National Volunteer Guide (Part 1)

This part provides an overview of the key legal issues affecting volunteer involving organisations

October 2018
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Some of the common terms used in this Guide include:

**ACNC** refers to the Australian Charities and Not-for-profit Commission

**CLG** refers to a company limited by guarantee

**Common law** refers to the law developed by the courts, or judge-made law (as opposed to legislation or statute, which is law made by Parliament)

**Constitution (or Rules)** refers to the governing document of a company. The Constitution sets out the company’s purposes and the procedures for running the company.

**Committee** refers to the organisation’s governing body, sometimes referred to as a Board, or similar

**Committee or Board meeting** refers to a meeting of the organisation’s governing body, also referred to as a directors’ meeting

**Committee member or Director** refers to a person specifically appointed to a position of management of the affairs of the company

**Formal volunteering** means time willingly given for the common good and without financial gain, taking place within organisations (including institutions and agencies) in a structured way

**Incorporated association** refers to an organisation incorporated under state or territory based incorporated associations laws

**Informal volunteering** means time willingly given for the common good and without financial gain, taking place outside the context of a formal organisation. This includes assisting people in the community, excluding one’s own family members. For example, looking after children, property or pets; providing home or personal assistance; or giving someone professional advice

**Member** refers to the persons or entities that hold an interest in the not-for-profit organisation, as an example in the context of a CLG, these are the persons or entities who gave a guarantee to be liable for a defined amount when they became a member, to cover the company’s debts and liabilities if the CLG is wound up and unable to meet them

**Policy** refers to a particular way of dealing with an issue or area of activity which the company has agreed on. Policies are usually (but not always) written down. A company may have policies about, for example, recruitment of new committee members, procedures for meetings or dispute resolution. Policies cannot override legal obligations or the company’s Constitution (or Rules), but they can supplement them

**Spontaneous volunteers** means people who seek or are invited to contribute their assistance before, during and/or after an emergency, and who are not affiliated with recognised volunteer agencies, and may or may not have relevant training, skills or experience

**Not-for-profit Law** refers to the specialist legal service for not-for-profit organisations and a program of Justice Connect, a registered charity with the ACNC and an accredited legal centre

**Rules** is another word for the Constitution of a not-for-profit organisation
Volunteer refers to those who give their time willingly for the common good and without financial gain.

Volunteer involving organisation means any organisation, corporation or group that engages volunteers.

Worker refers to a person who has performed work for another. A worker could be paid, for example, an employee of an organisation or unpaid, for example, a person undertaking an unpaid student placement or another form of volunteering. Please note that ‘worker’ has a distinct legal meaning in the context of work health and safety law, discussed in detail in Part 3 of this Guide.
Part 1 – Introduction and overview of the key legal issues affecting volunteer involving organisations
This part covers:

- background information on this Guide
- how to use this Guide, and
- the key legal issues covered in the Guide.

Volunteers are an important resource to many, if not most, community organisations. It is estimated that almost 44% of adult Australian’s volunteer more than 932 million hours on an annual basis. This amounts to an average of 55 hours per week. ¹

Most volunteers provide their services because they want to contribute to their community in a useful and meaningful way.

The relationship between the community organisation and the volunteer should be managed in a way that is mutually respectful, safe and healthy.

One way your organisation can ensure that this relationship is meaningful, and managed in a respectful, safe and healthy way is by building an understanding of the legal issues surrounding the engagement and management of volunteers. This Guide aims to strengthen this understanding.

In addition to the legal issues that surround the engagement and management of volunteers, there are “best practice” principles that volunteer involving organisations should consider in order to attract, manage, retain and recognise volunteers, and help improve the volunteer experience.

Volunteering Australia has developed the National Standards for Volunteer Involvement (the Standards) and these are referred to throughout. These Standards allow organisations to make use of simple, practical criteria across a broad range of volunteering situations and can be used as a general guide to best practice, as a checklist or as a reference to planning a new volunteer program or reviewing an existing program.

