

Westway Trust's activities and the application of public law requirements including the Public Sector Equality Duty, Human Rights Act 1998, information law and the Public Contracts Regulations 2015

Westway Trust (the “Trust”) has comprehensively considered the existence of any obligations in connection with public law requirements, including the application of the Human Rights Act 1998 (the “HRA”), the Public Sector Equality Duty (“PSED”) in the Equality Act 2010 (the “Equality Act”) and such other obligations that arise in the exercise of public functions.

This note has been prepared for the Trust and should not be relied on by any other person. Nothing in this note should be taken as an admission, to bind the Trust in any way or to constitute a waiver by the Trust of legal privilege or any other rights in respect of these or any other matters.

The status of the Trust

The Trust is a registered charity (Charity Commission registration 1123127) and private company limited by guarantee (company number 06475436). It is governed by Articles of Association adopted on 12 December 2007, as amended on 25 November 2014 (registered with Companies House 13 December 2014). The Trust is not established by statute.

The Trust does not have any statutory powers or functions, for example as an industry regulator. It does not exercise regulatory, coercive or monopolistic powers in respect of its members or users.

The Trust is not subject to government control or directly accountable to Parliament. The Trust is governed by a Board of up to 12 trustees: three are elected by member organisations, three are nominated by the Royal Borough of Kensington and Chelsea (“RBKC”) and six are openly recruited. The Chair is selected from the openly recruited trustees. Although RBKC is entitled to appoint three trustees to the Board, once appointed these trustees owe a duty of loyalty to the Trust alone and not to the council, in accordance with legal and policy requirements.

The freehold of the land held by the Trust is owned by Transport for London (“TfL”). A lease over the land is held by RBKC, which has in turn granted a sub-lease to the Trust. The Trust holds the land on a long lease. In 1997 the Trust bought out the requirement to pay an annual ground rent to RBKC with of a one-off payment.

It should be noted that although the charitable objects of the Trust require it to undertake its activities “*for the benefit of those living or working in the Royal Borough of Kensington and Chelsea and adjoining London boroughs*”, it is nonetheless a private and not public body. We understand that the House of Lords (now known as the Supreme Court) has been clear that “[t]he fact that a service can fairly be said to be to the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature.... Otherwise, the services of all charities, indeed, it seems to me, of all private organisations which provide services which could be offered by charities, would be caught” (*YL (by her litigation friend the Official Solicitor) v Birmingham City Council* [2007] UKHL 27). We understand that this has been the position taken by the courts in a number of cases since.

The application of the HRA and the Equality Act to the Trust's activities

The HRA gives effect in domestic law to a number of the human rights obligations set out in the European Convention on Human Rights and its associated protocols. Section 6 of the HRA states that “[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.” A public authority is not limited to a statutory public body and includes “any person certain of whose functions are functions of a public nature”. Therefore, a private organisation or charity such as the Trust is only required to comply with section 6 when it carries out public functions. In addition,

section 6(5) provides that “[i]n relation to a particular act, a person is not a public authority by virtue [of the fact that it exercises certain functions of a public nature] if the nature of the act is private.”

In contrast, private organisations and charities generally do have obligations under the Equality Act, including not to engage in unlawful discrimination, harassment or victimisation in the workplace or in the provision of goods, facilities or services to the public.¹

The PSED, as contained in section 149 of the Equality Act, principally applies to ‘public authorities’. Public authorities are prescribed and specifically identified as being subject to the PSED in accordance with section 150 and Schedule 19 of the Equality Act.

However, section 149(2) of the Equality Act also states that “[a] person who is **not a public authority but who exercises public functions** must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).” Section 150(5) of the Equality Act confirms that “[a] public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.” Therefore, a body that is not a public authority may still be required to comply with the PSED if it exercises a ‘function of a public nature’, albeit only in relation to such functions and not more generally.

Whether the Trust is required to comply with the PSED or is subject to section 6 of the HRA therefore depends on whether it exercises ‘public functions’. This question is not answered by a single test and is ultimately a question for the court. The courts adopt a ‘factor based approach’ which takes into account the precise context of the body and function in question and considers a number of factors such as: whether the body has statutory, coercive or regulatory powers; whether the body is exercising a ‘core state responsibility’ or providing a public service; and the extent to which the state has assumed responsibility for the relevant task or service to be performed.

Any assessment of whether the Trust was exercising public functions when it made a decision or took certain action would need to be considered in light of the specific circumstances. The law in this area is complex and would ultimately be a matter for determination by a court. However, the Trust has reviewed each of the activities that it undertakes with the benefit of legal advice, including in relation to health, sports and fitness, education, promoting the arts, property rental, childcare, green spaces and grant making and does not consider that it exercises any public functions.

Importantly, if the Trust were subject to the PSED in relation to a particular activity (albeit that it considers that it is not currently, on the basis of its activities to date), it would only be required to have ‘due regard’ to issues outlined in section 149 of the Equality Act in relation to that activity and would not be required to in fact achieve the results that are contemplated by the section.

Judicial review of the Trust’s actions

Judicial review is a process by which a court makes a determination about the lawfulness of a decision or action taken by a particular body. In order to be amenable to judicial review, the relevant decision, action or alleged failure to act that is being challenged must relate to the exercise of a public function. This includes decisions by private bodies that are exercising public functions.

The tests for amenability to judicial review and the application of the HRA are similar, but not identical. Having considered the various activities undertaken by the Trust, the Trust does not consider that it exercises public functions such that its decisions or actions would be judicially reviewable.

¹ Further information on the application of the Equality Act to charities is available on the Equality and Human Rights Commission website at: <https://www.equalityhumanrights.com/en/publication-download/what-equality-law-means-your-association-club-or-society>

Information law

The Trust is, in common with all private, public and third sector organisations that control data relating to individuals, required to comply with the Data Protection Act 1998. It is not, however, required to provide information pursuant to the Freedom of Information Act 2000 or, in its view, the Environmental Information Regulations 2004.

Public Procurement

The Trust considers that it does not fall within the definition of “contracting authorities” for the purposes of the Public Contracts Regulations 2015, and so is not bound by their requirements.

Finally

The Trust intends to keep its activities under review and, particularly, where they may comprise public functions in particular limited circumstances, undertake such action as may be necessary or otherwise appropriate to meet any applicable public law requirements. Otherwise, it intends to continue to adhere to the requirements and guidance that apply to charities in meeting its charitable objects.

While the Trust continues to welcome engagement from the community in relation to its proposals and actions, it considers that it is not generally a good use of its charitable funds and resources to conduct protracted correspondence in relation to the fulfilment or otherwise of public duties that do not apply to it.

To the extent that anything in the note is unclear, please direct your queries to Mark Lockhart.