

## **1. We welcome the opportunity to provide advice to inform the Children, Young People and Education Committee's inquiry into the range of Education Otherwise than at School (EOTAS).**

The Equality and Human Rights Commission (EHRC) is a statutory body established under the Equality Act 2010. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at the UN level as an 'A status' National Human Rights Institution in recognition of its independence, powers and performance.

The Commission in Wales ensures that the EHRC's policy-making in Great Britain reflects the needs of Wales and delivers our programme of work in Wales.

## **2. Equality and Human Rights Commission's priorities for education in Wales**

The education system plays a vital role in establishing and reinforcing the shared values that provide the foundation for a society in which all individuals are respected and have the opportunity to flourish and there are good relations between different groups. For that reason, we advocate for a human rights approach to education. HRE is any learning that develops the knowledge, skills and values of human rights. It includes education about human rights, through human rights and for human rights. Education about human rights improves individuals' understanding of how they should be treated and how they should treat others as part of an open, democratic society, and the legal protections they can rely on to exercise their rights. Education through human rights is about adopting a rights-based approach to the school environment. Education for human rights encourages individuals to adopt the attitudes and behaviours of respecting, protecting and promoting human rights in their daily lives.

Children are given special human rights protection by the United Nations Convention on the Rights of the Child (UNCRC).

The UNCRC has a number of Articles relevant to the issue of school exclusion, in particular:

- Protection of the child against all forms of discrimination or punishment (Art 2)
- In all actions concerning children, the best interests of the child should be a primary consideration (Art 3)
- A right for children, who are capable of forming their own views, the right to express those views freely in all matters affecting them. The views of the child should be given due weight in accordance with the child's age and maturity (Art 12)
- A right to education, on the basis of equal opportunity. School discipline should be administered in a manner consistent with the child's human dignity (Art 28).

The Welsh Government adopted the Convention as the basis for policy making for children and young people in Wales in 2004. The Rights of Children and Young Persons (Wales) Measure 2011, strengthened and built on the rights based approach of the Welsh Government to making policy for children and young people in Wales, placing a duty on all Welsh Ministers to have due regard to the UNCRC when exercising any of their Ministerial functions. Children's rights should be at the heart of considerations for EOTAS and we would recommend that an audit is carried out to assess all policies and frameworks around EOTAS to assess compliance with the values of the UNCRC.

There are a number of barriers to the fulfilment of children's rights in the UK, as highlighted in the Commission's submission to the Committee on the Rights of the Child (CRC) in April 2016. Gaps in educational attainment for pupils with some protected characteristics; identity-based and sexualised bullying, LGBT, abuse and harassment; mental ill-health, as well as the disproportionate use of exclusions experienced by certain groups of children are all areas of particular concern for the Commission.

One of the Commission's other priorities relates to ensuring that there are mechanisms for seeking redress for breaches of the Equality Act 2010 and Human Rights Act 1998 are made more accessible and effective.

### **3. Education other than at school: closely linked issues**

#### **Gaps in Data**

Despite the evidence set out below we would recommend that data is collected to understand the measures that prevent children leaving mainstream education and those who are reintegrated, to assist progress in

this area. This should not be limited to formal exclusion information and attendance at PRUs. It should include more detailed information about pupils who are not accessing the full school day or curriculum for any reason. Collection over a one week period during Welsh Government's annual census (PLASC) is unlikely to be appropriate in this area, where pupils may move to and from alternative provision at any time during the school year. Local Authorities should be required to track each pupil, including their protected characteristics and to use this when preparing equality impact assessments for strategic decisions about EOTAS provision in their area.

There is no requirement for data collection or analysis of;

- Complaints relating to EOTAS or alternative provision;
- Decisions of school governing bodies;
- Decisions of independent appeals following exclusions;
- Appeals linked to EOTAS provision to the Special Educational Needs tribunal for Wales (soon to be called the Educational Tribunal for Wales), either as discrimination claims or where this is part of an appeal about a statement for special educational needs.

