A Research Project funded by Lotterywest and the University of Western Australia and conducted by researchers from the University of Western Australia, Murdoch University and Curtin University

GUIDANCE MATERIALS FOR WA CHARITIES

Building Resilience: Utilising Restricted Reserves

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All views in these guidance materials (and any errors) are those of the authors in their capacity as researchers and do not represent the views of any of the people or organisations that have supported the research.

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The research project

The research was conducted with the assistance of a Research Advisory Group, being a reference group that was established specifically for this project to help shape its focus to ensure that it is useful to Western Australian charities.

The research methods comprised the following:

1. **Two exploratory workshops**, held with members of the Research Advisory Group to help with the process of shaping the research design.

2. **Doctrinal legal research** concerning the legal characterisation of restrictions on gifts and concerning legal mechanisms to amend or lift those restrictions.

3. **Twenty-eight interviews** conducted with 31 charity executives, legal advisors and others with a sector overview.

What are restricted reserves?

By ‘reserves’ we mean a charity’s *net assets*. So, ‘restricted’ reserves means charity assets that are subject to conditions on the way in which they can be used.

Of course, all charities must use their assets for their *charitable purpose*. However, additional conditions can often arise when gifts are made to charities. For instance, funds might be given with the condition that only the *interest* and not the *capital* can be spent. By way of another example, a gift might be for a specific activity within the charity’s broader purpose, such as to provide a particular type of healthcare or to fund a scholarship for education in a particular field.

Restrictions and crises

The Western Australian charity sector plays a fundamental role in relation to almost every aspect of the lives of Western Australians. For instance, health support at the time of birth, education, religious and social services, cultural enrichment during our lives, aged care in our later years and protecting the environment for future generations. However, recent crises such as COVID-19 and the earlier Global Financial Crisis pose challenges for society and the charitable sector and have shown that some charities can face legal and non-legal difficulties in accessing their reserves in times of great need. Donor restrictions on gifts—which may no longer be appropriate in the changed circumstances of a crisis—are a key reason.

Role of these guidance materials

These guidance materials are not intended to encourage charities to ignore donor’s wishes. However, the research we conducted suggests that often charities are unsure whether donor wishes are legally binding and, if so, are also unsure of the character of the legal obligation and the legal pathways to amend or lift such restrictions.

Accordingly, these guidance materials:

1. Provide information on the six main potential legal characterisations of donor restrictions and set out the available legal mechanisms for amending or lifting those restrictions. This information is contained in the *Accessing Existing Restricted Assets diagram*. The aim of the diagram is to empower charities when considering an amendment to restrictions and to provide them with a solid basis for any conversations with donors.

2. Make recommendations for preventative actions that charities can take in respect of future gifts, to avoid unwanted or inappropriate restrictions. These recommendations are set out in the *Preventative Measures diagram*.

This guidance is general in nature and does not constitute legal advice. However, it should materially help charities in obtaining legal advice.

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Apply to Supreme Court under s89 of the Trustees Act 1962 (WA) to confer powers on trustees where it is ‘expedient’ to do so. ‘Expedient’ means ‘advantageous’, ‘desirable’, ‘suitable to the circumstances of the case’. The provisions can be used to circumvent some restrictions on the use of property. For instance, providing trustees with an express power to distribute capital that is otherwise subject to a requirement that it be perpetually endowed.

Apply to Supreme Court to settle a cy-près scheme, which varies the charitable purpose for which property is held. Under s10(1) Charitable Trusts Act 2022 (WA) key grounds are: where it is ‘impossible, impracticable or inexpedient’ to carry out the purpose; or where ‘the amount available is inadequate to carry out the purpose; or where the property ‘is more than is necessary for the purpose’.

Apply to the Supreme Court to settle an administrative scheme, which alters the mode of administering a charity. Administrative scheme can be sought where the current mode is ‘inadequate or impractical’ to achieve a charity’s purpose or (Charitable Trusts Act 2022 (WA) s22(1); where the administration could be facilitated by extending or varying the powers of the trustees, or by prescribing or varying the mode of administration.

