

PE1531/E

Written Evidence – Public Petitions Committee: [PE1531](#) Charitable status of independent schools

1. Introduction

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act') as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,500 charities registered in Scotland.

OSCR has been asked to give evidence to the Scottish Parliament Public Petitions Committee on 13 January 2015 on the Petition PE1531. The petition calls on the Parliament to

urge the Scottish Government to remove charitable status, and thus taxpayer support, from private, fee-paying schools.

We understand that the Committee is particularly interested in

- exploring the process of OSCR determining the charitable status of independent schools
- seeking to understand the rationale of the OSCR's decisions in this field.
- obtaining OSCR's views on the petition

This evidence outlines the views we intend to discuss at the Committee, and gives more detail on some of the questions which Committee members raised at the meeting of 29 October 2014. It also draws from our recently published summary report [Fee-charging schools, public benefit and charitable status](#).

2. Summary of OSCR's activity on fee-charging schools

Since 2007 OSCR has reviewed the charitable status of 52 schools charities on the Scottish Charity Register. It was clear during the passage of the 2005 Act and early public consultation on OSCR's priorities that there was considerable public interest and concern about the charitable status of fee-charging schools. On this basis and on the evidence of risk found when we started our review programme these charities have been subject to more rigorous and in-depth scrutiny and action than any other group of

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charities on the Register, involving a significant input of resource from OSCR over a period of seven years.

In our reviews, we found that:

- 40 of the schools met the charity test (see below) on our initial review
- 9 failed the charity test because we found that the fees they charged unduly restricted access to the educational benefits they provide
- one school failed the test because its constitution allowed Scottish Ministers to control its activities.
- two reviews have been suspended because of other issues within the charities.

A list of the reviews and decisions is at Appendix A.

Where schools have failed the charity test, OSCR has taken action to enforce compliance with the requirements of charity law, using its powers to give directions to charities. We directed the nine charities which failed on account of their fees to take steps to meet the charity test within a fixed timescale or face removal of charitable status. We directed the other charity which failed to amend its constitution.

All 10 charities took action to meet the test within the required timescale, are now compliant with the requirements of charity law and continue to have charitable status.

The actions the charities took included increases in the support they provided for those unable to pay the fees and increasing the amount of educational benefit provided without charge.

3. The charity test

We make our decisions on fee-charging schools on the basis of the statutory 'charity test' set out in the 2005 Act, which sets out the criteria for how we must decide which organisations can be and remain registered as charities in Scotland and which cannot. Broadly, to be a charity an organisation must

- have only charitable purposes
- provide or intend to provide public benefit

In looking at public benefit we must have regard to how the benefit the public gains from the organisation's activities compares with

- benefit gained by members of the organisation or other persons other than as members of the public ('private benefit')
- disbenefit likely to be incurred by the public from the charity's activities

If a charity provides its benefits only to a section of the public, then we must have regard to whether any condition on accessing that benefit, including any charge or fee, is unduly restrictive. This is the aspect of public benefit which is in question for fee-charging schools.

4. OSCR's decision-making on fee-charging schools

A decision on whether or not a charity meets the charity test must be made on the facts of the individual case. OSCR's regulatory decisions are subject to statutory review and appeal procedures and OSCR must follow the principles of decision-making established in public law. We have set out the general principles on which we consider the public benefit and other aspects of the charity test where OSCR has discretion to exercise (see below). However, it is not legitimate for us to fetter our discretion by setting absolute requirements, ratios or thresholds.

The fee-charging schools reviewed were clearly established for the charitable purpose of the advancement of education, and running a school is clearly a legitimate way of advancing an educational purpose.

The main area we have concentrated on in our decision-making has been whether the fees charged by schools unduly restrict access to the educational benefit they provide. We have done this on the basis of published principles of decision-making which apply to all charities. In looking at the evidence in each case we consider:

- **whether there is help for those who cannot pay** – where a fee is charged which affects access to a benefit, we expect there to be arrangements in place to help people who cannot afford the fees to benefit. In the case of schools this tends to take the form of bursaries to help with fees.
- **proportionality** – higher fees require more help for those who cannot pay them, or more benefit for which no charge is made, than lower fees.
- **transparency** – any fee structure and arrangements for help with fees must be well-publicised and clearly explained.
- **the cost of providing benefit**– some benefits are more expensive to provide than others, and charities including schools need to be able to cover the cost of what they do.
- **the full scope of the benefit provided** – we look at the whole picture of benefit and restriction incoming to our decision. In the case of the schools, we look at whether they provide educational benefits beyond their fee-paying beneficiaries, for instance access to sports facilities or tuition for students from other schools.

