

“Always Someone Else’s Problem”

Office of the Children’s Commissioner’s
Report on illegal exclusions

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List of Abbreviations/Glossary

CCCU	Canterbury Christ Church University
DfE	Department for Education
DSG	Dedicated Schools Grant
EFA	Education Funding Agency
IRP	Independent Review Panel
LAC	Looked After Children
NFER	National Foundation for Educational Research
NPPN	National Parent Partnership Network
OCC	Office of the Children's Commissioner
Ofsted	Office for Standards in Education
PRU	Pupil Referral Unit
RSA	Royal Society for the encouragement of Arts, Manufactures and Commerce
SEN	Special Educational Needs
UNCRC	UN Convention on the Rights of the Child

Foreword from the Children's Commissioner for England

For a long time, illegal exclusions from school have been an elephant in the room for educators, policy makers and others. Whenever I speak to head teachers, educational psychologists or education welfare officers anywhere in England, all will admit, always in strict confidence, that these exclusions do sometimes happen. But nobody wants to go public or is prepared to name names. There is a feeling in these conversations that for the sake of inter-school harmony, or the reputation of the system, this is a subject best left alone. It is too hard to identify what is happening, or while there may be a few bad apples, it isn't really a significant problem. As the conversation goes on, it usually dawns on those talking to me that, if you are one of the however few children it has happened to, it is very significant indeed.

A year ago I published "*They Never Give Up On You*", the result of year one of my first formal Inquiry into school exclusions. Again, just as when I speak to professionals face to face, illegal exclusions were discussed. But finding concrete evidence that they do happen proved extremely elusive. We managed to find one head teacher who would admit, albeit anonymously, that not only did such practice take place, but that he excluded children from his school illegally – sending difficult, challenging and troubled Year 11 children home informally, for months at a time, in the months leading up to their examinations. However, given the secret and covert nature of this – as of almost any illegal activity in any walk of life – we had no way of knowing whether his was the only case in the country. It seemed unlikely, given there are tens of thousands of publicly funded schools in England, but we had no way of proving it.

That is why my team and I have now completed a second year of work on this Inquiry, this year looking specifically and in detail at the issue of illegal exclusions from school. As a result of the work conducted by this Office, and contained within this report, we have, we believe for the first time, a much clearer and more concrete idea of the scale and nature of illegal exclusions from school.

These illegal exclusions are affecting a small, but we believe a significant minority of schools. We estimate that several hundred schools in England may be excluding children illegally, affecting thousands of children every year. This fact, surely, is a source of shame to the entire education system. We use the term illegal to cover off the record, informal, under the radar exclusions, because that is what they are. Schools are providers of a statutory service, bound by the law. That some of them – however few – seem prepared to break it, is unacceptable. For the child concerned, given that if they are permanently excluded but their exclusion is unrecorded they may have no records to take with them to another school where they may seek admission, such an exclusion's consequences may be very long term, and damaging to their chances to succeed in a new place. It is of special concern that many of those who are illegally excluded also come from the groups suffering inequality, coming from particular ethnic backgrounds, or having special educational, behavioural or other needs. They are among our most vulnerable, and being made more so.

Why does this happen? This report states that there are three clear reasons. Firstly, it is because, too often, children, parents and even teachers do not know what the law says, and what is and is not acceptable.

Secondly, there is a gap in the accountability system. Simply put, nobody, with the partial exception of the Office for Standards in Education (Ofsted), is actively looking for illegal exclusions. The bodies

with a statutory responsibility to act are not delivering consistently on that responsibility. If you are a child or a parent, it is unclear who to complain to, and equally unclear what, if anything, will happen as a result.

Thirdly, there is no meaningful sanction to prevent schools from doing this. In the unlikely event that they are caught, given how covert and unrecorded an illegal exclusion is by its very nature, schools remain – and know they will remain – unpunished.

This report sets out in detail what we know about what is happening, and what needs to change to improve things for all our children for the future. I publish it urging that everybody involved in education in England takes note. It is simply not acceptable for the education of thousands of young people to be disrupted, illegally, by the actions, or the inactions, of adults whose job it is to show them an example to live up to, and to educate them.

A handwritten signature in black ink, appearing to read 'ME Atkinson', with a long, sweeping horizontal line extending to the right.

Dr Maggie Atkinson
Children's Commissioner for England

Executive Summary

Illegal exclusions is a very serious issue. The consequences of being permanently excluded from school are extremely serious. Unless high-quality support is in place for excluded children, especially where exclusion has been illegal and lacked recourse to any appeal processes, their life chances are likely to be substantially affected in the short and long term. Children who miss out on education as a result of their school acting illegally to remove them are much less likely to receive the support they need to turn themselves round. They may be in a position where no adult is looking after them during the days when they ought, legally, to be at school, and be placed at risk as a result. In the longer term, they are more likely than their peers to ‘disappear’ from education altogether, with profound and enduring results. It is simply unacceptable for this to be allowed to happen, even if it only affects a very small number of children.

It ought to be a source of shame for the whole education system that those who are responsible for the education of children are, however rarely, illegally preventing them from gaining this education. This issue should become a much higher priority for all those involved in our schools, regardless of the number of children involved.

This report, for the first time, provides quantitative evidence from teachers and school leaders about the scale and nature of illegal¹ exclusions from schools in England. This practice, as far as it can be measured, appears to affect a small but significant minority of schools, and therefore pupils.

We have found evidence of:

- pupils being excluded without proper procedures being followed; these exclusions are usually for short periods, but may be frequently repeated, meaning that the child misses substantial amounts of education
- pupils being placed on extended study leave, on part time timetables, or at inappropriate alternative provision, as a way of removing them from school
- pupils being coerced into leaving their current school, either to move to another school or to be educated at home, under threat of permanent exclusion
- schools failing to have due regard to their legal responsibilities regarding the exclusion of children with statements of Special Educational Needs (SEN) or Looked After Children (LAC)
- schools failing to have due regard to their responsibilities under the Equality Act 2010
- local authorities failing to deliver their legal responsibility to provide full time alternative education for children from the sixth day of exclusion

This illegal activity appears to impact disproportionately on those groups which are also most likely to be formally excluded, particularly children with SEN. It appears to happen most to those children who are least likely to know their rights, or to have adults in their lives who know the law, or who can and will support these rights on their children's behalf. Even at the most conservative estimates, which

1 We use the term illegal to describe this exclusions practice throughout this report despite the Department for Education using the term “unlawful” in its Statutory Guidance on Exclusions. This is issued to all governing bodies, and intended for use, in all publicly funded schools, regardless of their governance, funding or accountability models.

are supported by the data we have collected, an unacceptably large proportion of schools are acting illegally:

- 6.7 per cent of schools have sent children home for disciplinary reasons without recording it as an exclusion; if these were evenly spread across the country, it would represent 1600 schools², or to put it into context, an average of ten schools in every local authority area
- 2.7 per cent of schools have sent children with statements of SEN home when their carer, classroom support or teaching assistant is unavailable; if these were evenly spread across the country, it would represent 650 schools, or an average of more than four schools in every local authority
- 2.1 per cent of schools have recorded pupils as authorised absent or educated elsewhere when the school has in fact encouraged them not to come into school; if these were evenly spread across the country, it would represent approximately 540 schools, or an average of more than three in every local authority
- 1.8 per cent of schools have encouraged parents to take their children out of school and educate them at home without recording it as an exclusion; if these were evenly spread across the country, it would represent 192 schools, or an average of more than one in every local authority

The evidence indicates that illegal practice is far from the norm in English schools. Neither, does it appear to be the practice of only a tiny number of bad apples. It is likely, at the very least, to be affecting thousands of children in several hundred schools across the country. This is extremely serious, given the impact on these children and their families in the short and long term. Our evidence indicates that one of the main reasons for this is a lack of awareness of the relevant law – among teachers, parents and children alike.

Reasons for illegal exclusions

We consider that illegal exclusions happen for four main reasons.

- Lack of awareness of the law
- Gaps in the accountability framework for schools
- As an unintended consequence of the incentives in place for schools
- The lack of a meaningful sanction.

Lack of awareness of the law

We have found evidence of widespread lack of awareness and understanding of the law regarding exclusions – perhaps understandably – among children and their parents. Numerous witnesses told the Inquiry they had encountered excluded children whose families did not know what their rights were. They were unable to tell when a school was acting unreasonably or unlawfully. Parents reported to us, often in a resigned manner, that their children, often with SEN, were sent home for a day here and there, or sometimes much longer, without notice, for minor incidents, without being recorded as an exclusion. They were not aware that this is illegal, and they had never been told their or their children’s rights. In our evidence gathering, the impression from parents and young people was that in dealing with these symbols of authority, they trusted schools and head teachers to act reasonably, in good faith and within the law. They were generally reluctant to challenge schools’ authority to act.

2 There are approximately 24,000 state-funded schools in England.

Less understandably, however, we have identified a significant lack of awareness of law around exclusions among teachers and school leaders.

For example:

- Around a third (31 per cent) of teachers did not know whether it was legal to encourage a parent into educating their child at home.
- Around a quarter (24 per cent) of teachers did not know whether it was legal to falsify attendance records for a child who had been asked not to attend school.
- More than a third (39 per cent) of teachers did not know whether it was legal to send children with a statement of SEN home when their carer or teaching assistant was unavailable.

This is a serious cause for concern.

Gaps in the accountability system for schools

There is a clear gap in accountability for illegal exclusions within the education sector. Statutory bodies feel no obligation to address this issue, and in many cases are not empowered or resourced to do so. With the partial exception of Ofsted, we have found no statutory body, either local or national, proactively seeking to address illegal exclusions.

This means that parents, young people and even professionals are unsure of who to inform of their concerns, and of what will happen as a result. There are – it appears to us, from the evidence we have gathered, potentially legitimate – fears of reprisals for whistle-blowing. There is also widespread scepticism of whether complaints will be taken seriously. All of these factors act as disincentives to report even fully justifiable concerns.

Parents and young people have repeatedly reported to us that they feel let down by the education system, and have lost faith that it will treat them fairly. In many cases brought to us they report that they consider that they are seen as a problem to be dealt with, and that therefore their right to an education is neither respected nor assured. Based on the evidence we have collected over the two years of this Inquiry, we understand how they have arrived at this view. We consider this situation unlikely to change unless concerted action is taken to ensure that it does.

This situation is unacceptable. It should be a source of shame to the education service. It means that even in what we believe are relatively small numbers, some children lose out on education through the action or inaction of the adults responsible for educating them.

Unintended Consequences of the incentives in place for schools

A number of individuals and representative bodies who have given evidence to this Inquiry have expressed the view that illegal exclusions may be an unintended consequence of the accountability system and incentives in place for schools.

In particular, some of those who have given evidence have stated that the following factors interact, to incentivise illegal exclusions:

- a school league table and inspection regime, which schools perceive as being very high stakes issues for their reputations in a competitive climate

- publication of data on schools' formal exclusions, and the funding for excluded children accompanying the child away from the excluding school following a formal exclusion
- reductions in the availability of specialist support services for schools
- the lack of a meaningful sanction on a school for illegally excluding a child, given that, by its very nature, illegal activity tends to be covert rather than traceable

Lack of a meaningful sanction

While the law regarding exclusions is clear, the consequences of a school breaking this law are not. A school may be named and shamed if this practice is identified, or may lose a judicial review if a family is successful in bringing one in the absence of a legally binding appeals process that would not necessitate a court case. However, there is no financial penalty should such practice be uncovered unless a case goes to law, the school lose the case, and court costs be awarded against the school. The school's league table place is also unaffected. Indeed, the removal of the affected children may actually improve a school's academic performance. We are encouraged by Ofsted's statement that it would probably award an 'inadequate' rating to any school it finds to be excluding illegally. However, we do not consider this to be sufficient. Further action is necessary to remove the incentive to exclude illegally.

