

Exclusion of Pupils from School in the UK

Brenda Parkes¹

Introduction

In a recent speech to a school academy, Michael Gove MP, Secretary of State for Education, described those participating in the summer riots in the UK as an “educational underclass”, and made the link between educational underachievement, truancy, exclusions and crime.² For Gove, the riots were well-timed as an Education Bill (the Bill) with an aim to address discipline in school was going through parliament. The Bill received Royal Assent in November 2011, becoming the Education Act 2011 (EA2011). Amongst its changes, which included some positive measures such as free “early years” provision to two-year-olds from disadvantaged backgrounds, were changes to the exclusions regime, including the abolition of exclusion appeal panels (EAPs), and the creation of independent review panels (IRPs), with no power to direct reinstatement of a pupil, in their place.

The “equality impact assessment” on the Bill referred to the adverse impact bad behaviour can have on teachers, and how it can be a demotivating factor to those working in school and a deterrent to people who may be considering entering into the teaching profession.³ It states that “[a] sharper focus on discipline will improve school ethos and raise the attainment of all. We are on the side of teachers and will not be deflected from laying down lines which those who behave badly must not cross.”⁴ This “siding” with teachers has resulted in reforms to the dis-

cipline system which give increased powers to teachers to manage bad behaviour. It has also raised concerns, however, about the impact on the rights of children in school and the impact on equality.

For decades, there have been concerns about the disproportionate numbers of pupils from certain ethnic minority groups, as well as those with disabilities and special educational needs (SEN), who are affected by the exclusions regime. This article will examine the current debate and evidence regarding school exclusions, and consider whether there has been any improvement, and any examples of good practice, in attempts to address disproportionality in the numbers of particular social groups who are excluded. It will consider the equality and human rights context of exclusions and whether the recent changes to the exclusions system are likely to assist or hinder the advancement of equality and protection of the rights of pupils.

1. Legal Framework

The legal framework relating to the exclusions regime in the UK is found in statutes specifically relating to education. In order for this framework to be critically analysed, however, it is also necessary to examine the impact of equality and human rights legislation on the implementation of the regime. Each of these areas is explored in more detail below.

1.1 Education Law

The Education Act 2002 (EA2002) and the Education and Inspections Act 2006 set out provisions relating to permanent and fixed term exclusions.⁵ These statutes provide that a school can permanently exclude a pupil if: (i) he/she has seriously broken the school behaviour policy, and (ii) when allowing the pupil to remain in the school would seriously harm the education or welfare of the pupil or others in the school. The local authority must provide full-time education from the sixth school day of a permanent exclusion.

A school can exclude a pupil for a fixed period for persistent disruptive behaviour where it is not serious enough to warrant permanent exclusion. The school must not, however, exclude pupils for more than a total of 45 days within any school year. If a pupil is excluded for more than one day then they must be given work and the school must mark it. From the sixth consecutive school day of a fixed term exclusion, the school has responsibility for finding alternative suitable education for the pupil.

The governing body of the school is required to review the head teacher's decision to exclude, and the parent is allowed to meet with them. If the decision is upheld then the parent may appeal to the EAP, which has the power to direct the head teacher to reinstate the pupil. The EAPs also deal with disability claims in relation to permanent exclusions from maintained schools, short stay schools and pupil referral claims. Disability claims against fixed term exclusions are heard in the First Tier Tribunal (the FTT). Discrimination claims in respect of any other protected characteristics are heard in the County Court. The EA2011 referred to below introduces new review panels to replace existing appeal panels in September 2012.⁶

1.2 Equality Act 2010

In exercising all of its functions, including those related to the exclusions regime, a school must comply with equality legislation, and in particular, the Equality Act 2010 (the Equality Act).⁷

Direct and Indirect Discrimination

Direct discrimination occurs when a person treats another person less favourably than they treat or would treat another because of a protected characteristic.⁸ For example, direct discrimination in the exclusion process would occur if a pupil who is black or is disabled is excluded for a longer period in comparison to a white or non-disabled pupil who has behaved in a similar way. Direct discrimination could also occur if a disabled pupil is excluded as a result of the failure by the school to make reasonable adjustments.⁹ Sometimes exclusions may occur when a pupil has responded to prejudicial bullying in circumstances which can amount to direct discrimination.