5. Fettes College

Committee members expressed a particular interest in the case of Fettes College (The Governors of the Fettes Trust Scottish Charity SC017489), particularly asking why the charity had been allowed to make changes after failing the charity test. Essentially, they made changes because we directed them to do so.

We reviewed this charity on the basis of academic year 2010-2011. Full details are in our [published report](#). We found that the charity failed the charity test for the following reasons, all of which relate back to the principles set out above:

- it charged very significant fees (higher than the sector average). While the school had a bursary scheme in place, the high fees required a proportionately higher level of assistance if the fees were not to be unduly restrictive.
- it appeared that the bursaries were not necessarily awarded to those most in financial need of assistance (but on academic or sporting criteria). This meant they had less effect in mitigating the effect of the fees than bursaries awarded purely on the basis of financial need.
- there was some wider educational activity for which the school made little or no charge, but we did not consider the level of this was substantial enough to mitigate the restrictive effect of the fees charged.

Taking all these factors into account, we found that the fees charged unduly restricted access to the educational benefit the school provided, and that the charity failed the charity test since it did not provide public benefit.

We therefore used our statutory powers on 10 January 2013 to direct the charity to take action to ensure that the undue restriction was removed. If a charity fails to comply with such a direction within the timescale set we must remove the charity from the Scottish Charity Register.

We reassessed the school in October 2013 and found that the school had made changes in response to the direction we had issued:

- there had been some increase in the spend on means-tested bursaries (from 7% to 8.4% of income) and in the proportion of the roll receiving means-tested help (9.6% to 10.6%). Six pupils (0.8% of the school roll) received full bursary awards, with a further 28 students receiving 81-99% awards.
- the school had also amended its policies on awarding bursaries to target these more clearly on students on lower incomes, with awards now beginning to be made on that basis.
- the charity had expanded its provision of educational benefit for little or no charge, with activities including tuition for external candidates in minority subjects and regular and scheduled use of sports facilities by state school students and other educational events.

Taking all this into account, we found that the charity had sufficiently addressed the issues identified in the initial review, and that it had therefore complied with the direction we issued.

6. Further Action

We have now completed our programme of reviewing fee-charging schools, and have issued our final summary report, setting out lessons learned and our plans for future regulation of this group of charities, taking into account the level of risk evidenced by the reviews, the requirements of proportionality and other calls on OSCR's resources. To maintain the level of compliance with the charity test requirements now achieved we plan to:

- work with schools to improve the standard of public benefit reporting to allow OSCR and the public to verify the position in each school as part of the annual reporting requirement on charities.
- to prioritise schools where there has been charity test failure or other issues for focussed monitoring under our Targeted Regulation programme, and action where issues are identified.

7. OSCR's views on the petition

OSCR's role as the registrar and regulator of charities in Scotland is to exercise its functions and make decisions in particular cases on the basis of the law as it stands. Our interest in any proposed changes to charity law is in ensuring that any proposals are workable in themselves and compatible with the rest of charity law. The policy decision on what types of organisation should or should not be able to be registered as charities is one for Ministers and the Parliament.

Looking at the terms of the petition, it is worth noting that the description 'private, fee-paying schools' covers a variety of types of school on the Scottish Charity Register which charge fees, from the mainstream boarding and day schools to religious and special ethos schools of different kinds to schools catering for students with additional needs (where the fees charged are generally paid by local authorities).

The petition also refers to taxpayer support. Non-Domestic Rates Relief (NDRR) for schools and other charities falls within the legislative competence of the Parliament, and decisions in individual cases are for local authorities. However, tax reliefs such as gift aid, corporation tax and VAT reliefs are reserved matters, and decisions on awarding reliefs are a matter for HMRC on the basis of reserved finance legislation. The legal position on the charitable status of fee-charging schools in the law of England and Wales has diverged from that in Scots law in recent years.