List of Recommendations

Recommendations to the Department for Education (DfE)

1. We recommend that the DfE should work together with the Government Equalities Office and Equality and Human Rights Commission to produce statutory guidance for schools and other public educational bodies in interpreting the Public Sector Equality Duties with regard to exclusions.
2. We recommend that governors be empowered to provide a more robust challenge to schools which exclude illegally. Repeatedly, witnesses to the Inquiry have stated that governing bodies are neither equipped nor willing to provide effective challenge to head teachers when it comes to exclusions, either formal or informal.
3. We recommend that governing bodies be required to nominate a Member to have overall responsibility for behaviour and exclusions, in the same way that they do for LAC, SEN and other issues. This governor should have a specific remit to examine the school's policy and practice on behaviour management, including exclusions, and should receive mandatory training to support them on this. Governing bodies should have a responsibility to review the school's behaviour policy on an annual basis, as they do with numerous other school policies, and a responsibility to ensure that it complies with the law.
4. We recommend that all school-based professionals should have a clear route of accountability which enables them to draw problems to the attention of the relevant external body without fear of reprisals, if they consider that a school is illegally excluding pupils.

Recommendations to Schools

5. We recommend that all schools should, as a matter of course, publish their behaviour policies prominently on their website. Where they do not already contain information on exclusions, they should be amended to do so. This information should include information on the rights of children and their parents, as set out elsewhere in this report. These rights should also be issued to all parents alongside home-school agreements.

Recommendations to Ofsted

6. We recommend that Ofsted review its methodology for identifying illegal exclusions in the course of its normal inspection round, drawing on the findings of the work it is currently undertaking about children who are not receiving a full time education.
7. We recommend that Ofsted develops a method for ensuring that inspectors become aware of parental concerns regarding illegal exclusions. Ofsted should consider using the current review of the questions asked on the Parent View website as an opportunity to develop a robust mechanism for enabling parents to raise concerns.

Recommendations to local authorities and the Education Funding Agency (EFA)

8. The gap regarding accountability for identifying and addressing illegal exclusions should be closed. We consider that the legal position is, in many ways, already clear, but that the responsible bodies do not give due regard to their duties in this area.
9. For the sake of clarity, we consider that, for maintained schools, local authorities have responsibility for identifying and addressing illegal exclusions. For the increasing number of Academies (including Free schools) this responsibility rests with the EFA. We recommend that, as part of its response to this report, the DfE makes a clear statement that it agrees with this assessment, and expects these statutory bodies to give due regard to this issue. This includes an expectation of improvements to the timely and thorough investigation of any complaints made regarding illegal exclusions, and the imposition of appropriate sanctions where schools are acting illegally.
10. **We recommend that the following measures be considered so as to remove the potential incentive on schools to exclude illegally:**
 - **Any illegal exclusions which are found to have taken place should immediately be reported to Ofsted. Ofsted should record this information as part of its monitoring data on schools.**
 - **Illegal exclusions identified by the EFA (in the case of Academies) or the local authority (in the case of maintained schools) should be reported to, and recorded by, the school's governing body. They should then form part of the evidence provided to the head teacher's annual performance review. This should also be dealt with as a disciplinary matter for the head teacher.**
 - **Where a school is found to have falsified registers in order to hide an illegal exclusion, this is a criminal offence and should be dealt with accordingly³. The head teacher should be referred to the National College for Teaching and Leadership for professional misconduct.**
 - **Where a child has been identified to have been illegally excluded for a period of one month (either in a continuous period or as a result of repeated short-term illegal exclusions), the school should have a financial penalty imposed equal to the amount of funding it receives for that child annually.**

3 1996 Education Act; <http://www.legislation.gov.uk/ukpga/1996/56/contents>

About the Office of the Children's Commissioner (OCC)

The Office of the Children's Commissioner is a national organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. The post of Children's Commissioner for England was established by the Children Act 2004. The UN Convention on the Rights of the Child (UNCRC) underpins and frames all of our work. The elements of the Convention of most relevance to this work are set out in Annex A.

The Children's Commissioner has a duty to promote the views and interests of all children in England, in particular those whose voices are least likely to be heard, to the people who make decisions about their lives.

One of the Children's Commissioner's key functions is encouraging organisations that provide services for children, always to operate from the child's perspective.

Under the Children Act 2004, the Children's Commissioner is required both to publish what she finds from talking and listening to children and young people and those who work with them, and to draw national policymakers' and agencies' attention to the particular circumstances of a child or small group of children which should inform both policy and practice.

The OCC has a statutory duty to highlight where it believes vulnerable children are not being treated appropriately in accordance with duties established under the UNCRC, as well as other international and domestic legislation.

This report forms part of the Inquiry into School Exclusions commenced by the Children's Commissioner in July 2011, using powers made available under Section 3 of the Children Act 2004. These powers are also set out in Annex A.

Rationale for this report

In July 2011, the OCC launched its first formal Inquiry, into the issue of exclusions from school. This Inquiry was prompted by the publicly available data on which children were, and were not, excluded from school. According to national statistics, certain groups of children and young people are disproportionately likely to be excluded. This has been the case for as long as data on exclusions have been collected⁴. Given that for a permanently excluded child the effects of exclusion can be long-lasting, they are matters for significant concern and more importantly, for action.

The OCC conducted its Inquiry between July 2011 and March 2012, concluding with a report, published in March 2012, entitled "*They Never Give Up On You*"⁵. The scope of, and set of principles informing, this report also underpin our further work on exclusions.

The Inquiry took evidence from a large range of individuals and organisations, on a large number of issues relating to exclusions from school, including why the rates of exclusion are so different for different groups of young people, and what could be done to address them.

In the course of our evidence gathering, it became clear to us that not all instances of schools sending children home for disciplinary reasons were recorded as formal exclusions.

This report concerns illegal exclusions. This practice is also unethical. Given it is not recorded but becomes a covert activity and cannot be followed up, we consider it cannot be deemed to be in the best interests of the children affected, though in the course of this Inquiry we have had professionals confidently inform us this is why it is done.

In the first year of our Inquiry, we found evidence of the following activities, of:

- unrecorded short-term exclusions, undertaken by the school, where distressed, agitated or angry children are sent home to cool off.
- students being sent home without documentation being completed, and not being allowed back into school until after a meeting in school with their parents; such a meeting may take from hours to days to set up; where parents are unwilling or, because of other commitments, unable to attend a meeting sooner rather than later, the illegal exclusion may run for as long as it takes to get parents into school; a young person affected by such practice told the Inquiry:

"I just got sent home. Don't know why. Had to go home and not come back. They didn't even tell my mum."

– Girl, 14, London

- students being encouraged, some witnesses label it coerced, by head teachers to moving to different schools, for a range of reasons from not fitting in to a sense that the child would just be happier elsewhere.

4 Annual statistics have been published since 1998 showing these inequalities.

5 http://www.childrenscommissioner.gov.uk/content/publications/content_561

- in one extreme case, a head teacher admitting to our researchers that he:

“... managed Year 11 pupils [in this way] from Christmas until May: we will get their parents in and ask them to keep their children at home for the rest of the academic year, otherwise it’s a permanent exclusion. The pupils are coded [in the attendance register] as ‘C’⁶ and slip under the radar.”

These activities are explicitly prohibited by statutory guidance regarding exclusions⁷. They are often variously described in the education sector as informal, unofficial or back-door exclusions.

These euphemisms under-state the serious nature of the many cases we have both directly encountered, and been told about in detail. Throughout this report, we therefore refer to these cases as illegal exclusions.

Given both the difficulty in identifying the full scale and nature of this issue, and the low levels of general parental and child awareness of the law relating to exclusions, in 2012 we recommended that mandatory standard wording for documentation should be developed, to be sent to parents in cases of exclusion from any publicly funded school in England.

We also recommended that information on children’s and families’ rights regarding exclusion should be formally required to be included in home-school agreements, school prospectuses and website material.

In its response to our Inquiry, the DfE declined to accept these recommendations, although the DfE has, in fact, revised the statutory guidance to schools (2012) in a way which does improve the information which schools must give to parents. These improvements, disappointingly, stop short at specifying required wording.

We further recommended that the Government should conduct research to identify the full extent of unlawful exclusions, and recommend measures to prevent a small proportion of schools continuing to act in this way. Again, the DfE declined to implement this recommendation, stating that they were not in a position to conduct such research.

Finally, we recommended that any school found by Ofsted in the course of an inspection to have illegally excluded a child should automatically receive an inadequate overall grading. Ofsted responded⁸ that:

“The illegal use of exclusion would raise serious questions which may be linked to the leadership and management, the school’s safeguarding procedures, governance, behaviour and safety, and work with parents and carers. Serious inadequacies in any of these aspects would be likely to lead to the school being judged to be inadequate overall.”

Although this is not the firm commitment that we would have liked, we are extremely encouraged by this response. We consider it means that, in most cases, a school would receive an inadequate grading overall if it were found to have excluded a child illegally.

6 Meaning ‘educated off-site’.

7 <http://www.education.gov.uk/schools/pupilsupport/behaviour/exclusion/g00210521/statutory-guidance-regs-2012>

8 <http://www.childrenscommissioner.gov.uk/info/schoolexclusions>

While "*They Never Give Up On You*" identified a number of issues related to illegal school exclusions, the report also identified a number of areas for further examination, which OCC was not able to complete in the first year of its Inquiry.

This report represents the outcome of further work on illegal exclusions carried out during 2012-13. Our report on inequalities in school exclusions, "*They Go The Extra Mile*", was published in March 2013.⁹

This report does not examine either whether exclusions are always a fair or effective behaviour management tool, or whether exclusions are an appropriate response to particular types of behaviour. These issues were examined in some detail in "*They Never Give Up On You*". That report is still available on the OCC's website, and we do not propose to revisit its detailed contents in this report.

Whether or not a child's behaviour does justify an exclusion in extreme cases, and as DfE guidance makes clear as a last resort, the removal of any child from school must in all cases be fair, proportionate, and crucially, undertaken within the law.

There is broad agreement on this issue across the education sector. The large majority of stakeholders agree that the use of formal exclusions as a means of disciplinary sanction is a last resort which provides a degree of protection against unfair treatment for the young person. Formally excluded, they are able to appeal to the school's board of governors, and (for permanent exclusions) to an Independent Review Panel (IRP).

Similarly, the proper and proportionate use of formal exclusions helps to protect schools against legal challenges, and the risk of potentially significant and serious reputational damage.

Neither of these positive characteristics applies in the case of illegal exclusions. Their illegality means that there is no way of knowing whether illegally excluded children are being treated fairly or unfairly. We therefore welcome the unequivocal statements from the DfE, following our 2012 report, and in the latest statutory guidance on exclusions, that schools must only exclude within the law¹⁰.

Most evidence collected to date has been anecdotal, often based on the testimony of children and parents who feel they have experienced an illegal exclusion, or is contained in reports from intermediary and campaigning organisations such as law centres and charitable sector bodies. While their evidence is copious, often triangulated and valid, there is no way of knowing whether the cases they publicise represent all there are, or in reality represent the tip of an iceberg.

For those affected by illegal exclusions, the consequences can be severe, given a child so excluded moves schools both undocumented and casually, always assuming a second school will take them and their education will continue. Being treated in this way, as reports from the bodies mentioned above state and witnesses have told us in both phases of this Inquiry, can also harm individuals' trust in the education system as a whole.

9 http://www.childrenscommissioner.gov.uk/content/publications/content_654

10 See response to "They Never Give Up On You" from DfE – <http://www.childrenscommissioner.gov.uk>

The Law on Exclusions

Schools are able to exclude pupils by reason of their behaviour, provided the school acts within the law. The relevant law is explained to schools through statutory guidance¹¹.

Exclusions can be either permanent or for a fixed-term.

A permanent exclusion results in the child being removed from the school's roll. The child's home local authority becomes responsible for ensuring alternative educational provision for them. Their new place may be in another school, a Pupil Referral Unit (PRU), or other alternative provision which may be run by one of a range of organisations, often in a less formal environment than school. If the parents of a permanently excluded child consider the excluding school has acted unfairly, they can appeal against a permanent exclusion. In the first instance an appeal must be to the school's governing body. If the governors uphold the exclusion, the parents can appeal to an IRP which hears both sides of the case and then makes a decision. It may decide that the exclusion was legal and fair; or that the school should reconsider its decision to exclude. Its findings are binding on all parties. However, there is no longer a binding right of independent appeal against a permanent exclusion by either the parents or the child. If the Review Panel decides that the exclusion was unfair or illegal, the most it can do is to urge reconsideration and impose a financial penalty on the school if it refuses to offer to readmit the excluded child.

