oral hearing and £3,688 per case where there is an oral hearing. Using the government's assumptions that half of 700 cases are determined without an oral hearing and half with, then the cost to the GLA over four years would be £1,396,000. If all 700 cases are determined by oral hearings the cost would be £2,582,000.

The main concern of the Association is the cost that would therefore fall on all labour providers. The regulatory impact assessment estimates that if half of all appeals are without an oral hearing then on the assumption of 9,000 licence applications some £60 would be added to the cost of a three year licence. If only 2,250 licence applications are received, the cost per licence would rise by £240. If there is a hearing in each case then these figures increase to £144 and £574.

The licence fee is already very high compared with licence fees for other regulators. The Association is anxious to ensure that its members should not be meeting excessive costs in relation to appeals. This reinforces the Association's view that other than in exceptional cases appeals should not involve a hearing and also that fixed costs should not be incurred in setting up mechanisms to deal with appeals that may well not materialise.

Oral hearings

The Draft Regulations provide that the appellant or the Authority may request an oral hearing. Where neither party so requests, the appeal will be decided without an oral hearing. The Association would prefer the decision as to whether there should be an oral hearing should rest

with the appointed person. Such hearings should be held only where an important point of principle is at stake and not simply because a labour provider wants any grievances aired in public at someone else's expense. The appointed person should therefore be allowed to reject an application for an oral hearing if he or she considers, on the basis of written submissions, that the cost of such a hearing could not be justified.

Answers to specific questions

Appendix 1 sets out for ease of reference answers to the specific questions posed in the consultation document. These are consistent with the points made in the main body of this response.

Regulatory impact assessment (RIA)

The regulatory impact assessment is a thorough and useful exercise which enables informed debate on the issues raised. The Association has already raised in the main body of this response its concerns about the assumptions in respect of the number of licence applications and the number of appeals. For ease of reference, a more detailed commentary on the RIA is set out in Appendix 2.

Appendix 1

Answers to specific questions

Q1. The terms used to define a "decision with immediate effect".

The terms are satisfactory.

Q2. The merits of using Employment Tribunal Chairmen as appointed persons.

This seems appropriate.

Q3. If Employment Tribunal Chairmen are used, should be restricted to fee paidchairmen only?

Not qualified to comment.

Q4. The merits of using Agricultural Land Tribunal chairmen and deputy chairmen as appointed persons?

These people do not seem as relevant as Employment Tribunal Chairmen.

Q5. Whether there are other bodies of people who might be well qualified to take on the role of appointed persons.

Not qualified to comment.

Q6. Whether there is a need for a consistent approach in England, Wales and Scotland.

Yes.

Q7. Whether you agree that, except in the case of a decision with immediate effect, licences should continue to have effect until an appeal has been withdrawn or determined? If not, why not?

Yes.

Q8. Whether you agree that where an appeal is withdrawn, the Authority's decision should take effect on the day originally fixed by the Authority or on the 6th working day after the date of the secretariat's letter, whichever is later?

Yes.

Q9. Do you agree that the appointed person should be able to vary a licence or its conditions (after taking into account submissions from the parties)?

Yes but only within very well defined limits. Labour users will have to satisfy themselves that a labour provider holds a licence and the more that there are variations in licences and conditions imposed the more complex the procedure will be and the more difficult it will be for labour users.

Q10. Alternatively, do you consider that only the Authority should have the power to vary a licence or its conditions?

No.

Q11. Should the appointed person instead simply have the power to uphold or dismiss the appeal? If upheld, the matter would go back to the Authority for a fresh decision, although there would be no guarantee that the Authority would not come to the same decision but for different reasons. If dismissed, the original decision would take effect.

This would seem an attractive alternative.

Q12. Whether the periods for making an appeal against a decision (including decisions with immediate effect) are fair?

Yes.

Q13. Whether it is reasonable for appellants based overseas to be required to provide an address in the UK?

No. It is understood that postal services also operate in countries other than the UK.

Q14. Do you agree that 35 working days is a reasonable time limit where the expedited procedure applies?

Yes.

Q15. Whether the suggested provisions relating to the withdrawal and amendment of appeals are appropriate.

Yes.

Q16. Whether the time allowed for the Authority to reply is sufficient?

Yes.

Q17. Whether the time limit in which the Authority can amend its reply is appropriate.

Yes.

Q18. Whether you agree that the appointed person should be given this power [to request the appellant or the Authority to provide further material]?

Yes.

Q19. The principle of allowing appeals to be determined without a hearing.

The Association favours appeals without a hearing to be the general rule with hearings only in exceptional cases.

Q20. The arrangements proposed for determining an appeal without a hearing.

These seem appropriate.

Q21. The proposed arrangements and in particular the proposed timescale for arranging the hearing.

These seem appropriate.

Q22. The proposed arrangements and in particular: - the proposal to require witnesses to prepare signed witness statements before the hearing;

- whether unsigned witness statement should be accepted prior to hearing as long as an identical signed copy is produced at the hearing.

