

CONSULTATION ON SEXUAL HARASSMENT IN THE WORKPLACE

NCVO RESPONSE

October 2019

Executive summary

NCVO joins the government in its strong condemnation of sexual harassment – and harassment of any sort – in the workplace and outside it. We fully support the commitment to tackling sexual harassment in all its forms, and welcome the consultation’s aims to look at whether the laws on sexual harassment in the workplace are operating effectively, and whether they can be strengthened.

Our response reflects the views and experience of our members. It is also based on legal advice about the position of volunteers under the Equality Act 2010 and other possible legislative options for greater legal protection for volunteers and interns.

We strongly agree that we should address any situation of inadequate protections where there is an unequal balance of power between an organisation and an individual. In particular, we are mindful of the position of ‘interns’ at commercial and political organisations, for whom the power dynamics often involved in sexual harassment mean that they can be particularly vulnerable.

Legally, individuals in this position are considered ‘voluntary workers’ for the purposes of minimum wage law. We therefore recommend that protection under the Equality Act should be extended to ‘voluntary workers’ who do not work for charities – mirroring the exemption in the National Minimum Wage Act 1998 at section 44, whereby ‘A worker employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body does not qualify for the national minimum wage...).’

However, we do not believe it would be right to extend employment rights to volunteers, as traditionally thought of and distinct from voluntary workers. Such proposals have previously been raised in a number of different contexts. On each occasion, the considered view has been that it would be inappropriate to do so.

The government and the public should nevertheless feel reassured that charities and volunteer-involving organisations are already subject to a number of regulatory requirements in respect of their treatment and protection of volunteers. Charities also have their own codes of conduct and high standards to create positive, supportive and welcoming environments for their volunteers.

Because of this, the overwhelming majority of the NCVO members we have heard from have expressed their disappointment about the fact that the consultation prioritises a complex and burdensome legislative route and doesn't take account of the sector's existing good practice. There is a concern that changes to the legal framework are not the right way to strengthen protections for volunteers: the risk is that charity resources would need to be diverted from continuous improvements in practices and culture to having to build compliance mechanisms for the new rules.

A simpler, more proportionate and quite possibly more effective method of ensuring safe environments for all volunteers would be for government to support charities in their continuous journey of self-improvement in this area, so anyone who volunteers in any way and in any place is protected from sexual harassment and discrimination.

Should the government still want to pursue the legislative route to strengthen protections for volunteering, we suggest this would be better achieved through an option that has not been proposed in the current consultation.

This would consist of including in the Equality Act a new part for volunteers along similar lines to Part 7, which provides protection from discrimination for members of clubs and other bodies.

This would enable volunteers to bring County Court claims for discrimination, harassment, and victimisation in respect of their treatment from the point of applying to volunteer through to any 'detriment' broadly experienced at the hands of the organisation, including any detriment after the relationship had ended which was connected to the relationship.

The reason for taking such an approach is that it could be said that choosing to volunteer for a particular cause may be more closely aligned to membership of an association than employment.

Further consultation would be required to ensure questions over how this would operate were fully considered.

Consultation response

About NCVO

The National Council for Voluntary Organisations (NCVO) is the largest membership body for charities and voluntary organisations in England, with over 14,500 members from the biggest household-name charities to the smallest community groups.

NCVO is also the national representative body for volunteering, championing voluntary action and enhancing volunteering wherever it takes place. Working closely with volunteering leadership networks, NCVO draws on the latest research and practice to lead volunteering development. NCVO is the home of the UK quality standard for volunteer management, Investing in Volunteers.

We are absolutely clear that everyone (staff, volunteers, beneficiaries) deserves the strongest possible protections from sexual harassment and other forms of abuse, in an environment that promotes dignity and respect.

About this response

Our response focuses on the question of whether there are grounds to extend all the protections in Part 5 of the Equality Act to volunteers and interns.

It has been informed by consultation with our members, who were invited to share their views via email (<https://blogs.ncvo.org.uk/2019/08/27/how-proposed-changes-to-sexual-harassment-law-may-affect-charities-and-volunteers/>) and by participating in two round-table events which we hosted to discuss the proposals.

We have also sought legal advice on the legal position of volunteers under the Equality Act 2010, and other possible options for greater legal protection for volunteers and interns.

Volunteers' rights and employment law

The question of extending employment rights to volunteers has been raised in a number of different contexts previously. On each occasion, the considered view has been that it would be inappropriate to do so.

- In 2005, following a number of fairly high-profile employment tribunal cases being unsuccessfully brought by volunteers against charities asserting worker rights (in respect of discrimination and in a few cases the broader employment right of protection from unfair dismissal) the government considered the question of whether legislation should

be passed to extend legal workplace protections to volunteers. It was decided that no legislation was required.