The Standards cover the follow areas of volunteer involvement:

- Leadership and management
- Commitment to volunteer involvement
- Volunteer roles
- Recruitment and selection
- Support and development
- Workplace safety and wellbeing
- Volunteer recognition, and

Quality management and continuous improvement

Where appropriate, throughout this Guide we have referred to the Standards, in recognition that “best practice” sits alongside and in addition to the legal issues that volunteer involving organisations need to consider.

The Standards can be accessed from Volunteering Australia at www.volunteeringaustralia.org.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

Volunteering Australia’s National Standards for Volunteer Involvement, contain two Standards particularly relevant to the overall management of a volunteer program.

**Standard 1: Leadership and Management** states that governing body and senior employees lead and promote a positive culture towards volunteering and implement effective management systems to support volunteer involvement.

**Standard 2: Commitment to volunteer involvement** states that commitment to volunteer involvement is set out through vision, planning and resourcing and supports the organisations strategic direction.

TIP

In addition to Volunteering Australia, each state and territory has peak bodies which facilitate opportunities for people seeking to volunteer, and support organisations who are seeking to implement the Standards. These organisations are:

- Volunteering and Contact ACT | www.vc-act.org.au
- The Centre for Volunteering (NSW) | www.volunteering.com.au
- Volunteering Queensland | www.volunteeringqld.org.au
- Volunteering SA & NT | www.volunteeringsa-nt.org.au
- Volunteering Tasmania | www.volunteeringtas.org.au
- Volunteering Victoria | www.volunteeringvictoria.org.au
- Volunteering WA | www.volunteeringwa.org.au

1. About the Guide

Who is this guide for?

This Guide is designed for use by volunteer involving organisations. It provides an overview of the key legal obligations organisations owe volunteers and provides practical examples and tips to assist in their understanding. The Guide will be useful for committee members (or directors) of an organisation along with other members of the organisation, such as the volunteer manager as well as those who work with volunteer involving organisations (such as peak bodies). It will also be useful for volunteers.

This Guide primarily focuses on providing an overview of the key legal issues involved in engaging and managing volunteers – for example, laws dealing with workplace health and safety and workplace behaviours. The Not-for-profit Law website at www.nfplaw.org.au contains numerous resources on a broader range of topics to help your not-for-profit organisation understand its legal obligations in running the organisation.
This Guide is produced by Not-for-profit Law, a specialist legal service for not-for-profit organisations.

NOTE – THIS GUIDE PRINCIPALLY DEALS WITH FORMAL VOLUNTEERING

This Guide is intended for volunteering involving organisations engaging what is referred to as ‘formal volunteers’. By this we mean people who give their time willingly for the common good and without financial gain, within an organisation (including institutions and agencies) in a structured way. Sometimes community organisations attract ‘spontaneous volunteers.’ Spontaneous volunteers differ from ‘formal volunteers’ and may create certain challenges for organisations. For more information see Part 3 ‘Volunteer Safety’ of this Guide.

How can your organisation use this Guide?

This Guide is designed for use by volunteer involving organisations across Australia. It provides an overview of the key legal obligations of volunteer involving organisations, and where applicable differentiates between national, state and territory laws.

The Guide is divided into six parts. After this introductory part, the topics covered are:

**Part 2**: Volunteer, employee or independent contractor: the legal differences between types of workers and the main legal obligations an organisation owes to employees, independent contractors and volunteers

**Part 3**: Volunteer Safety: responsibility in regard to negligence, work health and safety, managing risk, insurance and child safe standards

**Part 4**: Volunteers and unlawful workplace behaviours: laws such as discrimination and sexual harassment, work health and safety and workers’ compensation

**Part 5**: Recruiting, inducting, managing performance and ending the volunteer relationship: recruiting, inducting, managing performance, managing grievances and ending the volunteer relationship

**Part 6**: Organisational issues applicable to volunteers: intellectual property, privacy and record-keeping

There are practical tools (like template documents) and tips throughout this Guide, and links to other reliable sources of information which you may find helpful.

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2. Key legal issues covered in this Guide

2.1 Part 1: Introduction and overview of the key legal issues affecting volunteer involving organisations

As outlined above, this Guide provides an overview of the key legal obligations of volunteer involving organisations and aims to assist your organisation to understand and manage risks.

