



# School Exclusions and The Rule of Law

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### Introduction

Lord Bingham stated that equality is a key principle of the rule of law, arguing that everyone should receive the equal benefit of the law as well as be held equally accountable before it. Throughout 2020, the Bingham Centre for the Rule of Law, together with the Oxford University Centre for Global History, held a series of expert roundtables on 'Achieving Racial Justice and Equality Before the Law'.

Further roundtables are planned and together, this series of events seeks to provide practical proposals for the realisation of necessary change and the implementation of the recommendations in key reports on racism in British society. These reports include, for example, [the MacPherson report into matters arising from the death of Stephen Lawrence \(1999\)](#), [the Lammy Review of the treatment of and outcomes for BAME individuals in the criminal justice system \(2017\)](#), [the McGregor-Smith Review on race in the workplace \(2017\)](#), [the Williams 'Windrush Lessons Learned Review' \(2020\)](#), and more recently the [Public Health England review into the impact of Covid-19 on BAME communities \(2020\)](#).

Amongst these important contributions is the 2007 report by Sir Keith Ajegbo, '[Curriculum Review: Diversity and Citizenship](#)' in which he argued that schools in England need significant help in teaching about diversity. Against this backdrop, the key takeaway from our November roundtables, which focused on education in schools and higher education settings, was that, within the education system, outcomes for some children from minority groups are significantly worse than the population at large. This is supported by recent research from the [Education in England: Annual Report 2020](#).

In this blog, Michael Olatokun and Michelle Kamyra from the Bingham Centre reflect on the use of exclusion in schools and the implications for equal treatment.

### The promise of equal education

Every child deserves an inclusive and high-quality education. This is a crucial right recognised by the UN Convention on the Rights of the Child (UNCRC), which states that children should have an education ([Article 28](#)) that enables them to explore their abilities, talents and personalities ([Article 29](#)).

The UNCRC is the most ratified UN treaty and represents a hard-won international consensus. The UNCRC's broad and holistic ambition is further underlined by [UN Sustainable Development Goal 4 \(SDG4\)](#), which states for all children to have quality education and access to lifelong learning opportunities. However, there is a significant gap between these lofty goals and the reality of our current education system.

### Why is the use of exclusion concerning?

[Research with excluded children](#) illustrates that the exclusion process can negatively impact young people's self-esteem and confidence. Furthermore, the 'unofficial' manner in which some exclusions are carried out potentially breaches the rule of law principles of legality and fair adjudication, [especially where informal methods such as off-rolling are used](#). At the Bingham Centre,

we are broadening our approach to the rule of law to consider the fairness of decision making and its effect on minority and marginalised groups. This post begins to address these issues and suggests recommendations for what can be done to improve the equal application of the law in the education system.

### **What is the relevant law?**

Formal school exclusions in pupil referral units and maintained schools are regulated by s51A of the Education Act 2002 which stipulates:

"1. The headteacher of a maintained school in England may exclude a pupil from the school for a fixed period or permanently".

Statutory guidance issued by the Department for Education (DfE) states that exclusions may only be justified on disciplinary grounds and no other basis. Schools, like all public authorities, must follow public law principles including equality of arms, fairness and providing reasons for decisions. They are also bound by the provisions of the Human Rights Act 1998. The Equality Act 2010 requires that schools must not discriminate against, harass, or victimise pupils because of their protected characteristics (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation). Since April 2011, they must also follow the duty under s149 of the Equality Act, the Public Sector Equality Duty, to have due regard to the need:

- To eliminate discrimination
- To foster good relations across all characteristics
- To advance equality of opportunity between people who share a protected characteristic and people who do not share it.

### **Who is affected?**

In 2021, DfE published data showing that the rate of permanent exclusions was significantly higher among pupils who receive free school meals (FSM) than non-eligible pupils (0.16 for FSM children, 0.04 non-eligible children). Furthermore, Gypsy/Roma pupils (0.24%) had the highest rates of permanent exclusions from mainstream schools followed by Mixed White/Black Caribbean pupils (0.15%) and Black Caribbean pupils (0.14). Related data show that these last two groups are also in the bottom three for GCSE attainment.

This data suggests that exclusion is directed at those who are already vulnerable or stigmatised. If excluded pupils are dealing with multiple and complex disadvantages outside the school, the use of exclusion exacerbates the problems that they face. Exclusion in this instance is another layer of systemic discrimination.

The use of exclusions can exacerbate other negative experiences that marginalised groups experience in the education system more generally; the lack of representation of Britain's diverse cultures within the curriculum is well known. In our roundtable series, participants emphasised the absence of the historical period of the Windrush generation or any attempt to understand the geographies of traveller communities. Early discussion and inclusion of such matters in lessons could support minority ethnic pupils ongoing learning and attainment.

### **Why is the law insufficient?**

Exclusion is a power held by schools as public authorities. They have several duties, including the need to act fairly in using the power, that may render the use of the power unlawful if not met. Access to justice is a core principle of the rule of law and it requires that individuals are given the opportunity to challenge unlawful exercises of power against them. School boards will often be legally represented in hearings challenging exclusion.