Collection and analysis of this data is crucial in considering where pupils/parents/guardians are raising concerns about EOTAS provision. Welsh Government should be required to collect this data centrally, with each pupil's protected characteristics so that an equality impact assessment for the EOTAS framework can fully address all equalities implications.

Once the socio-economic duty is in force, there should also be similar data collection and assessments in both areas above to aid compliance with that duty.

### **School exclusions**

An Estyn evaluation found that provision for pupils at risk of exclusion or disengagement was most effective where local authorities, schools and pupil referral units (PRUs) worked together to meet the needs of pupils at risk of disengagement and to ensure that they remained in full-time education. In these high-performing areas there was a clear strategy and comprehensive provision to meet pupils' needs. This included school-based strategies, support from external specialists and placement at PRUs or other forms of provision. These areas tended to have lower overall exclusion rates..

Understanding and addressing the disproportionate use of exclusions experienced by certain groups of children is necessary when considering education other than at school. Excluding children from school, whether on a temporary or permanent basis, can seriously harm a child's attainment and future prospects.

If Wales is to make sure that every child is able to fulfil their potential, then it is vital that we understand why an increasing number of children are experiencing exclusions and why certain groups are overrepresented.

We raised the over-representation of certain groups in national statistics on exclusions in our state of the nation report on equality and human rights, '[Is Wales Fairer?](#)' report, which was launched in October 2018:

The consequences of formal exclusion from school, whether temporary or permanent, can be very serious. The high exclusion rate of pupils eligible for free school meals (FSM) has a negative impact on their attainment. Research with British children found an association between school exclusion and poor general health, prevalence of learning difficulties among children and poor parental mental health.

There were also consistently high levels of psychological distress among children who had experienced exclusion.

In 2015/16, there were 32.6 exclusions overall for every 1,000 pupils. The exclusion rate was particularly high for pupils with SEN, at 101.3 per 1,000, compared with 11.6 per 1,000 for pupils with no SEN. It was also high for pupils eligible for FSM, at 86.3 per 1,000, compared with 20.9 per 1,000 for those not eligible. Exclusion rates were lower for Asian pupils (5.4 per 1,000) and Black pupils (19.7 per 1,000) and pupils from Other ethnic backgrounds (9.4 per 1,000) than for White pupils (31.6 per 1,000) or those of Mixed ethnicity (31.3 per 1,000).

Exclusion rates increased from 30.2 per 1,000 in 2012/13 to 32.6 per 1,000 in 2015/16. Pupils with SEN saw a large increase in exclusions of 15.7 per 1,000, while the rate for pupils with no SEN fell by 2.1 per 1,000. The exclusion rate also increased for pupils eligible for FSM by 8.6 per 1,000, which was more than the increase of 1.7 per 1,000 for pupils who were not eligible. Exclusion rates fell for Asian pupils by 8.9 per 1,000 and for Black pupils by 10.7 per 1,000, while increasing by 3.4 per 1,000 for White pupils and by 7.7 per 1,000 for pupils from other ethnic backgrounds.

There is a link between special educational needs and disability (SEND) and poverty, with poorer children more likely to have SEND. The exclusion rates for children with SEND, and those in poverty, tend to be far higher than average. Data is not disaggregated for Wales.

We highlight the recent [report](#) by Samaritans Cymru, 'Exclusion from School in Wales, the hidden cost', which states:

We need to know more about the situation of children and young people who are not in education, its impact on them and what works to address it. We also need to act now on what we do know. We understand that experiences of childhood adversity, negative life events and the cumulative effects of stress are associated with

feelings of entrapment and hopelessness. Loneliness and isolation and the lack of belonging to a group, reduce the positive sense of belongingness we all need to experience; this springs from being an accepted member of society.

Samaritans Cymru's report refers to a UK study by the University of Exeter. This study found that exclusion from school was more common among children of lower socio-economic status, boys, and those with language difficulties, lower educational attainment or special educational needs. Family characteristics, such as poor parental mental health and engagement with education, also predicted exclusion. It also found that children who were subsequently excluded were more likely to have a clinically impairing mental health condition or a social communication problem, as well as involvement in bullying as a perpetrator or victim, and poor teacher-pupil relationships.