Parts 2 – 6 are explained further below.

2.2 Part 2: Volunteer, employee or independent contractor?

Part 2 of this Guide is called: Volunteer, employee or independent contractor?

It is important that your community organisation understands the legal differences between employees, independent contractors and volunteers.

2.2.1 The key legal issues

1. The law recognises many different categories of relationships where one party (a worker) performs work for another party in exchange for payment or reward. These include, among others, the relationships of ‘employer and employee’ and ‘principal and independent contractor’.

2. The law also recognises a separate category of worker known as a ‘volunteer’. This category of worker performs work for another (such as your not-for-profit organisation) without an expectation of, or legal requirement of, payment or reward.

3. Your volunteer involving organisations needs to understand the legal distinction between volunteers, employees and independent contractors. The distinction is often made based upon the key ‘attributes’ of each category of worker.

4. Generally speaking the ‘attributes’ of each category of worker are:

   Volunteers are not paid for the work that they perform, they do so without a legally enforceable obligation to do so and the volunteer relationship can end at any time.

   Employees are paid for time worked, must perform the duties of their position, perform ongoing work under the supervision and control of an employer and are entitled to paid and unpaid leave.

   Independent contractors have control over how they carry out their work, are paid for results that they achieve, are contracted for a set period of time or a set task and are free to accept work from the general public and other businesses.

5. Merely labelling a worker a ‘volunteer’, ‘employee’ or ‘independent contractor’ does not mean they are in fact a ‘volunteer’, ‘employee’ or ‘independent contractor’. If the matter went to court, the court would look beyond the label to the substance of the work relationship as a whole.

6. Sometimes the distinction between workers can become blurred over time. For example, where a worker starts out as a volunteer but later becomes an employee or independent contractor (or vice
versa). This may even happen without a conscious decision being made by the volunteer involving organisation, especially where some sort of payment is made to the worker.

7. **Some laws apply differently to volunteers and there are some laws that do not apply at all to volunteers.** For example, employees can enjoy a high level of protection and be entitled to benefits under the *Fair Work Act 2009*, industrial instruments, superannuation and taxation legislation and workers’ compensation laws. Whilst work health and safety laws generally apply equally to employees, independent contractors and volunteers overall, independent contractors and volunteers do not generally enjoy the full range of legal protections and benefits provided to employees.

8. **Understanding the legal differences between volunteers, employees or independent contractors is crucial for determining the obligations that are owed and protections afforded to the volunteer.** This will put your organisation in a position to assist your volunteers to understand the basis on which your organisation is engaging them, and the legal entitlements owed to them.

9. **Other organisational matters could be different as well.** For example, whether someone is covered by your organisation’s insurance may depend on their worker status (i.e. a volunteer or employee)

10. **In some circumstances, members may also be considered ‘volunteers’.** This has certain legal implications for your organisation because certain laws apply to volunteers that may not apply to members, and insurance may apply to volunteers and members in a different way.

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**NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT**

Volunteering Australia’s National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these Standards into its day-to-day practice, it will help your organisation comply with the legal obligations.

According to the Standards, volunteer roles are designed to contribute to the organisation’s purpose, goals and objectives. These roles are appropriate for the community, service user or stakeholder groups with which the organisation works. Furthermore, volunteer roles should be defined, documented and communicated and reviewed, with input from volunteers and employees.

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**2.3 Part 3: Volunteer Safety**

Part 3 of this Guide is called: *Volunteer Safety*.

Many community organisations require the support of their volunteers to effectively pursue their stated purpose. Understanding your community organisation's legal obligations in relation to safety is crucial to protecting this valuable resource.
2.3.1 The key legal issues

1. Volunteer safety is a critical issue for your organisation. It is relevant to the risk of legal liability (legal responsibility) of community organisations, but it also impacts the ability to attract and retain the volunteers upon which community organisations rely.

2. There are various aspects to volunteer safety, each of which come with obligations and potential liabilities. The two primary sources of “safety” law that organisations need to be aware of are negligence law and work health and safety (or occupational health and safety) law.

