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**DEFRA Consultation on Changes to the Scope and Governance of the
Gangmasters Licensing Authority April 2013**

Response from the Employment Lawyers Association

21 June 2013

1. Introduction

The Employment Lawyers Association ("ELA") is a non-political group of lawyers working in the field of employment law. Our membership includes those who represent claimants and respondents in courts and employment tribunals. ELA does not comment on the political merits of proposed legislation, rather making observations from a purely legal standpoint.

ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

The Legislative and Policy Committee of the ELA set up a sub-committee under the chairmanship of Paul Statham of Pattinson & Brewer to consider and comment on the Consultation on Changes to the Scope and Governance of the Gangmasters Licensing Authority April 2013. A full list of the members of the subcommittee is annexed to the report.

2. Answers to Specific Questions

Question 1: Do you agree that the sectors listed in Chapter 4 are sectors where the risk to workers of exploitation is low and can safely be excluded from the scope of GLA licensing?

This is a policy question, on which ELA cannot comment.

Question 2: Are there other sectors with a low risk of worker exploitation that you think should be excluded from the scope of GLA licensing? What is the evidence for this?

This is a policy question, on which ELA cannot comment.

Question 3: Do you agree that the size and the system for GLA Board appointments should be amended to ensure that a smaller GLA Board had access to and took account of a wide range of stakeholder knowledge and viewpoints?

This is a policy question, on which ELA cannot comment.

Question 4: What mechanisms would you favour to ensure that a smaller GLA Board had access to and took account of a wide range of stakeholder knowledge and viewpoints?

The Government proposes to amend the size of, and system of appointments to, the GLA's Board, so that it is in line with similar non-departmental public bodies ("NDPBs"). This is on the basis that they have assessed that the Board is too large to benefit from clear direction. They remain concerned that a smaller Board should benefit from a wide range of stakeholder input. ELA do not comment on this policy decision but we recognise the dilemma that arises as a result of the change.

ELA therefore seek to identify practices among similar NDBPs from which to draw lessons on how a smaller GLA Board might relate to relevant stakeholders.

According to the Cabinet Office's *Public Bodies 2012* publication, there are, in addition to the GLA, 48 other NDPBs with regulatory functions. The government rightly

identifies the Security Industry Authority (SIA) and Seafish (Sea Fish Industry Authority) as appropriate comparators. ELA has identified the following organisations that are broadly similar to the GLA in terms of size, function and/or expenditure:

- i. Security Industry Authority;
- ii. Human Tissue Authority;
- iii. Human Fertilisation and Embryology Authority;
- iv. Traffic Commissioners and Deputies; and
- v. Sea Fish Industry Authority.

The Security Industry Authority (SIA): this body manages the licensing of the private security industry as set out in the Private Security Industry Act 2001.

The SIA helps to set up several “stakeholder networks”, which are said to “provide an opportunity for representatives from the private security industry to meet and discuss industry issues and SIA activities”. These are not funded by the SIA or run by them, but rather run by the representative involved in the network.

It has published a detailed Stakeholder Engagement Strategy document; this, among other things, categorises stakeholders and defines the terms under which the SIA will engage with them. Views presented at stakeholder network meetings are collated and published. The SIA notes that it can agree with or disagree with the suggestions of the meeting, effectively outsourcing its stakeholder stakeholders and avoiding the need to reach any kind of unanimity or present a united front. Its expectations of the stakeholders’ sub-groups, as well as its commitments to them, are clearly defined in advance.

Annex A: Stakeholder Matrix

Level: Stakeholders	Goal	Communication	What we will do	Engagement Approach
MONITOR Customers Government & Regulators	Monitor Stakeholders' views	One-way (stakeholder to SIA)	'we will monitor your views'	Media & internet tracking Research
INVOLVE Customers Suppliers Home Office and devolved administrations	Work directly with stakeholders to ensure their concerns are fully understood and considered in decision-making	Two-way or multi-way between SIA and stakeholders. Learning on both sides, but each act separately	'we will work with you to ensure your concerns are understood, to develop alternative proposals and provide feedback about how stakeholders' views influenced our decision-making'	ACS Forums & Roadshows Periodic Meetings Seek input to brand development, communications campaigns etc.

