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CONFIDENTIAL

Mr Jim Martin  
Scottish Public Services Ombudsman  
4 Melville Street  
Edinburgh  
EH3 7NS

Your ref: 200800985

17 December 2009

Dear Mr Martin

**Complaint against HM Inspectorate of Education (HMIE)**

Thank you for your letter of 7 December 2009.

The status in which you now propose to leave this matter resurrects and reinstates the profound contradiction in public policy which was itself the subject of the substantial correspondence between myself and Professor Alice Brown, Ombudsman of December 2008 through March 2009, and of our meeting in person. The implication of your letter is that I shall not be enabled to have any means of adjudication of its merits even though this is clearly stated to exist, and thereby that no others in similar position shall have such means. I now write to you because closure of this matter requires and necessitates resolution of this contradiction. It cannot remain unaddressed. I wrote to Professor Brown on 17 January 2009 and following that letter she requested that we meet, which we did on 9 March 2009. The meeting was cordial, professional and productive. Thus in the period January to April 2009 this case had been elevated within your office and was being dealt with directly by the Ombudsman herself, and following her retirement, by Eric Drake, acting Ombudsman, prior to your commencement in post. Following the outcome of that meeting between myself, Professor Alice Brown, Ombudsman, and Eric Drake, then Director of Investigations, and the receipt of the legal advice from the Scottish Government legal services department which the Ombudsman had initiated and which was a main subject of that meeting, this matter was cleared and authorised to proceed to investigation on 23 April 2009 on both of their authority in their position as Ombudsman. This was already a substantially delayed complaint, having been submitted to your office on 2 August 2008 held up by these ambiguities in the legislation.

Once cleared and authorised to proceed in April this year, and after such delay, it would be reasonable to presume that this matter was in the course of being investigated, that is the substance of the matter and not further background consideration as to whether it should be investigated, this having already been resolved after extensive and exhaustive correspondence and direct personal discussion with the Ombudsman herself. I am thus somewhat surprised for you to state to me that this case came to your attention in a conversation with Colin Wotherspoon following review of your office's caseload and one which occurred only recently. Not to have investigated it in all this time, and now to dismiss it without investigation is profoundly unsatisfactory. It is also contrary to the provisions of the Scottish Public Services Ombudsman Act (2002) section 11 which requires that:

- (1) If the Ombudsman, after considering a complaint, decides not to conduct an investigation pursuant to the complaint, the Ombudsman must send a statement of the reasons for the decision to the persons specified in subsection (2).
- (2) Those persons are—
  - (a) the person aggrieved,
  - (b) the listed authority in question

You have not communicated this to the listed authority, that is HMIE. This would be particularly important given that this matter had been discussed by the Ombudsman herself and the Senior Chief Inspector at a meeting specifically convened for this purpose following my meeting with her. It was also the subject of discussion in the HMIE Management Board of Wednesday 18 March 2009 and as reported in their minutes

under agenda item 12. Clearly HMIe themselves expect this contradiction and ambiguity to be resolved, as it indeed needs to be.

I was aware that you became Ombudsman in May 2009 and would imagine that it is difficult to take over cases such as this at mid-way stage. But this is a substantial and important matter with wider policy implications of very considerable significance. If my complaint may not proceed to adjudication then the text of all HMIe inspection reports requires to be altered.

You state that you are exercising your discretion not to pursue this complaint. Such discretion is a provision in legislation afforded in order to be able to rule out frivolous or trivial complaints. Yet this case is the opposite and comprises one of the 'upper-tier' complaints as referred to in the Crerar Review implementation committee 'Fit for Purpose Complaints System report'. Why else would the Ombudsman ask to meet me in person in regard of it if this were not the case? At our meeting the Ombudsman informed me that she considered that the matters I had raised were of major public significance, particularly in regard of stated published procedures of HMIe complaint process on their reports and website, as I had indicated. Given the Ombudsman decision as indicated to me of 23 April I contend that your decision now negates the whole basis of the complaints systems of Scottish public bodies.

