



Low Incomes
Tax Reform
Group

A voice for the unrepresented

BUREAUCRACY, EXPENSES AND THE LOW- INCOME VOLUNTEER

**A report by the Low Incomes Tax Reform Group of
The Chartered Institute of Taxation**

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About LITRG and contributors to this report

About us

The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. We take an income of around £15,000 as a low income for our purposes.

The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

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We are also grateful to Colin Ben-Nathan and Volunteering England for reviewing this Report. Any mistakes are solely ours.

Abbreviations

BERR	Department for Business, Enterprise and Regulatory Reform
CAB	Citizens Advice Bureau
CIOT	Chartered Institute of Taxation
DWP	Department for Work and Pensions
ESI	Employment Status Indicator
HMRC	HM Revenue & Customs
ITEPA	Income Tax (Employment and Pensions) Act 2003
ITTOIA	Income Tax (Trading and Other Income) Act 2005
LITRG	Low Incomes Tax Reform Group
NHS	National Health Service
NI	National Insurance
NIC	National Insurance Contributions
NMW	National Minimum Wage
PAYE	Pay As You Earn
SA	Self Assessment

Executive summary

The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation to give a voice to the unrepresented in the tax system.

A significant part of the LITRG's role is to examine policy proposals in tax and tax credits from the perspective of HMRC's low-income customers, especially those who are benefits claimants and therefore also customers of both the Department for Work and Pensions (DWP) and local authorities for housing and council tax benefits.

Unless otherwise stated in this Report, our comments apply to the whole of the United Kingdom.

We have been concerned for some time about the treatment of volunteers' expenses, and the extent of conflict between the rules for taxation, state benefits and the national minimum wage. We also noted the lack of adequate and joined-up guidance from Government.

So when in September 2008, Jobcentre Plus (the working-age arm of the DWP) published an updated guide¹ for those thinking about engaging in voluntary activity we hoped that we might see a holistic approach across the various arms of Government. We were disappointed.

This Report attempts to take a broader view of what faces a volunteer (and a volunteer-involving organisation) when confronted with the deceptively simple question of how a volunteer should obtain recompense for expenses incurred whilst volunteering.

All parts of Government encourage volunteering and stress how volunteering can serve as a bridge from welfare into work for people on low incomes. It is a "good thing" from all perspectives, so we might expect sympathetic and pragmatic rules to apply. Instead we descend into a world of labyrinthine complexity.

While volunteers give their time for free, they normally expect their expenses to be borne by the organisation they serve (indeed this is recognised as good practice and is promoted by volunteering development agencies), and generally volunteers' out-of-pocket expenses can be paid and reimbursed free of tax.

However, if done incorrectly, payment or reimbursement of expenses can lead to a volunteer being taxable, usually as an employee in receipt of taxable remuneration from the organisation concerned, or as a self-employed worker

At the same time, if care is not taken, the volunteer who is in receipt of benefits or credits may lose them or have them reduced. If that is not enough, those engaging the services of volunteers risk getting into a debate with HMRC – who are responsible for enforcing the policy developed by the Department for Business, Enterprise and Regulatory Reform (BERR) – as to whether the expenses regime offends national minimum wage law.

Although in this Report we focus predominantly upon the volunteer we do from time to time look at the position of a "service user" who is asked to volunteer by a public authority to give feedback on a government service (for example, the NHS). Unlike

¹ Volunteering while receiving benefits
http://www.jobcentreplus.gov.uk/JCP/stellent/groups/jcp/documents/websitecontent/dev_015837.pdf

the average volunteer, service users are sometimes paid (perhaps only a token sum or honorarium) for their input and indeed this is recognised as good practice.²

We also comment on the incongruous 'double cheque' arrangement that a volunteer has to enter into should he or she wish to donate expenses back to a charity under Gift Aid and urge the Government to consider revising the law to simplify this process.

We believe the evidence produced in this Report is sufficient to justify the formation of a working group comprised of the voluntary sector, volunteering sector and the Local Government Association, together with HMRC, the DWP and BERR, to address the issues raised throughout the Report.

We appreciate that this working group may take some time to form, to deliberate and to recommend. In the meantime there is no excuse for the paucity of information as to current practice. We believe DirectGov, the public services website, should take the lead and expand its current offerings on Volunteering in its Home and Community section.

² For example: A Guide to Reimbursing and Paying Members of the Public Who Are Actively Involved in Research. Involve and the Department of Health (revised August 2006). http://www.invo.org.uk/pdfs/Payment_Guidefinal240806.pdf

1 Tax and the low-income volunteer

1.1 Legislative background

1.1.1 If the manner in which volunteers are reimbursed their expenses is wrong, there could be unwelcome tax consequences. A tax charge could arise under the rules relating to income from employment, or self-employment, or miscellaneous receipts.

1.1.2 In order for tax to be charged under the provisions relating to employment income, there must be:

- an office or employment; and
- earnings deriving from that office or employment.

1.1.3 A volunteer will not be engaged under a contract of employment and will not normally be the holder of an office (although most charity trustees will also be company directors and therefore office-holders). Even if a contract were in place, the unpaid volunteer would not be in receipt of earnings from that office or employment so would not be chargeable to tax. But this does not necessarily mean that there are no terms in writing: some volunteers might have volunteer agreements in place with their volunteer-involving organisation.

1.1.4 Similarly, for an individual to be in receipt of taxable income from self-employment or miscellaneous receipts there must be a trade, profession or vocation or there must be profits of a casual or occasional nature. These provisions cannot be ignored, but they would not normally be applied to the unpaid volunteer.

1.2 Reimbursement of expenses

1.2.1 Similarly, the reimbursement of any out-of-pocket expenses incurred by volunteers in doing their voluntary work would normally be tax-free.

1.2.2 Moreover, as volunteers are 'unpaid', they would not be liable to tax on the reimbursement of any additional (non-business) costs that they may incur through undertaking such work. Additional costs may include, for example, travel from home to the place of volunteering and even the costs of caring for a dependant whilst volunteering (this will include childcare costs).

1.2.3 In some cases, it can be difficult to determine precisely how much expenditure has been incurred as part of the volunteering activity and this can involve the volunteer in a considerable amount of extra effort and bureaucracy. The volunteer development agency Volunteering England³ received a number of requests regarding minor travel expenses which are incurred through the use of Oystercards (a swipe-card system used for payment on the London Transport network). In response, they have provided three pages of guidance solely devoted to this topic.⁴

³ <http://www.volunteering.org.uk/>

⁴ Volunteering England Information Sheet: Reimbursing Volunteer Expenses for Travel with an Oystercard in London. June 2006.

<http://www.volunteering.org.uk/Resources/goodpracticebank/Information/Oystercard.htm>

1.2.4 It is not surprising, given the level of bureaucracy, that there is anecdotal evidence to suggest that many people do not claim their expenses or are put off altogether from volunteering.

1.3 Round sum expense allowances

1.3.1 Volunteer-involving organisations may not want the administrative complexity of reimbursing every item of cost and may prefer to pay a round-sum allowance of £x per day (see para 1.6.1 – Volunteering England do not recommend this treatment). This immediately opens a debate with HMRC as to the level of that reimbursement; the HMRC guidance⁵ states:

‘If expenses are paid that do more than reimburse the costs incurred, or are at scale rates that cannot reasonably be regarded as merely a reimbursement of what they spend, the voluntary workers may be receiving remuneration for their services. In that case, the payments will be taxable as employment income if it can be shown that they hold an office or employment. If they do not hold an office or employment, the payments may be Miscellaneous Income.’

1.3.2 Therefore, if a volunteer is paid £5 for travel costs whilst volunteering, but only incurs £4.50, the entire sum, not only the surplus 50p, could constitute a taxable payment. The volunteer would then have to make a claim under ordinary tax rules covering the deductibility of expenses. Costs relating to travel between two places where the volunteer needs to be for ‘work’ purposes would be allowable. However, if the travel were between ‘work’ and home the reimbursement would constitute taxable income.

