

**FILE NOTE:**

|                 |  |
|-----------------|--|
| <b>DATE:</b>    | 17 November 2011   |
| <b>AUTHOR:</b>  | OSCR   |
| <b>SUBJECT:</b> | REPORT UNDER SECTION 33 OF THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005 ON INQUIRY:<br><br>MERCHISTON CASTLE SCHOOL (SC016580) |

**Background**

As part of the Rolling Review of charities the Office of the Scottish Charity Regulator (OSCR) undertook an inquiry into the charitable status of the Merchiston Castle School under section 28 of the Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act').

This involved a desk-based review of written materials in order to determine whether public benefit was provided by the charity. A face to face meeting was also held with the School to help gather this information.

**Consideration**

To have charitable status, bodies have to pass the 'charity test' as laid out in sections 7 - 8 of the 2005 Act. The charity test requires bodies to have exclusively charitable purposes, to provide public benefit in Scotland or elsewhere, and to meet certain other conditions.

Section 7 (1) (b) of the 2005 Act, provides that a body meets the charity test if -

- *it provides (or in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere*

Section 8 (2) (b) of the 2005 Act requires that in determining whether a body provides or intends to provide public benefit in Scotland or elsewhere, regard must be had to –

- a) *how any –*
  - (i) *benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and*
  - (ii) *disbenefit incurred or likely to be incurred by the public,*  
*in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and*
- b) *where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.*

On balance, and having had regard to possible unduly restrictive conditions and access to the benefit (education) that is provided, OSCR considered that public benefit was not provided by Merchiston Castle School due to the fees that were in place and the absence of sufficient mitigation of the impact of these fees. Merchiston Castle School therefore failed to comply with section 7 (1) (b) of the 2005 Act and so did not meet the charity test.

The key information and considerations in relation to public benefit, and in particular to possible unduly restrictive conditions were as follows:

1. Merchiston Castle School is a medium sized independent school that provided education for approximately 430 pupils in Edinburgh. It is a single sex school and operates a Junior and a Senior School for boys. The majority of beneficiaries are boarders. In the 2007-08 session, there were 438 pupils enrolled at the School, of which 158 were day pupils and 280 were boarders.
2. The day fees charged by the school ranged from £10,485 per annum in the lower Junior school to £16,395 per annum for the Senior school. Boarding fees range from £4,500 to £6,450. The School's day fees included the provision of lunch, dinner and supervised homework.
3. The day fees charged were high, both when compared to the fees charged by other schools in the independent sector, and also when compared to the cost of providing education in the state sector. The boarding fee was relatively low compared to the fees charged by other boarding schools in the independent sector. Both these fees reflected the length of the school day, which runs until 9pm for all pupils.
4. Information on the tuition fees in place is available from the school upon request and is available from the school's website. The information that was provided was appropriate, and advised that means-tested provision is available.
5. There was good evidence of the charity providing other benefits in furtherance of its charitable purposes, for which it makes no fee or charge. Notably, it formed a partnership with the mentoring and counselling charity for young children, The Place2Be (SC038649). Up to 25 staff and senior pupils received training and offer mentoring and act as male role models to the pupils of Balgreen Primary School in Edinburgh. Some pupils of Balgreen Primary also attend Merchiston Castle School for up to two and a half hours per week. The cost of running this was being met by the school. Other examples include the provision of teaching practice placements for students and the provision of markers for exam boards. The School formed links with Zhuhai No 1 Middle School in China. Reciprocal visits took place for the staff and pupils of both schools through the Scotland/China Education Network.

6. The school offered means tested bursaries to new applicants. Means tested bursaries were available to pupils that passed entrance assessment, and were subject to biannual review. In the academic session 2007-08, there were 16 pupils in receipt of means-tested support, to the value of £100,838. In the 2007-08 session, the number of pupils in receipt of 100 per cent funding was four.
7. The school also offered Scholarships. In the 2007-08 academic session there were 116 non means tested concessions awarded for academic merit or sporting prowess (to the value of £383,197). There were 36 non means tested bursaries with a total value of £141,665. Non means tested concessions for pupils from armed forces families were also provided (£23,518 was awarded to 12 pupils in 2007-08).
8. In the 2007-08 session over all of these categories (and including the means tested support) four pupils were in support of 100 per cent funding.
9. The school had begun a process to restructure the facilitated access they offer so that the emphasis will fall on means tested rather than non means tested facilitation in future. This work was at a very early stage.
10. A recent development is that a former pupil has agreed to provide fully funded places at the School with a dedicated fund of £1 million. The school is working in partnership with the Laidlaw Youth Trust (SC037749) to find suitable candidates that were academically strong or showed talent in a particular area and would otherwise be unable to afford the fee. The first of these scholars were now attending the School.
11. All in all, more than 41 per cent of the school roll (180 pupils) was in receipt of some form of facilitated access. Within that, during the 2007-08 academic session, means tested support was offered to 3.7 per cent of the pupils (16 pupils).
12. In 2007-08, the total value of support (from all sources, but as in all cases not including the sibling or staff discounts) was £649,218. This represented just under 9 per cent of the total annual income of the charity in 2005-06. Of this, £100,838 was committed to means tested support, which represents less than 1.5 per cent of the total annual income figure.
13. The school attracted additional resources from rental and other income and donations. The full cost of the benefit provided was not directly passed on to the School's beneficiaries.
14. On balance, having had regard to possible unduly restrictive conditions and access, we concluded that public benefit was not provided by Merchiston Castle School due to the fees and charges that were in place and the absence of sufficient mitigation of the impact of these

fees. The key issue was that facilitated access arrangements are predominantly not linked to the financial situation of potential or existing students and their parents. The impact on addressing restriction was therefore limited. This was particularly so given the scale of the fees.