In your letter you suggest other avenues which may be pursued. These are not available to me. In paragraph 3 point 1 you indicate that I should seek further assistance from my employer 'in the first instance' in pursuing this matter with HMIe. But this matter is not at an initial stage, quite the opposite. The correspondence is already exhaustive. I responded formally to HMIe and so did my employer in support. HMIe have not met with me to discuss this matter or to consider evidence, and since this also comprises the substance of the complaint it means that such evidence has not ever been considered and evaluated. Their complaint reply was merely to divert the matter with bland advice and diversionary asides. HMIe are intransigent and this matter has reached non-resolution at the very highest level and after exhaustive correspondence terminating at the level of the General Secretary of the Association of Head Teachers, XXXXXXXXXXXXXXX and chief HMIe Kenneth Muir in June 2008. This is the 'point of non resolution'. The earlier written intervention of my employer who had backed me at a much earlier stage, and the response of myself and the nursery coordinator teacher to the first draft led to very substantial amendment being made by HMIe to the first draft. Thus I do not have issue with my employer in regards of this matter and there is no duty of care issue in regard of them. Therefore internal procedures, ACAS and tribunal are irrelevant. My dispute is not with my employer. It is with the wholly separate organisation of HMIe and their conduct and operation of their inspection process, their negation and non-consideration of evidence, their negation of our organisational structure and functional remit and responsibilities and their failure to consider the nature of our development in regard of very substantial changes then underway, such as in our planning and evaluation system.

You indicate that it is open to me to initiate an action for defamation in the courts. That action is not open to me since HMIe operate under qualified privilege and thereby such proceedings could not go ahead. The bodies to which you refer, the General Teaching Council for Scotland and the Scottish Government's Education Directorate are not the appropriate bodies to deal with this complaint. The latter would be in regard of policy implications, though not the complaint itself. Thus I deem that you should hear this complaint and then yourself contact the Scottish Government Education department to indicate the change in the culture of educational scrutiny which is necessary and the need to a shift of due processes of formative dialogue in regard of very subtle matters of social process contained within the functioning of schools and particularly their management. The General Teaching Council remit is in regard of the professionalism, competence and functional work roles of teachers, not inspectors. If there were a General Inspection Council of Scotland which looked at the professionalism, competence and functional work roles of inspectors then this would indeed be a most appropriate body to refer this complaint. But such a body does not exist.

You state in your letter that "your appeal to this office is an appeal against an HMIe report which I consider would effectively require me to take on the role of a regulator for HMIe, but that role is not within my remit." I contend that you are not correct. This takes me to the text of each and every HMIe inspection report including this school's:

If you are not satisfied with the action we have taken at the end of our complaints procedure, you can raise your complaint with the Scottish Public Services Ombudsman (SPSO).

The process and its steps are outlined diagrammatically on the HMIE website and in their explanatory leaflet 'HMIE feedback and complaints procedure'.

This matter was also the subject of the 'Memorandum Of Understanding Between Scottish Public Services Ombudsman (SPSO) And HM Inspectorate Of Education (HMIE)' of 2007 drawn up jointly by Ombudsman Alice Brown and the senior chief inspector of HMIE, Graham Donaldson. It states in Section 5

HMIE is a listed authority under the 2002 Act and is under the jurisdiction of SPSO. Consequently, the SPSO may investigate a complaint by a member of the public that they have sustained injustice or hardship as a result of maladministration or service failure on the part of HMIE.

And in section 3:

### **3.1 Listed authorities**

Section 22 of the 2002 Act (information about the right to make a complaint) requires a listed authority (including HMIE) to take reasonable steps to publicise the application and effect of the 2002 Act, including in particular, the right conferred by the 2002 Act to make a complaint, the time limit for doing so and how to contact the SPSO.

Thus it is the case that you are indeed the regulator for HMIE as is most specifically acknowledged by the then Ombudsman Alice Brown and the senior chief inspector Graham Donaldson in their memorandum of understanding drawn up on the basis of the legislation in 2007. Did they convene and go to the lengths of preparing this as a document in order that it be rescinded when the procedures should come to be used?

The last sentence of your letter states 'I have carefully considered your complaint and have made my decision'. But that statement is also not correct. You have only considered whether this complaint should proceed to investigation. You have not considered the substance of the complaint itself and in that regard you have now countermanded the decisions and extensive deliberations of your predecessors as Ombudsman in regard of this specific matter and their earlier decision to proceed with investigation and adjudication. The complaint itself, that is the substance of the matter, has not been considered and adjudicated.

