

Health and Safety Commission Paper		HSC/06/81	
Meeting Date:	17 October 2006	Open Gov. Status:	Fully open
Type of Paper:	Above the line	Paper File Ref:	
Exemptions:	No		

HEALTH AND SAFETY COMMISSION

Options for the merger of the Gangmaster Licensing Authority with HSE

**A Paper by David Butter – Policy Group – Agriculture & Food Sector
Advisor(s): Graeme Walker, Julian Shellard, and Max Walker
Cleared by Geoffrey Podger on 4 October 2006**

Issue

1. To consider the options for the future roles and structures of the Gangmaster Licensing Authority (GLA) and its Board following merger with HSC/E in order to contribute to a planned DEFRA consultation.

Timing

2. Routine.

Recommendation

3. The HSC is invited to agree that:
 - a. The options at Annex 1 for the GLA Board and Annex 2 for the Authority be used as the basis of DEFRA's planned public consultation on the future roles and structures of the GLA and its Board in an enhanced HSE and of subsequent consultation on the proposed Regulatory Reform Order;
 - b. The best option to develop in respect of the GLA Board involves the transfer of its statutory functions to HSC, with the Board continuing to exist in a modified form with strategic oversight of and responsibility for advising the Commission on gangmaster issues, legislation and the licensing regime [Annex 1 A];
 - c. The best option to develop in respect of the GLA in the short-to-medium term involves its merger within HSE as a stand-alone authority reporting on its activities to HSC [Annex 2 B];
 - d. An evidence-led review of the functions of the Strategic Board, the Authority and its management be carried out once HSC/E has gained experience of operating the licensing regime and the regime has had time to mature. This is unlikely to be before 2011.

Background

4. The Gangmasters (Licensing) Act 2004 regulates the activity of labour providers (gangmasters) and labour users in the UK's agriculture and fresh produce processing sectors, and established:
 - a. The GLA to operate a licensing scheme, set licensing conditions and maintain a register of licensed gangmasters;
 - b. New offences, including operating without a licence, engaging the services of an unlicensed gangmaster and using false documentation; and
 - c. A penalty of up to 10 years imprisonment.

5. The GLA, an executive Non Departmental Public Body (NDPB) sponsored by the Department for Environment, Food and Rural Affairs (Defra), came into being on 1 April 2005. The licensing regime and the offences come into effect during 2006.
6. The GLA is regulated by a Board of 19 stakeholder representative members appointed by the Secretary of State (SoS) together with 9 ex-officio members representing departments (including HSE) with an independent part-time Chair.
7. The Hampton recommendation to merge the GLA within HSE was accepted by the Government in the Chancellor's Budget Statement in March 2005. The merger is being project managed by officials from HSE, the GLA and Defra. Merger plans are to be published during October 2006 and the mergers need to be completed by April 2009. Publication of the merger plans is being co-ordinated by HSE's Better Regulation Unit. The GLA is expected to consist of approximately 50 full-time officials at the time of merger.

Argument

8. Defra Ministers have given public assurances that proposals for the implementation of Hampton affecting the department, including the merger of the GLA with HSC/E, will be the subject of a public consultation exercise. No firm date has yet been set for this although we expect it to be launched in the next few months.
9. The simplest model for merger would mirror existing arrangements whereby the GLA would continue to operate as an NDPB under the sponsorship of HSE rather than of Defra. This would be a novel approach, which appears not to have been adopted elsewhere in Government. It would not deliver the aims and objectives of Hampton nor would it realise any potential savings or efficiencies. It is believed it would impose additional complexity and management costs on HSE.
10. Alternative options for merging the GLA's Board and the Authority itself and for the delivery of their respective functions are discussed in the following paragraphs and the annexes. We intend these to be the subject of the public consultation document.