In a fixed-term exclusion, the child remains on the school's roll, but is forbidden from entering the premises for a defined period. This is almost always for less than a week. If a fixed-term exclusion lasts for longer than a week, the school becomes responsible for ensuring alternative educational provision. If the school does not provide full time alternative education from the sixth day of an exclusion, it is breaking the law.

Crucially, the DfE's statutory guidance on exclusions specifies the steps which the school *must* take in excluding the child:

- Only the head teacher of a school can exclude a pupil and this must be on disciplinary grounds.
- Any decision of a school, including exclusion, must be made in line with the principles of administrative law (ie that it is: lawful (with respect to the legislation relating directly to exclusions and a school's wider legal duties, including the European Convention of Human Rights); rational; reasonable; fair; and proportionate).
- Head teachers must take account of their legal duty of care when sending a pupil home following an exclusion (ie they must ensure that the child is safe when (s)he leaves the school).
- Schools must ensure that their policies and practices do not discriminate against pupils by unfairly increasing their risk of exclusion.
- Head teachers and governing bodies must take account of their statutory duties in relation to SEN when administering the exclusion process. This includes having regard to the SEN Code of Practice.
- Head teachers should, as far as possible, avoid permanently excluding any pupil with a statement of SEN or a looked after child.

¹¹ <http://www.education.gov.uk/schools/pupilsupport/behaviour/exclusion/g00210521/statutory-guidance-regs-2012>

- It is unlawful to exclude or to increase the severity of an exclusion for a non-disciplinary reason. For example, it would be unlawful to exclude a pupil simply because they have additional needs or a disability that the school feels it is unable to meet, or for a reason such as: academic attainment/ability; the action of a pupil’s parents; or the failure of a pupil to meet specific conditions before they are reinstated.
- Informal or unofficial exclusions, such as sending pupils home to cool off are unlawful, regardless of whether they occur with the agreement of parents or carers. Any exclusion of a pupil, even for short periods of time, must be formally recorded.
- Whenever a head teacher excludes a pupil they must, without delay, notify parents of the period of the exclusion and the reasons for it.
- They must also, without delay, provide parents with the following information in writing:
 - the reasons for the exclusion
 - the period of a fixed-period exclusion or, for a permanent exclusion, the fact that it is permanent
 - parents’ right to make representations about the exclusion to the governing body and how the pupil may be involved in this
 - how any representations should be made
 - where there is a legal requirement for the governing body to consider the exclusion, that parents have a right to attend a meeting, be represented at this meeting (at their own expense) and to bring a friend¹²

If a school does not abide with all of the steps set out above, they are acting unlawfully.

Managed Moves

It is important to differentiate between illegal exclusions, and well operated, properly monitored, managed moves systems. The latter exist, and have been running for some years, in many areas of England. They allow young people to move to a different school, or to a PRU or other alternative setting, without triggering formal exclusions proceedings. In many cases, they constitute best practice.

The detailed working of managed moves systems, and other alternatives to exclusion, was examined in detail in “*They Never Give Up On You*”¹³. From the outside, managed moves and illegal exclusions may appear similar – with children moving from one setting to another, for disciplinary reasons, with full knowledge on all sides, but without entering into a formal exclusions process.

However, there are a number of key distinctions:

- In a well-run, co-operative system of managed moves, decisions are taken collectively by both the excluding and receiving institution. Such work is considered by schools to be part of a strengthening pattern of school-to-school support in a diversifying school system. In illegal exclusions, decisions are taken unilaterally by the excluding school.
- Good managed moves systems are often monitored by other schools in the area, by the local authority, which continues to be granted both a seat at the table and a neutral role in co-

¹² ibid

¹³ “They Never Give Up On You” – The Children’s Commissioner’s Inquiry into School Exclusions. March 2012. http://www.childrenscommissioner.gov.uk/content/publications/content_561

ordination, and by other interested bodies, such as Academy chains or Dioceses. All these partners are accountable to a formally agreed local Fair Access Protocol which all sides sign up to. Illegal exclusions, by their inherently covert nature, cannot be monitored.

- Good managed moves are transparent, with all sides aware of what is happening. Illegal exclusions are covert and denied. One student told the Inquiry:

“I knew what was going on. I wasn’t excluded, but I had to move. It was good to have a fresh start, and everyone knew what had happened in my last school.”

– Girl, Year 10, West Midlands

- Parents and young people themselves are fully involved in the decision-making process in well-run managed moves. They consent to the move without an implied threat of permanent exclusion if they refuse.
- A child changing schools in such a managed move has a record in both the excluding and receiving schools, and all parties work to ensure that the new placement succeeds. In unofficial – and as the DfE states illegal – exclusions, the excluding school is acting in a way that indicates that it is not interested in a child’s destination or future chances. It is simply interested to see that the child leaves.

One young person told the Inquiry about a sense of being supported, in a formal process, to make his managed move:

“The teacher from [names old school] kept coming to check up on me till I was settled in at [new school].”

– Boy, Year 8, West Midlands

Methodology

In the production of this report, we have revisited the evidence collected for year-one of this Inquiry, as well as using a wide range of different techniques and avenues (set out below) to collect further evidence, both to back up and/or challenge what we found last year, and to inform our conclusions.

Written call for evidence

The second year of work on this inquiry was launched in Summer 2012 with a call for written evidence to be submitted by organisations and individuals working anywhere in the field. This call closed in December 2012, although we have received, and taken account of, a number of submissions after this date.

Submissions are available, should readers wish to read them, in accordance with the Publication Scheme set out on the Children's Commissioner's website¹⁴, except where respondents have requested that they not be published.

Where this material is reproduced throughout this report, it is presented in the terms that the information was presented to the Inquiry – that is, captured and reported verbatim where possible.

Bilateral Evidence Sessions

We met a large number of key statutory and non-governmental stakeholders through the course of this work, and used these meetings to gather evidence, corroborate evidence gained from other sources, and test hypotheses. A list of those individuals who gave evidence is attached as Annex B to this report.

Field visits

The Children's Commissioner, members of staff from the OCC, and members of the advisory group for this Inquiry have made a large number of field visits. Typically, these visits focused on one local authority area, covering several settings. Occasionally they were single institution visits. The team visited mainstream primary and secondary schools, special schools, PRUs, schools for children and young people with emotional social and behavioural difficulties across local authority maintained and Academy models of governance including residential provision, and other models of alternative educational provision. On each occasion, the Inquiry met a range of stakeholders, always including the children and young people attending the provision. In total, several hundred young people have spoken to the Inquiry. The following areas were visited specifically for this second year's work:

- two diverse outer London Boroughs
- a rural county in the South West of England
- a large county in the South East of England, with a mixture of urban and rural communities and a wide spread of income groups
- a county in the East of England with a mixture of affluent and disadvantaged communities

14 <http://www.childrenscommissioner.gov.uk>

These areas included some with a large number of schools already converted to Academy status, and others where there were very few, or where the pattern of governance was changing whether gradually or rapidly. It also included two areas which retained selection at eleven, and grammar and non-selective schools. In two cases, these areas were chosen as a result of information we had received suggesting that there was a problem with illegal exclusions in schools in the local authority area. In order to encourage openness and transparency, as well as to protect the identity of the young people we spoke to, many of whom were vulnerable for a number of reasons, and all of whom had experience of the exclusions system, the exact locations of the visits are not specified when we cite them. Instead, we have identified the type of setting, the job title of the individual(s) we spoke to (or the ages of the young people), and the region visited.

Evidence gathered on field visits during the first year of the Inquiry is also used in this report.

Input from children and young people

Throughout the Inquiry, children and young people have advised the Children's Commissioner on the priorities for the Inquiry, and the impact that exclusion has on their lives. As set out above, we spoke to children and young people affected by or at risk of exclusion in every setting we visited in the course of this work. The Children's Commissioner's young people's advisory group, Amplify, has also been extensively involved; three members attending meetings of the project-specific young people's advisory group (see below), and the whole of Amplify discussing the Inquiry on several occasions. Amplify advised the Inquiry on:

- its scope and terms of reference
- their views on issues surrounding exclusions
- the relevance of initial findings to the lives of young people, and how best to communicate the findings to a young audience
- the appointment of an organisation to run a project-specific children and young people's advisory group (see below)
- the appointment of organisations to conduct primary research on our behalf

A tendering process was undertaken to establish a reference group of young people who had been excluded or were at risk of exclusion. The contract to deliver this aspect of the Inquiry's work was won by the Runnymede Trust, a charity which is the UK's leading race equality think tank. The group of children and young people convened by Runnymede has advised the Children's Commissioner throughout on:

- the relevance of emerging findings for children and young people at risk of exclusion, and their relative importance from their unique perspective as children and young people personally affected by the issue under investigation
- the most effective ways to present the Inquiry's findings to children and young people

Around 20 young people (aged between nine and 16) have taken part in this group in the course of the Inquiry, from London, the East Midlands, Yorkshire and the South East. They have worked together, as well as giving us their own experiences and opinions, informing and working directly with staff at the OCC as well as Runnymede, so as to inform this year's work.

Primary research

For this report, following an open tendering process, a team from the University of Sussex was commissioned to undertake a primary research project looking at best practice in inclusion in schools, and in the work of teacher training providers. They worked with a number of key leaders in schools, local authorities, teacher training providers and other relevant stakeholders, to complete their research. Their findings are quoted throughout this report. In addition, the full report is included as Annex C to this report.

In addition, the National Foundation for Educational Research (NFER) have carried out a further two pieces of primary research on our behalf.

Firstly, their annual *Teacher Voice* omnibus survey for 2012 carried a number of questions on behalf of OCC relevant to this work. These questions examined:

- teachers' experiences of schools excluding illegally
- teachers' knowledge of exclusions law and guidance
- their views on whether this law and guidance was fit for purpose

The questions asked and the responses given are presented in Annex D.

Secondly, NFER conducted a number of group interviews and focus groups on our behalf. These were undertaken with teachers, school leaders and other school based, non-teaching professionals, such as Educational Psychologists and Education Welfare Officers. The focus groups examined similar topics to those examined through the *Teacher Voice* survey.

The report provided by NFER of these groups' reflections is presented as Annex E of this report.

We were also presented with a great deal more evidence of people's perceptions of what is going on in the school system. While in a number of cases we have been able to confirm or refute witnesses' and evidence presenters' perceptions, this has not been possible in all instances. Where OCC is reporting the views and opinions of individuals or groups rather than research based or confirmed evidence, we make this clear without necessarily either endorsing or denying those views. Where we have been able to confirm or deny the veracity of cases, we also make this clear.

Expert Advisory Group

The work of this Inquiry has been steered by a group of experts, who acted as a critical friend to the Children's Commissioner, and advised on all aspects of the Inquiry's work. They were:

- Sir Alan Steer, retired secondary head teacher; Government adviser 2005-10 and author of several reports on the behaviour of school aged children
- Adele Eastman, Senior Policy Specialist at the Centre for Social Justice, and author of its report "*No Excuses: A Review of Educational Exclusion*"
- Barry O'Shea, Head Teacher of Duncombe Primary School, Islington
- Gracia McGrath OBE, who has been the Chief Executive of early intervention mentoring charity Chance UK for 11 years; she has worked in the charity sector for more than 20 years
- Janet Mokades was an HMI for many years and has also been an Education and Children's Services Adviser to the DfE; she currently chairs a Safeguarding Children Board, is a Schools Adjudicator and Chair of the Navigate Academies Trust

The Inquiry team at the OCC has been led by Education Principal Policy Adviser John Connolly, whose work has been supported in the Inquiry's research, editorial, organisational and administrative functions by Delyth Johnson. We are also indebted to many members of staff at the OCC for their support, proof reading, challenges and questions, in the course of this work.

