

## **Rolling Review – Phase 1a**

OSCR's decisions on 30 charities

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## 1. Executive Summary

Phase 1a of the Rolling Review has been an essential element in the ongoing development of how OSCR interprets and applies the charity test. The assessment process has enabled us to explore in more detail the principles, first set out in April 2006, that guide our decision making on the charity test. This has been particularly true in relation to fees and charges as possible unduly restrictive conditions. The result is reflected in the revised *Meeting the Charity Test guidance*, published simultaneously with this report.

Phase 1a was designed to test out the principles and lessons which emerged from the pilot decisions published in July 2007. As we have adopted a risk based approach to the Rolling Review, a high proportion of the charities we reviewed in Phase 1a were selected on the basis that it was possible or likely that issues would arise, particularly when considering possible unduly restrictive conditions. It should therefore not be surprising to find that not all charities were able to satisfy all elements of the charity test.

That said, the vast majority of charities that were assessed in Phase 1a have been able to demonstrate that they provide public benefit. As with the pilot, this is a very positive outcome, and confirms the significant contribution charities of all types and sizes make to Scottish society.

In a number of cases (4 out of 30) we conclude that, on balance, public benefit is not provided as a result of the presence of unduly restrictive conditions, specifically the fees or charges. As we identified this as a specific risk category, this outcome is not surprising. Access to the benefit which these charities provide is a fundamental element of the charity test. Charities which fail the charity test on these grounds have been issued with three-stage Directions giving them a clear timetable for planning and implementing the changes that enable them to meet the charity test; and also requiring them to give OSCR an early assurance that they intend to comply.

From OSCR's perspective it is encouraging to see how the lessons of the original report have already had an impact. Several of the charities for which unduly restrictive fees are potentially an issue, have already made plans and progress towards being able to meet the charity test by providing facilitated access.

Six out of 30 charities have a problem with their constitutions as the way in which the terms 'charity' or 'charitable' have been defined in their constitutions makes it possible for their property to be used for purposes that are not charitable in terms of the Charities and Trustee Investment (Scotland) Act 2005. This is the same issue that was faced by one of the charities in the original pilot. We have made formal recommendations to Ministers in our *Annual Report and Accounts 2007-08* for changes to the legislation which may avoid this problem in future, but in the meantime we have issued Directions which will allow reasonable time for each of the charities to amend their constitutions to allow them to meet the charity test.

The constitution of one charity permits Ministers to direct or control its activities, and this must be addressed for the charity to meet the charity test. In this case we have also issued a Direction, again allowing reasonable time for the issue to be addressed.

Going forward, the consistency of the results in Phase 1a, including the positive evidence of public benefit provided, suggests that we should be able to streamline our original programme for assessing all 23,500 charities, by considering how to link this with OSCR's monitoring function and the regular reporting by charities to OSCR, and by working with umbrella organisations. We will be exploring this further as we proceed with the next risk based phase of the Rolling Review (Phase 1b) and we will be consulting in the course of 2009 on more integrated reporting by charities to OSCR.

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As with the Pilot Study Report we will provide a number of charities we have reviewed with recommendations. We also make recommendations which will be relevant to all charities. The lessons of Rolling Review, and our experience elsewhere, is that an up to date constitution is an essential precondition of good and effective governance of any charity. We therefore continue to recommend that charity trustees should review their constitutions and assure themselves that these are up to date with the legislative requirements and fit for purpose given the current activities of the charity.

Experience also shows the value of charities working with umbrella bodies to agree model constitutions, which will enable us to streamline the Rolling Review process and enable charities to avoid some of the most obvious difficulties they may encounter in meeting the charity test.

## 2. The Scottish charity test – an overview

To be registered as a charity in Scotland an organisation must have only one or more of the charitable purposes set out in the Charities and Trustee Investment (Scotland) Act 2005 (the '2005 Act') and it must provide public benefit in Scotland or elsewhere.

This is the charity test, contained in sections 7 and 8 of the 2005 Act.

Organisations seeking charitable status must meet the charity test to be entered in the Scottish Charity Register (the Register). The Rolling Review checks whether existing charities continue to meet the charity test and ought to remain in the Register.