'Off-rolling' is a method of informal exclusion in which a student is removed from the official roll to avoid scrutiny in exclusion statistics. [OFSTED states](#) that this is typically done in order to achieve an objective that is beneficial for schools such as removing students whom staff do not wish to teach (for non-disciplinary reasons) from classes or negating the impact of differential attainment on league table results.

Even where schools do act formally to exclude, parents of vulnerable children may often be unaware of their child's rights and the school's obligations. Schools must conduct a proper process, including the right to be heard and to make representations, for the end decision to be fair. Retrospectively, if a parent believes their child has been unlawfully excluded, they can make an internal complaint within the school or they have the right to request external moderation by an Independent Review Panel (IRP).

Unfortunately, legal capability, i.e. the skills, knowledge and confidence required to deal with legal problems, is [not widespread](#) throughout society. [Research has shown](#) that up to a million civil claims are not brought each year because those affected do not know that they have an actionable legal problem. Parents with little understanding of the education system or the law are more likely to be pressured into accepting the practice of off-rolling or other unlawful exclusions.

### **What happens to excluded young people?**

School exclusions should be a nuclear option of last resort; they are one of the most disruptive possible interventions in a child's development. A [2017 Institute for Public Policy Research](#) report showed that approximately half of the pupils permanently excluded from schools have a mental health issue, and this is important to reflect upon for two reasons.

The first is that children subjected to exclusion may well have been more appropriately dealt with through counselling and additional support. For these young people, mental health difficulties may have contributed to the exclusion outcome. The second reason is that exclusion may cause or exacerbate these problems. Both points are pertinent as the most common reason given for exclusions are behavioural, with [39% of permanent exclusions allegedly a result of disruptive behaviour](#). Moreover, a [report by the University of Exeter](#) showed that there is a positive correlation between exclusion and poor mental health outcomes.

### **How did the pandemic affect exclusions?**

Throughout the 2019-2020 and 2020-2021 academic years, many UK schools shifted their teaching online in order to meet the challenges of the coronavirus pandemic (although [there was in-person provision](#) for the most vulnerable and children of critical workers).

In the 2019-2020 academic year there was a marked reduction in the number of permanent exclusions, with [5057 in 2019/2020 compared against 7894 in 2018/2019](#).

At face value, a 36% reduction in the number of exclusions might seem welcome, but with record low numbers of children attending school onsite, one might expect an even more precipitous decline in exclusions; this did not take place. It is our view that because exclusion was typically applied in face-to-face settings, there is something qualitatively different about its application to pupils learning remotely. The continued use of exclusion in a new context sits uncomfortably during a pandemic where children's educational progress has been significantly compromised.

Similar views have been [echoed by civil society group No More Exclusions \(NME\)](#) who have lobbied the government to temporarily prohibit school exclusions, particularly during these uncertain times. They argue that a moratorium is the only intervention to protect marginalised children from structural and institutional racism. [NME stated](#);

"Children who've been exposed to structural racism, poverty, trauma and instability during lockdown are more likely to have difficulties returning to school and are therefore more likely to be removed from classrooms, deprived of education or expelled

from school yet again."

### **Recommendations and safeguards**

From the above, it is clear the use of exclusion may violate the rule of law in two senses; it undermines equal protection before the law, and it is prone to arbitrary decision making by school leaders. With this in mind, schools may wish to consider the following recommendations and safeguards:

- Schools should make sure that they provide sufficient information about pupils' rights to appeal and their duties under public law, and they should provide access to legal advice. These safeguards ensure that pupils subject to exclusion can participate in hearings and decision-making meetings appropriately.
- Schools should better understand their duties under the law to avoid indirect and direct discrimination against children facing exclusion. This includes the DfE guidance, '[The Equality Act 2010 and Schools](#)' which sets out a range of areas that should be taken into consideration to help schools understand and acknowledge the requirements for exclusion under the law.
- Exclusion decisions should consider the holistic nature of the young person's circumstances and be an intervention of last resort. This is important because those involved in the criminal justice system are many times more likely than the average citizen to have been excluded from school. Around [0.1%](#) of the general population have been excluded from school compared to [42% of prisoners](#).

### **Conclusion**

The UK [has been criticised](#) by the United Nations Committee on the Rights of the Child on two rule of law issues that relate to exclusion. The first is the (unlawful) use of exclusions in situations where it is not a matter of last resort. The second is a failure to provide access to advice for those subject to exclusion decisions. Without the ability to state one's case at a review hearing the combination of these two issues can leave parents and children in the worst possible situation; wronged without a remedy.

To promote a holistic and inclusive form of education, we need to guarantee the rights of for those most at risk of exclusion. The discriminatory impacts of exclusions on marginalised groups can keep communities trapped in a cycle of being let down by the education system, which in turn means they are unable to better their lives through improved employment prospects. The recommendations above chart a course to a more rule-of-law compliant approach which would enable the UK to make good its international commitment to equal education and to improve educational outcomes.

*Our partners EachOther have produced a powerful documentary exploring the impact of exclusions on young people. We encourage you to watch it [on YouTube](#).*

URL: <https://binghamcentre.biicl.org/comments/122/school-exclusions-and-the-rule-of-law>