THE EDUCATION LAW FOR SCHOOLS CONFERENCE 2007

DISCIPLINE AND EXCLUSIONS

by Janys Scott QC

Discipline as an aspect of the right to education

Discipline is not a negative subject. The European Court of Human Rights described discipline as an integral, even indispensable, part of any education system[1]. Discipline is part of the process whereby a school seeks to achieve the object for which it was stablished, including the development and moulding of the character and mental powers of its pupils[2]. Policy on discipline cannot be separated from policy on learning and teaching[3]. Policy is not just a matter for Ministers and education authorities. Each school should have a discipline policy, which should be set out in the school handbook[4].

No person may be denied the right to education. This is enshrined in Article 2 of the First Protocol to the European Convention on Human Rights. Scots law goes a step further and gives every child of school age an express statutory right to education[5]. Conferring a right to education recognises the obligations of the state in terms of Article 28 of the United Nations Convention on the Rights of the Child. If discipline is integral to education, then the right to education implies the "right" to be subject to the discipline of education. As will be seen, this is consistent with the way in which the European Court of Human Rights has approached the second part of Article 2 of the First Protocol which requires the state to respect the rights of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. The requirement of respect applies to discipline as to other aspects of education.

The United Kingdom signed the First Protocol to the Convention in 1952 under reservation. The second sentence in article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure. For the purposes of the Human Rights Act 1998 the Convention takes effect subject to the reservation[6]. Section 17(1) of the Human Rights Act 1998 imposes a requirement that this reservation must be reviewed every five years. In July

---

[1] *Campbell and Cosans v United Kingdom* (1982) 4 E.H.R.R. 293.
[2] *Valsamis v Greece* (1996) 24 E.H.R.R. 294.
[3] See "Better Behaviour – Better Learning" Report of Discipline Task Group, July 2001.
[4] Education (School and Placing Information) (Scotland) Regulations 1982, SI 1982/950.
[5] Standards in Scotland's Schools etc. Act 2000, s. 1.
[6] See section 1(2) and 15(1).

2004 the Department of Constitutional Affairs decided there should be no change to the reservation at that time.

Matters may be different, were a case taken to the European Court of Human Rights, rather than argued in a domestic court. The United Kingdom sought to invoke its reservation in *Campbell & Cosans v United Kingdom* 4 EHRR 293. The Court noted[7] that "under article 64 of the Convention, a reservation in respect of any provision is permitted only to the extent that any law in force in a State's territory at the time when the reservation is made is not in conformity with the provision". The Education (Scotland) Act 1980 post-dates the reservation, albeit many, but not all of the provisions derive from the Education (Scotland) Act 1946, re-enacted in substantial measure in 1962. In *Belilos v Switzerland* (1988) 10 EHRR 466[8] the Court held that a reservation that was too vague or broad to determine its exact scope would fall foul of article 64. That criticism could be levelled at the United Kingdom's reservation in respect of education. In *Loizidou v Turkey* 20 EHRR (1995) 99 at para 76- 77 the Court noted that the power to make reservations is limited. The reservation is relevant in domestic proceedings, but may not be of assistance in Strasbourg.

Aspects of discipline

Certain types of discipline are proscribed by law. Pupils may not be subjected to corporal punishment. The United Kingdom fell foul of the European Convention on Human Rights when it permitted teachers to administer corporal punishment to pupils[9]. An amendment to the Education (Scotland) Act 1980 followed and in 1986 restrictions were imposed on corporal punishment in state schools[10]. That change was insufficient to prevent a further complaint to the European Court of Human Rights, this time from a pupil in an independent school[11]. The complaint was dismissed, but the Court made it clear that the state's obligation to secure children their right to education extended to independent schools and covered the administration of punishment.

Section 16 of the Standards in Scotland's Schools Act 2000 now provides that a teacher has no right by virtue of his or her position as such to inflict corporal punishment on a pupil. An attempt by parents in England to argue that their Christian belief meant that it would be a

[7] Para 37.
[8] Paras 52-59.
[9] *Campbell and Cosans v United Kingdom* (1982) 4 E.H.R.R. 293.
[10] 1980 Act, s. 48A, inserted by Education (No 2) Act 1986.
[11] *Costello-Roberts v United Kingdom* (1993) 19 E.H.R.R. 112.

breach of their rights not to be allowed to send their children to a school where corporal punishment was available, failed[12]. The House of Lords recognised that the ban on corporal punishment in schools did interfere with the parents' Article 9 rights to freedom of religion but the interference was necessary in a democratic society to protect children, whose rights were recognised in the United Nations Convention on the Rights of the Child.