Human Tissue Authority (“HTA”): this organisation’s Board consists of 10 members and a Chair appointed by the Secretary of State for Health. Its engagement with stakeholders is apparently developed on a piecemeal basis in line with its strategic and business objectives. The ELA has not been able to locate any specific policies relating to the engagement of stakeholders such as that found on the SIA website. However, it is apparent that the HTA is responsive to a number of individual working groups and that its Board’s members are active members of the medical community; they are therefore able to bring their experiences to the HTA’s attention, as well as to develop partnerships among key stakeholder groups.

Human Fertilisation and Embryology Authority (“HFEA”): this is the UK's independent regulator overseeing the use of gametes and embryos in fertility treatment and research. As part of the “Joint Working Regulation”, the HFEA has partnered with the HTA and the Care Quality Commission. To further this partnership, those organisations have developed joint working protocols that set out, among other things, how information is to be shared between partnered organisations. Open meetings of the Authority are conducted approximately eight times per year and are open to members of the public. It conducts more than 21 stakeholder and public consultation meetings per year. As this body conducts its own consultations, it is able to gather views by inviting responses from interested parties.

Traffic Commissioners and Deputies: this body’s mission is “to champion safe, fair and reliable goods and passenger transport.” It engages stakeholders in three different ways: Information, Consultation and Involvement. It seeks to adhere to the Cabinet Office guidance on consultation. Further, it runs seminars and seeks to involve stakeholders when developing new policies.

Sea Fish Industry Authority (“Seafish”): Seafish was founded in 1981 and supports all sectors of the seafood industry for a sustainable, profitable future. It is the only pan-industry body offering services to all parts of the seafood industry, including catching and aquaculture, processors, importers, exporters and distributors of seafood and restaurants and retailers. Seafish have established three panels representing specific stakeholder groups. The operation of these panels is governed by clear terms of reference on Seafish’s website.

While there are clear differences between the above mentioned NDPBs and the GLA, a number of commonalities among the former can be identified. Firstly, NDPBs appear to establish and publish the terms on which they will engage with stakeholders. This is done in varying degrees of detail, with the SIA providing perhaps the most detailed and comprehensive terms. Secondly, some NDPBs will actively invite consultations, especially where they seek to make policy themselves. Thirdly, the Cabinet Office provides guidance on consultations, which can provide an objective and transparent basis of stakeholder engagement, and that guidance is used by NDPBs.

If the GLA is to reduce the size of its Board, it must retain the skillset and knowledge base of the larger Board. In particular, for an organisation concerned with the protection of workers from exploitation, it is vital that the relevant trade unions are involved in the process. The SIA provides an illustration of how this might be done: a wide variety of stakeholders are identified. This includes the GMB and

Unite as the relevant trade unions that organise in the security industry. A similar model could be applied in the GLA.

Organisations are free to join stakeholder networks, which the SIA assists in setting up. Those networks are not funded by the SIA. ELA are concerned that in this model, stakeholders will seemingly have to take more of an initiative, particularly in view of the fact that the SIA does not itself fund or organise stakeholder meetings. If stakeholders are neither duty-bound nor financially incentivised to involve them in the work of a relevant NDBP, then this would arguably have the effect of making only the most dedicated stakeholders attend meetings.

ELA are therefore concerned that without some recompense or duty to attend (akin to that incumbent on Board members), there might be a flagging in enthusiasm for stakeholder network meetings among some stakeholders. It is suggested that the level of enthusiasm for any proposed mechanisms of stakeholder involvement should be informed by the opinions of those very stakeholders. This may be acquired, for example, by a “mini-consultation” sent to GLA stakeholders. ELA would also recommend that the government seek the opinions of NDPBs whose Boards are clearly distinguished from their stakeholders in order to ascertain best practices.

