

Response by Stewardship to the BERR Consultation on National Minimum Wage and Voluntary Workers

August 2007

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Response by Stewardship to the BERR Consultation on National Minimum Wage and Voluntary Workers

Stewardship is a financial support services charity and representative umbrella body for the Christian charitable sector. The charity currently provides a range of professional services to Christian churches and charities with a mission purpose of sharing knowledge and encouraging good practice in law and finance. It works with charities ranging from the smallest to large international operations. It has its own volunteer team as well as paid staff. Its gross income is approximately £40 million per annum.

The Government quite validly sees the Third Sector as vital to public service delivery. Beyond this, charities and other voluntary organisations make a very valuable ongoing contribution to society.

The charity sector in particular is fairly unique in that there is both considerable use of volunteers and a typically high level of goal congruence between the objectives of the charitable organisation that makes use of the volunteers' services and the motivation, altruism and ethos of the volunteer themselves.

This gives rise to particular problems with the NMW in the voluntary sector that are felt by both the volunteer and the 'employing' charity. In these cases, whilst there is a recognised need to protect against exploitation of workers, there is a real tension between the way that the legislation works in practice and the genuine desire of volunteers for whom there is no question of exploitation or abuse.

We would thank BERR for the opportunity to discuss these issues during the review process. We have already presented our own survey of 213 responses on the subject of the National Minimum Wage and its effect on respondents' charities. This was presented to the former DTI in April 2007. Those responses are summarised as Appendix A to this document.

The consultation document is helpful by commencing with a statement supported by examples of the legislation as it stands. We consider this important as we believe there is widespread misunderstanding of the legislation in the sector (see below).

Our responses to the consultation document questions are set out below.

(i) Do you have any general observations or comments to make about the way in which section 44 of the Act has operated in practice?

The document does not cite quantitative evidence to support the assertion made that section 44 is allowing the voluntary sector to work as it always has done. Our experience, which is supported by our own survey, is as follows:-

Application

Our experience is that there is widespread **lack of clear understanding** of the operation of Section 44. Our survey results indicated that:

- One third of respondents described their awareness of the NMW rules as only reasonable and a quarter as limited or very limited.
- 28% of unpaid volunteers receive honoraria or periodic gifts.
- 44% receive training or other benefits.

This suggests that the operation of section 44 cannot be assumed to be working well and contradicts the statement in the consultation document that "On the face of it, therefore, the

Act has worked effectively in enabling workers to be paid the national minimum wage, and allowing the third sector to operate as it has always done". The lack of understanding is masking problems that will arise when understanding increases.

Impact

It is considered that a strict application of Section 44 would have **a considerable impact on the voluntary sector**. Key statistics from our survey were:

- Over a third of respondent churches and charities said that they could not really afford to pay their existing 'paid volunteers' the full NMW rate for all hours worked,
- Over a third of respondents said that they would have to cut back significantly on volunteer hours if the charity was to afford to pay the NMW. (Several charities indicated this would involve cuts of over 5,000 hours with one charity stating that 10,000 hours would be lost. The quantified total was over 50,000 hours from 44 respondents),
- Over 1 in 5 respondents have people who would volunteer but cannot because they need to be paid something - even though they would be happy with less than the full NMW.

These statistics indicate the sector will not only see a potentially significant cost or loss of significant volunteer hours but will also fail to achieve further volunteer hours that would be available.

It is considered this impact is seriously understated in the consultation proposals and will have hidden costs to the sector and the wider community if not addressed more widely than is being proposed.

The issues essentially involve situations:

- Where an individual is unable to work more than as provided by specific funding on a voluntary basis, even though they may wish to. For example, a charity with limited funds would be unable to afford more than a certain number of remunerated hours, relying on unpaid hours (at the discretion of the volunteer) to ensure that the charitable aims are achieved.
- Where an individual wishes to volunteer part of their time but also wishes for a part to be paid, without resources necessarily having to be diverted from 'front line' services. For example, a person taking early retirement may require some remuneration but does not require a full wage, and does not wish to deplete limited charitable resources. They therefore wish to be engaged both as remunerated staff and unpaid volunteer.

There would appear to be a gap between the 'total volunteer' and the 'employed worker' which is very usefully filled by 'partial volunteers' – often people with experience that can provide continuity and so add considerably to the work of the charity. This is often impossible with the NMW legislation as it stands.

The impact is to restrict the number of individuals who would wish to give a substantial amount of time to charitable work but are unable to do so without some payment. This appears to particularly affect the following categories of individuals:

- Newly retired (a group who have much to offer society and are being encouraged to maintain their productive capacity)
- Younger workers (particularly recent school and university leavers); a group who, if motivated and are able to gain experience in the voluntary sector have a very significant role in its development. In addition, they have the greatest impact on the 'teenage' beneficiaries.