3. When considering safety, your organisation must also be aware of the two sides to safety. The safety of the volunteer, as well as the safety of the people that the volunteer is interacting with, such as clients, employees, other volunteers and members of the public.

4. Generally speaking, your volunteer involving organisation will have a duty of care to its volunteers. This is called the law of negligence. This law involves both the common law (judge made law) and legislation in each state and territory in Australia.

5. Your organisation may also be vicariously liable for the acts or omissions of their volunteers. If your organisation is found (by a court) to be vicariously liable for the actions of volunteer, it will most likely be ordered by the court to pay compensation (in the form of money). Other consequences for the organisation of such an outcome could include operational and reputational damage.

6. There is legislation which seeks to limit or eliminate civil liability of volunteers in most states and territories. All of the states and territories have different laws concerning this situation, but generally, if a volunteer is protected (that is, they satisfy all of the tests in the relevant legislation) the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury, property damage or financial loss, as a result of their own actions or failures to act. Instead, if harm is caused by a volunteer, the community organisation may be liable rather than the volunteer individually.

7. Work health and safety laws also impose obligations to ensure, so far as reasonably practicable, the safety of volunteers in the workplace. Although work health and safety legislation is largely uniform between the states and territories, there are some nuances between them. Your organisation should be aware of its organisation’s work health and safety obligations to volunteers and have policies and procedures in place to meet these obligations.

8. Work health and safety laws also generally impose obligations on volunteers. Your organisation should ensure that volunteers are aware of the organisation’s work health and safety policies and procedures as well as training volunteers as to the obligations they owe as ‘workers’ in the workplace. As mentioned above, there are some nuances between the states and territories and your organisation should make sure it is aware of these differences.

9. It is important that your organisation adopts a risk management strategy aimed at eliminating, managing or mitigating the effects of those risks associated with the safety of its volunteers. Ensuring your organisation is adequately covered by insurance is another way that your organisation can manage this risk.
10. It is important that your organisation complies with the relevant obligations under state and territory laws (and the common law) relating to the safety of children. Organisations will need to consider the safety of children who are volunteers, and the safety of children that your volunteers may be interacting with through your organisation.

### NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

Volunteering Australia’s National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations. There are Standards relevant to the safety of volunteers including workplace behaviours.

**Standard 5: Support and Development** states that volunteers should be provided with the opportunity to understand their roles and gain knowledge, skills and feedback needed to safely and effectively carry out their duties.

**Standard 6: Workplace Safety and Wellbeing** states that the health and safety of volunteers is protected in the workplace.

### 2.4 Part 4: Volunteers and unlawful workplace behaviour

Part 4 of this Guide is called: Volunteers and unlawful workplace behaviour.

Your volunteer involving organisation has an obligation to protect volunteers from unlawful workplace behaviour and protect other people your volunteers are interacting with – to make sure they are not subject to unlawful workplace behaviour by the volunteer.

#### 2.4.1 The key legal issues

1. **Your volunteer involving organisation should take steps to protect volunteers from unlawful workplace behaviours.** Some of these behaviours include discrimination, sexual harassment, bullying and victimisation.

2. **Laws prohibit sexual harassment.** The laws exist at both a state and federal level. Generally, sexual harassment laws apply to volunteers (whilst carrying out volunteer work) in all states except Western Australia and the Northern Territory.

3. **Laws prohibit discrimination.** Discrimination can be direct or indirect and, in the case of indirect discrimination, can often be subtle. Generally, the state-based discrimination laws will apply in the Australian Capital Territory, Queensland, South Australia and Tasmania. They may apply in Victoria and New South Wales where volunteering falls within another area covered by the discrimination legislation, but the laws are unlikely to apply to volunteers in Western Australia and the Northern Territory.

4. **Laws prevent bullying.** Bullying behaviour is prohibited under federal law (e.g. volunteers are protected in the same way as employees under the *Fair Work Act 2009*) and prohibited by state and territory work, health and safety laws.