Findings

Evidence of Illegal Exclusions

This section examines the evidence we have gathered of the existence of illegal exclusions in England’s schools. As well as reporting our findings from the evidence sources set out above, it builds on work carried out by this organisation in the first year of our Inquiry, as published in “*They Never Give Up On You*”. It also draws on evidence from a number of external sources. In particular:

- “*No Excuses: A review of Educational Exclusion*” published by the Centre for Social Justice in September 2011
- research commissioned by the Welsh Assembly Government on illegal exclusions and published in 2012
- a survey on illegal exclusions published in February 2013 by the charity Contact a Family
- membership surveys conducted by the National Parent Partnership Network (NPPN) and the Association of Educational Psychologists

Types of illegal activity

In analysing the evidence collected, we have identified three different types of behaviour in schools and local authorities, all of which are unlawful. They are:

- Schools failing to follow proper procedures in excluding children, either for a short period or permanently.
- Schools following formal exclusion processes, but failing to take account of other elements of law in doing so. This is most common in cases where schools have failed to have due regard to their legal obligations under the Equality Act 2010 and predecessor legislation.
- Schools and local authorities failing to fulfil their legal responsibility to provide alternative education for those excluded for more than five days.

This chapter examines the evidence for them from a variety of sources.

Schools failing to follow Exclusions Guidance

Evidence from teachers, school leaders and school-based professionals

This Inquiry has, through NFER’s *Teacher Voice* survey, asked a representative sample of teachers and school leaders about their experiences of schools potentially acting unlawfully on exclusions. This survey was responded to by around 1000 teachers in total, including more than 200 school leaders. To the best of our knowledge, this is the first time teachers’ views have been sought on this issue.

Teachers and school leaders (defined as head teachers or principals and deputy heads) were asked to state whether, to the best of their knowledge, their school had done any of the following:

- formal fixed-term exclusions
- formal permanent exclusions
- encouraged some children to move schools, without recording such a move as a permanent exclusion

- encouraged parents to educate their children at home as an alternative to permanent exclusion
- recorded pupils as authorised absent or educated elsewhere when the school has asked them not to come in to school
- sent pupils with statements of SEN or medical needs home when their carer/teaching assistant is unavailable
- sent pupils home for any period without recording it as a fixed-term exclusion

For the sake of clarity, the first two bullets of this list are legal, provided that schools administer them correctly and have due regard to their additional responsibilities to certain groups (as set out in statutory guidance).

The third type of behaviour may in some cases be legal, if it is undertaken as part of a well-run system of managed moves. In other cases these may be illegal, with undue pressure being brought to bear on parents and young people to coerce them to move school. Unfortunately, without a detailed examination of individual cases, it is often impossible to distinguish between the differing types of case.

The other bullets in the list of behaviours given above represent different types of illegal activity.

The results are set out below in Table 1.

Table 1: Evidence from teachers, school leaders and school-based professionals

Has your school ever done any of the following:	Primary	Secondary	All classroom teachers	School Leaders
Formally excluded pupils for a fixed-term for reasons of poor behaviour	54.6%	88.2%	71.20%	71%
Formally excluded pupils permanently for reasons of poor behaviour	11.9%	64.8%	37.50%	31%
Encouraged some pupils to move to a different school, without recording such a move as a permanent exclusion	6.1%	38.9%	22.00%	15.8%
Encouraged parents of some children to educate them at home, without recording such a move as a permanent exclusion	0.6%	6%	3.40%	1.8%
Recorded pupils as ‘authorised absent’ or ‘educated elsewhere’ when the school has encouraged them not to come into school	1.9%	10.9%	6.30%	2.1%

Has your school ever done any of the following:	Primary	Secondary	All classroom teachers	School Leaders
Sent pupils with statements of SEN home when their carer/teaching assistant is not available because the school is unable to meet their needs	1.9%	0.4%	1.20%	2.7%
Sent pupils with medical needs home when their carer/teaching assistant is not available because the school is unable to meet their needs	1.1%	0.3%	0.80%	0.3%
Sent pupils home for any period without recording it as a fixed-term exclusion	6.7%	8.1%	7.30%	6.7%
Don’t know	9.5%	5.8%	7.90%	1.3%

It is clear from this table that there are significant differences in reported behaviour between the experiences of Primary and Secondary teachers, and in both phases between classroom teachers and school leaders. In the primary/secondary phase differences, our analysis indicates this is likely to be a reflection of the differing contexts of primary and secondary schools, and the consequent differences in practice. Secondary schools formally exclude far more children than primaries – over 90 per cent of primaries have no permanent formal exclusions.

In most of the categories above (legal and illegal), primary school teachers were less likely than their secondary colleagues to report their school acting in the ways specified. The exception was with the sending home of children with SEN and medical needs.

School leaders were less likely than classroom teachers to report that their school had acted unlawfully, again with the exception of sending home children with SEN. There are two potential explanations for this. It may be that, as school leaders are closer to the decision-making process for exclusions¹⁵, their reporting is simply more accurate regarding practice in their schools. Classroom teachers may be more reliant on hearsay or common knowledge than school leaders.

However, it may also be the case that they are less likely to admit to illegal activity (even with guarantees of anonymity), as they would be implicating themselves rather than (as with classroom teachers) other individuals. It is impossible to know beyond reasonable doubt whose reports are accurate. Indeed, both hypotheses could be true in different places. However, even at the most conservative estimates supported by the available data, an unacceptably large proportion of schools are acting illegally:

- 6.7 per cent of schools have sent children home for disciplinary reasons without recording it as an exclusion; **if these were evenly spread across the country, it would represent 1600 schools¹⁶, or an average of ten in every local authority**
- 2.7 per cent of schools have sent children with statements of SEN home when their carer or teaching assistant is unavailable; **if these were evenly spread across the country, it would represent 650 schools, or an average of more than four in every local authority**

¹⁵ All formal exclusions decisions must be taken by the Head Teacher.

¹⁶ There are approximately 24,000 state-funded schools in England.

- 2.1 per cent of schools have recorded pupils as authorised absent or educated elsewhere when the school has encouraged them not to come into school; **if these were evenly spread across the country, it would represent approximately 540 schools, or an average of more than three in every local authority**
- 1.8 per cent of schools have encouraged parents to take their children out of school and educate them at home without recording it as an exclusion; **if these were evenly spread across the country, it would represent 192 schools, or an average of more than one in every local authority**

These figures represent a small but significant proportion of the total number of schools in the country. This evidence would certainly suggest that illegal practice is far from the norm in schools. Neither, however, is it merely the work of a tiny number of bad apples. It is likely to be affecting thousands of children in several hundred schools. This is extremely serious, given the impact on these children and their families in the short and long term.

In addition to the quantitative data set out above, NFER also examined the experience of teachers and non-teaching professionals (such as educational psychologists, parent partnership advisers and education welfare officers) with regard to illegal exclusions. Many of the same themes arose in these discussions.

The most commonly understood example of unofficial exclusion cited by teachers related to sending a young person off the school site without issuing an accompanying letter to the parents, detailing why this action had been undertaken. Time out and cooling off were prime examples of this type of exclusion. One said:

“I understand it as asking somebody to stay at home, particularly if you know you’ve got OFSTED or somebody in. I think it’s less frequent now than it used to be. It’s a practice that’s dying out.”

– Teacher

A non-teaching professional told researchers:

“It did happen in [names schools] to a child who comes on transport and was told to go home. He said that he goes on transport and the Head of Year or another senior teacher said to him, ‘I don’t care, you go’. He left the school and didn’t know how to get home, was found by a bus stop by a stranger who put him on the right bus to get home. The other end, he wasn’t quite sure where his home was and somebody else helped him. He did get home safely – more by luck. His parents weren’t contacted, as far as I remember, to come and pick him up.”

– Non-teaching professional

Respondents also reported schools illegally extending a formal, initially fixed-term exclusion, converting it whilst it was in force into one of indefinite length.

"We get children who've been maybe officially fixed-term excluded due to a particular incident. And the parents are told 'when it's finished', like the five day attendance exclusion or whatever, 'we don't want them back so can you look for another school within that time'. We've told parents 'look, when the fixed-term exclusion is finished you're entitled to take your child back in and leave them on the doorstep' because they either should be in school officially or out of school officially and there's no grey area there."

– Non-teaching professional

Examples of more systematic uses of this model of exclusion were also provided where young people, especially in Year 11, were noted as sent out of school after Easter for extended study leave. Teachers also suggested that long-term, or indeterminate school-endorsed absence took the form of alternative education, attending projects, or undertaking educational visits.

One teacher told researchers:

"We also have an awful lot going on to this alternative provision, educated off-site, going off on project. As far as I'm aware in our school last year we had 12 going off on a project. And we find invariably someone goes 'oh there are some projects' the chances are you're never ever going to see them again. They're either going to be excluded while they are there, so excluded from the project, and as a result excluded from school and do not come back into school. And you hear six months later 'just so you know, so-and-so has disappeared off the register'."

A non-teaching professional said:

"[My authority] doesn't do exam leave, we don't do it. So when the exams start the exams kind of kick off properly in May. After about Easter you start to notice that certain people have gone. And you do get told such-and-such has gone on early exam leave. And it is coded as study leave because they know we can now legally do something. They are Year 11, they will never exclude a Year 11."

Another said:

"I think the point about alternative provision is that it will look as if people are still in school. There will be no record of it being exclusion, but it is, to a great extent – and lots of them are ultimatums."

Another said:

"There was a Head who used to do it all the time and when you'd say 'well it's illegal' he'd say 'so sack me' ... kids who were a pest or who they tried to put in alternative provision and wouldn't go. So they'd say 'right, you're not coming back into school then'. Or they used to say 'you're only allowed back into school if your parents come in with you'. And then the parents couldn't make it so they'd be out of school for ages. And they'd get forgotten in the end."

– Non-teaching professional

Placing challenging pupils on part-time timetables consisting of one or two mornings a week in school, with the remainder of time spent at home, was also recognised as an unofficial means of exclusion. Teachers were, however, keen to point out that offering pupils reduced timetables as a time-limited strategy to support reintegration after an exclusion could be an effective approach.

“We have lots of pupils who are on part-time provision, the schools can’t quite manage it. There’s guidance that goes out that says this has to be for a short-term period, there has to be a re-integration plan. And they plod along being part-time for ages. And there’s no record of them being excluded. These will be the primary kids.”

– Non-teaching professional

“... we’ve got RHINO – have you heard that one? Really Here In Name Only. They’re on the roll, the school’s not chasing them enough, they’re not excluded in that sense for their statistical input with OFSTED or whoever. But yes, there’s a lot of Really Here In Name Only.”

– Non-teaching professional

“... the part-time timetable is a big one, when the child gets put on a part-time timetable for two hours a day. And schools can do it but it should be for the child’s benefit. For example, if they’ve been out of school due to medical reasons then you might want to reintegrate them slowly. But it’s often done for behavioural reasons, again, for the support reasons I’ve already mentioned: the TA (Teaching Assistant) not being available. And it’s presented as something for the child’s own good. But it’s really to mask the lack of support that’s available in the school. And that can drag on. We find parents calling us and saying, ‘well the school are doing this’ – there’s been no negotiation, so the parent believes this is correct procedure. There’s no review of that, there’s no discussion about when is he going to go back to full-time. What’s the purpose of this part-time timetable? What’s happening in the meantime? You would expect some schools to be looking during that time, at maybe asking for a statutory assessment, getting a Statement for the child. But we find that very often that’s not been done. There’s been no moves towards that at all. So the situation just continues as it is. And then, of course, parents have to stay at home or give up work and look after the child for the time they’re at home.”

– Non-teaching professional

A small number of teachers noted previous experience of pupils being removed from the school roll without an adequate alternative being put in place. Some non-teaching professionals also reported knowing of parents and pupils being advised or coerced into electing to educate at home:

“The educated at home is a massive loophole, because certainly in my previous life there was one school that actually had a letter that they used quite often that they took round to the house and said ‘I will educate my child at home, sign here’. And so they were off the school roll and supposedly educated at home.”

– Non-teaching professional

“There’s also [...] the very, very poor attenders and the schools are then being slated for their attendance figures. So actually if you persuade a parent to educate them at home, then they’re off your roll and their non-attendance doesn’t count.”

– Non-teaching professional

This was corroborated by the Inquiry team on a visit to a local authority in the South West of England. A behaviour and attendance adviser in that authority told the Inquiry:

“We’ve got one school that regularly forces kids to be educated at home, knowing full well that the parents are in no position to provide any sort of education. They use a standard letter – we get half a dozen a year and all that differs between them is the signature. But the parents are happy to sign because it means their child doesn’t show up as excluded. That’s their right, so there is nothing we can do.”