15. The fees were high, and while there were some arrangements to facilitate access to benefit by those unable to pay the fees from their own resources, these arrangements were not then on a scale sufficient to mitigate the exclusory impact of the fees charged on those from a range of incomes. We recognised that the school had started to restructure the facilitated access to place more emphasis on means tested facilitation in future. However, this had yet to show significant impact on the overall picture on access.
16. We recognised that the way the school offered education increases the cost of the benefit provided. We also recognised the extent of the benefit offered for which no fee applies (e.g. the work with Balgreen School). However, proportionality is an important aspect of the assessment, and the scale of the fees in this case required more significant measures to be in place to mitigate the restriction the fees place on access in particular for those less able to pay.

For the reasons outlined above, the charity test was not met.

#### **Further Action**

We issued a Direction to Merchiston Castle School on 27 October 2008 under section 30 (1) (a) of the 2005 Act:

- a) **To notify OSCR in writing by 28 January 2009 (three months from the date of the Direction) that the charity intends to comply with this Direction in full.**
- b) **To develop and submit a plan to OSCR by 28 October 2009 (12 months from the date of the Direction) that shows how the charity will increase the facilitated access arrangements for the benefit it provides, or sets out some other strategy that will ensure that the charity will be able to meet the public benefit requirement of the charity test.**
- c) **To meet the objectives of the above plan or strategy by 28 October 2011 (three years from the date of the Direction).**

to ensure that it complied with section 7 (1) (b) of the 2005 Act.

Merchiston Castle School indicated its intention to comply with the direction on 8 January 2009, and submitted a plan by 28 October 2009 which in OSCR's view complied with section (b) of the direction.

#### **The plan**

The plan which was approved had two main elements:

1. Increasing accessibility to the benefit provided by the school by increasing provision of means-tested bursaries (including means-

testing of sibling discounts and staff remissions) so that by 2011-2012, means-tested assistance would be provided as follows if the “likely” scenario (out of three possible scenarios presented) was in fact achieved:

- at 8.4% of applicable income (but not less than 7.6%)
  - to around 16% of pupils on the roll
  - with 12 pupils (2.8% of the roll) in receipt of 100% bursaries.
2. Provide accessibility through activities for public benefit for which no charge is made, including:
- Use of playing fields and transport by local primary and special schools
  - Pupil to pupil mentoring schemes for pupils with support needs in 3 local primary schools
  - Provision of a technology scholarship
  - Access to school wildlife and biology facilities for local primary schools
  - Science and creative writing conferences and workshops with participation for students from other schools
  - Governance and other assistance to a new Academy School in a deprived area in England
  - Marking of public examinations, hosting placements for student teachers and also other smaller scale and one-off activities,

### **Situation as at 29 October 2011**

At the end of the direction period, the situation in regard to the main aspects of the plan was as follows:

1. Means-tested bursaries in session 2011-2012 provided at
  - 8.2% of gross income
  - 14.7% of the school roll
  - 11 pupils (2.4% of roll) in receipt of 100% bursaries
  
2. The school provides public benefit at no charge through the following activities:
  - Pupil to pupil mentoring schemes for pupils with support needs in 3 local primary schools – extended to 3 further schools
  - Provision of a technology scholarship
  - Access to school wildlife and biology facilities for local primary schools
  - Science and creative writing conferences and workshops with participation for students from other schools
  - Governance and other assistance to a new Academy School in England – extended to include provision of a 100% Merchiston bursary to an academy pupil
  - Marking of public examinations, hosting placements for student teachers and also other smaller scale and one-off activities,

A number of proposals for use of facilities by state primary and secondary schools (including touch rugby lessons and festivals of sport) have not in the end been productive of benefit. The following additional activities are being undertaken at no charge for public benefit:

- Provision, by agreement with local authority education department of weekly swimming lessons for P6/P7 pupils in local schools to address non-swimming targets
- Introduction of a Community Choir for boys from local primary schools and Merchiston pupils.

### **Decision on Compliance**

Underlying the charity's plan was a shift of the school's resources from scholarships awarded on academic or sporting grounds to means-tested bursaries. This has largely taken place, and there has been a significant uplift in the funding available for means-tested assistance to pay fees, and in the number of pupils in receipt of assistance. While there has been some minor variance in the performance against the plan projections, this is in the context of an unanticipated level of increase in the roll and income.

Most activities delivering educational benefit for no charge have been achieved. In most cases where they have not, this reflects situations where activities with partner schools or organisations have, for a variety of reasons not proceeded after a certain stage of planning. In almost all cases, replacement activities have been organised, notably the swimming lessons for local primary schools in particular constituting a substantial, timetabled regular and curricular benefit to local primary schools not included in the original plan.

OSCR is satisfied therefore that the charity met the objectives of its plan by 28 October 2011, and that it has therefore fully complied with the direction issued to it on 28 October 2008. The issues identified in the original review have therefore been addressed and the charity provides public benefit and therefore passes the charity test.

OSCR

17 November 2011