Our guidance 'Meeting the Charity Test' has been revised and updated for October 2008. This explains that we can distinguish four parts to the charity test. To be a charity the following requirements must be met:

- a body must have only charitable purposes
- in addition:
  - its constitution must not permit the body's property to be used for non-charitable purposes
  - its constitution must not expressly permit Ministers to direct or otherwise control the body's activities
  - the body must not be a political party or must not have as its purpose the advancement of a political party
- the body must provide or (in the case of an applicant) intend to provide public benefit
- in determining whether public benefit is provided by the body OSCR must have regard to:
  - how any private benefit compares to benefit by the public
  - how any disbenefit to the public compares to benefit to the public
  - whether there are any unduly restrictive conditions on obtaining the benefit the body provides.

More information and guidance on how OSCR applies the charity test can be found in our revised guidance *Meeting the Charity Test*, published simultaneously with this report and which can be accessed on the OSCR website [www.oscr.org.uk](http://www.oscr.org.uk). A summary version is also available.

## 3. Background to the Rolling Review

Since April 2006 OSCR has assessed over 2,600 new applications for charitable status, and those passing the charity test have been entered in the Register. However, all bodies in Scotland recognised by HM Revenue and Customs prior to April 2006 as having charitable purposes were automatically entered in the Register by OSCR as a result of the transition arrangements in the 2005 Act. These charities were, at that point, not assessed against Scotland's new charity test.

Under the 2005 Act, OSCR is under a duty to review entries in the Register from time to time, as well as to remove from the Register a charity that no longer meets the charity test. These requirements form the basis for OSCR's Rolling Review of charities.

### 3a. Preparing for the Rolling Review

In October 2006, OSCR launched its public consultation on the Rolling Review. The document *Rolling Review – Proposals for Consultation* outlined OSCR's proposed approach to the prioritisation and phasing of Rolling Review work.

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The consultation involved three elements:

- written consultation
- user/focus groups
- pilot assessments.

The Consultation Report can be accessed on the OSCR website: [www.oscr.org.uk](http://www.oscr.org.uk). A key conclusion from the consultation was that a risk based approach to the Rolling Review was appropriate, and a number of specific risk categories were identified at that point.

The Pilot Study Report, which was published in July 2007, provides a full report on OSCR's Rolling Review Pilot, including the methodology and the lessons learned during the pilot assessment process, both for OSCR and for charities in Scotland. It can be accessed on the OSCR website: [www.oscr.org.uk](http://www.oscr.org.uk).

### 3b. Phase 1 of the Rolling Review

The Rolling Review Pilot gave us a clearer understanding of the demands of the intended risk-based approach to Rolling Review. We therefore decided to proceed *gradually* with the review process.

In Phase 1a of our Rolling Review of charities on the Register we decided to work with a small number of charities only. This was intended to enable further policy development work to be undertaken and to help clarify, for example, how the principles in the 'Restrictive Conditions Policy Statement' (which was published as part of the Pilot Study Report) would relate to specific types of charity. During the same period of undertaking the review of a small number of charities we consulted on a draft of our revised and updated *Meeting the Charity Test* guidance. The Rolling Review process and consultation on the revised guidance have informed each other over this period. We refer to this first stage of the Rolling Review as **Phase 1a**, and the outcome of this work is the focus of this report.

## 4. Reviewing Charities in Phase 1a of the Rolling Review

OSCR consulted widely in 2007 on our original proposals for the Rolling Review. The feedback received from charities, professional advisers, charity trustees and members of the public was that a risk-based approach, combined with a degree of random selection, is appropriate. On that basis we identified several types of charities that may present specific risk or uncertainty in relation to the charity test. During Phase 1a we have reviewed 30 individual charities, 23 of which fell into a 'risk' group. The other seven were selected randomly.