Any action on the range of EOTAS provision will need to consider Welsh Government's commitment to enacting the socio-economic duty this year.

### **Mechanisms for seeking redress**

In Wales, there are no specific mechanisms for redress when parents or pupils have concerns about EOTAS or alternative provision. Parents or pupils may be able to use individual school complaints procedures or local authority complaints processes. There is a formal mechanism for redress where there has been an exclusion from school for more than 15 school days, which firstly involves a committee of the school's Governing Body and secondly a statutory appeal to an Independent Appeal Panel. Each local authority is responsible for making arrangements for the Independent Appeal Panel and there is no process for coordination of procedure or training for Panels. Pupils and/or parents are not usually legally represented at either Governing Body or Independent Appeal Panel hearings or when making a complaint but may be supported by SNAP Cymru or other support organisations. Unless a pupil or parent specifically raises the Equality Act 2010 or Human Rights Act 1998, there is unlikely to be consideration of these issues by Governing Bodies, local authorities or Independent Appeal Panels.

In addition, the Commission ran a Legal Support Project across Great Britain to offer advice and funding to help individuals experienced discrimination to pursue legal claims. Between September 2017 and May 2018, the project focused on helping victims of discrimination in education to access legal support. During this time, a significant number of applications related to school exclusions (disability and race). Since September 2017 the Commission provided assistance to a child of Gypsy, Roma and Traveller (GRT) heritage permanently excluded from school as well as to four disabled children (one of whom was also of GRT heritage) permanently excluded for behaviour arising in consequence of their disability. In all of the above cases the Independent Review Panels quashed the decision to exclude, but only

after the parents of the children were legally represented at hearings at which Equality Act 2010 obligations were pointed out. This is usually the last stage of the process (unless judicial review is pursued). It would better for pupils if advice and support was provided at the earliest stage of decision making, to schools, or local authorities so that there is no delay in the concern being addressed and appropriate provision provided.

Although Welsh Government circular 011/2012 “Complaints procedures for School Governing Bodies in Wales” contains valuable advice for schools when dealing from complaints from pupils of any age, this is not reflected when a complaint is made to a local authority and is not reflected in the Welsh Government Exclusions Guidance no 171/2015. This Guidance refers only to complaints by pupils aged over age 11 jointly with parents; or over age 16. Welsh Government should ensure that children, young people and parents have appropriate mechanisms for redress in challenging decisions about alternative provision or EOTAS, including the right to be heard before a Governing Body Complaint or Exclusions Committee or Independent Appeal Panel. This should include access to legal assistance and, where appropriate, independent representation should be provided, in particular for looked after children and those with special educational needs. There should also be guidance for those hearing complaints or appeals to ensure that there is consideration of the Equality Act 2010 and Human Rights Act 1998, even if not raised by the pupil or parent.

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

If a disabled pupil is excluded for behaviour connected to their disability, this could be discrimination arising from disability unless the school can justify the exclusion as being a proportionate means of achieving a legitimate aim. An exclusion is unlikely to be justified in circumstances in which the school has not complied with its duty to make reasonable adjustments for that pupil. This is a complex area of law, particularly where a pupil has a disability which may involve aggressive behaviour. It was recently confirmed in the case of *C v Governing Body of a School [2018] UKUT 269 (AAC)* that regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128) violated the pupil’s rights under the European Convention of Human Rights. Before this case, the application of Regulation 4(1)(c) had previously resulted in schools excluding pupils on the basis that they did not have a disability because it fell within the exception of “tendency to physical abuse”. We would recommend that Welsh Government guidance is updated to reflect the recent case law and that local authorities provide advice and support to schools to ensure that they are fully able to consider the Equality Act 2010 and Human Rights Act 2010 when making decisions about alternative provision or exclusions.

## **Public Sector Equality Duty (PSED)**

Given the well-established over-representation of certain groups amongst those who are excluded or on alternative education provision, we believe it is important for Welsh Government to require schools and local authorities to gather this data as a way to demonstrate due regard to equality. Our research has previously found that schools have rarely considered exclusions policies and implementation to be part of their equality work, suggesting that their approach to the Public Sector Equality Duty is not always evidence led, or that they believe there are easier issues to tackle.

