

# Briefing Sheet

# 10

## Carers (Scotland) Act 2016 and Equalities





# Carers (Scotland) Act 2016 and Equalities

## Introduction

**This Briefing Paper has been produced by MECOPP to assist local authorities and health boards consider issues which may arise in supporting carers with one or more protected characteristics in delivering responsibilities under the Carers Act.**

The Carers (Scotland) Act 2016 (implemented as of 1 April 2018) places a number of new duties on local authorities and health boards. Both on the 'face' of the Act and in the accompanying Statutory Guidance, there are requirements for local authorities to consider the needs of adult and young carers with protected characteristics<sup>1</sup> with regard to the identification of outcomes and needs for support:

Section of the Act	Provision
<b>Duty to prepare adult carer support plan:</b> Part 2, Chapter 1, Section 6 (5) <sup>2</sup>	<i>"A responsible local authority must exercise its functions under this section in a manner which encourages equal opportunities and in particular the observance of the equal opportunity requirements (within the meaning of Section 1.2 of Part 2 of Schedule 5 of the Scotland Act 1998)."</i>
<b>Adult carers: identification of outcomes and needs for support:</b> Part 2, Chapter 1, Section 8 (2) <sup>3</sup>	<i>"In identifying an adult carer's personal outcomes and needs for support, a responsible local authority must, in particular, take into account any impact that having one or more protected characteristics (within the meaning of section 149(7) of the Equality Act 2010) has on the adult carer."</i>
<b>Duty to prepare young carer statement:</b> Part 2, Chapter 2, Section 12 (7) <sup>4</sup>	<i>"A responsible local authority must exercise its functions under this section in a manner which encourages equal opportunities and in particular the observance of the equal opportunity requirements (within the meaning of Section 1.2 of Part 2 of Schedule 5 of the Scotland Act 1998)."</i>
<b>Young carers: identification of outcomes and needs for support:</b> Part 2, Chapter 2, Section 14 (2) <sup>5</sup>	<i>"In identifying a young carer's personal outcomes and needs for support, a responsible local authority must, in particular, take into account any impact that having one or more protected characteristics (within the meaning of section 149(7) of the Equality Act 2010) has on the young carer."</i>
<b>Information and advice service for carers:</b> Part 6, Section 34 (4) <sup>6</sup>	<i>"In providing information and advice about the matters mentioned in subsection (2), the service must, in particular, identify information and advice likely to be of particular relevance to person who have one or more protected characteristics (within the meaning of Section 149 (7) of the Equality Act 2010)."</i>

<sup>1</sup> The protected characteristics are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and, sexual orientation. More details can be found at <https://www.equalityhumanrights.com/en/equality-act/protected-characteristics>

<sup>2</sup> Carers (Scotland) Act 2016 <http://www.gov.scot/Topics/Health/Support-Social-Care/Unpaid-Carers/Implementation/Carers-scotland-act-2016>

<sup>3</sup> ibid

<sup>4</sup> ibid

<sup>5</sup> ibid

<sup>6</sup> ibid

This paper sets out the inter-relatedness of each of the key considerations within the Act and how, when effectively discharged, they can support carers with one or more protected characteristics to have their personal outcomes met. It will argue that the focus on achieving personal outcomes is essentially a ‘lever’ to ensure equality considerations are embedded in all aspects of local implementation. The approach suggested below is based on recommended practice from the Equality and Human Rights Commission<sup>7</sup>.

## Legislative Context

Public bodies with duties under the Carers (Scotland) Act 2016 also have responsibilities under the Equality Act 2010. The duties in the two pieces of legislation can be seen as being mutually reinforcing.

## The Equality Act (2010)

Section 149 of the Equality Act 2010 places a legal duty (known as the ‘General Equality Duty’) on public authorities to:

- ▶ Eliminate discrimination;
- ▶ Advance equality of opportunity; and,
- ▶ Foster good community relations

in relation to the protected characteristics (with the exception of marriage and civil partnership) set out in Part 2, Chapter 1, Sections 4 – 12<sup>8</sup> of the Equality Act. To assist in the better performance of the General Equality Duty, Scottish Ministers have listed the public authorities that are subject to Specific Equality Duties<sup>9</sup> to enable them to better perform the General Equality Duty. Included in the Specific Duties is a requirement to:

- ▶ Assess the impact of applying a proposed, new or revised policy or practice;
- ▶ Consider relevant evidence relating to persons who share relevant protected characteristics; and,
- ▶ Take account of the results of the assessment in developing and applying a policy or practice.