In September 2007 OSCR announced the following charities for assessment in Phase 1a of the Rolling Review:

### Schools

SC022723 Regius School  
SC005339 Glasgow Steiner School Ltd  
SC007957 Lomond School Ltd  
SC002922 Hutchesons Educational Trust  
SC004463 Jordanhill School  
SC011463 George Heriot's Trust  
SC016580 Merchiston Castle School  
SC037867 Gordonstoun Schools Limited  
SC014611 St Mary's Music School Trust Ltd  
SC017417 Governors of Donaldson Trust  
SC010904 St Leonards School

**Residential Care Services**

SC010314 Queens House Residential Home  
SC016007 Isobel Fraser Residential Home  
SC013208 Cosgrove Care Ltd  
SC013035 Servite Housing Association

**Museums**

SC000639 Bute Museum Trustees  
SC006185 Scottish Fisheries Museum Trust Ltd  
SC018225 Ullapool Museum Trust

**Charities With Membership Structure**

SC007410 National Trust for Scotland  
SC013138 Scottish Youth Hostels Association  
SC033661 Kilwinning Community Sports Club  
SC000942 Scottish Rock Garden Club  
SC003275 Biggar Music Club

**Randomly Selected Charities**

SC029625 Willows Animal Sanctuary  
SC010556 Sylvia Aitken's Charitable Trust  
SC017622 Edinburgh Interfaith Association  
SC008228 Providing For People in Paisley  
SC032270 Andarroch Trust  
SC032302 Isle of Gigha Heritage Trust  
SC002970 Robertson Trust

Some of the charities that were highlighted for review on the basis of a particular risk may also have characteristics that are of interest in relation to another risk. For example The National Trust for Scotland and the Scottish Youth Hostel Association, included in the list above under 'Charities with membership structures' are also examples of charities that charge fees for their services.

**4a. Process for Phase 1a Reviews**

We first wrote to all charities selected for Phase 1a of the Rolling Review in September 2007, giving early notification that we would soon be requiring information that would allow us to undertake our Rolling Review. Later that autumn we wrote to each charity requesting the completion of the standard 'Review of Charitable Status' form. We had established where information was already available from our files and in a number of cases we asked for the answers to specific questions or asked for other information or documents (for example an up to date constitution) to be supplied.

Charities returned information to OSCR during the period November 2007 to February 2008 and at that stage an assessment was made as to whether or not it was possible to conclude that the body in question met the charity test. Again, in some cases we needed to obtain further information. In a small number of cases it was necessary to do so through meeting with an individual charity. Such meetings are however the exception, and the Rolling Review remains, as envisaged, a desk based process.

As the charities in Phase 1a of the Rolling Review were largely selected on the basis of there being a risk or uncertainty over the ability to meet the charity test, the assessment and decision making process in a number of cases required in depth consideration of new policy issues. These policy issues required full consideration and agreement by the OSCR Board, which meant that the time

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taken to conclude all our assessments has been longer than originally anticipated. As with the Pilot Study Report, we have made and announced all the decisions together, and we appreciate the patience and understanding which all the charities involved in Phase 1a have shown during this extended period. It may be noted that given how we propose to approach the next phase of the Rolling Review (see section 8) charities will not need in future to wait for 'block announcements'.

### 5. Overview of outcomes of Phase 1a

This part of the report summarises the outcomes of Phase 1a in two different ways:

- in section 5a, we give an overview of the whether the charities we have reviewed were able to meet the various aspects of the charity test.
- in section 5b, we give an overview of the results for the various types of charity we looked at, given that specific 'types' of charities were selected for review on the basis of a risk or uncertainty in relation to their ability to meet the charity test.

Later, in Section 6 of this report we give an overview of the decisions reached: how many charities that we reviewed met the charity test, in how many cases the test was not met and where we have needed to issue a Direction, and cases in which we give formal recommendations.

#### 5a. Overview of outcomes by different aspects of the charity test

To be a charity a body must meet the following requirements:

- a body must have only charitable purposes
- in addition:
  - its constitution must not permit the body's property to be used for non-charitable purposes
  - its constitution must not expressly permit Ministers to direct or otherwise control the body
  - the body must not be a political party or must not have as its purpose the advancement of a political party
- the body must provide or (in the case of an applicant) intend to provide public benefit
- in determining whether public benefit is provided by the body OSCR must have regard to:
  - how any private benefit compares to benefit by the public
  - how any disbenefit to the public compares to benefit to the public
  - whether there are any unduly restrictive conditions on obtaining the benefit the body provides.

