

Monday 18 October 2021

# Welcome to Landmark Chambers' 'Equality Law for Planners' webinar

The recording may be accessed [here](#).

# Your speakers today are...



**Jenny Wigley QC (Chair)**



**Alex Goodman**

**Topic:**  
Equality law and  
the Planning Court



**Alex Shattock**

**Topic:**  
Designing for  
Equality and Best  
interests of the  
Child



**Kimberley Ziya**

**Topic:**  
The public sector  
equality duty:  
Requirement and  
application in the  
planning context

# The public sector equality duty: Requirement and application in the planning context



**Kimberley Ziya**

## The PSED (1)

- Section 149 of the Equality Act 2010
  - (1) A public authority must, in the exercise of its functions, **have due regard to** the need to—
    - (a) **eliminate discrimination, harassment, victimisation** and any other conduct that is prohibited by or under this Act;
    - (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.
  - (2) 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).
  - ...

## The PSED (2)

(3) Having due regard to **the need to advance equality of opportunity** between persons who share a relevant protected characteristic and persons who do not share it **involves** having due regard, **in particular**, to the need to—

(a) **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic **that are connected to that characteristic**;

(b) take steps to **meet the needs** of persons who share a relevant protected characteristic **that are different from** the needs of persons who do not share it;

(c) **encourage** persons who share a relevant protected characteristic **to participate in public life** or in **any other activity in which participation by such persons is disproportionately low**.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, **steps to take account of disabled persons' disabilities**.

## The PSED (3)

*(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*

*(a) **tackle prejudice**, and*

*(b) **promote understanding**.*

*(6) Compliance with the duties in this section **may involve treating some persons more favourably than others**; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.*

## Protected characteristics

- Section 149(7):
  - age
  - disability
  - gender reassignment
  - pregnancy and maternity
  - race
  - religion or belief
  - sex
  - sexual orientation

## What does the duty require?

- ***R (Coleman) v Barnet LBC* [2012] EWHC 3725 (Admin) at [65]-[71]**
  - Vital distinction between a duty to achieve a result and duty to have due regard to the need to achieve statutory goals
  - Has the DM in substance had due regard to the relevant statutory need
  - “Due” regard means “the regard that is appropriate in all the circumstances”
  - Those circumstances include “the importance of the areas of life of the members of the disadvantaged ... group that are affected by the inequality of opportunity and the extent of the inequality” and “such countervailing factors as are relevant to the function which the decision-maker is performing”
  - “Countervailing factors” can include economic and practical factors
  - Performance of the duty must be an integral part of the formation of the decision, not merely the justification for making it

## Application in the planning context

- ***R (Coleman) v Barnet LBC* [2012] EWHC 3725 (Admin) at [71]:**

*The decision under challenge in this case is a planning decision, the decision of a local planning authority to approve a scheme of development. It is not a decision of a public body to withdraw or reduce a particular service, such as the court had to consider, for example, in the Birmingham case, which concerned the provision made for disabilities in the then current budget of Birmingham City Council. Much of the case law is concerned with decisions of that kind. **This is not to say that the public sector equality duty is less onerous in a planning case than it is in others. It is not. But in such a case the circumstances in which the authority's performance of the duty has to be scrutinized will inevitably be different.***

## Application in the planning context: examples (1)

- ***Baker***: inspector's refusal of planning permission to allow members of the traveller community to pitch caravans on a site in the green belt
  - Duty complied with despite no express reference to it
- ***Coleman***: decision of local authority to grant permission for the development of a school on land on which a garden centre had been situated which was regularly used by the disabled and elderly
  - Duty complied with – countervailing factors properly weighed
- ***R (Lakenheath PC) v Suffolk CC [2019] EWHC 978***: decision of LPA to grant permission for the construction of a new school next to an active military airfield
  - Duty complied with despite no express reference to it

## Application in the planning context: examples (2)

- ***LDRA Ltd v SSCLG* [2016] EWHC 950 (Admin)**: inspector's grant of planning permission on appeal for an office and warehouse building which would replace a car park which was regularly used by disabled people to access the riverside
  - Despite clear evidence that the development would make it very difficult, if not impossible for disabled people to access the riverside, the PSED was not mentioned in the officers' report and it was likely that the inspector on appeal overlooked it → error of law
- ***R (Danning) v Sedgemoor* [2021] EWHC 1649 (Admin)**: LPA's grant of planning permission for a pub to be converted to a residential dwelling
  - No evidence that the committee had considered whether the decision could have implications for those with protected characteristics at all → error of law

