

By Mark Restall

Volunteers and the Law

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Foreword

Congratulations to Volunteering England and all who have contributed to this timely and valuable book. I have been a volunteer in various different organisations, worked with and coordinated volunteers in Law Centres, and sat on management committees in voluntary sector organisations, and the answers to the many questions that have arisen over the years are to be found in *Volunteers and the Law*. When an organisation is desperately in need of volunteer support but finds the legal side such a barrier that they have to turn away able and willing helpers, everyone loses out. Having the ‘know-how’ gives organisations confidence to work with volunteers, and ensures that they use the very best practice, so that the partnership between volunteers and the organisation is a healthy and fruitful one. This book will enable not only those organisations that have worked with volunteers over the years, but also new organisations and new staff, to develop their volunteer programmes and to check that they are within the law. The Law Society Charity is proud to have contributed funding for the publication of this book because the legal profession takes very seriously its responsibility to the community it serves. Members of the legal profession not only volunteer in many ways in countless different fields, but also support volunteering initiatives wherever they can. It is particularly beneficial that lawyers contribute their legal knowledge to enable others to volunteer. Read on and enjoy this really useful community resource.

Sara Chandler

Trustee, Law Society Charity

Introduction

The majority of calls to Volunteering England's information line touch upon legal issues in one form or another. Many organisations are unclear about the legal status of their volunteers and the responsibilities they have towards them. Worries around issues such as benefits and the reimbursement of expenses are perennial concerns.

Volunteering England decided there was a need for this book because, although there have been books on legal issues for voluntary organisations in the past, it is clear that the time has come for a book that focuses solely on volunteers. Eighteen million people make a gift of their time each year. There is increasing government attention on volunteering, with growing numbers of people being encouraged to volunteer. It is therefore very important that organisations understand both the good practice and the legal implications of volunteer involvement, in order to ensure that volunteering remains a valuable experience for all.

Volunteers and the Law is not intended to be a textbook or a technical reference guide to legal issues. The aim has been to create a readable overview of legal issues for volunteer managers and anyone who works with volunteers. It was written to cover the law as it applies to England and Wales. Much will be relevant to readers in the rest of the UK, but guidance should be sought from Volunteer Development Scotland (www.vds.org.uk) or, in Northern Ireland, from the Volunteer Development Agency (www.volunteering-ni.org). Recent legislation referred to in the text can be found at www.hmsso.gov.uk.

Of course, all the legal issues that the book covers are subject to change. One of the many joys when writing the book was having to revise sections only recently completed. Up-to-date information should be sought from the relevant sources, or from Volunteering England.

Please note that this book does not refer to trustees. Trustees are volunteers, but the context in which they work is very specific and the areas that would need to be covered, such as aspects of charity and company law, would be beyond the scope of this publication.

Volunteers and the Law should not be taken as a statement of law, or as a substitute for legal advice. Readers are encouraged to seek professional legal opinion on specific issues of concern. However, we hope that volunteer managers will find the book a valuable resource in answering most of the legal questions and concerns around the involvement of volunteers that arise in the course of their work.

Lastly, thanks are due to David Mears of Russell-Cooke Solicitors (www.russell-cooke.co.uk) and Sandy Adirondack (www.sandy-a.co.uk) for their valuable comments and advice. We are also very grateful to the Law Society Charity for agreeing to support this much-needed publication.

Mark Restall
June 2005

Contents

| | |
|--|-----------|
| Chapter 1 | |
| Volunteers and employment rights | 6 |
| - What is a contract? | 6 |
| - Worker or employee? | 7 |
| - Tribunal decisions | 8 |
| - National minimum wage | 12 |
| - Reducing risk | 14 |
| Chapter 2 | |
| Benefits and tax | 18 |
| - Volunteering and welfare benefits | 18 |
| - Tax and national insurance | 24 |
| Chapter 3 | |
| Safety and security | 28 |
| - Duty of care | 28 |
| - Health and safety legislation | 28 |
| - Liability and insurance | 30 |
| - Working with vulnerable clients | 32 |
| Chapter 4 | |
| Data protection, copyright and the Human Rights Act | 45 |
| - Data protection | 45 |
| - Copyright | 50 |
| - Human Rights Act | 51 |
| Chapter 5 | |
| Specific volunteering situations | 54 |
| - Involving young volunteers | 54 |
| - Volunteer drivers | 55 |
| - Volunteers from overseas | 56 |
| - Volunteer fundraisers | 58 |
| - Involving paid staff as volunteers | 61 |

1 Volunteers and employment rights

Introduction

The legal status of volunteers is an interesting and complex area. People new to volunteering are often shocked to discover that volunteers are not covered by the same protections as paid staff. This means that, in theory, volunteers can be discriminated against or unfairly dismissed with impunity. However, in some cases ‘volunteers’ have claimed their status is that of worker or employee.

The central issue here is whether or not there is a contract between the organisation and its volunteers; and if so, what the consequences of this are. This is a grey area, as the main guidance in this area comes from previous employment and employment appeals tribunal judgements, of which there are few. The range of volunteer relationships is very much a continuum. At one end are examples that are clearly purely voluntary, and at the other are those that are clearly contractual, but further towards the middle it is impossible to precisely place a dividing line.

This issue has been given greater importance in recent years by the introduction of the National Minimum Wage Act. While volunteers are exempt, those who could be considered workers in the eyes of the law would then be eligible for it.

Good practice

While it is true that volunteers do not have many ‘rights’, it is of course important to avoid practices that could be seen as unfair or discriminatory. As well as the clear moral case for this, no organisation would be able to retain volunteers for long if they felt they were being poorly treated.

Organisations involving volunteers should make it their duty to keep abreast of good practice in volunteer management. Many local and national bodies offer training on volunteering issues, and organisations such as Volunteering England produce publications, information sheets and other guidance on working with volunteers.

Volunteers should be covered by equal opportunities policies. They should have regular opportunities to discuss their work with a manager or supervisor, and know exactly what to do if there is a problem.

What is a contract?

A contract doesn’t have to be a written piece of paper signed by both parties. It doesn’t even have to be a verbal agreement. A contract is a description of a relationship – even if neither party has explicitly said that they’ve intended a contract to be created, the actual relationship between the two may be judged to be contractual.

In terms of employment a contract can arise when a payment is made in return for work, and there is an intention to create a legally binding relationship.

This payment – known legally as consideration – does not have to be of much value, or even directly financial. Perks or benefits that could be seen to have value may be regarded as consideration. Around volunteering this could be, for example, training that is not necessary to carry out the volunteer’s role.

The intention is not necessarily something either party has expressed or even considered – it could be implied from the circumstances. One way of thinking about intent is to imagine the relationship from the point of view of an outside observer. If it looks and feels like a binding agreement has been made, then intent is likely to be inferred.

If a contract is created between an organisation and its volunteers, it is likely to be one changing the legal status of volunteers to that of workers or employees.

It is difficult to define exactly when a volunteer-organisation relationship becomes

contractual. Guidance comes from definitions of workers and employees in legislation and common law, and from the decisions of employment tribunals which have had to make a judgement on whether or not a volunteer was in fact a worker or an employee before a case could be heard.

If it is decided that volunteers should be defined as workers, they will be covered by the National Minimum Wage Act, the employment provisions of the anti-discrimination legislation and the Working Time Regulations.

If they are found to be employees, then they will have access to full employment rights, as well as to all those rights that workers have.

Worker or employee?

If a contract exists, is it one that creates a worker or employment relationship?

A 'worker' is a person who carries out work for someone else while under a contract. This means that people who may not meet the legal definition of 'employee', yet are working under a contract, can be entitled to some – but not all – employment rights. One example of this would be casual workers. They work as and when they are needed, with no obligation on the employer to offer work, or on the individual to take it if offered.

The concept of an employment contract has been shaped by common law – that is, based on judgements from previous cases. This has thrown up a range of criteria for an employment relationship, often referred to as 'tests'. Two in particular are especially pertinent to volunteering relationships: 'control' and 'mutuality of obligation'.

Control

The amount of autonomy a worker has is an old test, generally used to distinguish employment from self-employment. However, its relevance has been challenged by changing work practices, whereby many people clearly working under an employment contract have a greater deal of autonomy than in the past.

More recently, courts and tribunals have also been considering people's level of integration into the organisation – taking into account not just the level of control exercised over someone's work, but also the organisation of the work itself. That is, there may not be a hands-on manager detailing every aspect of the work, but it is still subject to rules and procedures.

In terms of volunteering, some of the factors looked at for this test could be relevant – for example, whether there is a duty to obey orders, and whether or not there is discretion on hours of work. The presence of procedures may also be taken into account.

Mutuality of obligation

This 'test' is significant in that it helps clarify the difference between a contract of service (a contract of employment) and a contract to personally provide services (describing a worker relationship).

This distinguishes between employees and people such as casual workers, freelancers etc. In an employment relationship the organisation is obliged to provide work, and the individual is obliged to do it.

In the case of *Carmichael & another v National Power Plc* (House of Lords 18.11.99 [2000] IRLR 43) this mutual obligation was referred to as an 'irreducible minimum ... necessary to create a contract of service.'

Factors that may be taken into account here include whether the person is doing the work on a regular basis, and if there is a right to refuse work.

What are the consequences?

Workers and employees have access to a number of rights denied to volunteers. If such a relationship has been created unwittingly, the organisation may be in breach of several areas of legislation. The following are some of the rights that volunteers may be entitled to if they are working under a contract.

Workers (most people working under a contract) have the right:

- To be paid the minimum wage (if over school leaving age).
- To be covered by the worker provisions of the anti-discrimination legislation.
- Not to work more than 48 hours per week on average (and all other provisions in the Working Time Regulations).
- To four weeks' paid holiday each year (pro rata).

In addition to these rights, employees (people working under a contract of employment) have the right:

- To belong to a trade union (and all accompanying rights, such as time off for union activities).
- To more protection under health and safety legislation.
- To receive statutory sick pay.
- Not to be unfairly dismissed (subject to qualifying period).
- To more protection under anti-discrimination legislation.

Tribunal decisions

It is hard to be precise when describing whether or not volunteers will be regarded as workers or employees. The issue generally only arises when volunteers claim access to workers' or employment rights, and it is these cases that provide the best guide to future decisions.

Do note, however, that due to the rarity and unusual nature of cases involving volunteers it can be very difficult to second-guess how a tribunal might view any particular situation.

Maria DeLourdes Armitage v Relate & others (1994) COIT 43538/94

The most well known of the tribunal cases. This was a racial discrimination case brought by Mrs Armitage, a volunteer counsellor with Relate.

Under the terms of her service agreement, Mrs Armitage would have to provide a minimum amount of counselling each week. If she left Relate before providing 600 hours of counselling she would have to pay back a proportion of the cost of her training. There was also the possibility of payment for work after a certain number of volunteer hours. In one passage of the agreement the Executive Committee is referred to as 'technically "the employer" of the counsellor'.

The tribunal decided that the mutual obligations set out in the agreement (Relate's obligation to provide training and the counsellor's obligation to work or repay the cost of the training), and the expectation of paid work in the future were enough to create a contract of employment.

Migrant Advisory Service v Mrs K Chaudri (1998) EAT 1400/97

This case is even more clear-cut. Mrs Chaudri 'volunteered' in an office four mornings a week, working 12 hours in all. She initially received £25 a week to cover expenses. This sum increased to £40. Mrs Chaudri lived very close to the premises, and as she worked

from 10.00am to 1.00pm did not take a lunch break, making her actual expenses negligible.

The petty cash vouchers for the payments to Mrs Chaudri showed that she had been paid even when off sick or on holiday.

The appeals tribunal concurred with the original industrial tribunal that the payments in return for regular hours of work clearly amounted to a contract of employment. Judge Hill, presiding, remarked that ‘this is a very simple case and it is perhaps, in a way, like the elephant – you know one when you see one’.

Gradwell v Council for Voluntary Service, Blackpool, Wyre and Fylde (1997) COIT 2404314/97

In this case the applicant sought to demonstrate that an organisation’s volunteers were working under a contract, which would therefore raise the total within the organisation to above 20, thus allowing a claim for discrimination to be heard under the terms of the Disability Discrimination Act. At the time, the employment provisions of the DDA only applied if the organisation had 20 or more workers. This exemption was later reduced to 15, then ended completely in October 2004.

A volunteer agreement was in place. Volunteers received no payments other than the reimbursement of expenses, and there were no minimum time commitments. The chair of the tribunal felt that this relationship did not involve mutual obligations - expecting volunteers to follow written guidelines was not considered evidence of this. The training volunteers received was not felt to be consideration, and there was neither payment nor the promise of payment. **Therefore a contract had not been created.**

Murray v Newham Citizens Advice Bureau (2000) EAT 1096/99

While the Relate and Chaudri cases hinge on quite unusual practices, the relationship described in this instance is much closer to that in many run-of-the-mill volunteer-involving organisations.

The appeal tribunal judgement pointed to the existence of an agreement in which the volunteer committed to volunteer at particular times for a minimum time period, complete basic training within eight months, and notify the bureau manager of absence or intention to leave.

The organisation agreed to provide training, support and the reimbursement of expenses. There are also grievance and disciplinary procedures and a number of commitments and requirements expected of the volunteer such as processes for claiming holidays.

Here the appeals tribunal looked at the entire relationship between the organisation and its volunteers. While each aspect in and of itself might not be as blatant as the minimum hours and obligation to repay training costs in the Relate case or the payment in the Chaudri case, taken as a whole they were felt to be enough to create a contract of employment.

South East Sheffield Citizens Advice Bureau v Grayson [2004] IRLR 353.

This case was of particular interest, as the employment appeal tribunal showed a good understanding of volunteering and the issues faced by voluntary organisations.

The case was brought by a paid member of staff seeking to show that the bureau’s volunteers could be regarded as in employment, bringing the number of employees in the organisation above the (now defunct) small employer exemption of the Disability Discrimination Act 1995 (DDA).

The original tribunal decision

The original employment tribunal decision, basing its decision largely on *Murray v Newham CAB*, found that the relationship between the CAB and its volunteers was contractual, and fitted the DDA's definition of employment.

Section 68(1) of the Act defines 'employment' as

...subject to any prescribed provision, employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions are to be construed accordingly.

In summary, the tribunal's decision was reached on the basis that:

'...there was an intention that work would be done by the advisers in return for the payment of expenses incurred and the provision of training, the opportunity to gain experience and the acceptance of legal liability on the part of the bureau for any errors which they may commit in the course of the work done'.

It also pointed to the existence of disciplinary and grievance procedures, equal opportunities and health and safety policies and provision for supervision as being consistent with employment.

The employment appeal tribunal's findings

The case was appealed in November 2003. The employment appeal tribunal (EAT) not only overturned the decision, but also set out what amounts to a robust defence of the concept of volunteering as a distinct, freely entered-into relationship held by the majority of volunteer-involving organisations.

What follows are some key conclusions reached by the employment appeal tribunal, referred to in the text as the EAT. The original employment tribunal is referred to as 'the tribunal'.

Volunteer agreements

The tribunal had said it was significant that there was no explicit statement in the CAB's volunteer agreement saying it was not intended to create a legal relationship. The EAT felt that, on the contrary, the fact that the agreement was not signed, and that its stated intention was '...to clarify the reasonable expectations of both the volunteer and the bureau' suggested that it was not intended to be legally binding. As the EAT pointed out, few employees would find their relationship with their employer defined as 'reasonable expectations'.

Expectations are not obligations

The tribunal had pointed to a minimum commitment of six hours per week as a contractual element in the relationship. The EAT felt that as expressed – a 'usual minimum commitment' – it was simply outlining an expectation. The volunteers were not told they had to work those hours, nor was there any sanction against them if they did not. The EAT noted that the bureau relied on volunteers and that therefore it was not unreasonable for it to set out such guidelines.