- The same conclusion was reached in the Volunteer Rights Inquiry¹, a review which aimed to understand the nature and scope of the problems experienced by volunteers and to identify suitable remedies, led by Volunteering England in 2009 - 2011. The inquiry made several recommendations on supporting and protecting volunteers. However, volunteers and organisations alike had strong concerns about introducing additional regulation and/or legislation. The view was that this would create more barriers to volunteering and prescribe measures that would be not proportionate to the needs of a diverse sector.
- In 2012, in the case of *X v Mid Sussex CAB*, the supreme court considered the question of whether volunteers should be brought within the meaning of 'employment' in the Equality Act, taking into account the references to the potentially wider term of 'occupation' in EU law. This argument was rejected, and the supreme court confirmed that volunteers should not come within the scope of the Equality Act.

Charities and volunteer-involving organisations are already subject to close ethical regulation

The government and the public should feel reassured that volunteer-involving organisations are already subject to a number of regulatory requirements in respect of their treatment and protection of volunteers.

- As the consultation acknowledges, under the Health and Safety at Work Act 1974, employers have a general duty to ensure the health, safety and welfare at work of all their employees, and to protect people other than employees, including volunteers.
- Volunteers also come within the scope of the Protection from Harassment Act 1997, which provides additional legal protections against harassment that are not workplace specific.
- Furthermore, charities are subject to regulation by the Charity Commission, which requires that those who manage or work in organisations adhere to appropriate standards, and holds them to account for any failure to do so. In having a specific regulator already tasked with upholding public trust and ensuring compliance with standards, charities are already regulated for ethical conduct in a way that businesses are not.
- Beyond the overarching aims of Charity Commission regulation, there already exist a number of relevant specific pieces of guidance which charities are obliged to follow.

¹ https://www.ncvo.org.uk/images/documents/policy_and_research/volunteering-policy/volunteer_rights_inquiry_final_report1.pdf

For example, the Charity Commission’s guidance on ‘Safeguarding and protecting people for charities and trustees’ expressly requires steps to be taken to prevent sexual harassment and other discrimination of those who come into contact with the charity (which includes volunteers) on the basis of the protected characteristics set out in the Equality Act.

- Charities are required to report serious incidents within their organisations to the Charity Commission, while individuals are encouraged to raise complaints about charities with the Charity Commission where the charity may have harmed or abused anyone.
- In addition to Charity Commission regulation, other regulators frequently have oversight of a charity’s actions. For example, for volunteers working in fundraising roles, the Fundraising Regulator will enforce its Code of Fundraising Practice.
- In addition to this regulatory supervision, charities are commonly required under their agreements with their funders to ensure that adequate policies and procedures are in place for the protection of individuals involved in or affected by their activities and are under reporting obligations in respect of serious incidents to their funders, which may result in the withdrawal or claw-back of funding.
- Public sector organisations that involve volunteers also have a public sector equality duty under section 149 of the Equality Act 2010. This duty extends to private or voluntary organisations that provide a public function. This means having a due regard for: eliminating unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act, advancing equality of opportunity between people who share a protected characteristic and those who do not; and fostering good relations between people who share a protected characteristic and those who do not.
- Any volunteer is able to report concerns as a whistleblower. Unlike employees, volunteers are free to report to prescribed people or bodies² as well as non-prescribed bodies such as the press. Many volunteer-involving organisations actively encourage volunteers to raise concerns internally and act on these concerns.

Charities already work to establish safe and supportive environments for volunteers – and research suggests they succeed

But even setting these regulatory mechanisms aside, it is simply in charities’ own interests to create positive, supportive and welcoming environments for their volunteers.

² <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2/whistleblowing-list-of-prescribed-people-and-bodies>

Even for the largest national charities by income, the bulk of their work is frequently carried out by local volunteers. It's the nature of volunteering that volunteers are free to walk away at any time. Without creating an encouraging climate for these volunteers and ensuring they feel that they are treated respectfully, charities would be unable to carry out their work. Charities therefore focus a lot of effort on ensuring that volunteers' experiences are positive and rewarding.

In addition to aiming to create a safe and welcoming environment for their volunteers, most large and many smaller charities already have formal policies and procedures in place to deal with volunteer concerns or disputes.

NCVO recently undertook the largest study of the experiences of people who volunteer in over a decade. Our 'Time Well Spent' study was based on an in-depth survey of over 10,000 people conducted by YouGov.

