

# *Time for justice: safeguarding the rights of disabled children*

Article

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## **Title: Time for Justice: Safeguarding the Rights of Disabled Children.**

### **Abstract**

This article reviews two core strategies for safeguarding the rights of disabled children and examines the extent to which these processes advance justice for children in accessing an inclusive and equitable education. It evaluates the adequacy of the legal system in the face of increased evidence of exclusionary practices of schools, and the low uptake of the disability tribunal as a vehicle for redressing discriminatory practices. It reviews the work undertaken with schools to develop procedures and processes to support them in identifying disabled pupils in order to monitor the impact of their policies and practices. Although there were some limitations to this work it provided a platform from which to ensure that schools engaged with their responsibilities and understood more about the ways in which a child's impairment impacted on their participation in school-life. Instead we are dependent on the work of voluntary associations to safeguard children's rights.

### **Points of Interest**

- Disabled children experience many forms of disadvantage, including the practices that schools use to exclude them.
- Parents can use the legal system to appeal against this and other forms of discrimination; but few parents do.
- Statistics may reveal these inequities- but it requires the identification of disabled children.
- Previous government funded research to develop methods for schools to identify their disabled children and the barriers and supports to participation. This helped schools to recognize the difference between impairment and its impact, and understand the

importance of finding out the views of children and their parents. It also showed how many disabled children do *not* have special educational needs.

- The government continues to use special educational needs to find out the impact of their policies.
- There are many disabled children whose entitlements are overlooked and who have no good method for appealing against discrimination.

**Key words:** Disabled children; Rights; Disability Data collection; Discrimination Tribunal

## **Introduction**

This article concerns the systems that are in place to protect disabled children from discrimination and uphold their right to education. Discrimination can take many different forms; children may experience harassment or victimisation by staff or pupils, being treated differently and unfairly because of their impairment or health condition. Schools may fail to make reasonable adjustments to their policies and practices to facilitate their participation. Two key strategies that safeguarding children's rights will be evaluated. Firstly, parents and children's individual right of legal redress through the Family Court, one in which appeals are brought usually against a school or local authority. These processes and procedures will be examined together with evidence from Ministry of Justice statistics. The second system is a mandatory requirement by member states of the European Union to collect and monitor disability data in order to safeguard the rights of specific groups at risk of discrimination:

“..antidiscrimination law cannot be effectively implemented without collecting equality data because data are essential to measure inequalities, to target social policies and monitor implementation as well as to design remedies including positive action measures.” Open Society Foundations 2014 p5.

The method for data collection largely determines the way in which data can be used and this review will examine the evidence from previous major disability data collection trials in English schools prior to investigating current government practices for monitoring inequalities. Before evaluating these systems it is important to place their significance in a more global context and to examine the evidence that children require systems that safeguard these rights.

The Secretary General to the Convention on the Rights of Persons with Disabilities (UNCRPD) stated “(t)he scale and severity of the violations against [disabled children’s] rights, in all regions of the world, constitute a hidden emergency” (UNCRPD 2012 p1). It would be easy to position this situation as a development issue, given that four in five disabled children live in low income countries. Recent evidence suggests that those countries that might even position themselves as leaders in the disability rights field, employ a number of exclusionary practices. While the international gaze continues to fall on the challenges faced by low-income countries who experience a range of competing demands on their resources (Lang 2009; WHO/World Bank 2011), the inadequacy of provision in much wealthier nations is being exposed. For example, a national survey by a voluntary organisation in Australia of over 1,000 parents recently revealed how one in four disabled children has been refused school enrolment; over two thirds do not receive adequate supports at school and one in six are only offered part-time provision (CDA 2015). Following this revelation the Australian senate is currently carrying out an enquiry into access and attainment of disabled children and experiences of inadequate support. There are similar poor practices in England where children are being denied support and access to services. A recent report reveals how schools in England are deploying a number of illegal exclusionary practices, (Contact a Family 2013), ones that would not be included in official statistical reports, revealing the extent of the failure to meet disabled children’s needs. These data are

also reflected in a survey of families of children with autism where 1 in 5 children had been formally excluded and 2 in 5 informally, with parents being asked to collect their children from school in some instances for minor problems