Further to this, the volunteers were not paid for the hours they put in.

Expenses and 'if contracts'

The reimbursement of expenses was regarded as significant by the tribunal, but this was dismissed by the EAT, which felt that it would be surprising if organisations left unpaid volunteers out of pocket.

The EAT was, however, prepared to accept that the agreement to reimburse expenses did amount to a contract. At first glance this conclusion may be confusing, because normally a contract has to involve a two-way relationship. But the EAT felt that there may be a unilateral contract – an 'if' contract – in the agreement to reimburse expenses and insure volunteers against negligence claims, which it expressed as:

'if you do any work for the bureau and incur expenses in doing so, and/or suffer a claim

from a client you advise, the bureau will indemnify you against your expenses and any such claim’.

This may be a contract, but a contract on this issue only – crucially it does not obligate the volunteer to do any work for the bureau.

No obligation to provide or carry out work

The tribunal had concluded that the ‘usual minimum commitment’ of six hours committed volunteers to work, and in return as a consideration (a payment element of a contract) the bureau would provide training, supervision, experience, expenses and insurance cover, benefits that would be removed if a volunteer didn’t provide the bureau with work.

The EAT considered the tribunal’s reasoning to be flawed, with such benefits not having been shown to be linked to a reciprocal relationship, and a dubious interpretation of what could be seen as a consideration.

The key issue for the EAT was whether or not the volunteer agreement imposed a contractual obligation on the bureau to provide work, or on the volunteer to carry it out:

‘Like many similar charitable organisations, similarly dependent on the services of volunteers, the bureau provides training for its volunteers and expects of them in return a commitment to work for it, but the work expected of them is expressed to be voluntary, it is in fact unpaid and all that the volunteer agreement purports to do is to set out the bureau’s expectations of its volunteers’.

A volunteer for the bureau would be able to leave at any point, without the bureau having recourse to action for breach of contract.

The EAT concluded that the bureau’s volunteers did not fall into the DDA’s definition of employment.

Implications for volunteer-involving organisations

Because this case was an EAT decision, it set a precedent for future tribunals. The case concerned the DDA, but the principles discussed will apply more generally to cases where the employment status of ‘volunteers’ is being judged.

The EAT regarded the reimbursement of expenses, necessary training, and a written agreement that covered grievance and disciplinary procedures, confidentiality clauses and a request for as much notice as possible if a volunteer was going to leave the bureau as reasonable components of a volunteer relationship that did not amount to a contract to provide services. Some of these elements have in the past been regarded as potentially problematic.

However, it should be remembered that the judgement was based on a specific set of circumstances.

Not all volunteer agreements or working practices will now be ‘safe’. Future employment tribunals will look at the unique circumstances before them, and if they feel that elements of the ‘volunteer’ relationship are clearly contractual they will still be free to make that judgement.

The EAT decision does not mean that from now on it is safe to require a minimum time commitment. In this case the commitment was felt to be a ‘reasonable expectation’, and there were no sanctions in place if the six hours were not provided. The decision might be different if volunteers were expected to make a firm commitment and/or were subject to disciplinary action if they did not turn up for work.

Nor does the decision mean that it is now safe to provide any sort of benefit to volunteers. The volunteers in this case received ‘benefits’ that were reasonable in the circumstances and not analogous to any sort of payment in return for work.

The employment appeal tribunal’s decision can be read in full at

<http://www.employmentappeals.gov.uk/uploads/UKEAT2830317112003/index.htm>

National minimum wage

The National Minimum Wage Act 1998 came into force in April 1999. It applies to workers as well as employees. Confusingly, the act also creates a category of ‘voluntary workers’, who might otherwise have been regarded as workers, but are not entitled to the minimum wage.

Employers are required by law to ensure that their workers (over school leaving age) are paid at least the minimum wage. Current minimum wage rates are available from HM Customs and Revenue, the Department for Trade and Industry, trade unions, Citizens Advice Bureaux and similar bodies.

Workers or HM Customs and Revenue compliance officers can require employers to produce evidence that they have paid the national minimum wage. If they fail to do so the worker can bring a case to an employment tribunal.

The Act includes a section headed ‘voluntary workers’ (see technical box), although this expression is not used in the text of the Act. People working for a charity, voluntary organisation, associated fundraising body or a statutory body are not entitled to the minimum wage if the only money they receive is in respect of actual expenses, and they receive no benefits other than training to improve their ability to do the work they are carrying out, and/or (non monetary) subsistence or accommodation if this is reasonable in the circumstances.

Further to this, voluntary workers who receive money for subsistence are excluded from the minimum wage if they are placed by a charity or similar body with another charity or similar body. The exact wording is complex and needs to be followed carefully (see technical box).

This means that residential volunteers receiving what is sometimes referred to as ‘pocket money’ at one organisation may be entitled to the minimum wage, while volunteers with identical working conditions at another organisation will not, by virtue of having been placed in their role by another organisation, in the way that groups such as CSV operate.

What are the consequences?

The consequences for an organisation whose volunteers are in fact workers and therefore entitled to the minimum wage are potentially quite serious. Not only could the organisation be required to pay backdated minimum wage to its volunteers, but there are criminal offences punishable by fines associated with wilfully neglecting to pay the minimum wage and falsification of records and similar obstructions. The criminal penalties are unlikely to be relevant in cases where organisations genuinely believed their ‘volunteers’ to be exempt from the minimum wage, but having to not only pay volunteers the minimum wage but also backdate payments could be well beyond many organisations’ means.

If a worker feels that they are not receiving the minimum wage there are two main routes they can go down. Firstly, they can ask in writing to see their pay records. These must be produced within 14 days unless otherwise agreed. If the records are not produced, or the worker is not being paid the minimum wage, they can take the complaint to an employment tribunal. Here, as with the cases referred to earlier in the chapter, volunteers would have to demonstrate that they were in fact workers. If the claim is upheld, they will receive the minimum wage backdated as far back as 1 April 1999 (when the act came into force). If access to records was denied, the employer would also have to pay the worker a sum 80 times the minimum wage.

The other option open to someone who believes that they are not receiving the minimum wage when they are entitled to it is to contact the HM Customs and Revenue. The HM Customs and Revenue is the enforcement agency for the minimum wage.

Minimum wage compliance officers have a range of powers: they can require both workers and employers to produce pay records; they can enter premises to interview employers; and they can require employers to attend HM Customs and Revenue offices.

If the compliance officers believe that workers are not being paid the minimum wage, they can serve an enforcement notice requiring the employer to start paying the minimum wage and backdate the payments as far as 1 April 1999. If this is ignored there is a penalty of twice the minimum wage per person per day following the issuing of the notice.

Compliance officers do not have to be called in by workers – they can investigate any organisation where they believe the National Minimum Wage Act has been breached, even if no employees, other workers or volunteers have asked them to do so.

While no cases involving ‘volunteers’ have at the time of writing reached a tribunal, Volunteering England has heard of a case where HM Customs and Revenue compliance officers were called in by ‘volunteers’. The volunteers were receiving flat-rate payments of £5 or £6 per day to cover expenses (the sums differed depending on the role). The officers considered the volunteers to be workers and therefore entitled to the minimum wage. An arrangement was reached whereby some volunteers were taken on as paid members of staff, while the remainder were only reimbursed out-of-pocket expenses. There is no guarantee that the next organisation will be so fortunate.

National Minimum Wage Act 1998 (section 44)

Voluntary workers

44. -

- 1) A worker employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body does not qualify for the national minimum wage in respect of that employment if he receives, and under the terms of his employment (apart from this Act) is entitled to,-
 - a) no monetary payments of any description, or no monetary payments except in respect of expenses-
 - i) actually incurred in the performance of his duties; or
 - ii) reasonably estimated as likely to be or to have been so incurred; and
 - b) no benefits in kind of any description, or no benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment.

- 2) A person who would satisfy the conditions in subsection (1) above but for receiving monetary payments made solely for the purpose of providing him with means of subsistence shall be taken to satisfy those conditions if-
 - a) he is employed to do the work in question as a result of arrangements made between a charity acting in pursuance of its charitable purposes and the body for which the work is done; and
 - b) the work is done for a charity, a voluntary organisation, an associated fund-raising body or a statutory body.

- 3) For the purposes of subsection (1)(b) above-
 - a) any training (other than that which a person necessarily acquires in the course of doing his work) shall be taken to be a benefit in kind; but
 - b) there shall be left out of account any training provided for the sole or main purpose of improving the worker's ability to perform the work which he has agreed to do.

- 4) In this section-

‘associated fund-raising body’ means a body of persons the profits of which

are applied wholly for the purposes of a charity or voluntary organisation; ‘charity’ means a body of persons, or the trustees of a trust, established for charitable purposes only; ‘receive’, in relation to a monetary payment or a benefit in kind, means receive in respect of, or otherwise in connection with, the employment in question (whether or not under the terms of the employment); ‘statutory body’ means a body established by or under an enactment (including an enactment comprised in Northern Ireland legislation); ‘subsistence’ means such subsistence as is reasonable in the circumstances of the employment in question, and does not include accommodation; ‘voluntary organisation’ means a body of persons, or the trustees of a trust, which is established only for charitable purposes (whether or not those purposes are charitable within the meaning of any rule of law), benevolent purposes or philanthropic purposes, but which is not a charity.

Reducing risk

In the real world it is hard to avoid all risk factors associated with creating a contract with volunteers – few organisations could operate if volunteers were totally free agents drifting in and out at will, and few people would volunteer if they were getting absolutely nothing from the relationship.

However, it is usually possible to remove some of the elements that push the relationship towards a contract, even if some practices are retained.

Avoid giving volunteers income

Make sure that volunteers are receiving reimbursement for out-of-pocket expenses only, and collect receipts and transport tickets. It may be more convenient to offer a flat rate, but remember that any sum over actual expenses may be regarded as a consideration, no matter how small.

Reduce perks that could be seen as consideration

This can be difficult if volunteers are used to substantial benefits from volunteering with your organisation. However, clear perks (as opposed to benefits necessary for the voluntary work such as protective clothing) are likely to be regarded as consideration by tribunals.

Even benefits necessary for the volunteer to carry out their work (such as training) can be problematic if there appear to be obligations on the part of the volunteer – for example, saying, ‘Stay with us for six months and you’ll end up with valuable training that most people pay an arm and a leg for.’ The ‘Relate case’ illustrates this point – see above.

Any minor perks that remain should be described as purely at the discretion of the organisation, rather than an enforceable right the volunteer gains as part of the relationship, and care should be taken not to let ‘discretionary’ payments become customary.

Reduce obligations on the part of the volunteer

Time commitments tend to be the most problematic area here. Many organisations ask volunteers to commit to minimum time periods, with volunteers agreeing to volunteer for at least three or six months. If this can be avoided, do so. One compromise could be to acknowledge that volunteers are free to leave at any time, but suggest that if they stay in the position for at least the specified time they (and the organisation) will get the most out of the experience. Or simply express the hope that the volunteer can stay with you for three months.

The Grayson case clarified this a little – it's fine to outline 'reasonable expectations' – but the case should not be read as legitimising all minimum time requirements.

Don't make the relationship sound contractual!

Remember Judge Hill's comment about the elephant. If you don't want the relationship to be based on a contract, then it makes sense not to make it look like one. Avoid using language that smacks of employment. Terms such as 'contract', 'job', 'payment' can be replaced by 'agreement', 'role' and 'reimbursement of expenses'.

So, for example, rather than job descriptions for volunteers you might have role or task descriptions or outlines.

Make it clear that you don't intend to create a contract

Where it is not practical or reasonable to remove all benefits or obligations, it makes sense to state in volunteer documents such as agreements or policies that there is no intention to create a legally binding relationship, for example:

This agreement is not intended to be a legally binding contract between us and may be cancelled at any time at the discretion of either party. Neither of us intend any employment relationship to be created either now or at any time in the future.

This is not an easy get-out clause! If the arrangement between the organisation and its volunteers is clearly contractual, such disclaimers are likely to be ignored by any tribunal or court.

Create a distinction between paid workers and volunteers

This does not mean that you should treat volunteers as second-class citizens within the workplace, or that they should not be integrated into teams or departments. Nor does it mean that the work of volunteers should be regarded as being of any less value than that of paid workers. But it should be clear to an outside observer that the relationship between the volunteers and the organisation is different to that between the organisation and its paid staff.

While some organisational policies around good practice or legal compliance (such as health and safety, equal opportunities, data protection, child protection) should encompass both paid and voluntary staff, procedures regarding recruitment, supervision, problem-solving and other aspects of the individual's relationship with the organisation should be unique to volunteers.

This also helps take into account the different nature of volunteering. Procedures originally meant for paid staff are generally much too formal for volunteers.

Treat your volunteers fairly

It is worth noting that the tribunal cases have occurred when volunteers have felt that they have been discriminated against or unfairly treated. It therefore follows that a key preventative measure should be to ensure that volunteers have no grounds to bring such cases. Putting good practice in place and clear internal procedures for dealing with problems and grievances will reduce the likelihood that volunteers will feel the need to take a case to tribunal.

A final point: even if an organisation's volunteers are not 'workers' and thus cannot bring a case under the employment provisions of the anti-discrimination legislation, they might be able to claim that by offering opportunities for volunteering, the organisation is providing a service. If the organisation discriminates on the basis of sex, race or disability, a volunteer could potentially say they were being discriminated against not in employment, but in service delivery. This emphasises the importance of good practice in all aspects of volunteering.

Should you have policies and procedures in place?

Some people have raised concerns about having too many procedures in place around volunteering, especially disciplinary and grievance procedures that are similar to those used for paid staff.

There is no evidence to suggest that simply having policies and procedures in place as a framework for volunteer involvement is enough to create a contract.

The tribunal hearing the case of *Gradwell v Council for Voluntary Service, Blackpool, Wyre and Fylde* (1997) ruled that requiring volunteers to follow an organisation's rules and policies does not in itself create a contract.

Part of this confusion seems to arise from a view that any paperwork is anathema to the spirit of volunteering. Volunteer policies act as a framework for your volunteer programme. Good policies should act as guidance rather than all-encompassing blueprints. Policies and procedures should be there to maximise participation, not stifle it.

While it is true that in the *Newham CAB* case the employment appeals tribunal did mention the existence of grievance and disciplinary procedures, they were merely regarded as one of a number of mutual obligations. There is a theoretical increase in risk, but this needs to be offset against the benefits of having such procedures in place.

Without them, no one knows what to do when things go wrong. This applies both to the volunteer and their manager. This can lead to inconsistencies – one case might not be treated in the same way as another. Furthermore volunteers are unlikely to feel confident that their case is being treated seriously and fairly if they do not know where they stand.

However, it is important to avoid using the same procedures as you do with paid staff. This can blur the distinction between paid and unpaid staff, leaving volunteers with documents that tend to be bureaucratic and unclear.

Volunteer agreements

Many organisations use volunteer agreements. These can be useful for setting out mutual expectations in one or two sides of A4. However, they should not be very formal, nor use language or imply conditions that appear contractual. Nor should they be referred to as 'contracts' - it would be hard to argue that you didn't intend a relationship to be contractual when you are using a document called a contract.

In the 'Grayson' case the existence of an agreement was not seen as significant, as it was clarifying 'reasonable expectations'.

Care must be taken to set out what the organisation will provide and how it will treat the volunteer and what it expects from the volunteer in such a way as to avoid the creation of mutual obligations. Note the section on reducing risk.

Typically in an agreement an organisation might commit:

- To provide a full induction and any training necessary for the volunteer role.
- To provide a named supervisor for the volunteer, with regular supervision meetings.
- To treat volunteers in line with its equal opportunities policy.
- To reimburse out-of-pocket expenses where there are receipts or similar evidence of cost to the volunteer.

