

Introduction

This submission to the Immigration Act review is made by Volunteering New Zealand. It represents the views of VNZ members and other organisations involved in volunteering services within New Zealand. It also represents the volunteers who provide services across all sectors of New Zealand society.

Volunteering New Zealand is an association of regional volunteer centres and national organisations with a strong commitment to volunteering. These organisations cover emergency services, health, welfare, education, sport and recreation, conservation, special interests and advocacy.

Its mission is to create an environment which supports, promotes, values and encourages effective volunteering by the people of Aotearoa New Zealand. Its vision is to be recognised as the national voice of volunteering and volunteers in this country. This is a different role from that of other organisations which speak on behalf of not-for-profit or voluntary organisations.

This submission relates to Section 13.3 of the Immigration Act Review Discussion Paper, which covers proposals for increased legal liabilities for employers related to employment of immigrants and people visiting New Zealand. There are implications in these proposals for organisations who involve visitors in volunteering roles while they are in New Zealand.

If unreasonable restrictions meant a reduction in volunteering by visitors to New Zealand, it would be to the detriment of not only the organisations and individuals involved, but also the wider community which would lose the benefit of the contribution of these volunteers could have made.

Executive Summary

- A significant number of people who are in New Zealand on a visitor's permit undertake volunteer roles while in this country. Some may come specifically for short term volunteering projects including through exchange type programmes.
- The nature of some of volunteer positions may necessitate the organisation providing the volunteering opportunity to pay reimbursement expenses to some of these volunteers. This could include accommodation, meals and major transport costs.
- Without any legislated guidance, immigration and other officials may take the view that some of these expenses payments constitute 'reward or gain' and the volunteers should be deemed employees.
- The proposals in the Immigration Act Review Discussion paper seek to tighten the responsibility on employees to not employ people on visitor's permits or otherwise not entitled to paid employment. This increases the risk of voluntary organisations who involve visitors to New Zealand in volunteer roles and pay them reimbursement expenses to be found to be paying staff unlawfully and liable for prosecution.
- A solution would be to exclude volunteering from the definition of 'employment' in Section 2 Interpretation of the Immigration Act and include a definition of volunteering which includes a provision for the payment of appropriate expenses.

Background

Many new immigrants and visitors to New Zealand contribute by undertaking voluntary services. Some of these will have come to New Zealand with or subsequently obtained either a work permit or permanent residency. However there are a significant number who are in New Zealand on a visitor's permit/visa. They may have indeed come specifically to undertake a short term volunteering role.

For instance, the NZ Trust for Conservation Volunteers offers volunteering opportunities in New Zealand for overseas visitors. Some may obtain a working holiday or other work permit, but they would include people in New Zealand on a visitor's permit.

Where these volunteers receive no reimbursements or expenses payments of any sort, there would be no conflict with their visitor permit requirements.

There are, however, programmes where overseas people come to New Zealand as part of an exchange or other international programme to participate in short term volunteer projects. They are likely to need funding assistance and this may be provided through the New Zealand host agency and could include accommodation and/or a living allowance.

Many community support services also reimburse expenses incurred by their volunteers while carrying out their volunteer role and many of these organisations have recent arrivals and visitors to New Zealand in their volunteer teams. An example organisation would be the Citizens Advice Bureaux service. The CAB national office reports that they have many new arrivals to New Zealand involved in their services as volunteers, some of whom would have visitor's permits. The CABs state that they reimburse the expenses of their volunteers in a number of situations including for incidentals such as postage and phone calls, travel costs, accommodation, meals, etc.

Another example from the recreation/sports sector comes from the disabled skiing programme. There are volunteers who assist the disabled skiers at all stages of their activities. A number of these are visitors to New Zealand on a skiing holiday. The volunteers accompany the disabled skiers at all stages of their activities. Their lift passes which enable them to do this are paid for by the programme organisation.

The question arises as to whether, under current law, any of these expenses could be considered "gain or reward" and therefore payments for employment.

The Department of Immigration, in a letter dated 27 May 2003, said that direct reimbursement of expenses for genuine costs incurred when volunteering would not constitute gain or reward to a person. However in the same letter, it indicated that payments for or the provision of board and lodging and meals might be considered gain or reward and the person receiving this might be treated as being employed. It indicated there would be a case-by-case consideration of each situation.

This leaves a high degree of uncertainty about the situation and there is also anecdotal evidence that some within the Immigration Service would not concur with the statement in the letter of 27 May 2003, that direct reimbursement of expenses for genuine costs should not be considered gain and reward. A statement has been made to one of VNZ's national members to the effect that any payment whatsoever to volunteers would be considered to be a payment for gain or reward.

Immigration Act proposals

While in the current situation the rules about expenses payments to overseas visitors who volunteer are unclear, proposals in the Review Discussion Paper, if adopted, will make the position potentially much more onerous and problematic for organisations wishing to involve such visitors in volunteer roles.

Section 13.3 discusses the responsibility of employers in relation to employment of people coming to New Zealand from overseas and what should be the employers' responsibility to not employ people in New Zealand on a visitor's permit.

The Review Paper sets out two possible options. Option A is to add specific requirements into the Immigration Act (and possibly related employment law) which would impose a legal obligation on employers to ensure they only employed people legally entitled to work in New Zealand (ie with an appropriate work permit or residency/citizen status). The option also includes a proposal that employers would have to meet 'good employer' requirements.

