Response of the Equality and Human Rights Commission to the Department for Education:

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<th>Title:</th>
<th>School exclusions review: call for evidence</th>
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<td>Source of inquiry:</td>
<td>Department for Education</td>
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<td>Date:</td>
<td>Written submission requested by the Committees on 6th May 2018</td>
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For more information please contact

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<tr>
<th>Name of EHRC contact providing response and their office address:</th>
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<tr>
<td>Elizabeth Bowles, Programme Principal</td>
</tr>
<tr>
<td>Equality and Human Rights Commission</td>
</tr>
<tr>
<td>Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX</td>
</tr>
<tr>
<td>Telephone number: 020 7832 7822</td>
</tr>
<tr>
<td>Email address: <a href="mailto:Elizabeth.Bowles@equalityhumanrights.com">Elizabeth.Bowles@equalityhumanrights.com</a></td>
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Introduction

1. The Equality and Human Rights Commission (the Commission) welcomes the Government’s Review into School Exclusions (the Review), and the particular focus on those groups of children that the data show are more likely to be excluded. Understanding and addressing the disproportionate use of exclusions experienced by certain groups of children is a strategic priority for the Commission. Excluding children from school, whether on a temporary or permanent basis, can seriously harm a child’s attainment and future prospects. If Britain is to make sure that every child is able to fulfil his or her potential, then it is vital that we understand why an increasing number of children are experiencing exclusions and why certain groups are overrepresented.

2. The Commission has been concerned about the over representation of certain groups in national statistics on exclusions. We have raised this through a number of avenues, including through our statutory state of the nation report, *Is Britain Fairer?*,¹ which highlighted the exclusions rates by age, gender and other protected characteristics across England, Wales and Scotland. We will be conducting up-to-date analysis when we launch our latest report this October.

3. This submission provides:
   a) An update on the Commission’s current work on exclusions and reiterates our commitment to working collaboratively with the Review team;
   b) An overview of the equality and human rights considerations which are relevant for the Review, including findings of UN Treaty Bodies; and
   c) Insights into some of the gaps in publicly available data which may inhibit the ability of the Review to conduct a comprehensive assessment of how school exclusions are being carried out in practice and how they are impacting on pupils with different and multiple protected characteristics.

Current work on exclusions at the Commission

4. As we highlighted in a recent letter to Edward Timpson, the Commission is also focussing on the issue of exclusions this business year. We are interested in the drivers and impacts of school exclusions and how and why they disproportionally impact on certain groups. In order to inform our understanding, we are reviewing existing research looking at what is known about the different types of exclusions taking place across England, Wales and Scotland (formal, informal and de facto exclusions) and best practice to prevent the use of exclusions.

5. We will draw on this evidence and discussions with stakeholders to shape the terms of reference for a formal inquiry on this matter. Section 16 of the Equality Act 2006 gives the Commission power to conduct an inquiry into any matter which relates to sections 8 or 9 of that Act (equality and diversity or human rights). This allows us the opportunity to find out more about outcomes in relation to equality or human rights within a particular sector or about a particular issue. Our inquiry is likely to have a GB focus, reflecting our statutory remit. We would therefore like to build a mutually beneficial relationship with the Review Team to ensure that our work complements the Government’s Review rather than duplicates it.

6. The Commission has also been running a Legal Support Project to offer advice and funding to help individuals who have experienced discrimination to pursue legal claims. Since September 2017, the project has focussed on helping victims of discrimination in education to access legal support. During this time, a significant number of applications coming to us relate to school exclusions (disability and race). Since September the Commission has provided assistance to a child of Gypsy, Roma and Traveller (GRT) heritage permanently excluded from school as well as to four children with disabilities (one of whom was also of GRT heritage) permanently excluded for behaviour arising in consequence of their disabilities. In all of the above cases the

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Independent Review Panels quashed the decision to exclude, but only after the parents of the children were legally represented at hearings at which Equality Act obligations were pointed out.