Several non-teaching professionals provided examples of pupils with SEN either being sent home because of a lack of adequate support in school, or their parents being contacted to say that this support was not available, forcing the parents to either collect their child or sanction their continued presence in school without appropriate support.

Most teachers noted that illegal exclusions had occurred, to some extent, at some point in their school. Several suggested that it was still fairly common in their school, often in the guise of alternative or off-site provision. Others, however, expressed surprise that illegal exclusions take place: *"I can't believe they do happen. Are you actually saying they still do happen?"* Others questioned that this practice could persist without it being brought to the attention of Ofsted: *"I'm gob-smacked. I can't believe they've not been checked up"*. (Teacher)

Some teachers also suggested that unofficial exclusions had been more prevalent in the past, but as a result of increasing awareness of the legal position, such actions had become less common.

Several also noted that the likelihood of a school unofficially excluding pupils had reduced as a result of the increasing willingness and ability of parents to challenge such actions. There were strong feelings that parents and children had become much more aware of their rights and of the parameters in which schools can legally operate.

"We've learnt. Because quite far in the past I remember children where their parents were being called and saying 'you need to come and collect them' and that's obviously an illegal exclusion. And I think a lot of that continued to happen, exactly what you're saying, because yes it was illegal, but it's not illegal until somebody says so."

– Teacher

"I've been teaching a long time now and there are children now who get excluded whereas a long time ago they were just told not to bother coming in when they got to Year 11. And now you can't do that."

– Teacher

Non-teaching professionals (with experience of working in a larger number of schools than individual teachers) suggested that unofficial exclusions were still relatively common, often hidden by schools' use of attendance coding.

"There's a lot of underhand exclusion, and there's a lot of coding young people who are on roll as being a pupil at that school but actually maybe they've not been for a whole year. Would you call that an exclusion?"

– Non-teaching professional

Evidence from Parent Partnership Services and their national Networks

Parent Partnership Services are statutory services offering information, advice and support to parents and carers of children and young people with SEN. They provide a casework service to around 64,000 parents and carers every year. The National Parent Partnership Network (NPPN) supports and promotes the work of parent partnership services across England. It is based within the Council for Disabled Children and is funded by the DfE.

Part of every Parent Partnership Services's statutory role is to support parents in holding the LA (which funds the Parent Partnership Services) to account, without fear or favour and even if the

local authority is the employer of staff in the Parent Partnership Services. Many Parent Partnership Services do this 'calling to account' both fearlessly and repeatedly. In the best local authorities they are listened to, and action follows. In some, sadly, neither is common. Parent Partnership Services staff in more than one local authority have indicated to us that they consider they are unheard and children's cases are not taken up.

In December 2012, Parent Partnership Services' national network, the NPPN, launched a survey of Parent Partnership Services to ascertain the prevalence of illegal exclusions that Parent Partnership services professionals hear about or experience first-hand, and the trends that these illegal exclusions follow. They received 63 responses from Parent Partnership Services – 40 per cent of the local authorities in the country. Academic research practice indicates this is a good sample size for such a survey.

Parent Partnership Services were asked how many illegal exclusions they had heard about in the last school year. The average was 21 children per local authority, with some saying they had heard of well over 100.

When Parent Partnership Services staff were asked whether they had seen an increase or decrease in the number of illegal exclusions in recent years, 51 per cent said they had seen an increase, 36 per cent that they did not know, and 13 per cent that they had seen a decrease. This is in contrast with teachers who took part in NFER's focus groups, who generally felt that the problem was decreasing. Ten per cent of the Parent Partnership Services staff who responded went on to cite, in their localities at least, and in their professional opinions garnered over the length of their practice, an increase in the numbers of Academies as the reason for the increases they were seeing. This quote is typical:

"Increase seems to be in line with move to Academies (all the LA's secondary schools are now Academies)."

The main types of illegal exclusions which Parent Partnership Services staff reported were:

- exclusions on a take her/him home please basis, with or without paperwork, for a proportion of the day – 96.9 per cent of respondents reported having seen this (75 per cent said that this was the most common type of illegal exclusion); many respondents indicated that for some children this was a very regular occurrence, weekly or more
- lunchtime exclusions – 84.6 per cent of respondents said this happened, whether or not the child was allowed back to school for the afternoon
- exclusions from school trips/events – 84.6 per cent of respondents said children with SEN were routinely not allowed to access these
- regular exclusion from a particular lesson or part of the curriculum – 32.3 per cent of respondents said that this was happening

Other types of exclusions mentioned were:

- Ofsted Inspections – several responses cited that parents were told to keep their child at home during Ofsted inspections:

"We have in the past had to support parents who have been asked to keep their child off school for the three days Ofsted inspectors are in. We are now advising parents to contact Ofsted as soon as this happens but not all will, as they believe their child will be named or implicated."

- parents not receiving an exclusion letter with a return to school date, meaning that their child is in effect excluded indefinitely; schools then choose when, if at all, to make contact to begin reinstatement

Parent partnership services are there to support parents of children with SEN. It is not possible to account for how many children are illegally excluded and do not have such an organisation to stand alongside them. It should also be noted that at present support on exclusions are not part of the statutory role of Parent partnership services although 99% do provide some level of support.

Evidence from Parents and Young People

Contact a Family is a national charity which supports the families of disabled children. Their vision is that families with disabled children are empowered to live the lives they want and achieve their full potential, for themselves, for the communities they live in, and for society. They offer support, information and advice to over 340,000 families each year and campaign for families to receive a better deal.

In Autumn 2012, Contact a Family conducted a survey and published a report on its findings, on illegal exclusions among the families of children with special needs, whom they have supported¹⁷. The survey took evidence from parents and carers in England or Wales who considered their child had been illegally excluded. They received over 400 responses. All the children concerned were on the register of SEN and 70 per cent of them had a Statement.

The sample for the survey was deliberately targeted by Contact a Family to gain evidence from the families of children who had been illegally excluded. Therefore it is impossible to draw far wider or more general conclusions from this study on the overall prevalence of illegal exclusions across the general population. It is quite possible that there is a relationship between particular special needs, and the likelihood of a child with those needs being excluded.

It may be that these 400 cases represent the tip of a much larger iceberg, or equally, they may be the only cases in existence. However, we have no reason to doubt the veracity of the reports given, from the point of view of these 400 parents and their children.

This survey is undoubtedly valuable in identifying the types of exclusions experienced by these particular children. It presents a stark picture of the impact of illegal exclusion on them and their families.

Respondents reported the following types of exclusion. In these cases, it is difficult to imagine that, if they happened as described, such exclusions would in any way be in accordance with statutory guidance.

- 53 per cent reported their child being excluded because the school "*does not have enough staff to support the disabled child*". Of these, 49 per cent reported this happening every day or every week.
- 56 per cent reported that their child was excluded from a class activity or trip that was "*not suitable for disabled children*". Of these, 51 per cent say this happens once a month or term.

¹⁷ Falling through the net: Illegal exclusions, the experiences of families with disabled children in England and Wales. *Contact a Family*, 2013.

- 62 per cent report the child being sent home to cool off after an incident. Of these, 35 per cent say this happens every week.
- 70 per cent reported the child being sent home for their own good as he or she is *having a bad day*. Of these, 45 per cent say it happens every day or every week.
- 60 per cent reported their child being placed on a part-time timetable.

Contact a Family's Report also set out the impact of these exclusions on family life. Examples included parents reporting the following:

"My child was illegally excluded from school every week when he was in Year four. I was regularly asked to collect my child from school and told to keep him at home without an official letter from the school. My child was also put on a part-time timetable for about six weeks and I was told that the school couldn't cope with my son. There were endless phone calls to go and sit in the class with him or to bring him home. It was draining both mentally and physically as I was always up and down to the school. I kept him at home for three days when the school were having their Ofsted inspection."

"It started with the school asking me to bring him home at lunchtimes every day. We were also asked to collect him 30 minutes before the end of the school day. He was never allowed on trips and he was often sent home or put into isolation during Ofsted visits. During his last weeks at that school I found out he was in isolation on a daily basis. [...] The situation caused problems within the family, work was impossible for me and my son suffered health problems and lost a lot of confidence."

In total, 50 per cent of respondents said that they were unable to work or had had to give up working as a result of their child's regular exclusions. 32 per cent of those who did work reported having to take substantial time off.

Schools acting contrary to other aspects of law

Schools’ Duties regarding Equality

In March 2013, OCC published “*They Go The Extra Mile*”, our report on reducing inequalities in school exclusions. The report was prompted by the DfE’s annual statistics showing which groups of children remain most likely to be formally excluded. These are:

- boys rather than girls
- children with SEN
- children eligible for Free School Meals
- children from certain ethnic groups, in particular Gypsy/Roma Travellers, Travellers of Irish Heritage, Black Caribbean children, and Mixed White/Black Caribbean children¹⁸

“*They Go The Extra Mile*” focused exclusively on the formal exclusions system and how it disproportionately affects these groups. It made recommendations regarding how the education system could level the playing field on exclusions, and how all schools could learn from best practice.

However, in the course of researching inequalities in exclusions, we found evidence of an equalities dimension to illegal exclusions.

Some of this relates to the particular challenges faced by children with SEN – set out in detail elsewhere in this chapter. However, we also found substantial evidence of schools acting illegally, in that they were failing to have due regard to their duties on equality and diversity.

As set out above, schools are required by law to:

- ensure that their policies and practices do not discriminate against pupils by unfairly increasing their risk of exclusion
- take account of their statutory duties in relation to SEN when administering the exclusion process; this includes having regard to the SEN Code of Practice
- avoid (as far as possible) excluding permanently any pupil with a statement of SEN or a looked after child

It is worth reiterating at this point that these are legal requirements on any publicly funded school. They are not merely guidelines or exemplars of best practice. Schools do not have discretion in this matter. If they do not fulfil these requirements, they are in breach of the law. Unfortunately, however, in the course of this Inquiry, since 2011 we have found evidence that some schools either fail to understand this fact, or understand it but fail to act on it.

As part of the first year of our work on school exclusions, we commissioned Canterbury Christ Church University (CCCU) to conduct research into schools’ awareness of, and compliance with, statutory exclusions guidance. With regard to the elements of the guidance set out above, they found an extremely mixed picture.

18 Throughout this report we use the same categorisation of ethnicity as is used by DfE.

Schools typically spoke of treating each case on its own merits or emphasising consistency. There was a limited awareness of having to pay due regard to issues of equality as a first principle, with many schools more likely to take some characteristics into account than others, presenting an immediate issue of inconsistency across the system.

In particular, schools have some awareness of the need to have due regard to the implications of particular needs (particularly SEN) when considering approaches to dealing with children and their behaviour. One head teacher told CCCU researchers that:

*"We would look at whether the child has any SEN that would need to be taken into consideration, eg: there is a Year 10 boy with ADHD who is not taking his medication at the moment, and we are therefore taking that into consideration when making a decision."*¹⁹

Another told researchers that:

"If I thought it was a student with special needs meant they couldn't control that and they didn't have a choice in their reactions, we would find an alternative way of dealing with it."

However, for other schools, consistency for all pupils, including those with SEN, was more important. One school leader told CCCU that:

"... it can often be difficult dealing with SEN students but the school needs to be seen as treating all children the same."

Another that:

*"... if pupils realise that a child is treated differently, there comes a point when this undermines school systems."*²⁰

There was a general awareness that pupils with SEN have particular needs, and that it is the responsibility of the school to ensure it is working positively to implement strategies and approaches to support the pupil. However, the extent to which this awareness would influence a decision over whether to exclude varied considerably and unacceptably.

One school, which had a zero exclusion policy, discusses situations where pupils may display inappropriate behaviours, firmly placing the responsibility for that behaviour with the staff rather than identifying the child as 'the problem':

"It is our problem – we solve problems. Any problems displayed by a child means we haven't got something right."

The needs of pupils who are LAC were also highlighted in the CCCU research. Schools told researchers that:

"The school has support clubs for LAC children and often arrange six day breaks to work on a one-to-one basis with these children. Some LAC students cannot cope with normal lessons so have out of school and nurturing provision."

19 CCCU research <http://www.childrenscommissioner.gov.uk/info/schoolexclusions>

20 Ibid.

"Often Looked After Children are left to languish for months after being excluded as it is difficult to place them and this is not ideal for the students as not only is their schooling disrupted but also their confidence and social awareness and social skills ... Adults in the school will work with the children so they have an understanding that they are wanted and not rejected by the adults."