Overall, 96% of recent volunteers (those who have volunteered in the last 12 months) said that they found their experience satisfying, with a clear majority also saying they would recommend it to friends or family. This suggests that volunteers typically have a very positive experience.

The numbers reporting negative experiences were very small. Less than 2% of recent volunteers reported having felt unsafe, and there is no difference in this figure by gender. Our qualitative research suggests that where volunteers do talk about feeling unsafe, this typically relates to volunteer roles where there is some risk attached, for example as a police special or working with beneficiaries who may have drug or alcohol problems.

87% of recent volunteers agreed that they knew how to raise an issue if they needed to, and a similar proportion, 83%, said they felt well supported overall. This suggests organisations are already providing a good level of support to their volunteers.

Notably, while one in ten volunteers for civil society organisations, such as charities, said they found their volunteering 'too structured or formalised', this doubled to one in five among those volunteering in the public sector. We will come on later to the delicate balance that organisations need to strike between ensuring volunteers are sufficiently trained and supported versus the risk of overburdening and disaffecting their volunteers.

Charities aim for high standards and are scrutinised over them

Reflecting the ever-greater commitment on the part of the charity sector to ensure it is living up to the high standards the public expect of it, NCVO recently published a set of Charity Ethical Principles. These are intended to act as the sector's equivalent of the Nolan principles for public life, and to help organisations consider how they can best reflect the high standards they aim for in their governance and their operations.

These principles set out a framework for the ethical execution of charitable purpose, regardless of the charity's size, type or area of operation. They were developed in consultation and with the support of the sector, and are intended to help charities in their decision making and in developing relevant policies and procedures.

One of the principles is the 'Right to be safe', which means that every person who volunteers with works for or comes into contact with a charity should be treated with dignity and respect, and feel that they are in a safe and supportive environment. There is a clear expectation within the sector and beyond that charities have a responsibility to create an inclusive culture that does not tolerate inappropriate, discriminatory, offensive or harmful behaviour towards any person who works for, volunteers with, or comes into contact with the charity.

Charities are also subject to the public's scrutiny and have to meet its higher expectations about how they conduct the operations and deliver their activities. Charities depend on the public's confidence for its support, in both time and donations, so they are especially mindful about their reputation. Ensuring they are a safe place for everyone, including volunteers, is key to this.

The overwhelming majority of the members we have heard from have expressed their disappointment about the fact that the consultation prioritises a complex and burdensome legislative route and doesn't take account of the sector's existing good practice. There is a concern that changes to the legal framework are not the right way to strengthen protections for volunteers: the risk is that charity resources would need to be diverted from continuous improvements in practices and culture to having to build compliance mechanisms for the new rules.

This aligns with the 2011 Volunteer Rights Inquiry. The Inquiry found that most volunteering happens in an amicable relationship between volunteers and volunteer involving organisations. Recognising the variety and unique nature of volunteering, the Inquiry proposed that efforts to improve conditions for volunteers should: be proportionate; respect the reciprocity of volunteering; and promote parity of esteem between paid and volunteer

staff. This led to the 3R Promise, where organisations endeavour to get things *right* in the beginning, will offer a means of *reconciliation* when things go wrong, and accept *responsibility*³.

A simpler, more proportionate and quite possibly more effective method of ensuring safe environments for all volunteers would be for government to support charities in their continuous journey of self-improvement in this area, so anyone who volunteers in any way and in any place is protected from sexual harassment and discrimination.

This could be done for example by helping raise awareness and share good practice across the sector, in particular cascading guidance and support from experienced volunteer-involving organisations to smaller and less resourced ones. NCVO recently led a DCMS and National Lottery-funded partnership to create an extensive range of resources on best practice in safeguarding. Early indications are that by having created and promoted accessible and relevant resources we will succeed in bringing about a step change in the awareness of safeguarding issues throughout the sector, and help organisations develop the right approaches to address these. While charities already aim to create safe and respectful environments for volunteers, and indeed they normally succeed in doing so, as our research shows, there are always areas where improvements could be made and we would be keen to explore how we may be able to take a similar partnership approach with government to bring these about.

There is also a role for the Charity Commission in recognising that reporting by charities is a good thing, and sending an encouraging message to charities about how reports are handled by the regulator.

Changing the nature of volunteering, and compliance risks for charities

Impact of regulation

There was a widespread concern among our members that these proposals would have the effect of increasing a compliance burden among their volunteers. While there was universal support for the principles and aims of keeping everyone safe, charities were concerned about proportionality. Volunteers are often more sensitive to regulatory burden than paid employees. Informal and culture-based approaches are often more successful than formal, procedural and bureaucratic ones. Charities therefore need to work hard to ensure volunteers are satisfied. They need to strike a careful balance between ensuring volunteers

³ <https://www.ncvo.org.uk/policy-and-research/volunteering-policy/volunteer-rights>

have the competences and training necessary for their role, and are operating in a safe environment, with the risk of overburdening volunteers and making the roles feel 'too much like a job'.

