

19 October 2020

Sent by email to: IRAL@justice.gov.uk

Amanda Spielman
Her Majesty's Chief Inspector

Dear Sirs,

I refer to the Independent Review of Administrative Law and its call for evidence for reform to the process of judicial review.

As Her Majesty's Chief Inspector of the Office for Standards in Education, Children's Services and Skills (Ofsted), I was informed of the call for evidence and asked to consider potential feedback. Having consulted my legal department, I believe Ofsted has experience and evidence that may be useful to the IRAL Secretariat, and I have therefore included our responses to the questionnaire below.

Section 1

Questions

1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

Question One: In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?

Ofsted primarily experiences challenges in the context of inspections – for example a school, college, local authority, children's home, nursery or childminder that disagrees with Ofsted findings and seeks amendment(s) to a report. On occasion Ofsted also sees challenges to policy, although this is rarer.

In the former case, judicial review can on occasion lead to delay to report publication (for example where the claimant seeks an interim injunction restraining publication). When this happens, a report may not be published until several months after the inspection of a particular provider. This necessarily means that those who rely on these reports (such as parents and learners) will not receive them in good time. This can be of significant concern where, for example, an inspection identifies safeguarding concerns. This can also mean that urgent action may be delayed, for

example, the making of an academisation order by the Department for Education or decisions on continuing funding by the Education and Skills Funding Agency.

That said, Ofsted accepts that this is a consequence of the right to judicial review and in fact has recently amended its complaints procedure to ensure that, in most cases, complainants will not need to seek injunctive relief to prevent publication of a report before a final decision is made on a complaint.

For this reason, in Ofsted's opinion, these aspects do not generally impede the proper or effective discharge of its functions. Substantively, Ofsted considers that the judicial review function properly balances the rights of those seeking to challenge with deference to Ofsted as an expert regulator.

To put the above into context, Ofsted does not receive many claims relative to its volume of inspections. In the last three business years Ofsted made more than 190,000 inspections and received 2,656 complaints. From all this activity we have received just 18 judicial review claims.

Question two: In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?

Ofsted believes that the prospect of being subject to judicial review does not hamper its ability to make decisions, and that the risk of a future challenge incentivises robust and thorough policy- and decision-making. However we recognise that it may make Ofsted more risk averse and slower to formulate policy than it might be without the current form of judicial review.

Ofsted has generally found that pre-action correspondence provides an effective means of rebutting allegations of unfair or unreasonable inspection findings, as we can normally evidence secure inspection findings and thorough quality assurance. In the cases that do still proceed to a full hearing Ofsted is most often successful, and generally recovers reasonable costs, so provided that the evidence is secure, the potential costs of a claim do not tend to affect decisions. Cases which Ofsted has lost have generally provided useful clarification on new and difficult areas of law, such as the Equality Act.

Question Three: Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?

Before September 2020 Ofsted published reports as soon as possible, as we deem prompt publication to be in the public interest to ensure third parties can read and rely on our reports. This has led on occasion to claimants seeking an interim

injunction to prevent publication. It should be noted the threshold to obtain an injunction is high and is met in only very rare cases. Overall very few injunctions are sought (only nine in the last three years).

As noted in the answer to Question 1 above, our changes to our complaints procedure show how we as a regulator have adapted within the current constraints of judicial review to reduce costs and court time to promote fair process.

However, in some instances the provider has applied to court for an injunction preventing Ofsted from alerting third parties to the concerns identified. This can frustrate the working of government and the potential safeguarding of students as we cannot communicate appropriately with the Department of Education or other departments like the Regional Schools Commissioner. Ultimately this can fail to deal appropriately with the balance between protection of children and the interests of the provider

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

No.

Section 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

Ofsted has no comment on this question.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

From Ofsted's perspective, the decisions and powers subject to judicial review are clear. The challenges Ofsted receives most frequently seek to prevent publication of inspection reports or are challenges to complaint outcomes. Ofsted also occasionally receives challenges to new policy or frameworks. Ofsted does not consider any of these decisions should not be subject to judicial review.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear

From Ofsted's perspective, the process is very clear.