- To provide insurance cover for the volunteers.
- To implement good health and safety practice.

While it might expect volunteers to:

- Follow the letter and spirit of the organisation's policies and procedures, including equal opportunities, health and safety and confidentiality.
- To meet mutually agreed time commitments, or give notice if this is not possible.

Some organisations like to have signed agreements. In such cases it is doubly important to ensure that it is clear that the agreement is intended to be binding in honour only. Otherwise it would be a reasonable question to ask: if you do not intend it to be a binding document, then why do you need signatures? The tribunal decision for the Grayson case notes that the agreement was not signed.

2 Benefits and tax

Volunteering and welfare benefits

In theory, genuine voluntary work should not affect entitlement to any benefit. Unfortunately, in practice this is not always the case. It is therefore useful to be aware of the rules and regulations. Benefits are handled by Jobcentre Plus, part of the Department for Work and Pensions (DWP).

As well as dealing with the provisions regarding volunteering, this chapter contains summary descriptions of some of the main benefits available. These are by no means comprehensive, and are of course subject to change. If needed further information should be sought from the guides produced by the DWP and Jobcentre Plus, the agencies themselves, or other specialist advisory organisations such as Citizens Advice Bureaux.

What are reasonable expenses?

Where benefits legislation defines voluntary work, it is always described as unpaid. See for example section 4 of the Jobseeker's Allowance Regulations 1996:

"voluntary work" means work for an organisation the activities of which are carried on otherwise than for profit, or work other than for a member of the claimant's family, where no payment is received by the claimant or the only payment due to be made to him by virtue of being so engaged is a payment in respect of any expenses reasonably incurred by him in the course of being so engaged.

Where 'volunteers' receive more than out-of-pocket expenses they will be treated as if they are in paid work, and subject to the relevant rules on employment for the benefits they are claiming.

Volunteers should not be out of pocket as a result of volunteering. Typical expenses may include (but not necessarily be restricted to):

- Travel to and from the organisation (or wherever the voluntary work is taking place).
- Travel while volunteering.
- Meals taken while volunteering.
- Post and phone costs.
- Care of dependants (for example, children, elderly parents) while volunteering.
- The cost of protective clothing or special equipment necessary for the role.

The cost to a volunteer of using their own vehicle can be calculated by using the HM Customs and Revenue's mileage rates (see below).

Technical information

The Social Security Amendments (Volunteers) Regulations 2001 (SI 2001/2296)

This Statutory Instrument amended the Council Tax Benefit (General) Regulations 1992, Housing Benefit (General) Regulations 1987, Income Support (General) Regulations 1987 and Jobseeker's Allowance Regulations 1996.

Where each referred to the payment of expenses incurred being disregarded, this Regulation adds the words 'or to be incurred', meaning that expenses can in effect be reimbursed in advance. That is, a payment can be made in advance to cover expenses when they are incurred.

This does not remove the necessity to avoid volunteers receiving income. Receipts should still be kept by the volunteer and provided to the organisation, and unspent money received in advance expenses must either be returned or deducted from future expenses.

Jobseeker's Allowance

Jobseeker's Allowance (JSA) is paid to people capable of, available for, and actively seeking work. Claimants must be under pensionable age. They should either be unemployed or working on a paid basis for fewer than 16 hours per week.

Jobseeker's Allowance (JSA) comes in two forms – contribution and income-based. Contribution-based JSA is dependent on national insurance (NI) contributions, and is paid at a fixed rate for up to 26 weeks. Income-based JSA is means-tested, and available to people who haven't paid sufficient NI contributions, or who have been on contribution-based JSA for more than 26 weeks.

Under-18s are generally unable to claim JSA, unless they have paid enough National Insurance, which is unlikely. There are some exceptions for 16- and 17-year-olds to take into account unusual circumstances or severe hardship.

The two key conditions of entitlement to JSA are that claimants remain actively seeking and available for work.

Availability means being able to take up work immediately. There are some exceptions to this, including a concession for volunteers (see below). In most cases claimants have to be available for 40 hours of work a week, unless otherwise agreed.

To be actively seeking work means that claimants usually have to take more than two 'steps' to find work each week. Examples include applying for advertised posts, approaching potential employers, drawing up a CV, and signing up with an employment agency (Regulation 18, Jobseeker's Allowance Regulations 1996). Further to this, however, are the terms in the claimant's Jobseeker's Agreement.

All JSA claimants have to agree to terms laid out in a personal Jobseeker's Agreement. This sets out the type of work the claimant is looking for and what they will do to find it.

The rules for Jobseeker's Allowance come from The Jobseeker's Act 1995 and the Jobseeker's Allowance Regulations 1996. Their provisions relating to volunteers have been amended by Statutory Instruments, outlined below.

Volunteers on Jobseeker's Allowance

JSA claimants are fully entitled to volunteer, as long as they meet the two key conditions of eligibility for JSA, that they remain:

- Available for and
- Actively seeking work.

In a concession from the general rules on availability, volunteers do not have to be available to start work immediately. They must be able to start work with one week's notice, or attend an interview for work at 48 hours' notice.

They can also take part in residential volunteering for a period of up to 14 days (Jobseeker's Allowance Regulations 1886 s.14 (b)).

JSA claimants should also be easy to contact while volunteering if the chance of a job comes up.

There is no limit on the number of hours people on JSA can volunteer, but it is likely that a Jobcentre Plus Decision Maker will regard someone volunteering full-time as not having time to actively seek work, and could also question their true availability.

Volunteers should not receive any income other than to reimburse out-of-pocket expenses. Nor should they receive payments in kind, such as luncheon vouchers. Expenses should be reimbursed against receipts, public transport tickets etc. The organisation should keep these, or a photocopy if the volunteer needs the original.

Volunteers receiving JSA can be given a payment in advance to use for expenses. This is helpful, as it can be difficult for volunteers on low incomes to come up with money for travel and food even if they are going to get it back later. Organisations giving volunteers expenses in advance should still take care to see and keep receipts etc. Any unspent portion of the expenses should be returned, or deducted from the following payment.

The earnings disregard is the amount Jobcentre Plus will ignore when looking at

income received by claimants. At the time of writing this sum is £5 per week for single people, but can rise to £20 per week depending on special circumstances.

Note that if volunteers are given money over and above legitimate expenses, they are likely to be no longer treated as volunteers by the job centre because they will be considered to be paid for their work.

Volunteers who are receiving JSA have to fill in form ES 672V (ES 672V W in Wales).

This asks:

- Whether or not volunteers get paid in cash or kind for the role. Remind volunteers that reimbursement of out-of-pocket expenses is not a payment.
- Whether volunteers can choose whether or not to receive payment – if ‘volunteers’ can choose to waive payment they may be regarded as having notional earnings – see below.
- How the Jobcentre Plus office can contact the volunteer about a job or interview. If possible, volunteers should give a telephone number by which they can be reached while volunteering. This could be a mobile number or that of the organisation. If using the organisation number the volunteer might like to add that they can be contacted directly there, and if not available messages will be immediately passed on. Organisations should ensure that procedures are in place to pass messages on. If there is a delay, the volunteer’s JSA could be jeopardised.
- How soon the voluntary work can be given up or rearranged to attend interviews or start work. Volunteers are allowed 48 hours’ notice before attending an interview and one week’s notice before starting work. Note that if Jobcentre Plus offices are using forms printed before the notice periods were changed, they may state 48 hours for both events.

Notional earnings

If Jobcentre Plus believes that a person should be being paid for a service they are carrying out, then it will deduct benefit payments by an amount corresponding to the pay it believes the claimant should be receiving. The Jobseeker’s Allowance Regulations 1996 and the Income Support (General) Regulations 1987 specifically state that voluntary work should not be affected by this rule.

However, care should be taken to ensure that the roles you create are reasonable for volunteers to undertake.

Technical information

Notional earnings

Regulation 105(13) of the Jobseeker’s Allowance Regulations 1996 (SI 1996/207) sets out the notional income rules:

13) Where-

- a) a claimant performs a service for another person; and
- b) that person makes no payment of earnings or pays less than that paid for a comparable employment in the area,

the adjudication officer shall treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies him that the means of that person are insufficient for him to pay or to pay more for the service; but this paragraph shall not apply to a claimant who is engaged by a charitable or voluntary organisation or is a volunteer if the secretary of state is satisfied in any of those cases that it is reasonable for him to provide his services free of charge.

There is a similar provision in the Income Support (General) Regulations 1987, regulations 42 (6), (6a).

Preventing problems

As a key definition of voluntary work used in benefits legislation is that it is unpaid, and because means-tested benefits may be affected by income, organisations should be able to demonstrate that claimants received nothing more than their out-of-pocket expenses. Receipts or similar documentation should be sought wherever practical. It is also important to keep records, both for tax purposes and as proof that volunteers did not receive any financial income in the event of their legal status being called into question.

While at a senior level the Department for Work and Pensions and Jobcentre Plus understand and promote the value of volunteering to unemployed people, unfortunately this does not always filter down to local Jobcentre Plus branches. Some volunteers may find that they are told they cannot volunteer at all, they cannot volunteer for more than a certain number of hours, or that they are not entitled to receive reimbursement for their expenses. This makes it important to have the rules to hand, both to inform volunteers, and to help challenge any misapplication of the rules.

At the time of writing the key widely available booklet summarising the rules is *Financial help if you work or are looking for work (WK1)*. Leaflet JSAL7 (also available as JSAL7 JCP) promotes volunteering to JSA claimants, and also briefly summarises JSA rules.

It is good practice to make volunteers aware of their obligation to inform Jobcentre Plus, as this is something that many claimants are unaware of. Whether or not volunteers then choose to tell Jobcentre Plus that they are volunteering is up to them.

It can help to provide volunteers with a letter or similar document outlining that, in line with the regulations, volunteers:

- Are only receiving reimbursement for out-of-pocket expenses, or equipment and/or clothing necessary to carry out the voluntary work.
- Can be easily contacted if work becomes available.
- Are free to attend interviews at 48 hours' notice.
- Are free to take up work at one week's notice.

If volunteers have access to resources through the organisation that may help them search for jobs, then mention this – for example, newspapers, computers to write letters, use email etc. You could also describe the usefulness of the voluntary opportunity for helping unemployed volunteers back to work. Avoid overselling this angle – if it sounds like claimants are in an activity that they should be being paid for, then the notional earnings rule may be invoked.

Jobseeker's Allowance (Amendment) Regulations 2002 (SI 2002/3072)

This Statutory Instrument amended the Jobseeker's Allowance Regulations 1996 (SI 1996/207), extending the notice period before a volunteer takes up employment to one week.

What follows is from regulation 5 of the Jobseeker's Allowance Regulations 1996, as amended by the 2002 Regulations. In order to be regarded as available for employment:

- 5) (1) (b) a person who is engaged in voluntary work is not required to be able to take up employment immediately, providing he is willing and able –
- i) to take up employment on being given one week's notice; and
 - ii) to attend for interview in connection with the opportunity of any such employment on being given 48 hours' notice.

Income support

Income support is a means-tested benefit paid to people on a low income who are out of work or working on a paid basis for fewer than 16 hours a week where their circumstances make them ineligible for JSA. This might include carers, lone parents and people who are sick or disabled but haven't made enough National Insurance contributions to be entitled to incapacity benefit.

It is available for people between the ages of 16 and 59. People aged 60 or over can claim the Minimum Income Guarantee.

People on income support are fully entitled to volunteer for as many hours as they like. As with JSA, they should not receive any income from their voluntary work above their earnings disregard, or they will face deductions from their benefit. Notional earnings may also be taken into account for income support.

Payment for expenses can also be given in advance, as long as it still amounts to a genuine reimbursement.

Claimants receiving income support because they are sick or disabled are entitled to carry out 'permitted work' (see under incapacity benefit). However (unlike people who are on incapacity benefit and are carrying out permitted work), the money they earn over their earnings disregard will be deducted from their benefits.

Incapacity benefit

Incapacity benefit is paid to people who are unable to work because they are sick or disabled. It is contribution-based, but there are concessions that allow some people who have not made enough NI contributions to claim it.

The rules governing incapacity benefit are extremely complex. For example, different conditions apply for people under 20 (and in some cases under 25), and there are three different rates for payment. A fuller explanation of these can be found in *A guide to Incapacity Benefit (IB 1)*, published by the Department for Work and Pensions.

After seven days of incapacity a claimant must produce a sick certificate from their doctor. These come in various forms, and will either state a date (within 14 days) by which the person is ready to return to work, or remain open, merely stating when the person has to return to the doctor.

Following this there are two tests for incapacity, the Own Work (Occupation) Test, and the Personal Capability Assessment. The Own Work test is used when individuals have been working for more than 16 hours a week at least eight weeks out of the previous 21. This is based on an assessment of whether the individual is capable of working at their current occupation.

After 28 weeks, or immediately for those who do not meet the 16-hour work threshold for the Own Work Test, the Personal Capability Assessment is applied. In most cases this will involve assessment by an approved doctor, following the completion of Form IB50, which asks questions about the nature of the illness or disability. This test is based on general capacity for work, and tests ability to carry out a range of activities.

Incapacity benefit and volunteering

People on incapacity benefit are fully entitled to volunteer. Volunteering should not call into question a person's incapacity to work. There are no hour limits on volunteering by people on incapacity benefit. In the past there was a limit of 16 hours per week on average, but this was ended in October 1998.

Chapter IV of The Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311) concerns work carried out by people in receipt of incapacity-related benefits. Working would normally invalidate any claim to be incapable of work, but there is a specific exemption for voluntary work (regulation 17 (1) (b)).

This means that undertaking voluntary work should not in itself cause the individual to be regarded as capable of work, no matter how many hours they spend volunteering per week. Unfortunately it is not unknown for volunteers on incapacity benefit to face problems, especially where they come across Jobcentre Plus staff who are unaware of their own rules. Organisations should provide volunteers with information about these rules. It may also help to prepare a standard letter explaining the nature of the voluntary work, distancing it from paid work, and underlining the flexibility of volunteering, with the organisation changing roles to accommodate the individual, and volunteers being able to leave early or inform the organisation that they will not attend on days where their condition makes this difficult.

Technical information

Readers checking the Social Security (Incapacity for Work) (General) Regulations 1995 should note that paragraph 17 (2) (b), which refers to a 16-hour limit on 'exempt work' such as voluntary work, was amended by Regulation 4 (3) of the Social Security (Welfare to Work) Regulations 1998. The amendment ended the 16-hour limit on the amount of voluntary work an incapacity claimant could do on average over a week.

Permitted work

Please note that incapacity benefit claimants should not have to resort to justifying voluntary work under the permitted work provisions. Volunteering is not work and should not be regarded as such. What follows is merely for information.

Permitted work is work that people in receipt of incapacity benefit – or income support due to illness or disability – are entitled to take up in recognition that a degree of work can be helpful for people who are not currently able to take up full-time work.

Permitted work replaced 'therapeutic earnings' in April 2002 – note that the rules differ substantially from the earlier provisions.

A doctor's approval is no longer needed before taking up permitted work.

There are three levels of permitted work – permitted work (lower limit) (PWLL), supported permitted work (SPW) and Permitted Work Higher Limit (PWHL).

Under PWLL, claimants can earn up to £20 per week at the time of writing. They remain subject to the national minimum wage, if they fall into the definition of workers, therefore allowing a very small amount of work per week.

Supported permitted work allows volunteers to work up to 16 hours a week, and earn up to £72 a week (at the time of writing). SPW has to be supervised by someone working for a local or public authority or voluntary organisation, whose job it is to provide or find work for people with disabilities.