A high proportion of exclusions involve pupils with SEN, many of whom have learning disabilities. By way of example, in 2009, the High Court ruled in favour of a nine-year old disabled student who had been excluded for disruptive behaviour linked to his disability, Attention Deficit Hyperactivity Disorder (ADHD).¹⁰ The school argued that the decision to exclude was made on grounds of health and safety. However the court upheld the Special Educational Needs & Disability Tribunal's decision that, under the Disability Discrimination Act 1995 (DDA), the school had failed to make reasonable adjustments, as it should have involved the help of a specialist team that was available to them prior to the incident. The judge ruled that the pupil's scratching which tended to

lead to physical abuse was not covered by the DDA but his ADHD was. Many cases involving pupils with SEN arising from a particular disability could also involve failure to make reasonable adjustments and other forms of discriminatory treatment.

Indirect discrimination would occur if the exclusion process results in a disproportionate adverse impact on a group with a protected characteristic, without any justification for the policy being provided by the school or local authority, which is not found to be a proportionate means of achieving a legitimate aim.¹¹ In relation to the latter, questions could be asked about the effectiveness of excluding pupils from school as a policy generally.

The case of *D.H. and Others v Czech Republic*¹² involved discrimination under Article 14 (Non-discrimination) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and included comments that exclusion could relate to a pattern of discrimination as well as a specific act. This case related to Roma children who were generally segregated within the education system by being placed in remedial special schools. The case was brought under Article 14 and Article 2 of Protocol 1 (Right to education) of the ECHR. The European Court of Human Rights (ECtHR) concluded that even if a law is neutral, if its effect is racially disproportionate without justification, it would be unlawful.

An example of a “pattern of discrimination” in another area of social policy is the use of stop and search. Following the publication of a report into the use of this historically controversial police tactic,¹³ the Equality and Human Rights Commission (EHRC) carried out inquiries into certain forces which had demonstrated high levels of disproportionality in

their use of stop and search, and which had not convinced the EHRC that they had taken the necessary steps to comply with equality and human rights legislation. In the absence of a satisfactory explanation for the evident disproportionality, an indirect discrimination claim could be made. The EHRC served letters before action on two forces, and entered into formal legally binding agreements with them following their undertaking to take the necessary steps to address the disproportionality rates.¹⁴

Similarly to the “stop and search” process, school exclusions have historically been applied disproportionately to different social groups. Whether the exclusions system is objectively justified in any particular circumstance is not an entirely straightforward matter, however, and could involve a number of different interpretations of the usefulness and legitimacy of the principle of exclusion and the likely consequences that follow. Furthermore, the statistical interpretation may be particularly complex given the distribution of exclusion figures between schools and the increase in autonomy within the school system. Many of those who have researched this issue have highlighted the role that alternative measures can play in addressing behavioural issues – measures such as early intervention and restorative justice, which may often be more effective in meeting the aims that the exclusions system sets out to achieve.¹⁵

Public Sector Equality Duty

Under the Equality Act’s new public sector equality duty, which came into effect in April 2011,¹⁶ listed public authorities (including maintained schools) and others who carry out public functions must, in the exercise of their functions, have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not share it; and
- foster good relations between people who share a protected characteristic and those who do not share it.¹⁷

Furthermore, the Equality Act states that having due regard to advancing equality involves having due regard in particular to the need to:

- remove or minimise disadvantages suffered by people who share a relevant protected characteristic that are connected to that characteristic;
- take steps to meet the needs of people from protected groups who share a relevant characteristic that are different from the needs of persons who do not share it; and
- 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.¹⁸

The Equality Act states that meeting different needs involves taking steps to take account of disabled people's disabilities. It describes fostering good relations as tackling prejudice and promoting understanding between people from different groups. It states that compliance with the duty may involve treating some people more favourably than others.¹⁹ The new public sector duty is important because case law for the previous duties has established that the principles of a general duty require the public authority to ensure

that, when taking decisions and developing policies, those exercising these functions must be fully aware of the requirements of the duty and have a conscious approach and state of mind.²⁰ They must approach the issue with rigour, and ask themselves the right questions.²¹ There must also be advance consideration.²² Having "due regard" is the level of "regard" that is appropriate in all the circumstances.²³ Under previous legislation, there were specific duties which made it a requirement for schools to have equality policies and schemes and to monitor their policies and practices.²⁴ The regulations for the new Equality Act duty are more light touch than those relating to the previous equality regimes, and require the setting of objectives and publishing of information that shows how public authorities (including schools) have complied with the general duty.²⁵ There is less prescription in the new regulations which could lead to some public authorities failing to comply with their general duty if they do not introduce the relevant systems and procedures for collecting the necessary evidence base to facilitate the paying of "due regard" required under Section 149 of the Equality Act. Where, for instance, there is disproportionality, but a school does not adequately monitor its exclusions or consider how it should address such disproportionality, then it could be failing in its duty to have "due regard", as well as being at risk of breaching the provisions in the Equality Act relating to indirect discrimination.

