



# GLA Application and Inspections Consultation

TUC response

## Introduction

The Trades Union Congress (TUC) is the national centre for Britain's trade unions. The TUC has 53 affiliated trade unions, representing a membership of almost 6 million people who work in a variety of sectors and occupations. TUC affiliates represent members in many sectors regulated by the Gangmasters Licensing Authority (GLA), including agriculture, horticulture, forestry, meat processing and fresh fruit production.

For the TUC and affiliated unions, the protection of workers is a key priority. In recent years we have campaigned for improved employment rights and working conditions for agency workers and other vulnerable workers. The TUC also played an active role in the coalition of retailers, food industry representatives, trade unions and NGOs which called for the establishment of the GLA. This coalition, which was co-ordinated by the Ethical Trading Initiative (ETI), recognised the need for enhanced enforcement in the GLA sectors to prevent the exploitation of workers and ensure fair competition. Following the Morecombe Bay tragedy in 2004, the government recognised it was imperative to introduce a more effective system of regulation in the GLA sectors.

The TUC, like many other stakeholders, recognises that the GLA licensing system has made a serious contribution to increasing compliance with employment standards; reducing tax evasion; and creating a level playing field for business by ensuring that reputable firms are not undercut by rogue operators. Given the effectiveness of the GLA to date, the TUC has argued that its remit should be extended to include other high risk sectors including construction, hospitality and care industries.

The TUC therefore welcomed the government's announcement that it plans to retain the GLA, following the recent Red Tape Challenge exercise. However we have serious concerns about the proposed move away from automatic application inspections and associated fees, as outlined in this consultation document and in the Ministerial Statement of 24 May 2013.

Whilst the TUC recognises the need for the GLA to target serious and organised crime in partnership with other enforcement agencies and to identify and assist the victims of human trafficking, it is essential that this enforcement work is not undertaken to the exclusion of compliance activities by the Authority.

On the GLA's own analysis, a move to a risk-based approach to application inspections could see as many as one in five non-compliant gangmasters being granted licenses. Reducing controls at the point of entry is likely to lead to an increase of rogue gangmasters. This will undermine the effectiveness of the GLA in tackling tax evasion and in raising compliance with basic employment and health and safety standards. It will also undermine the credibility of the GLA licence. The TUC therefore believes that it is essential that automatic application inspections are retained. As documented in the joint submission, this view is shared by the main stakeholders in the GLA including major retailers, labour providers, trade unions and NGOs.

## Background

It is well-established that to date the GLA has played an important role in raising standards, increasing compliance with basic legal standards and in reducing the exploitation of workers.<sup>1</sup> However, independent research has also revealed that abuses of vulnerable workers in the food and agriculture sector remain prevalent.

The EHRC Inquiry into the meat processing sector in 2010 found evidence of widespread mistreatment of agency workers, particularly migrant and pregnant workers, employed in the meat processing factories. Some amounted to breaches of the law and licensing standards, such as coercing workers to do double shifts when they are tired or ill and the non-payment holiday pay; whilst others represented a clear affront to respect and dignity. The EHRC report made a compelling case for tougher and better resourced enforcement not weaker regulation.

Recent research commissioned by Joseph Rowntree Foundation<sup>2</sup> also found widespread mistreatment of agency workers in the UK food industry, including the regular underpayment of wages. Workers were threatened and bullied. Racist or sexist language was sometimes used in the workplace, underpinning a climate of fear. The most notable and unexpected forced labour practice was the 'underwork scam' – recruiting too many workers and then giving them just enough employment to meet their debt to the gangmaster. The workers were effectively trapped in an exploitative relationship by the poverty that resulted from low pay, underwork, and excessive charges and deductions. The report concluded that there was a continuing need for the Gangmaster's Licensing Authority to tackle worker exploitation. To this end 'the GLA needs to be able to continue with at least the same powers, if not a greater role in tackling workplace abuse.'<sup>3</sup>

Faced with these findings, the TUC is seriously concerned by proposals aimed at limiting GLA inspections and weakening the licensing system. In the TUC's opinion, the government's approach to deregulation and flexibility of labour is totally inappropriate in this context. The GLA's already limited resources will have been slashed by almost 20% by the end of this parliament based on government spending plans. With the proposed greater focus on serious crime

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<sup>1</sup> Wilkinson et al (2010) *Forced Labour in the UK and the Gangmasters Licensing Authority* The Wilberforce Institute for the study of Slavery and Emancipation, University of Hull; Gangmasters Licensing Authority: A Hampton Implementation Review Report – September 2009; *Inquiry into recruitment and employment in the meat and poultry processing sector* – Equality & Human Rights Commission – March 2010, p.1.