The process is commonly referred to as an equality impact assessment, also known as an EQIA. It is important to remember that conducting an EQIA is not an outcome in itself but something to be taken into account when making decisions about the policy. Adopting this approach will assist Public Authorities to identify and respond to the needs of a diverse carer population. The EQIA process provides a ‘lens’ through which to examine the equality implications of any given policy and a structured process to support decision making.

Extensive guidance on these duties is available from the Equalities and Human Rights Commission.<sup>10</sup>

Public Authorities will want to consider whether their responsibilities under the Carers (Scotland) Act 2016 should be subjected to an individual EQIA or whether they can be adequately addressed within an existing EQIA. For example, a local authority, integration authority or health board (with duties within the Act) may already have a ‘Corporate Information Strategy’ which has been through the EQIA process. It may consider it a proportionate response for the duty to ‘establish and maintain or ensure the

<sup>7</sup> <https://www.equalityhumanrights.com/en/commission-scotland>

<sup>8</sup> <https://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1>

<sup>9</sup> <https://www.equalityhumanrights.com/en/public-sector-equality-duty-scotland/regulations-specific-duties-and-details-which-public>

<sup>10</sup> <https://www.equalityhumanrights.com/en/commission-scotland/public-sector-equality-duty-scotland>

establishment and maintenance of an information and advice service in its' area' (Part 6, Section 34)<sup>11</sup> to be sufficiently covered under the existing EQIA. Judgements on 'proportionality' may lead the local authority to undertake a separate EQIA on developing local eligibility criteria due to the impact it will have on determining access to funded services.

Similarly, Public Authorities may consider it helpful to disaggregate provisions which have more of an individual or collective impact on carers with one or more protected characteristics when conducting an EQIA. Alternatively, Public Authorities may wish to consider conducting an over-arching EQIA on all provisions contained within the Act.

In undertaking an EQIA, Public Authorities will want to ensure that it is conducted alongside the development of the policy, not ad hoc, retrospective or simply a demographic description of population groups. An effective EQIA should be proportionate, comprehensive, evidence led, rigorous, relevant, identify issues openly and intended to identify mitigating actions where necessary.

## Carers (Scotland) Act 2016

The main provisions within the Carers (Scotland) Act 2016 can be broadly grouped under key themes (based on a summary document developed by the Scottish Government Carers Policy Branch)<sup>12</sup>:

- Adult carer support plans and young carer statements (duty to prepare, identification of outcomes and needs for support, content, review and provision of information);
- Provision of support to carers (duty to set and publish local eligibility criteria);
- Duty to provide support to carers (breaks from caring, charging for support);
- Carer involvement (duty to involve carers in carer services, carer involvement in hospital discharge of cared for person, involvement of, assistance to and collaboration with carers and carer assessments);
- Local carer strategies (duty to prepare, publish and review local carer strategy); and,
- Information and advice for carers (information and advice service to include carers' rights, income maximisation, education and training, advocacy, health and wellbeing, bereavement support and emergency and future care planning) and short breaks statements.

This paper will focus initially on the duty to prepare a local carer strategy as it is reasonable to assume that this document will determine local priorities for implementation, including local eligibility criteria. The duty to involve carers will also be explored in this context.

Subsequent sections will discuss equality considerations in relation to other duties contained within the Act.

