

The Governors of the Fettes Trust
Scottish Charity Number: SC017489

Inquiry Report under section 33 of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act)

Following inquiries OSCR found that the charity did not provide public benefit and therefore failed the charity test. As a result, on 10 January 2013, OSCR issued a Direction to the charity to remove the undue restriction on obtaining the benefit it provided to ensure the charity met the charity test. The charity trustees have now implemented measures to remove this undue restriction and on 3 October requested that OSCR re-assess their charitable status on the basis of the following:

- In the financial year 2013-14, 80 pupils are in receipt of a means-tested award from the school to the total value of £1,480,352. This represents 10.6% of the school roll and 8.4% of the school's available income. The bursaries awarded by the school were of varying values. The bracket with the highest number of awards was 81-99% of the fee with 28 pupils being in receipt of these high value remissions. In total, 6 pupils (0.8% of the school roll) received a full award, entitling them to 100% fee remission.
- In addition to increasing the overall spend on means-tested assistance the school has also taken steps to clarify the allocation process for these awards. There is now a clear distinction between the process for applying for a scholarship and for applying for means-tested assistance.
- In terms of activity carried out for which there is no charge, or nominal charge only the school has introduced a number of new activities as well as building on some of the activity already being provided. The benefit of this type now being offered is set out at the [end](#) of this updated section 33 report.
- Cumulatively the steps taken by the school have satisfactorily removed the undue restriction that was previously in place and we therefore conclude that the charity provides public benefit and therefore passes the charity test.

Executive summary of initial decision

- After an inquiry, OSCR found that The Governors of the Fettes Trust (The Fettes Trust), a co-educational independent day and boarding school in Edinburgh, failed the charity test, and directed the charity to take steps to ensure that it passed the test.
- OSCR found that, having had regard to possible unduly restrictive conditions on accessing the benefit provided, the charity did not provide public benefit.
- The fees charged by the charity were substantial and represented a restriction on accessing the majority of the benefit the charity provided.
- Although the charity offered means-tested assistance to those who are unable to pay the full fees, the proportion of its income committed to such assistance (7%) and the number of the school roll who benefited (9.6%) was insufficient to mitigate the level of fees charged by the school.
- The school also provided benefit for which it made little or no charge. However, the level of such activity and the impact it had was not significant enough to mitigate the school's fees.
- The charity had not taken sufficient steps to mitigate the fees and therefore OSCR concluded that they were unduly restrictive.
- For these reasons, OSCR found that the charity did not provide public benefit and it therefore failed the charity test.
- Under the direction issued, the charity had to remove the undue restriction on obtaining the benefit it provides by increasing its spend on means-tested assistance and any other measures as the charity trustees thought appropriate to ensure that the charity met the charity test by 31 July 2014.
- The charity was advised that if it did not comply with the direction, OSCR would take steps to remove it from the Scottish Charity Register.

1. Introduction

Following previous reviews of charitable status, the Office of the Scottish Charity Regulator (OSCR) has identified fee charging schools as having a higher possibility of

failing the charity test due to the fees charged to beneficiaries. Our concern is that these fees may unduly restrict access to the benefit these charities provide. Fee charging schools are therefore a priority in our ongoing programme of reviews.

As part of this programme, OSCR undertook an inquiry into the charitable status of The Fettes Trust (SC017489) under section 28 of the 2005 Act.

2. Background

The Fettes Trust is a co-educational, all through day and boarding school situated in Edinburgh. In summary, the charitable purpose of the school is the advancement of education through the operation of Fettes College.

The school operates a junior school and senior school for children aged seven to 18 years. Our review was based on the 2010-11 financial year of the charity which was the most recent period for which the school was able to provide complete, reliable financial information. In this year, the school had a roll of 706 pupils, of whom 450 (63.7% of the roll) regularly boarded.

The charity's available income for the year was £15,137,994 (comprising of consolidated unrestricted income of £14,917,994 and restricted income of £220,000 which was available for bursary provision); we have used this figure for the purposes of our assessment.

3. Our Original Decision

To maintain their charitable status, charities must continue to meet the 'charity test' as laid out in sections 7 to 8 of the 2005 Act. The charity test requires charities 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.*

4. Relevant factors

a. Benefit provided

In furtherance of its charitable purposes, the charity's main activity is the operation of a fee charging junior and senior school. In the junior school, younger pupils are taught core subjects by their form teacher and older pupils learn specialist subjects from specialist teachers. In the senior school, pupils learn specialist subjects throughout. In the fourth and fifth forms pupils study for GCSEs and IGCSEs and in the sixth form pupils are offered a choice between the International Baccalaureate and A Levels.