“because he wouldn’t stop tapping his ruler on the table or because he would not play outside..” p11 (Ambitious about Autism 2014); or in another case:

“The receptionist of the school would ring at 8am to say my son couldn’t come in due to staff sickness. This was very unsettling for my son as he needed routine and structure and missed school..I had to take a lot of time off work..” Ambitious About Autism 2014 p6.

There is also a dire shortfall in services to support children with mental health needs “to the extent that some child and adolescent mental health services will only accept referrals when the young person has attempted to commit suicide at least once,” (Mattheys 2015 p 476). Schools are routinely denying children access to the opportunities that support their participation in education and through this disregard a fundamental child right.

Disabled children’s access to education needs to be situated within a wider discourse of disadvantage. In the UK four in every ten disabled children are living in poverty (The Children’s Society 2011). A review by Blackburn et al (2010) demonstrates that they are more likely than their peers to live in single parent families, in conditions of material hardship, with poorer health outcomes. Their families are more likely to be in debt and living in rented accommodation. Additionally they are more likely than other children to be bullied (Green et al 2010; Naylor et al 2012). They spend more time at home than non-disabled children (Beresford and Rhodes 2008) and their families report difficulties in accessing the services they need, to the point of causing 80% of families anxiety and stress (Brawn and

Rogers 2012). Disabled children are more likely to be abused than non-disabled children (Cooke and Standen 2002; Spencer et al 2005) yet their needs are less likely to be identified and in consequence they are less likely to be on the protection register (Ofsted 2012).

Disabled young people are less likely to leave school with qualifications or the prospect of employment (Burchardt 2005). Disabled children experience layers of disadvantage. This situation is not improving – disabled people are particularly vulnerable during times of recession. A recent Demos publication has indicated the financial impact of multiple cuts on the support that disabled people are eligible to receive (Demos 2013). Roulstone (2015) expounds on the way in which, in the face of austerity, there is a narrowing of the category of eligibility for disability related benefits, with a shift back to medicalised definitions in order to oust “faux disability”, “scroungers and spongers” of welfare benefit. We can see a parallel here to the shift in focus within the Code of Practice (DfE/DoH 2015) on joined up services for children disabled from birth, those for whom the impairment is more severe and more easily recognised. As we have seen, it is also reflected in access criteria for mental health services.

Research repeatedly confirms the way in which poverty impacts on the life chances of individuals, including their progress in school (Croll 2002; Bradshaw 2002; Branden & Gregg 2004; West 2007). The following quote from a parent illustrates the interlayering of disability and disadvantage:

“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.

I ended up having to fight for everything. I had a tribunal case for an amended proposed statement and a discrimination case happening at the same time. The situation caused problems within the family, work was impossible for me and my son suffered health problems and lost a lot of confidence. I was also very depressed but kept battling.

As a result my son was left without school for a year. Over this time my son's social skills decreased and he had a lot of problems re-integrating into a school environment and forming relationships with his peers." Contact a Family 2013 p2.

A reoccurring theme concerns children's formal and informal exclusion from school. While data are not available for *all* disabled children, children with special educational needs (SEN) account for 6 in 10 of all fixed term exclusions and 7 in 10 of all permanent exclusions (DfE 2015b). Indeed, pupils with a statement of SEN are *nine* times more likely than their peers to receive a fixed term exclusion from school and those with SEN but no statement are nine times more likely than their peers to be permanently excluded from school (DfE 2015b). Recent data from the Office of the Children's Commissioner also highlights how children with SEN are over-represented within the group of children who are illegally excluded from school (OCC 2013). Ferguson and Webber (2015) note that there is little academic research or discussion about "the most appropriate way to protect the rights and interests of pupils from these [excluded] groups," (Ferguson & Webber 2015 p21).