The Board

11. Four possible options for the GLA's Board post merger have been identified and together with their respective benefits and risks are set out at Annex 1.
12. Of these, we recommend Option A which proposes that the Board's statutory and governance functions be transferred to the Commission with the Board being retained as a clearly visible entity advising and reporting to the Commission on the strategic direction and delivery of the gangmaster licensing legislation and regime. This option provides sufficient flexibility to take account of the outcomes of a 3-year review of the existing Board's structure and functions (previously agreed by Defra Ministers) and due to take place in 2008 whilst retaining a transparent and externally recognisable identity and role for the Board and its representative stakeholders. The proposed Strategic Board would be capable of providing the Commission with expert advice on the maturing licensing regime.

The GLA

13. The GLA itself currently operates from Nottingham. HSE Nottingham relocated in April 2006 at which time additional space to house the GLA post-merger was negotiated with the landlord. Co-location gives rise to a number of options for delivery of the GLA's functions and for its staff on merger with HSE. These together with their respective benefits and risks are set out at Annex 2.

14. Of these, Option B is recommended under which the GLA would remain an externally visible and identifiable entity. The resource allocated to it would be transparent, more easily managed and protected. It is compatible with Option 'A' for the Board and could be either an interim solution in the short-to-medium term capable of subsequent modification and fuller integration within existing structures once HSC/E has gained experience of operating the licensing regime and the regime has had time to mature or a long-term solution.
15. Two further options for discharging the GLA's functions have been identified and are set out at Annex 3. However it is considered that neither would deliver the aim and objectives or the principles of better regulation set out by Hampton.
16. A Regulatory Reform Order under the proposed Legislative and Regulatory Reform Bill is proposed as the legislative route to merger. Possible legislative routes for the transfer of the Board's governance functions to the HSC are discussed at Annex 4. It is not thought that the changes under consideration to transform the Commission and Executive into a unitary authority will affect the plans.

Consultation

17. Within HSE, with the GLA Board, the GLA, Defra and DWP.
18. The GLA Board meeting on 26 April discussed the options set out in Annexes 1, 2 and 3. Although the Board, through its Chair, subsequently wrote to Defra Ministers urging that there be no changes to the GLA for a further 3 years (see notes at Annex 5), the SoS replied on 9 June 2006 reaffirming support for the merger of the GLA with HSE.

Presentation

19. Defra plans to undertake a public consultation exercise (para. 8 refers). HSE will work with Defra and the GLA in developing the consultation document. We anticipate significant Parliamentary and stakeholder interest and scrutiny of any proposed changes to the GLA Board's functions and structure.
20. There is and it is likely that there will continue to be, interest in the merger by the representative stakeholders on the GLA Board. The current merger proposal seeks to address their concerns. The consultation on the merger options and on the subsequent Regulatory Reform Order will allow stakeholders, other interested parties and parliament to consider and comment fully on the proposals to implement the merger as recommended by the Hampton Report.

Costs and Benefits

21. In the short-to-medium term merger should facilitate more consistent adoption and implementation of the Hampton principles of better regulation by an enhanced HSE and realise efficiency gains through the implementation of common management structures, procedures, business processes and logistics within both organisations.
22. Longer term the merger should provide for a more consolidated regulatory landscape, simplifying a complex set of responsibilities for inspection into one organisation and point of contact, thereby facilitating a more efficient, targeted and coherent use of resources than would be possible were HSE and the GLA to remain independent regulators. By promoting the adoption of a more comprehensive risk based approach to prioritising inspection and enforcement it should help reduce duplication of

inspection activity whilst safeguarding the welfare and other interests (including health and safety) of workers by ensuring labour providers operate within the law.

Financial/Resource Implications for HSE

23. In line with Treasury guidelines, the GLA aims to be self-financing by 2010 - dependent on an appropriate and sustainable licence fee structure being agreed and implemented. Current estimates are of approximately £2.5m p.a. for operational activities (funded from the licence fee). Responsibility for enforcement, currently reserved to Defra and estimated at approximately £2m p.a. is not currently treated as an operational cost and therefore will not be recovered from the licence fees. A resource transfer will be sought from Defra as HSE negotiates to ensure that it does not take on any unsupported financial liability.
24. Some savings can be expected from common adoption, where practicable, of HSE-wide facilities and systems e.g. HR, payroll, IT support, finance, accommodation etc.