The school encourages sport for all pupils and offers a wide range of co-curricular activities. It also provides the Combined Cadet Force which is compulsory for five terms and aims to develop leadership qualities.

The Fettes Trust additionally provides public benefit in furtherance of its purposes for which it does not charge a fee or, charges a nominal fee only. This included:

- Regular and scheduled weekly use of the sports facilities by two state primary schools with approximately 30 children benefiting from this per week. The school's grounds are also used by a local primary school as part of the Forest School Scheme and annually by a local scout association.
- Use of the facilities as a venue for SAT testing for students from across the country who wish to attend American colleges.
- Offering support to pupils from Fettes College and other local schools in their career development and further education by organising careers and higher education fairs and providing trial interviews for Oxbridge candidates.
- Organising events to which other local schools are invited, including an annual sporting talent day to allow children to try new sports and activities and receive expert tuition (with approximately 50 children benefitting) and a termly maths masterclass (involving 50 to 60 pupils).

- Organising student exchange programmes and providing free tuition to students in local schools where the subject studied is not offered at their own school. For example, the school's staff members currently tutor a small number of pupils from three other schools in maths, law and in interview preparation.
- Academic staff serving as examiners for various examination boards.
- Assisting George Watson's College and Motherwell College in the establishment of the International Baccalaureate programme.
- Encouraging pupils to support the voluntary and charity sector through the Duke of Edinburgh Award scheme and the environmental work of the school's pupil-led eco-committee.

b. Accessing benefit

There are two main ways in which access to benefit provided by the school is restricted; the entrance criteria and the fees charged for the education.

Prospective pupils are required to sit a written assessment and attend an interview. The school advises that the purpose of the written assessment is to ascertain whether the pupil will be able to benefit from the level of education it offers. Where a prospective pupil has already been a student at another school, a report is required from that school. The school advises that it is not highly selective, but that it seeks to admit children who will benefit from the wide range of opportunities available to them. The entrance criteria appear to be reasonable and justifiable in the context of the charity's purposes and therefore we did not consider that they were unduly restrictive.

The annual fees charged by the school in the year reviewed (2010-11) were as follows:

Year	Fee	Sector average fee¹	Variation
Junior day fee	£11,955	£10,941	+£1,014
Junior boarding fee	£18,735	£17,925	+£810
Senior day fee	£19,050	£16,398	+£2,652
Senior boarding fee	£25,860	£24,642	+£1,218

¹ *Indicative average fees for SCIS schools analysis at July 2010, www.scis.org.uk*
(Note: comparison made with average day and boarding fees charged by boarding schools as Fettes College is primarily a boarding school).

In addition to the benefit provided for which there is little or no charge, the school sought to mitigate the impact of the fees it charges by offering both means-tested and non means-tested fee remissions to its pupils.

Means-tested financial assistance in the form of bursaries of up to 100% remission of the fee was available. The school advertises its bursary policy on its own website and in local and national press. In addition, the opportunities available for assistance are explained by the school at the various events it holds throughout the year, including its open day and its sporting talent day.

The school advised that there are normally more applicants seeking bursary assistance than funds available. It therefore uses the results of the admissions test and interviews to allocate funds to those who it considers would benefit most from an education at the school. At the time of the review, the charity's website indicated that only pupils who were already in receipt of a non means-tested scholarship from the school (awarded to children who show potential in a particular area or who show aptitude in several areas) could apply for a means-tested bursary. However, the school has advised us that this was no longer the case and had subsequently amended this part of its website.

Although the school stated that, for at least five years, receipt of a scholarship has not been a prerequisite to qualify for means-tested bursary support, in practice the vast majority (87%) of those in receipt of a means-tested bursary in 2010-11 were also in receipt of a scholarship. The same was also true of the 2011-12 and 2012-13 sessions, where 87% and 90% of the means-tested bursary recipients respectively were also in receipt of a scholarship award.

In the financial year assessed (2010-11), 68 pupils were in receipt of a means-tested award from the school to the total value of £1,057,344. This represented 9.6% of the school roll and 7% of the school's available income. The bursaries awarded by the school were of varying values with the highest number of awards being in the 61-100% bracket. In total, five pupils (0.7% of the school roll) received a full award, entitling them to 100% fee remission.