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

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

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

In 2017, the United Nations Committee on the Rights of Persons with Disabilities raised its concerns regarding the increasing number of disabled children in segregated education environments and ‘the fact that the education system is not equipped to respond to the requirements for high-quality inclusive education, particularly reports of school authorities refusing to enrol a student with disabilities who is deemed to be “disruptive to other classmates”’.

Amongst its concluding observations, the Committee recommended that the UK Government develop a comprehensive and coordinated legislative

and policy framework for inclusive education and provide data on the number of students both in inclusive and segregated education, disaggregated by impairment, age, sex and ethnic background, and on the outcome of the education, reflecting the capabilities of the students. The UN Convention on the Rights of Persons with Disabilities is clear that disabled people must not be excluded from the general education system (at any level) because of their disability (Art 24).

We have recommended to UN treaty bodies that the UK and Welsh governments should take further action on tackling the overuse and disproportionate use of exclusions on certain groups. We have recommended that: 'the process for providing alternative education to excluded pupils must be prompt, transparent and effective, and be in the 'best interests of the child.'

## **Data**

One significant area of concern is the growing number of reports of informal, illegal and de facto exclusions from school, which are unrecorded.

In addition, Article 2 of the First Protocol of the European Convention of Human Rights as set out in Schedule 1 to the Human Right Act 1998 provides that children have a right not to be denied access to the education system and sanctions, such as exclusions, are permitted provided pupils have access to alternative state education. We are concerned about reports that children are being encouraged into home education or alternative provision as a means to avoid a permanent exclusion. We also note that although some providers are now registered and inspected by ESTYN, this does not apply to all providers of alternative provision meaning many children are receiving education in alternative provision, which is not monitored or regulated. We would highlight the concerns raised in Estyn's report on EOTAS published in 2016 which highlighted the lack of local authority monitoring of provision, as well as other issues, including lack of Welsh language provision and difficulties ensuring that pupils receiving EOTAS access the expertise of the Child and Adolescent Mental Health Service (CAMHS).

While we know that certain groups of pupils are far more likely to face exclusions than others there is currently no intersectional data on exclusions. We believe that such data would provide a far more nuanced understanding of how certain characteristics (race, gender, socio-economic status, disability etc.) may combine to make certain groups of children more likely to be excluded than others. For example, it would be valuable to know the percentage of Gypsy, Roma, Traveller children who are excluded and who also have SEN/ALN to inform understanding of the multiple factors behind their exclusions.

## **Educational attainment**



We recommend that it is crucial for attainment issues to be considered and measured within EOTAS settings, as there is a data gap in terms of attainment levels for children in EOTAS. Our 'Is Wales Fairer? 2018' report sets out attainment data, which highlights concerns around groups of children and young people who are more likely to be in EOTAS and/or have experiences of exclusion from mainstream education.

## **1. Early years education**

In 'Is Wales Fairer? 2018', attainment in early years education was measured in Wales by analysing the percentage of seven-year-olds achieving the 'expected outcome' or better (as assessed by a teacher) at the end of the Foundation Phase.

Overall, 87.3% of children achieved the expected outcome in 2016/17, with girls (90.9%) outperforming boys (83.8%).

Children not eligible for FSM (90.1%) were more likely to do better than children that were eligible (75.9%). These gaps have narrowed slightly: between 2013/14 and 2016/17, overall achievement went up by 2.1 percentage points, and by more for boys (2.8 percentage points) than girls (1.4 percentage points), and by more for children receiving FSM (3.5 percentage points) than for children not eligible for FSM (1.5 percentage points).

Over the period 2015–17, attainment was substantially lower for children with SEN (57.8% achieved the expected outcome) than those without SEN (96.7%).

Around a quarter (24.0%) of children with autistic spectrum disorders achieved the expected outcome. Children with severe learning difficulties (5.0%) and children with profound and multiple learning difficulties (6.7%) had the lowest attainment.