Environmental Implications

25. None

Other Implications/Risks

26. The implications of options for the Board and the GLA are described in the annexes.
27. Unlike HSE staff, the GLA's staff are public servants not substantive civil servants. Their status post-merger is an issue for a number of reasons including that of increasing (by approximately 50), the civil service cadre, HR matters and funding. Advice is being sought from the Cabinet Office/Better Regulation Executive.
28. The effect of transferring the GLA's functions by means of an Order or by primary legislation will be to widen HSE's statutory powers beyond the General Purposes of the 1974 Act. Similar considerations apply if the Commission inherits the statutory and governance functions of the GLA Board. The Commission is advised that the General Purposes have previously been amended by for example the transfer of responsibility for controlling emissions into the atmosphere to the Environment Agency.
29. Once the licensing regime has matured and HSC/E has gained experience of operating it, an evidence-led review of the functions of the Strategic Board, the Authority and of its management could be carried out. If the review were to conclude the GLA should be more fully integrated to maximise Hampton gains, this could be done in the medium-to-longer rather than at the time of merger.

Action

30. The HSC is invited to agree to the proposals at paragraph 3.

Options for the GLA Board Merger Model

Option A

On merger the Board's statutory and governance functions are transferred to the HSC, which would be accountable to Ministers for implementation of the legislation and the licensing regime. The GLA Board is retained as a clearly visible Strategic Board advising and reporting to the Commission on the strategic delivery and direction of the gangmaster licensing legislation and regime. The Board (its structure informed by the Defra 3 year review) would continue with an independent chair and nominated members drawn from industry stakeholders. Existing ex-officio members would be stood down.

Benefits

- The Board is retained in a broadly similar role to that under existing Defra sponsorship.
- Transfers statutory responsibility and governance from the GLA to the HSC – a Hampton gain.
- Removes parallel access to Ministers, minimising the potential for conflict between the Board, the HSC and Ministers.
- Retains and ensures the continuation of independent expert advice to the HSC.
- Retains expert knowledge of the issues and of the emerging licensing regime.
- Retains a separate identity for the Board, which might placate the concerns of some representative Board Members

Risks

- Establishes a single issue Board.
- Some mirroring of function between the new 'Board' and existing IACs
- Does not maximise Hampton gains.

Option B

The Board's statutory and governance functions (as in 'A') are transferred to the HSC but the organisations eligible to nominate members are invited to form a new standalone, single topic Industry Advisory Committee (IAC) to advise on issues relating specifically to gangmasters/labour providers and labour users within the scope of the existing regulatory package. Like other IACs, it would provide expert advice to the HSC.

Benefits

- The governance structure is more compatible with existing HSC/E arrangements.
- A more clearly demonstrable merger of the two structures.
- Transfers statutory responsibility and governance from the GLA to the HSC – a Hampton gain.
- Removes parallel access to Ministers, minimising the potential for conflict between the Board, the HSC and Ministers.
- Retains a separate identity for the Board, which might placate concerns of some Board Members.

Risks

- Board members are likely to see this as an unacceptable downgrading of their role/influence/status.
- The option would create a new IAC to tackle a single issue affecting the agricultural sector when an Agriculture IAC (AIAC) was recently reconstituted and commenced work in April 2005. The AIAC has already identified six priorities for project work including one on casual, temporary and migrant working. Thus there is a clear potential for duplication of effort between the respective IACs.
- Does not maximise Hampton gains.

Option C

As in Option B, the Board's functions are transferred to the Commission, but the Board becomes a working group of the AIAC and assumes responsibility for the wider work currently being undertaken by the Casual, Temporary and Migrant Workers Project Group.

Benefits

- As for Option B, but more closely integrates the Board into HSC/E's existing governance structure.
- Removes potential duplication between the two IACs
- Maximises delivery of Hampton aims, objectives and principles, whilst retaining a separate identity for the Board.