Permitted work (higher limit) allows claimants to work up to 16 hours and earn up to £72 for a fixed 26-week period. This can be extended by a further 26 weeks if there is evidence that extending the period will help the claimant's capacity to enter full-time work.

This evidence can be from someone working for Jobcentre Plus or the DWP, such as a Disability Employment Adviser or a Jobcentre Plus Personal Adviser, or from anyone else (including the claimant).

If the evidence does not come from someone working or providing a service for the DWP, then it will be passed to a Jobcentre Plus / Social Security Office Decision Maker to make a judgement.

Money received through permitted work will be classed as income when housing and council tax benefit are calculated.

Other benefits that should not be affected

Disability Living Allowance/Attendance Allowance

These are similar – but not identical – supplementary benefits for people who need extra support due to physical or mental disability (DLA is for people under 65 while AA is for people aged 65 and over).

They are not affected by volunteering.

Severe Disablement Allowance

Since April 2001 no new claims can be made for Severe Disablement Allowance, but some people continue to receive it. It could be claimed if the individual had been unable to work for at least 28 consecutive weeks due to illness or disability.

Volunteering does not affect SDA.

Housing benefit/Council tax benefit

Housing benefit helps people on benefits or a low income meet the costs of accommodation, with council tax benefit similarly subsidising council tax payments.

These benefits differ slightly from those above in that they are administered by local councils.

Rules for these benefits do not affect volunteering, although, as with all means-tested benefits, care should be taken to avoid giving volunteers any money over and above out-of-pocket expenses. A volunteer who receives any such income should declare it to their local housing benefit/council tax benefit office.

Tax and national insurance

The large body of legislation and regulation that refers to taxation typically says nothing about volunteers. In practice, however, HM Customs and Revenue may have to deal with volunteers, and therefore there is guidance on treatment of volunteers in its technical manuals.

The basic position is that if volunteers receive nothing more than reasonable out-of-pocket expenses then this reimbursement will not have tax implications. If they receive some form of payment above genuine reimbursement, this will be treated as taxable income, and will be subject to the same income tax and national insurance regulations as any other earnings.

Volunteers who receive more than out-of-pocket expenses

Any payments other than reimbursement of genuine expenses will be subject to tax and national insurance. Simply referring to a payment as 'expenses' does not make it exempt, nor does describing it as an honorarium, pocket money, sessional payment or any similar term.

Volunteers receiving income have to pay tax on it. Depending on the circumstances, this may be as employees (with tax and national insurance paid through the PAYE system), through self-employment (with tax and NI paid through self-assessment), or case VI of Schedule D, a general 'sweep-up' provision to cover income received that isn't collected by other means (also through self-assessment).

'Volunteers' who receive more than their out-of-pocket expenses should be treated (for tax purposes) in the same manner as paid workers. This includes them providing a P45 form or filling out a P46. If such 'volunteers' receive more than the national insurance threshold (£94 per week at the time of writing) from the organisation, then in most cases PAYE should be operated. If you believe this to be the case then you should seek guidance from HM Customs and Revenue. Some income may simply be declared by volunteers to their local tax office and then be taxed under self-assessment, but in general it will be the organisation's duty to operate PAYE. Failure to do so can have serious consequences.

A further consequence when volunteers are treated as employees is that the organisation must complete form P9D or P11D. These are annual notifications of reimbursement payments for expenses and other benefits.

P9D is used to record taxable benefits or expenses payments over £25 given to employees earning less than £8,500 per year. P11D is used for employees receiving more than that sum, and must also include details of non-taxable payments or benefits.

'Volunteers' who receive more than the weekly earnings threshold for Class 1 ('employed earner') contributions will have to pay national insurance. The earnings threshold for 2005/6 is £94. Note that in such cases organisations would also have to pay employers' national insurance contributions.

Honoraria

An honorarium is generally understood to be a one-off, unexpected payment given as a gesture of thanks. If a payment is regularly made, or expected (either by the recipient being told of it in advance, or it being common practice to make the payment), then it will no longer be regarded as an honorarium, and will be treated as any other payment to volunteers.

Even if you believe that a payment you are making genuinely falls into this category, it would be wise to seek advice from a tax office or accountant. An honorarium proven to be tax-free will still be treated as income by Jobcentre Plus, possibly affecting benefits.

There are no clear legal rules on what is or is not an honorarium, and it is not recommended that organisations make payments of this kind to volunteers.

Tax and reimbursements

The general rule with expenses payments is that they should be a genuine reimbursement of costs incurred as part of the voluntary work.

They should be necessary for the role, and genuinely incurred - supported by evidence (receipts and similar documentation).

As with benefits, this would normally include:

- Travel to and from the organisation (or wherever the voluntary work is taking place).
- Travel while volunteering.
- Meals taken while volunteering.
- Post and phone costs.
- Care of dependants (for example, children, elderly parents) while volunteering.
- The cost of protective clothing or special equipment necessary for the role.

However, 'volunteers' who receive some form of payment or income from the organisation (above genuine reimbursement) will be taxed on expenses given to cover travel to and from home, meals taken while volunteering, and care costs. These expenses

can only be reimbursed tax-free for genuine – that is, unpaid – volunteers.

In some cases, it may be possible to agree flat rates for reimbursement of expenses with the local Inspector of taxes. A flat rate is where all volunteers get a fixed amount to cover expenses (for example ‘£5 per day to cover fares and lunch’ without having to prove that they actually incurred the expenditure. The inspector would have to be satisfied that the payments would be reasonable under the circumstances and not result in the volunteers receiving any profit. Such an arrangement will not prevent the possibility of the ‘expenses’ being regarded as income by Jobcentre Plus, or as payments forming part of a contract, or (if paid to a charity trustee) as an unlawful payment under charity law.

Good practice

Keeping records

Volunteers should be asked to produce receipts, bus tickets or similar documentation when reimbursing receipts. Although reimbursement of out-of-pocket expenses does not have to be entered on forms P11 or P9D, you should be able to show that you were not giving volunteers taxable income.

It is generally helpful to have an expenses claim form for volunteers to fill out. This can be kept with the receipts and other evidence of the costs incurred by volunteers.

Notional earnings

As with benefits, notional earnings can be assumed by HM Customs and Revenue decision makers in some circumstances. However voluntary work is specifically excluded from these provisions.

(Decision Makers Guide DMG 25090)

Volunteer drivers

HM Customs and Revenue sets a tax-free approved mileage rate for reimbursing travel expenses for people using their own vehicles for volunteering or employment. These can be obtained from HM Customs and Revenue, and the car rates are also published in booklet *IR122 Volunteer Drivers*.

The rates at the time of writing (for 2005/6) are:

Cars and vans: 40p per mile for the first 10 000 miles, and 25p for every mile thereafter.

Motorcycles: 24p per mile regardless of overall total.

Bicycles: 20p per mile, again, regardless of overall total.

Rates vary for environmentally-friendly motor vehicles.

Reimbursement at levels above these rates are likely to affect the tax status of the volunteers, may have implications for volunteers who are on benefits or who are charity trustees, and could possibly create a contract with the volunteer.

Tax issues can be complex. There is a bewildering amount of legislation and guidance, yet almost nothing that directly refers to volunteers and volunteering.

The clearest information on volunteering to be found on the HM Customs and Revenue website can be found in technical manuals prepared for their own staff.

These can be found at <http://www.hmrc.gov.uk/manuals>

For example, Chapter 1 of the Decision Makers Guide states in paragraph DMG12037:

Charity or voluntary work

A person working for a charity or a voluntary organisation, or who is a volunteer, should not be treated as engaged in remunerative work if the only payment

- 1) received or
- 2) due to be paid

is a payment for expenses incurred. There should be no question of notional earnings from this employment.

Note that the phrase ‘...or who is a volunteer’ includes those volunteering for local authorities, hospitals and other statutory bodies.

The Employment Income Manual states at EIM71100:

Voluntary workers

Before tax can be charged under the provisions relating to employment income there must be:

- either an office or an employment
- and earnings from that office or employment.

A person who does voluntary unpaid work for a voluntary organisation, for example, a charity or local society, will not normally be engaged under a contract of employment and will not normally be the holder of an office. If there is no office or employment, it follows that the reimbursement of any expenses incurred by voluntary workers in doing the work of the organisation will not give rise to liability to tax. Similarly, voluntary workers who are otherwise unpaid are not liable to tax on the reimbursement of the extra cost they might incur because they undertake such work, for example, the expenses of travel between home and the place where the work is done.

3 Safety and security

Health and safety

There is a large body of health and safety legislation in place to protect workers and employees. Unfortunately, much of it applies only to paid workers. This does not mean, however, that volunteers can be exposed to serious risks with impunity. Organisations have a duty of care towards their volunteers (among others), and section 3 of the Health and Safety at Work etc Act 1974 enshrines a similar duty in statute law.

Clearly, there is also a moral duty upon organisations to take account of the health and safety of volunteers. It is hard to imagine a situation where it would be justifiable to treat volunteers in a less favourable manner than paid staff, even if it were possible to do so while maintaining the duty of care.

Organisations should also remember that some volunteers may be employees in the eyes of the law, and therefore entitled to the full protection of the legislation.

Duty of care

The duty of care is a common law duty to take reasonable care to avoid causing harm to others. Organisations have a duty of care towards their volunteers. Failure to meet that duty could lead to the organisation and its trustees being liable if a volunteer is injured as a result.

What this means in practice is that reasonable steps should be taken to ensure that the likelihood and potential seriousness of injury to volunteers is reduced. Depending on circumstances, this might include giving volunteers adequate information, training, the use of safety clothing or equipment, closer supervision and so on.

Health and safety legislation

Section 3 of the Health and Safety at Work etc Act 1974 imposes a duty on every employer ‘to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety’, and ‘to give to persons (not being his employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety’.

This clearly includes volunteers, and while it only goes further than the duty of care in that it demands information on health and safety be provided, it does mean that there is a legislative as well as common law duty on organisations to take steps to protect their volunteers from harm.

The Management of Health and Safety at Work Regulations 1999

The Management of Health and Safety at Work Regulations 1999 place a duty on employers to carry out risk assessments, looking at potential risks to their employees and others, which includes volunteers. If they have five or more employees, these assessments must be in writing. Volunteer-only organisations do not have a statutory duty to carry out assessments.

However, it is hard to argue that the duty of care is being taken seriously if there has been no effort to look at what could go wrong and what could be done to protect volunteers from injury or harm. Therefore it makes sense even for volunteer-only organisations to take a systematic approach to protecting the health and safety of their volunteers. Written risk assessments allow organisations to identify potential problems, to demonstrate that they have done so, and to provide a basis for putting safety measures in place.

Risk assessment

Risk assessment involves looking at hazards and risk. In health and safety jargon, hazard means anything that could cause harm. Risk is a combination of the likelihood of that happening, and the potential seriousness if it did.

When working with volunteers it makes sense to have an overall risk assessment for your volunteer programme and smaller risk assessments for individual roles. Other organisational risk assessments should also take volunteers into account.

The actual method of assessing risk is not laid down in legislation. However, the Health and Safety Executive (HSE) recommends a five-step approach to the process:

1. Look for the hazards.
2. Decide who might be harmed, and how.
3. For each hazard, evaluate the chance, big or small, of harm actually being done and decide whether existing precautions are adequate or whether more should be done.
4. Record the significant findings of risk assessment, such as the main risks and the measures you have taken to deal with them.
5. Review your assessment from time to time, and revise if necessary.

See *Five steps to risk assessment*, HSE
<http://www.hse.gov.uk/risk/practice.htm>

It makes sense to create some form of table, listing each hazard, who might be affected, what the likelihood is of someone coming to harm, the potential consequences, and what measures should be taken to reduce the risk or eliminate the hazard altogether.

What actions are required will depend on the nature of the hazard. Some may simply require information or training to be given to the volunteer. Changes to the way the programme is carried out may be necessary – more supervision, different procedures and so on. Protective clothing or equipment may be necessary. An activity may have to be avoided altogether, if it has been found to be too hazardous.

The aim of the risk assessment is to be able to show that potential problems were identified, and importantly, that steps were taken to lower risk.

Health and safety policy

The Health and Safety at Work etc Act 1974 requires organisations with five or more employees to have a written health and safety policy. Organisations with fewer than five paid members of staff should strongly consider writing a health and safety policy and circulating it to staff and volunteers. A policy sets out an organisational commitment to health and safety, and clarifies procedures and specific areas of responsibility. As well as being a basis for good practice, having a policy in place also helps demonstrate that the duty of care is taken seriously.

Volunteers should be included in the policy. They should also have access to it, and inductions should include a briefing on the policy and the arrangements set out in it.

The Health and Safety at Work etc Act 1974, s.2 (3) states:

Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate revise a written statement of his general policy

with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.

The prescribed cases are organisations with fewer than five employees.

This paragraph outlines three facets of a health and safety policy:

- A statement of intent setting out the aims and ethos of the organisation regarding the safety of its paid staff, volunteers and anyone else who may come into contact with it.
- Who is responsible for what. This also helps clarify who volunteers and other staff should go to to report an incident or seek help or advice.
- The 'arrangements' in place – the systems and procedures that should be followed. These need not all be described in detail here, but should at least be referred to and detailed elsewhere. This might include procedures around first aid, reporting and investigation of accidents, fire procedures etc.

A number of organisations, such as the Health and Safety Executive, can provide information on drawing up a health and safety policy.

Liability and insurance

Breach of health and safety law is a criminal offence. The Health and Safety at Work etc Act 1974 states that where someone has committed an offence under health and safety law which was due to the act or default of some other person, that other person can be charged with the offence (whether or not the first person is charged). As well as individuals directly involved this could encompass committee members and senior managers. (Health and Safety at Work etc Act 1974 s.36)

Liability for negligence (causing loss, damage or injury due to failure to meet the duty of care) depends on the structure of the organisation. With unincorporated associations and trusts, the members of the governing committee may be personally liable. With incorporated organisations (companies limited by guarantee, or industrial and provident societies), primary liability will generally rest with the organisation itself rather than with the individual governing body members. Trustees can be indemnified against such costs by their organisation.

The Health and Safety Commission has produced guidance for directors and members of governing bodies – *Directors' responsibilities for health and safety*. It suggests five 'action points':

- Boards should accept formally and publicly a collective role in providing health and safety leadership in their organisations.
- Each member of the board needs to accept his/her individual role in providing health and safety leadership for their organisation.
- The board needs to ensure that all board decisions reflect health and safety intentions as articulated in its health and safety policy statement.
- The board needs to recognise its role in engaging the active participation of workers in improving health and safety.
- The board needs to ensure that it is kept informed of, and alert to, relevant health and safety risk management issues. The commission recommends that a member of the board should be designated health and safety director for this purpose.

Regardless of the legal structure of the organisation, it is important that volunteers are adequately insured. While established organisations are likely to have appropriate cover in place, it is important to check that such policies extend to volunteers.

It is important to note also that insurance cover does not mean that health and safety responsibilities can be neglected.

Employers' liability insurance

Employers in Great Britain have a duty under the Employers' Liability (Compulsory Insurance) Act 1969 and Employers' Liability (Compulsory Insurance Regulations) 1998 to maintain employers' liability insurance for not less than £5 million. This insurance must cover liability for accidents, disease or injury to an employee due to negligence or breach of health and safety law by the employer.

While employees, workers, apprentices and some trainees must be insured under this cover, there is no duty to insure volunteers. Note however that in certain circumstances volunteers can be found to be working under a contract and be regarded as employees and workers in the eyes of the law.

Although this legislation does not compel organisations to insure volunteers under such policies, it is clearly advisable for organisations to do so, as of course they are open to negligence cases being brought by volunteers.

Organisations should ensure that volunteers are explicitly covered by their employers' liability insurance, or under similar terms in their public liability policy.