The lack of any 'opt out' or 'contract restriction' means that there is an inherent conflict between the objectives of the charity and its workers (in their combined desire to meet the needs for which they are working) on one side, and HMRC (applying the law as it stands) on the other. There is no exploitative relationship between the charity (as employer) and the worker.

The interaction between NMW and the boundaries between those that are considered in law to be 'volunteers' as opposed to employees, is very little understood in the smaller charity sector. Unless greater flexibility is built into the system, there is a danger that as awareness in the sector grows, widespread non-compliance in the charity sector (including where grant-funded by Government) will develop or other solutions will be adopted which are essentially counter to what is best for society / the wider community, namely:

- Hours will be restricted to fit that which can be paid – with the consequences that real needs that could be fulfilled will be left unfulfilled.
- There will be a significant increase in false self-employment to evade the NMW requirements.
- There will be a significant reduction in the reliability of service delivery as 'self employed' volunteers may be less dependable for work, due to a lower 'mutuality of obligation' to the charity.

The last two of these potentially puts naturally law abiding charity trustees on a potential collision course with HMRC which means that both charity and HMRC resources are not best used.

These issues are most likely to occur where there is a close nexus between the objectives of the organisation and the worker(s). Where there is a real desire to meet the needs of the beneficiary group, workers do genuinely want to put all they can in to it. This principle and desire on the part of volunteers has been the seedbed of charity endeavour in the UK over the last two centuries. Indeed it has been a key factor of many successful charities in achieving their (charitable) objectives. A strict application of the current NMW Regulations will frustrate and hinder charitable endeavour.

(ii) Do you have any comments about the proposal to use section 3 of the Act (see paragraph 29) to exclude from the national minimum wage those who participate in schemes that are supported under the national framework recommended by the Russell Commission for those in the 16-25 age group?

The proposal to use Section 3 to exclude only those schemes which are specifically relating to the 'Russell Commission framework' is too narrow to properly address the issue.

It is too narrow on a number of counts:

1. **Age related.** An increasing number of charity voluntary workers or paid workers are those in early retirement. This proposal appears to **discriminate on grounds of age** against those schemes which are working with those workers who are over 26. This appears to be inconsistent with BERR's own age discrimination regulations.
2. **Class of organisation.** It appears to create two distinct classes in the voluntary sector group; those that must apply the NMW (those not in the Russell scheme) and those that can do as they wish in this respect (those in the scheme). This creates the following issues:
 - There is no apparent rationale for limiting the exclusion to these schemes. It is not apparently on the basis that they are considered to generate a greater 'community benefit' than other organisations.

- The smaller initiating element of the voluntary sector will be disadvantaged and not have the encouragement available to other elements. Significant numbers of major charity initiatives have come about from private and small scale initiatives which have grown arising from the vision and drive of the initiators. Secondly there is a massive impact from small scale initiatives which harness the energies of countless individuals which would be restricted.

It is acknowledged in the consultation document that for Project Scotland and 'V', if they did bring their methods within Section 44," taking such action might affect their ability to recruit and retain voluntary workers". This is exactly the case that we consider will occur for many charitable organisations and we cannot see the rationale that it is beneficial for the community that these select organisations be exempt and other charitable organisations have to suffer those same difficulties but not be exempt.

There appear to be no objective reasons why these particular charities have been proposed for exemption except on grounds they have the personal support of Government Ministers. This would not be healthy for the sector or the wider community, and is unjustifiable. Any such selection, in the absence of objective selection criteria, could be subject to a successful **Judicial Review**.

It also appears to fail to provide a protection for the voluntary workers, in that organisations which are exempt do not appear to have any alternative protections in place. Volunteers working for Project Scotland and 'V' have no legal protection against abuse and, as such, two administrative arrangements would exist for volunteers and the National Minimum Wage. ***Two systems, no logic!***

We want to see the legislative framework create a situation where:

- Individuals are able to be paid for work to achieve their objectives without concern that they will take away resources from the front line services they are trying to help.
- Charitable organisations are not restricting the amount they can use workers due to limitations caused by the NMW.
- Charity workers are not subject to abuse or undue pressure to work for longer hours for lower pay than they would wish.
- There is greater certainty over the status of volunteers when they are in receipt of payment than is currently the case.

The proposal does not address the problem except in a few 'select' organisations.

(iii) If the national framework were to be extended at a future stage to those who have attained the age of 26, do you consider that the descriptions in section 3(1A) (see paragraph 29) cover all relevant activities? If section 3(1A) is not broad enough, can you indicate what kind of description would cover the activities that should be included, and what those activities are? (This issue is discussed in paragraph 34.)