Imposition of school detention is unlikely to be a breach of the Convention. Article 5 provides for a right to liberty, but not every restriction on freedom of movement will constitute a deprivation of liberty. The freedom of movement of small children is restricted for their own safety. A child may be held in a psychiatric ward without this constituting a breach of article 5[13]. A ten year old girl questioned by police and kept in an unlocked cell for two hours without being arrested or formally detained was not deprived of her liberty contrary to Article 5[14]. In the Canadian case of *M v R*[15] a pupil was instructed to go to the vice principal's office, where he was searched and drugs found in his sock. The Canadian Supreme Court declined to find he had been "detained", nor was there any unjustified interference with his private life.

A similarly sensible view has been taken of confiscation of property. A pupil is entitled to peaceful enjoyment of his or her possessions in terms of Article 1 of the First Protocol. A pupil should not be deprived of possessions except in the public interest and subject to conditions prescribed by law. This argues for clear school rules. If a pupil were to bring a dangerous object into school he or she may reasonably expect the object to be confiscated. A failure to remove the object is likely to constitute a failure of the duty of care towards other pupils and staff. There must be a reasonable relationship of proportionality between the confiscation and the aim being pursued[16]. This suggests that it may be difficult to justify permanent confiscation of valuable items, capable of safe return.

School uniform has been the source of controversy in recent years. In *R (on the application of SB) v Denbigh High School Governors*[17] a schoolgirl was not allowed to attend school dressed in a jilbab, as this was not part of the school uniform. The school's right to enforce a uniform policy was endorsed by the House of Lords. A school is to be afforded an area of judgment comparable to the margin of appreciation allowed by the European Court of Human Rights to states. A similar view was taken in the case of a pupil who wanted to wear

[12] *R v Secretary of State for Education and Employment, ex parte Williamson* [2005] UKHL 15; [2005] 2 AC 246.
[13] *Neilsen v Denmark* (1988) 11 E.H.R.R. 175.
[14] *X v Federal Republic of Germany* (1981) 24 DR 158.
[15] 5 B.H.R.C. 474.
[16] See *HMA v McSalley* 2000 SLT 1235.
[17] [2006] UKHL 15; 2007 1 AC 100.

a “purity ring” denoting her commitment to chastity before marriage[18]. Her school had a general ban on wearing jewellery. The policy was clearly prescribed, and served important functions that were legitimate and proportionate. The school did allow exceptions where the ban would impose a disproportionately harsh result, but was entitled not to make an exception in this particular case. The school uniform cases illustrate the general principle that article 9 of the European Convention on Human Rights protects the absolute right to hold a belief, but the right to manifest a belief is qualified.

Exclusion is a measure of discipline in schools. There is Scottish Executive guidance in relation to exclusion from school[19]. The guidance emphasises that exclusion is the most severe sanction and should generally be reserved for serious breaches of discipline or criminal behaviour. Individual education authorities are expected to produce their own local guidelines in relation to exclusion. Exclusion from school may be for a period of time, or may be permanent. In the case of a temporary exclusion the pupil’s name will remain on the school register. If the pupil is excluded permanently, his or her name will be removed from the register.

It is not always clear what amounts to an exclusion from school. An attempt to transfer a pupil to another school against the wishes of his parent has been treated as an exclusion from his original school[20]. In an English case a majority of the House of Lords considered that a headteacher had acted sensibly in requiring a pupil to stay at home, without formally excluding him, pending the outcome of a police investigation into a charge that he had acted with others in setting fire to school premises[21]. English legislation provides for exclusion on disciplinary grounds, but does not rule out the possibility of exclusion on other grounds. Scottish legislation applies, in its terms, to exclusion generally. It affords the possibility of challenge to exclusion.

Procedure relating to exclusion

Education authorities cannot exclude a pupil from school unless one or both of two conditions are fulfilled. These are:

[18] *R (on the application if Playfoot) (A Child) v Millais School Governing Body* [2007] EWCH 1698 (Admin).
[19] Scottish Executive Education Department, “Exclusion From Schools In Scotland: Guidance to Education Authorities Circular 8/03”.
[20] *Proudfoot v Glasgow City Council* 2003 SLT (Sh Ct) 23.
[21] *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363.