Note that the above regulations place a number of general duties on employers, such as the requirement to display the certificate of insurance.

Public liability insurance

This insurance cover is not a legal requirement, but any organisation that owns or controls premises, holds public events or has any dealings with the public would be foolhardy to avoid taking out such cover. Many funders require it, as do the conditions of some registrations such as for childcare premises. Organisations may also have obligations under contract to maintain this insurance.

As mentioned above, it can be extended to protect the organisation against claims from volunteers arising from injury or sickness as a result of negligence by the organisation.

In general, however, it protects the organisation for claims by third parties, including service users and members of the public, for death, illness, loss, injury, or accident caused by the negligence of the organisation.

It can also protect for loss or damage to property caused through the negligence of someone acting with the authority of the organisation, which may include the actions of volunteers. Policies may differ so organisations are advised to check their cover to clarify that it covers volunteers.

Personal accident insurance

Personal accident insurance covers injuries, accidents or deaths that occur where the organisation has not been negligent. Some organisations may wish to provide this cover, or extend an existing policy as a courtesy towards volunteers.

Professional indemnity insurance

Organisations providing information, advice or other professional services should arrange professional indemnity insurance, and make sure that volunteers involved in such activities are covered. This type of insurance covers organisations for claims arising from injury, loss or damage resulting from advice or other services.

Volunteer drivers

Please see Chapter 5, Specific volunteering situations, for information on insurance cover for volunteer drivers.

Insurance for volunteers

When thinking about insurance, organisations need to be aware of an important legal principle. This is that insurance contracts require ‘the utmost good faith’ on the part of the purchaser of the insurance. Organisations must provide all relevant information when seeking insurance – for example, the numbers of volunteers working with the organisation, exactly what activities they carry out, and so on.

Organisations may wish to use the services of an insurance broker with experience of acting for voluntary organisations. Brokers can help in a number of ways, including negotiating premiums with insurance companies, negotiating appropriate cover for an organisation’s volunteers and advising the organisation on limits or exclusions in policies. For example, even if policies specifically refer to volunteers, they may only be covered while actually engaged in voluntary activity for the organisation or (possibly) travelling to or from the activity.

Organisations should make sure that all information available to volunteers about insurance is accurate and up to date and does not give an impression that insurance may be available, or available at certain levels of cover, when it is not. It can be useful to make a general statement that all insurance policies are subject to limitations and exclusions, and that the organisation’s cover may change from time to time.

Working with vulnerable clients

Organisations with vulnerable clients have an enhanced duty of care. They should have a clear child/vulnerable adult protection policy in place, which should be reflected throughout volunteer involvement. Typical measures might include:

- Taking up references.
- Thorough training and induction.
- Looking at working practices and making sure that all has been done to avoid unnecessary risk – for example, are there ways to avoid one-to-one contact with clients?
- Adequate supervision.
- Having proper channels for clients, volunteers and staff to raise concerns.
- Actively seeking feedback from clients.

Now that there is easier access to criminal record checks, it is easier to argue that taking the duty of care seriously includes obtaining disclosures for volunteers working with vulnerable clients. Insurance companies are increasingly concerned to see that organisations are taking all measures open to them to protect their clients.

It is important to note that while criminal record checks are an important tool for organisations seeking to protect vulnerable clients, they should not be regarded as the only or even the best safeguard. There is a danger that they can create a false sense of security. Clearly they are only ever going to provide information on people who have an existing record.

The Criminal Records Bureau

Criminal record checks are available from a central agency, the Criminal Records Bureau. The CRB was set up following the Police Act 1997. As well as outlining the powers of the new agency, the Act described the three levels of criminal record check – now known as disclosures – the CRB is to provide.

Basic disclosure

At the time of writing the basic disclosure was not available, and appears unlikely to be introduced in the near future.

When available it will give details of unspent convictions only, and any member of the general public will be able to obtain their details directly from the CRB. Organisations will be entitled to ask volunteers to produce a basic disclosure, as under the Rehabilitation of Offenders Act 1974 all employers are entitled to ask about unspent convictions.

Note that when basic disclosures are introduced there will be a charge for anyone seeking to obtain one. It would be good practice to reimburse the cost to avoid volunteers being out of pocket. Organisations should consider carefully whether or not there is a need to demand such details from their volunteers.

Standard disclosure

Standard disclosures contain details of all convictions, spent as well as unspent, as well as details of any cautions, reprimands or warnings. They also include, where relevant, details from the Protection of Children Act List, List 99 and the Protection of Vulnerable Adults List.

They are only available for people working with children or vulnerable adults, as well as some positions within the health, pharmacy, legal, banking, financial and other specified professions. That is, positions defined as exempt by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. Applications for standard disclosures must be signed by the individual and countersigned by a person from the organisation applying for the disclosure. This organisation must be registered with the CRB.

Standard disclosures are free for volunteers. However, organisations using umbrella bodies (see below) rather than registering in their own right should remember that such organisations are likely to pass on administration costs at the very least.

Enhanced disclosures

Enhanced disclosures are available for those regularly caring for, training, supervising or being in sole charge of children or vulnerable adults. They contain the same details as standard disclosures. They may also contain information from local police records that a chief constable considers relevant to the position applied for. In some cases this information may be particularly sensitive, and not recorded on the disclosure form (copies of which go to both the individual and the organisation). A separate letter will be sent to the countersignatory at the organisation. This extra information is sometimes referred to as 'soft intelligence'.

Enhanced disclosures are free for volunteer roles. However, organisations using umbrella bodies rather than registering in their own right should remember that such organisations are likely to pass on administration costs at the very least.

Spent convictions

The Rehabilitation of Offenders Act 1974 created the concept of 'spent' convictions. This is to allow ex-offenders a better chance of reintegration into society by removing barriers to work. After a period of time most convictions become spent, and do not have to be revealed to potential employers. The more serious the crime, the longer the rehabilitation period.

Custodial sentences of more than 30 months can never become spent.

The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 made provision to allow organisations to ask about spent convictions for some positions in the health, pharmacy, legal banking and financial professions, and significantly for voluntary organisations that involve people working with children or vulnerable adults. See the box below for a definition of vulnerable adults.

This means that unless organisations are recruiting for a position that falls into the Exceptions Order, they can only ask volunteers to reveal unspent convictions. They cannot apply for standard or enhanced disclosures, because these reveal spent convictions and other information that most organisations have no right to see.

Organisations choosing to ask about convictions or undertaking criminal record checks should operate equal opportunities in relation to ex-offenders. Convictions should only be taken into account where they are directly relevant, and any information disclosed should be treated in the strictest confidence, and handled in accordance with the principles of the Data Protection Act. Anyone who receives disclosures from the Criminal Records Bureau must comply with the CRB code of practice on how the information is used, stored and destroyed.

Technical information

Vulnerable adults

The definition of vulnerable adults used to determine whether there is entitlement to a standard or enhanced level check comes from the exceptions order of the Rehabilitation of Offenders Act (Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975) as amended in 2002:

‘vulnerable adult’ means a person aged 18 or over who has a condition of the following type:

- i) a substantial learning or physical disability;
- ii) a physical or mental illness or mental disorder, chronic or otherwise, including an addiction to alcohol or drugs; or
- iii) a significant reduction in physical or mental capacity.

Registering with the Criminal Records Bureau

For an organisation to gain access to disclosures, it must either register with the Criminal Records Bureau, or reach an arrangement with a registered body willing to carry out checks for them, referred to as an ‘umbrella body’ by the CRB.

At the time of writing the cost of registration is £300, a one-off payment. There are proposals to make this an annual fee and to limit the number of bodies that can register.

Registered bodies must be entitled to ask exempted questions under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. There is also a code of practice that should be strictly adhered to.

Registered bodies must nominate a lead countersignatory. This is a person with management responsibility for use of the disclosure service. The lead countersignatory can nominate additional countersignatories to take on some of the workload.

The role of the countersignatory is to:

- Countersign applications and receive the disclosures.
- Control the use of, access to and security of disclosures.
- Confirm the details of the documentary evidence provided by the disclosure applicant, to help establish their identity.
- Ensure compliance with the CRB’s code of practice.
- Ensure that the position is covered by the Exceptions Order to the Rehabilitation of Offenders Act 1974 and the disclosure requested is at the appropriate level.

The Criminal Records Bureau carries out enhanced disclosure checks on all countersignatories.

Umbrella bodies

Umbrella bodies are registered bodies that carry out disclosures for other organisations. This is usually in order to provide a service for smaller groups unable to afford the cost of registering or to take on the level of administration needed to be a registered body.

Umbrella bodies register in the same way as any other registered body, indicating that they wish to take on this function on the application form. Lead and additional countersignatories are also appointed in the same manner.

Countersignatories carrying out checks for other organisations must be satisfied that the position in question is exempt, and that the organisation is willing and able to comply with any relevant areas of the Code of Practice, such as handling, storage and use of disclosure information.

The relationship between an umbrella body and the organisation it is providing information for should be clearly defined in writing. How information is passed on is not prescribed by the CRB. Umbrella bodies could pass disclosures directly to the organisation, or only information considered relevant. They could even be solely responsible for the final decision on the suitability of a prospective volunteer, passing no information on at all. The exact nature of the relationship will affect the responsibilities of each party under the code of conduct, and potential liability arising from recruitment decisions.

Applying for a disclosure

The individual to be checked has to fill in an application form. This is obtained either by the individual themselves, or by the countersignatory. In some circumstances the CRB will provide registered bodies with application forms.

Individuals contacting the CRB for a disclosure will need the following information:

- The organisation's 11-digit registered body number.
- Their full name and any other name they are known by.
- All addresses they have lived at over the last five years.
- Their date and place of birth.
- Their national insurance number.
- Details of other forms of identity such as passport or driving licence.

Additional information may be asked for.

An application form, partially filled in with the above details, will then be sent to the individual to be completed and passed to the organisation, along with appropriate identity documents. The countersignatory then fills in the relevant sections, signs the form and returns it to the CRB.

Alternatively, the countersignatory can contact the CRB directly, giving the name, address and date of birth of the volunteer. A form will then be sent directly to them to fill in. This route may be preferable in some cases, as some volunteers may not be confident about using the telephone.

Please note that sections E and F of the application form (asking for additional personal information and a referee) no longer have to be completed.

Countersignatories should ensure that volunteers have correctly filled in their sections of the form. The CRB provides comprehensive guidance for both the countersignatory and the applicant.

The organisation is responsible for completing sections X and Y. Section X asks for the identification produced by the applicant. There are two groups of documents accepted by the CRB, listed in the accompanying box. The amount and types of identification depend on a number of factors.

Section H, line 69 gives the opportunity for the applicant to give consent for the CRB to check the information they have provided against outside sources. If consent is given then the volunteer must produce either at least one item from group 1, and any two others, or five items from group 2.

If this consent is not given, the volunteer must produce either at least one item from group 1 and any four others, or seven items from group 2.

Identification documents accepted by the CRB

Group 1

Valid passport (any nationality).

UK driving licence (either photocard or paper).

Original UK birth certificate (issued within 12 months of date of birth) (full or short form acceptable).

Valid photo identity card (EU countries only).

UK firearms licence.

Group 2

Marriage certificate.

Non-original UK birth certificate (issued after 12 months of date of birth) (full or short form acceptable).

P45/P60 statement**.

Bank or building society statement*.

Utility bill (electricity, gas, water, telephone (inc mobile phone contract/bill))*.

Valid TV licence.

Credit card statement*.

Store card statement*.

Mortgage statement**.

Valid insurance certificate.

Correspondence or a document from: the Benefits Agency; the Employment Service; the HM Customs and Revenue; or a Local Authority*.

Financial statement (such as pension, endowment, ISA)**.

Valid vehicle registration document.

Mail order catalogue statement*.

Court summons**.

Valid NHS card.

Addressed payslip*.

National Insurance number card.

Exam certificate (such as GCSE, NVQ).

Child benefit book**.

Connexions card.

Certificate of British nationality.

Work permit/visa**.

*documentation should be less than three months old

** issued within past 12 months

Copies of the disclosure will be sent to both the volunteer and the organisation. Section 124 of the Police Act 1997 makes it a criminal offence for a member, officer or employee of a registered body to disclose information contained in a disclosure, unless he or she does so in the course of their duties:

a to another member, officer or employee of the registered body,

b to a member, officer or employee of a body at the request of which the registered body

countersigned the application, or
 c *to an individual at whose request the registered body countersigned the relevant application.*

The CRB code of conduct states that registered bodies must have a written policy on the handling and storage of disclosure information:

Recipients of disclosure information

- *must ensure that disclosure information is not passed to persons not authorised to receive it under section 124 of the Act. Under section 124, unauthorised disclosure is an offence;*
- *must ensure that disclosures and the information they contain are available only to those who need to have access in the course of their duties;*
- *must securely store disclosures and the information that they contain;*
- *should retain neither disclosures nor a record of disclosure information contained within them for longer than is required for the particular purpose. In general, this should be no later than six months after the date on which recruitment or other relevant decisions have been taken, or after the date on which any dispute about the accuracy of the disclosure information has been resolved. This period should be exceeded only in very exceptional circumstances which justify retention for a longer period. Note that disclosures carried out as required by the Care Standards Act should be retained until seen by National Care Standards Commission Inspectors.*

Registered persons shall

- *have a written security policy covering the correct handling and safe-keeping of disclosure information; and*
- *ensure that a body or individual at whose request applications for disclosures are countersigned has such a written policy, and, if necessary, provide a model for that body or individual to adopt.*

Enhanced disclosures may contain additional information from local police force records. In particularly sensitive cases, this will not be recorded on the disclosure document itself, but will come in the form of a separate letter to the countersignatory. If such a letter is deemed necessary, the countersignatory's copy of the disclosure document will indicate that one is being sent.

The handling and storage of the letter should be treated with all the care demanded by the code of practice. The contents and existence of the letter must not be revealed to the volunteer or anyone unconnected to the recruitment process, even when it forms the main reason for turning a prospective volunteer down. Section 124 of the Police Act 1997 also covers this letter, making it an offence to reveal its contents.

What to do with the information

The code of practice obliges registered bodies to have a written policy on the recruitment of ex-offenders – and, in the case of umbrella bodies, to ensure that organisations requesting disclosures have such policies. Furthermore, all recipients of disclosure information are obliged:

- To follow guidance laid down or endorsed by the CRB on the use of disclosure information.
- Not to unfairly discriminate against an applicant on the basis of information in a disclosure.
- To include a statement in recruitment material reassuring applicants that a criminal record will not necessarily be a bar to accepting them.
- To discuss matters revealed in a disclosure with the applicant before turning them down (this does not apply to information received in a letter as a result of an enhanced disclosure check).
- To make available guidance on involving and fair treatment of ex-offenders, and the Rehabilitation of Offenders Act.

Protection of Children Act 1999

The Protection of Children Act 1999 was created to streamline and strengthen safeguards around recruitment to work with children.

The two most relevant changes the Act brought in are the creation of a Protection of Children Act List (POCA list) of people considered unsuitable for work with children, and the requirement for some organisations to check prospective volunteers and workers against the POCA list and List 99 (maintained by the Department for Education and Skills).

Childcare organisations

How the Act applies to organisations depends on whether they fall into its definition of 'childcare organisations', which must comply with it, or that of 'other organisations', which are merely encouraged to follow its provisions.