1.3.3 Similar treatment would apply to any other out-of-pocket expenses incurred through volunteering but failing the test which says that such costs must be incurred ‘wholly, exclusively and necessarily’ (see below) in performing one’s duties⁶. The low-income volunteer may, therefore, be faced with an unexpected and unwelcome bill.

1.3.4 In an attempt to avoid these problems, we understand that some charities have agreed a flat rate expenses allowance with their local HMRC office where they have been able to show that the payments were reasonable and that the volunteers were not making a profit.

1.3.5 The problem with this pragmatic approach for tax purposes is that the DWP may still treat the expenses as income, which would need to be taken into account for the purposes of means-tested benefits (see Section 2). The round sum payment might also be seen as creating a contract with the volunteer, which could then have implications regarding the national minimum wage and employment rights (see Section 3).

⁵ Employment Income Manual (EIM) 71100

⁶ The wholly, exclusively and necessarily legislation in respect of employment is at ITEPA 2003 section 336 and the wholly and exclusively legislation at ITTOIA 2005 section 34 in respect of trading profits. There are no specific rules regarding the deductions to be allowed against Miscellaneous Income (charged under ITTOIA 2005 section 687), but in practice the rules of calculating trading profits are normally followed.

1.4 Inconsistencies in the treatment of round sum allowances

1.4.1 However, volunteers for certain organisations receive what could be regarded as a very generous flat rate allowance, which appears not to give rise to tax issues. For example, magistrates (who are unpaid volunteers) currently receive daily subsistence of £7.34 for between four to eight hours and £10.23 for eight to twelve hours, provided that they have incurred at least some expenditure⁷. Magistrates, along with certain other people who perform public service, are also entitled to receive a tax-free subsidy in respect of a potential loss of earnings whilst engaged on those duties; however, if the recipient is self-employed, the allowance may be taxable as trading income⁸.

1.4.2 But then the voluntary sector seems to have its own exceptions, especially when linked to the public sector. For example, volunteers for the UK Warning and Monitoring Organisation (who warn the public of air attack and the approach of radioactive fall-out following a nuclear attack) are entitled to a tax-free attendance allowance⁹.

1.4.3 It is unsurprising that there is so much confusion regarding reimbursements for out-of-pocket expenses to volunteers when such a patchwork system is in place.¹⁰

1.5 Trustee expenses

1.5.1 Under general trust law, a trustee (who might also be called a director or member of the management committee) may not receive payment from the charity unless this is specifically allowed under the governing document. Even then, the trustees need to record in their minutes that certain conditions have been satisfied. If the conditions are not satisfied, a trustee may have to refund the sums paid.¹¹

1.5.2 The Charity Commission cites the following as examples of legitimate expenses:

- *‘the reasonable cost of travelling to and from trustee meetings, and on trustee business. This can include public transport, taxi fares and*

⁷ Rates effective from 1 August 2008, Her Majesty’s Courts Service
<http://www.magistrates-association.org.uk/documents/hmcs/magistrates-allowances/magistrates-allowances-1.8.08.pdf>

⁸ Employment Income Manual (EIM) 01120 and Business Income Manual (BIM) 40475

⁹ Employment Income Manual (EIM) 71000

¹⁰ A similar situation arises with respect to the benefits system. For example, councillors on non-means-tested benefits can earn over £86 a week and keep entitlement to incapacity benefit, but have it reduced for earnings over that amount. Councillors can also have travel expenses from home to work treated as ‘necessary’ which are therefore ignored, and work as a councillor is treated as ‘exempt’, therefore not bringing into question a person’s incapacity. See Benefit Barriers to Involvement, Commission for Social Care Inspection (CSCI), October 2007 (pp24).
http://www.csci.org.uk/PDF/benefit_barriers.pdf

¹¹ More information regarding trustee expenses can be found in the Charity Commission guide, The Essential Trustee: What You Need to Know CC3 and Payment of Charity Trustees CC11.

petrol allowances to the level permitted by... HMRC... before tax becomes payable;

- *reasonable refunds for the cost of meals taken while on charity business;*
- *the reasonable cost of childcare, or care of other dependants (for example, an elderly parent) whilst attending trustee meetings;*
- *the cost of postage and telephone calls on charity business;*
- *the cost of a trustee's telephone rental and broadband subscription, so long as these are split to reflect the percentage of time relating to usage on behalf of the charity;*
- *communication support: translating documents into Braille for a blind trustee, or into different languages; provision of alerting or listening devices, and other special aids for people with hearing impairment;*
- *the costs of buying training materials and publications relevant to trusteeship;*
- *providing special transport, equipment or facilities for a trustee with a disability; and*
- *cost of reasonable overnight accommodation and subsistence (including any essential care costs) while attending trustee meetings or other essential events such as voluntary sector conferences or specialist training courses.¹²*

1.5.3 One might hope that stringent reimbursement rules set by the independent regulator for charitable activity would not give the various arms of Government any issues for recipients. But hopes are not always fulfilled in the area of voluntary activity and it may be wise for HMRC clearance to be obtained.

1.5.4 There are additional complications if the volunteer is also an office-holder; for example, a director of a charity incorporated as a company limited by guarantee. The HMRC Employment Income Manual states that the same principles regarding the reimbursement of expenses apply to office-holders as to other volunteers. The guidance goes on to say that if the sums involved are small, HMRC should not spend time examining the extra expenses that they incur as a result of holding office. However, the guidance then states that this only applies to 'small' amounts of travelling and subsistence payments. If the reimbursements to office-holders amount to £8,500 or more per tax year (calculated on a source-by-source basis unless those sources can be linked), they will be treated as earnings by virtue of ITEPA 2003 section 72.¹³

1.5.5 Therefore, even if unpaid, the office-holder risks being taxed on expenditure incurred as a result of the voluntary activity. This may be a sobering thought to those who incur high travel costs.

1.6 Asylum seekers

1.6.1 An asylum seeker is not allowed to have paid work, but can volunteer. Any breach of this condition could have a detrimental effect upon the person's asylum application. This is one of the reasons why Volunteering England does not

¹² CC11, Section D1

¹³ Employment Income Manual (EIM) 71100.

recommend any round sum treatment for any volunteer¹⁴, even when agreed with HMRC.

1.7 Benefits in kind

1.7.1 For tax purposes it is necessary not only to consider the nature of the expenses, but the methods by which the expenses are met. If a service user hires a taxi to go to a hospital meeting and then is reimbursed in cash this could well be a taxable event. But if the hospital arranged for a taxi company to pick up the service user from home and deliver them to the hospital on the hospital's own taxi account, then no taxable event is likely to have occurred.

1.7.2 Following tax simplification measures outlined by HM Treasury in the 2007 Pre-Budget Report¹⁵, HMRC explored in consultation¹⁶ the possible abolition of the rule which allows low-income workers (under £8,500 per annum) to be exempt from most of the rules which tax benefits in kind, or perks, provided to employees by their employers. However, in April this year the Government announced¹⁷ that it had decided not to do so and cited the interests of the voluntary sector.

1.7.3 But the debate should be considered far from over. There is only a commitment to retain the threshold as it stands and we understand there is no intention for it to be uprated in future. With inflation, the protection that the £8,500 threshold offers will be gradually eroded. We believe the projected impact of this should be assessed now and that plans ought to be made in advance to safeguard the future for volunteers.

1.8 Honoraria

1.8.1 An honorarium is an ex gratia payment made to a person for their services in a voluntary capacity where fees are not normally expected.

