

Deeds of Gift: guidelines for NSLA libraries

First published 2010; revised July 2019

Background

Libraries have a long history of accepting donations from individuals and organisations to add to their collections.

Donations include a wide variety of material including papers and personal records documenting a family or individual history, photographs or photograph albums, records of a business, organisation or religious group and other manuscript material.

The relationship between a library and a donor should be based on a common understanding of the wishes of the donor of the material and the responsibility of the library to provide access to information to support learning and research, preserve cultural heritage and encourage creativity and free expression of ideas.

The most effective way to indicate the transfer of ownership in the donated material from the donor to the library, and to outline the wishes of the donor and the responsibilities of the recipient library, is to use a Deed of Gift.

Purpose of a Deed of Gift

A Deed of Gift is a formal, legal agreement that transfers ownership in the materials to be donated from the donor to the recipient library and sets out any conditions attached to the donation. It is important to recognise that any conditions agreed to are legally binding stipulations, and that a failure to comply with such stipulations may result in the gift reverting to the donor.

Similarly, while the Deed of Gift is the clearest and most legally effective way to transfer ownership of the donated material, it is only legally effective if the donor had full title to the material in the first place. If not, the donor is only transferring possession, which potentially exposes the library to a future claim from the true owner.

The Deed of Gift may also transfer ownership of the donor's copyright in the materials to the accepting library, or grant licences to use the material in specified ways. As copyright is frequently owned by a third party rather than the donor it is advisable, and avoids confusion, to have a separate deed for copyright. It is strongly recommended that all efforts are made by the library to undertake reasonable diligence to confirm the rights of all donors, rather than taking this on face value.

A signed Deed of Gift establishes and governs the legal relationship between donor and library in relation to the donated material. A deed may be used where material is being newly donated to the library, or where material is already in the possession of the library but existing arrangements need to be renegotiated.

In the event that a legal issue arises over the ownership, use of, and copyright in the donated material a Deed of Gift will provide some protection to the library.

Additionally, a Deed of Gift furthers positive donor relationships by ensuring donors are aware of the terms under which the donation will be accepted, made accessible and used.

Elements of a Deed of Gift

The Deed of Gift should always clearly identify the donor and the recipient library, accurately describe the material to be donated, legally transfer ownership of the material to the library, set out ownership of the intellectual property (including copyright and moral rights) in the donated material, and indicate what the library should do with unwanted material. As much as possible, the fields on the Deed of Gift form should align with fields in the library's collection management system to allow for efficiencies in either automated or manual transfer of data. The deed should also include an indemnity clause to protect the library against any loss or damage that may result should a donor make an incorrect or false statement.

Name of the donor and recipient library

The name and address of the donor and the name of the recipient library should be clearly stated on the Deed of Gift. The Deed should also require the donor to state that they are the owner of the material to be donated and have the authority to donate the material to the library.

As the Deed of Gift involves the collection of the personal information of the donor it is important to consider and address any privacy law requirements, either within the Deed itself or separately. It may be necessary to ensure that the donor is informed of range of factors. This could include the library's contact details, or that personal information of the donor enables the library to manage and administer the gift, the circumstances in which the personal information will be disclosed, where to find the library's privacy policy, and whether the personal information will be disclosed to overseas recipients.

Description of the donated material

The Deed of Gift should include an accurate description of the material contained in the donation. This could be collated by the donor prior to the donation, or in consultation with the recipient library at the time of the donation. A general description (e.g. 'Business records of Cox & Co.') within the Deed and a more detailed list attached to the Deed of Gift is acceptable.

Procedure for unwanted material

The Deed of Gift should provide options for the donor to state how unwanted material should be dealt with by the library. Options should include return of unwanted material to the donor or disposal at the discretion of the library. Even if the donation is carefully appraised at the time of donation and unwanted materials separated at that time, this element should still be included to allow for the possible future de-accessioning of the donated material, dependant on the policy of the library.

Copyright and intellectual property

The Deed of Gift should provide for the donor to grant the recipient library ongoing rights to make use of the material. This can be achieved by:

- transferring ownership of copyright in the donated material to the recipient library
or
- granting the library a licence to use the material in certain ways.

It is important to note that transfer or licensing of copyright can only be accomplished if the donor is the owner of copyright in the material, or has the right to transfer or license copyright in the donated material. It is important for the library to make donors aware of their rights and obligations with regard to the copyright in their donations.