To quote the Act:

"child care organisation" means an organisation:

- a which is concerned with the provision of accommodation, social services or health care services to children or the supervision of children;*
- b whose activities are regulated by or by virtue of any prescribed enactment; and*
- c which fulfils such other conditions as may be prescribed.'*

The Protection of Children (Child Care Organisations) Regulations 2000 (SI 2000/2432) lists the enactments described in paragraph (b):

- Local Authority Social Services Act 1970, sections 2 and 7A to 7D;
- Adoption Act 1976, section 9;
- National Health Service Act 1977, sections 8 and 15 to 18A, Schedule 5 and Schedule 5A;
- Registered Homes Act 1984, sections 16 and 26;
- Children Act 1989, sections 72 and 73, paragraph 4 of Schedule 4, paragraph 7 of Schedule 5 and paragraph 10 of Schedule 6;
- National Health Service and Community Care Act 1990, section 5 and Schedule 2;
- Criminal Justice Act 1991, sections 84 to 88A;
- Probation Service Act 1993, section 25; and
- Criminal Justice and Public Order Act 1994, sections 7 to 15.

'Other organisations' refers to those organisations who may care for or work with children but do not fall into the above definition.

Regulated positions

The Act originally also defined 'child care position' as a term to describe those which came under its scope. This was later amended by the Criminal Justice and Court Services Act 2000 by reference to a category of 'regulated positions'.

Please note that these regulated positions refer to volunteers as well as paid staff. They refer to 'normal duties' to exclude occasions where someone might fall into the definitions on a one-off basis.

'Regulated position' is defined as:

- *A position whose normal duties include work in:*
 - *An institution which is exclusively or mainly for the detention of children.*
 - *A hospital which is exclusively or mainly for the reception and treatment of children.*
 - *A care home, residential care home, nursing home or private hospital which is exclusively or mainly for children.*
 - *An educational institution.*
 - *A children's home or voluntary home.*
- *A home provided under section 82(5) of the Children Act 1989.*
- *A position whose normal duties include work on day care premises.*

- A position whose normal duties include caring for, training, supervising or being in sole charge of children.
- A position whose normal duties involve unsupervised contact with children under arrangements made by a responsible person.
- A position whose normal duties include caring for children under the age of 16 in the course of the children's employment.
- A position a substantial part of whose normal duties includes supervising or training children under the age of 16 in the course of the children's employment.
- One of the following positions:
 - Member of the governing body of an educational institution.
 - Member of a relevant local government body.
 - Director of social services of a local authority.
 - Chief education officer of a local education authority.
 - Charity trustee of a children's charity.
 - Member of the Youth Justice Board for England and Wales.
 - Children's Commissioner for Wales or deputy Children's Commissioner for Wales.
- Member, or chief executive, of the Children and Family Court Advisory and Support Service.
- A position whose normal duties include supervising or managing an individual in his or her work in a regulated position.

A child care organisation is obliged to refer names of people for consideration for the POCA list in these positions under the circumstances outlined above, and to check people in such positions against List 99 and the POCA list. Other organisations may do so if they wish.

(Protection of Children Act 1999, as amended by the Criminal Justice and Court Services Act 2000)

The duty to check prospective volunteers

Child care organisations as defined in the legislation are required to check individuals they wish to offer regulated positions against both the POCA list and List 99.

Other organisations are not bound by this duty, but the guidance on the Act produced by the Department of Health clearly recommends that they consider carrying out checks.

Individuals found to be on either list must not be offered a regulated position.

These checks are now only available through the Criminal Records Bureau as part of the information contained in standard and enhanced disclosures.

The Protection of Children Act list

The Department of Health has long kept a list of people considered to be unsuitable for work with children. The POCA placed this on a statutory footing.

Child care organisations have a duty to refer to the Department of Health the names of individuals for inclusion in the POCA list under the following circumstances. They all refer to situations where misconduct occurs that harmed a child or placed a child at risk of harm, and refer to 'regulated positions' only – see above for a definition.

They must refer:

- If an individual has been dismissed on the above grounds.
- If an individual resigns, retires or is made redundant in circumstances where the organisation would have dismissed them on such grounds.
- If the organisation has transferred an individual to a position that is not a regulated position for such reasons.
- If the organisation has suspended the individual or provisionally transferred them on the above grounds but has not yet come to a decision whether to dismiss or confirm the transfer.

Other organisations are not obliged to report but are entitled to do so.

Further to this, child care and other organisations can refer names under

circumstances where a person has left a position, through dismissal, resignation, retirement or an internal transfer, and information comes to light that if available earlier would have led the organisation to either dismiss or consider dismissing the individual. (Protection of Children Act 1999, s.2)

Criminal Justice and Court Services Act 2000

The Criminal Justice and Court Services Act 2000 (CJCSA) built on and amended the Protection of Children Act 1999. It introduced disqualification orders, barring people convicted of certain offences against children from working with young people under the age of 18.

Disqualification orders are made against people convicted of an ‘offence against a child’ (outlined below), who have either received a ‘qualifying sentence’ or a ‘relevant order’.

A qualifying sentence is one of imprisonment or detention for 12 months or more, including suspended sentences. A relevant order is an order made by a court that the individual be admitted to hospital or placed under guardianship under the Mental Health Act 1983 and various military discipline acts.

If the above conditions are met, the court is obliged to make an order disqualifying the offender from working with children. The only exception to this is if the court decides that due to the particular circumstances of the case it is unlikely that the person will commit another offence against a young person.

If the offence is committed by someone under the age of 18, a disqualification order would only be made if the court believes that there is a likelihood of the person committing more offences against children.

‘Offence against a child’

Schedule 4 of the Act lists a number of offences that would bar a person from working with children (these are commonly referred to as ‘Schedule 4 offences’). These are all offences committed against children, defined in the act as under-18s.

The offences include murder, manslaughter, rape, grievous bodily harm and an extensive list of serious offences against a child. These are not all of a directly violent or sexual nature – supplying or offering a class A drug to a child is included, for example.

New offences created by the Act

The Criminal Justice and Court Services Act 2000 made it an offence for a disqualified person to knowingly apply for, offer to do, accept or carry out any work with children. This includes voluntary work.

It is also an offence to knowingly recruit such a person to work with children, or allow them to continue in the work if they are already doing so. It is not an offence if the person carrying out the recruitment is unaware that the individual is disqualified from working with children. Again, this includes voluntary work.

The definition of ‘work with children’, known as regulated positions, is set out in the section on the Protection of Children Act 1999 above.

It should be noted that these offences refer not only to offenders who are disqualified by the orders described by the Act; they also encompass people included on the Protection of Children Act list as well as that kept by the Department for Education and Skills (often referred to as ‘List 99’). Access to these lists is now available via Standard or Enhanced Disclosures from the Criminal Records Bureau.

(Criminal Justice and Court Services Act 2000, s.35(4))

There is no requirement in the CJCSA to carry out criminal record or related checks. However, many organisations working in this field may be compelled to by the Protection of Children Act or the Care Standards Act. The guidance produced by the Home Office on the Criminal Justice and Court Services Act strongly recommends that checks are carried out.

(Criminal Justice and Court Services Act 2000 Protection of Children Guidance paragraphs 9.7-9.9 - <http://www.homeoffice.gov.uk/docs/cjcsguide.html>)

Care Standards Act

The Care Standards Act regulates the provision of care to vulnerable people. It created the National Care Standards Commission, (subsequently split into the Care Standards Commission Inspectorate and the Healthcare Commission) and outlined details of a Protection of Vulnerable Adults scheme to mirror the Protection of Children Act list. Social care organisations are required by law to register with the CSCI and Independent Health Care organisations with the Healthcare Commission. Both are subject to inspection.

The Act and subsequent Regulations and National Minimum Standards set out criteria registered care organisations have to meet.

At the time of writing the following services are required to register with the CSCI or Healthcare Commission:

- Care homes.
- Children's homes.
- Domiciliary care agencies.
- Residential family centres.
- Voluntary adoption agencies.
- Independent fostering agencies.
- Private and voluntary hospitals and clinics.
- Exclusively private doctors.
- Nurses' agencies.

The exact nature of a care home is not clearly defined – the CSCI broadly describes them as providing accommodation and personal care that includes assistance with bodily functions. Domiciliary care agencies are those that provide physical care such as helping clients dress, or intimate help with bodily functions. Non-physical, emotional or psychological care such as befriending does not bring an organisation under the Care Standards Act. Organisations unsure whether they should register should contact the CSCI for advice.

There are National Minimum Standards in place for:

- Care homes for older people.
- Adult placements.
- Care homes for adults 18-65.
- Domiciliary care.
- Nurses' agencies.
- Children's homes.
- Adoption.
- Residential family centres.
- Fostering services.
- Independent health care.
- Boarding schools.
- Residential special schools.
- Accommodation of students under 18 by Further Education Colleges.

Criminal record checks

Virtually all volunteers in an organisation registered with the Commission will need to be police checked. This will also include a check against the Protection of Children or Vulnerable Adult lists where relevant. The Commission for Social Care Inspection produces a table outlining who needs to be checked and at what level of disclosure.

Disclosures are obtained and handled in the same way as for any disclosures (see above). Disclosures must be kept until they are checked by CSCI inspectors at the next

inspection. This may be longer than the six months recommended by the CRB code of practice, but is permissible.

Portability

The introduction of the POVA list (see below) means that the portability of CRB disclosures is no longer valid for organisations regulated by the CSCI, as a new POVA check must be undertaken for each new role started since 26 July 2004 (see Care Standards Act 2000 s.89, and the information below).

Protection of Vulnerable Adults List

The Care Standards Act made provision for the creation of a list of people considered unfit to work with vulnerable adults, paralleling the Protection of Children Act list. This 'POVA' scheme is being introduced in two phases. The first phase, introduced on 26 July 2004, applies only to workers in care homes or in domiciliary care. It is intended to later extend the scheme to those who work with vulnerable adults in the NHS or independent health care.

To quote Department of Health guidance:

As from 26 July 2004, POVA checks must be carried out where an individual:

- *applies for a care position with a new employer; or*
- *moves, or is transferred, from a non-care position to a care position within his current employment. (Please note that a check against the POVA list is required if an individual moves from a regulated child care position to a care position working with vulnerable adults within his current employment.)*

(Protection of Vulnerable Adults Scheme in England and Wales for care homes and domiciliary care agencies: A practical guide)

This applies to volunteers as well as to paid staff. Section 80 (4) of the Care Standards Act 2000 states that references to employment regarding the POVA scheme use the same definition as that in the Protection of Children Act 1999:

'employment'-

- a) means any employment, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract; and*
- b) includes an office established by or by virtue of a prescribed enactment.*

In care homes this applies to those workers having 'regular contact' with residents. For domiciliary care organisations it applies to those providing 'personal care' in individuals' own homes.

'Regular contact' and 'personal care' are not defined. The Department of Health guidance referred to above suggests that regular contact implies contact that has a constant or definite pattern, or which occurs at short uniform intervals. It also points out that this means looking at the contact with clients in day-to-day work rather than simply the position's job title or role description.

The guidance also points to the definition of personal care in the national minimum standards for domiciliary care agencies as a wider benchmark.

- Assistance with bodily functions such as feeding, bathing and toileting.
- Care falling just short of assistance with bodily functions, but still involving physical and intimate touching, including activities such as helping a person get out of a bath and helping them to get dressed.
- Non-physical care, such as advice, encouragement and supervision relating to the foregoing, such as prompting a person to take a bath and supervising them during this.
- Emotional and psychological support, including the promotion of social functioning, behaviour management, and assistance with cognitive functions.

POVA checks are obtained through the Criminal Records Bureau as part of a standard or enhanced disclosure.

POVAFirst checks

Provision has been made for initial POVA checks to be made in exceptional circumstances, where delay in employing care workers would leave the organisation with less than the statutory minimum number of workers, or clients at risk.

These POVAFirst checks simply check the applicant's name and date of birth against the POVA list. If there is no match the organisation will be informed and can employ the applicant before the full CRB disclosure is returned. An initial match does not mean that the individual is definitely on the list, but further checks will have to be made based on information sent in with the disclosure application form, and the organisation must wait for the full disclosure.

POVAFirst checks are applied for online following the submission of a disclosure application form. The online form is at the disclosure website, www.disclosure.gov.uk, and organisations wishing to obtain the check will need to provide their registered body number, the number of the relevant disclosure application, the applicant's date of birth, and the countersignatory's email address.

Duty to refer

As with the Protection of Children Act list, there is a duty to refer certain individuals to the list where through misconduct they harmed or placed at risk of harm a vulnerable adult. The Department of Health guidance states that:

The circumstances in which a provider of care must refer a care worker to the Secretary of State for possible inclusion on the POVA list are as follows:

- *The provider has dismissed the worker on the grounds of misconduct (whether or not in the course of his employment) which harmed or placed at risk of harm a vulnerable adult as defined in subsections 80(6)(a) and 80(6)(b) of the Act.*
- *The worker has resigned, retired or been made redundant in circumstances such that the provider would have dismissed him, or would have considered dismissing him, on such grounds if he had not resigned, retired or been made redundant.*
- *The provider has, on such grounds, transferred the worker to a position which is not a care position; or*
- *The provider has, on such grounds, suspended the worker or provisionally transferred him to a position which is not a care position but has not yet decided whether to dismiss him or to confirm the transfer.*

There is also a duty to refer those who have left positions after the POVA scheme commenced on 26 July 2004 where evidence later comes to light that would have led the organisation to dismiss or consider dismissing them if they were still volunteering or working for them.

There is also provision (although not a duty) to refer people who were dismissed or left their post before the introduction of the POVA list where the organisation considers it would be in the interest of vulnerable adults.

At the time of writing the Department of Health guidance referred to above was available via the CSCI website:

http://www.csci.org.uk/information_for_service_providers/pova/default.htm

Do I need to carry out a CRB check?

Some organisations may be subject to regulation that requires criminal record checks for paid and unpaid staff – for example, within the police force - and advice should be sought from the regulatory body. For most organisations the relevant legislation that requires volunteers to obtain a CRB Disclosure is the

Protection of Children Act 1999 and the Care Standards Act 2000.

The Protection of Children Act applies if the organisation fits into the definition of the child care organisation outlined above, and if volunteers are working in one of the regulated positions set out in the Criminal Justice and Court Services Act 2000.

The Care Standards Act applies if the organisation provides residential or domiciliary care and is required to register with the Commission for Social Care Inspection.

These two Acts do not cover all circumstances where volunteers will be working with vulnerable clients. Organisations or projects falling outside these provisions are not compelled to obtain disclosures. However, they do have a duty of care towards their clients. The easier access to criminal record checks afforded by the CRB means that it is harder to argue that carrying out the checks is not a reasonable step to take. Increasingly, insurance companies are looking for evidence that organisations are doing all in their power to prevent abuse before offering insurance cover at a reasonable premium if at all.

However, the disclosure system is not perfect. Some organisations are stretched to find the £300 registration fee, and access to 'umbrella bodies' willing to provide checks can be difficult – and expensive if the only option is one of the private companies offering the facility on a commercial basis.

Organisations need to look carefully at the roles and working environment of volunteers. Are the volunteers working directly with clients? How much access do they have? How much is – or could be – unsupervised or on a one-to-one basis? Can the work be changed to avoid this?

4 Data protection, copyright and the Human Rights Act

Data protection

Apart from some informal, one-off activities, most organisations will need to keep some details about their volunteers. If this falls into the Data Protection Act 1998's definition of 'personal data', the organisation has a number of legal duties related to the collection, storage, use of and disclosure of such information. They may also need to 'notify' (register with) the information commissioner, although the Act applies whether or not this is the case.

In theory, data protection issues should be fairly simple. The 1998 Act sets out eight data protection principles, and for most cases they offer a clear guide on action. However, matters can quickly become complicated – for example, where there are conflicting duties to different people affected by the same information.

Definitions

The Act uses several specific terms to refer to information and individuals or organisations, depending on their roles and responsibilities under the Act.

The Act applies to 'personal data'. Organisations or individuals who collect or hold personal data are referred to as 'data controllers'. Any other organisations or individuals who use the information on behalf of the data controller are 'data processors'. A person whose personal data is processed is called a 'data subject'.

