# Care experience as a protected characteristic in the UK

**Introduction**The independent review into children’s social care (MacAlister, 2022) has made the recommendation for care experience to be enshrined in law as a protected characteristic under the Equality Act (2010). This paper considers the contemporary grounds-based system that underpins the Equality Act (2010) in relation to children and young people who have been in care. This article is a timely contribution to discussions about the rationale and effect of the experience of care, being acknowledged as a protected characteristic. The three tenets examined in this article are whether there: is definitional stability, evidence of inequalities and, if it reflects the perspectives of those with first-hand experience of care (Malleson, 2018). This article aims to provoke dialogue between policy-makers, academics, practitioners and those people who have first-hand experience of non-parental care.

Malleson’s (2018) work examines the solid foundations of a grounds-based legal framework that protects particular characteristics in the UK, as enshrined in the Equality Act (2010). The three tenets Malleson (2018) identifies are a useful framework for an enquiry into whether having been in state care, as a child, should become a protected characteristic. In the UK, it has been third sector organisations based in Scotland that have fore fronted conversations about the value of care-experience being a protected characteristic (Who Cares? Scotland and the Human Rights Commission 2018). In 2019 the Scottish Children’s Reporter Administration reported that they will actively work to promote equality for looked after children and young people, as a part of this they have developed internal policies to ensure that being care experienced is regarded as a protected characteristic. Following successful lobbying at local authorities across the UK, at the time of writing 31 have made a formal motion to recognise care experience as a protected characteristic (Galloway, 2023).

If the evidence demonstrates that care experience has a stable definition, clear evidence of inequalities and fits with the perspectives of those with lived experience, it would strengthen the case for people with care experience to be afforded legal protection under the Equalities Act (2010). Such legal acknowledgement, through being a protected characteristic, can afford protections against direct and indirect discrimination. Additionally, there are statutory duties for employers and organisations to ensure equal treatment of employees this can be supported with explicit policies, interlinked is the requirement for organisations to conduct equality impact assessments that should be used to ensure no group is deleteriously affected by organisational changes and policies (Equality and Human Rights Commission, 2014). However, the claim that this legal protection would lead to seeing ’outcomes drastically improve’ (MacAlister, 2022 p.7) is questionable.
 **A stable definition**Protected characteristics and legislation promoting equality have been a result of struggles for recognition, on the grounds of an innate or ascribed quality e.g. race. Although to say these characteristics are innate, or natural, is disputable as contemporaneous understandings of identity are often fluid, subjective and socially constructed (Malleson, 2018).

One way that the care-experience may be defined is looking at the legislative definitions of a ‘looked after child’, this is a contemporary label which was introduced in the Children’s Act 1989. The term, ’looked after child’ is used to denote a particular group of children and young people whose welfare needs are to be met by the State. This status is ascribed to children and young people who, for a range of reasons, are accommodated by a Local Authority for more than 24 hours. Therefore, ‘looked after’ is not a subjective or chosen identity, as it is a label bestowed upon children, and it is one removed from a child or a young person when they cease to be ‘looked after’. This legal definition may be considered a way to objectively identify the care experience as a part of a person’s identity.

However, there are challenges implementing this definition. Two pertinent issues arise specifically related to the challenges posed to the definitional and categorical stability. The first relates to the temporality of being a child looked after. While some children enter into the care system for their entire childhood, leaving care for independent adulthood. Some other children may spend a few days in care, or may even spend a few years in care before returning to live with their parents, and for some children care is episodic across their childhood. In addition, some of those asking for the care experience to be a protected characteristic are adults (Care Experienced Conference, 2019), who have legally ceased to be looked after, perhaps many years ago. The second is that the use of legislatively defined being, or having been, a ‘looked after’ child, is that it is likely to omit experiences of informal private arrangements that might not differ substantially from formal state arrangements. These challenges may prove an obstacle to securing the care experience as a protected characteristic.
 **Evidence of inequalities**

Next, the article turns to the tenet that there must be evidence of inequalities for a particular group seeking protections under the Equality Act (2010) (Malleson, 2018). Arguably, differential treatment and outcomes allayed to the care experience is a long-standing issue. As Ferguson (2007) articulates, historically children placed in institutions when their parents were unable to ‘properly’ care for them were perceived to be different from other children in society, they usurped the norm of viewing children as innocent, and were seen to need ‘de-contaminating’ to be less a threat to wider society (p.133). Listening to counter narratives from those with lived experience of care that articulate the complexity of the lives of children in care and their individual strengths can disrupt the view of children in care as threats to social order (Hugman, 2016).

The outcomes of children and young people in care have been extensively researched, with a clear pattern of lower educational attainment of care experienced children and young people, in comparison to their non-care experienced peers, across compulsory education levels (Sebba and Luke, 2019; Carey, 2023). Despite targeted policy developments to support educational attainment for children and young people in care, for example, the development of virtual schools and the pupil premium plus (Department for Education, 2018), they continue to be less likely to transition to higher education at the ages of 18 and 19 years old, compared to their non-care experienced peers (Harrison, 2017). In addition, Children’s Commissioner (2023) states that children and young people in care have poorer outcomes in direct comparison to their peers who are not in care (excluding those who have been identified as ‘in need’) in the domains of health and general well-being.