It is therefore particular timely to ask explicitly with respect to disabled children "How good are our safeguards?"

### ***Children and Disability Discrimination Legislation***

Starting with the first of two major mechanisms, set out in the United Nations Convention to advance the rights of children with disabilities, namely individual redress through anti-discrimination legislation. In England the high rate of exclusion of children with SEN “suggests, at the very least, indirect discrimination against disabled children contrary to the Equality Act 2010,” (Broach et al 2010, p 41). Further, the higher rate of bullying of disabled children is also indicative of harassment. We might ask the question: Is the legal system fit for purpose in safeguarding disabled children from such discrimination? To examine this situation it is helpful to understand the process by which parents can bring a case to a legal tribunal. If we take unlawful discrimination with respect to exclusion, a number of elements have to be established through evidence *submitted by the parents*:

1. That the child meets the definition of disability as set out in the Equality Act 2010 (DfE 2013);
2. That they have been treated unfavourably compared to other pupils, including a failure to follow due process; [where a pupil is excluded from school, the headteacher makes a decision giving the reasons for exclusion – either because of “serious breach or persistent breaches of the schools behaviour policy” or where “a pupil’s behaviour means allowing the pupil to remain in school would be detrimental to the education or welfare of the pupil or others in the school,” (DfE 2015 p6) and notify the parents of the pupil. The matter is also referred to the governing body within a strict time limit. The governing body then decides whether to uphold this decision or to reinstate the pupil, again in writing and providing reasons for this];
3. Whether treatment was appropriate to what the school was trying to achieve or whether a disproportionate means/treatment was used;
4. That there was failure to make appropriate adjustments- that a school has put in place all the strategies recommended to include and support the pupil;



5. That the schools discipline policy puts the pupil at a substantial disadvantage (more than minor or trivial); that the school could have done something to avoid exclusion.

The claim therefore rests on parents collating a considerable amount of detailed evidence.

However **none** of this will be considered by the tribunal if the pupil has a tendency to physical violence either as a standalone or, for example, as part of a condition such as ADHD or ASD. According to the Equality Act 2010, their condition cannot be treated as a disability, assuming that this was the reason for the exclusion (Hancox 2013 P v Governing Body p26). In effect this absolves the school from taking any responsibility for the child's behaviour, whether through inappropriate provision or support, or a failure to tackle bullying. Ironically a significant portion of the very children the Act was intended to safeguard are excluded by the conditions of the Act.

This may partially explain the low level of registered appeals. Out of 115 registered appeals in 2014-2015, 67 (58%) were actually decided at tribunal, the remainder were either withdrawn or conceded and 17% of the cases related to permanent exclusion (the other cases are unclassified). Of these 67, around half were upheld. Similarly of the 126 registered appeals in 2013-14, only 55% were decided by tribunal and in 2012-13 out of 135 registered appeals, only 50% were decided by the tribunal (Ministry of Justice 2013, 2013a, 2014, 2015). Notably outcome data is not available for these two years but if we examine that of the previous years it is apparent that typically less than half of cases are upheld.

Insert table 1 about here

It is difficult to further interrogate the data given the decreasing amount of information provided in relation to disability discrimination claims and the incompleteness of the data.

“Most of the appeals are uncategorised in their nature,” (Ministry of Justice 2013; 2014;2015). More analysis has been provided in the past, for example, statistics for 2009-2010 reveals that 28% of the claims were in connection with temporary exclusion, and data are provided with respect to ethnicity and legal representation for parents at these hearings. If we compare these data to those brought to tribunal in relation to the statementing procedures (or more recently the Education Health and Care plans) there has been a steady increase in the number of appeals from 1,161 in 1994 to 4,063 in 2014. Parents appear to be more likely to take action with respect to assessment and placement than they do in relation to discrimination. As Ambitious About Autism (2014) found:

“Many families of children with autism who experience exclusion from school tell us they are afraid to speak out, for fear that they will receive even less support if they are seen as trouble-makers” p7.