"Looked After children are not excluded, alternative provisions are made if it's deemed to be fitting for an exclusion, but you don't exclude Looked After Children ever."

However, while researchers found that many teachers recognised the particular needs of children with SEN and LAC, the situation was less positive for other groups who are disproportionately likely to be excluded. A lack of awareness of cultural and racial difference was a particular issue, one we found mirrored in the fieldwork undertaken for this Inquiry.

An online survey reported that factors related to whether the child had SEN or a disability, and if they are a LAC, were very important in the decision to exclude (68.7 per cent of respondents for SEN, and 76.7 per cent of respondents for LAC). However, the picture for pupils from ethnic minority groups was much more mixed, with 25.4 per cent of respondents thinking that this was always taken into account, 22 per cent believing that it was occasionally taken into account, and 35.6 per cent reporting that this factor was never taken into account (17 per cent gave a "don't know" response to this question). As the requirement in exclusions guidance to take it into account is both clear and binding, such figures are a cause for concern.

Throughout all the school visits made for this Inquiry over the course of two years, no school reported they took into account any other relevant characteristics (primarily gender and race) when looking at decisions to exclude, or at the contents of, or any changes to, behaviour policies which inform these decisions. In fact, the opposite was at times true.

Several of the schools we have visited have behaviour practices which are clearly discriminatory, and are contrary to schools' legal duties. These include school rules on hair length or hair cut which applied to boys, but not to girls; or which related to hairstyles much more likely to be worn by one ethnic group. In both cases, breaches of these school regulations could lead to immediate short-term exclusions, without any notice given. Students were not allowed back into school until hair had been cut or re-styled – meaning that such exclusions could be indeterminate, or indeed in effect indefinite.

Such conduct is illegal. It is directly contrary to schools' Equality Duties under the Equality Act 2010; to the rights enshrined in the Human Rights Act 2004, and to the UNCRC.

In *"They Go The Extra Mile"*, we undertook to pass details of schools acting in a discriminatory way as part of a formal complaint to Ofsted and to the relevant schools' responsible authority.²¹

Given the longstanding and stubborn differences in exclusion rates between different ethnic groups, and between boys and girls, these findings are a cause for concern. The evidence demonstrates that schools are not routinely aware of the legal requirement to have due regard to both gender and ethnicity. This Inquiry has focused solely on exclusions, but has seen no evidence of the situation being different for other issues.

21 The local authority in the case of maintained schools. The Education Funding Agency in the case of Academies.

We therefore reiterate the recommendation made in “*They Go the Extra Mile*” – that DfE should work together with the Government Equalities Office and Equality and Human Rights Commission to produce statutory guidance for schools and other public educational bodies in interpreting the Public Sector Equality Duties with regard to exclusions.

The Role of local authorities in “Day 6” Provision

As set out above, local authorities have a statutory role in exclusions. They are responsible for any child who has been permanently excluded from school – with a specific responsibility for providing alternative, full time²² education from the sixth day following the exclusion.

However, we have seen substantial evidence that this duty is often not fulfilled, and that systems in too many local authorities are insufficient to ensure that high quality alternative education is provided in all cases.

In the course of the Inquiry, we visited one large authority which, despite having had ample notice of our visit and what we would seek to find out whilst we were there, was unable to provide any data at all on how it was discharging its responsibility to provide alternative education for permanently excluded pupils. This authority, whose schools permanently exclude several hundred children each year, had delegated responsibility for this provision to a number of local offices. These were under no requirement to provide information to the local authority for central collation, analysis or subsequent action. Senior officers asserted that they were sure that every child was receiving a full time education. However, they had no evidence to support their assertion.

We met children in every area we visited who reported missing education for months at a time following either formal or illegal exclusions. Some reported receiving a small quantity of work to do at home, backed up by minimal amounts (one or two hours per week) of home tuition. Others reported no education being provided at all for long periods, prior to a place being found at a local PRU or other alternative provider.

This evidence is corroborated by a survey conducted by Ofsted in 2009, which found that almost half of the local authorities visited did not meet the requirement to provide full time education for all formally excluded children.²³ That our visits three years later showed little improvement in too many cases, is disappointing.

The evidence that a significant number of local authorities do not fulfil their statutory responsibility to offer full time education for excluded children is convincing. This is as serious a breach of the law as schools illegally excluding, and should be treated as such. When children are out of school in this way, they may often be at risk of harm, including being left on their own either within the home or outside it for long periods while parents or carers work. Moreover, it is clear that if this is the case for those children who have been formally excluded, there is very little chance that the same local authorities will have reliable or accurate information on those who have been illegally excluded.

22 Defined through secondary legislation in 2011 as 25 hours per week.

23 Ofsted, Day six of exclusion: the extent and quality of provision for pupils, London: Ofsted, 2009, p4; Ofsted states that ‘The small sample size, however, means that generalisations should not be drawn from the findings’.

Conclusions

In reviewing all the evidence we collected, its most significant feature is its consistency. No single piece of evidence we have collected has acted as a smoking gun which puts the existence of widespread illegal exclusions beyond reasonable doubt. There is, however, a large and convincing body of evidence pointing in the same direction, as detailed above. Moreover, we have found little or no evidence which contradicts the points we have made. We consider it extremely unlikely that all of this evidence is uniformly unreliable. All the evidence we have collected, and that collected by others, indicates that a small but significant minority of schools and local authorities are acting in a number of ways which are unlawful. This is likely to affect thousands (rather than millions) of individual children and their families, in hundreds (rather than thousands) of schools.

This activity breaks down into the following broad categories:

- pupils excluded without proper procedures being followed; exclusions are usually for short periods, but may be frequently repeated for the same child, meaning that this child misses substantial amounts of education
- pupils placed on extended study leave or part time timetables, or at inappropriate alternative provision, so as to remove them from school
- pupils persuaded, some label it coerced, to leave their current school, either to move to another school or to be educated at home under threat of formal permanent exclusion should this course not be followed
- schools failing to have due regard to their legal responsibilities regarding the exclusion of children with Statements of SEN or LAC
- schools failing to have due regard to their responsibilities under the Equality Act 2010 with regard to disability, gender or ethnicity
- local authorities failing to deliver their legal responsibility to provide, or to assure the provision of, full time alternative education for excluded children from the sixth day of exclusion

This illegal activity appears to impact disproportionately on those groups which are also most likely to be formally excluded, particularly children with SEN. On any analysis of the statistics that are available, and the testimonies given to us, it often appears to happen most to those children who are least likely to know their rights, or to have adults in their lives who know the law, or who can and will support these rights on their children’s behalf. One – clearly very exercised – professional told us:

“This doesn’t happen to white middle-class kids. That’s how schools get away with it.”

We are aware of widespread accusations that both established chain and newer converter Academies, and some established faith schools, especially in the Secondary sector, are more likely to engage in this sort of illegal activity than maintained schools are. It is important to state here that we have found no evidence to support these claims.

We do, however, consider that Academies’ governance and accountability arrangements could, in the longer term, make it less likely that any school’s illegal activity will easily or quickly be identified and addressed, as ever more schools – in coming years probably the majority – become Academies or Free Schools. This will potentially be compounded by the fact that schools deemed Outstanding

will not regularly be inspected or called to account. This represents a potential flaw in the school accountability regime. We explore this issue later in the report.

The remainder of this report examines why the phenomenon of illegal exclusions happens, what can be done to identify cases, and how they can be prevented.

Why do Illegal exclusions take place?

In this section, we examine the reasons why the illegal exclusions examined above are allowed to continue, given that there is overwhelming evidence that they happen in a significant minority of schools, and that the law is clear and communicated clearly to schools through statutory guidance.

We consider that it is very rare for schools systematically, wilfully or knowingly to break the law, in order illegally to rid their schools of pupils deemed to be undesirable elements, or cynically to seek to improve their league table positions. There may be a very small number of such schools – for example, the school described above which, it is alleged, coerces parents into ‘electively home-educating’ their children in Year 11, while being under no illusions that these children will receive an adequate standard of alternative education. However, it is likely that these cases are very few in number.

The vast majority of schools act in what they consider is the best interests of all the children on their rolls. The majority of head teachers clearly have no desire to game the exclusions process. However, from the evidence we have gathered in two years’ work on this Inquiry, the fact remains that a significant minority do appear prepared to act illegally.

We consider, having taken as much evidence as possible into account, that the majority of illegal school exclusions take place for a combination of reasons.

There is a profound and troubling lack of awareness of the law on these matters, among school leaders including governors, and a school’s parents and children alike. This can lead to illegal exclusions taking place by accident. Although this illegal activity may be inadvertent, it is nonetheless unacceptable. Head teachers and governing bodies have a shared statutory duty to ensure their schools act within the law at all times.

Separately, some schools knowingly act illegally in what they believe to be the best interests of all the children on their roll – believing either that the law is wrong, or given how they are governed and held to account, that it does not apply to them. In some cases, such exclusions may even be done with the approval or encouragement of parents, to avoid the stain of a formal exclusion on their child’s record and after a period of hard work between them, the child and the school.

Some other schools, it is clear from their evidence, reluctantly and with regret, exclude children illegally, feeling they have no alternative. Their evidence indicates they do this after long experiences of a lack of resources and support for children for whom they are trying, but struggling, to do their best.

We consider these factors are exacerbated by unintentional gaps in the governance and accountability regime for schools. Simply put, in this year’s detailed examination of this subject we have found that no public body, with the possible exception of Ofsted, which by the nature of its remit and resourcing inevitably visits most schools infrequently, considers the proactive identification

of illegal exclusions is within their remit. This means illegal exclusions are unlikely to be identified, because nobody is either looking for them, or responding to any complaints that might be made.

Where these exclusions are identified, they are unlikely to be addressed. We have indeed found evidence that those who identify them and draw them to the attention of public authorities, including staff in such bodies as Parent Partnership or other statutory support services, can either be ignored, or criticised for rocking the boat, rather than what they are actually doing: carrying out their legal duties on children’s and families’ behalf.

Finally, where illegal exclusions are identified and pursued, there is no meaningful sanction for schools. Therefore it is clear that there is no disincentive on them to act in the same way in the future.

This section examines each of these contributory factors, and proposes ways in which the system as a whole could address this issue. Our intention is two-fold:

- to make it less likely that illegal exclusions will take place in the future
- to make it more likely that any exclusions which do take place are identified and acted upon

Awareness of the Law

We have found evidence of widespread lack of awareness and understanding of the law regarding exclusions. This lack of awareness exists – perhaps understandably – among children and their parents. However, less understandably, it also appears to exist to a troubling degree among teachers and school leaders.

As part of NFER’s *Teacher Voice* survey, we asked whether teachers knew what constituted legal and illegal activity with regard to exclusions. They were asked to state whether the following activities were legal:

- formal fixed-term exclusions
- formal permanent exclusions
- encouraging some children to move schools, without recording such a move as a permanent exclusion
- encouraging parents to educate their children at home as an alternative to permanent exclusion
- recording pupils as ‘authorised absent’ or ‘educated elsewhere’ when the school has asked them not to come in to school
- sending pupils with statements of SEN or medical needs home when their carer/teaching assistant is unavailable
- sending pupils home for any period without recording it as a fixed-term exclusion

For the sake of clarity, the first two bullets of this list are legal, provided that schools administer them correctly and have due regard to their additional responsibilities to certain groups (as set out above).

The third may, in some cases, be legal, as part of a well-run system of managed moves. In other cases, these may be illegal, with undue pressure being brought to bear on parents and young people to coerce them to move school. Unfortunately, without a detailed examination of individual cases, it is often impossible to distinguish between the differing types of case.

The other bullets above represent different types of illegal activity. The results are set out in Table 2.