- whether witnesses should be required to give evidence on oath or affirmation.

- whether parties should be required to submit written representations where they are appearing, or whether this should be optional.

These all seem bureaucratic. There seems little purpose in requiring signatures. Where there are oral hearings then written statements should be required in advance.

Q23. The proposed procedural arrangements for hearings.

These seem appropriate.

Q24. The arrangements for announcing the decision.

These seem appropriate.

Q25. Whether the proposal to rely on judicial review is satisfactory or whether there should be an additional avenue for appeals on points of law to the High Court? If the latter, what advantage would there be to an additional appeal on a point of law?

Bearing in mind that there will be few appeals given the ready availability of alternative sources of making money for illegal gangmasters, there would seem no point in making provision for appeals on points of law to the High Court.

Appendix 2

Commentary on the Partial Regulatory Impact Assessment (RIA)

Generally, the Assessment is very helpful and usefully informs the decision taking process. The Association's main comments are on the assumptions.

Numbers of appeals

The Association believes that the estimated number of appeals is far too high.

Firstly, it believes that there will not be 9,000 licence applications in a four year period. Research has been conducted on the number of labour providers. However, it should not be assumed that the number of labour providers currently will be the same as the number who will wish to register. Many labour providers will take the view that the burden of being regulated is too great for them and of course those that operate illegally will have no intention of registering but rather will ply their trade elsewhere where there is no regulation.

It is significant that fewer than 600 labour providers have registered under the code of practice and it is probable that a significant proportion of these, probably over 20%, will not put themselves forward for an audit.

The Association believes that 1,000 would be a more reasonable estimate for the number of labour providers who will register. However, this partly depends on the scope of the legislation. The Association notes that the GLA is now working on the assumption that 1,000 labour providers will seek licences.

Broadly speaking, the assumptions used in the RIA are that 10% of applications will be refused or licences withdrawn and half of those will appeal. The ALP believes that both these assumptions are unrealistic. What is being proposed is not in any sense a "licence to trade" but rather an onerous regulatory regime for just one part of one sector of the economy. The scheme covers organisations providing labour to agriculture and the fresh produce trade but not direct employment nor the provision of labour to other sectors, such as hospitality, catering, contract cleaning and construction. The scheme also does not cover "gangmasters" who bring gangs of workers to the UK but does then provide them directly to labour users. Organisations are unlikely to apply to be licensed if they know they will not get a licence. This should be fairly straightforward given that the licence conditions will be compliance with existing legislation. Where a labour provider is refused a licence, then this is likely to be for perfectly good and unarguable reasons and it is improbable that there would be an appeal. The labour provider will simply work elsewhere. Accordingly, the 10% assumption seems very much on the high side and a reasonable guess might be a figure of nearer 2%. This would bring the number of appeals over four years from 702 down to 140, and if only 1,000 rather than 4,000 labour providers register the figure would be just 35.

Paragraph 11.4 gives a number of reasons which might have an impact on the number of appeals. The Association believes all these are flawed –

- The notion that the more onerous the conditions the greater the chance of licences not being granted and an appeal being lodged is questionable. Labour providers will be well aware of the conditions for obtaining a licence and those that think they will not get one will not apply. This point seems to assume that labour providers will apply for a licence in ignorance of the criteria.

- The suggestion that labour providers will be keen to have a licence that will enable them to operate legally in the area covered by the legislation misunderstands business. The licence will simply be another added burden and not in any way a marketing point.

- Of course, the more effective the auditing mechanism the more that breaches will be found. However, it is difficult to see why labour providers should wish to appeal against losing a licence when they have been found to be in breach of the conditions, on the assumption that the GLA behaves reasonably.

Costs

The figures on costs seem reasonable given the assumptions. The Association is pleased to note that the government will bear the cost of providing the appeals secretariat and paying the fee for the appointed person. Given the huge margin of uncertainty about the likely work load it is important not to build up a substantial element of fixed costs at the outset.

The costs for a typical labour provider business on the whole seem reasonable but it is unrealistic to argue that the labour provider's lawyer will be involved only if a case goes to an oral hearing and will spend twelve hours on the case. If a labour provider wishes to appeal against a decision then he may well wish to take professional advice regardless of whether there is an oral hearing. It is wholly proper that the costs of appeals should fall on the labour providers concerned not on the generality of labour providers.

The Authority will have to meet its own costs in respect of appeals. At first sight these figures are alarming. It is suggested that over a four year period some £60 would be added to the cost of a £2,000 licence simply to cover the costs of dealing with appeals. This figure would be must the same regardless of the number of licences but obviously would be reduced if the proportion of cases going to appeal is reduced. Again, it is important that the Authority should not build up significant fixed costs in anticipation of a high number of appeals as these costs would have to be met by the generality of labour providers.

Uncertainty

The consultation is in one respect premature. The scope of the Act has not yet been settled nor have the licence conditions. The wider the scope and the more discretion that the GLA has in deciding whether to give a licence the greater the scope for appeals.