## Practice points

- Is there evidence that the decision will impact on those with a protected characteristic? **Duty engaged**
  - Suspect impacts but insufficient info? **Ask for it** (*LRDA Ltd v SSCLG*, at [32])
- Go through the statutory aims in s.149(1): would the decision promote or undermine these aims? **Both are relevant**
- Remember “due” regard:
  - ultimately a matter of judgment
  - but need to show that you have reached reasoned judgment
  - wide spectrum: withdrawing a public service vs not maximising potential to advance equality of opportunity
- Countervailing factors
  - any factors that it is proper and reasonable to consider
  - weight a matter for DM

## Equality law and the Planning Court



**Alex Goodman**

## Direct discrimination – s 13 of the Equality Act 2010

S 13(1): A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

“Protected characteristics” defined in s 4 as:

age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

## Indirect discrimination: s 19 of the Equality Act 2010

- A applies to B a provision, criterion or practice (“PCP”) which is discriminatory in relation to a relevant protected characteristic of B’s (S19(1)).
- S 19(2): a PCP is discriminatory if
  - (a) A applies, or would apply, the PCP to persons who do not share the characteristic;
  - (b) it puts, or would put, persons who share B’s characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

## Equality Act 2010 – burden of proof

- Section 136: Claimant needs to establish prima facie case that defendant has breached the EA 2010. Burden of proof then shifts to defendant to show that the Act was not breached:

136(2): If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened [the 2010 Act], the court must hold that the contravention occurred.

136:(3) subsection (2) does not apply if A shows that A did not contravene the provision.

## Article 14 ECHR

- “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground...”
- No claim under Art. 14 unless the facts "fall within the ambit" of another Convention right: *Petrovic v. Austria* (1998) 33 E.H.R.R, at [22].
- If the state creates a measure that affects the exercise of rights protected by the Convention, “*the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified” (*Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916 per Etherton MR at [55]).*

## Direct discrimination: *R. (on the application of Fraser) v Shropshire Council* [2021] EWHC 31 (Admin)

- Claimant argued that the Council had granted permission for residential development for older people with less open space than would be required for a conventional development and that older people were therefore treated less favourably.
- Officers' report concluded that, despite failing to provide the amount of open space required, the quality of the open space made it a better development proposal "irrespective of the intended residents of the development" (at [183]).
- Court found that no discrimination had occurred: permission would have been granted whether the intended residents were older people or not.

# Direct discrimination: *Secretary of State for Communities and Local Government v Proudfoot Properties Limited* [2013] EWCA Civ 498

- Applicant sought permission to develop six houses with triple garages in an AONB. Applicant alleged:
  - 1. Refusal prevented the peaceful enjoyment of his possessions, contrary to Art. 1 of Protocol 1 ECHR (“A1P1”).
  - 2. planning permission had been granted to similar proposals in the area and that in refusing his application the Council had discriminated against him contrary to Art. 14.
- Court held: 1. refusal was a proportionate way of achieving legitimate aim of protecting AONB; and
- 2. No discrimination as comparator cases claimant relied upon presented different considerations, combined with pronounced harm to the area presented by his proposals – refusal therefore justified (see also *Holland* [2009] EWHC 2161 (Admin)).

# Indirect discrimination: *Smith v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1650 (Admin)

- Smith claimed the definition of “Gypsies and Travellers” in 2015 *Planning Policy for Traveller Sites* as “nomadic” unlawfully discriminated against elderly and disabled Gypsies contrary to Art. 14 and s 19 of the EA 2010
- **Lost on both grounds:** court held that nothing “inherently objectionable” to different treatment of settled Gypsies and Travellers provided that the planning regime as a whole can accommodate the needs of settled Gypsies and Travellers – the 2015 Policy “is part of a patchwork of provisions” to address the needs of Gypsies and Travellers (at [80] per Pepperall J).

# *Moore v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin)

- *Planning policy for traveller sites* (2012): traveller sites in the green belt constituted inappropriate development.
- SoS stated in July 2013 that he would *consider* recovering appeals concerning the development of traveller sites on the green belt.
- However, SoS recovered *all* such appeals from September 2013 until September 2014
- Court found that although the policy for recovery was "not itself discriminatory", the application of the policy was discriminatory within the meaning of s 19: the appeals would take longer to determine than appeals made people other than travellers, and this approach was not a proportionate way of achieving the Secretary of State's aims (at [126]).