Section 3 - Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

Yes; in fact as set out above, Ofsted has replicated the injunction process by putting in place a revised complaints procedure in which inspection reports are not normally published until the outcome of the "Step 2" formal complaints process. This may lead to some short delays to publication, which may be extended where legal proceedings are started, but protects the interests of the complainant/claimant and Ofsted.

Ofsted does not have any issue with the time for a claimant to lodge a claim, as the claimant will know very early the contents of the inspection report and therefore whether they wish to challenge its contents. Further, if the claimant waited until the deadline the report would already have been published. It is therefore not only the judicial review timeline that encourages early application, but the Ofsted report publication timetable.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

Ofsted does not consider that they are too lenient, as when we are successful we usually recover a sizeable proportion of our legal costs. Ofsted operates an inhouse legal team and uses Counsel at panel rates which reduces legal costs. However, on the relatively rare occasions in which Ofsted has been required to pay the other side's costs, these have been significant even where the case has not progressed that far.

For this reason, some form of faster, more cost-effective tribunal process for smaller judicial review claims may be appropriate, although Ofsted has not considered this in sufficient detail to give a formal view.

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

In addition to the above points on legal costs Ofsted has considered internally the scope of costs of a complaint or claim as against the basic costs of the inspection itself. These can be extensive, and of course the costs awarded in the case may reflect the legal fees incurred, but not the substantial investment of inspector time drawn away from frontline inspection – itself a cost to the public purse.

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

The usual remedy sought is that the inspection report is quashed, and a further inspection and new judgment is made. This is relatively rare for Ofsted but seems a fair and sensible outcome for both parties

However, in other instances the court has directed that a report should be amended rather than quashed. This can also provide a middle way to satisfy both parties. In other instances, a court decision has prompted Ofsted to make amendments to a report, rather than quashing it altogether or returning for a new inspection.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

Ofsted considers that having strengthened its internal complaints procedure and built in a publication delay as noted above, we have minimised the need for judicial review. However, given the serious adverse financial (for some providers) and other consequences of a poor inspection outcome, we can never expect to eliminate such challenges entirely, no matter how well we inspect.

Claimants can also refer matters to the Parliamentary and Health Service Ombudsman, although this would not prevent the report being published, which is often the claimant's goal.

As referred to above, it is possible that some form of faster, more cost-effective tribunal process for smaller judicial review claims may be appropriate, although Ofsted has not considered this in sufficient detail to give a formal view.

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

We have a number of pre-action matters that are not pursued after our Pre-action Protocol (**PAP**) response and therefore don't initiate proceedings. We consider that settlement after our PAP response occurs as a natural response (seen in all areas of litigation) of the potential claimant being provided a comprehensive response to the issues they raise, and being confronted with the reality of trial action and the risks and costs of this process. Some cases do settle before the substantive hearing, but few cases settle 'at the door of court'.

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

Ofsted's complaint procedure has recently been revised to ensure that inspection reports are not normally published until the outcome of the Step 2 formal complaints process. In many cases this will remove the need for an injunction and hopefully therefore the need for court proceedings. It will not of course remove the need for an injunction at the end of the complaints process if the claimant is unhappy with the outcome, or the potential need for such in a challenge to policy.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

Ofsted has not seen many of these issues. Generally, providers bring a challenge, although there has been an increase in challenges being brought by a child via their litigation friend, often their parent. Likewise, unions have threatened challenges on behalf of their members. However, no issue with standing arises in Ofsted's view. We have also seen a relative increase in applications to intervene by interested parties, which have varied in their success but have been of assistance in some cases.

I trust the above is useful. Please do not hesitate to get in touch with Ofsted if further information or clarification is required.

Yours sincerely

A handwritten signature in black ink that reads "Amanda Spielman".

Amanda Spielman
Her Majesty's Chief Inspector