

GLA 32/8.1

Licensing Standards Review

18 January 2012

BOARD PAPER REFERENCE – GLA 32/8.1 – Licensing Standards Review

Issue

1. To discuss and agree the new version of the GLA Licensing Standards to be implemented from 6 April 2012.

Recommendation

2. The Board is invited to discuss and agree the changes to the Standards in light of the consultation.

Background

3. A consultation reviewing the GLA Licensing Standards closed on 28 October 2011. A summary of responses is at annex A. The responses has informed the revised version of the Standards at annex B (with changes marked).

Issues for Decision

Changes Proposed in the Consultation

Policy on Future Applications for Revoked and Refused Businesses

4. At present, the GLA will usually refuse applications in the following circumstances:
 - Once an applicant is found to be not fit and proper for at least two years from the date of that fit and proper decision, or
 - Where an applicant has been refused or revoked twice within a two year period, except on fit and proper grounds, for at least two years from the date of the second decision.
5. We also consider refusing an application in the following circumstances:
 - Once an applicant is found to have been connected to someone who has been deemed to be not fit and proper for two years from the date of the fit and proper decision, or
 - Where an applicant is found to have been connected to someone who has been refused or revoked twice within a two year period on fit and proper grounds for two years from the date of the second decision.
6. The consultation proposed the policy of automatically refusing applications where the applicant, or persons connected to the applicant, have been found not to be fit and proper is expanded to include failures against other Critical standards.

7. The responses to the consultation, with the exception of the ALP and the Cordant Group Plc, indicated broad support to changing the policy to extend it to cover other Standards.
8. Therefore, we propose to extend the policy to cover Standards 3.1, 3.2 and 3.3 as well as making explicit that it applies to Standard 1.1. The issues considered under 3.1, 3.2 and 3.3 are indicators of forced labour and can be cited as the most extreme examples of exploitation. However, businesses would be able to present grounds why a fresh application should be considered on its own merits.
9. Consultation responses broadly supported incorporating failures for 100 points or more. Whilst failures of a 100 points or more indicates serious problems within a business, unless 1.1, 3.1, 3.2 and 3.3 are failed, it may be possible to correct the identified issues, apply and be granted a licence again and be compliant going forward. Therefore, we are not proposing including failures for 100 points or more in the policy of automatic refusals for future applications.

GLA Inspections

10. The consultation document proposed explicitly incorporating paragraph 6 of the schedule to the Gangmasters (Licensing Conditions) Rules 2009 in Standard 1.1. Paragraph 6 requires "a licence holder must permit the Authority to inspect the business at any reasonable time". Responses were varied with many supportive in principle as long the licence holder had opportunity to explain why an inspection might not be able to proceed.
11. As the requirement paragraph 6 is already an existing legal requirement, we consider it would help raise awareness by including it in the Standards. Therefore, we propose to include the obligation under Standard 1.1. It will be made clear that the Standard will not be failed if the licence holder can provide a reasonable explanation.
12. Paragraph 6 of the Rules and the reference to obstruction in standard 1.1 should also be read alongside sections 16 and 18 of the Gangmasters (Licensing) Act 2004 which concern the powers of GLA officers and the criminal offence of obstruction. Section 16 sets out the general powers of a GLA officer to inspect, whether it be a licence holder or others. Paragraph 6 makes the requirement to be inspected a specific licence condition. Therefore, refusing to allow an inspection can affect a licence.