The law is not a perfect change agent. An example of an appeal to the Upper Tribunal of a case of the permanent exclusion of a 10 year old boy found that the First Tribunal had failed to identify the reasons why the boy was excluded and failed to investigate the issue of reasonable adjustments, whether the Governing body were right to conclude that these were in place. In short a failure “to identify the facts” (Hancox 2013 Para 73 p28).

In the face of these high demands and the low success rate of having the claim heard and upheld, it is unsurprising that there is a limited use of the system. We know from SEN Tribunals how stressful parents can find the proceedings leading to a high rate of withdrawal (Runswick-Cole 2007; SOS!SEN 2014). Moreover, the limited reporting of the data serves to render invisible the nature of the discrimination. We might put this alongside the more extensive and consistent reporting in the parallel special educational needs tribunals in relation to assessment and placement decisions, where data are clearly portrayed and

interrogated with a Ministry of Justice commentary in relation to changes and further analysis of the cause of appeals. In contrast there seems to be little concern in relation to discrimination.

### ***Monitoring Inequality through Disability Data Collection***

The failure of the legal system to safeguard individuals from discrimination and harassment makes it even more imperative that proactive systemic strategies are in place. Turning now to examine the place of disability data collection, which continues to be a highly contentious issue, (Moore 2015). National and International policy places this process at the heart of the movements for combating discrimination. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) provides direction to the collection of disability data (Article 31 UNCRPD 2009) in order that nations can report on their adherence to the principles and the effectiveness of their measures to eliminate discrimination. The World Health Organisation likewise makes recommendations for countries to develop national systems for collecting disability data (WHO/World Bank 2011), and, as we have seen, it is a mandatory requirement of member states of the European Union to collect disability data. More specifically in the UK the Children's Commissioner has identified the role of disability data in offsetting the poverty and disadvantage experienced by disabled children:

*Recommendation 54.* Data should be gathered on the number of children affected by disability and the nature of this disability. This will enable the UK Government and devolved administrations, local authorities and health boards to plan services for disabled children and their families more effectively.” OCC 2011p23

This quote highlights the important relationship between the collection of statistics and how they are used. The “ planning of services” requires slightly different data from that required in relation to anti-discrimination law of “measuring of inequalities,” or “monitoring the

outcome of changes in policy” (Open Foundation 2014). There have been longstanding attempts to create a framework for international comparisons, including those of the United Nations Washington Group for Disability Statistics, the World Health Organisation’s International Classification of Functioning, the European Commission’s Eurostats, and the OECD. These bodies have all set out to create an objective measure, one that can be used to gauge the progress of nation states towards effectively implementing antidiscrimination law. Although the impetus is apparent, progress is slow (Open Foundation 2014). Disability statistics are unlike other equality statistics in a number of ways and this in turn creates many challenges to their comparability over time and space.

Central to the UNCRPD is the recognition that disability is an “evolving concept” one that “results from the interaction between persons with impairments, and attitudinal and environmental barriers that hinders their full participation in society on an equal basis with others.”(Preamble UNCRPD 2009). This definition recognizes the fluid and contextual nature of disability, not a permanent, fixed, descriptor but one that is situational. Additionally, the disclosure of disability is a voluntary one. These conditions create a challenge for statisticians and those who seek to aggregate and disaggregate data and make comparisons across different settings and cultures. Moreover, where countries are successful in removing barriers to participation, figures for disabled people will fall. There will, therefore, be a changing data set. Those who successfully participate will no longer be part of that data set. Consequently, it may be difficult to discern whether data reflect the removal of barriers and the provision of appropriate support, a reticence to disclose disability, or a failure to develop robust measures. The rhetoric of objective and reliable data therefore need to be more carefully delineated to reflect the complexity of disability.

