

# 11KBW

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## Challenges to Ofsted Decisions

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# Topics to be covered

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- ❖ Background and non-litigious options
- ❖ Interim restraint of publication of report
- ❖ Note on time limits
- ❖ Some substantive issues:
  - Not adjudicating complaints
  - Consistency with previous reports

# (1) Background and non-litigious options

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Inspection regime:

- Childcare
  - Childcare Act 2006, Part 3 (esp. ss.49-50, 51D-51E, 61E-61F)
  - Early Years Foundation Stage (Welfare Requirements) Regulations 2012
  - Statutory Framework for the Early Years Foundation Stage
- Schools – Part 1 of Education Act 2005
- FE and HE Colleges - Education and Inspection Act 2006, ss.125,133

# Non-litigious resolution: Complaint to Ofsted

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**Stage 1** – Raise concerns with Lead Inspector

**Stage 2** – Formal complaint

- No later than 10 working days after incident of concern or report publication
- Won't re-consider judgment of serious weaknesses/Special Measures

**Stage 3** – Internal Review

- No later than 15 working days of Stage 1 outcome

**Independent Complaints Adjudication Service for Ofsted**

- Can't overturn inspection judgments

NB O will only withhold publication/withdraw report in “***exceptional circumstances***”

## (2) Interim Restraint of Publication

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***R (City College Birmingham) v Office for Standards in Education, Children's Service & Skills*** [2009] EWHC 2373 (Admin), [2009] ELR 500

- Leading case on interim restraint of publication of report by O.
- Critical inspection report by O; detailed complaint by C; detailed response by O rejecting all aspects of complaint – C sought JR of rejection of complaint.
- Key challenge re: “*inadequate*” grade attached to ESOL (c.1/3 of C’s entire teaching)
  - During complaint O was persuaded to split off part of ESOL (with Unsatisfactory grade) leaving remainder with Satisfactory grade.
  - C claimed that meant that %age of subjects graded Satisfactory rose from 75% to 82% so overall grade for Effectiveness of Provision should have increased from Unsatisfactory to Satisfactory.
  - C alleged O acted in *Wednesbury* unreasonable manner or in breach of legit. exp. in not doing so.

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Burton J:

- Considering application to restrain publication of O's report (not permission for JR).
- Accepted C's "*only point*" was arguable – [7], [20], [23]-[24].
- Injunction would prevent O discharging its statutory duty to publish report and interfere with public's rights under ECHR, Art.10 to receive information [24]
- Gave guidance on principles applying to grant of interim relief to prevent publication of a report by O [25]-[30]
- Injunction not justified [31].

# Burton J's Guidance

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- Normal principles for private law injunctions will apply – i.e. (a) *American Cyanamid* test, and (b) injunction to restrain defamation will be rare, esp. if justification defence raised [25]
- Also additional hurdles for public law injunctions [26-27]:
  - Not individuals seeking to salvage reputation or avoid personal loss;
  - Ct less ready to grant injunction in favour of one public body against another
- *A fortiori* where duty on public body to publish and public interest in publication of report [28]
- Need “*exceptional circumstances*”, “*most compelling reasons*”, “*pressing grounds*”, “*exceptionally strong grounds*” - good arguable case not enough [28-29]
- Judge’s “*thermometer*” re: arguability “*will be set and calibrated several degrees higher*” [30]

# A recent example

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***R (Interim Executive Board of X) v Ofsted (No.1)*** [2016] EWHC 2004  
(Admin)

- X was VA school with Islamic ethos which segregated boys and girls
- Segregation policy well-known to parents and X had been inspected by O several times without criticism of segregation [12]
- June 2016 - No-notice inspection held in which Overall Effectiveness downgraded from “Requires Improvement” (in Dec 2015) to “Inadequate” on basis principally of:
  - Gender segregation;
  - Inappropriate material in school library.



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Stuart-Smith J on the relevant principles:

- May be difference between cases where duty to publish (i.e. ***City of Birmingham***) vs. power to publish (under EA 2005, s.11(1)) [31]
- Either way public interest that favours publication [32]
- Referred to ***City of Birmingham*** and ***R v ASA, ex p Vernons Organisation*** [1992] 1 WLR 1289) [33-35]
- Apparent strength of case or circumstances which underpin C's complaint can be brought into account [37]
- Previous reports are relevant, but subsequent report can't be unlawful simply because inconsistent with previous one [38]

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Judge started from “*mild scepticism*” that HMCI and Inspectors acted as X alleged [39]

(1) Arguable case inspection infected by pre-determined mindset [45]:

- “*Extraordinary*” discrepancy in judgments between July 2016 report and the 3 previous [40]
- X’s evidence as to conduct of HMCI’s visit and inspection was “*apparently plausible and credible*” [41]
- O’s witness evidence on reasons for inspection “*begs more questions than it answers*” [42]
- If segregation was illegal, no credible evidence why successive inspections had missed this [43]

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(2) Effect of publication would be “*extremely adverse and irreparable*” [46]

- Exacerbated by O’s plan to publish on last day of summer term.