Human Rights

A decision to exclude a pupil from school must also comply with the Human Rights Act 1998, particularly in relation to Article 2 of Protocol 1 of the ECHR (Right to education) as well as Article 14 (Non-discrimination). There is a difference of opinion as to whether Article 6 (Right to a Fair Trial) applies

to school exclusions. In the case of *Oršuš v Croatia*,²⁶ the ECtHR determined that Article 6 of ECHR applies to educational disputes. However the UK Department for Education's (DFE) position is that this case can be distinguished on its facts and that, as a result, Article 6 does not apply to exclusions. This is discussed further below. Exclusion policies and procedures must also comply with international law, including in particular the Convention of the Rights of the Child (CRC),²⁷ the International Convention on the Elimination of All Forms of Racial Discrimination²⁸ and the Convention of the Rights of Persons with Disabilities,²⁹ which includes obligations to protect both the rights of children with disabilities and the right to education.³⁰ Much of the CRC is relevant to school exclusions, including Article 3 relating to the best interests of the child, Article 12 giving every child the right to say what they think in all matters affecting them and Article 28 which affirms the right to education. Exclusion policies and procedures have therefore become subject to scrutiny by the relevant UN treaty bodies.³¹

2. Disproportionality: The Evidence Base

Having outlined the legal framework which governs the exclusions regime in the UK, this section will now explore the ways in which the regime may have failed to comply with equality law obligations due to its disproportionate impact on particular social groups.

For decades, exclusions have been the subject of much research and many inquiries due in particular to their disproportionate impact on certain ethnic minority groups, including, in particular, Black Caribbeans, Gypsies and Travellers, as well as those with SEN and disabilities. The purpose and aims of the whole exclusions system have also been the subject of great scrutiny, as links have been made between the exclusions sys-

tem, underachievement, the family environment, crime and gang culture. Reports have generally been consistent in highlighting disproportionality, with some also identifying examples of good practice in the approach adopted by certain schools in relation to discipline, with a greater emphasis on early and preventative interventions rather than exclusion. This section provides an overview of some of the evidence which demonstrates continuation of the disproportionate impact of the exclusions regime on certain social groups, and illustrates the failure of the state to effectively address inequalities within the exclusions system.

The latest Department for Education figures on exclusions for 2009/2010 record an estimated 5,740 permanent exclusions and 331,380 fixed-term exclusions.³² What the statistics show is that the previous Government's objective to reduce the number of permanent exclusions appears to have succeeded, in that they have declined from 12,300 permanent exclusions in 1997/1998. The number of fixed-term exclusions recorded for 2009/2010 was the lowest since 2003/2004.

Despite this decrease in the number of exclusions overall, the 2009/2010 report highlights Black Caribbean pupils being four times more likely to be excluded and those with a statement of SEN being eight times more likely to be permanently excluded and six times as likely to have been excluded on one or more occasions.³³ Those with SEN formed nearly three quarters of pupils permanently excluded in 2009/2010, while Gypsies and Travellers were the ethnic group with the highest proportion of exclusions although some caution had to be adopted due to the smaller numbers involved.³⁴ The figures include those with SEN who have been excluded but do not capture all disabled pu-

pils. The absence of disability related information in education has been highlighted by a report commissioned by the DFE itself.³⁵

As far back as 1985, the Commission for Racial Equality (CRE) published a report of its investigation into what were then called “suspensions” in Birmingham which found disproportionate numbers of black pupils suspended from school.³⁶ It concluded that black pupils were four times more likely to be suspended than white pupils. The explanation for this difference could not be attributed to standard references to pressures and problems of living in the city or the incidence of one-parent families. The report concluded that these factors did not stand up to scrutiny. It was more a case of institutional discrimination rather than direct or intentional discrimination although there was clearly evidence of stereotyping. Institutional discrimination was defined as all the practices and procedures employed by a school or authority which, unintentionally or otherwise, have the effect of placing members of one or other racial or ethnic group at a disadvantage and cannot be justified.³⁷ The CRE found, for instance, that black pupils were more likely to be recommended for suspension units rather than other schools and that there was evidence of misinterpretation of black pupils’ behaviour, which often involved a failure to take into account cultural characteristics such as hair style.³⁸ The report also highlighted the importance of record keeping and monitoring and looking at reasons for over-representation.³⁹