Additionally, four pupils were in the receipt of external support in the form of the Education Maintenance Allowance (EMA). The EMA is paid directly to eligible 16 to 19 year olds from low income families at a rate of £30 per week.

The school also offers three non means-tested forms of financial assistance, these being scholarship awards, fee reductions for children of members of HM forces and sibling discounts where two or more children from one family attend the school concurrently. Cumulatively, these discounts benefited 81 pupils in the 2010-11 year, with the total value of the awards amounting to £769,908. This represented 11.5% of the school roll and 5.1% of the school's available income.

5. Conclusion of the initial review of charitable status

We were satisfied that The Fettes Trust had charitable purposes and that there was no evidence of any significant private benefit or disbenefit arising as a consequence of the charity's operations. These parts of the charity test were therefore met.

In assessing whether The Fettes Trust provides public benefit, we considered the conditions in place on accessing the benefit provided by the school – namely the fees charged - and whether these were unduly restrictive.

In doing so, we had particular regard to the principles we established from our experience to date in assessing whether fees and charges amount to undue restriction; these are set out as follows in our guidance publication, 'Meeting the Charity Test':

- **Transparency is important, whatever the scale of fees** – the charity should be able to demonstrate that its fee structure and arrangements to facilitate access are well publicised.
- **There are otherwise no absolute requirements** - it is for the charity to decide in what way it can best ensure that any fees or charges do not unduly restrict access to its benefits, but the overall decision on whether there is public benefit is for OSCR to make.
- **Proportionality is a factor in assessment** – in the case of small or insignificant fees less evidence is generally required to assess whether these constitute an undue restriction. The greater any fee, the more evidence may be needed, and the more important any measures on the part of the charity or others to mitigate the impact of the fee become.
- **The scale of any fee will be weighed against the full scope of the benefit(s) provided (those that are being charged for as well as any that are not being charged for)** - this means that we will take into account any other benefits the body provides in furtherance of its charitable purposes, for which it makes no charge.

- **Where a fee is charged which may affect the access to a benefit, we expect some kind of facilitated access or other mitigation to be in place** - we will assess the cumulative impact of any support to help potential beneficiaries to access charged for benefit. We will take account of the extent to which any facilitated access makes provision for people with a wide range of incomes, including low incomes.

Forms of facilitated access which are clearly linked to the financial situation of potential beneficiaries (for instance through means-testing) are likely to have the greatest impact in addressing undue restriction in this context. Facilitated access arrangements, such as support to pay any fees or charges, which come from a body that is not a charity or is not connected with the charity can and do in practice facilitate access to the benefit a charity provides.

- **The cost of providing the benefit that is being charged for is relevant to assessing whether any fee or charge is unduly restrictive** – some benefits are more expensive to provide than others and we recognise that charities must be able to cover the cost of providing benefit.

As the table in Section 4b above indicates, the fees charged by The Fettes Trust were notably higher than the sector average fees, with the senior day fee being considerably higher. It should be noted that the comparison was made for the purposes of context only. The average sector fee is substantial and represents a restrictive condition on accessing the benefit provided by the school; fees which exceed this level are consequently yet more restrictive. In order for public benefit to be provided, there must therefore be significant mitigation of the school's fees in place if they are not to be undue.

We acknowledged, however, that the provision of educational benefit through the operation of a school is costly and that charity trustees must bear in mind their duties to act with care and diligence when managing the charity's affairs. In order to ensure future sustainability, charities in this sector – as in any sector where benefit is expensive to provide – must be able to generate income which meets the charity's necessary expenditure to allow the charity trustees to fulfil their legal duties and responsibilities.

The school had taken steps to mitigate its fees in a number of ways. It has in place a means-tested bursary assistance scheme which is advertised to potential and existing beneficiaries. However, the charity's website until very recently contained what it has now confirmed as incorrect information about the way in which means-tested bursaries can be accessed, in particular who is eligible to apply. This may have had the effect of

restricting access for some potential beneficiaries, therefore the charity's recent steps to clarify this information are a positive development.

During the year under review (2010-11), awards of varying values were made under the means-tested bursary scheme, benefitting families on a wide range of incomes. There was also a particular focus on high value awards which benefit those on low incomes, although relatively few pupils (0.7% of the school roll) were in receipt of an award equating to remission of the full fee. Additionally, we also noted that the government-funded Education Maintenance Allowance supplemented the school's own means-tested bursary assistance to a limited extent for a small number of pupils; this benefit was available up to a maximum of £1,260 per year (42 weeks at £30 per week).

