



## Fee-charging schools, public benefit and charitable status

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## 1. Executive summary

- Since 2007 OSCR has reviewed the charitable status of 52 schools on the Scottish Charity Register
- **40 met** the test for charitable status in Scotland
- **10 failed the charity test**, in nine cases because the fees they charged unduly restricted access to the educational benefits the schools provided
- OSCR took action to enforce compliance in these cases – it directed the 10 charities to take steps to meet the charity test within a fixed timescale, or face removal of charitable status
- 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
- **Two** reviews have been suspended because of other issues within those charities
- OSCR will continue to monitor and maintain the level of compliance achieved with this category of charities, and is encouraging them to build on good practice by reporting on the public benefit they provide.

## 2. Introduction

The Office of the Scottish Charity Regulator has completed its programme of reviewing the charitable status of independent fee-charging schools in Scotland. This briefing sets out:

- Why OSCR undertook this work
- What kind of decision OSCR needed to make about these charities
- Which principles guided OSCR's decision-making
- What the results of the reviews were
- What action OSCR took where it found that individual charities were not complying with the requirements of the law
- How OSCR will deal with these charities in the future.

The briefing supplements the detailed reports on the decisions in these individual cases which OSCR has already published.

## 3. Why did OSCR look at these charities?

The Charities and Trustee investment (Scotland) Act 2005 sets out a number of criteria ('the charity test') which form the basis of which OSCR must decide which organisations can be registered as charities in Scotland and which cannot. The charity test requires that to be, or to remain, a charity in Scotland, an organisation must

- Have only charitable purposes (and a list of charitable purposes is included in the 2005 Act)
- Provide or intend to provide public benefit.

Also its governing document cannot allow it to distribute its property for non-charitable purposes or allow Government Ministers to direct or control its activities, and it cannot be a political party.

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In looking at whether a charity provides public benefit, the 2005 Act requires OSCR to 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, whether any condition on accessing that benefit, including and charge or fee is **unduly restrictive**.

This last point is particularly relevant to fee-charging schools. The charitable status of such schools was much discussed during the progress of the 2005 Act through the Scottish Parliament, and the specific inclusion of charges and fees as an element of the charity test was an amendment put forward specifically with reference to fee-charging schools, though it applies equally to all charities. In summing up the then Scottish Government's position on the amendment, the Deputy Minister for Communities stated:

*"I hope that I can reassure all charities that charging a fee so that access is granted to services will not automatically prevent bodies from being deemed as charities. Whether charitable status is granted will depend on individual circumstance and OSCR will consider each body on a case-by-case basis".*

When the 2005 Act came into force in April 2006, it automatically granted charitable status to all the organisations, including fee-charging schools, which had been recognised as charities by Her Majesty's Revenue and Customs, under the arrangements that previously applied.

#### 4. The pilot exercise

OSCR took up its powers in April 2006, and in October 2006 we consulted on our proposals to review the charitable status of the charities we had 'inherited' on our register (known then as the 'Rolling Review'). Given the focus of attention on fee-charging schools during the passage of the Bill, we put forward this group of charities (among a number of others) as one to which we should give high priority. This was on the grounds that they might have a high likelihood of failing the charity test because the fees they charged to their students might unduly restrict access to the benefits the charities provide.

The results of the consultation endorsed our view of the priorities for review of charitable status. We also piloted the reviews using eight charities which had volunteered to be reviewed. One of the eight was the High School of Dundee, which is a fee-charging school.

We found that the High School of Dundee (charity number SC011522) met the charity test. As well as the other elements of the charity test, we looked particularly at issues of potential disbenefit and undue restriction.

On disbenefit, we noted that there were arguments current in society that:

- the existence of an independent school has a negative impact on state schools in the same area
- that independent schools have a divisive influence in society.

We could not find any strong evidence to support these views in the context of the charity test, which requires us to look at any disbenefit resulting from the activities of the charity itself. Fundamentally, these arguments relate to the independent sector as a whole rather than specifically to any single school.

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As the main driver behind the review we looked in detail at the issue of possible undue restriction on account of the fees the charity charged. This enabled us to develop our policy and methodology in assessing whether a fee or a charge constitutes an unduly restrictive condition on accessing the benefit a charity provides. We discuss these more fully below.