Over twenty years later, in 2006, the Department for Education and Skills (DFES) produced its own “Priority Review” report on black pupils and exclusions (the Priority Review Report).⁴⁰ It noted that black pupils are less likely to fit the profile of typical white excluded pupils, who generally

have (i) SEN or are eligible for Free School Meals (FSM), (ii) longer or more numerous previous exclusions, (iii) poor attendance records, (iv) criminal records or (v) more looked-after children. The findings challenged the assumption that racial inequalities are due to socio-economic inequalities. Instead, there was evidence that there is an “x-factor” linked to ethnicity. The report pointed out that while there is a lot of academic common ground regarding this issue, some commentators focus on in-house reasons for inequality, such as policy and practice in schools and the education system generally, while others concentrate on outside factors within the wider community which cause black pupils to behave worse or differently. It used the term “institutional discrimination” to describe how disproportionate exclusions arise. A disproportionate exclusion could arise if, for instance, an overall policy is adopted to address socio-economic factors, but does not necessarily deliver equality outcomes for different ethnic groups. The report identified factors that are often put forward as leading to disciplinary action and exclusion:

- institutional racism and discrimination;
- negative stereotyping of black pupils as threatening;
- over-harsher disciplining of black pupils; and
- generally low teacher expectations.⁴¹

The report also acknowledged the link between school exclusions and social exclusion, and the high correlation with unemployment and involvement in crime. It noted that ethnic minority pupils are frequently put in lower academic sets, regardless of their attainment levels – a practice which, in itself, could be discriminatory. DFES concluded that failure to address the exclusions gap is not due to an insufficient legal basis within equalities

legislation that could challenge such a gap, or the non-existence of good practice models. Instead, the gap persists because of the marginal status of race equality in the education system. The report concluded that while there are both in-house and out-of-school explanations for the exclusions gap, a focus on in-house solutions is preferable to an emphasis on out-of-school factors which are difficult to address due to a lack of sufficient evidence. Further, it is important to avoid locating the problem within the black communities and therefore excuse inaction by the system. It also emphasised how important the issue of exclusions is for the black communities, and how the DFES should give it similar priority, stating that “[f]or black communities, exclusions are to education what stop and search is to criminal justice”.⁴² DFES concluded its Priority Review Report with a series of recommendations including the targeting of 20 local authorities and the 100 schools with the worst record on exclusions for follow-up action.

In an article written for the Runnymede Trust – *Did they get it right?*⁴³ – published in 2010 as a follow-up to the Priority Review Report, Diane Abbott MP stated that the report was withheld from publication initially and only published because it was leaked to the press.⁴⁴ Furthermore, following her own inquiries, she found out that the implementation of the report was not as suggested in the review but involved the self-selection of a number of authorities for follow-up action.⁴⁵ This indicates that there was a reluctance on behalf of the government to be transparent about the evidence base for exclusions, and that some of those authorities where there is evidence of disproportionality may not be taking responsibility to address the issue.

The Runnymede Trust’s publication was referred to as a “re-examination” of the issue.

It brings together commentators with different perspectives, including various academics, representatives of charities and other organisations that work directly with excluded pupils or those at risk of exclusions, and teachers unions – the Association of Teachers and Lecturers, the National Union of Teachers and the Association of School and College Lecturers. There are various contributions which reflect issues that were referred to in the DFE report including what can be referred to as “in-house reasons” and “outward-looking factors” for disproportionate exclusion rates.

The Centre for Social Justice’s (CSJ) report on exclusions published in September 2011 highlighted various social and economic factors that it considered could contribute to school exclusions, including family influence and gang culture.⁴⁶ The report highlighted disproportionality of the impact of exclusions amongst certain ethnic minority groups as well as the large number of those excluded who have SEN.

The issue of this disproportionate application of the exclusions regime has also been brought to the attention of certain UN treaty bodies. The Children’s Legal Centre (CLC) submitted a report to the Committee on the Rights of the Child (CoRC) in 2008 on the extent to which the UK has complied with the right to education set out in Articles 28 and 29 of CRC.⁴⁷ The report referred to disproportionate numbers of ethnic minority and SEN pupils being excluded and made recommendations relating to the reduction of the number of discriminatory exclusions, highlighting how exclusion from school can lead to social exclusion and disengagement. Similarly, in its recent Concluding Observations on the UK and Northern Ireland, the Committee on the Elimination of Racial Discrimination (CERD) expressed concerns about the

continuing disproportionality in numbers of excluded pupils from ethnic minorities.⁴⁸