1.8.2 The Charities Commission regards an honorarium to a trustee, even if it is a modest or token sum, as a form of payment and therefore only to be made where the trustees are satisfied that it is in the best interests of the charity. In some cases, for example where the total value of all trustee payments exceeds £1,000 in a year, the charity may need to seek express authority from the Commission for payment.¹⁸

1.8.3 Some charities and service providers have advised that paying an honorarium will not be classed as income for tax purposes. For example, the guidance to service users in 'Valuing Involvement' (developed with involvement of the DWP) states:

¹⁴ Volunteering England, Volunteer Expenses Information Sheet
<http://www.volunteering.org.uk/Resources/goodpracticebank/Information/volunteerexpenses.htm>

¹⁵ 'Delivering tax simplification' - http://www.hm-treasury.gov.uk/d/pbr_csr07_chapter4_p68_9.pdf

¹⁶ Benefits in kind and expense payments in the payroll – a fresh approach, 13 December 2007

¹⁷ Summary of Responses: Benefits in kind and expenses payments through the payroll

¹⁸ Charities Commission guidance CC11, D5 and F8.

*'Where a conference, seminar, focus group or other form of involvement is a once only event...HMRC have confirmed that a one off cash gift in these circumstances is not taxable. No tax and NI should be deducted. HMRC do not wish to be notified.'*¹⁹

1.8.4 However, it is possible that this guidance could mislead. The fact that the gift is a one off is not the only criterion to consider; the payment also has to be unexpected. Therefore, if it is common practice to make a one off payment or the volunteer knew about the arrangement in advance, the sum might not be considered to be an honorarium and might be liable to tax. We understand that HMRC themselves provide non-taxable cash honoraria to volunteers who partake in their customer market research studies.

1.8.5 This is not a straightforward issue and the lack of clear guidance from HMRC on the topic does not make matters easier. As part of this research, we contacted HMRC's Self Assessment Helpline on behalf of an elderly mother who had been given a one off unexpected payment by her health trust to reward involvement. The advice we were given was that the sum would be taxable, even though in this case it appeared that it probably would be tax-free.

1.8.6 It seems that some charities have fallen foul of the honorarium trap. The website for the Methodist Church, for example, states regarding honoraria: *'Several organisations have got into trouble recently and had to pay substantial sums to the Inland Revenue in back payment.'*²⁰

1.9 The wholly, exclusively and necessarily rule

1.9.1 Tax law takes a strange approach to payments or reimbursements of expenses. As described above, if they are not specifically exempt, they are taxable in full, though certain types of expenses may be deducted from the total. Where the lines become blurred between paid work and voluntary activities (for example if a round-sum treatment is adopted as described above), volunteers may find themselves entangled in arguments with HMRC as to the tax treatment of out-of-pocket expenses.

1.9.2 Expenses incurred by self-employed people are deductible if, and only if, they are incurred 'wholly and exclusively' for the purposes of the business. This is a very strict test. Thus, a lady barrister could not obtain a deduction for the cost of a formal black dress she was obliged to wear in court because she wore it also for 'warmth and decency'. There was 'duality of purpose', so that she could not claim to wear it 'wholly and exclusively' for the one purpose of her profession.²¹

1.9.3 Where expenses are incurred by an employee, the criteria for deductibility are even stricter – the word 'necessarily' is added to the 'wholly and exclusively' test and

¹⁹ Valuing Involvement. Care Service Improvement Partnership (CSIP) and National Institute for Mental Health in England (NIMHE), August 2007. (See Section 6)
http://www.spn.org.uk/fileadmin/SPN_uploads/Documents/valuing_involvement.pdf

²⁰ <http://www.methodist.org.uk/index.cfm?fuseaction=opentoyou.content&cmid=65>

²¹ *Mallalieu v Drummond* (Inspector of Taxes) - [1983] STC 665

the amount must be incurred 'in the performance of the duties of the employment'²². Thus, a rugby player employed by his club could not claim a deduction for the cost of various dietary supplements and medications he took in order to keep himself at the level of physical fitness required by his contract. While it was a condition of his employment that he maintain that level of fitness, his contract did not oblige him to take those particular dietary supplements and medications in order to do so²³.

1.9.4 As can be seen, these rules are complex and full of subtle distinctions and can apply where the lay person might not expect it. An older person who took part in a voluntary university research project commented:

*"At the moment, one of our members is contacting the Inland Revenue about a payment for attending a seminar. I realise that this is a grey area, one does expect to pay income tax if eligible, but when the costs outweigh the benefits, it is disheartening, and some people cannot afford to be involved with participatory projects."*²⁴

1.10 Employed or self-employed?

1.10.1 In establishing that a payment of expenses is taxable wholly or in part and the manner in which it is to be taxed, there are sometimes also difficulties in determining the tax status of the 'volunteer'. That is to say, are they an employee, or self-employed, or should the payment be taxed under the rules relating to receipts of miscellaneous income²⁵? The guidance for service users, 'Valuing Involvement', states that if a service user or carer is self-employed, they must supply their registration number and details of tax office. The Development Centre or Trust can then contact the tax office to check.²⁶ However, we understand that due to taxpayer confidentiality HMRC would not in fact be able to confirm this information.

1.10.2 A major voluntary sector organisation told us that they liked to offer paid service users a choice as to whether to be employed or self-employed. They also said that where the service user decided to be self-employed, HMRC often waived the tax due by concession because of the small amounts involved. This pragmatic approach by both service provider and HMRC would, prima facie, seem to be helpful to the low-income volunteer. But, it would be unnecessary if HMRC followed their own guidance regarding service users, which states that:

²² Section 336 Income Tax (Earnings and Pensions) Act 2003

²³ *Emms v Revenue and Customs Commissioners* SpC 668

²⁴ Quoted in *Contributing on Equal Terms: Service User Involvement and the Benefits System*. Social Care Institute for Excellence (SCIE), October 2005 (see Section 5, pp23). <http://www.scie.org.uk/publications/reports/report08.pdf>

²⁵ Income Tax (Trading and Other Income) Act 2005, Section 687

²⁶ *Valuing Involvement*. Care Service Improvement Partnership (CSIP) and National Institute for Mental Health in England (NIMHE), August 2007 (see Section 8.5ff, pp28, 29). http://www.spn.org.uk/fileadmin/SPN_uploads/Documents/valuing_involvement.pdf

‘...HMRC agrees that the amounts paid to those concerned are unlikely to fall within the definition of “earnings” for PAYE or NI purposes. No employment relationship exists and as such PAYE and NIC would be inappropriate.’²⁷

1.10.3 The experiences of service users and providers suggest that HMRC are not always aware of this guidance. It is, in itself, rather at odds with general HMRC policy and practice which usually seek to consider the terms and conditions of each arrangement on its own merits.

1.10.4 Status law can be complex and guidance points the volunteer to HMRC’s leaflet IR56 or the online Employment Status Indicator (ESI). However, IR56 was withdrawn on 17 October 2008 (having been replaced by two inadequate factsheets²⁸), the ESI is not straightforward and, generally speaking, the information on HMRC’s website is hard for the layman to digest. With HMRC increasingly relying on computer programs which are not devised with the volunteer in mind, there is a risk that status will be challenged. Unless the volunteer and/or the payer has professional advice on call, it can result in an unexpected and unwelcome bill, and potentially also a penalty on any unpaid tax.

1.11 Operating PAYE

1.11.1 Where it is accepted that the service user/volunteer will fall into the charge to tax, there is some confusion as to the mechanism for paying the tax to HMRC. One assistant director of finance who was involved with payments to service users and carers was told that it was insufficient for recipients to sign a declaration that they would inform HMRC of any earnings they received and instead payments would have to go through the payroll.

1.11.2 However, another user-controlled organisation was told that all they needed to do was to provide details of how much each person had been paid during the year with a signed declaration from each person to say that this was the only income they received apart from their benefits²⁹. Three respondents to a survey by the General Social Care Council reported that they had not been paid anything yet because of tax problems and because it was so difficult.³⁰

1.12 Gift Aid

1.12.1 Gift Aid is a scheme whereby taxpayers can donate a net sum to a charity out of taxed income, and the charity can reclaim the basic rate tax which the taxpayer will have paid on that sum.

²⁷ Employment Income Manual (EIM) 71105.