Apply to the Supreme Court for advice or directions on a proposed course of action. Due to court’s inherent supervisory jurisdiction (Re Padbury (1908) 7 CLR 690) or under legislation for certain forms of charities: Trustees Act 1962 (WA) s92; Charitable Trusts Act 2022 (WA) s44(2)(d).

Agree with the donor (or executor/heirs) for the donor to amend/not enforce their rights such that the charity can act in breach of restriction. If original restriction involved a gift-over to another charity, may need the other charity to also agree. Agreement should generally be in deed form to deal with the lack of consideration by the charity.

Legal nature of restraints and legal amendment mechanisms

- **Mere wish**
  - As a non-binding wish, there are no legal consequences if the charity uses the funds for another purpose or otherwise contrary to the wish.

- **Charitable trust**
  - Restriction is characterised as a charitable purpose for which the funds have been given, with the recipient charity treated as a trustee with fiduciary obligations to use the gift for that purpose, rather than its own broader charitable purposes.

- **Common law condition subsequent giving rise to forfeiture**
  - A condition that donated property be used in a specified manner which, if breached, entitles the donor to call for the property back, or may result in a gift-over to another charity.

- **Equitable personal obligation**
  - An equitable obligation to accept the restriction stipulated by a donor where a charity chooses to accept the benefit of a gift of property along with the restriction.

- **Charge**
  - An equitable interest in the donated property which secures the use of the donated property for a particular purpose, held by the person in whose favour it is charged.

- **Agreement**
  - A binding agreement between the donor and the charity whereby the charity agrees to comply with a restriction and the donor agrees to give the property.

**POSSIBLY**

**APPLY TO SUPREME COURT UNDER S89 OF THE TRUSTEES ACT 1962 (WA) TO CONFER POWERS ON TRUSTEES WHERE IT IS ‘EXPEDIENT’ TO DO SO.**

‘EXPEDIENT’ MEANS ‘ADVANTAGEOUS’, ‘DESIRABLE’, ‘SUITE TO THE CIRCUMSTANCES OF THE CASE’. THE PROVISIONS CAN BE USED TO CIRCUIT SOME RESTRICTIONS ON THE USE OF PROPERTY. FOR INSTANCE, PROVIDING TRUSTEES WITH AN EXPRESS POWER TO DISTRIBUTE CAPITAL THAT IS OTHERWISE SUBJECT TO A REQUIREMENT THAT IT BE PERPETUALLY ENDBOURED.

**APPLY TO SUPREME COURT TO SETTLE A CY-PRES SCHEME, WHICH VARY THE CHARITABLE PURPOSE FOR WHICH PROPERTY IS HELD.** UNDER S10(1) CHARITABLE TRUSTS ACT 2022 (WA) KEY GROUNDS ARE: WHERE IT IS ‘IMPOSSIBLE, IMPRACTICAL OR INEXPEDIENT’ TO CARRY OUT THE PURPOSE; OR WHERE ‘THE AMOUNT AVAILABLE IS INADEQUATE TO CARRY OUT THE PURPOSE; OR WHERE THE PROPERTY ‘IS MORE THAN IS NECESSARY FOR THE PURPOSE’.

**APPLY TO THE SUPREME COURT TO SETTLE AN ADMINISTRATIVE SCHEME, WHICH ALTERS THE MODE OF ADMINISTERING A CHARITY.** ADMINISTRATIVE SCHEME CAN BE Sought WHERE THE CURRENT MODE IS ‘INADEQUATE OR IMPRACTICAL’ TO ACHIEVE A CHARITY’S PURPOSE OR (CHARITABLE TRUSTS ACT 2022 (WA) S22(1); WHERE THE ADMINISTRATION COULD BE FACILITATED BY EXTENDING OR VARYING THE POWERS OF THE TRUSTEES, OR BY PRESCRIBING OR VARYING THE MODE OF ADMINISTRATION.

**APPLY TO THE SUPREME COURT FOR ADVICE OR DIRECTIONS ON A PROPOSED COURSE OF ACTION.** DUE TO COURT’S INHERENT SUPERVISORY JURISDICTION (RE PADbury (1908) 7 CLR 690) OR UNDER LEGISLATION FOR CERTAIN FORMS OF CHARITIES: TRUSTEES ACT 1962 (WA) S92; CHARITABLE TRUSTS ACT 2022 (WA) S44(2)(D).