(3) Balance of convenience – temporary inconvenience for O which did not undermine general principle of public interest in publication [48]

(4) X had established “*a pressing ground and pressing social need in exceptional circumstances*” for interim injunction [50]

# (3) A note on time limits

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## ***R (Dawatul Islam UK & Eire) v Ofsted (13.7.16, Admin Ct)***

- O sent school provisional report in Nov 2015 and final report in Dec 2015 and published report on 4.1.16.
- JR issued on 4.4.16, i.e. exactly 3 months after publication.

Holman J:

- refused permission on basis that underlying challenge was to contents of report and school had been aware of that since December, so OOT.
- No injunction had been sought so anyone would have read report.
- O's policy to re-inspect after approx. 6 months anyway.

# (4) Substantive issues: (a) Not adjudicating complaints?

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## ***Old Co-operative Nursery Ltd v Her Majesty's Chief Inspector of Education, Children's Services and Skills [2016] EWHC 1126 (Admin)***

- Nursery rated Outstanding in all areas in Sept 2013
- Following complaint in April 2014 to O that child had been “*in the road*” while being escorted from nursery to school, O inspected on 6.5.14
- Inspection report sent to nursery in July 2014
  - Nursery was now rated “*Inadequate*” in *all* areas
  - Notice to improve identified 9 different actions – some “*so vague as to be meaningless*”
- Nursery re-inspected on 6.8.14 and found to be “*Outstanding*” in *all* areas and Nursery had complied fully with notice to improve

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Nursery sought JR of the inspection, the report and the publication of an “Outcome Summary”

Coulson J granted the application

**First issue** – had O unlawfully investigated and adjudicated upon a complaint?

- Common ground that under CA 2006, ss.49-50 O had no power to investigate or adjudicate on a complaint [33]
- Outcome Summary into the child in road incident was really of an investigation into a complaint [34]:
  - See [35-42]
  - *Inter alia*, Outcome Summary did not suggest inspection considered anything apart from 30.4.14 complaint
- Therefore investigation/adjudication was not one O entitled to undertake [43]

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## ***Cambridge Associates in Management v HM Inspector of Schools in England*** [2013] EWHC 1157 (Admin)

- Complaint to O about supervision of children on 3.2.11
  - NB No serious dispute about what happened
- O inspected on 11.2.11 and issued non-statutory Notice to Improve
- C challenged: (1) N to I and (2) publication of findings on website:
  - Issuing N to I was perverse
  - Requirements in N to I “*made no sense*”
  - Publication of summary unnecessary/disproportionate

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## James Goudie QC (Deputy Judge of the High Court):

- O entitled to find breach of welfare requirements, albeit 3.2.11 incident was brief [41-42]
  - Qu was whether period of time when supervision was inadequate was a significant period
- Issuing N to I was proportionate and reasonable [43-48]
- Publication of summary lawful when N to I was lawful [56-58]
  - Policy reasonable and proportionate use of powers



# (2) Substantive issues: (b) Consistency with previous reports

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## Old Co-operative Day Nursery (again)

**Third issue** – Was O irrational /unfair in its approach to previous reports?

Coulson J:

- Inspector failed to take into account *any* elements of the history or O's Sept 2013 report [68]
- O's guidance required that history of provision be taken into account and inspector ignored this guidance [70-71]
- Report's conclusions were irrational [78]:
  - Fact that C went from Outstanding to Inadequate and back to Inadequate in all categories within 7 months indicated "*a rogue inspection and report*"

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*“...I consider this aspect of the defendant’s guidance to be of fundamental importance. Inspections of schools (and the subsequent reports) are a vital tool in the defendant’s armoury so as to ensure that all schools strive to and maintain a proper standard. But it is of critical importance to ensure that such inspections are not random, one-off events in which absolutely everything turns on what happens on the day of the inspection. Instead, inspections must be carried out on a consistent basis, ensuring that each one is part of a continuum, building towards improvement or the maintaining of excellence.”*

[72]

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***R (IEB of X School) v Chief Inspector of Education, Children's Services & Skills (No.2)*** [2016] EWHC 2813 (Admin)

- Substantive judgment in this case on rolled-up application
- **Principle issue:** whether gender segregation was necessarily discriminatory under Equality Act 2010
  - No evidence either girls or boys were treated unequally re: quality of education [1], [53]
  - Gender segregation without more was not discriminatory [122-127], [142-148]

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Jay J also addressed other issues on assumption that he was wrong on the discrimination point:

- There was no irrationality/unlawful inconsistency with previous judgments [152]
  - Issue re: segregation was essentially legal judgment – if previous legal judgment was wrong, O was bound to correct it
  - Contrast **Old Co-op** where judgments were value judgments on quality of education
- Change of mind by O was not abuse of power, as earlier decisions (*ex hypothesi*) incorrect in law [154]
- But O should have given X more time to adjust [158]