Personal data means information that can identify a living individual. This includes information that can be combined with other information that a data controller holds or is likely to hold to identify such an individual. This information – data – is that which is or is intended to be stored on computer or related devices, or in 'relevant filing systems'.

Relevant filing systems are manual filing systems, where information is kept in some form of structured retrievable form. The key question here is basically: could you easily retrieve information about an individual from the files?

Doing virtually anything with data is known as 'processing'. The Act defines the term: *'processing', in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including-*

- a) organisation, adaptation or alteration of the information or data,
- b) retrieval, consultation or use of the information or data,
- c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- d) alignment, combination, blocking, erasure or destruction of the information or data.

As the Information Commissioner's legal guidance on the Act states, 'it is difficult to envisage any action involving data which does not amount to processing within this definition'.

Technical information

Data is defined in section 1 of the Act as:

'...information which -

- a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- b) is recorded with the intention that it should be processed by means of such equipment,
- c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

- d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68, or
- e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)'

Personal data is defined as

'...data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'

The data protection principles

Section 4 and Schedule 1 of the Act set out the eight data protection principles which form the core of the Act. Personal data must be:

- Fairly and lawfully processed.
- Obtained only for specified and lawful purposes and must not be further processed in a manner incompatible with these purposes.
- Adequate, relevant and not excessive for the purposes for which it is processed.
- Accurate and kept up to date.
- Not kept longer than necessary for the purpose for which it was processed
- Processed in accordance with the rights of data subjects.
- Kept with appropriate security measures.
- Not transferred to a country or territory outside the European Economic Area unless the country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Fair processing

Conditions for the first principle are set out in Schedule 2 of the Act.

Processing of personal data should only take place if:

- *The individual (data subject) that the information is about has given consent to the processing. That is, he or she knows who is using the information, what for and who it is likely to be passed on to. Consent can be implicit where it is obvious what the information will be used for – application forms being an obvious example.*
Or:
- *It is necessary for the performance of a contract to which the data subject is a party, or for the taking of steps at the request of the data subject with a view to entering into a contract.*
Or:
- *The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation implied by contract.*
Or:
- *It is necessary for the administration of justice or for other specified purposes including the exercise of any functions of a public nature exercised in the public interest by any person*
Or:
- *It is necessary to protect the 'vital interest' of the data subject. The Information Commissioner's guidance interprets vital interest as 'a life or death situation'.*

Or:

- *It is necessary for the purposes of 'legitimate interests' of the data controller or third parties to whom the data is disclosed, except where the processing would prejudice the rights and freedoms or legitimate interests of the data subject.*

Apart from the first condition, consent, the conditions rely on necessity. This is not defined in the Act, but a guide would be whether or not obligations or aims can be reached without collecting or using the information.

Sensitive personal data

The Act recognises that some personal information is particularly sensitive. This 'sensitive personal data' is subject to tighter rules. It is defined in section 2 of the Act as personal data consisting of information as to:

- The racial or ethnic origin of the data subject.
- His political opinions.
- His religious beliefs or other beliefs of a similar nature.
- Whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992).
- His physical or mental health or condition.
- His sexual life.
- The commission or alleged commission by him of any offence
- Any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

As well as meeting one of the Schedule 2 conditions, there are separate conditions which need to be met for the processing of sensitive personal data. They are set out in Schedule 3 of the Act, and include the data subject giving explicit consent.

Individuals' access to information kept on them

The Data Protection Act allows for 'subject access'. Individuals wishing to see data held on them can make a request in writing to the appropriate data controller. The data controller can make a charge of up to £10. The data controller must reply promptly, at the latest within 40 days of receiving the fee.

The response should include:

- The information kept on them.
- An explanation of the purposes for which the data is being processed.
- Details of those to whom the information is may be disclosed.

There are exceptions to the right of subject access. Examples include where disclosure might involve releasing information about another individual (see below), when it is being held for some research purposes, and in some social work agencies where disclosure might harm the physical, mental or emotional health of the individual.

References

Under the Data Protection Act, volunteers may claim access to their references. However, disclosure is almost certain to identify the referee. While the Act seems to safeguard the identity of third parties that could be revealed by disclosure in section 7 (see box), the Information Commissioner's Code of Practice for Employment Records – which contains recommendations on how the legal requirements of the Act can be met – suggests that consent is not needed from the referee. Some or all details can still be held back if

appropriate, but the Code explicitly states that information revealed such as sickness records or disciplinary issues should not be withheld.

The employer must decide whether on balance the worker's right to know what information is held about him or her and its source outweighs the right to privacy of the third party who can be identified through releasing the information.

Factors to weigh in this balance include:-

- *Whether the information can easily be edited to remove the part that reveals the identity of a third party without significantly changing its likely value to the worker.*
- *Whether releasing the information would breach a duty of confidence owed by the employer to the third party. (NB: When considering the release of references it is hard to see how releasing factual information about the worker such as his or her sickness record or allegations which have been or ought to have been put to him or her by an employer would breach such a duty.)*
- *Whether the third party has expressly refused consent to release of the information and the reasons given, if any.*
- *What the third party was told when the information was supplied about its possible release or, if told nothing, what the third party's reasonable expectations would be. (NB: those asked to give references should not be led to believe and cannot expect that their references will be kept confidential in all circumstances. They may, for example, have to be released under disclosure procedures in the event of a claim of unlawful discrimination.)*
- *The impact the information has had or might have in the future on actions or decisions affecting the worker.*
- *The nature of the information, in particular whether its release could be damaging to the third party or whether it would reveal sensitive data about the third party.*
- *The extent to which the worker is likely to be aware already of the information.*
- *Whether the information includes facts which the worker ought to be made aware of because he or she might dispute them.*
- *Whether the information identifies the third party in a business or personal capacity. (NB: When considering the release of references the third party's right to privacy is greater if he or she is the author of a personal reference rather than of a corporate one).*
- *The fact that if information is released in error the error cannot subsequently be corrected, but if information is withheld the error can subsequently be corrected by its later release, perhaps on the order of the Information Commissioner or a court.*
- *The Commissioner's view is that, where the information from which a third party can be identified consists of an employment reference received by the employer it should normally be released to the worker unless the referee provides some compelling reason as to why it should be edited or not released at all. If, in other cases, the release of such information would breach a duty of confidentiality owed by the employer to the third party, the information should only be released if its nature is such that it has had or is likely to have a significant adverse impact on the worker.'*

Section 7 of the Data Protection Act 1998

- 4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless-**
- a) the other individual has consented to the disclosure of the information to the person making the request, or**
 - b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.**

- 5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.
- 6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to-
- a) any duty of confidentiality owed to the other individual,
 - b) any steps taken by the data controller with a view to seeking the consent of the other individual,
 - c) whether the other individual is capable of giving consent, and
 - d) any express refusal of consent by the other individual.

Volunteer records

No clear guidelines exist for the retention of volunteer records.

Organisations operating under any form of regulation must follow the guidelines set out by the appropriate guidance or inspecting/regulating body.

Other organisations should follow the data protection principle that data should not be kept longer than for the purpose which it was taken.

The Criminal Record Bureau code of practice states that disclosures must not be kept for longer than six months, except in exceptional circumstances. In their general guidance they recommend that organisations consult with them if they feel that they may need to retain disclosures for longer than the six-month period.

(Code of Practice and Explanatory Guide for Registered Persons and other recipients of Disclosure information, CRB)

Organisations regulated under the Care Standards Act must keep disclosures until their next inspection by the Commission for Social Care Inspection. This may involve retaining them for more than six months, but is permitted by the CRB.

(Guide to Criminal Records Bureau Checks, CSCI)

Organisations working in areas with particular health and safety concerns – such as work with hazardous substances – should seek specific guidance on legal requirements for retention of health and safety records.

Records relating to accidents should be kept for at least three years, as under the Limitation Act 1980 this is the time limit for personal injury claims. Note though that there can be exceptions to this, where long-term health effects may emerge, as with asbestosis. The three-year limit then starts when the individual is first aware of the problem.

Organisations involving volunteers providing advice or similar services should also be aware that the Limitation Act imposes a six-year time limit for damages claims other than for personal injury. Were such a case to be brought, training records and similar information might be needed to demonstrate that the organisation had taken adequate measures.

Copyright

Copyright allows people who create certain types of work to control how it is used. There is no registration process – copyright exists as soon as the work is created or recorded.

The type of works that copyright protects are:

- Original literary works – that is, anything that is written, spoken or sung, such as articles, leaflets, computer programs and databases, as well as novels and lyrics for songs.
- Original dramatic works, including works of dance or mime.
- Original musical works.
- Original artistic works, such as paintings, graphic design, photographs, collages, technical drawings, diagrams, maps, logos.
- Published editions of works – ie, the layout of a publication.
- Sound recordings in whatever form.
- Films, including videos.
- Broadcasts.

Copyright material cannot in most cases be:

- Copied.
- Distributed.
- Publicly performed or shown.
- Broadcast.
- Adapted.

without the permission of the copyright holder.

Copyright and volunteers

Copyright normally belongs to the person or persons who created the work. The Copyright, Designs and Patents Act 1988 states that material produced by employees belongs to their employer, but makes no mention of volunteers, so the copyright of their work remains with them, not their organisation. Therefore organisations should ask their volunteers to assign (transfer) copyright to them, or agree a licence whereby the organisation can use the work within agreed limits but copyright stays with the volunteer.

Although this may seem a trivial issue, Volunteering England has heard of cases where volunteers have been producing work for important publications such as Annual Reviews, but following disputes with their organisations have refused to allow them to use their work.

The assignment must be in writing (Copyright, Design and Patents Act 1988 s.90 (3)). Organisations should draw up forms asking volunteers to assign copyright to them. It would be advisable to make it clear that the assignment is intended to be a legal contract. One way is to pay a nominal amount – say £1 – for the assignment and refer to this in the document.

There are no statutory guidelines for licensing copyright. However, it makes sense for the agreement to set out:

- The parties involved.
- The work the licence covers.
- The terms of the licence (how the work can be used).
- The duration of the licence.

If a payment is being made, then the licence should be clear about the form this will take – a one-off fee, an annual fee etc. Note that agreeing payment to license work from a volunteer may be seen as a payment for work, creating a contract. It also goes against the concept of volunteering as being an activity without financial reward.

Copyright, Designs and Patents Act 1988, Section 1

Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—

- a) original literary, dramatic, musical or artistic works,
- b) sound recordings, films, broadcasts or cable programmes, and
- c) the typographical arrangement of published editions.

Copyright, Designs and Patents Act 1988, Section 16 (as amended):

1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom—

- a) to copy the work (see section 17);
 - b) to issue copies of the work to the public (see section 18);
 - ba) to rent or lend the work to the public (see section 18A);
 - c) to perform, show or play the work in public (see section 19);
 - d) to communicate the work to the public (see section 20);
 - e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);
- and those acts are referred to in this Part as the ‘acts restricted by the copyright’.

2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—

- a) in relation to the work as a whole or any substantial part of it, and
 - b) either directly or indirectly;
- and it is immaterial whether any intervening acts themselves infringe copyright.

Human Rights Act

The Human Rights Act 1998 came into force in 2000. It brings most rights from the European Convention on Human Rights (ECHR) directly into British law. Previously, British citizens wishing to assert ECHR rights had to take a case to the European Court of Human Rights.

When the Act was drafted, there was some speculation in the volunteering sector that it could give new rights to volunteers. Some people believed that the Act would offer volunteers protection from discrimination.

In fact there is little in the Act which would affect volunteers one way or the other.

The ECHR articles included in the Human Rights Act are:

Article:

- 2: Right to life.
- 3: Prohibition of torture and degrading treatment or punishment.
- 4: Prohibition of slavery and forced labour.
- 5: Right to liberty and personal security.

- 6: Right to a fair trial.
- 7: No punishment without law.
- 8: Right to respect for private and family life.
- 9: Freedom of thought, conscience and religion.
- 10: Freedom of expression.
- 11: Freedom of assembly and association.
- 12: Right to marry.
- 14: Prohibition of discrimination.

Articles 16, 17 and 18 are also included in the Act, but they do not convey rights on individuals, merely clarify some of the boundaries on the use and interpretation of Convention rights.

There are also Protocols to the Convention which add supplementary Articles. Britain has ratified Protocols 1 and 6:

Protocol 1, Article:

- 1: Protection of property.
- 2: Right to education.
- 3: Right to free elections.

The two Articles for Protocol 6 call for abolition of the death penalty except in times of war.

While Article 14 prohibits discrimination, this is only in terms of access to the rights within the Act:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(Human Rights Act 1998, Schedule 1)

Article 1 of Protocol 12 is a standalone right for individuals not to be discriminated against, but Britain has yet to ratify it.

- 1 *The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
- 2 *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

(European Convention on Human Rights, Protocol 12)

The one Article that may affect the way some organisations (see ‘public authorities’ below) work with volunteers is Article 8, the right to respect for private and family life. This will mean that individuals who feel that their privacy has been infringed can take a case forward under Article 8 as well as – if appropriate – under the Data Protection Act. Charities should have clear confidentiality policies outlining how information will be stored and with whom it will be shared. Particular care should be taken with people’s contact details, references and police checks.

Public authorities

The Human Rights Act applies only to ‘public authorities’. The Act itself does not provide a clear definition of a public authority. Apart from referring to courts and tribunals, it only defines public authorities as organisations ‘certain of whose functions are functions of a public nature’ (Human Rights Act 1998 s.6(3)).

What is clear is that this definition includes government departments, local authorities, the NHS, the police and so on. Less certain is the area where other organisations carry out some public functions.

It had been supposed that organisations contracted to carry out activities that are the responsibility of a public authority might be seen as a public authority (but only in this one aspect of their work). However, this was thrown into doubt by a case in 2002. Residents of a care home operated by the Leonard Cheshire Foundation took the organisation to court to prevent its closure, arguing that this would contravene article 8 of the Human Rights Act. The case went to appeal (*R v. Leonard Cheshire Foundation* [2002] EWCA Civ. 366.), where the appeal court found that although the home received local authority funding to provide care for many of its residents, it was the local authority that retained the public function and responsibility towards those in receipt of care.

The judges stated that: 'In our judgement the role that Leonard Cheshire Foundation was performing manifestly did not involve the performance of public functions. The fact that the Leonard Cheshire foundation is a large and flourishing organisation does not change the nature of its activities from private to public.'

5 Specific volunteering situations

Involving young volunteers

While there are legal restrictions on employing young people, they do not in general apply to young volunteers.

While it could be argued that organisations should follow employment legislation in this area, there is a strong argument that the nature of volunteering is different from paid work, and that some discretion should be displayed in the interest of involving young people in their community.

Section 18 of the Children and Young Persons Act 1933 and subsequent amendments limit employment to those aged 14 or over. It states that no child may be employed before 7 am or after 7 pm on any day or for more than two hours on any school day or Sunday. The legislation also requires that children must have a minimum of two consecutive weeks free from work during the school holidays. Many local authorities have bye-laws further restricting the work young people may do.

The Children and Young Persons Act 1933 defines employment in the following terms: *a person who assists in a trade or occupation carried on for profit shall be deemed to be employed notwithstanding that he receives no reward for his labour.*

Most local bye-laws use a similar definition. Some local authorities have taken the definition of 'for profit' to include, for example, charity shops, requiring the organisation to apply for child employment permits.

Parental permission

Parental consent should be sought when involving young volunteers. Parental responsibility continues until the age of 18, although the nature and extent of this responsibility is less clear between 16 and 18.

Both the young person and their parent or guardian should fully understand what the voluntary work entails. Provide clear information about the organisation and the work the volunteer is expected to do, preferably a task description. Make sure that they are aware of time commitments, where the work will take place and how it will be supervised.