Changes in Details

13. The consultation proposed a sliding scale of points for failing to notify of changes in details:
 - Failure to notify a change in Principal Authority would be upgraded to 30 points;

- Failure to notify a change in trading name or if the Principal Authority, directors, company secretary or partners are convicted of any criminal offence or receive an alternative sanction would remain at 16 points;
 - Failure to notify a change in directors, company secretary, partners or other individuals named on the licence or if any contact details change would be 8 points.
14. The consultation also proposed that it would be an explicit requirement for licence holders to notify the GLA if they go into administration, liquidation or become bankrupt. Failure to do so would attract a score of 30 points.
15. There was no clear consensus with responses on these points. Therefore, we propose to retain the current 16 points for failing to notify the GLA of a change in PA, trading name or if the PA, directors, company secretary or partners are convicted of any criminal offence or receive an alternative sanction.
16. In addition, we are proposing to include the sanction of 8 points being added to a licence for failing to notify the GLA if any directors, company secretary, partners or other individuals named on the licence change and if any contact details changes. We consider that not having a sanction for failing to inform us of such details may result in the changes never being notified (or there may be a significant delay). Again, the standard will not be failed if the licence holder can provide a reasonable explanation. Similar to current process, the 8 points will remain on the licence for a 12 month period and will count towards any subsequent inspection score in that period.
17. We also propose to introduce 16 points penalty for failing to notify the GLA if the licence holder enters administration or is made bankrupt. Where a business is liquidated the licence will be cancelled as the licensed entity no longer exists.

Discrimination

18. The consultation proposed amending the wording of Licensing Standard 5.7 to better reflect the Equality Act 2010. There was broad support for the change so we intend to make the proposed text change.
19. It was also proposed that the Standard be re-classified as Critical. Responses on this point were varied. We propose to keep the Standard classed as non-critical. If non-compliance with the Standard is identified – and there are no other issues – it is likely an ALC will be added to the licence. If the licence holder continues to breach the Standard, then they will face having the licence revoked for breaching Standard 1.3. On balance, we consider this would be the most proportionate way to consider issues related to this Standard.

Transport

20. The consultation proposed to make Standard 6.4 clearer on the need for vehicles with 8 passenger seats or less used for hire or reward needs

appropriate insurance. The responses supported a change and we propose to revise the Standard accordingly – the emphasis is now on appropriate insurance being in place.

Fees and Services

21. The consultation proposed the part of Standard 7.3 dealing with fees moved to 7.1. Responses were varied, with concerns expressed that an administrative error could result in a critical breach of the Standards.
22. The GLA recognises that such action would be disproportionate, therefore, it is proposed that the section in question remains in Standard 7.3.

Other Issues Discussed in the Standards

Agency Worker Regulations

23. The consultation invited views on whether the Standards should take account of the Agency Worker Regulations. Overall, there was strong support for the Standards reflecting the Regulations in some way, although a small number did object to such a change. Therefore, we propose that the Standards should reflect the Regulations.
24. We consider the wording of the standards relating to wages, under Standard 3.3, reflects the requirements of equal treatment in terms of pay. Any non-payment of additional wages a worker is entitled to would be considered withholding of wages under Standard 3.3.
25. We also consider the Standard 2.3 adequately reflects the requirements of the Regulations. However, we propose to make other amendments to 2.3 (please see paragraph 56 below).
26. A minor change is proposed to Standard 5.1 to reflect that workers may be entitled to longer rest breaks and periods than the legal minimum.

Pensions

27. The consultation invited views on whether the Standards should reflect the changes to the pension law. Responses were varied.
28. Since the consultation, the Government has announced small businesses will be given additional time to prepare for automatic enrolment. Under the Government's revised timeline, small business would begin automatically enrolling their staff in May 2015, instead of the current timing of April 2014. This change will affect over 80 per cent of GLA licence holders. In light of this time extension, the GLA does not propose to include the pensions requirements at this stage.