The collection of disability data and therefore by default, the identification of disabled children is a subject of great dispute. A central concern lies with the medicalization of

disability, a conflation between impairment and disability, and the vested interests of professionals to retain control over the categorisation process (Reiser 2003; Connor 2014). In contrast with this lies the recognition that for some parents at least, of the benefits of diagnosis when the impairment is recognized (Riddick 2002). Russell and Norwich (2012) for example describe the ways in which some parents' views were transformed by a diagnosis of ASD. They were able to "reconstruct what was once viewed as a negative label into a more positive one ... (it) changed world views concerning life and disability..." p239. It can also be a means to access resources and support. Pullin (2008) also writes about the ways in which disability may be viewed as a desirable status in that in the US, it provides a route to additional resources "a fall-back position in the face of inadequate teaching, funding and other resources." P104. We might conclude therefore as Rouse et al (2008) that "it would seem sensible to develop systems that have the capacity to understand difficulties in the social and educational context in which they occur." P266. This offers parents and children the opportunity to weigh up the relative benefits in deciding whether or not to disclose a disability.

### ***Disability data collection for schools in England***

In 2007 an opportunity for a systemic strategy to safeguard children's rights was provided when the government commissioned the first of a series of funded research projects to develop tools that schools could use to collect data on disabled children. This was a government response to the requirement for all public authorities to ensure that disabled people were being treated fairly as set out in the Disability Discrimination Act 2005. It also required authorities to measure their performance in delivering improved outcomes for disabled children. It formed one part of requirement for schools to be proactive in their provision for disabled pupils, through setting out their plans and strategies for enabling access. Although schools have routinely provided local authorities and central government

with data on children with special educational needs, the collection of data concerning disabled children at a local level was described at the time as “patchy” (Mooney et al 2008). Despite a statutory requirement for local authorities to keep a register of disabled children under the Children’s Act 1989, there were large variations in the definitions that were used and the voluntary nature of the registration led to partial data on which to gauge their performance. Indeed the government commissioned two additional studies, one to establish prevalence figures (Mooney et al 2008) and the other to understand variation in the prevalence between local authorities (LA), although notably despite the title, the focus of this report was children with special educational needs (Lewis et al 2010).

It could be said that this was a time of commitment for safeguarding the needs of disabled children. A number of government funded reports had detailed the multiple disadvantages that impact on disabled children (Audit Commission 2003; Strategy Unit Report 2005; Gray et al 2006; House of Commons Select Committee 2006) and a Disability Rights Commission report (Miller et al 2006) had indicated the importance of a robust data collection system as a first step in monitoring whether disabled young people were realizing their potential and to monitor the impact of enhanced services.

At the time the government commissioned the research, the aim was for schools to be able to provide data for the school census- thereby enabling the government as well as LA to meet their equality duties. In contrast to other methods of data collection, tools were devised for schools to collect information from both parents *and* pupils. This was new ground for census data and reflected a commitment to an interactional definition of disability. Pupil views were central in understanding the barriers they encounter as well as providing important information about what they found supportive. Unlike other measures of the time, the tools included self-report measures concerning the degree of impact experienced– teasing out the significant experiences from those which were felt to have a minor effect on daily life. The framework

was piloted with 74 schools and 10 local authorities (Porter et al 2008). Using these tools, revealed that the impact of an impairment or health condition was more likely to be experienced at school than at home, yet a quarter of disabled children did not have special educational needs. These included children with health, medical or mental health needs. Data from the children themselves suggested that some 16% of the 1,600 children who completed an online questionnaire had been struggling with aspects of school life for more than a year.

