

DLUHC Committee Inquiry on Children, Young People and the Built Environment: Consideration of children in policy and decision-making

Alice Ferguson, Playing Out (in consultation with legal, child rights and Equality Act experts)

Are children commonly considered in decision-making?

A clear theme emerging from the written and oral evidence so far presented to the committee has been the lack of consideration of children's needs within national and local policy and decision-making, including/particularly in relation to outdoor space and the built environment.

Both government and local authority representatives have testified to the fact that within policy areas such as planning, housing and transport, children are rarely, if ever, given consideration as an equality group in their own right.

The impact of this is the creation of environments that exclude and discriminate against children, or that don't meet their needs (e.g. roads they can't navigate safely, housing estates that ban them from using outside space for play, have unsuitable, inaccessible or insufficient play space, or where space for cars takes priority over safe, playable doorstep space).



Tony Clarke @anthonysclarke · Mar 1
'Never heard children mentioned at a planning committee meeting.' - certainly my experience as a councillor that sits on a planning committee. Food for thought & a call for us to do better!

Playing Out @playingout · Feb 29
'We are encouraged to think more about bins and cars than about children' - Watch the 2nd session of the @CommonsLUHC Inquiry into Children, Young People & the Built Environment - we've also summarised some of the key points made: playingout.net/blog/we-think-...

Playing Out @playingout · Mar 2
As we understand it, councils don't think they have a duty to consider children as an equality group in their own right - does that chime with your experience?

Tony Clarke @anthonysclarke
Children as a group are not considered in documents & reports for planning committee decision-making would be my experience, yes.

4:21 PM · Mar 2, 2024 · 9 Views

As well as helping to meet children's rights more widely, addressing this underlying problem could go some way to ensuring children's need for informal outdoor play, physical activity, access to green space, community connection and independent mobility are better met through policy and decision-making related to the built environment.

We believe there should be a statutory responsibility for policy-makers to consider children and their specific needs alongside those of adults and all equality groups.

Is there currently a legal duty on local authorities to consider children as an equalities group in decision-making (including on the built environment)?

It seems there is a need for clarification here. **The Equality Act 2010** explicitly excludes children from being considered under the protected characteristic of age in all areas other than employment, meaning children *as a group* are not protected from discrimination by public authorities under the Equality Act.

However, some interpret the **Public Sector Equality Duty** (which is part of the Equality Act, sections 149-157) as applying to children as a group under the protected characteristic of age.

Equality Act

The main aim of the [Equality Act 2010](#) was to “legally protect people from discrimination in the workplace and in wider society”. Children who share one or more of any **protected characteristic** apart from age (e.g. race, sex, disability) are protected alongside adults in those groups.

However, whilst “age” is one of the nine protected characteristics listed in the Equality Act, this explicitly **does not apply to children** (under 18s), except within employment.

The UK Government’s guide to the Equality Act makes this clear saying, “The Equality Act 2010 includes provisions that ban age discrimination **against adults** in the provision of services and public functions”. <https://www.gov.uk/guidance/equality-act-2010-guidance#age-discrimination>

PART 3

SERVICES AND PUBLIC FUNCTIONS

Preliminary

28 Application of this Part

- (1) This Part does not apply to the protected characteristic of—
- (a) age, so far as relating to persons who have not attained the age of 18;
 - (b) marriage and civil partnership.

The Equality and Human Rights Commission’s [Code of Practice for Services](#) explains that, “**For those aged 18 years and over, age is a protected characteristic.** Protection will be provided against age discrimination for those over 18. **The Act disappplies age as a protected characteristic for those aged under 18 years** in relation to services and public functions (Part 3 of the Act).”

So, for “services and public functions” (including the planning process or housing), protection against age discrimination is limited to people aged 18 and over and local authorities don’t need to specifically consider age discrimination against children.