(a) they are of the opinion that the parent of the pupil refuses or fails to comply, or to allow the pupil to comply, with the rules, regulations, or disciplinary requirements of the school; or

(b) they consider that in all the circumstances to allow the pupil to continue his attendance at the school would be likely to be seriously detrimental to order and discipline in the school or the educational well-being of the pupils there[22].

The first of these two conditions relates to actions by the parent. A parent has a duty to provide efficient education suitable to the child's age, ability and aptitude[23]. If a child is excluded from school because the parent refuses or fails to comply with the rules, regulations or disciplinary requirements of the school, he may be prosecuted[24]. The second concerns actions by the pupil, that are seriously disruptive.

The procedure for exclusion is prescribed by law. On the day on which a decision to exclude is taken the parent must be informed orally, or in writing, of the decision and of a date within the next following 7 days when a person will be available to discuss the decision to exclude the pupil. That person may be the head teacher of the school, or another teacher, or an official of the education authority[25]. Within the eight days immediately following the decision to exclude the authority must give certain written intimation to the parent[26]. The information should include the reasons for the exclusion. These may be brief. Neither the decision, nor any reasons that may be provided for the decision, should be seen in the same light as reasons for a judicial or *quasi* judicial decision[27]. It may be helpful if the authority gives an explanation of why they consider that there is a ground for exclusion, but it has been considered sufficient for the authority simply to indicate the ground, in terms of the regulation[28].

A decision to exclude a child from school may be referred to an appeal committee[29]. Where a pupil is over school age, he or she has the sole right of appeal. In other cases the parent may appeal. A pupil of school age, who has legal capacity may also appeal[30]. The test of legal capacity is whether the pupil concerned has a general understanding of what it means

[22] Schools General (Scotland) Regulations 1975, SI 1975/1135, r. 4.
[23] 1980 Act, s 30(1).
[24] 1980 Act, s 35(2); *Wyatt v Wilson* 1994 SLT 1135.
[25] SI 1975/1135 r. 4A(1).
[26] SI 1975/1135, r. 4A(2).
[27] *Glasgow City Council, Petrs* 2004 SLT 61.
[28] *S v City of Glasgow Council*, 2004 SLT (Sh Ct) 128.
[29] 1980 Act, s. 28H.
[30] 2000 Act, s. 41.

to instruct a solicitor[31]. This is an unfortunate test as there is no legal aid available for a child to be represented before an appeal committee. Solicitors are not therefore necessarily involved in appeal committee hearings. Further, it is not clear whether a child with capacity may appeal in place of the parent, or both have simultaneous appeal rights. Given the parent's duty to provide education, it would be logical for the child's right to appeal to be in addition to the parent's right, rather than in substitution for it.

There is no time limit specified in the legislation within which an appeal should be made, but when an appeal is made, the committee must hold a hearing within one month, or they will be deemed to have refused the appeal[32], with the result that the appellant may appeal to the sheriff. The appeal committee may confirm, or annul, the decision of the education authority. If it confirms the decision to exclude the pupil, it may modify the conditions for the pupil's readmission to school[33]. The committee has no power to vary the length of the exclusion. The committee must notify the appellant and the authority in writing of the decision and the reasons for it[34]. If the appeal committee annuls the decision to exclude, or modifies the conditions for the pupil's readmission, then the authority must comply[35]. The authority has no right of appeal, although there may be scope for judicial review of the committee's decision.

Use of education appeal committees has been controversial. They were criticised by the Scottish Committee on the Council on Tribunals in their 1999/2000 Annual Report, who referred to the process as "often seriously unsatisfactory". In 2004 the Executive commissioned George Street Research to carry out interviews with parents whose appeals had been heard by an appeal committee. The research highlighted that for many parents appealing to an appeal committee was a dispiriting experience, and most felt the system was unfair and worked against them. There was found to be a "serious imbalance of power" between the local authority and parents. Appeal committees have neither the appearance of independence from the education authority, nor the appearance of impartiality. In 2006 the Executive consulted on the use of appeal committees, prompting some hope of improvement in the system. That hope has thus far been disappointed.

[31] Age of Legal Capacity (Scotland) Act 1991, section 2(4A) and (4B).
[32] Education (Placing in Schools etc. – Deemed Decisions) (Scotland) Regulations 1982, SI 1982/1733, r. 5(1)(a).
[33] 1980 Act, s. 28H(2).
[34] 1980 Act, s. 28H(3).
[35] 1980 Act, s. 28H(4).