The CLC's concerns about social exclusion and disengagement were subsequently proved justified by incidents which arose three years after the report was published. The interim report into the riots which took place in various UK urban centres in August 2011, by a committee chaired by Darra Singh, referred to Ministry of Justice statistics on those who were brought before the courts.⁴⁹ This revealed that 46% were black (including mixed race), 42% were white, 7% Asian, and 5% of "other" ethnicity. 26% of those who appeared before the courts were aged between 10 and 17 years of age. Of this age group, one third had been excluded from school for at least one fixed term period in the year 2009/2010, a percentage six times higher than the national average. Two thirds of this group had SEN, which is three times higher than for the population as a whole.

3. Unofficial Exclusions

One particular trend that has been highlighted as a potential cause for concern in many of the reports on exclusions is the use of unofficial or informal exclusions. The Priority Review Report suggested that unofficial exclusions which are not recorded could provide a partial explanation for the decrease in the overall numbers of pupils who are excluded from school.⁵⁰ The DFE produced guidance in 2008 (soon to be replaced by new statutory guidance) which emphasised the unlawfulness of unofficial exclusions.⁵¹ These unofficial exclusions include various measures that in effect exclude pupils such as:

- i) schools encouraging parents to move their children from the school;
- ii) the use of part-time timetables;
- iii) placement of pupils in Pupil Referral

Units (PRUs) which are short stay centres for pupils who are educated in ways other than at a maintained or special school;

iv) managed moves which involve the transfer of a pupil from one school to another in the same area to avoid exclusion; and

v) dual registration where a pupil is registered at a main school as well as another educational establishment such as a PRU, or independent school.

These measures are forms of exclusion short of official exclusion as defined by the legislation. A 2011 CSJ report found that despite the number of exclusions falling in 2010/2011, the number of pupils being educated in PRUs almost doubled between 1997 and 2007.⁵² It highlights the fact that they are being used illegally in some cases, and that there are no records on how these are being used. Furthermore, the use of onsite provision for the purpose of informal exclusion has the effect of reducing the numbers of pupils who are recorded as having been excluded.

In its shadow report to the CoRC in 2008,⁵³ the EHRC advised that the CoRC should explore with the government the increased use of informal as well as temporary exclusions and the effectiveness of PRUs.⁵⁴

4. Identifying Good Practice and Recent Developments

Some reports that highlight concerns about bad and potentially unlawful practice in the use of exclusions also refer to some evidence of good practice, such as early intervention and alternatives to exclusion.

In its Priority Review Report, the DFES noted the importance of monitoring involvement of pupils in disciplinary processes and identifying those at risk early on. It also recognised the role of restorative and preventative ap-

proaches to behaviour management that seek to mediate the root causes of conflict rather than simply punishing the pupil.⁵⁵ The new EA2011 has, however, removed the requirement on schools to hold reintegration interviews for pupils who have been excluded, which could lead to certain opportunities to prevent further exclusions being missed.

The DFE is currently carrying out a pilot into the use of exclusions and potential alternatives (the DFE Pilot).⁵⁶ The three-year school exclusions trial launched in 2011 will require head teachers to take responsibility for every pupil admitted to its school and the placement of pupils it excludes permanently rather than leaving it to the local authority to make arrangements which is the current position. The aim behind this new approach is to encourage schools to take more responsibility for pupils who are at risk of exclusion and engage in early intervention and good practice.

In the same vein, those who provide advice and advocacy support to parents and pupils in relation to the exclusion process, such as the Communities Empowerment Network, have also highlighted the need for more preventative and early interventions.⁵⁷ The CoRC Concluding Observations on the UK emphasised the importance of early and alternative intervention, recommending the reduction of the number of exclusions as well as the use of social workers and psychologists in order to help children in conflict with the school.⁵⁸

Barnardo's produced a report in 2010 in response to policy commitments made by the Conservative Party, whilst in opposition, which it was concerned could increase the rate of exclusions.⁵⁹ It highlighted the importance of early intervention and alternatives to exclusions that are effective using several case-studies looking at four different modes

of intervention as good practice examples. It pointed out that the costs of exclusions can be greater than expenditure on alternatives. The Office on Standards in Education (Ofsted) published a report in 2008 on ways of reducing the number of black pupils being excluded. It examined eleven schools and referred to good practice that had been identified by Her Majesty's Inspectors in an earlier review.⁶⁰ These examples included respect of the individual, and a systematic caring and consistent approach to behaviour, understanding causes of behaviour, empowering pupils to take control of their lives, and diverse role models.⁶¹

