

Shellfish: Response of the Association of Labour Providers to GLA consultation

29 June 2006

Introduction

On 24 May 2006, the GLA published *Shellfish Gathering Consultation*, accessible at - <http://www.gla.gov.uk/consultation.htm>. Comments are sought by 5 July 2006.

This response sets out the views of the Association of Labour Providers (ALP). The ALP was founded by 18 labour providers in January 2004. It now has 118 members and is generally recognised as the trade association for those labour providers that serve the food industry. The Association is not aware of any of its members involved in the gathering of shellfish. The consultation is therefore not directly relevant to the ALP, and the Association is not able to offer any comments based on the practical experience of members. However, the Association can offer some limited comments based on the experience of the licensing regime to date.

Executive summary

The proposed definition of “using the worker” may be difficult to apply in practice and gives scope for avoidance.

At first sight the estimated number of labour providers that will seek licences (100 – 200) looks on the high side.

The proposed licensing standards seem vague and may not adequately cover a position where a gangmaster is using a worker but does not have any sort of employment contract with the worker.

The proposals

The Gangmasters (Licensing) Act 2004 generally applies to the provision of labour by employment agencies and businesses. However, in respect of shellfish gathering, the legislation also applies to direct employment or use of labour. This is a direct response to the Morecambe Bay tragedy, which was the trigger for the enactment of the legislation.

The main issue that needs to be addressed is the definition of "using labour". Shellfish gathering is a unique industry that operates in the different way from other industries. There are only a few places where shellfish gathering can take place, and each has its own particular characteristics. Part of the industry relies heavily on casual labour with a loose relationship between those who gather shellfish and those who then take control of the shellfish. In some respects the shellfish gatherers can be seen as working for themselves and selling what they gather to a wholesaler. The consultation document addresses this issue by defining "using the worker" to include situations in which the labour user makes arrangements with the worker that –

- require the worker to follow his/her instructions; or
- determine where or when or how the worker carries out the work; or
- require the worker to sell his/her gathered shellfish to them is the first link in the buying chain.

Defining “using a worker”

It is characteristic of regulation that it alters the nature of the market. While these three conditions may meet current arrangements it would not be difficult to circumvent them. The abuse has occurred where migrant workers, illegally in the country, have in effect been controlled by "gangmasters" and exploited. There has been no employment relationship between the gangmaster and worker. The relationship may well fall within the definition that has been adopted. However, it would not be difficult to get round the definition. For example, a gangmaster could offer to transport workers to a suitable location and could then offer to buy the gathered shellfish, rather than requiring the worker to sell the shellfish to him. This would not come within the definition that has been chosen. The Association has no firm proposal to make on this as it does not have adequate knowledge of the market; however, it has sufficient knowledge of markets generally to conclude that what is proposed will not work.

Numbers

The consultation document states that "based on the information received, it is estimated that there are between 100 and 200 businesses and/or individuals who would require a licence to operate under the proposed arrangements in the shellfish gathering sector." Such forecasts have tended to prove to be wildly inaccurate when new regulatory regimes have been set up. As has already been explained, regulation changes the nature of the market. The natural responses to regulation are to move out of the market as the opportunity for excess profits is less likely to arise or for small organisations to merge so that they are better able to meet regulatory requirements.

It was originally estimated that 4,000 organisations would seek licences under the Act. The ALP suggested that this figure was far too high and that 1,000 was a more likely estimate. This has now been adopted. By 15 June 2006 400 businesses had applied for licences, suggesting that the 1,000 figure may be about right. However, the earlier estimates were all based on employment businesses rather than employment agencies and businesses to which the Act actually applies. It would need a detailed analysis to estimate the number of employment businesses that have applied.

Fees

There is no reason why the fees paid by those who gather shellfish should be any different from the fees paid by other businesses subject to the legislation. However, the fees are exceptionally high by regulatory standards and will inevitably have the effect of deterring some businesses from staying in the market. This is particularly true as some of the shellfish gathering businesses may be very small and, unlike labour providers generally, the option of moving into other lines of business is likely to be less available.

Licensing standards

The consultation document recognises that someone can "use" a worker and then be caught by the licensing regime but without having an employment relationship with them. For example a person who requires a worker to sell his gathered shellfish to them is not employing the worker. However, the suggested variations to the licensing standards seem questionable. Generally, it is all left very vague with the words "if applicable" being used frequently even if the words "where applicable" had been used already. The table is generally not very informative as to what is being proposed.

7.3 seems to have a lot of "yeses" in the column that applies to using a worker that do not seem appropriate given that there may be no employment or relationship. The same applies to 9.1.

Consultation question

This section gives brief answers to the formal consultation questions drawing of be main body of this response. As is often the case the consultation questions do not necessarily cover the major issues.

1. There is a risk that the proposed interpretation of the term "using" a worker will not be effective as it would be easy for a gangmaster not to require a worker to sell shellfish to him but to offer to buy. It would be difficult in practice for the enforcement agencies to distinguish between an offer and a requirement. It is not easy to suggest a solution to this problem given the approach that has been adopted, of using the Gangmasters (Licensing Act) rather than specific regulation of the activity of shellfish gathering.
2. It is always difficult to estimate the number of businesses that will apply for licences when regulation is introduced. Unlike labour providers generally, those businesses engaged in gathering shellfish do not have the option of easily operating in another sector. Having made this point, the number of potential licensees at between 100 and 200 seems of the high side.
3. There is no reason why the fees for those engaged in shellfish gathering should be any different from the fees generally so what is proposed is supported. However, the fees are very high for a regulatory agency and will bear particularly heavily on small shellfish gathering businesses that do not easily have the option of moving into other lines of business.
4. There is a case for the making the rules for shellfish gathering as close as possible to those for the food industry. However, there may well be very few, if any, businesses that operate in both sectors. If the nature of the sectors are very different there they would be a stronger case for starting again from scratch in shellfish gathering. The Association is not sufficiently familiar with the nature of the shellfish gathering industry to comment further on this.
5. The proposed new licence conditions are in many cases very vague with extensive use of the words "if applicable". Some of the standards cannot be applied to situations where there is not an employment relationship between worker and gangmaster.
6. The Association is not in a position to suggest whether further condition should be included in the licensing standards for shellfish gathering.
7. The partial regulatory impact assessment is rather thin. The benefits are covered in no more than a few lines and the costs are the mechanical ones of time taken to fill in forms. There is not really a proper regulatory impact assessment of the introduction of the licensing regime for shellfish gathering. However, if the decision has already been made that shellfish gathering should be regulated under the Gangmasters Licensing Act rather than in any other way then having a regulatory impact assessment serves no purpose.