The Government’s [response to a consultation](#) on exceptions to banning age discrimination also confirms that children are not protected against age discrimination. There is **no mention of children** in this report, which says, “The Government is committed to eradicating harmful and unjustifiable age discrimination. **The Equality Act 2010 bans age discrimination against those aged 18 and over** in the provision of services and the exercise of public functions, and by private clubs and other associations. The Government intends to bring the ban and related exceptions into force in October 2012”. (p.4)

CRAE’s [guide to the Equality Act](#) (aimed at children) says: “The Equality 2010 Act only gives adults (over 18s) full legal protection from unlawful age discrimination. Children and young people are excluded from this

new protection. However, you can still bring claims based on other characteristics such as disability, race, sex etc. CRAE has been campaigning for many years to get under 18s protection from age discrimination. Find out more here: <http://www.crae.org.uk/protecting/age-discrimination.html>”

Public Sector Equality Duty

The [Public Sector Equality Duty](#) (2011) is part of the Equality Act and requires local authorities to have “due regard” to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

While only (a) *explicitly* refers to conduct that is prohibited under the Equality Act, it is less clear whether (b) and (c) also apply only to persons protected under the Act (ie *not* children on the basis of age as regards public authorities and services). Some legal experts I have spoken to say this is implied, as the PSED is part of the Act, and that it would be hard to argue that children as a group must be given “due regard” in planning or housing policy.

However, there is no mention of “child” or “children” in the PSED, and no explicit mention of the Act and Duty only applying to those aged 18 and over. For this reason, other experts and organisations interpret it as meaning that children as a group (having the shared p/c of age) *should* be given “due regard” in local authority decision-making (particularly in terms of b & c).

For example, CRAE says, “The Public Sector Equality Duty applies to all of the nine groups of protected characteristics. **Children and young people are covered in relation to age in all settings** except schools and children’s homes”.

The [EHRC’s guide to the PSED](#) states:

“The provision banning age discrimination in services and public functions (under Part 3 of the Act) took effect on 1 October 2012. Prior to that date, for the protected characteristic of age, a body did not need to comply with the first aim of the duty in relation to services and public functions (Part 3 of the Act). A body now needs to consider the first aim of the duty in respect of age discrimination and harassment in services and public functions, subject to exceptions (see Annex C)”.

These exceptions include schools and children’s homes, which suggests children are otherwise intended to be given “due regard” on the basis of age.

The case law, including “Bracking and ors. v Secretary of State for Work and Pensions [2013] EWCA Civ 1345”, has established certain principles relating to the PSED:

- The public authority decision maker must be aware of the duty to have “due regard” to the relevant matters;
- The duty must be fulfilled before and at the time when a particular policy is being considered;
- The duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”
- The duty is non-delegable; and

- Is a continuing one.
- It is good practice for a decision maker to keep records demonstrating consideration of the duty.

The [Government guidance on the PSED](#) states that “the duty requires decision-makers to understand and take account of the consequences of their choices, having due regard to the aim of eliminating conduct prohibited by the act, advancing equality of opportunity and fostering good relations. At the same time, the duty is not a rubber stamp. It is a legal requirement. **Making decisions without having due regard to the duty can be unlawful**”.

Conclusions

Whilst the Equality Act *does* protect children and young people from discrimination on the basis of other protected characteristics (e.g. race, sex), it *does not* protect them as a group on the basis of age (except within employment).

Legal experts are not in agreement about whether or not the PSED applies to children in a meaningful way that would place a duty on e.g. planning committees to have due regard to their needs.

Because the EA explicitly excludes children from being considered an equality group in most areas, and because the PSED at least partially rests on the legal requirements of the EA, and children are not explicitly mentioned in the PSED/guidance, it seems likely that local authorities *do not think or are not aware* that they have a duty to have due regard to the needs of children under the protected characteristic of “age”.

The fact that there is no explicit/clear public sector duty to consider children as an equality group in their own right on the basis of age underpins routine discrimination of children and failure to consider/meet their needs within the planning system and wider policy and services.

In summary, either there is no legal duty to specifically consider children in decision-making related to the built environment OR most public servants are unaware of this duty.

Recommendations

Ideally, the Equality Act should be amended to include children under the “age” characteristic across all areas. There is no obvious reason not to do this given that, were this amendment to be made, direct age discrimination would still not be unlawful where it is “a proportionate means of achieving a legitimate aim” (section 13).

Whether or not the PSED currently applies to children (and it is possible this would only be clarified through a test case), it seems evident that it should – or that there should be a stand-alone duty on decision-makers to consider children as a group in their own right, along similar lines to the PSED.

The most recent concluding recommendations to the UK Government from the UNCRC included this recommendation: “*To take legislative and other measures to ensure the protection of all children below 18 years of age from discrimination on the grounds of their age, particularly in England and Northern Ireland...*”