The researchers also investigated whether it was possible to gauge whether disabled children were making progress commensurate with their peers using the National Pupil Data-base. Those children without SEN were, in general, achieving as their mainstream peers, although there were concerns that a few children with the highest potential were under achieving, and that this was likely to go un-recognised given that their attainment was in-line with age related expectations. It was difficult to draw conclusions about the attainment of pupils in special schools (Porter et al 2008).

The largest threat to the robustness of the data was the variation in return rates between schools with some schools achieving an 80% return from parents and others just 10%. A variety of factors were possible contributors. Notably schools varied in the strategies they used to encourage and remind parents to return their questionnaires but this, in turn, likely reflected their commitment to the research and to a more positive school ethos concerning issues of diversity and difference.

The government commissioned a follow-up study with 49 schools across 11 local authorities which refined and streamlined the parent questionnaire and further tested the guidance and tools for schools to use with children (Porter et al 2010). Schools were provided with guidance on how to enter data about disabled children in an online summary report, emulating what would be required in census reporting. A sample of parents were interviewed

about their experience of completing the questionnaire and additional observational data was collected to understand further the differences between parental views of impact and those of staff in school. These measures were designed to ensure a valid method for collecting data that would enable public authorities to fulfil their duties.

In brief, the findings of this phase of the work confirmed the disjuncture between disability and SEN, best depicted as overlapping groups. Not all disabled children experienced difficulties in learning and likewise not all children with SEN were disabled, thereby revealing the inadequacy of current census data (Porter 2010). It also revealed the limitation of drawing conclusions based either on the nature of the child's conditions or the presence of additional needs as these measures don't necessarily equate to impact. For example, some parents of children with multiple needs report a minor impact of the impairment whilst those with a single need experienced limitations to participation in every aspect of daily life (Porter 2015). The study illustrated well the cultural and contextual nature of disability, the way in which the effect of impairment is mediated by the adjustments and supports available in both the home and school setting. The researchers also conducted observations in schools, including children where the returned information surprised the school. These largely served to explain differences between professional and parent views in that children unknown to school appeared engaged in class- their experiences invisible to staff. In some cases this was because the child did not attend when the impact was greatest, for example those with severe migraine or asthma. However there were also some children whose difficulties had been ignored by school and where in consequence no adjustments made. Instead the difficulties had been seen as characteristics of the child, such as getting easily distracted or frustrated.

Two factors, therefore, highlight the importance of this data collection process: firstly, the disconnection between disability and SEN, best seen as overlapping groups and secondly the invisibility for many schools of children with a variety of health and mental health problems.



As others have concluded, these children are simply not on teachers' radar and in consequence their entitlement overlooked (White 2015). Many schools were unclear who their disabled children were; they didn't have a routine method in place for finding about the experiences of children and the barriers and supports to participating in school. The feedback from schools suggested that the very process of data collection enabled them to understand the definition provided through the Equality Act 2010. They understood more about the barriers and support to learning and about the nature of disability (Porter 2015). The survey, designed for a particular purpose and context, provided an important first step in developing a dialogue with parents and pupils.

While the tools have been developed and extended for use in international contexts, they have not been used to provide census data. These annual data enable the government to analyse, monitor and develop policy with respect to raising standards of achievement, to inform the targeting of funding and hence provides a mechanism for monitoring issues of equity with respect to disabled pupils. The method shows small variation year-on-year, reflecting government priorities, with a justification for changes, so that in 2013 census specification in relation to disability it reported:

“This data item has previously been collected on a voluntary basis and the return rate has been low and this has impaired the Department's ability to conduct meaningful analysis of the prevalence and outcomes of this important cohort of children. As it is not felt that the continued collection of this data item on a voluntary basis would meet policy needs, the decision has been made to remove it from the Census in 2013. The Department is reviewing the situation with regard to the 2014 Census and considering whether to put the collection of Disability data on a mandatory basis with the benefit of an enhanced dataset.” DfE 2013a p 1.