Option B would be to add to the current strict liability offence, a new obligation in Immigration Act requiring employers "to positively check and (cite reliable evidence) that a prospective employee is legally entitled to work in New Zealand and to remove the "reasonable excuse" of having sighted a tax code declaration.

Either option would impose new legal obligations on employers to not employ people in New Zealand on a visitor's permit.

Volunteering NZ's concern relates to the situation where an organisation provides a volunteer role to a person on a visitor's permit and reimbursement payments of expenses are necessary.

If, subsequently, the Immigration Department or their employment colleagues in the Department of Labour, decided the reimbursement payments constituted "reward or gain", the organisation could face prosecution for employing someone not legally entitled to work in New Zealand. If the full Option A were adopted, there could also be a liability in terms of being a 'good employer' and a potential further prosecution for not having paid the minimum wage. From the perspective of Volunteering New Zealand and organisations who involve volunteers in their services, this would be an unacceptable situation.

The solution

The solution we propose is to exclude volunteering activities from the definition of employment, as set out in Section 2 of the Immigration Act. We note there are also a number of exclusions set out in the Act. This would be adding another situation to that list. Furthermore, it would be in line with provisions added to the United Kingdom immigration law about 4 or 5 years ago. We understand this has been a very successful change to the UK law. ocvs

It is recognised that it would require more than simply inserting "volunteers" as an excluded group. There would need to be an appropriate definition of what is a volunteer and also a provision to ensure the payment of reasonable expenses did not constitute 'reward or gain' and therefore would be not employment income

Definition of Volunteer

We are aware that the Office for the Community and Voluntary Sector are making a submission and are likely to discuss possible definitions of 'volunteer'. We would also note there is a definition of 'volunteer' in the Health and Safety in Employment Act and that similar wording is used in the Employment Relations Act within a provision to exclude volunteers from the definition of 'employee' (Section 6 Meaning of Employee). However we

do not see this definition as being sufficiently comprehensive to cover the issues which VNZ raises in this submission.

Given these issues arise from overseas visitors to New Zealand undertaking volunteer roles (which may be part of an international exchange programme), we would propose using an internationally developed definition. It is also appropriate that our immigration legislation reciprocates the spirit under which volunteers from New Zealand undertake projects in other countries while receiving reimbursements for expenses and payment of living allowances. Just one example would be those who serve in other countries through Volunteer Service Abroad.

We would refer the Review Team to the international document “Volunteerism and Legislation – a Guidance Note” which has been jointly produced by the United Nations, the International Federation of Red Cross and Red Crescent Societies and the Inter-Parliamentary Union. This document describes voluntary activity and comments on how it should be acknowledged in the following way.

“First, voluntary activity is not undertaken primarily for financial reward, although reimbursement of expenses and some token payment may be allowed and even recommendable to facilitate access of individuals from all economic backgrounds. Second, it is undertaken voluntarily, according to an individual’s own free will. Third, voluntary activity brings benefits to people other than the volunteer, although it is recognised that volunteering brings significant benefit to volunteers as well.

Volunteerism is about people helping, learning and actively participating in communities. Volunteerism has no borders. It is a cross-cutting social phenomenon that involves all groups in society and all aspects of human activity. It can take many different forms, depending on cultural and economic realities of countries and communities.

To avoid confusion between the concepts of employment and volunteerism, it may be necessary for some labour law provisions expressly to exclude volunteers from the scope of their application. For example, the general presumption that “work” is “paid work” should not apply to voluntary workers serving non-profit purposes. Volunteerism is non-paid, but it is not always cost-free. The legal concept of “consideration for work” should not apply to any reasonable amounts volunteers may receive, such as reimbursements of out-of-pocket expenses related to their voluntary activities or the board or lodging they may be provided in the course of their work. The law should clarify what kind of compensation volunteers may reasonably receive, according to their specific needs and service requirements, without being subjected to the general labour law system as ‘employees’ ”.

Volunteering New Zealand endorses the points which are made in this extract from the international document, which goes on to offer possible definitions of volunteer. VNZ would propose that the following would provide a potential basis for appropriate wording in New Zealand immigration and employment law. The definition is:

“A volunteer is an individual who, by free choice, offers his or her time, work and skills, occasionally or on a regular basis, without expectation of compensation, other than reimbursement of reasonable expenses and subsistence allowance necessary for the accomplishment of his or her assignments as a volunteer, for the public benefit, individually or within the framework of informal or officially registered non-governmental non-profit organisations or national or international public entities”.

VNZ would add that, regardless of the concerns about proposed tightening to employers obligations, it is appropriate and desirable that volunteering and its particular needs are recognised in legislation such as the Immigration Act and employment legislation.

Submission

Volunteering New Zealand submits that volunteers and volunteering be added to the list of exclusions from the definition of “employment” in Section 2 of the Immigration Act. The suggested wording might be “activity in New Zealand as a volunteer as defined in Section 2 of this Act; such activity to be with a not-for-profit organisation”.

This would require adding a definition of “volunteer” to Section 2 of the Act and we would submit that the wording given above, taken from a significant international source, be used for the definition.

Conclusion

Volunteering New Zealand has appreciated being able to make a submission to the Immigration Act Review. VNZ would welcome the opportunity for dialogue with the officials and others who will be involved in the development of any legislation to arise from this review. This would be to discuss the proposal made in this submission, how it might be implemented and possible consequential legislative changes.