<sup>11</sup> <http://www.gov.scot/Topics/Health/Support-Social-Care/Unpaid-Carers/Implementation/Carers-scotland-act-2016>

<sup>12</sup> <http://www.gov.scot/Topics/Health/Support-Social-Care/Unpaid-Carers/Implementation/Carers-scotland-act-2016>

In considering how the duties within both the Equality Act 2010 and the Carers (Scotland) Act 2016 can be effectively discharged, local authorities, integration authorities and health boards should consider the following questions:

**What impact will the local carer strategy have on carers with protected characteristics from both a negative (discriminatory) and positive ('advancing') perspective? A useful way to frame the response will be to consider what are the aims of the strategy and how do these relate to advancing equality?**

The aim of the Carers (Scotland) Act 2016 is to ensure Scotland's 759,000 carers are supported to continue their caring role (as long as they are able and willing to do so) and to have a life alongside their caring role. This is articulated through the medium of 'personal outcomes'. Local carer strategies are expected to demonstrate how this will be achieved through the provision of support and services. Local carer strategies are consequently the key strategic document through which the Act's provisions will be reflected. The duty to prepare, publish and review such strategies is contained in Sections 31, 32 and 33 of the Carers (Scotland) Act 2016<sup>13</sup>. Section 31 of the Act has particular resonance for carers with protected characteristics as it sets out what information must be contained within the strategy including local authority and health board plans to determine the level of demand for support to relevant carers (section 31 (2) (b))<sup>14</sup>, the support available in the local authority area to relevant carers (section 31 (2) (c))<sup>15</sup> an assessment of the extent to which demand for support to relevant carers is currently not being met (section 31 (2) (d))<sup>16</sup> and plans for supporting relevant carers (section 31 (2) (e))<sup>17</sup>.

Policy is rarely 'neutral' both in terms of its development and its subsequent implementation. Local authorities and health boards will want to consider the relative impact of the strategy on **all carers** within the local population both from a negative (discriminatory) and positive ('advancing') perspective.

The inclusion of specific equality considerations within the Act recognises the impact that having one or more protected characteristics can have on an individual carer seeking to have their support needs met. It is therefore incumbent upon the local authority and health board to identify what, if any, actions will have a negative impact on carers with protected characteristics and to set out what mitigation it will put in place.

Local authorities and health boards will also want to consider which aspects of the carer strategy are particularly relevant to each aspect of the General Duty (eliminate, advance & foster). For example, data gaps may exist on the nature and extent of informal caring within LGBTI (lesbian, gay, bi-sexual, transgender and intersex) communities which may result in their needs not being reflected within local strategies and any subsequent allocation of resources. In this instance, the local authority and health board may consider the 'advancement of equality' to be the most important part of the duty. Similarly, the development and application of local eligibility criteria could inadvertently discriminate against carers with protected characteristics if they disproportionately impact on one group.

<sup>13</sup> ibid

<sup>14</sup> ibid

<sup>15</sup> ibid

<sup>16</sup> ibid

<sup>17</sup> ibid

In determining priorities within the local carer strategy, local authorities and health boards should consider which equality groups (people with protected characteristics) the policy is relevant to.

The 'weight' given to different protected characteristics will vary across Scotland according to local population statistics. For example, data from the 2011 Census highlights that although every local authority area in Scotland has a Black and Minority Ethnic carer population, these are concentrated in the Central Belt. This may lead a local authority to prioritise this group of carers within the local strategy. However, 'size' is not a determinant of 'need' as a population may be very small but the impact of the policy may be very high. For example, local authorities and health boards may have a very small, identified, LGBTI carer population with significant support needs.

### **What evidence is available on carers with protected characteristics to inform the development and implementation of the local carer strategy?**

Sourcing accurate data and information on carers with protected characteristics at a local level can prove challenging for local authorities and health boards yet this information is vital in preparing a local carer strategy which is reflective of the whole population. Local authorities and health boards will want to consider which equality groups and communities should be involved in the development of the strategy. Local demographics provide a starting point which can be supplemented by local consultation.

In the absence of local knowledge or research, there are a number of national intermediary bodies which may be able to provide an insight into the experience of individuals with protected characteristics. Although not exhaustive, organisations listed in appendix 1 may be able to assist with either supporting consultation through their knowledge of local networks, insight based on 'lived experience' or sharing available research.