We give below a very brief summary of the Rolling Review assessments in relation to these elements.

##### *Charitable purposes*

No significant difficulties have arisen out of the assessments in relation to charitable purposes. However, in one case a charity lists a purpose which, under the Charities and Trustee Investment (Scotland) Act 2005, is not charitable: 'the promotion of trade and industry'. This charity therefore does not meet the charity test.

In addition, in a number of cases it appeared to us that the constitutions of some charities may benefit from revision, in light of the 2005 Act (in which there are now 15 charitable purposes) and in light of modern circumstances. We make a general recommendation to all charities, as we did after

the conclusion of our Pilot Study, to ensure that the charity's constitution is up to date, is in keeping with the requirements of the Charities and Trustee Investment (Scotland) Act 2005, and accurately reflects the charity's activities.

#### *Use of property for non-charitable purposes*

This was considered in some detail in relation to museums, where the question arose as to whether the destination of the assets upon dissolution of some of these charities would be in breach of the 2005 Act. None were identified.

In the case of six charities, the term 'charity' or 'charitable purpose' is defined in terms of UK tax law rather than the 2005 Act. As a result, and due to the exact drafting of the constitutions in question, these constitutions permit the property of the charity to be applied for purposes that are not charitable under the 2005 Act. This is in breach of section 7(4)a of that Act.

#### *Ministerial control*

In the case of one charity we have identified that its constitution permits Ministers to direct or otherwise control its activities: the constitution requires the consent of the Secretary of State for Scotland in order for any changes to be made to the memorandum and articles of association during any year in which the Scottish Education Department (SED) (now the Scottish Government), has contributed funds to the charity.

#### *Political parties and the advancement of political parties*

This issue did not arise in the charities included in this phase of the Rolling Review.

#### *Benefit provided*

In all cases the benefit that is provided could be clearly identified from the wide range of activities being undertaken. This is a very positive outcome, and testifies to the significant contribution charities of all kinds make to Scottish society.

It must be noted however that the assessment of whether *public benefit*, in terms of the charity test, is provided requires us to have regard to a number of further matters: private benefit, disbenefit and possible unduly restrictive conditions.

#### *Private benefit*

The issue of private benefit was considered in particular in the context of membership-based bodies, but did not give any particular difficulties in that context or otherwise.

#### *Disbenefit*

None of the charities reviewed had activities that gave rise to significant disbenefit.

#### *Unduly restrictive conditions*

Unduly restrictive conditions were assessed in detail in relation to two types of charity in particular: residential care providers and schools (on the basis of the level of fees, but other access criteria also needed to be assessed).

In the case of charities providing residential care services, fees and charges did not appear to present significant difficulties. While the cumulative impact of these fees and charges can be considerable, in the cases looked at they were typical of those in the sector and in line with guidelines suggested by external bodies. We also took into account that assistance with the payment of fees is determined by primary and secondary legislation. In the cases we looked at a significant number of beneficiaries were assisted, some to a substantial level.

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In the case of the schools, the fees and charges in place varied significantly across the group we assessed, as did the arrangements in place to facilitate access for those unable to pay the full fees charged. There was a diverse range of financial support (facilitated access) mechanisms in place. Establishing the impact of each of these has been challenging. In the case of 4 out of the 11 schools assessed we concluded that, having had regard to fees and charges as possible unduly restrictive conditions, on balance public benefit was not provided by these charities, and the charity test was not met.

The summaries in Section 7 of this report provides more information.

#### **5b. Overview of outcomes by different types of risk factors or types of charities**

We give here a brief overview of the issues that have arisen in relation to specific types of charities or risk factors, either around public benefit or any other identified risk relevant to that group.

##### *Membership-based charities*

The assessment of the public benefit provided by the membership bodies included in this phase of the Rolling Review did not reveal any difficulties. The membership or selection criteria were reasonable, as were any fees or charges in place relating to the membership or services provided to members or the public at large. Access to the benefit provided was available to a significant section of the public. In some cases discounted provision was available.

##### *Museums*

Museums were identified as a priority for Rolling Review due to the risk that their constitutions may allow the distribution of property for non-charitable purposes (in particular upon dissolution).