Risks

- Presentationally and politically very difficult. Is likely to be seen as even more of a downgrading of the role/influence/status of the Board.
- Organisations eligible to nominate members may withdraw (in protest).
- The cooperation and goodwill of important stakeholders is lost.

Option D

The Board's role and functions are transferred to the HSC and the Board is dissolved. HSE reports on the activities of the GLA to the Commission with officials bringing any policy advice to the HSC in the same way as they would with other areas of work.

Benefits

- Maximises efficiency gains.
- Is the best option to illustrate our embrace of Hampton principles as a modern regulator.
- Maximises merger / full incorporation bringing synergies and realising benefits.

Risks

- Politically very difficult.
- Could be badly received by the Chairman and representative Board members.
- Could threaten engagement with important stakeholders, which are eligible to nominate / have nominated representative Board members.

- Would eliminate an existing body that could provide a useful sounding board / lightning rod for HSC/E.
- Likely to generate unfavourable coverage in Parliament and the media, particularly if announced early while the GLA is still being fully established and the necessary supporting regulatory framework is still not in place

Options for the GLA Merger Model

Option A

The GLA is merged with the other Hampton merger candidate organisations in a separate stand-alone division within HSE e.g. a Non-Major Hazards Division reporting separately to the HSE Board. The division would have independent management, reporting and enforcement arrangements, processes and structures.

Benefits

- Discharges the obligation to merge the GLA with HSE.
- Minimal disruption to the workings of the GLA and its staff in the short-term

Risks

- An interim but in the long-term probably unsustainable position.
- Realises some but not many of the Hampton aims, objectives, principles or potential benefits.
- Assumes a degree of compatibility / synergy with the other merger candidate organisations, which probably does not exist.
- Longer term would require convergence with the other merger candidate authorities.

Option B

The GLA and its staff transfer into HSE as a stand-alone division with its own policy, functional management and enforcement arrangements and structures. The GLA would remain as an externally visible and identifiable entity under the governance of HSC/E. The GLA would retain its existing functions, processes and structures albeit aligned to existing HSE systems as and where appropriate.

This option would be fully compatible with preferred option 'A' for the Board. The resource allocated to the GLA would be transparent and in the short-to-medium term would be more easily protected and managed.

The GLA would in all probability be co-located with HSE's Nottingham office. Peripatetic Compliance / Enforcement Officers would probably continue to be home based although they would be able to access HSE offices to use common facilities e.g. PACE interview rooms etc.

Benefits

- Discharges the obligation to merge the GLA with HSE.
- Minimal disruption to the workings of the GLA, its staff and the licensing regime in the short-to-medium-term.
- Minimises disruption to HSE in the short-to-medium term.
- The GLA identity is retained.
- Retains expertise in an area outside of HSC/E's traditional remit.
- Longer term convergence could be completed once the licensing regime has had time to mature and HSC/E has gained experience of managing it.

- Minimises merger costs

Risks

- Realises some but not many of the Hampton aims, objectives, principles or potential benefits.
- Little integration / interaction with / from other parts of HSE in the short-to-medium term.

Option C

The GLA is incorporated within HSE, retaining its identity through the creation of a new division e.g. a Gangmaster Licensing Division responsible for issuing licences and for monitoring the performance of licence holders. Its HQ functions are co-located at the HSE office in Nottingham. The division is responsible for setting policy and managing operational and enforcement activities including the work of its peripatetic Compliance and Enforcement Officers working from home or based in HSE's divisional / local offices as appropriate.

Benefits

- A clearly identifiable resource.
- Limited changes required to primary legislation.
- Some efficiency gains from using shared accommodation, logistics etc.

Risks

- Possible disruption to licensing regime during move.
- Limited delivery of Hampton aims, objectives or principles.
- Some disruption to GLA staff.