A parent, or pupil who is a young person, or pupil with legal capacity, may appeal from the appeal committee to the sheriff[36]. The legislation does not limit the rights of appeal to the person who instigated the original appeal to the appeal committee. The procedure on appeal to the sheriff is identical in a number of respects to the procedure which applies to placing requests. The education authority may be a party, but the appeal committee may not be a party. The appeal is by way of summary application. It must be lodged with the sheriff clerk within 28 days from receipt of the decision of the appeal committee. There is a rebuttable presumption that the decision was received the day after it was posted, unless posted on a Friday or Saturday, in which event it will be presumed to have been received on the following Monday. The sheriff may hear a late appeal, on cause shown. Appeals are heard in chambers[37]. The sheriff may confirm, or annul, the decision of the education authority and may, if confirming the decision to exclude the pupil, modify the conditions for the pupil's readmission[38]. The sheriff cannot vary the length of the exclusion[39]. The sheriff has a discretion as to the expenses of the appeal. The decision of the sheriff is final[40]. There can be no further appeal, but there is scope for judicial review[41].

There has been considerable disparity in the approaches taken by sheriffs towards exclusion appeals[42]. Some have allowed appeals where the appeal committee has made an error of law, such as failing to give reasons. Others have made an error on the part of the appeal committee a precondition of considering the merits of an appeal. One approach is to have a full re-hearing on the merits, which is consistent with the sheriff's role in relation to an appeal following refusal by the appeal committee of a placing request. Other sheriffs have declined to look at the facts. The variety of approach was considered by Lord Menzies in *Glasgow City Council, Petrs*[43]. Lord Menzies pointed out that the sheriff's decision required to be directed towards the original decision of the education authority, not the decision of the appeal committee. The education authority must therefore be allowed to place material before the sheriff to show that their decision was justified. The material could be in the form of parole evidence from the head teacher or other members of staff, but could take other forms. It would be open to the appellant to test the material and to place contrary material

[36] 1980 Act, s. 28H (6).
[37] 1980 Act, s. 28F(2), (3), and (4).
[38] 1980 Act, s. 28H(7).
[39] *F v City of Glasgow Council*, 2004 SLT (Sh Ct) 123.
[40] 1980 Act, s. 28F(8) and (9).
[41] *Glasgow City Council, Petrs* 2004 SLT 61.
[42] See *Inderhaugh v Grampian Regional Council; Crawford v Strathclyde Regional Council; Mackie v Grampian Regional Council; McDonald v Grampian Regional Council; Kelly v Dumfries and Galloway Regional Council*, 1999 FamLR 119.
[43] 2004 SLT 61.

before the sheriff. In other words the appeal should be directed towards the merits of the education authority's decision, rather than matters of procedure.

Lord Menzies decision has gone some way towards resolving the question of the correct approach. He approved *obiter* the approach taken by the sheriff in *Wallace v City of Dundee Council*[44]. In that case the sheriff determined that he was acting in a judicial rather than an administrative capacity. He could not therefore refuse the appeal merely because he was satisfied that the education authority was entitled in the exercise of their discretion to exclude the pupil. He required to be satisfied that the decision of the education authority was justified in all the circumstances of the case. On the other hand he was not entitled to substitute his own view of the matter for that of the education authority. The exercise was similar to an appeal against revocation of a firearm certificate by a chief constable[45]. This approach has since been followed in the sheriff court[46]. When presenting their case to the sheriff the authority has not been restricted to matters mentioned in their letter setting out reasons for the exclusion.

An education authority is obliged to keep a record for every pupil at a state school[47]. Where the record contains information relating to the decision to exclude the pupil, it should also contain information with respect to the decision of any appeal committee and of the sheriff on any appeal. The parent, or the pupil if he is a young person, must be informed of the terms of the entry. The record should be used only for the purpose of supervising the pupil's educational development and giving advice and assistance to, or in relation to, the pupil. Disclosure is confined to persons authorised by Scottish Ministers or the education authority. If a decision to exclude is annulled then the regulations relating to pupils' progress records cannot be construed as authorising disclosure of the contents of any part of the record which mentions the decision to exclude the pupil.

Exclusion of disabled pupils

The Disability Discrimination Act 1995, as amended by the Special Educational Needs and Disability Act 2001, imposes a duty on education authorities not to treat a disabled pupil less

[44] 2000 SLT (Sh Ct) 60.