²⁸ ES/FS1 – Employed or self-employed for tax and National Insurance contributions, and ES/FS2 – Are your workers employed or self-employed for tax and National Insurance contributions

²⁹ Contributing on Equal Terms: Service User Involvement and the Benefits System. Social Care Institute for Excellence (SCIE), October 2005 (see pp23).
<http://www.scie.org.uk/publications/reports/report08.pdf>

³⁰ Working Towards Full Participation. General Social Care Council, 2005 (see pp36).
<http://www.gsc.org.uk/NR/rdonlyres/CC4E1B8D-3883-44D8-80C9-E6C1D9E54AE1/0/Fullparticipationreportfinal05final.pdf>

1.12.2 Many volunteers are reluctant to claim expenses for altruistic reasons. Twenty-nine per cent of volunteers told the Helping Out national survey that they saw expenses as a form of donation to the organisation, while the same number thought that asking for expenses to be reimbursed would be like taking the money away from the organisation.³¹

1.12.3 HMRC are often asked by charities if they can claim gift relief on expenses foregone by volunteers. Unfortunately, one of the requirements of the Gift Aid scheme is that a gift by a donor to a charity *'takes the form of a payment of money'*³². Therefore, a Gift Aid payment to a charity cannot merely be a book entry: the charity must pay the expenses to the volunteer who is then free to pay all or part of it back to the charity in the form of Gift Aid³³. This may act as a disincentive to the volunteer.

1.12.4 If an exception were made in the case of foregone expenses, it would not be unique in terms of the charitable gifts legislation. Special reliefs are available for Income Tax and Capital Gains Tax where qualifying investments and interests in land are gifted or intentionally transferred at undervalue to a charity³⁴. In addition, individuals may gift their tax repayment to charity direct through the 'SA Donate'³⁵ system on their annual self assessment tax return.

1.12.5 There are also arrangements which allow charities to circumvent the 'gift of money' rule where donations of items for sale by the charity are made. These work by the charity shop acting as 'agent' for the donor in terms of selling the donated items, with the donor agreeing (once the goods have been sold) that the charity can keep the proceeds and a Gift Aid claim is made accordingly. HMRC's guidance states:

'After the goods are sold you must write to the supporter to confirm that they want to donate all or part of the sale proceeds to your charity....

Alternatively you can write to tell the supporter how much the sale proceeds were and explain that you intend to treat the whole amount as a gift to the charity unless they contact you within 21 days to say they want to keep the proceeds.

*You must then give them at least 21 days to respond to this letter before you treat the proceeds as a donation to your charity.*³⁶

³¹ Helping Out. Cabinet Office, Office of the Third Sector, September 2007 (see section 6.3). http://www.cabinetoffice.gov.uk/~media/assets/www.cabinetoffice.gov.uk/third_sector/helping_out_national_survey_2007%20pdf.ashx

³² Section 416(2) Income Tax Act 2007

³³ HMRC website guidance for Charities 'Voluntary workers' expenses' http://www.hmrc.gov.uk/CHARITIES/gift_aid/vw-expenses.htm

³⁴ Part 8, Chapter 3 Income Tax Act 2007 and Section 257 Taxation of Chargeable Gains Act 1992

³⁵ Section 429 Income Tax Act 2007

³⁶ HMRC website guidance for charities 'Selling goods on behalf of individuals' http://www.hmrc.gov.uk/CHARITIES/gift_aid/selling-ind.htm#2

1.12.6 Yet there seems to be no requirement here for the charity to physically pay the proceeds to the donor and then ask them to send it back again – so why is there a need for this ‘double-cheque’ arrangement in the context of expenses?

1.12.7 Following a reduction in the basic rate of tax from 22% to 20% from 6 April 2008 (as announced in Budget 2007) and a period of consultation on the Gift Aid scheme, Schedule 19 of Finance Act 2008 introduced a transitional supplementary relief for charities for three years, ending in 2010/11. As the Government are keen to soften the blow when the transitional relief comes to an end, we recommend that they review the treatment of foregone expenses.

1.12.8 Until recently, the HMRC guidance³⁷ regarding this issue also failed to advise the volunteer that, if they are to use the Gift Aid scheme, they must have paid enough tax in the year to cover the tax on the gift (as it stands now, the guidance remains limited and, in our view, inadequate). If they have not, HMRC may decide to recover the tax from the volunteer if the charity reclaims tax that has not been paid. The low-income volunteer may therefore find themselves faced with a tax bill as a reward for their generosity. It is true that in 2002 and again in 2004 the then Economic Secretary to the Treasury, John Healey, gave an assurance that, if the Inland Revenue (i.e. HMRC today) were to discover during an audit that a charity had claimed relief on a gift by a non-taxpayer, then, even though in law the liability was that of the donor, in practice it would look to the charity for repayment³⁸. But in practice, for a variety of reasons, this hardly ever happens and the donor in fact often bears the cost. For example, non-taxpayers claiming a repayment of tax deducted at source on bank interest will have their repayment restricted by the amount of the tax due on the gross equivalent Gift Aid donation (as noted in our submission to the 2007 HM Treasury consultation³⁹).

1.13 Lack of guidance from HMRC

1.13.1 The complexities surrounding volunteering and tax are exacerbated by a lack of guidance and even where guidance is available, by the failure to keep it up-to-date. This problem is epitomised by the rules surrounding volunteer drivers. This is not a straightforward topic and the volunteer is required to wade through eight pages of HMRC explanations and examples relating both to the tax free mileage scheme and how to keep a record of actual motoring expenses. It must then be disheartening to find that the guidance refers to the 2002-03 tax year.

1.13.2 The tax free mileage rates have not subsequently changed (which is an anomaly in itself), but reference to a tax year long past could still be confusing for the volunteer. Moreover, the guidance notes refer to an obsolete leaflet (IR90: Tax Allowances and Reliefs) and throughout HMRC are referred to as the Inland Revenue.⁴⁰ HMRC used to be able to provide volunteers with leaflet IR122, Volunteer Drivers, but this has now been withdrawn. In recent years, HMRC have

³⁷ HMRC website guidance ‘Giving to charity through Gift Aid’ - <http://www.hmrc.gov.uk/charities/donors/gift-aid.htm>

³⁸ Hansard, Finance Bill Standing Committee, 13 June 2002, col 402; also 6 July 2004, col 728

³⁹ <http://www.litrg.org.uk/reports/submissions.cfm?id=464>

⁴⁰ <http://www.hmrc.gov.uk/mileage/volunteer-drivers.htm>

withdrawn a substantial number of leaflets from circulation, focusing more upon information on the internet. However, according to 2008 figures from the Office for National Statistics only 65% of households in the UK have internet access⁴¹, and lack of access is concentrated disproportionately amongst people on low incomes and on certain sectors of society⁴².

1.13.3 In 1999, the Inland Revenue contributed to a Government Consultation, 'A Review of Charity Taxation'. The report stated:

*'We also recognise the important role that charity workers play in helping charities to carry out their activities, whether they be paid employees of the charity, employees on secondment from business or volunteers. They all carry out essential work in our local communities. This chapter contains suggestions for improving the guidance for charities on the tax treatment of payments to charity workers.'*⁴³

1.13.4 The report then goes on to say that charities could benefit from having a charities helpline to cover both direct and indirect taxes which would offer them advice covering a range of issues. Unfortunately, however, the Charities Helpline (which also covers Community Amateur Sports Clubs) does not deal with issues pertaining to volunteer expenses, status etc and instead the volunteer needs to contact 'their own tax office' or the Self Assessment Helpline, neither of which is staffed by charities experts. The result is that the volunteer cannot always be guaranteed to receive the correct guidance, an example being the phone call referred to above regarding honoraria. HMRC staff cannot really be blamed for providing incorrect advice, as they are faced with the same inadequate guidance notes.

1.13.5 Later in the report (para 6.11), the then Inland Revenue recognised that charities could find rules regarding PAYE etc 'complex and difficult to apply' and said that they would introduce a new leaflet with practical advice and worked examples. They also said that they intended to improve existing guidance, such as in leaflet IR122. The promised leaflet has yet to materialise and, far from being improved, IR122 has been withdrawn.