This approach supports Sections 21 and 27 of the Carers (Scotland) Act which requires local authorities and health boards:

*“Before setting its local eligibility criteria, a local authority must (a) consult such persons and bodies representative of carers as the local authority considers appropriate, and (b) take such steps as it considers appropriate to involve carers.”<sup>18</sup>*

*“...take such steps as they consider appropriate to involve carers and such persons and bodies representative of carers in the planning and evaluation of carer services.”<sup>19</sup>*

The Census provides a useful starting point on local population statistics although caution should be adopted given its 10 year cycle. Basic information can be supplemented through further interrogation of the Census data as it is possible to request specific cross analyses of informal caring by identified population groups through the National Records for Scotland Office (NRS)<sup>20</sup>.

<sup>18</sup> ibid

<sup>19</sup> ibid

<sup>20</sup> <https://www.nrscotland.gov.uk/statistics-and-data>

Local authorities and health boards should be mindful that an absence of data or evidence does not mean there is no need to consider the needs of carers with protected characteristics. Where an evidence gap has been identified, local authorities will want to consider how they will mitigate this.

### **How will the results of the assessment (evidence gathering) be taken into account in the development of the local carer strategy?**

In concluding the preparation of the local carer strategy, local authorities and health boards will want to consider how to address the findings of the assessment, including in the context of the requirement in Section 31 of the Act to set out plans for supporting relevant carers and identify the extent to which demand for support for relevant carers is not being met. For example, a local authority having reviewed the available evidence and consulted with local organisations may conclude that it needs to conduct or commission further research on carers with a disability. This action would be included in the local strategy.

### **Duty to Prepare an Adult Carer Support Plan (ACSP)**

Section 8(2) of the Carers (Scotland) Act 2016 requires local authorities in identifying an adult carer's personal outcomes and needs for support to take into account any impact that having one or more protected characteristics has on the adult carer. Section 9 of the Act sets out the content of the ACSP. Although not prescribed within the Act, there has been increasing recognition of the value of a 'culturally competent' approach to an assessment of need for the individual carer with increasing numbers of local authorities choosing to adopt this model both for assessment processes and service development. An introduction to 'cultural competency' can be found at: [http://mecopp.org.uk/files/documents/MECOPP%20publications/mecopp\\_briefing\\_sheet\\_06.pdf](http://mecopp.org.uk/files/documents/MECOPP%20publications/mecopp_briefing_sheet_06.pdf)

The quality of individual assessments for carers with one or more protected characteristics can be enhanced by active recognition of the carer as an 'equal and expert partner' in their individual caring situation. The Statutory Guidance accompanying the Act notes that the principle of carers as 'equal and expert partners' in their individual caring situation is particularly pertinent to carers with particular needs or specific considerations such as carers from Minority Ethnic communities (4.1.2)<sup>21</sup>. The Statutory Guidance also notes that local authorities are required to have regard to certain principles in carrying out their ACSP functions, including the principle that carers must be provided with 'reasonable assistance' to enable them to express views about their support and make informed choices, e.g. interpreting and translation services, to enable the carer to have as much involvement as they wish to with regard to the individual needs assessment and support provision (4.1.16 a & b)<sup>22</sup>. Section 11 (1 & 2) of the Act<sup>23</sup> also requires the local authority to provide the adult carer and any other person the carer requests with the information contained in the ACSP.

<sup>21</sup> Carers (Scotland) Act 2016 Statutory Guidance

<sup>22</sup> *ibid*

<sup>23</sup> *ibid*



### Duty to Provide Support

The duty placed on local authorities to provide support to carers (sections 24, 25 & 26) of the Act <sup>24</sup> – and the subsequent provision of that support – will to a great extent depend upon the availability of appropriate services and support to meet those personal outcomes.