[45] See *Hamilton v Chief Constable of Strathclyde*, 1978 SLT (Sh Ct) 69; *Rodenhurst v Chief Constable, Grampian Police*, 1992 SC 1; *Jackson v Chief Constable of Tayside Police*, 1993 SCLR 160 (Notes).

[46] *F v City of Glasgow Council*, 2004 SLT (Sh Ct) 123 (a decision arising from the incident that gave rise to the decision of Lord Menzies in *Glasgow City Council, Petrs* 2004 SLT 61); *S v City of Glasgow Council*, 2004 SLT (Sh Ct) 128.

[47] SI 1975/1135, r. 10.

favourably and a duty to make reasonable adjustments to ensure that disabled pupils are not placed at a disadvantage. These duties are explained and illustrated in a Code of Practice for Schools. It is unlawful to discriminate against a disabled pupil by excluding the pupil from school, whether permanently or temporarily[48]. If a disabled pupil can show that his exclusion arises as a result of discrimination then the decision to exclude may be reduced under the 1995 Act[49].

Proceedings for relating to unlawful discrimination should generally be commenced in the sheriff court. They may be brought by any person who has title and interest to enforce statutory duties under the 1995 Act[50]. This means that an action may be brought by a parent as legal representative of a child under 16, a child of 16 or more, or a child under 16 who has legal capacity. A child who has a general understanding of what it means to instruct a solicitor has legal capacity[51]. A claim must usually be made within six months of the date of the discrimination, although the sheriff may consider a claim out of time where it is just and equitable to do so[52]. Action under the Disability Discrimination Act 1995 appears to be an alternative to an appeal under section 28H of the Education (Scotland) Act 1980. Any action by a parent will be taken as the child's legal representative, with the result that legal aid may be available on the basis of the child's means, rather than the parent's means[53].

In *A v East Ayrshire Council*[54] a pupil assaulted a member of staff, following an incident in the playground. The pupil was diagnosed as suffering from attention deficit hyperactivity disorder, oppositional defiance disorder and Asperger's syndrome. The sheriff found that the pupil was disabled and that his behaviour was related to his impairment. He had been treated less favourably than a child who was not disabled. The education authority claimed not to know that the child was disabled, but the parent was able to show that knowledge of the disability could reasonably be imputed to the authority. The authority did however succeed in establishing that the less favourable treatment received by the child by virtue of his exclusion was justified. The authority had not therefore discriminated against the pupil in terms of the 1995 Act[55].

---

[48] Disability Discrimination Act 1995, s. 28A(4).

[49] 1995 Act, s. 28N(3) provides that the remedies available in proceedings of this nature are those which are available in the Court of Session other than an award of damages.

[50] 1995 Act, s. 28N(1) and (2).

[51] Age of Legal Capacity (Scotland) Act 1991, section 2(4A) and (4B).

[52] 1995 Act, s. 28N(4) and (5), sch 3, para 10.

[53] *Cf* cases where the right to appeal is limited to the parent in his or her own right; *N.S. and F. S. v The Scottish Legal Aid Board*, [2007] CSOH 116.

[54] 2006 FamLR 112.

[55] 1995 Act, s. 28B(1).

Less favourable treatment can only be justified if the reason for it is both material to the circumstances of the particular case and substantial[56]. Determining whether there is justification requires a balancing exercise. The authority has to show that the unfavourable treatment was justified in all the circumstances, including the interests of the school and of the disabled pupil[57]. The authority will not generally be able to show justification of the treatment, if they have failed without justification to comply with their duty to take reasonable steps to ensure that disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled[58]. This means that the authority will generally be required to show that they have taken steps to prevent discrimination taking place, before they can plead that a discriminatory exclusion was justified. They will not usually be able to show that the steps they took would have prevented the exclusion, but if there has been a failure to take reasonable steps, they will only avoid a finding of discrimination if they can show that otherwise justified treatment remained justified, despite the failure[59].

The UK Government has just completed a consultation exercise in relation to discrimination law. They included in the issues for consultation the possibility that discrimination in education cases should be moved from the sheriff court to the Additional Support Needs Tribunal. One intention of the review is to simplify the law relating to discrimination. Something more radical than moving discrimination cases from the sheriff to the Tribunal may be required to achieve this objective, particularly in relation to exclusion from school.