7. In some cases concerning children with impairments which may impact on behaviour, such as autism spectrum disorders\(^3\), schools have sought to rely on Regulation 4 of the Equality Act 2010 (Disability) Regulations 2010 which removes “tendency to physical abuse” from the definition of disability for the purposes of the Equality Act 2010. This interpretation is supported in case law *(X v Governing Body of A School (SEN)) [2015] UKUT 7 (ACC)*. We are concerned that that interpretation deprives children with impairments that would otherwise amount to a disability for the purpose of the Equality Act 2010, but whose disability presents as a “tendency to physical abuse” from protection against discrimination. We consider that the reference to “tendency to physical abuse” in the 2010 Regulations should be read as referring only to a free standing tendency, and not to when such a tendency results from an underlying impairment.

8. This matter has been considered in the tribunals in Scotland. Two decisions of the First Tier Tribunal of the Health and Education Chamber (Additional Support Needs) (the ASN tribunal), which considered the tendency to abuse exception are under appeal. In *McGibbon v Glasgow City Council (2018)* the ASN tribunal found that a child with autistic spectrum disorder did not, in fact, have a tendency to physical abuse and that the child was unlawfully discriminated against by the Council’s decision to exclude. In *South Lanarkshire Council v M (2018)* a child with autism, a sensory impairment and a learning disability was excluded as a result of his behaviour. In both cases, the First Tier Tribunal of the Health and Education Chamber (Additional Support Needs) (the ASN tribunal) disagreed that the child’s aggressive behaviour constituted a “tendency to physical abuse. The Councils in both cases have submitted applications to appeal the ASN tribunal’s finding and will rely on the UT decision in *X* to support their appeal.

**Equality and Human Rights considerations**

**The Equality Act 2010**

9. Under the Equality Act 2010, it is unlawful to exclude a pupil because of any of the protected characteristics covered by the Act. This would be unlawful direct discrimination.

10. If a disabled pupil is excluded for behaviour connected to his or her disability, this could be discrimination arising from disability unless the school can justify

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the exclusion as being a proportionate means of achieving a legitimate aim. An exclusion is unlikely to be justified in circumstances in which the school has not complied with its duty to make reasonable adjustments for that pupil.

11. Under the public sector equality duty (PSED) schools must have ‘due regard’ when making decisions and developing policies, to the need to:

- Eliminate discrimination, harassment, victimisation and other conduct prohibited by the Equality Act 2010.
- Advance equality of opportunity between people who share a protected characteristic and people who do not share it.
- Foster good relations across all protected characteristics – between people who share a protected characteristic and people who do not share it.

12. Schools in England must also publish information to demonstrate how they are complying with the equality duty. Given the well-established over-representation of certain groups amongst those who are excluded on a fixed or permanent basis, we believe it is important for schools to gather this data as a way to demonstrate due regard to equality. Our research has previously found that schools have rarely considered exclusions policies and implementation to be part of their equality work, suggesting that their approach to the PSED is not always evidence led or that they believe there are easier issues to tackle.4

**Human Rights considerations**

13. As an “A status” National Human Rights Institution, we have a responsibility to monitor and report on progress that the UK makes in fulfilling its international human rights obligations, and to follow up on the concluding observations made by the relevant human rights committees.

14. In the past two years, UN committees have highlighted the increased use of temporary and permanent exclusions in the UK, and have recommended that the UK Government take action accordingly.

15. The UN Convention on the Rights of the Child has a number of Articles relevant to the issue of school exclusion, in particular:

- Protection of the child against all forms of discrimination or punishment (Art 2)
- In all actions concerning children, the best interests of the child should be a primary consideration (Art 3)
- A right for children, who are capable of forming their own views, the right to express those views freely in all matters affecting them. The views of the child should be given due weight in accordance with the child’s age and maturity (Art 12)

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• A right to education, on the basis of equal opportunity. School discipline should be administered in a manner consistent with the child’s human dignity (Art 28).

16. The Committee on the Rights of the Child has raised concerns regarding the disproportionate number of children experiencing permanent or temporary school exclusions who have particular protected characteristics and, with the exception of Scotland, that only children with disabilities have the right to appeal against their exclusion. It also raised concerns that, ‘children with disabilities, in particular children with psychosocial disabilities and other “special educational needs”, are often subject to the practice of “informal” exclusion or “taught off-site” to control their behaviour; Isolation rooms are used for disciplining children.’

17. The Committee has recommended that the UK Government ‘use the disciplinary measure of permanent or temporary exclusion as a means of last resort only, forbid and abolish the practice of “informal” exclusions and further reduce the number of exclusions by working closely with social workers and educational psychologists in school and using mediation and restorative justice.’ In addition, it recommends that isolation rooms are abolished and that children have the right to appeal against their exclusion and are provided with legal advice, assistance and, where appropriate, representation for those without means.  