However no item was included in 2014 census, nor in 2015 or for the 2016 census. In many respects the Annual School Census provides important insights into what aspects are areas of national concern. There is no mention of disability, nor of health in the 2015-2016 census. In consequence statistics relating to attendance and exclusion cannot be disaggregated to investigate inequities with respect to disabled children, only with respect to those with special educational needs. We might briefly compare this with the extensive pupil level categories with respect to ethnicity or spoken language, or the note with respect to gender “In exceptional circumstances, a school may be unsure as to which gender should be recorded for a particular pupil. Where this occurs, gender is recorded according to the wishes of the pupil and / or parent.” DfE 2014 p36. It appears that some equality characteristics are addressed in the data collection and others are not.

### ***Harmonisation of data***

In tandem to the funding of the Disability Data Collection in school studies was work by the Office for National Statistics on the harmonisation of disability. The main target of these changes was data collected through social surveys (White 2011) with the proposal of a set of questions and an introductory script to ensure that respondents did not equate the term with eligibility for Disability Living Allowance or a Blue Badge. The driving force was to enable the data from one survey to be directly comparable to another, thereby facilitating “benchmarking” against larger scale data. Notably it is seen as “improving international comparability” and meeting the demands of the European Union’s Statistics on Income and Living Conditions, (White 2011p3). While the measures include questions concerning the social barriers affecting participation, the target group is clearly an adult population, with adult activities listed in relation to restrictions on participation. The survey data are unlikely to directly inform the development of policies and practices, not least because the “user

group” is primarily bureaucratic. As a means of safeguarding disabled children it falls far short of previous methods.

In contrast to the situation in England, the Australian Government recently advised schools in a document entitled Nationally Consistent Collection of Data. This sets out guidance for them to implement a system that will provide information about the numbers of disabled pupils, the schools they attend and the adjustments that are made, referring the obligations under the Commonwealth Disability Discrimination Act (Australian Education Council 2015).

Although as a European policy report notes: “it has not yet been established which data sets can best be used to indicate inequalities and inform policy making,” (The Open Society p5) Australia reveals a commitment to generating the tools that are appropriate for children. In England the government have adopted a minimal adaptation to existing Household panel surveys one that serves external accountability but effectively reduces the need of others to embrace their responsibilities. In the most recent report on the extent to which the government is meeting its strategy for “Fulfilling Potential” it uses SEN data for children even though there is a clear awareness of its limitations:

“This proxy is not a good match. Firstly pupils with special educational needs have learning difficulties or disabilities that make it harder for them to learn than most pupils of the same age. These learning difficulties or disabilities may equate to a disability or may be barriers, either social or educational, which may not be considered a disability under the Equality Act definition. Similarly children with an impairment, who would be considered disabled under the Equality Act, may not be considered as having any special educational needs as their impairments do not create a barrier to education,” DWP 2014 p 5-6.

Despite their recognition of the inadequacy, progress in relation to government strategy is still being measured using inappropriate methods.

## **Conclusion**

The focus of this paper has been the processes and mechanisms for upholding the rights of disabled children with particular reference to exclusionary practices of school. Although much has been written on legal redress with respect to the inclusion of disabled children, much less attention has been given to exclusionary practices. Cole (2015) has assembled evidence to reveal the devastating effect that exclusion can have on the lives of young people, especially those with mental health difficulties. Moreover exclusion from education, both formal and informal, represents a failure in the provision of appropriate services and support. It contravenes Article 24 of the UNCRPD and contributes to the layering of disadvantage. However, as we have seen, the legal system has singularly failed as a method for protecting disabled children's rights and as a vehicle for individual redress. The Tribunal system is under-utilised to the extent that Ferguson and Webber (2015) have asked 'do parents understand exclusion to be a legal issue?' Equally it might be argued that it is a system unfit for purpose, requiring time, resources and detailed knowledge to pursue a claim. Moreover, if children feel that they don't know enough about their rights, then it is quite likely that parents don't either (OCC 2014). It embodies the premise that some children, by virtue of type of impairment, have an entitlement while others do not. It also harbours the principle that some protected characteristics are more important than others. As the Equality and Human Rights Commission (2014) pointed out:

“there can be situations where one child could be harassed because of race and one because of disability and the first child can seek compensation and injunctive relief, whilst the second child cannot”. P9

This echoes the experiences reported by disabled children that race is taken more seriously in school (OCC 2014). These individual legal mechanisms for the pursuit of entitlement are essentially reactive, contributing further to the experience of impairment.