Question 5: Do you agree or disagree that the GLA should have access to enforcement undertaking civil action in addition to their current powers to address breaches of the law? What is the evidence to support your answer?

ELA consider that the GLA should have access to the sanction of enforcement undertakings (“EUs”) in addition to their current criminal powers to address breaches of the law.

ELA is aware of the constructive and important part played by the GLA in improving labour supply standards within the food and agricultural supply chains since its inception. ELA believe that it is sensible that the GLA is able to act in a proportionate way when dealing with labour providers who are seeking to comply with the regulations or who commit technical breaches, while maintaining the ability to take more serious action against labour providers who exploit workers. We note from the impact assessment that the use of EU’s may well free up resources to tackle more serious abuses such as tax evasion, trafficking, and health and safety negligence and cases where serious exploitation is taking place.

The Hampton report (Reducing administrative burdens: effective inspection and enforcement – March 2005) and the Macrory report (Regulatory justice: making sanctions effective - November 2006) contain a number of principles that are relevant to the enforcement undertaking proposal, namely:

- (a) A sanction should aim to change the behaviour of the offender;
- (b) A sanction should be responsive and consider what is appropriate for a particular offender and regulatory issue;
- (c) Be proportionate to the nature of the offensive and the harmed caused;

- (d) Aim to remove the harmed caused by regulatory non-compliance (where appropriate) and
- (e) Aim to deter future non-compliance.

It is noted that the GLA's prosecution guidance tries to ensure that unnecessary prosecutions are not pursued. It is also noted that licensed businesses, which do not meet the GLA Licensing Standards, may have Additional Licence Conditions attached to their licence with the licence then being conditional upon compliance with those conditions. However, In ELA's view, the Macrory principles set out above would be better met by giving the GLA a larger toolbox of sanctions particularly where technical offences occur where there has been no abuse of workers.

The criminal process can be lengthy and put businesses through potentially damaging public speculation, stress and uncertainty which could be avoided in appropriate cases, using EUs. In particular, it is noted that the damage of a criminal prosecution to a business' reputation can be significant.

EUs have been used extensively in relation to environmental packaging offences, which historically would have dealt with under the criminal system. Criminal prosecutions have continued in relation to serious offences, but technical breaches of packaging regulations have proved well suited to EUs. It is considered that a similar situation could apply to technical breaches of Gangmaster legislation.

Given the fact that EUs would apply to only 2 offences, the administrative burden on the GLA would be limited (we look at the process below).

It is understood that a business giving an EU would have admitted that an offence had taken place. While compliance with an agreed EU would rightly prevent criminal prosecution, a failure to comply with it would presumably make prosecution by the GLA easier and less costly.

Further, ELA accept the logic of the argument set out in paragraphs 2.14 and 6.14 of the Impact Assessment that improved enforcement is likely to benefit those businesses who typically comply with regulations. There is a more level playing field with more offenders being caught and suffering sanctions that should lead to a change in their behaviour. The courts are less likely to impose token penalties for offences as they will know if the GLA is prosecuting rather than going down the EUs route then it must be considered a serious matter.

As long as the power to prosecute serious offences is retained, ELA consider the correct balance of sanctions has been struck.

Question 6: If you agree do you have a view on how the GLA might implement an enforcement undertaking civil sanction?

ELA considers that the approach taken by the Environment Agency offers a sensible way in which the process of EUs can be implemented.

The Environment Agency has implemented guidance on EUs, a template offer form from a business setting out the EUs. It is expected that most EUs will arise out of investigative action by the GLA (as opposed to voluntary offers by businesses) and

therefore it would be necessary to train appropriate enforcement officers in relation to the use of EUs. However, given the limited number of offences, we believe that this investment would be limited.

ELA envisage that the EUs guidance would need to give clear indicators as to what situations would be appropriate for the offering of EUs and the content/timeline for EUs.

Impact Assessment

We have no additional comments that are not recorded in our answers to the questions above.

List of Working Party Members

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