18. Highlighting the over-representation of GRT and African-Caribbean communities among the exclusion data, the Committee on the Elimination of Racial Discrimination has also recommended the UK Government require schools to collect qualitative and quantitative data on exclusions from school on the grounds of race, colour, descent, or national or ethnic origin, and to use the data to develop concrete strategies. This will help the UK Government to meet Article 5 of the Convention on the Elimination of Racial Discrimination which prohibits racial discrimination in education.

19. Last year, the Committee on the Rights of Persons with Disabilities raised its concerns regarding the increasing number of children with disabilities in segregated education environments and ‘the fact that the education system is not equipped to respond to the requirements for high-quality inclusive education, particularly reports of school authorities refusing to enrol a student with disabilities who is deemed to be “disruptive to other classmates.”’

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7 Committee on the Rights of Persons with Disabilities. 3 October 2017. Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland. Available at:
Amongst its concluding observations, the Committee recommended that the UK Government develop a comprehensive and coordinated legislative and policy framework for inclusive education and provide data on the number of students both in inclusive and segregated education, disaggregated by impairment, age, sex and ethnic background, and on the outcome of the education, reflecting the capabilities of the students.\(^8\) The UN Convention on the Rights of Persons with Disabilities is clear that disabled people must not be excluded from the general education system (at any level) because of their disability (Art 24).

20. We have also recommended to UN treaty bodies that the UK and Welsh governments should take further action on tackling the overuse and disproportionate use of exclusions on certain groups. We have also recommended that:

- The process for providing alternative education to excluded pupils must be prompt, transparent and effective, and be in the ‘best interests of the child.’
- The UK Government should establish a central record of all children in England not accessing education in the usual way for all educational establishments, including academies and free schools, to ensure their needs are being met.
- The UK and Welsh Governments extend to children under 16 the right to be heard before exclusion and to appeal against both temporary and permanent exclusions. Such children should be provided with legal advice and assistance and, where appropriate, independent representation should be provided, in particular for looked after children and those with special educational needs.\(^9\)

**Concerns regarding data gaps**

**Illegal exclusions**

21. We note that the Review is looking at exclusions based on publicly available data. One significant area of concern is the growing reports of informal, illegal and de facto exclusions from school which are unrecorded. For example, IPPR highlights there are more than five times the numbers of excluded pupils than officially recorded as permanently excluded.\(^10\) OFSTED and CQC have noted that school leaders are using illegal exclusions too readily to cope with children and young people who have SEND, with an alarming number of parents being asked to take their children home.\(^11\)

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\(^8\) Ibid.
22. In addition, Protocol 1, Article 2 of the Human Right Act provides that children have a right not to be denied access to the education system and sanctions, such as exclusions, are permitted provided pupils have access to alternative state education. We are concerned about reports that children are being encouraged into home education or alternative provision as a means to avoid a permanent exclusion. We also note that only state-funded alternative provision has OFSTED ratings meaning many children are receiving education in alternative provision which is not monitored or regulated.

**Intersectional data**

23. While we know that certain groups of pupils are far more likely to face exclusions than others, there are currently no intersectional data on exclusions. We believe that such data would provide a far more nuanced understanding of how certain characteristics (race, gender, socio-economic status, disability etc.) may combine to make certain groups of children more likely to be excluded than others. For example, in 2015/16, more than half of GRT pupils received temporary exclusions at secondary schools.\(^{12}\) Data also show that special educational needs are most prevalent in travellers of Irish heritage and Gypsy/Roma pupils with 30.8% and 26.9% respectively.\(^{13}\) It would therefore be helpful to know the percentage of GRT children who are excluded and who also who have SEN to inform the Review’s understanding as to the multiple factors behind their exclusions. We believe that by only looking at official data, the Review may miss the both the scale of the exclusions taking place as well as the scale of the over-representation of certain protected characteristics in unofficial exclusions.

24. In conclusion, we welcome the Government’s examination of how headteachers use exclusions in practice and that equality is central to this Review. We hope that that we can meet to identify constructive and mutually beneficial ways to better understand the issues and determine how best to respond.

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