

## Unlocking restricted funds

The Charities Act 2011 provides some welcome relief for charities struggling to use funds that appear to be locked away from use with out-of-date purposes or restrictions.



**Laura Soley**  
Partner  
T: 020 7551 7835  
l.soley@bwbllp.com

Laura advises a range of clients on general charity law matters. She has a particular specialism in trusts, endowments and legacies.



**Alice Faure Walker**  
Senior Consultant  
T: 020 7551 7702  
a.faurewalker@bwbllp.com

Alice combines client work with more general professional support. She has particular experience of constitutional issues, trusts and charity secretarial practice.

### Laura Soley and Alice Faure Walker outline some ways to release much-needed funds

Does your charity have any restricted funds that it is struggling to use? Does it have funds with out-of-date purposes? Does it have any permanent endowment funds that produce such a small income that it is difficult to use effectively? If so – help is at hand in the form of the Charities Act 2011.

#### First steps

The first step is to establish whether the restriction really is legally binding. We often find, on closer examination, that there is no legal restriction on how the funds are used. They may simply be subject to a ‘request’ from a donor that they be spent in a particular way, or the trustees may have decided to ‘designate’ funds for a particular use. Sometimes funds that have been described as permanent endowment in a charity’s accounts are not actually permanent endowment. It is usually a good idea to take advice on the circumstances of your particular fund.

#### The nature of the restricted fund

There are two main types of restricted fund:

- Restricted income funds – where the whole of the fund can be used, but must be used for particular purposes. For example, funds may have been donated to a charity on the basis that they must be used for its work in a particular region.
- Restricted capital funds – where the charity can only spend the income from the fund, and not the underlying capital (called ‘permanent endowment’) or may only access the capital in certain circumstances (called ‘expendable endowment’). For example, a legacy may have been made to a charity on the condition that it should be invested to produce an income for the charity – the capital can never be spent.

#### Changing the purposes of the fund

If the restriction affects the purposes for which the fund can be spent, this can sometimes cause difficulties. For example, the purposes may become out-of-date, and the charity may want to change them to something more relevant to its beneficiaries.

There are powers in the Charities Act 2011 that allow unincorporated charities to change their purposes. These powers will usually also apply to restricted funds, even if your charity is incorporated: BWB can advise more on this.

The procedure depends very much on the size of the fund.

#### Smaller restricted funds

A simplified procedure applies where the gross income of the charity did not exceed £10,000 in the previous financial year. (Where the main charity is incorporated, our view is that the procedure will be available if the income of the fund itself did not exceed that figure.) Provided certain criteria are fulfilled (for example, the trustees are satisfied that it is expedient in the interests of the fund for the purposes to be replaced), the trustees can resolve to change the purposes of the fund, provided the Charity Commission agrees. The Charity Commission must be informed of the resolution, and given a statement of the trustees’ reasons for passing it. The Commission then has a period to object. It may ask for more information, and insist that public notice is given.

This power can be enormously useful for charities with restricted funds. We recently helped a Royal Charter body to update the purposes of a large number of funds for specific scholarships and prizes, and to merge them together.

#### Larger restricted funds

If the Charities Act 2011 provisions described above cannot be used, the trustees may be able to make an application to the Charity Commission asking it to change the purposes of the fund using its powers to make a cy-près scheme.

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In certain circumstances, the Charity Commission can make a scheme to change the purposes of a restricted fund. For example, a scheme is possible where the original purposes of the fund cannot be fulfilled, or where they no longer provide a suitable and effective method of using the fund, taking the spirit of the original gift and the current and social economic circumstances into account.

When deciding on the new purposes, the Commission must take various factors into account, including the desirability of securing that the fund is applied for purposes close to its original purposes, and the need for it to have purposes that are suitable and effective in the light of current social and economic circumstances.

The procedure for making a scheme is set out in detail on the Charity Commission's website. The Commission may insist on prior consultation with beneficiaries, and public notice. We can advise on the best way of approaching an application.

The Charity Commission recently helped one of our charity clients by making a scheme to allow them to use the restricted proceeds of sale of a care home in assisting its beneficiaries in that area generally.

### Permanent endowment

There is also scope for the restriction on permanent endowment funds to be lifted, so that the capital can be spent as well as the income. There are powers in the Charities Act 2011 for the trustees of certain permanent endowment funds to resolve to release the capital or part of the capital. Whether or not Charity Commission consent is needed depends on the size of the fund and its income, and special rules apply where the permanent endowment is land, or a particular item, rather than cash or investments.

### Conclusion

This is a broad outline of the possibilities: charities should take advice on their particular circumstances. They will also need to be alert to the public's reaction – how will donors, or their families, feel about a change in the original purposes of a gift? Having said that, we have helped clients to release many thousands of pounds of funding in this way, so that it can be put to really effective use in these tough times.