

Who Cares? Scotland

www.whocaresscotland.org

Protected Characteristics and Care Experience

Protected Characteristics under the law



The Equality Act 2010 (the Act) protects people against discrimination due to certain protected characteristics. Under the Act, there are nine protected characteristics:

1. Age
2. Disability
3. Gender reassignment
4. Marriage and civil partnership
5. Pregnancy and maternity
6. Race
7. Religion or belief
8. Sex
9. Sexual orientation

There are some important differences in the law depending on which protected characteristic you have, but speaking generally, under the Act you are protected from discrimination:

- When you are in the workplace.
- When you use public services like health care (e.g. visiting your GP or local hospital) or education (e.g. your school or college).
- When you use businesses and other organisations that provide services, goods and facilities (like shops, restaurants, and cinemas).
- When you use transport.
- When you buy or rent a property
- When you join a club or association (e.g. your local tennis club); and
- When you have contact with public bodies like your local council or government departments.

The protection under the law applies whether you experience direct discrimination, indirect discrimination, harassment, or victimisation. What do these terms mean?

- **Direct discrimination:** this is when you treat someone worse than you treat someone else and the reason is because of a protected characteristic. For example, refusing to employ someone because of their race.
- **Indirect discrimination:** this is when you treat everyone in the same way, but it has the effect of putting people who share a protected characteristic at a disadvantage. For example, a rule which says employees are not allowed to wear any headgear and must use hair nets – this disadvantages Sikh employees.
- **Harassment:** when someone makes you feel humiliated, offended or degraded and this is related to a protected characteristic. For example, a Muslim man visits his local takeaway regularly. Every time he goes in, one of the staff makes comments about him being a terrorist. He finds this offensive and upsetting.

- **Victimisation:** This is when you are treated badly because you have made a complaint of discrimination under the Equality Act or supported someone else's claim.

In addition to combatting these forms of discrimination, public bodies are also under a duty to pay due regard to the need to eliminate discrimination, advance equality of opportunity between people who share a protected characteristic and those who do not and promote good relations.

Care Experience as a Protected Characteristic

Over the years we have heard lots of examples of young people being treated differently because of their care identity – that they have experience of care. For example, one high achieving care experienced young person told us,

“A teacher found out I was in care and as a result she constantly questioned me about cheating on essays and then had an invigilator stand over me for most of my higher exam.”

Another young person told us about his treatment by the police,

“I think young people end up with more charges if they live in a Children's Unit. Picking up charges for stuff like vandalism, absconding, breach of the peace, is just a by-product of unit life.”

Another care experienced young person told us about a time they went for a job interview. At the interview, when the manager saw the young person's previous address he reportedly said *“That's the children's home isn't it? Are we going to have any trouble with you?”*. The young person did not get the job.

Due to examples like this, as an organisation, Who Cares? Scotland believes that care experience should be made a protected characteristic. This would provide care experienced young people with protection from discrimination and harassment because of their care identity.

Essentially, we see the benefits of making care experience a protected characteristic as three things. It:

1. Ensures that any discrimination of someone with care experience is treated with the same seriousness as discrimination against people sharing any of the existing protected characteristics.
2. Raises consciousness about the discrimination faced by care experienced young people and the importance of providing support to this group.
3. Allows corporate parenting and equality and diversity work to be more closely aligned.

Importantly, the protection and support would be life-long rather than stopping once a young person reaches their 26th birthday. This would mean that layers of protection that apply across a care experienced person's life and would fall away at certain stages leaving protected characteristic status as the bedrock protection that stays in place throughout their lives:

- Under 18: “looked after” status.
- 18 to 20: right to continuing care or after care.
- 21 to 25: right to after care.
- Lifetime: protected characteristic status.

How do we do it?

There are different ways we could make care experience a protected characteristic, including a change in the law, however

this document focuses on the steps corporate parents can take now without any change in the law required.

What can corporate parents do now?

Although we ultimately want to see protection from discrimination and harassment on the basis of care experience made unlawful via legislation, there is nothing to stop corporate parents taking action right now. As mentioned above, any organisation can choose to voluntarily change their internal policies so that care experience is treated as a protected characteristic. For corporate parents, taking this step is a vital way to help meet your existing statutory duties.

In particular, under section 58(1)(c) of the Children and Young People (Scotland) Act 2014, corporate parents have a duty to promote the interests of care experienced young people. The statutory guidance on corporate parenting makes it clear that this duty includes taking action to tackle the discrimination faced by care experienced young people. This means that discrimination based on care identity has been recognised at a statutory level in Scotland, and corporate parents have a duty to tackle that discrimination.

One of the most powerful and meaningful ways that a corporate parent can tackle the discrimination faced by care experienced young people, is by formally recognising care experience and committing to non-discrimination and non-harassment on this basis.

Although this protection would only apply to your own organisation, this would nonetheless ensure that, internally at least, discrimination against a care experienced person is treated with the same seriousness as discrimination against people sharing any of the existing protected characteristics, and consciousness about the discrimination faced by care experienced young is raised.