Of those highlighted for review, none have presented this difficulty. One museum allows for any charitable assets to be held temporarily by a Local Authority and to be applied for charitable purposes, should the charity cease to exist. This is not problematic in terms of the charity test, in particular as the constitution makes further provision that this step be taken only until such time as a new charitable vehicle can be established for the display of all exhibits.

The review process required that thought be given to the acquisition policies and practices of museums, such as the return of loaned items. No difficulties were identified.

##### *'Random' charities*

Among the randomly selected charities were a number of grant giving charities.

Clarification was sought in relation to the grant giving policies (or practices, where a policy has not been available) of these charities. This has helped to confirm our position in relation to the appropriate charitable purpose(s) of these bodies, as stated in the constitution.

In one case the constitution of a randomly selected charity stated a purpose which is not a charitable purpose under the 2005 Act, 'the promotion of trade and industry'. This will need to be changed to allow the charity to meet the charity test. The charity concerned is a rural development trust, set up under a model constitution agreed with HMRC prior to OSCR taking up its powers. We have already agreed a new model constitution with the relevant umbrella body, which addresses this issue and no longer contains this purpose.

We are aware that a number of similar organisations, with similar activities, may have the same non-charitable purpose included in their constitutions. During Phase 1b of the Rolling Review we shall work further with the umbrella body to ensure that these organisations will take appropriate steps to enable them to meet the charity test in the future.

The review of this charity has also been an interesting example of the complex structure and activities of a body involved in rural development and regeneration. We plan to issue further, more detailed guidance on regeneration as a charitable purpose later in 2008, and will report more fully on this case in that context, rather than in this generic report.

#### *Charities providing residential care*

Fees and charges appeared not to present significant difficulties in relation to the charity test for the charities we looked at that provide residential care. While the cumulative impact of these fees and charges can be considerable, they reflect the nature and cost of the benefit provided and in the cases looked at they were typical of those in the sector and in line with guidelines suggested by external bodies.

We also took into account that assistance with the payment of the fees is determined by primary and secondary legislation. However, the exact extent of this in relation to the individual beneficiaries is not always known to the charities. In the cases we looked at a significant number of beneficiaries were assisted, some to a substantial level.

The housing association included in this group does not cater exclusively for sheltered or very sheltered housing tenants, and also provides more mainstream housing services. This has required consideration of shared ownership or shared equity schemes run by charitable Registered Social Landlords. We propose to provide more detailed guidance on this issue shortly.

#### *Schools*

A variety of day schools, boarding schools and grant aided schools have been reviewed. The fees and charges in place vary significantly across the group, as do the arrangements in place to facilitate access for those unable to pay the full fees charged. Establishing the impact of these arrangements has been challenging.

A clear conclusion from the process has been that means-tested access arrangements have the most significant impact on opening up access that is restricted due to fees that are being charged. The process has also led us to clarify further how we take account of access arrangements that are made available by others than the charity itself.

One clear and very encouraging trend that has come through from the assessments we have made, is that the schools on the whole are working hard to respond to the requirements that the charity test puts on them. The results of these efforts are not yet apparent in all cases in terms of improved access, and may take some time to be realised.

Finally, the extent and nature of benefit schools provide for which there is no fee or charge was similar across the charities reviewed. However, in most cases, this kind of benefit was neither significant enough nor closely enough related to the charity's purposes to have critical impact in our assessment of public benefit. In this context, we take into account in particular the activities that further the charity's purposes (generally the provision of education for a certain age group).

In the case of 4 out of the 11 schools assessed we concluded that, having had regard to the full scope of the public benefit assessment (including fees and charges as possible unduly restrictive conditions), on balance public benefit was not provided, and the charity test was not met.

For further details see section 7, 'Selected case summaries'.

## 6. Overview of decisions reached

In this section we give an overview of the decision reached in respect of each charity.

