

The proposal to subsume the Gangmasters Licensing Authority into the Health and Safety Executive

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Submission by the Association of Labour Providers

Introduction

The Gangmasters Licensing Authority (GLA) came into operation on 1 April 2005. Its function is to operate the licensing regime under the Gangmasters (Licensing) Act 2004. As part of the Hampton review, announced on 15 March 2005, it is the intention to subsume the GLA into the Health and Safety Executive (HSE).

This paper calls for a proper examination of the various options for the GLA. This matter is of considerable relevance to the Association of Labour Providers as all of its members will be regulated under the Act.

Executive summary

The GLA has been established to deal with a specific problem in the labour market, that is exploitation of workers and of the tax system by “gangmasters”. The Authority has a representative board with senior and experienced people appointed as chairman and chief executive.

The official rationale for subsuming the GLA into the HSE is to reduce duplication and overlap by regulators, in particular to reduce the number of inspections. This is of no validity as the HSE has little relevance to the work of the GLA and does not inspect labour providers.

As a result of the announcement there is now uncertainty among those governing and employed by the GLA and also among the labour providers who will be regulated by it. As well concentrating on its job, the GLA now has to devote senior resources to structural issues.

The arguments in the Hampton Review about the problems faced by small regulators have some validity and in the longer term it may well be the case that it would be better for the GLA to be part of a larger organisation. In addition to merging with the HSE, there are at least five other options for the GLA which merit consideration –

- Merger with the Employment Agency Standards Inspectorate of the DTI (which already covers labour providers).
- Merger with the Security Industry Authority which has some similarities in nature.
- Merger with Her Majesty’s Customs & Revenue (HMCR) which has 160 staff dealing with labour providers.
- Subsuming in the Serious Organised Crimes Agency.
- Remaining as a stand alone regulator at least for the short term.

The coverage of the legislation is unsatisfactory and within three years there will be a need for a fundamental re-examination of the Act and the Authority. That would be the right time to review where the Authority should fit into the regulatory structure.

Going forward, it is important that the various options are properly considered and that relevant parties are consulted. There is no reason why this should be a lengthy process. Six months should be more than adequate to produce a framework which will meet all of the necessary tests.

The structure and functions of the GLA

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 candidates 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 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 HMCR, 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 no 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. It has yet to be established that the activity at Morecambe Bay would come within the province of the GLA, as it seems that the people who controlled the workers were not providing them to a labour user but were either employing them (in practice if not in law) or were buying from them. Morecambe Bay was certainly a health and safety issue but probably not a gangmaster issue.

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 HMCR), 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 HMCR. 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 subsequent transfer to HSE would therefore be highly disruptive at that stage.

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.
- HMCR. Illegal gangmasters exist to make money and they do this largely by tax evasion. HMCR is therefore very relevant to the issue. Interestingly, HMCR 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 HMCR is unable to do this. There would be a case for making the GLA a specialist unit within HMCR.
- 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. 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 new announcement.

It is proposed that either the Hampton review, to the extent that it is still functioning, or a separate review should be conducted of the various alternatives for the future of the GLA. It should produce a position paper within two months on which consultation would then take place, with a final decision being taken in the autumn.

Ideally, there should be an immediate announcement that the GLA will not be subsumed into the HSE; this would remove an unnecessary distraction.