Education of excluded pupils

If an appeal against exclusion is allowed then the education authority is statutorily obliged to comply with a decision of the appeal committee annulling the decision to exclude a pupil or modifying the conditions subject to which an education authority have excluded the pupil from school[60]. There is no express requirement to comply with the decision of the sheriff, but it may be taken that this is implied. Reduction under the Disability Discrimination Act 1995 of a decision to exclude should have the same effect.

In England the requirement to reinstate certain pupils has resulted in teachers refusing to teach that pupil. The House of Lords has held that industrial action by teachers unwilling to teach a disruptive pupil is capable of being a trade dispute. A claim on the part of the pupil

[56] 1995 Act, s. 28B(7).
[57] *Olchfa Comprehensive School Governors v E*, [2006] EWHC 1468, [2006] ELR 503.
[58] 1995 Act, ss. 28B(8) and 28C.
[59] *Olchfa Comprehensive School Governors v E*, [2006] EWHC 1468, [2006] ELR 503.
[60] 1980 Act, s. 28H(4).

was dismissed[61]. The House of Lords recognised that it may be necessary to make special arrangements for the instruction of a reinstated pupil. This may occur when staff decline to teach the pupil, or there may be difficulties in relation to that pupil's contact with fellow pupils. A regime in which the reinstated pupil is barred from contact with other members of the school community is likely to be treated as reinstatement, on the basis that the pupil has resumed his or her status within the school[62]. The education authority will have resumed its obligations towards the pupil.

It is not a breach of a pupil's right not to be denied education, in terms of article 2 of the First Protocol to the European Convention on Human Rights, for a pupil to be excluded from school, provided the pupil has access to other educational facilities[63]. The right to education does not confer a right to education at a school of the pupil's choice[64]. Excluded pupils retain their right to education, both in terms of the Standards in Scotland's Schools etc. Act 2000[65] and as a function of the Convention.

Where a pupil is excluded from school, or withdraws in circumstances where he or she would have been excluded but for the withdrawal, the education authority must provide school education for that pupil without undue delay[66]. The responsibility for making the provision falls on the authority for the area of the school the pupil has been attending. The education may be provided in a school under their management. Alternatively the authority may make arrangements for the pupil to receive school education in another school, the managers of which are willing to receive the pupil. This may be an independent school, for which the authority may meet the fees, or a school under the management of another authority. Special arrangements may be made for the pupil to receive education elsewhere than at an educational establishment. While the education authority have responsibilities towards excluded pupils, parents too remain responsible for providing education to the child[67].

---

[61] *P (A Minor) v National Association of School Masters/Union of Women Teachers*, [2003] UKHL 8; [2003] 2 AC 663.
[62] *R (L (A Minor) v Governors of J School*, [2003] UKHL 9; [2003] 2 AC 633.
[63] *A v Head Teacher and Governors of Lord Grey School*, [2006] UKHL 14; [2006] 2 AC 363.
[64] *R (on the application of SB) v Denbigh High School Governors*, [2006] UKHL 15; [2007] 1 AC 100.
[65] 2000 Act, s. 1.
[66] 1980 Act, s. 14, as substituted by 2000 Act, s. 40.
[67] 1980 Act, s. 30.

Exclusion from independent schools

The legislation relating to exclusion does not apply to children who attend independent schools. Provision of education in an independent school generally rests on a contract between the school and the parents. An exclusion may be challenged if it occurs in breach of an express, or implied, term of the contract. Fairness in dealing with a matter such as exclusion may however be an implied term of a contract between an independent school and the parent of a pupil[68]. Fairness is a flexible principle and depends on the circumstances of each case. Remedies in respect of an unlawful exclusion will however be limited to those which apply to a breach of contract. The court may make a declaration that the removal is unlawful and an award of damages, but it is unlikely that a private school could be ordered to reinstate the pupil.

The Disability Discrimination Act 1995 extends to independent schools. The proprietor of an independent school is responsible for ensuring compliance with the Act[69]. Exclusion from a private school may constitute unlawful discrimination, under the same conditions as apply in state education. The remedies available are limited, as the court cannot make an award of damages[70].

Janys M Scott QC.

This paper was originally delivered on 21 September 2007 at a Conference organised by **CLT Scotland**, and is reproduced with their kind permission.

[68] *Russell Gray v Marlborough College*, [2006] EWCA Civ 1262, [2006] ELR 516; see *also L v Incorporated Froebel Educational Institute*, 2000 WL 33348541.
[69] 1995 Act, s. 28A(5) and sch. 4A.
[70] 1995 Act, s. 28N(3).