### 6a. Charities that meet the charity test

We consider the following charities to meet the charity test:

- National Trust for Scotland, SC007410
- Biggar Music Club, SC003275
- Scottish Fisheries Museum, SC006185
- Roberston Trust, SC002970
- Servite Housing Association, SC013035
- St Mary's Music School, SC014611
- George Heriot's Trust, SC011463
- Governors of Donaldson Trust, SC017417
- Gordonstoun Schools Ltd, SC037867
- Sylvia Aitken's Charitable Trust, SC010556
- Kilwinning Community Sports Club, SC033661
- Regius School, SC022723
- Glasgow Steiner School Ltd, SC005339
- Scottish Rock Garden Club, SC000942
- Providing for People in Paisley, SC008228
- Queens House Residential Home, SC010314
- Isobel Fraser Residential Home, SC016007.

In a small number of these cases we will provide good practice suggestions, for example that the charity is more open in making its provision known to the public; and how it lets the public know who may be able to benefit.

#### *Charity test met – recommendation issued*

The following charities also meet the charity test. However, specific issues of significance have arisen during the review process, which merit a formal recommendation being issued, advising the charity to address the issue within a reasonable period of time:

- Willows Animal Sanctuary, SC029625. This charity carries out a range of activities, some of which do not appear to be in pursuit of its stated purposes. We have therefore recommended that the charity trustees carry out a review of their activities and their constitution and consider what the purposes of the charity should now be. If the charity concludes that it wishes to change its constitution (to reflect updated purposes), it needs to ensure that it makes the changes in a way that gives effect to them, given the constitutional form of the charity.
- Edinburgh Interfaith Association, SC017622. In this case, the constitution lacks any provision to ensure that the charity uses its property for charitable purposes only. Although this does not result in a breach of section 7(4)(a) of the 2005 Act in this case, we have recommended that the charity trustees review the constitution and consider adding a provision which explicitly ensures that the property of the charity can only be applied for charitable purposes.

## **6b. Charities that do not meet the charity test as a consequence of their constitutional provisions**

### *Non-charitable purpose*

In one case we have issued a Direction on the basis of a charity having a non-charitable purpose:

- Isle of Gigha Heritage Trust, SC032302 has as one of the purposes stated in its constitution ‘the promotion of trade and industry’. This is not a charitable purpose under the Charities and Trustee Investment (Scotland) Act 2005, nor is it analogous to any charitable purpose under the 2005 Act. The charity is already taking steps to address this, as well as the matter of the definition of the terms ‘charity’ and ‘charitable’ – see below.

### *Definition and use of the terms ‘charity’ and ‘charitable’ in the constitution*

In the case of six charities, Directions have been issued requiring that the definition of the term ‘charity’ or ‘charitable purpose’ is defined in terms of the 2005 Act. In the constitutions of these charities the terms ‘charity’ and/or ‘charitable’ are defined in terms of UK tax law. As a result of this and the way in which the constitutions are drafted in these particular instances, the constitutions permit the property of the charity to be applied for purposes that are not charitable under the 2005 Act. This is a breach of section 7(4)(a) of that Act.

These charities are:

- Scottish Youth Hostel Association, SC013138
- Ullapool Museum Trust, SC018225
- Andarroch Trust, SC032270
- Cosgrove Care Ltd, SC013208
- Bute Museum Trustees, SC000639
- Isle of Gigha Heritage Trust, SC032302.

This issue arose during the *Rolling Review Pilot Study*, and has also arisen during the registration of English and Welsh charities with OSCR. We have made a specific recommendation to Ministers in our *Annual Report and Accounts 2007-08* for changes to the legislation which may avoid this problem in future.

### *Ministerial control*

In the case of one charity, the constitution permits Ministers to direct or otherwise control its activities, breaching section 7(4)(b) of the 2005 Act:

- Jordanhill School, SC004463 has been given a Direction as its constitution requires that the consent of the Secretary of State for Scotland is obtained for any changes to the memorandum and articles of association during any year in which the Scottish Education Department (SED) (now the Scottish Government), has contributed funds to the charity.

For more information on what constitutes ministerial control or direction in this context, please see the OSCR Policy Statement on Ministerial powers, which can be found in the Pilot Study Report, and on the OSCR website: [www.oscr.org.uk](http://www.oscr.org.uk).