Many impairment types saw a fall in attainment: children with physical and medical difficulties, those with hearing impairments; those with speech, language and communication difficulties; and those with behavioural, emotional and social difficulties.

In 2016/17, Indian children (93.2%) and children of mixed ethnicity (88.8%) achieved more highly than White British children (87.7%). The lowest percentage achievement was by Gypsy/Roma/Irish Traveller children (56.2%). Black (83.1%), Other White (78.1%) and 'Other' children (79.6%) also had lower attainment than the White British group. Most ethnic groups improved between 2012–14 and 2015–17, with White British children progressing by 4.1 percentage points.

## **2. School-leaving age**

The school system in Wales has been criticised for its poor performance. The OECD's Programme for International Student Assessment (PISA) ratings show that 15-year-olds in Wales are outperformed by those in England and Scotland. In 2015, students in Wales scored below the OECD average for science reading and mathematics, while students in England scored above the OECD average for science and reading, and around the average for mathematics.

Attainment at the end of compulsory education has been measured in Wales by the achievement of the Level 2 inclusive threshold, which requires the equivalent volume of five GCSEs at grade A\*-C, including English or Welsh first language and mathematics.

Overall, 54.6% of pupils in Year 11 achieved the threshold in 2016/17. A higher percentage of girls (58.8%) than boys (50.7%) did so. Only one in five pupils with SEN (20.6%) reached the threshold, compared with two-thirds of pupils without SEN (66.6%).

Attainment was particularly low for pupils with social, emotional and behavioural impairments, speech, language and communications needs, general learning difficulties, and moderate learning difficulties. Data was not available on pupils with severe or profound and multiple learning difficulties.

Only half as many pupils eligible for FSM achieved the threshold compared with pupils not eligible for FSM.

'Is Wales Fairer? 2018' found that the percentages achieving the threshold were highest for Indian and Chinese pupils. A higher percentage of Bangladeshi (65.2%) than White British pupils (58.9%) reached this level of attainment, compared with only one in five Gypsy/Gypsy Roma pupils (21.5%). Black (57.8%) and Pakistani children's attainment (59.7%) was close to the average.

### **3. Impact of poverty and social exclusion on educational attainment**

There is a clear association between socio-economic status and educational attainment across the UK. Even high-attaining children from disadvantaged family backgrounds are less successful later in life than those from better-off families, (Social Mobility and Child Poverty Commission, 2015).

Research found that the poverty attainment gap in Wales emerged as young as three, narrowed in primary school and then widened again in later years. By the age of 14, children living in poverty were well behind their more affluent peers.

Welsh Government data shows that around one in five children eligible for free school meals (FSM) did not reach the expected standard of development in language ability by the age of seven. The equivalent figure for children not eligible for FSM was around one in 12.

A Welsh Government report found a number of barriers to looked after children and young people (LACYP) achieving positive educational outcomes. These included the transient nature of LACYP's living situations, meaning support services were fragmented and continuity of support was poor. The stigma associated with being looked after was considered to be another barrier. It was noted that some professionals have low expectations of this group.

#### **4. Exclusions from school**

The consequences of formal exclusion from school, whether temporary or permanent, can be very serious. The high exclusion rate of pupils eligible for free school meals (FSM) has a negative impact on their attainment. Research with British children found an association between school exclusion and poor general health, prevalence of learning difficulties among children and poor parental mental health.

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#### **5. NEET (not in education, employment or training)**

In 2016/17, 7.4% of people aged 16–18 in Wales were NEET. Between 2010/11 and 2016/17, the percentage of people who were NEET dropped by minus 4.1 percentage points.

A study found that school attendance and attainment were more effective at predicting someone's NEET status than demographic variables such as FSM eligibility, SEN status or ethnic background.

## **6. Bullying**

There are no official statistics on bullying in Wales, although evidence exists from various sources. The Children's Commissioner for Wales explored children and young people's experiences of bullying to understand its causes and impact. Physical identifiers such as ethnicity, disability and gender were considered to be key factors in prompting bullying.

We strongly recommend that targeted action is taken to understand the link between bullying and children who are in EOTAS settings.