The Disability Discrimination Act 2005 created an opportunity for a more systemic approach to ensuring that disabled children were treated fairly. It created the conditions for the development of a universal system for collecting disability data for children, one in which children could render their experiences visible – if they chose. It provided a vehicle for making schools, local authorities and the Government more accountable for monitoring the impact of their policies, practices and procedures on disabled children. However, competing concerns that the process placed further bureaucratic demands on schools, hostility to what could be seen as categorisation, yet also unease at basing statistical markers on the experience of disabled children and their parents, has led to what elsewhere has been described as “equality data paralysis,” (Open Society Foundation 2014 p6). While data on other protected characteristics are routinely collected within the school census, data on disability are not.

This is a missed opportunity. The methods provided the prospect of children having their say, for schools to learn about the barriers and supports to participation, and in consequence for a fuller understanding of the meaning of disability as the impact of an impairment. The development of a mandatory school based system of voluntary disclosure had much to offer. Instead there has been a tendency to use special educational needs as a proxy indicator (Open Society Foundation 2014, DWP 2012), a system open to the vested interests of professionals to confirm or deny eligibility for support. While the Children and Families Act (Great Britain

2014) requires local authorities to identify all children and young people in their area “who have or may have a disability” (Section 22) it proposes the use of data sets based on medical conditions, irrespective of the experience of impact. Schools are called on to publish information about “their arrangements for identifying, assessing and making provision for children with SEN.” For disabled pupils the information focuses on their admission, thereby ignoring processes that might support the identification of barriers and supports for children whose condition occurs after the point of school entry, and for whom experiences in school prove disabling. As Mittler (2015) argues “not to be counted can be considered as an extreme form of discrimination” p85.

There is a clearly discernible gap between the policy rhetoric and the experience of disabled children. For the purposes of reporting back to the European Union, the government have opted for a tool that is based around adult measures, an approach that does not serve to uphold the rights of the child.

While the government continues to espouse how they

“protect the rights of disabled people by:

- making sure UK government policies take account of the United Nations Convention on the Rights of Disabled People
- encouraging the use of the social model of disability which says that disability is created by barriers in society” DfE/GEO/ODI 2013

The outcome is far from enabling. If the framework for policies that uphold the rights of the child do not function in favour of them, they in turn have a disabling effect.

These conclusions add to the body of evidence that the UNCRPD has produced the “necessary but not sufficient” conditions to bring about change (Lang 2009). The UK

government have signed up to the optional protocol enabling direct appeal to the committee if their rights are infringed and this remains an avenue for empowered individuals to pursue.

In the meanwhile the responsibility for safeguarding children's needs falls to voluntary organisations. They have been proactive in drawing attention to illegal practices both here and in Australia where their action has been influential in setting up an official enquiry.

Voluntary organisations also have an important role to play in helping parents to understand the process and procedures for bringing a disability discrimination case to tribunal, an extension to their work with respect to admissions and assessment appeals. The growth of this sector, and our reliance on it reinforces the notion of disability as an object of charity. It is an anachronism that we should be reliant on charitable endeavours to uphold disabled children's rights. In the face of growing disadvantage, the UNCRC provides as Oliver and Barnes (2006) note an "illusion of equality," one that is experienced by disabled children who would like to know more about their rights and entitlements in order that they might challenge them (OCC 2014). Until that happens, society is singularly failing to create the conditions for justice for disabled children.

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