<sup>2</sup> Sam Scott et al (2012) *Experiences of forced labour in the UK Food Industry* Joseph Rowntree Foundation.

<sup>3</sup> Ibid p7

cases the TUC is seriously concerned that abuses towards vulnerable workers in the food and agricultural sectors will go undetected and are likely to increase.

## Consultation Questions

### **Question 1:**

#### **Do you agree that the GLA should adopt a risk based approach to determine whether an inspection is required on receipt of an application?**

No. The TUC is opposed to the introduction of a risk-based approach to pre-application inspections for the following reasons.

##### **a) Lack of robust and reliable evidence to underpin a risk based approach**

The GLA has previously commissioned two reviews aimed at assessing whether it was possible to develop a risk profile and remove the general requirement for uniform application inspections. Both reviews concluded that there is a lack of robust data on which to implement a risk based approach to application inspections. In the light of these findings, the GLA Board unanimously decided to retain the general requirement for application inspections.

Evidence set out in the consultation document confirms that the GLA still lacks a robust data source on which to base a reliable risk based approach and that any move away from uniform application inspections cannot be justified.

Under the current proposals, the GLA would be heavily reliant on reports of non-compliance provided by other government departments (OGD) for determining whether an application inspection should take place. However, as Appendix 3 of the consultation document reveals, this is a very poor proxy for detecting non-compliance with GLA licensing standards. In fact there is a negative correlation - gangmasters are more likely to be non-compliant with GLA standards where OGD data suggests they have a clean record.<sup>4</sup>

The GLA is also proposing that an application inspection will take place where a licence have been previously revoked; where information is received pointing to inaccuracies on the application form; where there is a lack of evidence of procedures to ensure compliance; or where there is evidence the applicant would not meet the 'fit and proper' test (licensing condition 1.1). However these circumstances are likely to arise in a very limited number of cases. The GLA is also proposing to carry out random checks on 10% of applicants where there is no indication of non-compliance. The figure of 10% appears to have been arbitrarily selected. It is far from clear how this target can provide an adequate check on the effectiveness of the new inspection system, particularly in the light of the GLA's assessment that the new risk-based approach could result in approximately one fifth of non-compliant firms being licensed.

##### **b) Lost benefits associated with application inspections**

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<sup>4</sup> According to GLA statistics for 2011-12, a significantly higher percentage of businesses with a clear OGC check (32%) were refused a licence or issued with ALCs following an inspection than those who had received an adverse OGD report (22%).

The TUC believes that the current system of application inspections benefits the labour provider, the labour user and the GLA.

Application inspections help to generate a relationship between the GLA and the labour provider and assist the labour provider to gain a better understanding of licensing requirements. Uniform inspections also provide reassurance to labour providers that they are competing on a level playing field with other agencies and are not being undercut by rogue operators.

Application inspections also enable GLA inspectors to assess the environment in which the labour provider will be operating and to ensure that relevant management systems, procedures and documentation are in place. They also mean that GLA inspectors are better placed to assess whether the Principal Authority is genuinely in control of a business. Application inspections can also assist the GLA to identify and investigate any persons connected to the principal authority. They also assist the GLA inspectors to monitor the creation phoenix companies following the revocation or refusal of a licence.

Labour users have increased confidence that licensed labour providers comply within minimum legal requirements, thereby reducing the risk to reputational damage. Application inspections also assist in building consumer confidence in the food industry and in maintaining the credibility of the GLA licensing standard.

#### **c) Cost implications**

The TUC suspects that the proposals to move away from the requirement for application inspections will prove a false economy. The consultation document fails to provide any analysis of the staffing and cost implications of the proposals. However the TUC predicts that it be more cost effective and less time-consuming for the GLA to prevent rogue gangmasters from entering the licensed sector, than to deal with the ensuing increase in non-compliant activities. Any savings which may be achieved through reduced application inspections will almost certainly be offset by the costs associated with increased compliance inspections, licensing decisions, enforcement actions, and the handling of appeals.

#### **d) The economic case**

There is no evidence that the current licensing system and associated fees act as a barrier to entry or restrict growth in the sector. The continuing high level of new entrants indicates that this is not the case.

There is also no evidence that moves away from uniform applicant inspections will reduce burdens on business. Indeed the opposite may be true. A reduction in application inspections will place a greater responsibility on end users (retailers) of the products and would lead to multiple inspections/audits by retailers on their suppliers creating greater burdens upon the industry. It is likely that all retailers will need to audit every contract and labour providers will be inundated with site visits.