Health and safety and the duty of care

Section 3 (5) of the Children Act 1989 states that

- A person who—*
- a) does not have parental responsibility for a particular child; but*
 - b) has care of the child, may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.*

There is also an enhanced duty of care towards young volunteers, reflecting their relative immaturity. This means that risk assessments cannot take responsible behaviour for granted, and are likely to require increased supervision, more explicit instructions and so on. This needs to be well judged – 17-year-olds are likely to be more mature than 14-year-olds, but everyone is an individual, and some 17-year-olds are less mature than others.

Under health and safety legislation, risk assessments specific to the individual must be carried out before a young person under 18 can be employed. Although this requirement does not apply to young volunteers, good practice would be to carry out this type of risk assessment.

Good practice

Organisations targeting or likely to attract young volunteers should put child protection policies in place. Their exact nature will depend on the work of the organisation, but they should set out adequate safeguards around day to day working practices, routes for complaints to be raised and procedures to deal with any such problems, and recruitment procedures for staff working with young volunteers.

Organisations should also be aware that staff 'caring for, training, supervising or being in sole charge of children' as part of their normal duties are in 'regulated positions' under the Criminal Justice and Court Services Act 2000. It is important therefore to be aware of these regulations, and to consider the need to obtain criminal record checks for staff working with young volunteers.

Volunteer drivers

This section is not a full description of the wider legal issues and good practice relevant to a volunteer driver schemes. For further information on this issue contact the Community Transport Association (www.communitytransport.com).

Insurance

Drivers using their own vehicles should inform their insurers of their voluntary activities. To avoid confusion with commercial use of the vehicle, they should make it clear that they will receive out-of-pocket expenses only. This should not result in an increase in premium, as volunteering should be regarded as part of the 'social, domestic and pleasure' use of the vehicle (some insurers may categorise volunteering as a business use, but should not raise the premium).

Volunteer drivers should not accept an increase in premium, and may wish to change insurer if their current one insists on an extra charge.

Organisations should make sure that volunteers have informed their insurers of their volunteer driving. A simple way to do this would be to provide a standard letter for volunteers with a return slip for the insurance company to complete.

Contingent motor liability insurance may be available to cover organisations if an accident occurs and there is a problem with the volunteer's insurance.

Expenses

As with all volunteers, it is good practice for drivers' expenses to be reimbursed, but care should be taken to avoid giving drivers sums that could be construed as payments. HM Customs and Revenue sets tax-free mileage allowances for reimbursement of travel costs. They are set to avoid recipients profiting from the payments, and reflect costs such as wear and tear, as well as fuel.

At the time of writing they are:

- Cars and vans, up to 10,000 reimbursed miles per year: 40p per mile (regardless of engine size).
- Cars and vans, additional reimbursed miles: 25p per mile.
- Motorcycles: 24p per mile.
- Bicycles: 20p per mile..

Volunteers should keep clear records of journeys taken as volunteers, noting mileage, time/date and purpose of journey.

Volunteers from overseas

The rules on which people from overseas can volunteer are complex and sometimes contradictory.

There are no restrictions on volunteering by people from

| | |
|----------------|---------------|
| Austria | Latvia |
| Belgium | Liechtenstein |
| Cyprus | Lithuania |
| Czech Republic | Luxembourg |
| Denmark | Malta |
| Estonia | Netherlands |
| Finland | Norway |
| France | Poland |
| Germany | Portugal |
| Greece | Slovakia |
| Hungary | Slovenia |
| Iceland | Spain |
| Ireland | Sweden. |
| Italy | Switzerland |

People from outside the European Economic Area are not allowed to take up work, paid or unpaid (which includes volunteering), without a work permit. Given that work permits are only issued where a genuine vacancy exists and where particular qualifications or skills are required that are in short supply from the British and EEA labour force, there is little chance of obtaining a work permit solely to volunteer.

However, the Home Office has allowed a concession to allow people from outside the EEA to volunteer for a charity if they meet the following criteria:

- The activity is purely voluntary and does not involve taking up a salaried post or permanent position of any kind within the charitable organisation or entering into any arrangement that is likely to constitute a contract of employment.
- The activity is either for a charitable organisation listed in Home Office guidance or a registered charity whose work meets the criteria set out in this instruction.
- The activity is unpaid, or is not likely to be subject to payment of the national minimum wage [see Chapter 1] and directed towards a worthy cause.
- It is closely related to the aims of the organisation.
- It is fieldwork involving direct assistance to those the charitable organisation has been established to help.
- The passenger intends to leave the United Kingdom at the end of their stay.

People from countries for which a visa is needed to travel to the UK must obtain one before travelling.

Such 'visa nationals' must have a visa that will allow them to volunteer. Generally speaking, if they don't have a work permit, this would mean a volunteer visa, working holiday visa or student visa. If they wish to switch to a different visa, they may have to return to their home country and apply from there. Please note that a visitor visa does not allow the holder to volunteer. This visa forbids paid or unpaid employment, under which in this circumstance the Home Office would include voluntary work.

At the time of writing there is some confusion over whether people can volunteer while holding a visa that forbids paid or unpaid employment. There are signs that volunteering may no longer be included in the working definition of unpaid employment for the purposes of visas (this is already the case for asylum seekers). However, until this is confirmed by the Immigration and Nationality Directorate of the Home Office (see the Volunteering England web site for up-to-date information) the above guidance should be followed.

Visa nationals coming to the UK with the sole purpose of volunteering must arrange a placement before entry.

People who have arranged their voluntary work before travelling to the UK, and who do not need a visa but would like peace of mind, can seek entry clearance before travelling. This takes the form of a certificate placed in their passport. This is not a requirement and does not guarantee entry into the UK, but it may make passage through immigration control easier. Application for entry clearance is made to the British Embassy or High Commission in the volunteer's country. A fee is charged for entry clearance.

Technical information

Further information on the application of immigration policy on volunteering can be found in Chapter 17, Section 9 of the Immigration and Nationality Directorate's Instructions. These can be found in the Laws and Policy section of the Immigration and Nationality Directorate website (www.ind.homeoffice.gov.uk).

Applying from the UK for permission to volunteer

Different regulations apply according to whether the person is from a country from which a visa is required to enter the UK (visa nationals) or not (non-visa nationals). You can find out which category a country falls into by phoning the Immigration and Nationality Department on 0870 606 7766.

[or visit the UKvisas website:

<http://www.ukvisas.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1020786334922>]

Non-visa nationals

Non-visa nationals can apply while in the UK to change their immigration status to allow them to volunteer. Applications are considered under the Home Office concession described above.

Application is made on Form FLR0 obtainable from the Application Forms Unit (0870 241 0645 or <http://www.ind.homeoffice.gov.uk/default.asp?PagelD=114>) of the Immigration and Nationality Department. Applicants need a letter from the organisation they are volunteering with and evidence of funds.

Students

Since mid-1999, students from outside the European Economic Area no longer need permission to take part-time or holiday work, including volunteering.

Some restrictions remain in place, including a limit of 20 hours per week during term time, unless the college agrees otherwise.

Refugees

People who have refugee status or who have exceptional leave to remain, and family members, are allowed to do any type of work including voluntary work.

Asylum seekers

Many people seeking asylum want to use their skills and contribute something to the society in which they wish to live. Recent changes to asylum rules have made this easier.

Since April 2000, asylum seekers (people in the process of applying for refugee status) and family members are allowed to volunteer. This includes while they are appealing against a decision to refuse them asylum.

New Home Office guidance confirms that the government ‘does not expect asylum-seekers to be left out of pocket because of their volunteering’, and that they can be reimbursed normal volunteer expenses. It states that care should be taken to ensure that activity undertaken by an asylum seeker is genuinely voluntary, and does not amount to either employment or job substitution.

Although asylum seekers receive form IS 96, which states that they cannot take up employment, paid or unpaid, this does not include volunteering. This has led to a great deal of confusion, which the Home Office has sought to clarify:

‘There is a difference between volunteering and employment, which in general remains forbidden to asylum seekers even where the employment is unpaid. An example of unpaid employment would be an arrangement in which a person makes an arrangement to help out in a business, perhaps on behalf of a relative, in return for some non-monetary benefit. But where the work is unpaid and is carried out on behalf of a charity, voluntary organisation or body that raise funds for either then it will be accepted for immigration law purposes as volunteering.’

(From guidance on the Immigration and Nationality Directorate website – www.ind.homeoffice.gov.uk)

Asylum and Immigration Act 1996, section 8

This Act makes it a criminal offence to **employ** a person who does not have the right to work in the UK. It does not apply to volunteers. Chapter 1, Volunteers and employment, gives guidance on the possibility of volunteers being seen as workers in the eyes of the law.

Volunteer fundraisers

The Charities Act 1992 and The Charitable Institutions (Fund-Raising) Regulations 1994 define ‘professional fundraisers’ and the relationship they have with organisations. This part of the Act is not restricted to registered charities – it applies to any organisation established for charitable, benevolent or philanthropic purposes.

‘Volunteer’ fundraisers who receive more than £5 per day, £500 per year or £500 per event over and above their out-of-pocket expenses will be regarded as ‘professional fundraisers’ for the purposes of the above legislation. This is in addition to tax and benefit implications and the possibility that they would be regarded as workers or employees for employment-related legislation.

Professional fundraisers and their organisations have a number of duties placed upon them. These include having a detailed agreement that sets out (among other things) the principal objectives of the fundraising and the methods used to achieve them, tight controls on the transfer of funds, and the information that fundraisers have to provide when inviting donations.

Organisations involving ‘volunteers’ who they feel may be professional fundraisers should seek guidance on their duties from the Charity Commission.

The Charity Commission provides guidance on fundraising activities in publication CC20 – *Charities and Fundraising*.

The Institute of Fundraising also produces codes of practice and information on fundraising activities.

Public collections

Public collections are legally governed by two families of legislation. House-to-house collections come under the House to House Collections Act 1939 and subsequent

regulations, while street collections are covered by the Police, Factories etc (Miscellaneous Provisions) Act 1916 and related regulations.

At the time of writing a Charities Bill that (among other things) proposed detailed changes in the regulation of fundraising activities had failed to make it through Parliament before the body was dissolved prior to the 2005 election. The Bill is likely to be reintroduced at some point in the future, and organisations are advised to check guidance from the Charity Commission and the Institute of Fundraising for up-to-date information (www.charitycommission.gov.uk and www.institute-of-fundraising.org.uk).

The following is a summary of the key points of the current acts focusing on the requirements for individuals that may affect volunteers. Organisations considering fundraising should seek further advice on their responsibilities.

House-to-house collections

For the purposes of the House to House Collections Act 1939 and the House to House Collections Regulations 1947 and 1963, 'house' is defined to include places of business, so this legislation also covers collections made by touring pubs or offices etc.

House-to-house collections must be for a charitable purpose and licensed by the relevant licensing authority. This would normally be the local authority, apart from the metropolitan police district in London, where the police commissioner is responsible for licensing, and the City of London, where the Corporation of London's Common Council is the licensing body.

Applications for licences must be submitted on or before the first day of the month before the month in which the collection is to take place.

Some large charities are exempt from having to obtain local licences, although they are expected to inform local authorities if they are planning a collection. This will help the authority to ensure that householders are not subject to an unreasonable number of collections. Exemptions are granted by the Home Office.

Collectors must be over the age of 16 and be 'fit and proper persons'.

They should be issued with a badge and a certificate of authority, both of which should be signed, and both of which should be obtained from The Stationery Office. Exempt organisations can have their own designs approved by the Home Office.

The certificate of authority must be produced if either a police officer or a person the collector is asking for donations from asks to see it. The badge must be worn where it can be clearly seen while collecting.

The collector must return the badge and certificate when the collection is complete, or earlier if asked to by the licence holder (referred to in the regulations as the promoter).

Money can be collected in three ways. It can be collected in a sealed and numbered box clearly labelled with the purpose of the collection. If permission has been obtained from the Home Office it can be collected in sealed envelopes. Money collected by any other method must be recorded at the time in a receipt book with either duplicate receipts or counterfoils, with a copy of the receipt going to the donor.

Collectors must not ask for money in a way that will cause annoyance, and must leave a house or doorway if asked to by the occupant.

Sealed boxes can be delivered directly to a bank, or if opened must only be opened by the promoter in the presence of a witness. The amount and identification number of the box must be recorded on a list. The licensing authority should then be informed of the total amount of money raised, names and addresses of the collectors and how much each raised, and the expenses incurred during the collection.

Street collections

Street collections are regulated in a different way to house-to-house collections, in that they are not covered by compulsory central regulation. The Charitable Collections

(Transitional Provisions) Order 1974 sets out model licensing provisions which licensing authorities are free to adopt or adapt. Organisations considering street collections should therefore seek advice directly from the local licensing authority. As with house-to-house collections, the licensing authority is the local authority, or in London the metropolitan police commissioner or the City of London's Common Council.

Good practice

Organisations involving volunteers in public collections should remember their duty of care towards their volunteers. Volunteers may be in potentially vulnerable situations where it is obvious that they are carrying money. Organisations would be well advised to carry out risk assessments and take steps to ensure that risk to volunteers is minimised. Volunteers should be given sufficient information to be able to assess their own safety and avoid problems.

The Suzy Lamplugh Trust (www.suzylamplugh.org) produces guidance on personal safety.

Involving paid staff as volunteers

Although it may seem above and beyond the call of duty, it is not unknown for paid staff to wish to volunteer for their organisation. While there is nothing to stop this taking place, care must be taken to avoid some potentially tricky problems arising.

The volunteer role should be substantially different to the paid role. This is to help distance the volunteering from the paid work. If the overall number of hours for both the paid and unpaid work divided by the employee's pay came to less than the minimum wage, minimum wage inspectors might regard the 'voluntary' work as being an extension of the paid work, and at worst see the arrangement as an attempt to breach the National Minimum Wage Act. Similarly, the Working Time Regulations might apply if the voluntary work is lumped together with the paid work.

Clear distinctions between the paid and unpaid roles will also help to avoid internal confusion about the capacity in which the individual is there in. Even so, there may be problems to do with line management responsibilities, pressure to deal with issues arising from the paid work while there as a volunteer, and so on.

Having dual roles also opens up the possibility of messy disciplinary issues, especially if there is already confusion over the boundaries between roles. It would be at the very least awkward if such a person acted in a way that called for disciplinary proceedings while volunteering. Disciplinary proceedings for employees can in some circumstances be taken on issues outside their normal work, but legal advice should be sought if this is deemed necessary.

If you would like more information on any of the issues raised in this book, contact Volunteering England's free information helpline (and textphone)

0800 028 3304

Opening hours 10.30-12.30am
and 2.00-4.00pm Mon-Fri

Updates on any changes to the law affecting the areas covered in this book will be placed on the Volunteering England website
(www.volunteering.org.uk)

About Volunteering England

Volunteering England is the national volunteer development organisation for England. It works strategically across the voluntary, public and private sectors to raise the profile of volunteering as a powerful force for change, and it provides support systems to assist anyone involved with volunteers.

Volunteering England works to:

- Keep volunteering high on the policy agenda, working with government to promote opportunities for, and remove institutional barriers to, volunteering
- Provide authoritative, up-to-date research on volunteering issues
- Support volunteering development through:
 - Building partnerships across the voluntary, private and public sectors
 - Promoting accredited quality frameworks for volunteering management and local volunteer development agencies
 - Convening national events and practitioner networks
 - Mounting awareness campaigns
 - Providing consultancy, education, training, publications, information and web-based services
 - Providing grants and strategic support to the work of volunteers
 - Identifying, disseminating and promoting good practice in the involvement of volunteers.

For more information please visit our web site at www.volunteering.org.uk



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