### 5. How does OSCR decide whether fees or charges unduly restrict access?

A decision on whether or not a charity meets the charity test must be made on the facts of the individual case. OSCR must follow the principles of decision-making established in public law. In terms of making fair decisions, OSCR must not unduly fetter its discretion in making decisions. In considering undue restriction as in considering other aspects of the test where OSCR has discretion to exercise, there are therefore no absolute requirements, ratios or thresholds.

However, we have evolved the following principles of decision-making, which apply to all organisations applying for status and all charities on the Scottish Charity Register. When looking at fees or charges a charity makes we consider:

- **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. Examples of this are discounts or grants or bursaries to help with fees. Help that is targeted on the basis of the individual's ability to pay, and helps people on a range of incomes, including low incomes, will count the most here
- **the full scope of the benefit provided** – if an organisation charges for certain benefits that it offers, but provides other benefits in furtherance of its purposes for free to the public or to particular groups then we will look at the whole picture of benefit and restriction in coming to our decision
- **proportionality** – the higher the fee the more evidence is needed about help for those who cannot pay or benefit provided for free
- **transparency** – any fee structure and arrangements for help with fees must be well publicised and clearly explained
- **the cost of providing benefit is relevant** – some benefits are more expensive to provide than others, and charities need to be able to cover the cost of doing what they do. We take this factor into account in looking at the fees. We also look at how far the charity uses its resources to subsidise the cost of providing the so as to minimise the fees charged to all beneficiaries low.

These principles form part of the [Meeting the Charity Test guidance](#), which the 2005 Act requires us to publish, and which we consulted on in 2007-8. An update of the guidance is currently in preparation and we aim to consult on it in early 2015.

## 6. How did the process start?

The early stages of our programme of individual reviews of charitable status resulted in the schools that we reviewed achieving mixed results with regards to passing the charity test. Between 2007 and 2009, we reviewed a range of independent schools that included specialist schools, such as those educating deaf pupils or specialising in excellence in music. The results of these are set out in our report [The Rolling Review – Phase 1a 2007-09](#) reviews.

## 7. The reviews 2007-09

Some of the schools reviewed between 2007 and 2009 did not pass the charity test. Five schools were given directions to take steps to ensure they could pass the charity test. Four of these, Hutchesons Educational Trust (SC002922), Lomond School Limited (SC007957), Merchiston Castle School (SC016580) and St Leonards School (SC010904), failed the charity test because they were unduly restricting access to the public benefit they provided on the basis of the fees they charged. The fifth school, Jordanhill School (SC004463), failed because its constitution made it subject to control by Scottish Ministers.

We issued the four schools that initially failed – on the basis of undue restrictions on public benefit – with directions in October 2008 to take steps to meet the charity test. The directions issued to the schools were in three parts with each school being directed:

- a. To notify us within three months of the date of the direction as to whether they planned to comply with the direction (the charity may choose not to do so, in which case we would proceed to remove it from the Register).
- b. To develop and submit a plan within 12 months setting out how the school would meet the public benefit requirement of the charity test.
- c. To meet the objectives of the plan within three years of the date of the direction.

These four schools indicated that they would seek to comply with our directions and submitted plans which, if carried out, we agreed would enable them to pass the charity test. All four plans involved a combination of action to increase the level of means-tested assistance available to those unable to pay the fees, and to increase the level of activity providing public benefit for which no fee would be charged.

Jordanhill School was issued with a direction to amend its constitution to remove Ministers' powers to control it.

## 8. Outcomes

When we assessed the five schools' situations as at 28 October 2011, we looked at whether they had fulfilled the plans they presented to OSCR to meet our directions. We found that overall all the schools had fulfilled the objectives of their plans and were providing public benefit and, therefore, passed the charity test. Full details of these reviews, the directions, and what the various schools did to comply are available at: <http://www.oscr.org.uk/charities/managing-your-charity/reviews-of-charitable-status/charitable-status-reviews-schools>

## 9. The reviews 2009-11

From 2009 to 2011 we followed up our initial reviews by monitoring how the schools acted on our directions to be able to pass the charity test. We also reviewed a further school, Cargilfield School (SC005757), and found that it met the charity test. There are further details in our [Protecting Charitable Status](#) report.