# *Connors v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1850

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Distinction between unlawfulness of the decision to recover the appeal and the decision itself:

- A decision to recover an appeal which may contravene equality law does not impugn the substantive decision itself “*unless that unlawfulness infected the decision-making process itself*” (at [34]).

## Public Sector Equality Duty – s 149

- S 149(1) provides that, a public authority must, in the exercise of its functions, 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.

## Public Sector Equality Duty – s 149

- S 149(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
  - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

## Public sector equality duty

Discharging the duty:

- “the duty is a duty to have due regard to the specified matters, not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning. The absence of a reference to the public sector equality duty will not, of itself, necessarily mean that the decision-maker failed to have regard to the relevant matters although it is good practice to make reference to the duty, and evidentially useful in demonstrating discharge of the duty”:* (*R. (on the application of Buckley) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin) per Lewis J at [113]).

## PSED – failures to discharge duty

- **R. (on the application of Buckley) v Bath and North East Somerset Council [2018] EWHC 1551 (Admin)**: partial demolition and rebuild of estate: no regard was had to the impact on elderly residents of losing their homes and whether the impact was greater than those who did not share that protected characteristic. Outline planning permission quashed.
- **R. (on the application of Danning) v Sedgemoor DC [2021] EWHC 1649 (Admin)**: Error of law in failure to fulfil section 149 duty on basis of “a complete absence of evidence” in respect to Council’s consideration of the impact of proposed changed of use from pub to residential dwelling on persons with protected characteristics (at [56]).

## PSED – failures to discharge duty

- **R. (on the application of Williams) v Caerphilly CBC [2019] EWHC 1618 (Admin)**: Claimant successfully challenged decision to close leisure centre. Court held that the Council failed to have regard to impact of closure of the leisure centre on elderly and disabled persons.
- **LDRA Ltd v Secretary of State for Communities and Local Government [2016] EWHC 950 (Admin)**: Court not satisfied that Inspector had any had to the impact on disable people of loss of car park used to access the River Mersey. Planning permission quashed.

## PSED – Decisions upheld

- In [Gathercole v Suffolk CC \[2020\] EWCA Civ 1179](#), the Court of Appeal held that when considering a planning application to build a new primary school the local planning authority had failed to have regard to the effect of aircraft noise on children with protected characteristics in breach of the public sector equality duty. The appeal was dismissed because applying [s.31\(2A\) of the Senior Courts Act 1981](#) it was highly likely that the same decision would have been made without the error.
- In [R. \(Lakenheath Parish Council\) v Suffolk CC \[2019\] EWHC 978 \(Admin\)](#) a decision to grant planning permission for a new primary school was upheld because the s.149 duty was discharged in substance even though the officer's report did not mention the PSED in terms.
- [R. \(Coleman\) v Barnet LBC \[2013\] Eq. L.R. 223](#): claim under s.149 dismissed on basis Council had done everything required of it under section 149 in weighing up the replacement of a garden centre used by elderly and disabled people with a school.

## S.71 of the Race Relations Act 1976

- Section 71 now superseded by EA 2010.
- But Cases raising the duty under r [s.71\(1\)\(b\) of the Race Relations Act 1976](#) to “have due regard to the need ... to promote equality of opportunity and good relations between persons of different racial groups” remain relevant
- See e.g. [Baker v Secretary of State for Communities and Local Government \(Equality and Human Rights Commission intervening\) \[2009\] P.T.S.R. 809](#) and [R. \(Harris\) v Haringey London Borough Council \(Equality and Human Rights Commission intervening\) \[2011\] P.T.S.R. 931](#) and [Collins v Secretary of State for Communities and Local Government \[2013\] P.T.S.R. 1594](#)), in which the Court of Appeal held that for the purposes of race relations, gypsies were capable of being a separate racial group as defined by [s.3\(1\) of the 1976 Act](#).

# Designing for Equality and Best interests of the Child



**Alex Shattock**

## This talk

- Two topics: designing for equality
- Best interests of the child

## Designing for equality: a difficult challenge?



## Designing for equality

- “*Consideration of diversity should be at the heart of planning activities*”- [2005 Office of the Deputy Prime Minister guide](#) (a bit old now- but still relevant!)
- Planning is about people, and people are a diverse bunch
- This talk will consider how we design our plans and how we design our projects with equality in mind- bearing in mind the risk of legal challenge if we don't do a good job on this
- ***Also well worth a read:*** [London Mayor's SPG on Equality and Diversity](#)
- ***See also*** [this helpful short guide from the TCPA on Equality Impact Assessments](#)

## Designing for equality: the plan-making stage

- Age of consultees- almost always older. How do you engage with young people?
- Traveller sites- planning should allow for different lifestyles
- Provision of parks and community benefits- where will these be situated, and where are they needed?