The requirement for meeting the carer's identified needs after consideration of whether they can be met through the provision of services to the supported person or universal services must be considered in light of available evidence. For example, a considerable body of research now exists which evidences the particular difficulties faced by Black and Minority Ethnic carers in accessing appropriate and accessible supports, whether funded or universally available. A synopsis of this can be found at [http://mecopp.org.uk/files/documents/MECOPP%20publications/mecopp\\_briefing\\_sheet\\_03.pdf](http://mecopp.org.uk/files/documents/MECOPP%20publications/mecopp_briefing_sheet_03.pdf) and [http://mecopp.org.uk/files/documents/MECOPP%20publications/mecopp\\_briefing\\_sheet\\_07.pdf](http://mecopp.org.uk/files/documents/MECOPP%20publications/mecopp_briefing_sheet_07.pdf) Research is also available on young carers<sup>25</sup> and informal caring with the older population<sup>26</sup>. However, substantial data gaps exist with regard to the experience of LGBTI and disabled carers and caring within refugee and asylum seeking communities. It is for the local authority to determine, on completion of the evidence gathering to inform the strategy, what action it will take. For example, a local authority may decide that it is not a proportionate response to invest in a specific service for carers from the LGBTI community but it may decide to invest in mandatory training for its staff and to provide additional resources to an existing community organisation to increase their capacity to identify and support carers within this community. This does not, however, alleviate them of their responsibilities to comply with the overall requirements of the Equality Act 2010.

### Information and Advice for Carers

Section 34 (1) of the Act<sup>27</sup> requires local authorities to:

*“...establish and maintain, or ensure the establishment and maintenance of, an information and advice service for relevant carers.”*

Additionally, Section 34 (4) of the Act requires local authorities to identify information and advice likely to be of particular relevance to carers with one or more protected characteristics.

In fulfilling this duty, local authorities will want to consider not only **how** information and advice is to be made available to carers with one or more protected characteristics but also **what** type of information may be of particular relevance to them. For example, local authorities may wish to consider profiling the language and communication support needs of their carer population to ensure accessibility and appropriateness. Requests for local authority interpreting and translation services (whether directly provided or commissioned) may prove a useful starting point to build the profile. Determining what advice and information may be of particular relevance to carers with different protected characteristics may not be as straightforward and should be done in consultation with both them and groups representative of their interests. For example, Black and Minority Ethnic carers or carers from the LGBTI community may need information and advice on how to report a 'difference in treatment' which they perceive to be due to racism or homophobia on the part of support agencies.

<sup>24</sup> *ibid*

<sup>25</sup> <https://carers.org/search/site/young%2520carers%2520scottish%2520research>

<sup>26</sup> <https://carers.org/news-item/no-such-thing-retirement-older-carers-says-new-carers-trust-report>

<sup>27</sup> *ibid*



### Concluding Remarks

All of the duties contained within the Carers Act are equally as relevant to carers with one or more protected characteristics as they are to carers within the majority population. The successful implementation of each duty whether at an individual (ACSP) or strategic level (carer strategy) is to a greater or lesser extent dependent upon the successful discharge of other duties within the Act. The duties can therefore be seen as mutually reinforcing.

This paper argues that the ability of a local authority to meet the personal outcomes of a carer or carers with one or more protected characteristics will depend on the availability of support and services within that local authority area. In order for personal outcomes to be accurately captured, a culturally competent approach to assessments is recommended. Collation of equalities data captured in the assessment process and information from the subsequent ACSP's as to which supports and services are available at a local level to meet personal outcomes provides a robust data set to capture current and emergent met and unmet need. Evidence gathered through the EQIA process together with the active engagement of, and consultation with, carers with protected characteristics should generate sufficient information to enable local authorities and health boards to make an informed decision regarding local priorities and provide a strategic 'steer' within the local carer strategy.

### Appendix 1

Details of National Intermediary Organisations:

- ▶ **MECOPP** ([www.mecopp.org.uk](http://www.mecopp.org.uk))
- ▶ **Scottish Young Carers Alliance** hosted by the **Carers Trust Scotland** (<https://carers.org/country/carers-trust-scotland>)
- ▶ **The Equality Network** (<https://www.equality-network.org>)
- ▶ **Scottish Trans** (<https://www.scottishtrans.org>)
- ▶ **Stonewall** (<http://www.stonewallscotland.org.uk>)
- ▶ **Inclusion Scotland** (<http://inclusionscotland.org>)
- ▶ **Engender** (<https://www.engender.org.uk>)
- ▶ **Age Scotland** (<https://www.ageuk.org.uk/scotland>)
- ▶ **The Alliance** (<https://www.alliance-scotland.org.uk>)
- ▶ **Scottish Commission on Learning Disability** (<https://www.sclld.org.uk>)