Many donations contain a mix of material, and the donor may have legal rights over only some of the material to be donated. The Deed of Gift should enable donors to clearly state for which material they are able to transfer or license copyright ownership to the recipient library, if they choose to do so. It could also include the option of future transfer or license, such as upon the death of the rights holder or at a specific point in time.

Transferring copyright

Where the donor is transferring ownership of copyright in the material to the recipient library, it is important that they understand the implications of this transfer. Full transfer of copyright will give the library the broadest rights over the material, including the right to give permissions to others. However, donors should be aware that it also means that the donor no longer has any rights over the material. This will avoid confusion down the track should a donor seek to recover the material, or give permission for others to use it.

Copyright transfers are legally required to be in writing and signed by the copyright owner.

Licensing usage

If the donor does not wish to transfer copyright in their material to the recipient library the Deed of Gift should include a clause that states clearly for the donor and the recipient library what are the permitted uses of the material.

For example, the Deed of Gift may include a statement outlining the possible uses of the material by the library and its clients. Ideally, this should be written as an inclusive rather than an exclusive list, to ensure that it does not restrict future uses that may not have been contemplated at the time of donation.

At a minimum, the deed should state clearly that the materials can be used and made available to others as permitted by the *Copyright Act 1968*. This is important to ensure that the deed does not inadvertently restrict the rights the library and its users have under the Act. This could have the unfortunate effect of meaning collection materials cannot be made available for everyday uses such as document delivery, or even preserved, for more than 100 years after they are donated.

The Deed of Gift may also include the provision for donors to grant the recipient library additional rights beyond those provided in the Copyright Act, or to clarify rights that may be uncertain or apply only in some circumstances. This can be done by granting the library a non-exclusive, perpetual licence to use the work in certain ways. For example, the licence may give the library explicit permission to make the material available online as part of its digital collection; or to sublicense the material to others who wish to make use of it in certain circumstances, so they do not have to track down the donor for future requests.

Finally, it can be a good idea for the Deed of Gift to give donors the option to license donated material in which they own copyright using an open content licence, such as a Creative Commons licence.

Moral rights

The donor or others may also have moral rights in the material. Moral rights are the right of a creator to be attributed as the creator of his or her copyright work, to take action if their work is falsely attributed as someone else's work and to take action if the work is distorted or treated in a disreputable way. The Deed of Gift should allow for the donor, if they are the creator of the donated material, to state how they wish to be identified if the library, when using the material, is required to identify the creator.

Special conditions

Libraries are committed to the maximum possible access to their collections. The ultimate purpose of a Deed of Gift is to make materials available in a timely, fair and equitable manner. However, in special circumstances a donor may wish to make a donation subject to certain conditions. For example, restrictions on the use of material may be required to protect sensitive information and to guarantee confidentiality for living persons. There may also be restrictions on access to donated material such as secret, sacred or sensitive material.

The Deed of Gift should include the option for donors to state any special conditions to which the donation is subject. However, it is recommended that restrictions accepted by libraries should have an end date. For instance, where a library accepts restrictions to protect a person's privacy, or accepts restrictions on reproduction of out-of-copyright material, the deed should set a reasonable end date to those restrictions. In addition, any special conditions should be negotiated with the donor prior to the completion of the Deed of Gift to arrive at an outcome that is acceptable to the donor, and the recipient library.

Signing the Deed of Gift

Historically, deeds needed to be 'sealed' by the party being bound by the deed (i.e. by the person applying a wax seal). However, legislation in most Australian states and territories has done away with the requirement for an individual to apply a seal to the deed, provided the document is expressed to be a deed or to be sealed, and it is signed and attested by a witness who is not a party to the deed.

Therefore, in addition to the Deed of Gift indicating that the donor wishes to donate the material described in the deed, and stating that they are the owner of the material and have the authority to donate the material, the deed must be signed by the donor, witnessed, and signed by a representative of the recipient library.

The wording 'signed, sealed and delivered by the donor as a deed in the presence of the witness named below' prior to the signatures of the donor, witness and representative of the recipient library, will meet this requirement.

Legal review

These guidelines aim to assist libraries in understanding the significance and benefits of the use of a Deed of Gift when accepting donations, and ensure that the Deed works in the best interests of the goals of libraries, and considers the needs of potential donors of material. While the guidelines have been developed in good faith, they do not constitute legal advice. It is strongly recommended that a Deed of Gift developed by individual libraries be subject to legal review prior to implementation.