Removing or Re-Categorising Standards

29. The ALP and REC consider there are matters within standards 4.1 (Quality of Accommodation) and 6.4 (Transport) that should not be classed as "Critical". The GLA proposes to make 4.1 clearer that minor and easily corrected matters will not lead to the Standard being breached. Standard 6.4 already states that the GLA will take a proportionate approach in determining whether the Standard should be breached – on that basis the Authority does not intend to change the Standard.
30. TUC and UCATT called for Standards 5.2, 6.1, 6.2 and 6.3 to be reclassified as Critical. The Authority considers that such a change would be disproportionate for all the matters covered by the Standard. However, if serious issues are identified relating to these Standards, the GLA still has the ability to consider revoking a licence under Standard 1.1.
31. The Cordant Group Plc recommends that the GLA exercise discretion as to the number of points scored, with Standards having a sliding scale and a maximum total. The GLA consider this would generate confusion with licence holders and would be hard to administer. Therefore, the Authority does not propose to make such a change.

Minimum Wage and Withholding Wages

32. The consultation proposed an alternative approach for dealing with breaches of standards 2.2 and 3.3 by adding a condition to the licence requiring the licence holder to pay amounts owed to the workers within a specified timescale. Failure to comply with any such condition would then lead to the licence being revoked. The standards would still be classed as "Critical" and have a score of 30 points. The score of 30 points would therefore contribute to the overall licensing standards compliance score. This alternative approach would only apply if there were no other issues with the licence. Any other non-compliances would mean the overall compliance score will exceed 30 points and therefore revoking the licence is likely to be appropriate.
33. The responses were broadly support introducing this approach. The GLA proposes to adopt this approach where appropriate.

Expiry of Licences

34. The consultation invited views on whether any changes should be made to rule 5 of the Gangmasters (Licensing Conditions) Rules 2009. ALP and REC advocate for the GLA to allow licences to be transferred.
35. Currently, the GLA's position is that licence transfer will normally be refused. The Authority is particularly concerned with identifying and tackling "phoenix" companies. The GLA intends to review the policy of licence transfers with the Liaison Group with a view to ensure the Authority's approach does not adversely impact business but continues to guard against the risk of "phoenixing".

Trade Union Matters

36. The consultation invited views on whether Standards 5.3 and 5.4 should be merged in order to consolidate trade union matters.
37. Some responses were supportive whereas TUC and UCATT opposed a change. Given the lack of consensus, the GLA does not intend to merge these Standards.

Other Issues Raised

Basis for Standards

38. NFUS comments that the content of the Standards is wider than the requirements contained in the Gangmasters (Licensing Conditions) Rules 2009 and queries whether the GLA is exceeding its mandate.
39. Regulation 12 of the Gangmasters (Licensing Conditions) Regulations 2005 allows for the GLA to have regard to obligations contained in other legislation. As a result, the Licensing Standards comprises requirements contained in the Gangmasters (Licensing Conditions) Rules 2009 and other relevant legislation.

GLA Remit

40. Some responses called for the GLA's remit to be extended. Questions of the GLA's remit are a matter for the Government.

GLA Fees

41. NFUS considers that any activity which the GLA undertakes that goes beyond what it was intended to under the Act and Rules adds cost to its operation. The NFUS comments that, as the GLA's costs are passed on to licensees (and therefore labour users) through licence fees, this means fees are likely to include charges for enforcement activity that would otherwise not attract a charge.
42. The GLA licence fee recovers costs associated with processing applications, renewals and maintenance issues. The fee does not recover costs associated with enforcement. Only partial costs of compliance work associated with Application Inspections are recovered through the charging regime.

GLA Licence Decision Making Process

43. The ALP recommends introducing a "minded to revoke" stage before a formal notice of revocation on the grounds this would allow a labour provider to be informed of allegations and given the opportunity to respond before a decision is made. This proposal is echoed by the Cordant Group Plc.
44. GLA officers already discuss compliance issues identified during an inspection with the business concerned. This allows the business to respond. GLA recognises that it is important that the findings of the GLA Officer are discussed

with the licence holder at the end of an inspection visit. We intend to improve consistency of this approach. This process has regard to the Regulators' Compliance Code, specifically the principle set out in the first sentence of paragraph 8.2 of Code:

When considering formal enforcement action, regulators should, where appropriate, discuss the circumstances with those suspected of a breach and take these into account when deciding on the best approach.