In your website mention is given to other means of resolving problems given the high cost of resources and time in conducting a full investigation. I made such proposal to Colin Wotherspoon in my letter of 8 June 2009. If SPSO made partial consideration of evidence and then proposed to HMIE a quicker means of resolution then this could be readily achieved. The central point though is that HMIE have to be subject to some process of accountability with indication that their refusal or failure to enter into due process would indeed then lead to full independent review and investigation. What I wish from this process is the correction of the report, the removal of factual inaccuracy and the removal of pejorative incorrect and unfair personal commentary on the basis of such a flawed and perfunctory process as occurred here. If HMIE were subject to such process of accountability I deem that this would have been resolved at a much earlier stage. Indeed HMIE would probably have revisited or corrected the report right back at the beginning. A change of culture is needed, one which does not deem complaints to be a 'big thing'. As Alice Brown has stated and as is available on your website at <http://www.valuingcomplaints.org.uk/home/>

An organisation that truly welcomes values and uses complaints to inspire and guide improvement will deliver better public services than one that does not.

In 2008 in announcing the steps being taken to enable implementation of the Crerar Review which looked into scrutiny and complaints handling, Cabinet Secretary for Finance and Sustainable Growth John Swinney said:

We have an opportunity to create a leading edge public scrutiny and complaints handling system in Scotland. I am committed to making that happen.

## Scotland plans to improve scrutiny of public service services

<http://www.snp.org/node/7875>

But unless the lessons of this case are learned and enacted this is not going to happen. What has occurred here and is still ongoing is the most profound and complete opposite to the state of affairs as envisaged by John Swinney MSP. I consider that all doors have been shut to me. The complaints process which is stated to exist does not exist. Yet is it not somewhat ironic that the only persons who have actually met with me in a formal capacity in regard of this case have been Alice Brown, Ombudsman and Eric Drake, SPSO Director of Investigations. What I consider should have happened is that someone in HMIe should have arranged to meet me expeditiously following receipt of the first draft response from us. With the right ethos and a will to ensure fair play a very different report would then have emerged from this process, one which valued our work and what we had achieved, was fairly drawn and gave useful pointers as to further developmental progression in a respectful fashion.

May I draw comparison to England. England like Scotland has a 'hard' culture of school accountability, as opposed to very different systems in operation in say Finland and Canada. But what is interesting in the English context is that a very explicit rationale to create a tough regime, and one which recently has been proclaimed to get tougher also carries with it a very public proclamation of its intent to be fair. Thus there is a well functioning complaints system for English school inspections, one also containing a stage of independent adjudication which is available if necessary through ICASO, The Independent Complaints Adjudication Service for Ofsted . It is recognised that a certain number of complaints are inevitable and moreover their adjudication is welcomed by Ofsted itself. This is a very telling difference. An organisation and its personnel with such a strong ethos of accountability and toughness also expect that to apply to themselves. They also do not proclaim utter invincibility. Moreover they use problems as an opportunity for learning and improvement.

If we compare Scotland and England with a similar 'tough' and separated accountability regime here then it would be reasonable to expect a similar rate of complaints and case outcomes. Roughly a tenth of the population and a tenth of the number of inspections should lead to an annual Scottish rate of thirty complaints from primary school inspections of which a half would be expected to be fully or partially upheld. This would not justify a fully separate organisation and would be why such remits are more broadly addressed to the SPSO office in Scotland under current legislation. Except that it is not happening. A Freedom of Information answer on the HMIe website indicates that only one complaint was made to HMIe in a five year period this decade and that not upheld. Given the high number of stress absences, resignations and demotions following HMIe inspections, and given that the nature of HMIe inspection system was given as a major factor for the poor retention and recruitment rate in the 2009 report of the independent *Recruitment and Retention of Head Teachers in Scotland* study commissioned by the Scottish Government, I would conclude that something is amiss with scrutiny and complaints handling in regard of school inspections in Scotland and that is quite separate from my own negative experience at a personal level.

The most profound conclusion of my letter, as evidenced in the memorandum of understanding between Alice Brown and Graham Donaldson, is that you are indeed the Ombudsman with competent remit for this complaint and thus it is incumbent on you to hear it as indeed such process was already underway on the instruction of your predecessor.

Yours sincerely

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(Head Teacher)