Experience prior to the establishment of the GLA also reveals that voluntary auditing systems were not successful in preventing the exploitation of vulnerable

workers or in maintaining compliance within minimum legal standards through the food industry. Retailers and auditing companies do not have the same investigatory powers as statutory agencies and cannot access relevant information, including bank accounts. Retailer auditing processes are also unlikely to uncover issues such as harassment and bullying which frequently accompany the other common illegal abuses related to underpayment, bondage and accommodation.

### Conclusion

The TUC is firmly opposed to a risk based approach to application inspections which will increase the risk of rogue gangmasters operating in the sector. These proposals will create unfair competition for reputable firms and will undermine the ability of the GLA to prevent the exploitation of workers, to improve health and safety standards and to tackle tax evasion.

There is also a serious risk the proposals will undermine the reputation of the GLA and the credibility of the GLA licence. They should therefore be rejected.

### Questions 2 & 3:

**Are there any specific situations in which you consider an inspection of an applicant should always be required?**

**Do you think there are any specific situations in which an inspection of an applicant should never be required?**

The TUC believes that the licensing system remains the most appropriate and effective form of regulation for the food sector. In our opinion, all labour providers should be inspected prior to being licensed.

Please see the response to question 1.

### Question 4:

**Do you consider the list of current Government organisations consulted by the GLA is adequate, or do you think that the GLA should seek information from other organisations? If so, please indicate which organisation(s) you consider appropriate?**

Since its establishment, the GLA has developed good working relations and undertaken joint enforcement actions with a range of enforcement agencies.

In addition to the organisations listed in paragraph 2.6, the TUC believes that the GLA should also seek information from the Serious Organised Crime Agency (SOCA), the UK Human Trafficking Centre (UKHTC) and the Employment Tribunal Service. The GLA should also seek information from the Insolvency Service. This information may assist the GLA to identify the creation of phoenix companies.

The GLA should continue to develop working relations with labour inspectorates in other EU countries in order to monitor the practices and ownership of gangmasters based outside of the UK.

The TUC is also aware that legal restrictions exist which prevent enforcement agencies from sharing intelligence relating to on-going investigations with other government agencies. Previously the government indicated it planned to introduce legislation creating information sharing gateways between the employment-related enforcement agencies. This legislation has not been forthcoming. The TUC believes that the government should act on this issue as a matter of priority.

**Question 5:**

**What information do you believe the GLA should be seeking from OGDs or other organisations?**

GLA staff have developed extensive experience in gathering intelligence from other government agencies and are aware of the type of information which should be requested.

However the TUC would suggest that the GLA should request notification from the Employment Tribunal Service of all claims brought against labour providers and labour users operating in GLA regulated sectors. The GLA should also seek to develop protocols with the HMRC regarding the application of cash security deposits.

The GLA should also try to gather more information on the extent to which labour providers operate across different sectors. This would be extremely useful in building up evidence to deal with new applicants and in building a case against criminal businesses operating across GLA and non-GLA sectors.

The Board of the GLA provides a rich mix of organisations which will hold intelligence of use to the GLA. The GLA should continue to work with these organisations to gather intelligence on new applicants.

**Question 6:**

**What documents do you consider the GLA should seek in place of an application inspection, which may also assist in determining whether an inspection should occur (which may include industry audits)?**

As outlined in response to Question 1, the TUC believes that the requirement for application inspections should be retained.

The TUC is firmly opposed to the introduction of “earned recognition”. The concept of “earned recognition” is not a new one and has been tried and tested in the USA and Ireland amongst others. In both these cases the models adopted proved very costly and ineffective.

The TUC believes that a system of “earned recognition” based on intelligence from other government agencies and the supply of written documentation will not be effective and cannot provide the GLA with assurances of compliance with licensing standards.

Government agencies, other than the GLA, do not gather intelligence relevant to compliance with many GLA standards, including compliance with equality



legislation and the underpayment of wages. Due to current cuts in government funding, other government agencies are also unlikely to have sufficient resources to carry out inspections in GLA sectors.

Equally, it will not be impossible for the GLA to assess compliance with some GLA standards on the basis of written documentation supplied the labour providers. Reliance purely on written documentation may lead to GLA licences being issued to non-compliant firms.

Recent decisions from the Court of Appeal have confirmed that an individual's employment status cannot be determined simply by reference to any written contract of employment or contract for services. Rather any assessment must be based on the day to day reality of the employment relationship. This means that where a labour provider asserts that individuals are 'self-employed' and not entitled to the NMW or statutory holiday pay, the GLA will need to undertake workplace inspections to assess compliance.