Option D

The GLA is merged within an existing HSE division e.g. FOD but remains an identifiable resource e.g. a Gangmaster Licensing Unit with responsibility for policy and strategic and operational functions and for managing the licence regime. The HQ functions and licensing regime are co-located at HSE Nottingham office. Peripatetic Compliance and Enforcement Officers working from home or based in FOD regional / local offices are managed by local FOD management.

Benefits

- Similarities with an existing HSE model i.e. the Asbestos Licensing Unit.
- Consistent with Hampton principles for inspection and enforcement.
- Efficiency gains from co-location and local management of peripatetic staff.
- Identifiable resource for planning and delivery.

Risks

- Changes required to primary and secondary legislation.
- Greater disruption to GLA staff than option A – changes to management structures, reporting arrangements etc.

Option E

The GLA is merged completely into existing HSE divisions and structures e.g. Policy Group (PG) and FOD. The policy and strategic functions of the GLA are for example discharged through the combined Agriculture/Food Sector and Policy Branch in PG; with operational and enforcement functions being carried out by FOD divisional staff. The licensing regime could be held and managed centrally or devolved to divisional / local offices to be administered within their respective geographical areas.

Benefits

- Fully delivers Hampton aims, objectives, principles and benefits.

Risks

- Substantive changes required to primary and secondary legislation as the GLA will effectively be abolished.
- Current authorisations under HSWA / FEPA / ELCI will need to be amended or an additional warrant will need to be issued to staff under the G(L)A 2004.
- The work is fundamentally different to HSE's core business. HSE staff would require training.
- Additional resource required to deliver compliance / enforcement work would be a burden on current HSE frontline activities.
- Dilutes the effort directed to gangmaster activity. Staff may be allocated to other HSE priorities and therefore would not support the G(L)A 2004.
- Devolving the licence regime may cause disruptions during start-up and transfer of functions.
- Implications for current GLA staff in post.
- No identifiable resource for planning and monitoring of delivery.

Conclusions

Option A is probably unacceptable politically. It delivers few (if any) of the Hampton aims and objectives or the principles of better regulation, assumes levels of compatibility with the other merger candidate organisations which are probably unjustified and in the longer term is not sustainable.

Option B may not be considered to be a long-term solution but does allow the emerging licensing regime to continue as at present. Once the regime has matured and HSC/E has gained experience from operating the regime, there could come a time when a further review would be appropriate.

Options C and D are the most attractive in terms of delivering Hampton and realising efficiency gains / benefits without jeopardising the licensing regime.

Option D is a familiar arrangement. Tried and tested in the form of the Asbestos Licensing Unit, it is known to be capable of delivering an efficient, fit-for-purpose licensing regime.

Option E again would not be acceptable to the GLA Board or the GLA itself. Although the Hampton principles are met in full there are substantial risks, which cannot be resolved in the short term. To mitigate potential disruption to the licensing regime this option would

require a phased approach involving several stages, over a number of months or possibly, years.

It is recommended that the GLA be merged within HSE under Option B – at least as an interim measure, possibly moving in the longer term towards Option E.

Other Options for the GLA

Option F

The GLA could become an agency of HSE. HSL is currently the only agency in HSE and their staff like those of HSE are substantive civil servants. The status of the GLA's staff (see para.27 of the paper) would be a significant issue were this option to be adopted, as they are public servants.

Benefits:

- Staff disruption minimised.
- Disruption to the licensing regime minimised.

Risks:

- Staff status remains an issue, as HSE and HSL staff are substantive civil servants.
- Currently funded through Programme Funding by Defra, the GLA would continue to be funded as such. However this would result in inconsistent budgetary and accounting treatment within HSE and specific National Audit Office approval / authority would be required.
- It is unlikely that similar savings in management and overhead costs to those in merging into HSE could be achieved. In practice, additional complexity in terms of budgeting and accounting would increase HSE costs.
- Hampton objectives, in particular reduction in the number of regulators, would not be realised.

Option G

The GLA could operate the licensing regime under contract to HSE. This would in effect be to privatise the operation, giving rise to potential liabilities e.g. under TUPE and other employment issues. Any contract would need to be subject to periodic re-tendering.