***In the 1930s-1950s, New York City's chief planning officer made sure local parks and swimming pools were mostly built in white-majority districts- there were hardly any in black-majority districts. Blatant racism...***



## Designing for equality: the plan-making stage

- **Consider-** have you assessed your plan for equality issues (EqIA)?
  - Have you identified what those issues are?
  - Do you have policies in place to address them?

## Designing for equality: the project stage

- **Escape routes** in e.g. the event of a flood or fire: will wheelchair users be able to escape?
- Width of roads/ paths- and steps
- Will your proposals remove an **important benefit** for protected groups? E.g. demolition/change of use of an important building used by older people: how will you make up the loss for that protected group?
- Large developments: consider **offering** a significant benefit to protected groups such as a community hub, school or museum. Will engage PSED in your favour

## Designing for equality: the project stage

- Toilet provision:
  - **Gender- neutral?** Though see recent government opposition to this vs London Mayor support
  - **Ratio of male-female toilets?** Equal number  $\neq$  equal experience
  - **Baby change facilities**

## Designing for equality: the project stage

- Toilet provision:
  - **Changing places toilets:**
    - Very important for users with profound and multiple learning disabilities, as well as people with other physical disabilities such as spinal injuries, muscular dystrophy and multiple sclerosis
    - These toilets provide the right equipment including a height adjustable adult-sized changing table



## Designing for equality: the project stage

- Toilet provision:
  - **Changing Places toilets** are now mandatory in England for many buildings— Approved Document M of the Building Regs (2021 change):
    - Assembly, recreation and entertainment buildings with a capacity for 350 or more people. Or a collection of smaller buildings associated with a site used for assembly, recreation or entertainment such as zoos, theme parks and venues for sport and exhibitions with a capacity of 2000 people or more;
    - Shopping centres/malls or retail parks with a gross floor area of 30,000 m<sup>2</sup> or more;
    - Retail premises with a gross floor area of 2500m<sup>2</sup> or more;
    - Sport and leisure buildings with a gross floor area over 5000m<sup>2</sup>;
    - Hospitals and primary care centres; f. Crematoria and cemetery buildings

## Designing for equality: the project stage

- Toilet provision:

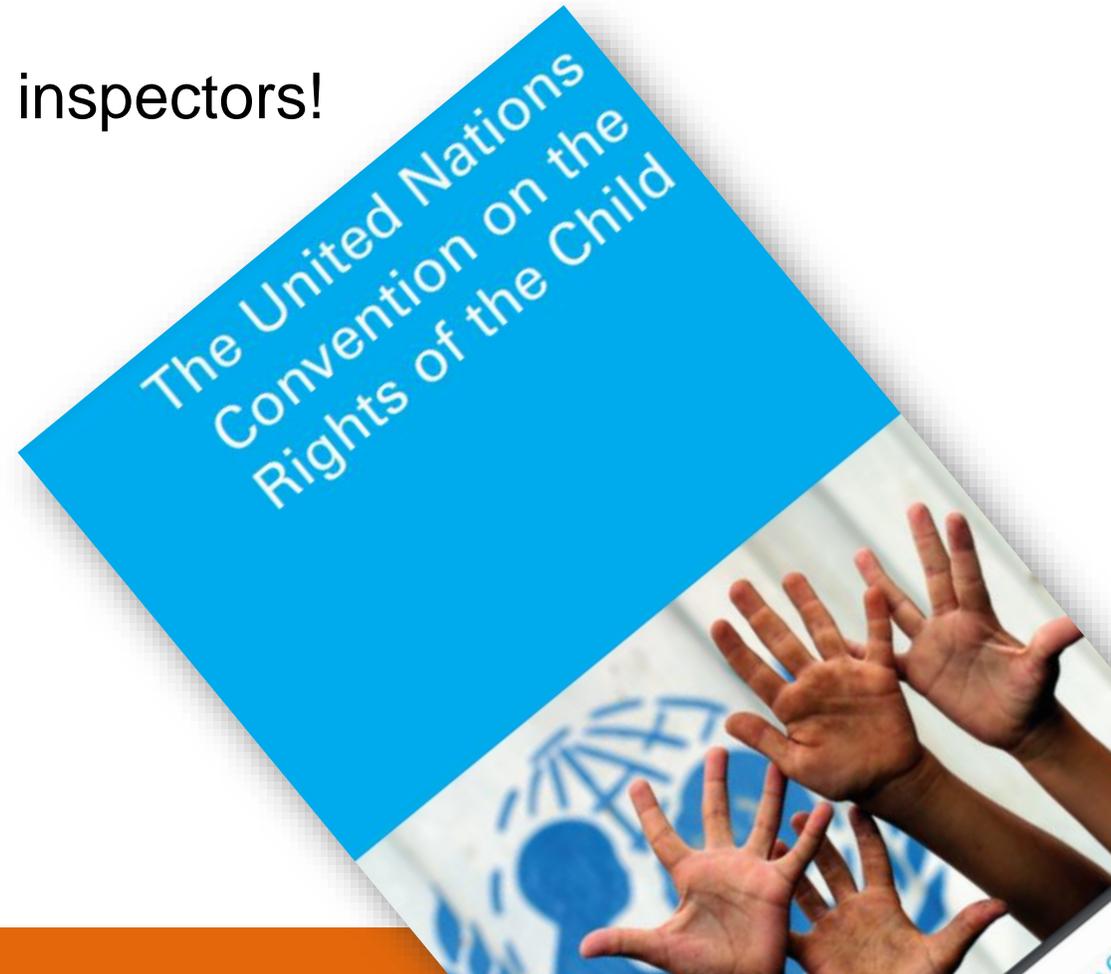
*If you think carefully about loos, you can't lose...*