5. **Laws prohibit victimisation.** These laws are the same laws that prohibit discrimination so your organisation will need to carefully consider whether victimisation laws apply to volunteers in the relevant state or territory.
6. Sexual harassment, discrimination, victimisation and bullying may also be a work health and safety issue in which case the relevant federal, state or territory work health and safety legislation may apply to your organisation.

7. Where legislation does not protect a volunteer at work, a common law (negligence) duty of care may still be owed to your volunteer to ensure that they do not suffer harm resulting from inappropriate workplace behaviour.

8. Aside from legal obligations to protect your volunteers from unlawful workplace behaviour, your organisation has legal obligations to protect the people your volunteers are interacting with, and to ensure that they are not subject to unlawful workplace behaviour by the volunteer. Your organisation could be legally responsible (under discrimination laws, work, health and safety legislation and negligence law) for the actions of volunteers.

9. We recommend you comply with these laws (as much as reasonably practicable) even if they do not apply. It is a matter of best practice.

**NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT**

Volunteering Australia’s National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations. There is a specific standard in relation to safety of volunteers.

**Standard 6: Workplace Safety and Wellbeing** states that the health and safety of volunteers is protected in the workplace.

2.5 Part 5: Recruiting, inducting, managing performance, and ending the volunteer relationship

Part 5 of this Guide is called: Recruiting, inducting, managing performance and ending the volunteer relationship.

Your organisation should carefully consider the legal issues associated with recruiting and inducting volunteers, managing their performance, dealing with their grievances and ending the relationship.

2.5.1 The key legal issues

1. **Your organisation should recruit volunteers in a fair and non-discriminatory way, including via screening.** Organisations should undertake some level of screening for volunteers, even if certain checks are not required by law (under legislation or contract).

2. **A Position Description should be used for all volunteer positions in your organisation.** It should focus on the specific skills or qualifications needed for the role. It should be used when advertising for volunteers and in making decisions about prospective volunteers.

3. **Volunteers should be inducted before commencing their role.**

**NOTE**

Part 5 of the Guide provides an induction checklist for your organisation to use. It also provides a sample volunteer position description and a sample volunteer agreement.
4. A Volunteer Agreement is an important part of engaging volunteers, helping to make sure the volunteer understands their rights, role and responsibilities along with those of the organisation. A volunteer agreement will also assist with situations where a volunteer involving organisation wants to create legally binding obligations on the volunteer, for example, to protect the organisation’s confidential information or intellectual property. Provided such legally binding obligations go no further than this, having a legally binding agreement in relation to such matters will not affect a genuine volunteer relationship (i.e. inadvertently turning the relationship into another category of working relationship such as employment or independent contractor).

5. Volunteers should be told about your organisation’s procedure for handling grievances. This will assist in preventing issues becoming more problematic. Your organisation should ensure volunteer’s grievances are heard and dealt with in an appropriate manner.

6. Managing the performance and grievances of volunteers can be problematic if not done correctly.

7. Volunteers can be ‘dismissed’ without fear of an unfair dismissal claim (under employment laws). However, good practice dictates that the process in managing volunteers is handled well and with the same respect afforded to employees.

8. Following a fair process in the recruiting, inducting, and managing volunteer performance will increase a volunteer’s confidence and commitment to the organisation.

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**NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT**

Volunteering Australia’s National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations. There are a number of specific standards in relation to volunteer roles, recruitment, and support in managing volunteers.

**Standard 3: Volunteer roles** states that volunteers are engaged in meaningful roles which contribute to the organisation, purpose, goals and objectives.

**Standard 4: Recruitment and selection** states that Volunteer recruitment and selection strategies are planned, consistent and meet the needs of the organisation and volunteers.

**Standard 5: Support and development** states that volunteers understand their roles and gain the knowledge, skills and feedback needed to safely and effectively carry out their roles.

**Standard 7: Volunteer recognition** states that volunteer contribution, value and impact is understood, appreciated and acknowledged.

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**2.6 Part 6: Organisational issues applicable to volunteers**

Part 6 of this Guide is called: Organisational issues applicable to volunteers.