As well as helping care experienced people, and helping you meet your duties as a corporate parent, there are further potential benefits to your organisation taking this step. For example, corporate parenting work and equality and diversity work overlap in several different ways. Voluntarily making care experience a protected characteristic, would allow these two workstreams to be more closely aligned. This is an opportunity to provide clarity on how the two areas should interact.

Most corporate parents will have a range of structures and processes for equality and diversity issues. In many cases, these structures and processes should be utilised, rather than duplicated, for corporate parenting issues. Equality and impact assessments should always consider the potential impact on care experienced people; equality and diversity training should always cover your corporate parenting duties; mainstreaming of equality and diversity matters should always include relevant actions under your corporate parenting plan.

It is important to remember that there is no protection from discrimination and harassment for people without care experience.. In other words, you can treat people with care experience more favourably than people without. This is in line with the way the Equality Act 2010 treats disability discrimination and gender reassignment discrimination. This is important, because it allows corporate parents to take strong positive action to support care experienced people.

On a more practical level, it is also important that resources are not reduced by bringing corporate parenting and equality and diversity together in this way. This should instead be a way to ensure that adequate resources are in place for both areas.

We would love to hear from more corporate parents who have decided to take this step, and we're also more than happy to talk if you have any queries about how this would work. Please get in touch!

Equality and Human Rights Commission

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Commission

The Equality and Human Rights Commission is the equality body for Great Britain and an A-status national human rights institution. We are responsible for enforcing equality law and promoting and protecting human rights.

Scotland
equalityhumanrights.com

Under the Equality Act 2010 it is unlawful to discriminate, harass or victimise someone because they have or are perceived to have one of the characteristics protected under the Act, or if they are associated with someone who has a protected characteristic.

This means for someone to be protected from discrimination and harassment under the Act, they must share one of the nine protected characteristics. The characteristic of care experience is not protected under the Act.

The Equality Act 2010 does not prevent corporate parents from taking action to address the needs of, or disadvantages faced, by people with care experience, unless this causes unlawful indirect discrimination against people sharing one of the protected characteristics.

Corporate parents can therefore treat people with care experience more favourably than people who do not have care experience. This would only be unlawful if doing so puts (or would put) people who share a protected characteristic at a particular disadvantage and that can't be justified, i.e. it is not a proportionate way of achieving a legitimate aim.

In an effort to address the disadvantages faced by people with care experience, many organisations have already adopted lawful policies or practices that benefit only people with care experience. For example:

- Local authorities offer discounted council tax schemes to people who have left care
- Further education and higher education institutions reserve a certain amount of places or set up bursary schemes for care experienced young people

As well as making discrimination and harassment on the basis of one of the protected characteristics unlawful, the Equality Act 2010 also allows organisations to take positive action to tackle a particular disadvantage, different needs or disproportionately low participation of a specific protected group, provided certain conditions are met. Actions that are targeted at protected groups are allowed under the Act if they are:

- A proportionate means of encouraging people to overcome or minimise disadvantage or,
- Meeting the different needs of the protected group or,
- Enabling or encouraging people in protected groups to participate in an activity

There is often confusion and uncertainty about the difference between positive action and positive discrimination and this can sometimes cause organisations to shy away from taking positive action. Positive action is not the same as positive discrimination.

Positive discrimination is unlawful under the Act because it involves more favourable or preferential treatment of someone because of one protected characteristic and this leads to less favourable treatment of others.

Positive action is the preferential treatment of someone because of a protected characteristic but the purpose of the treatment is to benefit members of a disadvantaged or under-represented group who share a protected characteristic, or to address inequality **and** the treatment is a proportionate way of achieving that aim. For example:

Figures from competition records show that fewer women than men compete as judo players and this is because of their low participation in the sport. A national judo organisation considers two options to try to do something to increase women's participation in judo.

The first option is to host a major competition and the prize money for women is twice the prize money for men. This is likely to be unlawful positive discrimination because it discriminates against male judo players and it would not meet the appropriate and necessary test.

The second option is, for six months, to mount a major publicity campaign combined with the promotion of a discounted training programme for women judo players only. This is likely to be lawful positive action because although it does involve less favourable treatment of men it could meet the appropriate and necessary test since it is likely to be effective in attracting more women to the sport and the less favourable treatment of men would be time-limited and short-term.

It is, however, not unlawful disability discrimination to treat a disabled person more favourably than a non-disabled person. This is because protection for disability is "asymmetrical" and only people who meet the definition of disability under the Act have the protected characteristic of disability. Non-disabled people are protected against direct disability discrimination only where they are perceived to have a disability or are associated with a disabled person.

In summary, with the law as it currently stands, if a corporate parent voluntarily changes their internal policies so that care experience is treated as a protected characteristic, this should not limit the range of actions they can take to address the needs of, or disadvantages faced by, people with care experience. Corporate parents should however assess and be satisfied that the action will not result in unlawful indirect discrimination before implementing any policy.

More information about the Equality Act 2010 including guidance and our Codes of Practice are available on the EHRC website here <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>