As part of our routine case work we also assessed an application for charitable status from St Aloysius' College (SC042545), a Roman Catholic fee-paying school in Glasgow. This school met the charity test and we entered it on the Register in August 2011.

## The reviews 2012-14

### 10. What happened in the latest round of reviews?

At the beginning of 2012 OSCR considered the outcomes of the pilot and the earlier rounds of reviews. On the basis of the evidence our view was that there remained a substantial risk that fee-charging school charities would not comply with the public benefit requirements of the charity test. We decided therefore that we should review the remaining charities in this category.

There are a number of other school charities providing special education of various kinds. In these the fees charged are generally paid by local authorities or central government on the basis of assessed need, rather than by beneficiaries or their families. The considerations around undue restriction are therefore very different in these cases and they were not included in this round of reviews.

Since 2012, we have reviewed a further 39 fee-charging schools. Of these, we found that 32 met the requirements of the charity test. They were a very diverse group of schools, including large day schools, boarding schools, small religious schools and Steiner schools:

- Day education fees ranged from £1,500 per year for junior day education to £11,237 per year for senior day education
- Boarding education ranged from £15,450 per year for junior education and £25,860 per year for senior education
- The value of bursaries offered within individual schools ranged from 10% to 100% of the fee with some schools also providing for additional costs such as uniforms and transport
- The schools spent a varying amount of their available gross income on means-tested bursaries, ranging from 4.6% to 42.1%. The median proportion of available income spent was 6.1%, and the highest percentages were in small specialist schools.
- The number of pupils in receipt of means tested assistance as a percentage of the school roll ranged from 5.8% to 57.9%. The median proportion of the school roll assisted in this way was 10.2%
- The schools provided a wide range of activities for which they made little or no charge. These activities provide benefit to the wider public. Some examples of these are:
  - The provision of facilities, such as classrooms, sports facilities, halls and theatres, to a number of external users on a regular and scheduled basis. Users include, state schools, sports clubs, and community groups
  - The provision of secondary education to state school pupils where the subject is not offered by their own school
  - Contribution to national educational improvement and development through encouraging and facilitating staff to participate in national examination marking and development, curriculum development and contribution to educational boards and committees.

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## 11. Round-up of issues leading to charity test failure

Five schools in the post-2012 round of reviews failed the charity test. These were Fettes College (SC017489), St Columba's School (SC012598), St George's School for Girls (SC012632), Wellington School (SC005052) and Loretto School (SC013978).

In the case of four of the schools, OSCR considered that the level of gross income spent on means-tested assistance was insufficient in relation to the fees charged.

Each of the four also had other issues which led to the initial failure of the charity test, including infrequent or minimal activity for which no fee was charged and lack of clarity and transparency around the allocation of means-tested assistance.

In the case of Loretto, while the overall level of spend on means-tested assistance was already higher than some of the schools reviewed, it was the value of the awards which was problematically low, which meant that their impact in removing the restriction of the fees was limited.

We issued directions to all five of these schools to take steps to remove the undue restriction on obtaining the benefit provided by the charity within 18 months. The actions taken were to include increasing the charity's means-tested assistance spend and taking such other measures, as appropriate, to ensure that the charity met the charity test.

## 12. Action taken by schools to pass

All five schools responded to us well within the timescale allowed for compliance with evidence as to the steps they had taken to comply with the directions we had issued to them.

On the basis of the evidence submitted, we found that all five had addressed the issues we had set out in the directions we had issued to them. We therefore found that they had complied with the directions and that they met the charity test. For further details see the [full published reports](#) on our website.

## 13. Suspended reviews

We have suspended the reviews of two of the schools. As is a matter of public record, Fernhill School (SC011011) encountered financial difficulties while we were completing our review and we have suspended our review while its governance and financing are being restructured. Struthers Memorial Church (SC006960), of which Cedars School of Excellence is a part, is currently subject to a separate OSCR inquiry.