Table 2: Teachers awareness of the law

All teachers		Weighted Column%
Can you say whether or not it is in accordance with the statutory guidance for a school to formally exclude pupils for a fixed-term for reasons of poor behaviour?	In accordance with the statutory guidance	82.50%
	Contrary to the statutory guidance	1.40%
	Don't know	16.10%
Can you say whether or not it is in accordance with the statutory guidance for a school to formally exclude pupils permanently for reasons of poor behaviour?	In accordance with the statutory guidance	68.00%
	Contrary to the statutory guidance	7.10%
	Don't know	24.90%
Can you say whether or not it is in accordance with the statutory guidance for a school to encourage some pupils to move to a different school, without recording such a move as a permanent exclusion?	In accordance with the statutory guidance	13.70%
	Contrary to the statutory guidance	52.20%
	Don't know	34.20%
Can you say whether or not it is in accordance with the statutory guidance for a school to encourage parents of some children to educate them at home, without recording such a move as a permanent exclusion?	In accordance with the statutory guidance	3.30%
	Contrary to the statutory guidance	64.90%
	Don't know	31.80%
Can you say whether or not it is in accordance with the statutory guidance for a school to record pupils as 'authorised absent' or 'educated elsewhere' when the school has encouraged them not to come into school?	In accordance with the statutory guidance	3.00%
	Contrary to the statutory guidance	72.90%
	Don't know	24.10%
Can you say whether or not it is in accordance with the statutory guidance for a school to send pupils with statements of SEN home when their carer/teaching assistant is not available because the school is unable to meet their needs?	In accordance with the statutory guidance	3.20%
	Contrary to the statutory guidance	64.30%
	Don't know	32.50%

All teachers		Weighted Column%
Can you say whether or not it is in accordance with the statutory guidance for a school to send pupils with medical needs home when their carer/teaching assistant is not available because the school is unable to meet their needs?	In accordance with the statutory guidance	5.80%
	Contrary to the statutory guidance	55.60%
	Don’t know	38.60%
Can you say whether or not it is in accordance with the statutory guidance for a school to send pupils home for any period without recording it as a fixed-term exclusion?	In accordance with the statutory guidance	2.70%
	Contrary to the statutory guidance	68.30%
	Don’t know	29.00%

While the majority of teachers asked gave correct answers to these questions, there was still a troubling uncertainty on legality and illegality among teachers. In particular, the very high proportion of teachers who answered “don’t know” to these questions is a cause for concern.

For example:

- Around a third (31 per cent) third of teachers did not know whether it was legal to encourage a parent into educating their child at home.
- Around a quarter (24 per cent) of teachers did not know whether it was legal to falsify attendance records for a child who had been asked not to attend school.
- More than a third (39 per cent) of teachers did not know whether it was legal to send children with a statement of SEN home when their carer or teaching assistant was unavailable.

These worrying figures are backed up by evidence from focus groups carried out for this Inquiry by NFER.

Although all teachers who took part in the groups were aware that the exclusion process was governed by legislation and that schools had to act in accordance with the law, there was less clarity on the specific requirements.

In most cases, there was a presumption that the school’s approaches to and policies on exclusion would be lawful – that is, teachers assumed that school leaders would ensure that their school was compliant with legislation, so all they had to do was follow the schools procedure, rather than inform themselves of the guidance.

In at least one instance, staff noted that their school had only learned, through experience, that their actions had been illegal via challenges from parents. One teacher said:

“You’re legal until somebody says you’re not.”

A non teaching professional told researchers:

“I’d like to think a lot of the [schools in the local authority] were fully clued-up on the guidance. But [...] there are some that slip through the net. And they will do their own thing. They will still tell parents ‘come and collect your child’. Parents will phone me about it and I’ll say ‘Go back to the school and find out if this is a formal exclusion’. ‘If the school cannot tell you that it is a formal exclusion then it’s an unofficial exclusion and your child needs to go back into school’. And you know what, most often than not, kids are allowed back in school because they’ve been reminded of the guidance which they should have known about in the first place.”

In “*They Never Give Up On You*” we set out how knowledge of exclusions law and guidance was also very sparse among children and their parents.

Numerous witnesses told the Inquiry they had encountered excluded children whose families did not know what their rights were. They were unable to tell when a school was acting unreasonably or unlawfully. Parents reported to us, often in a resigned manner, that their children, often with SEN, were sent home for a day here and there, or sometimes much longer, without notice, for minor incidents, without being recorded as an exclusion. They were not aware that this is illegal, and they had never been told their or their children’s rights. In our evidence gathering, the impression from parents and young people was that in dealing with these symbols of authority, they trusted schools and head teachers to act reasonably, in good faith and within the law. They were generally reluctant to challenge schools’ authority to act:

“They know the law – or claim to, and I don’t. I had no idea that what they were doing was illegal.”

– Parent of excluded child, London

This sentiment was echoed by the students themselves. One told the Inquiry (when asked if she knew what schools were allowed to do on exclusions):

“Schools can do what they like, can’t they?”

In our second year of evidence gathering, we found more evidence of this lack of knowledge of young people’s rights.

CASE STUDY – SOUTH LONDON Pupil Referral Unit

In one particularly upsetting example, we met a group of teenagers in a PRU in London. We had been briefed by leaders at the PRU that the group contained a mixture of young people who had been permanently excluded from school, and others who were at the PRU on a short-term ‘respite’ basis, with the intention that they would return to their schools after a term. It became clear in the course of our discussion with the young people that those who had been permanently excluded were not aware of that fact. All those we spoke to were under the impression that they would be returning to their original schools. It was only as a result of this conversation that a number of these young people found out that they had, in fact, been permanently excluded and removed from their schools’ rolls.

These findings demonstrate a clear need for further work to be done to increase awareness of the law on exclusions. **We recommend that all schools should, as a matter of course, publish their behaviour policies prominently on their website. Where they do not already contain**

information on exclusions, they should be amended to do so. This information should include information on the rights of children and their parents, as set out elsewhere in this report. These rights should also be issued to all parents alongside home-school agreements.

There is a potential further role in this for school governors. Repeatedly, witnesses to the Inquiry have stated that governing bodies are neither equipped nor willing to provide effective challenge to head teachers when it comes to exclusions, either formal or informal. We therefore recommend that governors be empowered to provide such a challenge.

We recommend that governing bodies be required to nominate a member to have overall responsibility for behaviour and exclusions, in the same way that they do for LAC, SEN and other issues. This governor should have a specific remit to examine the school's policy and practice on behaviour management, including exclusions, and should receive mandatory training to support them on this. Governing bodies should have a responsibility to review the school's behaviour policy on an annual basis, as they do with numerous other school policies, and a responsibility to ensure that it complies with the law.

Alongside this report, we publish a short film, aimed at children and young people, summarising the law on exclusions. This will be available on the Children's Commissioner's *YouTube* channel. We will be working with other organisations to publicise this film with children at risk of exclusion.

The Response of Statutory Agencies

We consider that the response of statutory agencies, whether local or national, to illegal exclusions, is inadequate

At no point did we encounter any organisation proactively seeking either to identify or address illegal exclusions.

When meeting education leaders, whether local, regional or national, we made a point of asking the same question: Whose job is it to identify and prevent illegal exclusions? Responses to this question varied. However, on no occasion did the organisation being asked state that it was, or even that it ought to be, their responsibility.

A partial exception to this was Ofsted, who believe that the evaluation conducted as part of their regular programme of inspections would identify illegal exclusions in some cases. They have also stated, as discussed elsewhere in this report, that when such cases are identified, a school can expect this to affect the inspection judgement.

However, we do not consider that it is sufficient to rely on Ofsted. Only a small minority of schools are inspected in any given year, meaning that this method cannot be relied upon to identify all illegal activity. Indeed some schools – currently those which have previously received an overall rating of "Outstanding" – are now not routinely inspected by Ofsted.²⁴ Moreover we are not aware of any illegal exclusions having been uncovered in this way. Given this, and the clear evidence that such exclusions do take place, it is questionable whether this analysis is effective in identifying illegal activity.

²⁴ These schools are still, however, required to participate in Ofsted's programme of thematic surveys and may be inspected if monitoring data suggests sufficient cause for concern.

Ofsted is also neither equipped nor empowered to follow up individual complaints from parents or other interested parties in a timely fashion, unless the complaint is deemed to be a qualifying complaint under Ofsted's powers to investigate complaints against schools, which ought to be a key feature of any future intervention to prevent illegal exclusions. Finally, Ofsted and other bodies (such as the Local Government Ombudsman), which may have a useful role to play in identifying and responding to illegal exclusions, have had their powers and budgets reduced. This makes it less likely that such exclusions will be identified by any national regulatory or other statutory body.

We therefore recommend that Ofsted review its methodology for identifying illegal exclusions in the course of its normal inspection round, drawing on the findings of the work it is currently undertaking about children who are not receiving a full time education.

Separately, we recommend that Ofsted develops a method for ensuring that inspectors become aware of parental concerns regarding illegal exclusions. Ofsted should consider using the current review of the questions asked on the Parent View website as an opportunity to develop a robust mechanism for enabling parents to raise concerns.

Elsewhere, we encountered what can only be described as complacency or apathy from statutory bodies regarding this issue. Both local authorities and national bodies that we encountered and questioned appeared to assume that illegal exclusions happened only very rarely, and that they would find out about, and act on them if they happened.

These strategic leaders often reported to us a very different situation from that reported by practitioners in the same area, and by parents, young people and advocacy organisations. This mismatch between the system leaders' understanding and the reality of what is reported as happening on the ground by the people to whom it is happening, is a matter of significant concern.

In one extreme case, we discovered that a local authority Director of Children's Services and other senior managers, and therefore the elected members of the authority, were collectively unaware of a long history of complaints made by the local Parent Partnership Service regarding illegal exclusions of children with SEN from particular schools in the authority. We could find no evidence of these complaints having been investigated by the authority. Even more seriously, we were informed that when the Director was made aware of these complaints by OCC during our visit for this Inquiry, the first response was to criticise the Parent Partnership Service for informing us, placing the staff concerned in an impossible position, given that the Parent Partnership Service model in place was one where the Parent Partnership Service staff were local authority employees. Parent Partnership Service staff are bound by the nature of their work to present such challenges, so that they can, at the very least, be investigated, and the situation for children in affected localities can be improved.

To some degree, the disconnect described here, between what is experienced on the ground and what is known at strategic levels, both in some local authorities and across many national bodies, may reflect an unintended consequence of the changing nature of the relationship between schools and other statutory bodies. Local authorities are moving rapidly from a position where they had at least some degree of legal power of direction over the majority of local schools and were a default provider of school improvement and intervention services, whether traded or untraded, to one of much less power and influence. In some cases, this loss has, in itself, been a means of ensuring that schools improve, particularly where school-to-school challenge is genuine, robust and critical. In other instances, the changes have been negative in their results. In these instances, schools are not supported, challenged, monitored or changed either by school-to-school or other means.

Ongoing changes in how funding for schooling is routed mean that a majority of state secondary schools are now Academies, with a minority remaining within the remit of local authorities. Reduced local authority budgets mean that local authorities often do not provide the same range of services as they did before, unless schools choose to buy back and thereby fund such on-going local services. Many local authorities therefore have less knowledge of what is happening in local schools. This is particularly the case given the expansion of Academies, where schools, along with their growing independence in other areas of their work, are also under no obligation to share information with the local authority.

Separately, it appears that some of the models of service provision emerging from the process of local authorities providing fewer services, have also led to a number of unintended consequences and conflicts of interest. Historically, those best able to identify illegal exclusions were employed at arm's length of the school, usually by the local authority. This gave them a degree of independence from schools and enabled them to raise concerns with those able to address them. Increasingly, however, these professionals, including education welfare officers, counsellors and education psychologists, are employed directly by the school. This puts them in a difficult position, as they would need to challenge directly the legality of methods used by their employer, and in many cases their line manager, if they identified concerns.

We recommend that all school-based professionals should have a clear route of accountability which enables them to draw problems to the attention of the relevant external body without fear of reprisals, if they consider that a school is illegally excluding pupils.

From our investigations, there is a clear gap in schools' accountability for illegal exclusions. Statutory bodies currently appear to feel no obligation to address this issue, and in many cases are not empowered or resourced to do so.

This means that parents, young people and even professionals are unsure of who to inform of concerns, and of what will happen as a result. There are (potentially legitimate) fears of reprisals for whistleblowing, and widespread scepticism of whether complaints will be taken seriously. All of these factors act as disincentives to report concerns.

Parents and young people have repeatedly reported to us that they feel let down by the system, and have lost faith in the education system to treat them fairly. In many cases, they feel that they are seen as a problem to be dealt with and that their rights to an education are not respected. Based on the evidence we have collected over two years, we understand how they have arrived at this view, and feel that it is unlikely to change if the status quo remains.