The Office of the Children's Commissioner (OCC) will be publishing the report of its inquiry – The School Exclusions Inquiry – in March 2012.⁶² It will look in particular at whether (i) the exclusions regime, and particularly the related decision-making process, is consistent with children's rights under the CRC, and (ii) whether schools and public authorities are meeting the requirements of the public sector equality duty under the Equality Act. At the launch of the inquiry, the Children's Commissioner said that it would be looking at the government's proposals for changes to the exclusions system and whether the current system and the changes to it are consistent with the CRC. However, the findings will be too late to influence the most recent changes already introduced by the EA2011, although they could potentially impact on statutory guidance being produced by DFE on the new exclusion process which will commence in September 2012.

5. Future Research

The DFE Pilot may be informative if it can give some insight into the role of early intervention and preventative measures practiced by schools in handling discipline issues, and

lead to recommendations which encourage alternatives to exclusions as well as seek to fill gaps in knowledge. Future research could look at how schools and local authorities are meeting their obligations under the public sector equality duty under the Equality Act. This could include evaluating how schools and local authorities are collecting data and analysing the impact of exclusion policies on different groups of pupils, including ethnic minority pupils and those with disabilities and SEN as well as those with more than one protected characteristic, and whether they are taking any steps to address any evidence of disproportionality and other potential forms of discrimination. Any research should also look for evidence of the use of informal exclusions.

6. Reforms to the School Exclusions System under the EA2011

As mentioned above, the Coalition Government has recently introduced reforms through the EA2011 to address discipline in schools, including amendments to the exclusions system. The reforms have been met with a number of criticisms from both equality and human rights organisations.

The EA2011 introduced certain measures intended to address bad behaviour in school by giving stronger powers to teachers to search pupils without consent,⁶³ to impose detention on a pupil without notice,⁶⁴ and to introduce IRPs with limited powers.⁶⁵ The requirement for schools to enter into behaviour and attendance partnerships to support early intervention and preventative measures has been repealed. All of these reforms have implications for both equality and human rights. This section will examine particularly the challenges presented by the introduction of IRPs and the criticisms of the new “appeals” process, which is argued

to (i) undermine equality obligations under the Equality Act by increasing the potential for disproportionate impact of the exclusions regime, and (ii) represent a contravention of the Human Rights Act 1998.

Following the amendment to EA2002 brought in by Section 4 of EA2011, parents of pupils who have been permanently excluded will now be able to appeal to an IRP which will have the authority to recommend that the school reconsiders its exclusion decision. In cases where the IRP considers that the decision was flawed when viewed in the light of the normal principles of judicial review, it may direct the school to reconsider its decision. In these circumstances, it also has the discretion to impose a fine. Review panels will replace appeal panels which had the power to reinstate permanently excluded pupils.⁶⁶ This new system of IRPs, therefore, allows the head teacher to make the final decision as to whether to reinstate an excluded pupil on the advice of an IRP. The reasoning behind this shift in power to the head teacher is to prevent pupils from being reinstated on a procedural point, without taking into account the needs of the pupils within school generally and with potential negative impact on the head teacher’s authority, staff morale and pupil safety. The assumption behind this policy is that the school knows what is best for the child and other pupils. Under the new regime of IRPs, those permanently excluded who allege disability discrimination will still be able to appeal to the FTT (Special Education Needs and Disability) which has greater powers than IRPs because they can order reinstatement.

The introduction of IRPs in replacement of EAPs has been criticised widely, not only by civil society. For example, the parliamentary Education Select Committee considered the proposal to introduce IRPs and supported

the retention of EAPs as currently constituted for reasons of justice and fairness.⁶⁷

In various submissions and consultation responses to the 2010 Schools' White Paper – *The Importance of Teaching*⁶⁸ – and the Bill, several organisations expressed their concerns about what was being proposed in respect of the new appeal process. Concerns were expressed by the EHRC in its shadow report to CERD that the introduction of IRPs may lead to an increase in the already disproportionate numbers of particular ethnic minority groups affected by the exclusions regime.⁶⁹ The EHRC considered that removing the power to make reinstatement would decrease the IRP's ability to hold the school to account.⁷⁰ It also highlighted that, although one of the objectives of the change was to shorten the time it takes to determine an appeal, the practical effect on a pupil could be to delay the process as decisions are referred back for reconsideration.⁷¹ It emphasised that the suspension of a child's education is detrimental to his or her development and delay of a decision is not in the "best interests" of the child. The EHRC also expressed its concern about the impact of reforms to the legal aid budget which will remove school exclusion from within its remit, making it more difficult for affected pupils to challenge the decisions to exclude them.⁷² The EHRC reaffirmed its reservations about these proposals in its parliamentary briefing on the Bill, in which it criticised the failure of the equality impact assessment to consider the impact of its proposals for exclusions on equality.⁷³