# Best interests of the child



## Best interests of the child

- Decision makers have a legal duty to have regard to the best interests of children
- This includes local authorities and planning inspectors!



## Best interests of the child

- Key case: **ZH (Tanzania) v SSHD** [2011] UKSC 4
- Not a planning case- but:
- Applied in **Stevens v SSCLG** [2013] EWHC 792 (Admin), Hickinbottom J:
  - a planning case (about travellers)
  - The judge set out at [69] a number of helpful guidelines relating to how the rights of children should be considered in the planning process.
  - These were later endorsed by the Court of Appeal in **Collins v SSCLG** [2013] EWCA Civ 1193.

## Best interests of the child: *Stevens* principles

1. Article 3 of the UN Convention on the Rights of the Child “requires a child's best interests to be a primary consideration.”
2. This requires the decision-maker, first, to **identify what the child's best interests are.**
3. In the planning context, a child’s rights “*are likely to be consistent with those of his parent or other carer who is involved in the planning decision-making process*” and “*the decision-maker can assume that that carer will properly represent the child's best interests, and can properly represent and evidence the potential adverse impact of any decision upon that child's best interests.*”

## Best interests of the child: *Stevens* principles

4. Once identified, “*although a primary consideration, the best interests of the child are not determinative of the planning issue.*”
5. However, “*no other consideration must be regarded as more important or given greater weight than the best interests of any child, merely by virtue of its inherent nature apart from the context of the individual case.*”
6. Further, “*the best interests of any child must be kept at the forefront of the decision-maker's mind as he examines all material considerations and performs the exercise of planning judgment on the basis of them; and, when considering any decision he might make... he needs to assess whether the adverse impact of such a decision on the interests of a child is proportionate.*”

## Best interests of the child: *Stevens* principles

- While Hickinbottom J limited his analysis in ***Stevens*** to cases where it was alleged that a planning decision would interfere with a child's **Article 8** rights, it was accepted on behalf of the Secretary of State in the later Court of Appeal case ***Collins*** that:

*“in light of the reasoning in **ZH** in particular (at [21]), there is a broad consensus in support of the idea that in all decisions concerning children, their best interests must be of primary importance, and that planning decisions by him ought to have regard to that principle” (emphasis added)*

- So: principle applies in any planning decision involving children

## Conclusion

- Equality law can seem like a different world- but it *does* apply to planning!
- If you understand equality impacts at an early stage, and seek to overcome any issues *early on*, your local plan or planning permission will have a much better chance of surviving a High Court challenge
- Conversely, if you are opposing development, always check that the LA/developer/Inspector has properly considered the equality issues/ best interests of children
- Seek legal advice if in any doubt!

***Ideally from Landmark's crack team of equality/planning law specialists...***

## Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.**

# Thank you for listening

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