Benefits:

- Civil service numbers are not increased.
- Staff disruption would be reduced in the short-term but in the longer term might be adversely affected by the re-tendering process.
- Disruption to the licensing regime minimised.

Risks:

- In effect, a privatisation of the licensing regime.
- Legal opinion would be required as to whether the contract could be let directly to the GLA in the first instance without following due process.
- Periodic re-tendering of the contract would be required.
- Staff/employment issues e.g. TUPE would need to be resolved.
- Hampton objectives, in particular reduction in the number of regulators, would not be realised.

It is unlikely that similar savings in management and overheads to those from merger with HSE are achievable as contract management arrangements would increase HSE costs.

Legislative routes for transfer of functions from the GLA to HSE

Short-term reassignment of GLA functions

This could be done by means of an Agency Agreement under section 13(1)(b) HSWA by which, the Commission could agree to perform the GLA's functions provided that in the opinion of the SoS they could "appropriately be performed...in connection with any of the [it's] functions". It would be a policy and practical judgement as to whether that condition could be satisfied.

Assuming the SoS could give that opinion, and an Agency Agreement were to be put in place, under section 11(4)(b) the HSC could direct the HSE to carry these out on the HSC's behalf: in effect a form of double-delegation. However as the Notes on Clauses to HSWA make clear, this would have the effect of making the HSC and HSE, the GLA's agent. Section 13(1)(b) was primarily intended as a means of helping out other organisations, providing them with a statutory means of using the expertise of HSE staff in support of their work. In addition, again as the Notes on Clauses make clear, HSE staff carrying out GLA work under this route would not be able to use HSWA powers.

Section 13 HSWA is not thought to provide an appropriate vehicle for merger.

Formal merger

Section 15 HSWA can be used to make Regulations for the general purposes of Part 1 HSWA. However even if the merger could be considered to be for the general purposes of the 1974 Act, Section 15 Regulations cannot modify legislation made after 1974 unless that legislation refers to "the relevant statutory provisions".

Section 15 HSWA is not thought to provide an appropriate vehicle for merger.

Conclusion

No powers are available to effect a formal merger under current legislation.

Regulatory Reform Order under the Legislative and Regulatory Reform Bill

The Legislative and Regulatory Reform Bill is currently making its way through Parliament. In its current format the Bill would make provision for an Order to amend the GLA legislation by substituting HSE for the GLA throughout. Supplementary and consequential provisions would need to be made to allow for continuity in terms of legal proceedings etc. By way of example, the Nuclear Installations Act 1965 etc (Repeals and Modifications) Regulations 1974 amended the Nuclear Installations Act 1965 substituting HSE for the SoS for Energy.

It is proposed that a Regulatory Reform Order should be the legislative route to merger.

Response from the GLA Board Meeting of 26 April on Merger Options

The Authority agreed unanimously:

- 1) To reaffirm its determination to ensure that it achieves the objectives given by its present Act, to curb exploitation in the agriculture, food processing and shellfish gathering sectors;
- 2) To note that management could easily be distracted by the need to plan for a merger with the Health & Safety Executive but expresses confidence in its senior management and staff to deliver these objectives;
- 3) To note with pleasure the invitation from the Serious and Organised Crime Agency to become one of its operational partners;
- 4) To urge the Secretary of State:
 - a) To recognise that the Authority's success so far has been to no small extent based on the excellent work done by those representing all parts of the agriculture, food processing and shellfish gathering sectors, which has been continued by the representatives of those sectors who now sit on the Authority;
 - b) To assure the Authority that she will bear in mind the outcome of its experience over the first three years, when that is made available to her, especially if there is evidence to show that its remit should be extended to labour providers operating in other sectors; and
 - c) To assure the Authority that there will be no dilution of the resource available to achieve its objectives as a result of any change resulting from the implementation of the Hampton proposals.
- 5) To appreciate that its senior management will need to work with the Health & Safety Executive on the Hampton proposals; and
- 6) To confirm the importance of the public consultation on the outcome of this work.