1.13.6 As part of this project, we have reviewed a number of independent reports, guidance documents and websites relating to service providers. On the whole, the information provided was accurate and helpful. For example, most counselled against making round sum expenses payments and clearly explained what types of expenditure could be claimed. However, often the guidance tends to be written with the benefits legislation in mind and, although many of the principles are similar, this is not explicit. For example, 'Valuing Involvement' explains the effect of the notional earnings rule in respect of benefits and the national minimum wage, but does not mention its potential impact on working and child tax credits claimants (see below).⁴⁴

⁴¹ <http://www.statistics.gov.uk/CCI/nugget.asp?ID=8&POS=&ColRank+374>

⁴² Communities and Local Government research on Digital Inclusion - <http://www.communities.gov.uk/communities/digitalinclusion/>

⁴³ Review of Charity Taxation Consultation Document. HM Treasury, March 1999. <http://www.hmrc.gov.uk/consult/rct.pdf>

⁴⁴ Valuing Involvement. Care services Improvement Partnership (CSIP) and National Institute for Mental Health in England (NIMHE). August 2007. http://www.spn.org.UK/fileadmin/SPN_uploads/Documents/valuing_involvement.pdf

1.14 Tax credits

1.14.1 Indeed, there is little guidance on the tax credits issues. The tax credits legislation states that a claimant is only eligible for working tax credit if they meet certain hours and age requirements and are in paid work.⁴⁵ The work done by a volunteer who only receives reimbursed expenses is specifically excluded as paid work under the tax credit legislation⁴⁶.

1.14.2 However, if volunteers start being paid for their activities, they may become eligible for working tax credit provided all other conditions are met. This would apply to volunteers who have unintentionally been paid more than reimbursed expenses as well as service users who have been paid for their time. It would be worthwhile for this to be brought to the attention of the volunteer in the guidance provided by HMRC and voluntary/service user organisations. There is also a wider policy issue of welfare reform in terms of encouraging people back into paid work via volunteering.

1.14.3 If a person does qualify for tax credits, any payment in respect of any expenses incurred in volunteering is excluded when calculating income for tax credits purposes⁴⁷. Again, this is an important point that should be brought to the attention of volunteers.

1.14.4 The volunteer also needs to be wary of the notional income rules for tax credits. These state that if a tax credits claimant provides a service and receives no earnings or earns less than a comparable employment, trade or business in that area would pay, the claimant may be treated as having an amount of income that is reasonable for that employment, trade or business⁴⁸.

1.14.5 The notional income rules do not apply to claimants who are volunteers, or are engaged to provide a service to a charitable or voluntary organisation, provided HMRC are satisfied that it is reasonable to provide the service free of charge.⁴⁹ This 'reasonableness' test could potentially be an issue where there is differing treatment for volunteers doing the same work and particularly for service users who are given the option of either voluntary or paid involvement or a combination of the two.

⁴⁵ Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/2005, Reg 4(1)

⁴⁶ Ibid. Reg 4(2)(a)

⁴⁷ Tax Credits (Definition and Calculation of Income) Regulations 2002, SI 2002/2006, Reg 19 Table 7, Item 1

⁴⁸ Ibid, Reg 17(1)

⁴⁹ Ibid, Reg 17(2); also HMRC's Tax Credits Technical Manual (TCTM) 04805

2 Welfare benefits and the low-income volunteer

2.1 Reimbursement of expenses

2.1.1 The welfare benefits rules in relation to voluntary work have been summarised in a document produced by Volunteering England's Policy and Information Team. For example, for Jobseeker's Allowance, voluntary work is regarded as being unpaid:

'...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'.⁵⁰

2.1.2 It follows that, as for tax purposes, the reimbursement of out-of-pocket expenses should not affect benefits. At the same time, there is again the risk that a round sum allowance is treated as income. As with the tax legislation, this would also mean that reimbursed expenditure such as travel from home to the place of volunteering/involvement and childcare would be treated as income for benefits purposes. This can often result in confusion for the low-income volunteer, particularly since guidance can be contradictory.

2.1.3 The DWP Guide to Volunteering While on Benefits used to state, rather vaguely:

'If you get anything more than your expenses, we will treat everything that you get paid as 'earnings' but we may still be able to ignore some of your expenses, depending on what they are for.'

2.1.4 The updated Jobcentre Plus guidance now gives the following slightly more comprehensive message:

'...you must tell us about:

- *all your expenses (remember to keep your receipts)*
- *any money you get on top of expenses (this counts as earnings), and*
- *anything else you are given (this may not be money).*

Always talk to your personal adviser before you start volunteering. They can tell you if volunteering will change the amount of benefits you receive. If you live with your parents or partner, their benefits could be affected if you get money or anything else on top of expenses.'⁵¹

2.1.3 Yet the recent DWP Green Paper on welfare reform⁵² clearly recognises that *'voluntary activity can have many advantages for unemployed people as well as the wider community'* and states that *'**Any** money paid to refund expenses incurred during voluntary activity is fully disregarded when working out benefit entitlement'* [emphasis added].

⁵⁰ <http://www.volunteering.org.uk/NR/rdonlyres/81032428-3697-4C4F-98AF-A22840E6112E/0/BenefitsJSAandIBRegulations.pdf>

⁵¹ Volunteering while receiving benefits
http://www.jobcentreplus.gov.uk/JCP/stellent/groups/jcp/documents/websitecontent/dev_015837.pdf

⁵² No one written off: reforming welfare to reward responsibility, Chapter two – An obligation to work, para 2.82 et seq

2.1.4 We think it is disappointing that the new guidance from Jobcentre Plus (whilst being an improvement on the former DWP information) does not go far enough to advise potential volunteers on the expenses issue and the current wording may even act as a disincentive to potential volunteers who perceive seeing an adviser as an obstacle.

2.2 Benefits in kind

2.2.1 Welfare benefits law is not as sophisticated as tax law in the area of the provision of benefits in kind, but many of the principles are the same. Therefore there are advantages in providing expenses by direct provision by the engager rather than direct reimbursement. This is reflected in the advice given by the Department of Health in their expense guide Reward and Recognition which advises:

*'The provision by the service provider of travel cards or tickets or taxis (through an account with a taxi firm) or the provision of petrol (through an account at a garage) does not affect benefits in any way and can be a useful way of enabling increased involvement for some service users.'*⁵³

2.2.2 It seems extraordinary that one government department suggests that artificial arrangements be employed so as to defeat the rules of another. But, perhaps it is justified because the rules operated by the latter are in themselves lacking a coherent logic.

2.3 Earnings disregard

2.3.1 People who are in receipt of means-tested benefits (income support, housing benefit, council tax benefit and those who are funded by the local authority for the cost of their residential care) are only allowed to receive very small sums before their benefits are reduced. This is a major disincentive to service users on benefits taking part in paid consultations as it can limit their involvement to two to three hours per week. It also encourages artificial devices as mentioned in the last section.

2.3.2 Moreover, the rules relating to the earnings disregard can be complex. For example, with income support, only the first £5 of earnings are disregarded for those without a partner, the first £10 for those with a partner and the first £20 for a lone parent or for those in receipt of a disability premium⁵⁴.

2.4 Fear of losing benefits

2.4.1 Doing voluntary work does not itself call into question individuals' ability to work, and therefore their entitlement to disability benefits, no matter how many hours per week are spent on volunteering. In addition, volunteering is excluded from the

⁵³ Reward and Recognition, Department of Health, August 2006 (para 33)
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4138523

⁵⁴ IS20 – A guide to Income Support, Jobcentre Plus
http://www.jobcentreplus.gov.uk/JCP/Partners/Allowancesandbenefits/Dev_010126.xml.html

permitted work legislation.⁵⁵ However, volunteers have been challenged by Jobcentre Plus staff, some of whom seem to be unaware of their own rules. This has acted as a major disincentive to volunteering, as one service user stated:

*“I do worry about my involvement with the mental health service meetings in case someone decides I am too well to be on Incapacity Benefit and Disability Living Allowance”.*⁵⁶

2.4.2 The risk is even greater for those using residential care services as they may also be charged by their local authority for residential care charges.