This is simply unacceptable and should be a source of shame to the whole of the education service. It means that children are losing out on education as a result of the actions, and inactions, of the very adults who are supposed to be responsible for educating them.

Linked to this, we are concerned that, although there is, through the statutory guidance on exclusions, a legally binding set of arrangements for schools, there is no proactive assessment of the extent to which these arrangements are being followed.

We recommend that this accountability gap should be closed. We consider that the legal position is, in many ways, already clear, but that the responsible bodies do not give due regard to their duties in this area.

For the sake of clarity, we consider that, for maintained schools, local authorities have responsibility for identifying and addressing illegal exclusions. For the increasing number of Academies (including Free schools) this responsibility rests with the EFA. We recommend that, as part of its response to this report, the DfE makes a clear statement that it agrees with this assessment, and expects these statutory bodies to give due regard to this issue. This includes an expectation of improvements to the timely and thorough investigation of any complaints made regarding illegal exclusions, and the imposition of appropriate sanctions where schools are acting illegally.

Where complaints processes within these bodies are poor, they should be reviewed and improved. We have found, for example, that it is extremely difficult to register a formal complaint about a school with the EFA. The systems which it has in place to do this are simply not fit for purpose.

Incentive structures and unintended consequences

A number of individuals and representative bodies who have given evidence to this Inquiry have expressed the view that illegal exclusions may be an unintended consequence of the accountability system and incentives in place for schools. One trade union representative told us:

“From the point of view of the head teacher, there must be a temptation to exclude illegally – it would be a completely rational response to the incentives in the system.”

In particular, some of those who have given evidence to the Inquiry have stated that the following factors interact to incentivise illegal exclusions:

A high-stakes league table and inspection regime

Both a school's results in public tests and examinations, and its performance against Ofsted's inspection framework, have significant consequences for head teachers and their schools. Head teachers can be rewarded for success, and punished for failure – even to the point of losing their jobs. Schools can, if they fail to hit floor targets and/or have their school placed in a negative Ofsted category, be converted to Academy status by a directive from the Secretary of State. It is clearly in schools' interests to do well. We agree that it is in the public interest to ensure that schools are fit for purpose, achieving all they can for their children, setting high and aspirational standards, and ensuring public money is well spent. However, some head teachers may choose to respond to the pressures that they perceive are on them to succeed by excluding those pupils who will not, or are unlikely to, contribute to the school's results. Elsewhere in this report we also cite evidence of pupils being removed from school for the duration of Ofsted inspections²⁵.

Publication of data on formal exclusions and funding for excluded children following the child

Data on formal exclusions are collected and published annually. A school will also lose the funding associated with any child which it permanently excludes. We are also aware that Ofsted see high levels of formal exclusions as being a cause for concern. Together, these act as disincentives for schools to issue formal exclusions, other than as a last resort.

²⁵ See evidence listed on page 26

Reductions in support services for schools

In recent years, and given the continuing economic and financial difficulties facing the country, there has been substantial downward pressure on budgets across the public sector. While the cash value of the Dedicated Schools Grant (DSG) has been protected, reductions elsewhere mean that it is now expected to pay for more aspects of a school's work. Over time, the real value of the DSG will also be eroded by inflation. While the introduction of the pupil premium will mitigate this in some cases, in others schools will continue to see real-terms reductions in their resources.

In parallel, continued downward pressures on local authority budgets mean that they make decisions which leave them less and less able to supply a number of services which they would previously have provided to schools in their area, whether on a part-traded basis or otherwise. In many areas, the local authority would previously have been both the holder of the statutory duty to ensure provision, and the only provider of these services. Schools have consistently reported to us that professional services such as Educational Welfare, Family Support and outreach or Educational Psychology, meant to be in place to help schools to deal with challenging students and their families, are now much more difficult to access than was previously the case.

This squeeze is a particular challenge where a local authority in a large rural county serves a scattered urban, suburban, semi-rural, coastal and rural population, where economies of scale are not sufficient to enable the market to mature as it might elsewhere, to enable professionals to work without a backstop of local authority funding. Witnesses to the Inquiry have expressed concern that, without this support, schools may be tempted to exclude more students than they previously did.

The lack of a meaningful sanction for illegally excluding a child

While the law regarding exclusions is clear, the consequences of a school breaking this law are not. A school may be named and shamed if this practice is identified, or may lose a judicial review if a family is successful in bringing one in the absence of a legally binding appeals process that would not necessitate a court case. However, there is no financial penalty should such practice be uncovered unless a case goes to law, the school lose the case, and court costs be awarded against the school. The school's league table place is also unaffected. Indeed, the removal of the affected children may actually improve a school's academic performance. We are encouraged by Ofsted's statement that it would probably award an inadequate rating to any school it finds to be excluding illegally. However, we do not consider this to be sufficient, for reasons set out earlier in this report.

The interaction between these factors gives cause for concern that some illegal exclusions may be an unconscious response to incentives present in the system. At the very least, it is worthwhile examining whether there are ways in which these perverse incentives can be mitigated.

We consider that the approach to exclusions currently being trialled in pathfinder projects across England may help in this regard. Schools will retain responsibility for the educational outcomes of all children on their roll, whether or not they are educated on site. This will give schools an incentive to keep children fully engaged and avoid exclusions (formal or illegal).

However, we consider that further action is necessary to remove the incentive to exclude illegally. The approach currently being piloted will have no effect on schools coercing parents to electively home-school their child, or to coerce them to move voluntarily to a different school.

We recommend that the following measures be considered so as to remove the potential incentive on schools to exclude illegally:

- **Any illegal exclusions which are found to have taken place should immediately be reported to Ofsted. Ofsted should record this information as part of its monitoring data on schools.**
- **Illegal exclusions identified by the EFA (in the case of Academies) or the local authority (in the case of maintained schools) should be reported to, and recorded by, the school's governing body. They should then form part of the evidence provided to the head teacher's annual performance review. This should also be dealt with as a disciplinary matter for the head teacher.**
- **Where a school is found to have falsified registers in order to hide an illegal exclusion, this is a criminal offence and should be dealt with accordingly. The head teacher should be referred to the National College for Teaching and Leadership for professional misconduct.**
- **Where a child has been identified to have been illegally excluded for a period of one month (either in a continuous period or as a result of repeated short-term illegal exclusions), the school should have a financial penalty imposed equal to the amount of funding it receives for that child annually.**

Areas for Further Examination

In “*They Go The Extra Mile*”, we set out our intention to conduct further work in the future as a result of issues which have arisen in the course of this Inquiry.

The education landscape has changed very quickly in recent years and will continue to evolve at a similar rate for the foreseeable future. Changes to school governance, along with changes to the extent to which schools are expected to act collaboratively, rather than competitively, mean that there is a risk that areas which are best dealt with by working together will be less likely to happen. Pressures on budgets, allied to immature markets in specialist support, also mean that there is a risk that they will be forced into going it alone and being less likely to access expert services.

Schools currently often have a collective memory of working together, developed over many years. This is often deeply embedded in custom and practice, with many key individuals still in post. It is, of course, possible that these arrangements will continue out of enlightened mutual self-interest across groups of schools, coupled with a continuing future role for the local authority as the statutory champion of the child. However, it is far from certain that this good practice will continue everywhere, or be developed where it has not previously existed.

We therefore propose to look at further developments in the relevant systems and practices in our next year of activity.

We also propose to examine the lessons to be learned in this area of inquiry, from the period of Grant Maintained schools in England in the early 1990s, and how school leaders at that time managed similar issues to those faced by converter Academies now.

Admissions and dealing with SEN/poverty/diversity

The relationship between exclusions and admissions was not part of the scope of this Inquiry. As a result, we have not included discussion of this issue in this report. However, it is an issue which was raised with us consistently by the majority of stakeholders who gave evidence to this Inquiry. Stakeholders repeatedly reported instances of schools attempting to game the admissions system to skew their intake and reduce the number of difficult children they have on roll. In particular, those giving evidence reported schools attempting to reduce the number of children they admitted with statements of SEN, with a recognised SEN but no Statement, with English as an additional language, or with proven eligibility for, and take up, of free school meals and therefore a low family income.

Specific accusations made to the OCC in the course of this work included:

- parents of children with SEN being dissuaded from applying for schools at information evenings, or being required to have an interview with the Head teacher in advance of application
- parents being told of expensive school trips which were compulsory and extremely expensive as a way of dissuading those on low incomes from applying
- uniform or appearance rules in some schools aimed at reducing the number of students from ethnic minorities
- school uniform being only available from one expensive supplier based some way away from the school; one parent described a uniform as costing “upwards of £300 with no flexibility from the school”

- schools attempting to refuse admission to children with statements of SEN, where the school has been named on the statement, as it would damage the education of others

Witnesses' contention is that this exclusion by admission is at least as common as other forms of discriminatory activity. If it happens, it is also equally illegal.

The admissions system has not been the focus of this work, and as a result we are not in a position to verify these accusations. However, we note that similar cases have been identified by the Schools' Adjudicator in her annual report²⁶, and in the recently published report by the Academies Commission chaired by former HMCI Christine Gilbert and sponsored by the Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA)²⁷.

Taken together, this body of evidence suggests that there is, at the very least, a case to answer on this issue. We therefore propose to study this aspect of the admissions system in our future work.

26 <http://www.education.gov.uk/schoolsadjudicator/about/a00199754/annual-report-of-the-chief-schools-adjudicator-for-england>

27 Academies Commission Report: 'Unleashing Greatness: Getting the best from an academised system' <http://www.academiescommission.org/academies-commission-report-unleashing-greatness-getting-the-best-from-an-academised-system/>

Annex A

Powers of Inquiry of the Children’s Commissioner (From Children Act 2004.):

“(1) Where the Children’s Commissioner considers that the case of an individual child in England raises issues of public policy of relevance to other children, [s]he may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues.

(2) The Children’s Commissioner may only conduct an inquiry under this section if he is satisfied that the inquiry would not duplicate work that is the function of another person (having consulted such persons as he considers appropriate).

(3) Before holding an inquiry under this section the Children’s Commissioner must consult the Secretary of State.

(4) The Children’s Commissioner may, if he thinks fit, hold an inquiry under this section, or any part of it, in private.

(5) As soon as possible after completing an inquiry under this section the Children’s Commissioner must –

(a) publish a report containing his/her recommendations; and

(b) send a copy to the Secretary of State.

(6) The report need not identify any individual child if the Children’s Commissioner considers that it would be undesirable for the identity of the child to be made public.

(7) Where the Children’s Commissioner has published a report under this section containing recommendations in respect of any person exercising functions under any enactment, he may require that person to state in writing, within such period as the Children’s Commissioner may reasonably require, what action the person has taken or proposes to take in response to the recommendations.

(8) Subsections (2) and (3) of section 250 of the Local Government Act 1972 (c. 70) apply for the purposes of an inquiry held under this section with the substitution for references to the person appointed to hold the inquiry of references to the Children’s Commissioner.”

About the UN Convention on the Rights of the Child

The UK Government ratified the UN Convention on the Rights of the Child (UNCRC) in 1991. This is the most widely ratified international human rights treaty, setting out what all children and young people need to be happy and healthy. While the UNCRC is not incorporated into UK law, it still has the status of a binding international treaty. By agreeing to the UNCRC the Government has committed itself to promoting and protecting children's rights by all means available to it.

The legislation governing the operation of the Office of the Children's Commissioner requires us to have regard to the UNCRC in all our activities.

In relation to school exclusions, and in particular to addressing inequalities in the rates of exclusion for different groups, the articles of the UNCRC which are of most relevance are:

Article 2: All rights apply to all children whatever their ethnicity, gender, religion, abilities, whatever they think or say, and whatever type of family they come from.

Article 3: The best interests of the child must be a primary consideration in all actions.

Article 12: Every child has a right to express their views regarding all matters that affect them; and for these views to be taken seriously.

Article 23: Children with a disability have a right to special care and support to live a full and decent life, with dignity and independence.

Article 28: Every child has the right to an education [...]. Discipline in schools must respect children's human dignity.

Article 29: Children's education must develop each child's personality, talents and abilities to the fullest.