The school's expenditure on means-tested bursary support, at 7% of the charity's available income, was higher than that of some of the other schools reviewed by OSCR to date, as was the number of pupils in receipt of such assistance (9.6% of the school roll). However, The Fettes Trust's fees were notably higher than the sector average fees and therefore a proportionately higher level of mitigation was required if the fees are not to be undue.

Additionally, it appeared that means-tested bursary awards were made primarily to pupils who were already in receipt of a non means-tested scholarship award; this was despite the school's change in policy at some point prior to 2008. This indicated that the school did, in practice, continue to prioritise the distribution of such awards on the basis of academic, sporting or artistic merit above financial need. As the principles above set out, we consider that forms of facilitated access which are clearly linked to the financial situation of potential beneficiaries have the greatest impact in addressing the unduly restrictive nature of fees.

In this case, it was not clear that the means-tested bursary support scheme was primarily directed at those who are less able to pay and this therefore has an impact on the extent to which it mitigated the substantial fees charged by the school. We did not consider that either the level of expenditure on means-tested assistance, or the way in which the bursary scheme was operated in practice, were sufficient to open up access to the benefit provided.

The school also took steps to mitigate its fees through the operation of non means-tested fee remissions, namely scholarship awards, fee reductions for children of members of HM forces and sibling discounts. This form of mitigation benefited a larger part of the

school roll than the means-tested bursaries (11.5% of the roll compared to 9.6%) but its impact on mitigating the fees was considerably lower as it is not focussed to any degree on addressing the need of those who cannot afford the fees charged.

As well as providing benefit which is charged for, the school provided benefit for which there is no or little fee. This type of activity did benefit a range of beneficiaries outwith the school itself and therefore formed part of our overall assessment. However, taking the full scope of the benefits provided by the school into account, we did not consider that the benefit provided in this way was significant or substantial enough to mitigate the level of fees charged by the school for the majority of the benefit it provides.

The not charged for activities undertaken by the school which had the most impact were the regular use of its sports facilities by two local primary schools, the organisation of events open to pupils from other schools (in sports, maths and career development/further education) and the tuition of a small number of pupils from other schools in specialist subject areas. The majority of the activities appeared to be regular and ongoing. However, the remaining activities were for the most part relatively infrequent or they were otherwise not primarily directed at providing not charged for benefit in furtherance of the advancement of education of young people. While these activities did provide benefit to a number of beneficiaries, the school did not participate in a significant enough level of such activities to fully mitigate the fees it charged, taking into account the level of those fees and the other forms of facilitated access it offered.

Fettes College is an all through school located in central Edinburgh catering for a relatively large number of pupils. As such, it has a comparatively higher level of resources available to it than, for example, a small, rurally-located junior school and therefore has greater opportunity to offer benefit which is not charged for. The school had not evidenced that it was committed to offering a significant enough level of regular benefit for which there is little or no charge, when considered in the context of the substantially above-average fees. This type of activity consequently had a limited impact on mitigating the fees it charges.

On balance, and having had regard to possible unduly restrictive conditions on accessing the benefit, we concluded that public benefit was not provided by The Fettes Trust. This was due to the fees and charges that were in place, the insufficient mitigation of the impact of those fees through means-tested bursary support and the insufficient level of other benefit being provided in furtherance of its charitable purposes for which no fee or charge was made.

For the reasons set out above, OSCR found that the Fettes Trust did **not** meet the charity test.

6. Issue of the Direction

On 10 January 2013, OSCR directed The Fettes Trust under section 30(1)(a) of the 2005 Act to take the following steps for the purposes of meeting the charity test:

To remove the undue restriction on obtaining the benefit provided by the charity (as set out in section 5 of this report) by 31 July 2014.

This action must include increasing the charity's means-tested assistance spend and taking such other measures, as appropriate, to ensure that the charity meets the charity test such as by:

- a) increasing the benefit for which there is no charge (or nominal charge only); and/or
- b) taking any other actions that appear to the charity trustees to be necessary at present or, following a change in circumstance, in the duration of this direction.