2.5 Notional earnings

2.5.1 As with the tax credits legislation, volunteers are exempt from the benefits rules regarding notional earnings. However, for those who are deemed as ‘paid’ (eg due to poorly-structured reimbursement of out-of-pocket expenses) or choose to volunteer without pay, Jobcentre Plus can use the notional earnings regulations to deduct money from benefits. This principle is reinforced in Jobcentre Plus guidance:

‘What if I choose not to get paid for my work?’

Choosing not to be paid is not the same as volunteering. If you are doing something that someone would normally be paid for – for example, if you are working in business or for a member of your family where they would usually pay someone to do the work – we will class this as unpaid work and not volunteering.

...we might decide that what you would have been paid are ‘notional earnings’.

...

We decide by looking at whether:

- *someone would normally be paid to do the same kind of work*
- *your work helps society or your community in some way, and*
- *you work for a charity or similar group.*⁵⁷

2.5.2 Care is needed in waiving expense reimbursement in case it could be regarded as creating notional earnings.

2.6 Honoraria

2.6.1 There seems to be confusion regarding the payment of honoraria in a benefits context. The ‘Valuing Involvement’ guidance states that, for a once only event,

⁵⁵ The permitted work legislation allows those on incapacity benefit or income support (or the new Employment and Support Allowance) due to illness or disability to work for up to sixteen hours per week.

⁵⁶ Quoted in *Contributing on Equal Terms: Service User Involvement and the Benefits System*. Social Care Institute for Excellence (SCIE), October 2005 (pp16).
<http://www.scie.org.uk/publications/reports/report08.pdf>

⁵⁷ *Volunteering while receiving benefits*, pp10
http://www.jobcentreplus.gov.uk/JCP/stellent/groups/jcp/documents/websitecontent/dev_015837.pdf

people on benefit can be given a cash gift which is treated as capital, provided that does not take the volunteer's capital above the allowed limit (currently £3,000)⁵⁸.

2.6.2 However, Volunteering England counsels caution on using honoraria, one reason being that, even if ruled to be tax-free, they are likely to be treated as a benefit by Jobcentre Plus.⁵⁹ On undertaking a mystery shopping call to a local Jobcentre Plus, we were told that the sum would be treated as earnings, and there was no mention of the rules regarding capital. There seems to be no clear guidance on the treatment of honoraria on the DWP website. There is also a different approach taken by BERR in respect of the NMW. In the light of such disjointed guidance, it is unsurprising that there is confusion regarding this issue.

2.7 Lack of guidance and consistency

2.7.1 The position regarding honoraria is symptomatic of the lack of guidance provided by the DWP. This is emphasised by a survey undertaken by Citizens Advice, which found that 48% of CAB volunteers on benefits were concerned, before they started volunteering, that it might affect their benefits. Only 8% of CAB volunteers and clients said they received information from their Jobcentre Plus about the impact volunteering could have on their benefits.⁶⁰ Although for many, fears remained groundless (only 3% said that volunteering had an effect on their benefits), the lack of guidance provided by Jobcentre Plus must act as a disincentive to volunteering.

2.7.2 Due partly to the complexity of the rules, there is often inconsistent treatment of the volunteer on benefits:

"I've worked with several research projects led by people on benefit and this has been a continuing (and stupid) difficulty. Each local benefit officer can exercise their own discretion – don't have to take any notice of their predecessor or their neighbour officer in the next patch".⁶¹

2.7.3 This lack of consistency also extends to different parts of Jobcentre Plus. For example, some claimants were treated as employed by Jobcentre Plus but not by their own Access to Work⁶² scheme.⁶³ And we understand that benefits claimants

⁵⁸ http://www.spn.org.uk/fileadmin?SPN_uploads/Documents/valuing_involvement.pdf

⁵⁹ Frequently Asked Questions, number 37, Volunteering England website.
<http://www.volunteering.org.uk/Resources/information/50frequentlyaskedquestions/37isitoktopayvolunteershonoraria.htm>

⁶⁰ The Benefits Barrier. Citizens Advice Bureau, September 2005
http://www.citizensadvice.org.uk/the_benefits_barrier.pdf

⁶¹ Quoted in Contributing on Equal Terms: Service User Involvement and the Benefits System. Social Care Institute for Excellence (SCIE), October 2005 (pp12).
<http://www.scie.org.uk/publications/reports/report08.pdf>

⁶² Access to Work:
http://www.direct.gov.uk/en/DisabledPeople/Employmentsupport/WorkSchemesAndProgrammes/DG_4000347

⁶³ Quoted in Contributing on Equal Terms: Service User Involvement and the Benefits System. Social Care Institute for Excellence (SCIE), October 2005 (pp12).
<http://www.scie.org.uk/publications/reports/report08.pdf> (pp23).

who volunteer can often be confused about expense claims – do they provide the original receipts to the volunteer-involving organisation or to Jobcentre Plus?

2.7.4 Similarly, there is a lack of co-ordination between the DWP and HMRC. For example, one volunteer talked about being part of the volunteer driving scheme for HMRC purposes, but this being treated as income by the DWP. This led the volunteer to conclude: “There is a mismatch between the two government departments.”⁶⁴

⁶⁴ Volunteering for All? Exploring the Link between Volunteering and Social Exclusion. Institute for Volunteering Research, 2004 (pp33).
<http://www.ivr.org.uk/NR/rdonlyres/DA958DB4-FDF8-4943-AA26-C9C9B202A34B/0/fullreport.pdf>

3 National minimum wage and the low-income volunteer

3.1 Legislative background

3.1.1 BERR are the government department responsible for policy on the NMW, with HMRC bearing responsibility for enforcement. BERR explain who is entitled to the NMW as follows:

*'Most workers in the United Kingdom over compulsory school age are entitled to be paid at least the national minimum wage. If you have a contract of employment you are a worker. Even if you do not have a contract of employment, you are a worker if you are doing work personally for someone else (under a worker's contract, such as a contract to personally perform services) and are not genuinely self-employed. The contract does not need to be written; it may be an implied contract or an oral contract. People such as homeworkers, agency workers, casual labourers, part-time workers and workers on short-term contracts are all entitled to the national minimum wage. It does not matter when or how a worker is paid – e.g. a worker may be paid by the month, week, day, session or hour and by cash, cheque, bank transfer or other method.'*⁶⁵

3.1.2 The Low Pay Commission note in their 2008 report⁶⁶ that:

'Voluntary workers are a group given a particular meaning in the National Minimum Wage Act. When working for specific organisations (a charity, voluntary organisation, associated fund-raising body, or a statutory body), and receiving only very specific payments and benefits-in-kind (such as necessary expenses incurred, reasonable subsistence or training required to perform the work) they are excluded from minimum wage coverage. The objective of this arrangement is to ensure that genuine 'volunteers' may continue to work (and receive necessary expenses) without minimum wage liability, while 'workers' in the voluntary sector retain their right to be paid at least the National Minimum Wage.'

3.1.3 However, the NMW does apply where payment is received and this includes the payment of round sum expenses over and above the amounts actually incurred, as well as payments made to reward service users.

3.2 Problems in practice

3.2.1 Indeed, Volunteering England heard of HMRC compliance officers being called in to review a case where volunteers were being paid round sum payments of £5- £6 per day to cover expenses.⁶⁷ An agreement was reached with HMRC (who enforce

⁶⁵ National Minimum Wage Guide , BERR, Revised September 2008 (pp11).
<http://www.berr.gov.uk/files/file47736.pdf>

⁶⁶ National Minimum Wage, Low Pay Commission Report 2008, para 3.59 -
www.lowpay.gov.uk/lowpay/report/pdf/2008_min_wage.pdf

⁶⁷ Volunteers and the Law. Volunteering England.
http://www.volunteering.org.uk/NR/rdonlyres/4D224B2A-CB11-4529-9A95-BA4018209641/0/volunteers_and_the_law.pdf

the BERR rules) where some volunteers were taken on as paid employees and some just reimbursed expenses. The punishment could have been more severe, as upheld claims can be backdated as far as 1 April 1999 and substantial penalties levied for non-compliance (with the penalty provisions to be strengthened through the Employment Act 2008).