**AGREE WITH THE DONOR (OR EXECUTOR/HERS) FOR THE DONOR TO AMEND/NOT ENFORCE THEIR RIGHTS SUCH THAT THE CHARITY CAN ACT IN BREACH OF RESTRICTION.** IF ORIGINAL RESTRICTION INVOLVED A GIFT-OVER TO ANOTHER CHARITY, MAY NEED THE OTHER CHARITY TO ALSO AGREE. AGREEMENT SHOULD GENERALLY BE IN DEED FORM TO DEAL WITH THE LACK OF CONSIDERATION BY THE CHARITY.

Consider also: Internal charity controls on the use of assets, impact on reputation and donor perceptions, and impact on financial sustainability.

Note: Legal constraints might apply in particular circumstances, such as consumer protection requirements on fundraising, or Crown lease or grant conditions.
## Preventative Measures

### Legal Drafting of Gift Terms

<table>
<thead>
<tr>
<th>Measure</th>
<th>Summary</th>
<th>Intended effect / example</th>
</tr>
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<tbody>
<tr>
<td>Gift agreements or acknowledgments</td>
<td>It is not possible to foresee the future. Change of circumstance can mean that restrictions make it difficult to effectively pursue charitable purpose. Terms in the agreement should seek to maximise flexibility around: Broad wording for the restricted purpose; Expressly allowing for a change of use if circumstances change.</td>
<td></td>
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<tr>
<td>Template terms for wills</td>
<td>As above. Eg: I give to [organisation] [X]% of my residuary estate or [X%] of my [insert basis].</td>
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### Education and Support

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<tbody>
<tr>
<td>Education &amp; support for charity officers</td>
<td>Education support on matters such as the legal effect of restricted gifts, associated costs to charities and donors, and mechanisms to address historic restrictions.</td>
<td>Prevent unnecessary or unintended restrictions on gifts and address historic restrictions.</td>
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### Internal Controls on Accepting Gifts

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<tr>
<td>Formal gift acceptance policy</td>
<td>Policy/practices should cover: - fit with the charity’s purpose and values; - unacceptable donors/circumstances; - the types of property accepted as a gift; - circumstances in which donators are permitted to specify restrictions (eg by value/risk thresholds) and the nature of those restrictions; - delegations of authority specifying who can accept gifts (eg by value thresholds); - record-keeping and feasibility checks for conditions.</td>
<td>Reduce administrative costs associated with restricted gifts, and instances of receiving restricted gifts that cannot be accessed.</td>
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<tr>
<td>If formal thresholds are controversial and limiting for the charity, more informal decision checklist</td>
<td>Delegations of authority should still be in place (eg above a low threshold it might be for the board/trustees to consider the various factors and decide whether to accept a restricted gift). Decision checklist covering the other above matters as relevant considerations.</td>
<td>Provide more flexibility than a formal policy, but still ensure some protection for charity.</td>
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### Donor & Community Relations

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<tr>
<td>Build trust with donors and the community</td>
<td>Requires charity to be responsible systems are transparent about its use of gifts and more broadly in relation to its management and outcomes achieved.</td>
<td>Trust that the charity will appropriately use gifts, lessening need for restrictions in the first place.</td>
</tr>
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<td>Pre-acceptance conversations with donors</td>
<td>Explain to donors the potential problems arising from restricted gifts, and the need for flexibility and seek to understand donor reasons for seeking restrictions, to see whether those reasons can be addressed in other ways.</td>
<td>Limit or eliminate unnecessary restrictions on gifts in order to make the gift more effective. And where restrictions are accepted, the charity will have a very good understanding of their basis.</td>
</tr>
<tr>
<td>Information evenings with potential testators</td>
<td>Information evenings with people considering leaving a bequest to the charity in their will. Staffed by volunteer lawyers and charity fundraising staff.</td>
<td>Provides an opportunity to explain charity’s preferred terms and the reasons for building in some flexibility.</td>
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### Ongoing Management of Restricted Gifts