8. Conclusion

OSCR welcomes the opportunity to give a view on the petition, and hopes the Committee finds this submission useful.

OSCR
22 December 2014

Appendix A: Schools reviewed as part of individual charity review programme

Charity name and number	Date review started	Outcome
1. Corporation of The High School of Dundee (SC011522)	2006	Met charity test
2. George Heriot's Trust (SC011463)	2007	Met charity test
3. Glasgow Steiner School (SC005339)	2007	Met charity test
4. Gordounstoun Schools Limited (SC037867)	2007	Met charity test
5. Governors of Donaldson Trust (SC017417)	2007	Met charity test
6. Regius School (SC022723)	2007	Met charity test
7. St Mary's Music School Trust Ltd (SC014611)	2007	Met charity test
8. Hutchesons Educational Trust (SC002922)	2007	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
9. Lomond School Limited (SC007957)	2007	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
10. Merchiston Castle School (SC016580)	2007	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
11. St Leonards School (SC010904)	2007	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
12. Jordanhill School (SC004463)	2007	Failed charity test on initial review – direction issued Subsequently complied with

		direction and met test
13. Cargilfield School (SC005759)	2010	Met charity test
14. Aberdeen Waldorf School (SC012895)	2012	Met charity test
15. Ardvreck School Ltd (SC009886)	2012	Met charity test
16. Albyn School Limited (SC008392)	2012	Met charity test
17. Beaconhurst Grange Ltd (SC005753)	2012	Met charity test
18. Belhaven Hill School Trust (SC007118)	2012	Met charity test
19. Belmont House Ltd (SC016822)	2012	Met charity test
20. Christian Schools (Scotland) Ltd (SC006206) (Hamilton College)	2012	Met charity test
21. Clifton Hall School Ltd (SC009293)	2012	Met charity test
22. Compass School (SC020370)	2012	Met charity test
23. Craigclowan School Ltd (SC010817)	2012	Met charity test
24. Craigholme School (SC014860)	2012	Met charity test
25. Edinburgh Merchant Company Education Board (SC009747) (George Watson's School and Erskine's and Stuart Melville Schools)	2012	Met charity test
26. Edinburgh Steiner School Trust Limited (SC002109)	2012	Met charity test
27. Glenalmond College (SC006123)	2012	Met charity test

28. Governors of Dollar Academy Trust (SC009888)	2012	Met charity test
29. Kelvinside Academy War Memorial Trust (SC003962)	2012	Met charity test
30. Kilgraston School Trust (SC029664)	2012	Met charity test
31. Lathallan Schools Limited (SC018423)	2012	Met charity test
32. Lewis Independent Christian School, Stornoway (SC028950)	2012	Met charity test
33. Mannafields Christian School, Edinburgh (SC006202)	2012	Met charity test
34. Moray Steiner School Ltd (SC007157)	2012	Met charity test
35. Robert Gordon's College (SC000123)	2012	Met charity test
36. Morrison's Academy Trust Scheme (SC000458)	2012	Met charity test
37. Oakwood Education Trust (SC024571)	2012	Met charity test
38. St Margaret's School for Girls (SC016265)	2012	Met charity test
39. St Mary's School, Melrose (SCSC009352)	2012	Met charity test
40. Springvale Education Trust (SC033774)	2012	Met charity test
41. Strathallan School (SC008903)	2012	Met charity test
42. The Glasgow Academicals War Memorial Trust (SC015638) (Glasgow Academy)	2012	Met charity test
43. The International School of Aberdeen (SC007756)	2012	Met charity test

44. The High School of Glasgow (SC014768)	2012	Met charity test
45. The Proprietors of the Edinburgh Academy (SC016999)	2012	Met charity test
46. The Governors of the Fettes Trust (SC017489) (Fettes College)	2012	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
47. St Columba's School Ltd (SC012598)	2012	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
48. St George's School for Girls (SC012632)	2012	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
49. Wellington School Ayr Ltd (SC005052)	2012	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
50. Loretto School Ltd (SC013978)	2012	Failed charity test on initial review – direction issued Subsequently complied with direction and met test
51. Fernhill School Ltd (SC011011)	2012	Review suspended
50. Struthers Memorial Church (SC006960)	2012	Review suspended