3.2.2 It becomes the employer's responsibility to distinguish whether a person is a volunteer or a voluntary worker and the definition of worker in this context is wider than an employee or office-holder for tax purposes. There are subtle distinctions which almost require a lawyer to interpret and these not only relate to worker status.

3.2.3 For example, where the voluntary worker is assigned from a charity to a qualifying organisation, they may receive monetary payment (solely) for subsistence. Therefore, residential volunteer A who receives 'pocket money' and is employed directly by the charity will be entitled to rights under the NMW legislation, whilst residential volunteer B who has been assigned by a charity but otherwise works under exactly the same conditions, will not be.⁶⁸

3.2.4 BERR acknowledged that there were inconsistencies with the NMW and launched a consultation in June 2007.⁶⁹ Some charities were paying their voluntary workers round sum subsistence allowances of £50 to £60 a week as well as training, accommodation and childcare costs. Following the consultation, the Government proposed to offer a new exclusion for those charities that are supported by the national framework for youth volunteering, supporting the aims of the Russell Commission. An exemption was also proposed for the Cadet Force Adult Volunteers.⁷⁰

3.2.5 As well as the Government providing a rather piecemeal approach to solving this problem, the consultation process itself highlighted a number of concerns regarding the complexities and inconsistencies in the NMW. For example, evidence was provided of uncertainty regarding the boundaries of monetary payments and benefits in kind under Section 44 and there was also confusion around the fact that the legislation talks about 'voluntary workers' and regards 'volunteers' as being completely outside the scope of the National Minimum Wage Act 1998 ('NMW Act').

3.2.6 For example, the Government responded to BERR's June 2007 consultation by saying that '*...reimbursement of childcare expenses represents a significant benefit in kind and as such would change the nature of the relationship between voluntary worker and qualifying organisation*'. This is a puzzling approach when compared with the general approach of the other government departments and the wider governmental objective of moving parents off benefits and into work (with volunteering representing a useful stepping stone to build skills etc).

⁶⁸ Example given in A Detailed Guide to the National Minimum Wage, BERR (formerly the Department for Trade and Industry), October 2004, (section 43):

<http://www.berr.gov.uk/files/file11671.pdf>.

Note: this guidance has now been replaced by National Minimum Wage Guide, BERR, updated September 2008 (pp22 and 23), where specific examples are no longer given:

<http://www.berr.gov.uk/files/file47736.pdf>

⁶⁹ Consultation on the National Minimum Wage and Voluntary Workers, June 2007.

<http://www.berr.gov.uk/files/file39857.pdf>

⁷⁰ National Minimum Wage and Voluntary Workers: Government Response to Consultation, October 2007. <http://www.berr.gov.uk/files/file42602.pdf>

3.2.7 Although the Government's initial response⁷¹ was that they did not intend to make any changes to the scope of Section 44 of the NMW Act in terms of payments to voluntary workers, an amendment has now been made via the Employment Act 2008 (which was given Royal Assent on 13 November 2008). We hope that this amendment will help to resolve some of the issues:

'14 Voluntary workers

In the National Minimum Wage Act 1998, in section 44 (voluntary workers), after subsection (1) there is inserted—

*“(1A) For the purposes of subsection (1)(a) above, expenses which—
(a) are incurred in order to enable the worker to perform his duties,
(b) are reasonably so incurred, and
(c) are not accommodation expenses,
are to be regarded as actually incurred in the performance of his duties.”⁷²*

3.2.8 However, clear guidance will be necessary in terms of interpreting this new provision. On debating it, the Lords made several observations as to the complexities which remain. For example, the interaction of the above new rule for NMW purposes with principles of taxation will still need careful consideration. Lord Jones of Birmingham said of the changes:

“When I was trying to get my mind around it the other day, I went all the way back to my tax law at university to think about it. The distinction between expenses allowable for self-employment and those for employment is the word “necessarily”. I tried to transpose that into the application here. This is not about tax law, but about what is or is not caught under an employer's obligation under the National Minimum Wage Act. So if something was transposed into the national minimum wage that, in the minds of the noble Baroness and myself, would not have been incurred necessarily and was therefore not allowable under Schedule E taxation, it would be deemed remuneration for the purposes of the calculation of the national minimum wage. It would have nothing to do with the Revenue. It would be caught under that method of calculation. The employer would therefore be caught by the National Minimum Wage Act 1998.

Now that word is being moved so that, although this type of expenditure would not be necessarily incurred—so it would be caught under Schedule E taxation and not allowable—here, and only in NMW terms, not Revenue terms, it will be deemed not to be remuneration. Therefore the employer does not get caught, is more minded to take on the voluntary worker and, in certain situations such as childcare, the voluntary worker can now do it. We leave them outside the NMW. If that was inside the HMRC but not the NMW environment, it would still fall foul of Schedule E and not be allowable because it was not incurred necessarily. What is important is not the taxation application, but the “necessarily” principle of taxation.”⁷³

3.2.9 And when asked who will determine what is 'reasonable', he went on to say:

⁷¹ National Minimum Wage and Voluntary Workers: Government Response to Consultation, October 2007 (section 2.12ff). <http://www.berr.gov.uk/files/file42602.pdf>

⁷² Employment Bill
<http://www.publications.parliament.uk/pa/cm200708/cmbills/151/2008151.pdf>

⁷³ Hansard, Lords Committee Stage Debate (Third Sitting), 13 March 2008, Col GC267

“The test of reasonableness will ultimately be decided by a judge in a tribunal somewhere and will go through two or three hurdles on the way: first, common sense; secondly, the inspectorate, rightly; thirdly, probably someone from HMRC in some form of inquiry; and, lastly, anyone who disagrees with the test of reasonableness has every right to go to an adjudicator or a tribunal to understand what it is.”⁷⁴

3.2.10 But clearly in most situations it should not be necessary to resort to taking a case to tribunal (which will be rather too late in the day for those engaging the services of volunteers who have already fallen foul of the provisions). The above statement therefore reinforces the need for proper guidance – produced in consultation with the voluntary sector and other interested government departments - at the outset.

3.2.11 Adding weight to our arguments for an across-the-board review, Baroness Wilcox also commented:

“...I draw the noble Lord's attention to an adjustment that the Department for Work and Pensions made two years ago when attention was drawn to the effect that volunteering expenses had on state benefits. It was pointed out that many beneficiaries of jobseeker's allowance and incapacity benefit should be actively encouraged to seek voluntary work. As I mentioned, such work has a proven effect on a person's self-confidence and health, and can give them valuable experience and training before they become immersed in the world of paid employment.

On 9 October 2006, therefore, the Department for Work and Pensions announced that meal expenses and so on would not affect benefits, and so recipients could work towards re-entering the job market without fear of being penalised. Today, the Minister has repeated what the Department for Work and Pensions said two years ago. Therefore, the question is: why on earth has it taken two years for a lesson that one department learnt to be taught to another? The situations are practically identical.”⁷⁵

3.2.12 It is worthwhile noting that, as well as being entitled to the NMW, if volunteers are considered to be workers, they would have access to a number of other rights such as paid holiday entitlement and rights under the Working Time Regulations. If volunteers are deemed to be employees rather than a workers, they become entitled to further rights such as, inter alia, membership of a trade union and protection under anti-discriminatory legislation. This will all hinge on whether there is deemed to be a contract with the volunteer and, if so, whether that contract creates an employment relationship. It is a highly complex area, particularly since contracts can be oral or implied as well as written. Employment law is therefore yet another issue that the charity/service provider and volunteer/service user may need to consider.