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# Overall conclusions

## 14. What did we learn from the reviews?

- **High risk of failure** – a high proportion (10 out of 50) of the high-fee-charging school charities we looked at failed the charity test when we first reviewed them, almost all on the basis that the fees they charged unduly restricted access to the educational benefit they provided. This indicates that the initial perception of the high risk of failure presented by these charities was correct
- **Complexity** – as a regulator, OSCR is required to adhere to regulatory and public law principles including fairness, reasonableness, consistency and proportionality. Schools are complex organisations, some of them very large both in financial terms and in terms of beneficiary numbers. There are constraints on their ability to change quickly, including contractual obligations to existing beneficiaries and the requirements of other regulators (Education Scotland, the Care Inspectorate). Both the evidence involved and the nature of the public benefit decision in each case are complex. To comply with the regulatory principles, our decisions, particularly in issuing directions to the schools and assessing compliance with those directions required more than simply a mechanical calculation about fees and bursaries, and needed to take account of the circumstances and constraints in each individual case

- **Variety** – the schools we have looked at have included boarding, day and mixed schools, single-sex and coeducational, religious and non-denominational, schools with Steiner and other types of ethos and music schools, schools which are academically selective and schools which are not. All of these factors interact in various ways with the issues connected with the fees they charge. Again, this means that regulatory decisions have to take full account of individual circumstances. Consistency of decisions means the consistent application of principles, rather than formulae or rules.

## 14. How will OSCR look at these charities in the future?

OSCR has just consulted on its Targeted Regulation proposals. These set out how we intend to focus our activities better on critical issues that may adversely impact on public trust and confidence in charities. The action we have taken on high fee-charging schools is an example where we have already taken a targeted approach, where OSCR has proactively used its resources to address an issue where:

- there was a high likelihood of charities not complying with the requirements of the law
- there was a high level of public concern.

We have considered how we should continue to regulate the group of high-fee-charging independent schools charities dealt with in this report. Our future regulation of these charities needs to reflect:

- what the continuing likelihood is that any one of these charities will fail to provide public benefit
- the place of this group of charities in the picture of overall regulatory risk which is emerging through OSCR's Targeted Regulation programme
- principles of good regulation – OSCR needs to be proportionate and fair in its regulation and target action only at cases where it is required.



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There are two broadly balancing considerations which underpin how we have looked at this. On the one hand, our reviews showed that:

- a significant proportion (10 out of 50) of the high-fee-charging independent schools examined failed the charity test when reviewed
- these failures have occurred throughout the period of reviews.

It is therefore reasonable for OSCR to continue to maintain a higher level of vigilance concerning the compliance of this group of charities.

On the other hand, it is clear that there is a better awareness among the charities reviewed of what is required to pass the charity test. Any future failures would represent backsliding from a position of now having met the public benefit requirements, rather than of never having met them.

In considering the proportionality issue we also need to bear in mind that these charities have already been subject to a more rigorous and in-depth scrutiny than any other group of charities on the Register, involving a significant input of resource from OSCR over a period of seven years. OSCR needs also to be able to target its resources on other areas of regulatory interest – and it is now doing so, looking for instance at Arm's Length External Organisations (such as culture and leisure trusts) linked to local authorities.

On the basis of the reviews and the action we have taken we are now in a position where all of the schools reviewed meet the requirements of the charity test. To maintain this position, we plan to:

1. Work with the schools to improve the quality of Trustee Annual Reports (TARs), to ensure that all of the schools include at least the minimum of information (on roll, income, bursaries and wider activity) necessary to verify the position on undue restriction in the school in their TAR. Many of the schools now do this, with some very good practice on public benefit reporting, but we will look to agree a standard for reporting and to enforce this.
2. Identify selected schools for specific annual monitoring as part of the changes to annual reporting under the Targeted Regulation programme, starting with annual returns for year ends July-August 2014. We would prioritise schools which have failed the charity test in the past, or where particular points of interest beyond charity test issues emerged during our reviews. Where monitoring identifies an issue we will engage with the charity and where necessary open an inquiry.

## Appendix: 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. Beaconsgrange Ltd (SC005753)	2012	Met charity test



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Charity name and number	Date review started	Outcome
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

Charity name and number	Date review started	Outcome
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
52. Struthers Memorial Church (SC006960)	2012	Review suspended

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