There are other laws that can affect volunteers and have an impact upon your organisation.
2.6.1 The key legal issues

1. **Your organisation needs to understand the difference between the different forms of intellectual property, because in some circumstances these laws treat volunteers differently.** For example, your organisation does not automatically own any copyright created by a volunteer. This means that it is crucial that your organisation enters into written agreements with volunteers for the transfer of ownership of intellectual property to your organisation upon creation. Agreements with volunteers should also cover any Moral Rights the volunteer may have in respect of any literary, dramatic, musical or artistic work which they produce for your organisation. Your organisation should protect any trademarks, designs and patents by registering them with IP Australia.

2. **Confidential information creates an obligation in law to maintain the confidentiality of information when it is disclosed to someone on a condition of confidentiality.** The obligation to treat information in confidence does not necessarily extend to volunteers unless the confidentiality of the information is made very clear. A confidentiality agreement provides a direct and immediate way for your organisation to protect your rights in respect of confidential information.

3. **Privacy laws may apply to your organisation.** Your organisation may need to implement practices and procedures which reflect privacy law obligations, including appropriately training volunteers to ensure your organisation’s ongoing compliance under privacy law. If the privacy laws do not apply to your organisation, we would recommend that you follow them as a matter of best practice.

4. **Your organisation must be aware of your obligations in relation to the personal information of its volunteers.** Only collect and store the volunteer’s personal information with their consent, only use it for the purpose it was collected, treat it as confidential information, store it securely and be extra careful with ‘sensitive’ and ‘health’ information of your volunteers.

5. **The law may require your organisation to hold records in relation to your volunteers.** For example, the ACNC requires registered charities to provide annual reports, which includes details about the number of volunteers the organisation has engaged. If your charity does not provide this information, this can lead to revocation of charity status.

6. **Regardless of any legal obligation to keep records on volunteers it is a good idea to keep records for a number of reasons.** These reasons include internal organisational reporting, current or anticipated disputes or legal action, or for the purposes of insurance. We recommend you keep them for 7 years and that they be kept and maintained alongside the organisation’s other records.
Volunteering Australia’s National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations. **Standard 8: Quality Management and Continuous Improvement** states that effective volunteer involvement results from a system of good practice, review and continuous improvement.
Resources

Related Not-for-profit Law Resources

Not-for-profit Law has developed a National Volunteer Guide, which sets out in detail the key legal issues affecting volunteer involving organisations. The Guide is in six Parts and includes a number of templates and sample policy documents, which should be read together. See Not-for-profit Law's page on volunteering at www.nfplaw.org.au/volunteers

- Part 2: Volunteer, employee or independent contractor
- Part 3: Volunteer safety
- Part 4: Volunteers and unlawful workplace behaviour
- Part 5: Recruiting, inducting, managing performance and ending the volunteer relationship
- Part 6: Organisational issues applicable to volunteers

Not-for-profit Law has also developed a number of free webinars for volunteer involving organisations, which can also be accessed from Not-for-profit Law's page on volunteering at www.nfplaw.org.au/volunteers

Volunteering Australia resources

- Volunteering Australia  www.volunteeringaustralia.org

Volunteering Australia has published a suite of resources for volunteer managers including information on insurance and complaint handling.

- National Standards for Volunteer Involvement

Volunteering Australia’s National Standards for Volunteer Involvement reflect best practice in volunteer management in Australia’s current work environment.

- Definition of volunteering

Volunteering Australia’s definition of volunteering has a set of explanatory notes, a detailed Issues Paper that provides background and context, and a set of FAQs around it.

State and territory peak bodies for volunteering

State and Territory peak bodies facilitate opportunities for people seeking to volunteer, and support volunteer involving organisations. These bodies are:

- Volunteering and Contact ACT – www.vc-act.org.au
- The Centre for Volunteering (NSW) – www.volunteering.com.au
- Volunteering Queensland – www.volunteeringqld.org.au
- Volunteering SA&NT – www.volunteeringsa-nt.org.au
- Volunteering Tasmania – www.volunteeringtas.org.au
- Volunteering Victoria – www.volunteeringvictoria.org.au
- Volunteering WA – www.volunteeringwa.org.au
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