A national health charity told us:

'Our own volunteers have voiced much concern over an overly bureaucratic experience.'

They asked their volunteers about the proposals, and as one of them put it:

'My concerns [are] about... the impact on the more casual, but nonetheless valuable, volunteers who are likely to see another raft of online awareness and other training as the final straw in turning them off volunteering altogether.'

A local charity said:

'The implications are potentially massive for smaller groups. We need workable and proportionate legislation that provides maximum protection to everyone without discouraging people from volunteering.'

Many charities dispute the assumptions made on their volunteer involvement levels and infrastructure. Especially the assumption that large charities with staff-based infrastructure can roll that infrastructure out to volunteer teams.

A well-established youth charity said:

'Many volunteer organisations [have] a small staff team in ratio to a much larger volunteer community. [...] Extending Equality Act cover therefore would not be as easily rolled out for larger scale organisations such as our own as the Government may consider. We are extremely concerned that the resources required for an organisation on the scale of ours would hugely detract from our ability to deliver on our youth work programmes.'

Volunteers as donors

Moreover, there was a concern that the proposals would have the effect of fundamentally shifting the nature of volunteering. It is wrong to view volunteering relationships like employment relationships. Volunteers are free to walk away at any time if they are unhappy with any aspect of their role. Volunteers are more comparable to donors than employees, with charities facilitating the donation of their time.

There was a concern that the proposals would:

‘...erode the relationship between charities and volunteers from, at present, a purely voluntary relationship based on mutual expectations to, in future, something more akin to a contractual, employment relationship.’

As one national charity put it:

‘We know that feedback from many of our volunteers is that their relationship can already feel like work, and [these proposals] would exacerbate this. We know that volunteers are less likely to continue to engage with us if they perceive volunteering to be too admin-heavy, and even the introduction of GDPR saw some step back from [us] entirely.’

A conservation charity said:

‘Volunteering is how people choose to spend their leisure time. There’s no compulsion and, if anything, the differential in power is already tipped in favour of the volunteer. If charities don’t treat their volunteers well, they leave.’

[...]

‘More and more volunteers are asked to take on large amounts of training which is a barrier to people volunteering with us, and other organisations.’

Creating a two-tier system

Volunteer-involving organisations see volunteering as an inclusive way for people to give time to the causes they love. Many are trying to open up volunteering opportunities to a wider group as possible. When discussing consultation proposals, there was concern that organisations may structure roles to fall outside of the scope of the regulations, to avoid the additional compliance burdens. This could undermine the very practices set up to safeguard and support volunteers or increase diversity.

A charity working with young people said:

‘The proposed legislation would risk many more volunteer roles being categorised as ‘informal’, with the consequence of offering volunteers less clarity about their roles and reduced support and guidance.’

A charity that operated a blended model of a large central service and local independent branches said:

‘Under the current proposals [certain] volunteers would be protected from discrimination and harassment, however, it is not at all clear whether the [...] volunteers in our network of local offices would be protected. In our view, this is not fair or equitable.

A local community organisation said:

‘This is particularly important if volunteers are to be included in the proposal – changes will need to take into account the informal nature of many volunteering opportunities’

A charity that works with older people across the country said:

‘My concern is that organisations with little volunteering resource will move away from growing and diversifying their volunteer opportunities.’

Increasing compliance risk

There was also a clear concern that the new compliance burden would have a negative impact on charity resources. Resource would need to be shifted from making positive improvements to volunteering programmes to focusing on compliance. The expectation was that further training and procedures would be an inevitable consequence of these proposals, not least because of the demands of insurers.

A major national charity told us:

‘Volunteering is based on mutual trust and expectations rather than binding obligations. Much of its value for volunteers, service-users, and organisations comes from its distinction from paid employment... We are concerned that volunteering could become a subset of employment, and the very things that make it unique – the lack of legal obligation on either party, the mutual trust and expectations behind it – will be lost.

[...]

‘Volunteers themselves might end up with more obligations or responsibilities as part of their volunteer roles because the organisations taking them on are aware that they now have legal obligations relating to protecting them from discrimination and harassment.’

One children’s charity told us:

‘The creation of two legal categories of volunteering would be completely inappropriate for a charity such as ours and for the wider voluntary sector. We recognise it is good practice to agree role descriptions with volunteers, be they for trustee roles or for someone who occasionally helps at a fundraising event. The proposed legislation would risk many more volunteer roles being categorised as ‘informal’, with the consequence of offering volunteers less clarity about their roles and reduced support and guidance.’