45. At the same time, the GLA will continue to have regard to the second sentence of paragraph 8.2, which states:

This paragraph does not apply where immediate action is required to prevent or respond to a serious breach or where to do so is likely to defeat the purpose of the proposed enforcement action.

46. This principle emphasises the importance for a regulator to take action where it is apparent alternative approaches of engagement could frustrate achieving compliance.
47. After an inspection, which includes discussing issues of non-compliance, where the evidence justifies revocation, the decision to revoke will be served at that stage. The GLA considers a "minded to revoke" step would unnecessarily prolong matters and could obfuscate the process. Unless a revocation has been made with immediate effect, the business can continue to trade during any appeal process.
48. It is important to stress that the GLA is willing to review and change a decision where necessary. Once an appeal against revocation is submitted, the case is reviewed on its merits. Where necessary, the GLA can change the original decision if it is appropriate on review of the grounds of appeal. Since 1 January 2011, this has occurred on 3 occasions out of 37 decisions to revoke.
49. The ALP also recommends the GLA introduces more proportionality into its decision making process by using ALCs where the fail score exceeds 30 points but the breaches are relatively minor or technical in nature. The GLA already applies this approach on a case-by-case basis.

Change to Active Check

50. The ALP considers the Active Check notifications on licence holder be amended so that unreasonable commercial risk is not caused.
51. The GLA will review the wording of the Active Check notifications with the Authority's Labour Provider and Labour User Liaison Group.

Communication and Guidance

52. The NFU called for improved guidance on section 4(5) of the Act. This is something the Authority is currently developing.
53. The FPC requests any changes be communicated well in advance of them being implemented. This point is covered in the "Transition" section below.
54. The Cordant Group Plc comments the GLA should refrain from publishing or publicising decisions to revoke without immediate effect and similarly any re-application for a licence. This is already the GLA policy on issuing press releases, except if there is an excessive points score and there are grounds for publishing due to the public interest.

Other Amendments to Standards

Licensing Standard 1.2

55. We propose to remove the list of bullets. This will ensure Standard is focussed on the Principal Authority demonstrating competence and capability rather than a check list of things that need to be in place. The GLA will take an overall view of an applicant and licence holder's compliance with all the Standards in determining whether Standard 1.2 should be passed.

Licensing Standards 2.2 and 2.3

56. Standard 2.3 currently is concerned with maintaining records for benefits. However, we intend to make it explicit that the GLA expects the benefits list under the current standard 2.3 to be actually paid not just that records must be maintained. Therefore, we propose to include under an expanded critical standard 2.2 that benefits must be paid. We also propose to incorporate the record keeping requirements under the current 2.3 under standard 7.3. Standard 7.3 already covers record keeping so this change would better align similar requirements.

Licensing Standard 2.4

57. Minor rewording of Standard 2.4 to better reflect section 8 of the Employment Act 1996.

Licensing Standard 4.4

58. The GLA proposes to delete Standard 4.4 as it is already sufficiently covered under Standard 7.1.

Licensing Standards 3.2, 7.3 and 7.5

59. Minor revisions are proposed to Standards 3.2, 7.3 and 7.5 so that they better reflect the requirements of the Gangmasters (Licensing Conditions) Rules 2009.

Shellfish Standards

60. The GLA intends to move the specific standards related to shellfish gathering from Standard 6 to new dedicated Standard 9. No changes are proposed to the actual Standards themselves.

Final Version

61. Subject to agreement by the Board, a final version of the Standards will be circulated to the Board members following the meeting.

Transition

62. As soon as the new Standards are agreed by the Board, all applicants and licence holders will be notified of the changes and the new Standards publicised. Any inspection after 6 April 2012 will be conducted against the new Standards.
63. Licence holders with ALCs affected by the change in standards will be instructed to clear the ALC according to the current system. If the ALC has not been rectified by the clearance deadline, any relevant new standard will apply.