Section 3(1A) is limited to job seeking related activity or training, and appears to be drafted in such a way to achieve a particular outcome. The descriptions in section 3(1A) appear to have been designed as an exclusion to get certain (Government, not charity) youth training organisations 'off the hook', whilst ignoring more endemic issues in the charity sector. We may be missing the point of the question but we do not see that this definition helps with the wider issues of the voluntary sector. (see section (v))

(iv) Are there any other circumstances where the position of volunteers or voluntary workers should be similarly clarified (ie, apart from the national framework recommended by the Russell Commission)? If so, what are they?

See our comments under section (ii) above. If this whole consultation and review is to address a small number of specific problems raised by special interest groups, rather than a systematic consideration of the affects on the charitable sector of strict application of the NMW regulations, then BERR may wish to consider the position of partially paid interns, such as MPs' researchers? We are concerned that such an inconsistent approach would lead to future examples of the anomalies that have come to light (such as MP interns and CFAVs). Having excluded certain groups once, on unclear grounds, the Government would be vulnerable to pressure to make future exclusions, should they come to light. Piecemeal exclusions may only serve to aggravate the 'them and us' syndrome between large, politically connected organisations, and small charities that make up the bulk of the Third Sector. In the absence of an objective justification and criteria for exclusion, this appears to be bad policy-making.

(v) Do you have any views about the need for alternative action to deal with any difficulties that you consider arise for the third sector as a consequence of the Act? If so, what are the difficulties and what alternative action would you suggest?

The answer to this question is partly stated in response to question (i) and is repeated here:

Key statistics from our survey were:

- Over a third of respondent churches and charities said that they could not really afford to pay their existing 'paid volunteers' the full NMW rate for all hours worked,
- Over a third of respondents said that they would have to cut back significantly on volunteer hours if the charity was to afford to pay the NMW. (Several charities indicated this would involve cuts of over 5,000 hours with one charity stating that 10,000 hours would be lost. The quantified total was over 50,000 hours from 44 respondents),
- Over 1 in 5 respondents have people who would volunteer but cannot because they need to be paid something - even though they would be happy with less than the full NMW.

These statistics indicate the sector will not only see a potentially significant cost or loss of significant volunteer hours but will also fail to achieve further volunteer hours that would be available.

The scope of the problem outlined would appear to be quite widespread – the consistent theme being where the workers themselves have passion for the charity's work. We have seen these issues arise in:

- Community youth work initiatives.
- Prisoner rehabilitation and counselling.
- Charities working with the poorer ethnic minority sections of the community.
- Work with community counselling.
- Work with the elderly living on their own in the community.

Alternative solutions

[A] An opt out for 'charitable organisations'

Support for an opt out is strong where the aims of the organisation and the aims of the individual worker are the same. This will in essence only be where the objectives of the organisation are such that the individual worker would wish to espouse them whole heartedly. For this reason, an opt out by the worker can legitimately be limited to charitable, philanthropic and benevolent organisations.

It is unlikely that the issue will be at all prevalent in non-charitable organisations – although there may be cases where this may arise in ‘Community Interest Companies’ (e.g. the local shop in rural areas). If this route were to be followed, the operation of the NMW to volunteers in CIC’s should also be reviewed to see where any clear demarcation by type of organisation can be made.

There is a risk of abuse of charity workers if this option were available. To minimise the risk it would seem that the option should be a mutually agreed one, based on facilitating law, the key features of which may be:

1. A clear statement that this is a voluntary ‘opt out’ by the worker
2. A built in cooling off period, before the opt out becomes effective.
3. A clear statement that the option has been taken without pressure or duress.
4. The decision being evidenced in writing and subject to inspection by the proper authorities
5. The decision being re-declared (or not) annually.

We have not examined other precedents but the opt out from the Working Time Directive may provide useful experience in framing a change of this nature.

[B] Separating the employment contract from a ‘voluntary agreement’

An alternative approach is to have clearly demarcated hours which are ‘contracted’ and need to be dealt with as any other employment contract and fully subject to NMW but also a ‘volunteer agreement’ for additional hours which the worker wishes to undertake and for which they do not want to be paid.

There are two options in this regard:

1. The separation only being possible for work which is entirely different in character.
2. The separation being possible for hours that are essentially indistinguishable (i.e. the same as the ‘core’ activity).

The former would significantly reduce the risk of abuse but also essentially leaves the present position unchanged. It is often core activity that the worker wants to undertake but not for payment. It would have the second difficulty of determining definitions of ‘core activity’ which would need to be sufficiently clear in practice to leave trustees and workers with certainty. Practical guidance is limited in this at present.