And with tens of millions of people volunteering in the UK these changes would massively increase the exposure to vexatious claims.

One well-known national volunteer-led charity told us that they are already:

‘increasingly struggling with threats of litigation from no win no fee lawyers on a range of issues and... [with the number of volunteers we have] these proposals could open up the floodgates’.

Overall, by shifting the nature of volunteering and greatly increasing concerns about liability, the consequences of this would be to deter volunteering, or at least certainly not to encourage it. This would clearly run counter to the government’s desire to enable and encourage people to volunteer, as set out in the 2018 civil society strategy.

Voluntary workers

We do however agree that there are situations where there is an unequal balance of power, and the less powerful individual is not currently given appropriate legal protection.

In particular, we are mindful of the position of ‘interns’ at commercial and political organisations – whose position was behind the immediate concern which sparked the consultation.

The term ‘intern’ is not defined in UK law. The legal status of an intern depends on the arrangements under which they are engaged by the organisation and how the role is managed. An intern will necessarily fall into one of the following categories⁴.

- A worker or an employee, and therefore eligible for payment of the National Minimum Wage (NMW).
- A voluntary worker, expressly exempt in the legislation and not eligible for the NMW.
- A volunteer, and therefore not eligible for the NMW.

⁴ NCVO (2015). Volunteer Internships in the Voluntary Sector Review and guidance. <https://knowhow.ncvo.org.uk/your-team/volunteers-and-your-organisation/ncvoguidancevolunteerinternshipsvoluntarysector.pdf>

Interns in political or commercial organisations are often motivated by skills development. Roles are seen as a ‘rite of passage’ to work in certain professions. Such internships are often seen as exploitative, as personal career progression is only possible following such a role. Roles often have the characteristics of a *worker* or *employee* and should be paid NMW. In 2018, the government committed to ‘stamp out illegal and exploitative unpaid internships’⁵. Furthermore, the power dynamics in these roles can mean that the role holders are particularly vulnerable in the workplace. It is this dynamic which can create an environment for sexual harassment to occur.

If sexual harassment does occur, these workers may be less likely to report it, either because they do not know what their rights are or because their position, both legally and in the organisation, is more precarious than that of an employee. Nor do they have the same freedom to walk away that a volunteer does, as this could jeopardise their career prospects.

The dynamic in this relationship is very different to that of a *voluntary worker* or *volunteer* - roles that are unique to charitable, voluntary or statutory causes. Here, the motivation of the individual is overwhelmingly making a difference to others, and the organisation is the means by which the person makes that difference. Gaining skills and experience is usually secondary to them taking on roles with these types of organisations. Although the voluntary worker category has elements of contractual obligation, the NMW Act recognises that individuals in charitable, voluntary, associated fundraising or statutory organisations are different. As such, role holders are legally exempt from national minimum wage. The power dynamic in these relationships is also less imbalanced, because voluntary workers do not have their personal livelihood or career progression bound to the role.

We would therefore recommend that protection under the Equality Act should be extended to include ‘voluntary workers’ who do not work for charities – mirroring the exemption in the National Minimum Wage Act 1998 at section 44, whereby ‘A worker employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body does not qualify for the national minimum wage...’.

This further builds on the government position that unpaid roles in commercial and political organisations appear exploitative.

⁵ HM Government (2018). Good Work A response to the Taylor Review of Modern Working Practices.

Options for future consultation

Such a change would represent a significant and welcome improvement, ensuring the protection of those who would be the lesser-empowered party in an unequal relationship, whereby advancement in their chosen career is dependent on the organisation for which they are providing unpaid work. It may also help to improve standards in 'internships' in general, which have long been an issue of concern.

Following such a change, if there is evidence that there is still a need to strengthen protections for volunteering when it takes place in a formal setting, we suggest this would be better achieved through an option that has not been suggested in the current consultation.

This would consist of including in the Equality Act a new part for volunteers along similar lines to Part 7, which provides protection from discrimination for members of clubs and other bodies. The reason for taking such an approach is that it could be said that choosing to volunteer for a particular cause may be more closely aligned to membership of an association than employment.

This would enable volunteers to bring County Court claims for discrimination, harassment, and victimisation in respect of their treatment when from the point of applying to volunteer through to any 'detriment' broadly experienced at the hands of the organisation, including any detriment after the relationship had ended which was connected to the relationship.

Further consultation would be required to ensure any reasonable adjustments and exceptions, such as how an organisation should be defined and questions about enforcement and jurisdiction.