In a joint submission to CERD, a group of UK NGOs criticised the proposed amendment to the appeals process and the widening of powers to search pupils, and the likelihood of these powers being used disproportionately.⁷⁴ It suggested that this could in turn

impact on trust and confidence between ethnic minority pupils and teachers which could then impact on behaviour and thereby lead to further exclusions. It recommends that the government complies with the requirement to report on disproportionality in exclusion rates on the basis of ethnicity and demonstrate how they are meeting their public sector equality duty. The UK NGO group also recommended that the appeal process allows reinstatement of a pupil.⁷⁵

The Children's Rights Alliance, in its annual review of the state of children's rights, expressed concern at the possibility that the introduction of financial penalties in the event that schools do not reinstate pupils following an IRP decision, and the requirement on the school to find alternative education for the excluded pupil, could lead to certain pupils who are at risk of exclusion being refused admission to the school in the first place.⁷⁶

The view of the OCC in its formal submission of evidence to the Education Bill Committee in March 2011⁷⁷ was that (i) it was important that legal responses to issues around discipline are proportionate, especially so when changes affect the rights of children as in the case of the Bill,⁷⁸ and (ii) any weakening of protection of pupils under the new exclusions procedure could breach Articles 3, 12 and 28 of the CRC (which seek to ensure the best of interests of the child, respect for the views of the child, the right to education and the protection of a child's dignity when being disciplined, respectively).⁷⁹ It highlighted that the right of appeal to an independent appeal panel is an essential part of the exclusions process and that the new IRPs would not be able to meet this need satisfactorily as they will not be able to direct a school to readmit a permanently excluded pupil, even in cases of mistaken identity or where the exclusion is unlawful.⁸⁰

The OCC also made the additional recommendation that children should be given the same rights as parents to appeal decisions affecting them, and expressed concerns that schools could find themselves involved in lengthy legal action in the absence of a proper appeal system.⁸¹ Furthermore, the OCC warned that the power to detain pupils without notice was designed to cause inconvenience to both pupils and parents.⁸² The OCC also added that the consequences of being permanently excluded are significant as many excluded pupils never re-engage with full-time education again, as evidenced by the fact that over half of young offenders in custody have been excluded from school previously.⁸³

The Joint Committee on Human Rights (JCHR) also engaged with the DFE about the human rights implications of the proposal to replace appeal panels with IRPs deprived of the power to direct reinstatement of a permanently excluded pupil.⁸⁴ It referred to the DFE's position⁸⁵ that the right to a fair hearing under Article 6 did not apply to school exclusions due to the decision made by the ECtHR in *Ali v UK*,⁸⁶ that an excluded pupil had not been denied the right to education under Article 2 of Protocol 1 of the ECHR. The JCHR noted that the ECtHR did not, in its judgment, consider the applicability of Article 6 so it was not relevant to this particular issue.⁸⁷

The JCHR considered in some detail the view of the Administrative Justice and Tribunals Council (the Council) which had expressed concerns that the IRP may not be sufficient to meet obligations under Article 6 and Article 13 of the ECHR.⁸⁸ Although it agreed with the general approach of the government to addressing discipline in schools, it expressed concern that the absence of the power to reinstate a pupil who has been permanently ex-

cluded would not provide a fair hearing or an effective remedy.⁸⁹ The Council recommended that all appeals against permanent exclusions should be heard initially at the FTT,⁹⁰ but the government rejected this option as it would have extended its jurisdiction.⁹¹ Disability-related cases will be heard by the FTT, but the government rejected the option that those with SEN should have a right to appeal first to the tribunal, on the basis primarily that such appeals take too long to process. The JCHR considered the government's response to the Council's views on the matter with reference to relevant case law. The government relied on the case of *R (on the application of LG)*⁹² in support of its position that the right of access to a court in Article 6 is not engaged in relation to the exclusion process, as exclusion is not determinative of a civil right. This was decided in February 2010 but was superseded by the ECtHR's 2010 judgment in *Oršuš v Croatia*,⁹³ which decided that Article 6 applied to an education dispute; and therefore applies in relation to exclusion cases. The JCHR asked the government if it was still of the view that Article 6 did not apply to exclusions in the light of this case, and its response was that it still was of this view as the *Oršuš* case could be distinguished on its facts on the basis that although *Oršuš* related to education and discrimination, it was about Roma children being put into separate classes from other children. It is the government's view that Article 6 does not apply to exclusions as the right to education is not a right or guarantee to be educated at a particular institution, and the domestic situation enables a permanently excluded pupil to continue to receive education.⁹⁴