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<tr>
<td>Sound governance processes</td>
<td>Sound overarching governance systems for the charity’s gifts, lessening need for relating to the management of gifts.</td>
<td>Can avoid difficulties accessing reserves and help build trust with donors.</td>
</tr>
<tr>
<td>Centralised records and customer relations system for restricted gifts</td>
<td>System that captures all relevant information relating to restricted gifts, including gift conditions and agreements and any subsequent acquirals against those conditions, as well as outcomes achieved.</td>
<td>Minimise uncertainty about what the assets were gifted for or whether they have been spent or can be used for another purpose. Avoid funds sitting idle (potentially unbeknownst to the charity).</td>
</tr>
<tr>
<td>Implementation plan &amp; delegations of authority for gift expenditure</td>
<td>Especially for longer term gifts, an implementation plan for how the gift will be used, delegations for who can authorise spending, an investment mandate and, potentially, a regular review of implementation.</td>
<td>Avoid funds sitting idle &amp; ensure compliance with conditions or early identification of any issues due to changed circumstances. Build trust with donors.</td>
</tr>
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Further information

The key findings of the research are:

- There are six main potential legal interpretations of restrictions placed on gifts by donors: mere wish, charitable trust, common law condition subsequent giving rise to forfeiture, equitable personal obligation, charge or agreement.

- Determining the correct legal interpretation is a matter of ascertaining the objective intentions of the parties/donor and this is a fact-specific exercise. However, the courts have not typically characterised restrictions as giving rise to an agreement, generally favouring other interpretations, such as a charitable trust construction.

- There are several legal mechanisms permitting the lifting or amendment of restrictions that can apply to some or all of the legal interpretations of restrictions. In particular, seeking advice or directions from the Supreme Court, seeking a cy-près scheme, seeking an administrative scheme, using the trustee expediency provisions, or agreeing a variation.

- Western Australian charities obtain their funds from a wide variety of sources, ranging from individual donors to charitable foundations, government funding for services, corporate sponsorships, in-kind gifts and self-generated funds.

- Perceived levels of need and reasons for accessing reserves varied markedly. For instance, some charities accessed reserves only for crises, such as COVID-19, others to expand operations, some for standard operations, and some did not need to access reserves at all.

- Most interviews evidenced perceived legal and non-legal difficulties in accessing reserves.

- For some charities, the non-legal difficulties were more significant than any legal restrictions. In particular, the non-legal difficulties included a lack of centralised and easily accessible records, concern over donor perceptions and reputational damage, and resourcing for legal advice on gift restrictions as opposed to other areas of operations.

- The key legal difficulty was that most charities were unsure whether their restricted gifts gave rise to a legally binding restriction and, if so, the nature of that legal restriction. This was not necessarily because the charities lacked access to legal advice. Rather, it was an expertise and resourcing issue. Most in-house lawyers lacked specific expertise in characterising restricted gifts and paid or pro bono support from external lawyers was typically prioritised for other operational matters.

- Most charities treated restricted gifts as giving rise to a legally or morally binding agreement with the donor (i.e., a mere wish or agreement characterisation) and considered that any amendment or lifting of restrictions should therefore take place by way of agreement with the donor (or their executor or heirs).

- Very few participating charities considered whether approval to amend or lift restrictions might also be required from the Supreme Court or the Attorney-General (which would be the case for a charitable trust). Failure to consider this issue raises a material risk of governance breaches for charity officers.

- Very few organisations had used the legal processes of the courts, including administrative and cy-près schemes, or advice or directions from the court to lift restrictions. Most organisations, in any event, expressed concern about the cost (in time and money) and risk of adverse donor perceptions from seeking court approval for amendment of restrictions.

- Participants were generally ambivalent about the benefits of creating an independent administrative body (as opposed to the courts) to interpret or approve changes to restrictions to potentially reduce the time, cost and adversarial perceptions of going to court for assistance with restrictions. To the extent that an independent administrative body was supported, the participating charities wanted it to provide a level of relatively informal advice and assistance akin to an advice line/simple rulings system.

- Most charities wanted guidance on preventative measures that they could take to deal with the risks posed by restricted assets.

The research underpinning these guidance materials is available on the UWA research repository at research-repository.uwa.edu.au
A research project funded by Lotterywest and The University of Western Australia and conducted by researchers from The University of Western Australia, Murdoch University and Curtin University

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