Other research has highlighted how adults with care experience are over-represented in socially excluded populations: the prison population (Murray, 2012), the homeless population (Harding, 2004; Dixon, 2007; Harding et al., 2011) and the sex-worker population (Home Office, 2004; Coy, 2008). To claim that there is a strong evidence base documenting inequities over the life course for those who are care experienced would be erroneous, as it is under researched (Hugman, 2022). That said, there has been some substantive research conducted by Murray et al (2020) that illustrates how the risk of premature death through non-natural causes has increased for the cohort in care in 2001, in comparison to those in care in 1971. Furthermore, this empirical study also found that care experienced adults were less likely to report good health, in comparison to their non-care experienced peers (Sacket et al, 2021). This suggests that there is a basis for ensuring that care experience is a lifelong characteristic, not limited by the fact they may no longer have any legal status related to their previous care experience.

**Lived experiences**

The third tenet examined is that the characteristic should ‘broadly reflect people’s understanding of social reality and lived experiences’ (Malleson, 2018 p.620). To develop this discussion qualitative research that shares the perspective of those with lived experience of the care system will be drawn upon.

The media can play a role in influencing the public’s views on a subject. Capes (2017, p.90), a care experienced academic and author, has argued that the ‘poor prospects of ‘looked-after’ children are reinforced across the breadth of popular culture’. Referring to children’s literature, Capes suggests that these representations cause ‘particular harm because they teach children from disadvantaged backgrounds that they are destined to fulfil their inherited predisposition for ‘poor outcomes’’ (2017, p.91). Supporting this are the views of care experienced adults, who believe that media stereotypes are ‘particularly pernicious’ (Care Experienced Conference 2019 p.29). With such stereotypes circulating in the media, it is perhaps unsurprising the reporting of petitions against the development of new residential children’s homes (Barnes, 2023; Reynolds, 2019; Slater 2022).

Regarding educational settings, Mannay et al (2017) and Honey et al (2011) found that children and young people in care reported that their teachers, compared to their non-care experienced peers, treated them differently. What is perhaps striking in the accounts from young people is that differential treatment was sometimes characterised by sympathy, concern, and lower expectations in terms of behaviour and engagement. Furthermore, young people with care experience have said that they think the public perceive them as criminals or assume their behaviour is problematic (Channel 4 News, 2015; Ofsted, 2009; Become, 2017). The stigma experienced by those with lived experience is said to be ‘widespread’ in many different spaces, such as ‘the care system itself, in local communities, in wider society, amongst professionals, and in the worlds of education and work’ (Care Experienced Conference, 2019 p.29).

Adjacent to explicit stereotyping and stigmatising attitudes towards children, young people and adults with care experience are the systematic ways in which they are treated differently, because of being in care. A recent House of Commons discussion (2022) brought to the fore how some young people in care are perhaps put at a disadvantage educationally as they are in unregulated educational provision. Moreover, Fitzpatrick (2022) and Howard League for Penal Reform (2017) have highlighted how young people’s behaviour whilst in care can be unnecessarily criminalised.
 **Conclusion**

While this is a relatively new policy agenda this article has shown that there is evidence that the care experience can fulfil the three tenets underpinning the Equality Act (2010): definitional stability, material inequalities and the need to reflect the lived experiences of people with care experience. That being said, what constitutes care experience as an identity characteristic is complex, and should a definition based on current legal status alone (e.g. looked after, relevant, or eligible children) there is a risk that a large proportion of those with care experience would be excluded from legislative protection later in their life course. The evidence that care experienced adults do have poorer outcomes in adulthood bolsters the argument that the process of defining those in care must include those with direct care experience.

Inclusion of care experience as a protected characteristic would enable care experienced people who have faced direct discrimination recourse to address its effect on their lives. The efficacy of care experienced being the 10th protected characteristic in eradicating inequalities and stereotypes requires further research. While protected characters does not afford a group protection from discrimination, as the legislation is focused on individual experiences, it could raise awareness of what it means to be care experienced, and unintentionally enable more effective challenging of deficit stereotypes. Future research on this subject needs to critically examine the limits of the Equalities Act (2010) in addressing systemic inequalities, such as the ones highlighted in this article. This would provide a basis for assessing the claims that the care experience as a protected characteristic would transform their outcomes.

As care experienced people will be the most affected by such a development, future research on this policy area with them would be beneficial. The equalities legislation brings statutory duties to organisations, and this could increase the visibility of care experiences in more sectors of society. Consequently, there would be greater knowledge of care experienced people in organisations and, it would impress upon organisations a requirement to explicitly consider the needs of care experienced people. However, care experience as a protected characteristic may reinforce the identity of being a person with care experience. Thus, it is imperative that research with care experienced people is conducted to establish whether they would support this aspect of their identity becoming protected. Such research should identify any concerns amongst those who are care experienced, collect data on examples of direct and indirect discrimination and establish if this is a priority policy area in their view.

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