3.2.13 The September 2008 Jobcentre Plus guide indicates that the full-time volunteering round sum subsistence allowances should be taken into account for benefits purposes (which is somewhat at odds with Baroness Wilcox's remarks above in terms of the DWP's statements to the contrary) and should be regarded as taxable income, but not as paid work for tax credits purposes. How confusing.

⁷⁴ Hansard, Lords Committee Stage Debate (Third Sitting), 13 March 2008, Col GC269

⁷⁵ Ibid, Col GC270

3.3 Therapeutic work

3.3.1 Often, someone with learning difficulties will benefit more from being in a working environment than being, for example, at a day centre. The work can be therapeutic and enhance the self-esteem of the individual. However, the productivity of the individuals could be less, sometimes considerably less, than other workers.

3.3.2 How does the NMW react to this situation? With little flexibility, it appears. BERR, in its guide to 'therapeutic work', states there is no reference in the NMW legislation to a worker's productivity, ability or effectiveness and:

- *'The legislation also makes no distinction between disabled and non-disabled people, or between people with a mental or physical impairment, which affects their ability to carry out day-to-day activities and other people, and contains no reference to 'therapeutic work'.*
- *The key criterion for determining whether anyone is entitled to the minimum wage is simply - is he a worker?*
- *Section 54 of the NMW Act 1998 defines workers as people who work under a contract of employment or other contract, under which they undertake work for another party in a personal capacity (other than the self-employed).*
- *The minimum wage applies to a wide category of workers. This was a deliberate choice, taken because the Government wanted to ensure that people such as agency workers, casual workers, home workers and workers on short term contracts would still be entitled to the minimum wage.'*⁷⁶

3.3.3 Of course, we are not suggesting that disabled employees should be remunerated at a lower level than their counterparts, but rather that the system should aid employers to cater for them and to create opportunities for people with a diverse range of needs to engage in active employment.

3.3.4 Does this therefore argue for further government subsidy for employers – particularly small employers – who offer therapeutic work placements? An analogy could be drawn with the Statutory Sick Pay and Statutory Maternity Pay provisions, which provide help for employers (depending on the size of the business). The DWP's recent Green Paper⁷⁷ recognises the benefits of work in terms of economic prosperity and individual well-being, stating that 'Our vision is a welfare state where no one is written off and everyone is expected to contribute'. Reforms must take into account that volunteering and therapeutic work can be an important part of contributing to society and can act as a stepping stone to more permanent, paid employment.

3.3.5 The advice given by BERR in its guide illustrates the problems of interpretation for BERR itself, for other government departments and employers, both in the voluntary sector and elsewhere:

⁷⁶ BERR (formerly the Department of Trade and Industry – DTI) National Minimum Wage Information Note – The Minimum Wage and 'Therapeutic Work', January 2007. <http://www.berr.gov.uk/files/file36956.pdf>

⁷⁷ No one written off: reforming welfare to reward responsibility

'It might be possible to pay genuine expenses and make occasional 'ex gratia' payments to the participant without creating a worker's contract, as long as no expectation of payment for the activity was created and no obligation was placed on the person to carry out the activity. (In Scotland the position is different as Scottish law does not require consideration before a contractual obligation is enforceable. However, a contract in Scotland does require an intention to create legal obligations, and for the sort of contract we are discussing, some patrimonial interest, namely some material gain or loss between the parties, which is similar if not the same as the requirement for consideration).

...

If ...the individual is paid money or given a benefit by the employer over and above expenses and is obliged to perform an activity in accordance with the employer's instructions, then there will almost certainly be a worker's contract...

...

Scenario (b) *A charity runs a workshop for participants with mental health problems. The scheme pays clients £4 per day if they attend. If they do not attend, the only result is that they do not receive the attendance allowance. If they go along and do not want to do any activity they don't have to. The organisation does not ask participants to produce any set output or meet specific deadlines.*

Analysis

In this scenario a small ex gratia payment is paid. There is always a risk that a contract may be inferred if a payment is made, regardless of whether it is described as an "attendance allowance" or "pocket money" or by another term. Such terms are meaningless from a legal perspective. However, if such a payment is made and there are no obligations on the participants who attend to carry out the activity, and they do not lose their place if they do not attend then a contract is unlikely to be inferred.

...

Scenario (f) *A local centre for people with learning difficulties provides work-related activities to help people acquire the skills which may help them enter the labour market. Those taken on by the centre receive no pay or other benefit for the activities undertaken but are offered expenses including costs of travel to and from their home. On occasions they will be told they will be required to attend the centre for certain periods of time and that work will have to be carried out in a certain way.*

Analysis

In this scenario participants are offered out-of-pocket expenses. Payment of genuine expenses will not of itself imply a worker's contract even if clients are expected to attend the centre and carry out work. The safest option is to reimburse expenses once receipts are submitted. A flat rate representing an amount as near as possible to the average out-of-pocket expenses incurred by the group would probably also be acceptable. However labelling money as expenses cannot disguise the payment of consideration. ...'

3.3.6 The analysis of scenario (f) is interesting, in terms of suggesting that 'the safest option is to reimburse expenses once receipts are submitted'. But this sits rather uncomfortably in terms of the low-income volunteer, for whom incurring the up-front expense and having to wait for reimbursement may be a barrier too far.

3.3.6 So there are many fine judgements to be made, not only for the NMW, but for tax, tax credits and welfare benefits. The Low Pay Commission states in its 2008 Report:

'The Commission regards good guidance as particularly important for the voluntary sector, and in recent reports we have called for the existing guidance to be updated, consolidated and made more accessible.'

3.3.7 We could not have put it better.

4 Conclusion and recommendations

4.1.1 We have not set out in this report to provide comprehensive answers to the issues we have identified but it is clear from our research that volunteering needs to have minimal bureaucracy surrounding it. What is also needed, as advocated by Volunteering England, is a well-resourced volunteering infrastructure. The various government departments that are involved with the issues of volunteer expenses are used to regulating as part of their activities and they become nervous when rules can be exploited.

4.1.2 It is abundantly clear that the economy and society get wonderful value from the efforts of volunteers; however the bureaucracy of the regulators can be a significant disincentive to volunteering itself. The sums at stake are usually small and a risk-based, co-ordinated approach might create a much easier structure than currently exists.

4.1.3 Equality issues must be taken into account, such as the particular needs of persons with various types of disability and those facing other hurdles such as migrants trying to overcome the language barrier. There should be no barriers to anyone being able to take an active role in society in whatever ways are considered to be beneficial for their development.

4.1.4 There needs to be a common approach across government departments to the definition of income; what expenses may be directly reimbursed; and what additional costs are reasonably incurred. Whatever definitions are chosen, they must have a uniform interpretation, not one which varies depending upon how payment is made. Such definitions should be generous in spirit, as very often the pedantic rules bear hardest on those with the lowest incomes and create unnecessary costs in the hard-pressed voluntary sector. This suggests a review of earnings disregards under the benefits code,⁷⁸ which act as a disincentive to the low-income volunteer. It also suggests that childcare cost reimbursement should be disregarded as a benefit for volunteers across all arms of Government.

4.1.5 We believe the evidence produced in this Report is sufficient to justify the formation of a working group comprised of the voluntary sector, the volunteering sector, together with HMRC, the DWP, BERR and the Local Government Association to address the issues raised throughout this Report. We would recommend that HMRC take the lead because of their greater involvement with expenses issues.

4.1.6 We appreciate that this working group may take some time to form, to deliberate and to recommend. In the meantime there is no excuse for the paucity of information as to current practice. **We recommend that Directgov, the public services website, should take the lead and expand its current offerings on Volunteering in its Home and Community section.**

4.1.7 Finally, in terms of the Government's intention to increase Gift Aid contributions to charity to compensate for the reduction in the basic rate of

⁷⁸ There are detailed recommendations regarding overcoming the benefits barriers in Benefits Barriers to Involvement. Commission for Social Care Inspection (CSCI), October 2007. http://www.csci.org.uk/PDF/benefit_barriers.pdf

tax, we recommend that consideration be given to reviewing the rules for unclaimed volunteer expenses.