Despite the position expressed by the government, the JCHR concluded that whether it was considered a matter of ECHR law or common law, the right of access to an independent court or tribunal applies to perma-

ment exclusions from school.⁹⁵ On this basis, it proceeded to question the government on the absence of the right to an effective remedy in the new exclusions regime. Without giving IRPs full appellate jurisdiction on factual matters or the power to order reinstatement, the proposals in the Bill are incompatible with the requirements of Article 6 of ECHR.⁹⁶ The JCHR recommended that the Bill should be amended to remove the incompatibility.⁹⁷ It also recommended that the government should give further consideration to the recommendation of the Council to refer all exclusion appeals to the FTT as this will remove the incompatibility with Article 6 by providing an independent tribunal with the necessary jurisdiction to provide an effective remedy.⁹⁸ These recommendations were, however, rejected by the government, which argued that the changes to the appeal process in the exclusions regime were justifiable given that the option of judicial review remained available to challenge potentially unlawful decisions.⁹⁹

Conclusion

The evidence provided in this article demonstrates that there has been, and continues to be, a pattern of disproportionality in the use of exclusions, impacting adversely on certain ethnic minority groups and SEN pupils, many of whom are disabled. There needs however to be better recording of excluded pupils who have disabilities. The monitoring and research does not fully address how the exclusions system impacts on disabled pupils generally. Findings of research highlight various reasons for disproportionality from in-house factors including institutional discrimination to out of school factors. There are some examples of good practice, with efforts by some schools, local authorities and the DFE to address the

issues. The legal framework has generally provided a positive context for the achievement of equality and protection of human rights to some extent. However, it is of concern that this has not resulted in equality of outcome across the education system. Furthermore, it is of particular concern that the government has introduced amendments to the exclusions system which could, arguably, interfere with children's rights, and impact on equality. Of particular concern is the new "appeal" system which grants limited powers to the new IRPs. These reforms will need to be monitored closely. It is also important that schools and local authorities take responsibility, themselves, to comply with equality and human rights legislation. They should also monitor for any inequalities and breaches of legislation, including disproportionality and discriminatory practices, and the reasons for these. In addressing disproportionality, schools should consider whether there are any alternatives to exclusion and ensure they adopt early intervention and preventative measures. Effective implementation of the new public sector equality duty would be compatible with this approach.

With indirect discrimination now extending to disability discrimination under the Equality Act, the question of whether exclusions are a proportionate means of achieving a legitimate aim becomes even more pertinent given the numbers of exclusions which involve SEN pupils, many of whom have learning disabilities, as well as the continued over-representation of certain black and minority ethnic groups in the exclusions system. The aim of exclusions may be to punish pupils and manage poor behaviour as well as to protect the environment of the pupil population in general. Many of those involved in the system, however, including

those representing the interests and needs of parents and pupils, seriously question the effectiveness of the exclusions system in meeting its aims. Instead, there are concerns that there is a correlation between exclusions and pupils' disaffection with society generally, as evidenced by the riots in August 2011. Even if the exclusions system could be shown to be objectively justified, there is still evidence that some pupils are more at risk than others of being subject to direct discrimination.

Although the courts have been reluctant to find a breach of the right to education, as far as those pupils subjected to the exclusions system are concerned, the prevalence of informal exclusions could put schools and authorities at risk of breaching this right, if providing any alternative education on an informal basis circumvents the statutory educational system. It is important that there is greater scrutiny of these practices as well to ensure that pupils are not further disadvantaged by this process.

1 Brenda Parkes is a freelance equality and human rights consultant and was previously a senior lawyer at the Equality and Human Rights Commission and the Commission for Racial Equality. Acknowledgement and thanks are given to Anthony Robinson who kindly read drafts of this article, gave some helpful comments and assisted with the editing. However the views expressed in this article are those of the author. Anthony Robinson is a board member of the Communities Empowerment Network and an equalities and human rights lawyer.

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7 Equality Act 2010, Section 85.

8 Equality Act 2010, Section 13.

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