The question then arises about protecting the worker from unwarranted pressure to sign such a ‘volunteer agreement’ but wording and procedures could be built in that give workers protection in that regard.

The disadvantage over option A is in circumstances where the funding is very uncertain and the worker is happy to work for whatever amount can be raised however large or small that is. The ‘separate contract route’ would not have the flexibility to cater for this situation.

[C] Extension of the ‘reasonable subsistence’ provisions

These provisions allow ‘reasonable subsistence’ to be paid to volunteers over and above the direct expenses incurred in volunteering. However, the current provisions only are met where the worker is seconded / referred by another charity. As a result a directly recruited or ‘founder’ worker is not covered. This distinction appears to be arbitrary and without a good rationale.

This is a much more limited option than [A] or [B] and would not meet the needs of many charity / workers if the amount that they needed to receive to enable them to undertake the

work was higher than 'reasonable subsistence'. This may well be the case with newly retired individuals who still need to put some funds away for retirement or non-subsistence matters.

The extent of these limitations would depend in part upon the criteria set for 'reasonable subsistence'.

(vi) Do you consider that there are difficulties of such significance facing the third sector that section 44 of the Act needs to be amended to introduce a new power to enable changes to be made to the types of organisations that could become qualifying organisations and/or the boundaries of permitted monetary payments or benefits in kind? If so, please specify the difficulties, the types of organisation that should be included and where the boundaries should lie.

We are persuaded that the difficulties are of such significance that Section 44 should be amended in the above ways [See (V) above]. The evidence that these difficulties are widespread is not only anecdotal but is also reflected in the survey results (see appendix A). This evidence has informed us in our responses to the questions in (i) and (v) above.

Type of organisation

The issue would appear to be widespread where the aims of the organisation and the aims of the individual worker are the same. This will in essence only be where the objectives of the organisation are such that the individual worker would wish to espouse them whole heartedly.

To be practical there needs to be a clear demarcation to prevent organisations being created to abuse the exemptions and it is suggested that organisations that have charitable status would be sufficiently distinct. There is an existing framework of legislation and case law together with registers maintained by the Charity Commission/OSCR.

Boundaries

The problem with defining monetary boundaries is that some situations are limited by the income of the charity concerned and hence inherently creates difficulties. If the alternative solutions that we have suggested above are not considered acceptable and monetary boundaries are required we suggest the concept of 'reasonable subsistence' – already in legislation for secondees from charities – can be used.

(vii) Do you have any comments about the position of CFAVs (see paragraph 36)?

We cannot see the logic for another selected organisation being exempt from the NMW whilst the great proportion of the voluntary sector is not. It would appear that it is only those organisations that have 'political clout' achieve beneficial exemptions. Such a position would be difficult to defend in court and cannot be good for the wider community. **It has the appearance of a piecemeal patch-up to address the issues of specific stakeholders rather than a coherent policy on the application of the NMW to volunteer workers.**

Appendix A

Summary of Stewardship's survey of the impact of the National Minimum Wage on charities

The survey was undertaken in February 2007 and was issued to approximately 1,000 UK charities that subscribe to our free 'Charity Technical Bulletins'.

There were 213 responses and our estimate of the number of volunteers covered by the organisations responding to this survey is around 20,000.

Key points arising were:

- Over 1 in 5 respondents have people who would volunteer but cannot because they need to be paid something - even though they would be happy with less than the full NMW.
- Over a third of respondents said that they would have to cut back significantly on volunteer hours if the charity was to afford to pay the NMW. (Several charities indicated this would involve cuts of over 5,000 hours with one charity stating that 10,000 hours would be lost. The quantified total was over 50,000 hours from 44 responses – there were a further 13 un-quantified responses outlining that they would lose hours but couldn't quantify them).
- Over a third of respondent churches and charities said that they could not really afford to pay their existing paid volunteers the full NMW rate for all hours worked, although significantly more than 1 in 5 have adopted the dual role arrangement, only paying the NMW for one of the roles.
- 28% of unpaid volunteers receive honoraria or periodic gifts. 44% receive training or other benefits.
- A third of respondents described their awareness of the NMW rules as only reasonable and a quarter as limited or very limited.

We asked how respondents saw things changing in the next three years in their charity. The general themes that emerged from this were:

Recruiting volunteers is problematic

The need to pay NMW or nothing at all may lead to redundancies

The need to pay the full NMW is leading to services being cut or curtailed. A recurrent theme was that youth work in particular was being inhibited.

Charities are unable to fulfil their vision and expand, or their ability to serve the local community is being seriously restricted.

The increasing call for professionalism and regulatory awareness and compliance needs improved stability and management of the staff team that cannot be provided by volunteers.

There were other 'qualitative' comments made by a number.