Similarly, workers' contractual rights, for example to pay, working hours or holidays, can be based on written or oral contractual terms. They may also be based on custom and practice. In order to determine if works are receiving their entitlements, GLA inspectors will usually need to carry out workplace inspections and interview staff.

It is also important to note that the GLA previously experimented with an unsuccessful form of "earned recognition". After the GLA was established, it was agreed that members of the Temporary Labour Working Group should be initially exempted from the requirement for application inspections, on the premise that they were reputable firms which had signed up to the ETI Code of Practice for labour providers in agriculture and fresh produce. However subsequent inspections revealed significant levels of non-compliance.

For reasons outlined in response to question 1, the TUC also questions the proposed reliance on industry audits.

#### **Question 7:**

**What controls do you consider are necessary to ensure that an objective and reliable assessment of compliance can be made, including an assessment of the competency of the Principal Authority?**

The TUC believes that the application inspections remain the only reliable and effective means of assessing compliance with licensing standards and of assessing the competency of the Principal Authority. Please see the response to Question 1.

#### **Question 8:**

**Do you think the renewal process should remain annual or that longer licensing periods should be contemplated?**

The TUC does not support the introduction of longer licensing periods. Due to the seasonal nature of much of the work covered by the GLA there would often be a high turnover of workers during the period of a licence. Similarly the principal players in the labour provider may change. Both these are factors which

may provide an opportunity for the Gangmaster to apply changes to the original conditions without necessarily notifying the GLA. For this to be allowed to continue for any length of time would be to the detriment of the workers.

**Question 9:**

**Do you agree that those labour providers who demonstrate a longer history of compliance should have longer licences? If so:**

**(a) what do you consider the maximum length of such licences ought to be?**

**(b) what additional controls/checks, if any, do you consider appropriate?**

As noted in response to question 8, the TUC does not support the introduction of longer licensing periods. If longer period of licensing were contemplated, the TUC believes that additional checks would need to be carried out, both with the OGDs and through inspections.

The TUC would have serious concerns if licences were extended beyond 2 years. The labour providers should only qualify for a longer licence once they have received annually renewed licences for at least five years. Based on the statistics in Appendix 4 of the consultation this would allow almost 50% of current licence holders to be considered for an extended licence.

If longer licences are to be introduced, the TUC would support a penalty system similar to that set out in paragraph 4.15 of the consultation document.

**Question 10:**

**Do you consider that the renewal process should be removed altogether? If so, what additional controls/checks, if any, do you consider appropriate?**

Given the high turnover of workers and principal players within labour providers, the TUC cannot envisage any circumstances where the renewal process should be removed altogether. Such a move would take workers employed in these sectors back to a position similar to that which existed before the creation of the GLA.

**Question 11:**

**Do you agree that the Public Register should be enhanced to include:**

**(a) details of ALCs and, if so, list the specific areas of non compliance by reference to the standards?**

**(b) labour providers whose status has changed to “revoked without immediate effect”?**

**(c) businesses that are formally revoked and, if so, for how long should these details be displayed?**

The TUC welcomes the proposals to introduce greater transparency of the status of a GLA Licence Holder. However this, in our view, should be a feature of the system regardless of any changes to the application and licensing process.

The TUC agrees that greater transparency would encourage licence holders to meet their obligations and correct any identified areas of non compliance as quickly as possible. It would also provide labour users with clearer information on those providers who meet all the requirements and are therefore more likely to be the chosen provider.

To this end, we agree with the proposition that information relating to ALCs and where a licence has been revoked without immediate effect should be included on the public register. The register should also confirm where licensing decisions are the subject of an appeal.

The TUC also recognises that the proposed changes to public register may have significant commercial implications for labour providers. It is important therefore that the GLA ensures that its decision making processes are robust and comply with principles of natural justice. To this end, the TUC believes that inspectors should provide labour providers with a summary of compliance-related concerns at the end of an inspection. This would provide the gangmasters with the opportunity to provide a full response and to present relevant evidence before a decision is taken. Labour providers should also receive a copy of, and have the opportunity to comment on, the inspection report before any decision is taken. Licensing decisions should be issued without undue delay.

We also agree that the public register should include information relating to earlier revocations of GLA licences.

**Question 12:**

**Do you agree that the active check process should be enhanced to provide greater detail of changes to a licence status, and which may appear on the Public Register?**

The TUC agrees that the proposed changes to the Active Check Process service to stakeholders would need to be amended if changes to the Public register were implemented.