7. Situation as of October 2013

Following the Direction issued to the charity in January, the charity trustees began to take measures to remove the undue restriction on obtaining the benefit provided. They have now implemented these measures and on 3 October requested that we re-assess their charitable status on the basis of the following:

In the financial year 2013-14, 80 pupils are in receipt of a means-tested award from the school to the total value of £1,480,352. This represents 10.6% of the school roll and 8.4% of the school's available income. The bursaries awarded by the school were of varying values. The bracket with the highest number of awards was 81-99% of the fee with 28 pupils being in receipt of these high value remissions. In total, six pupils (0.8% of the school roll) received a full award, entitling them to 100% fee remission.

In addition to increasing the overall spend on means-tested assistance the school has also taken steps to clarify the allocation process for these awards. There is now a clear distinction between the process for applying for a scholarship and for applying for means-

tested assistance. This change in process has enabled assistance to be more clearly targeted on pupils on lower incomes with a 13% reduction in the overlap between pupils who are in receipt of means-tested assistance and also receive a scholarship.

In terms of activity carried out for which there is no charge, or nominal charge only the school has introduced a number of new activities as well as building on some of the activity already being provided. The benefit of this type now being offered includes:

- Providing tuition for external candidates in various subjects including German and Art. Additionally, in 2012 six pupils sat GCSE Modern Greek and three sat A Level Modern Greek. In 2013, five external candidates sat A Level Persian and another sat IGCSE Persian Studies and Islamic studies and one sat A Level Music.
- Regular and scheduled use of the sports facilities and school grounds by local state primary schools with around 55 children cumulatively benefiting per week
- Regular use of the sports pitches by Lacrosse Scotland for U19s training three times per term for two terms per year and the Scottish Rugby Union for U16 and U18 training five times per year.
- Hosting and organising a number of events to which children from other schools are invited, including
 - An annual Latin Day where approximately 120 children from local Scottish & North of England schools attend to learn about the language and literature.
 - The annual Edinburgh Schools Cross Country league and relay events with approximately 200 children attending each event.
 - An annual Sporting Talent Day for local primary aged children. On average 70 children receive training and advice for a variety of sports on the day with on-going support offered to those who have attended thereafter.
 - An annual Careers day with three local state high schools which over 100 non-Fettes pupils attending per year.
 - A Chinese New Year celebration involving an evening of language and cultural exchanges. Pupils from two local state secondary schools students are invited with around 150 attending per year.
 - Providing interview training for pupils who wish to apply to Oxford and Cambridge Universities. This is open to local state school pupils.

- A weekly chess club with a Chess Grand Master providing tuition to both Fettes and non-Fettes pupils. The club has just launched with 60 external pupils likely to attend per session.
- Use of the schools facilities six times per year as venue for SAT Testing for external students who wish to apply to American Colleges. Up to 60 external students attend each session.
- Scheduled use of the facilities by a local drama group twice a week. Up to 30 children attend per session. The group also use the schools theatre for all of their performances.
- Continuing pupils and staff voluntary work assisting at Oaklands School, a school for children with severe and complex learning difficulties.
- Continuing to assist George Watsons College in connection with their International Baccalaureate programme and providing ongoing support and advice.
- Taking part in a buddy/mentoring scheme arranged through the charity Place2Be. 30 pupils have been identified as volunteers, from Lower 6th year. These volunteers will become mentors in Primary schools across Edinburgh working with local pupils.

Conclusion

We consider that the school has sufficiently addressed the issues identified in the original review. In particular the increase in the amount of income expended on means-tested bursaries as well as the increase in the number of full remissions awarded and the continued trend of issuing higher value awards overall has had the effect of impacting on those who cannot afford the fee. We have also been encouraged by the clarification in the processes for awarding means-tested assistance. This has separated the process for awarding means-tested assistance and scholarships, whereas previously pupils had to be in receipt of a scholarship to be eligible for a bursary.

It is now the position that 74% of means-tested award holders are also in receipt of a scholarship. While this figure is still high, we acknowledge that it is a significant decrease from the previous year (90%) and that will take a number of years for pupils who were

awarded scholarships and means tested assistance under previous criteria to work their way out of the system.

Finally, the school has increased its not charged for benefit to a level which we now consider to be substantial and having a high impact on a high number of beneficiaries from outwith the school.

Cumulatively the steps taken by the school have satisfactorily removed the undue restriction that was previously in place and we therefore conclude that the charity provides public benefit and therefore passes the charity test

19 November 2013