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### **6c. Charities that do not meet the charity test as they do not provide public benefit**

In the case of four charities we concluded that, having had regard to the full scope of the public benefit assessment (including fees and charges as possible unduly restrictive conditions), public benefit is not being provided, and the charity test is not met. These charities are:

- Lomond School, SC007957
- St Leonards School, SC010904
- Merchiston Castle School, SC016580
- Hutchesons Educational Trust, SC002922.

In Section 7 of this report summaries are given for these cases, providing a brief overview of the factors considered in each case.

### **6d. Nature of Directions**

The reasons why a number of charities in Phase 1a have not been able to meet the requirements of the charity test are varied. The Directions that OSCR has issued to these charities (under section 30(1) of the 2005 Act) to:

*'take, within such a period as may be specified in the direction such steps as OSCR considers necessary for the purposes of meeting the charity test'*

take account of the very different issues that need to be addressed by the charities.

(a) In cases where the reason for not being able to meet the charity test results from the drafting of the constitution, and where this can be addressed by the charity itself, we will usually give the charity a year within which to take the necessary steps. This is consistent with previous practice and should allow enough time for consideration of the issue by the charity trustees, and for the necessary meetings (such as an AGM) to be convened, and so should allow changes to be accommodated within the normal cycle of meetings. Charities in Phase 1a which had a non-charitable purpose or a definition of 'charitable' or 'charity' in their constitutions which resulted in property being able to be applied for non-charitable purposes have therefore been given a year to put this right.

(b) In cases where the charity does not meet the charity test due to a difficulty with its constitution but where resolving this is not, or is not exclusively, within the control of the charity itself, a longer period may be reasonable. How long will depend on the specific circumstances of the charity, but we would usually consider two years to be a reasonable period. In Phase 1a this is relevant to the case where the constitution expressly permits a Minister to direct or control the activities of the charity. In this case, making the change which removes the relevant clause is subject to consent from the Secretary of State and the charity has been directed to correct this within two years.

(c) In cases where the charity does not meet the charity test because it does not provide public benefit a period of more than a year to introduce changes might also be reasonable. How long we should allow depends on exactly why public benefit is not provided, and the nature and scale of changes that the charity will need to put in place to address this. OSCR is charged with encouraging, facilitating and monitoring compliance with the Scottish charity legislation, and in that context will need to strike a balance between on the one hand ensuring that the necessary steps are taken with some urgency and on the other hand permitting enough time for sometimes complex changes in the operation of a charity to be implemented.

For the four charities in Phase 1a that, on balance, were considered not to provide public benefit we have therefore adopted a three-stage approach:

- within three months the charities will be asked to provide OSCR with an assurance that they will be seeking to comply with the Direction (if they do not give this assurance, we will remove them from the Register on the grounds that they have failed to comply with the Direction and do not meet the charity test)
- within a further nine months (that is, 12 months in all) we will require the charities to provide OSCR with a plan on how they will introduce changes that will enable them to meet the charity test
- those changes should then be in place and effective within a further two years, allowing three years in total for the charity test to be met.

## 7. Selected case summaries

In this part of the report on Phase 1a we have included case summaries for a number of assessments in Phase 1a.

The decision making on Rolling Review cases follows the format reported on in the Rolling Review Pilot Study report, and is supported by three decision making frameworks:

- Decision Framework Rolling Review – see Appendix 1
- Framework for assessment of Restrictive Conditions – see Appendix 2
- Framework for assessment of Private Benefit – see Appendix 3.

In the summaries we publish here we do not give an outline of the full decision making process, nor all the aspects of the charity test that we have needed to look at in each case. Rather, we describe only the aspects that illustrate a particular issue that we have needed to examine.

When reading these summaries it should therefore be borne in mind that in each case we have assessed the charity against the full charity test – and have therefore in each case assessed whether the organisation has only charitable purposes and whether it provides public benefit.

We have included brief summaries for all the schools that we have assessed as all of these, and in particular the totality of the cases we have looked at, provide an illustration of how, in the context of assessing public benefit, we have regard to whether any condition on obtaining the benefit provided (including a charge or fee) is unduly restrictive.

### **Bute Museum Trustees – SC000639**

The charity Bute Museum Trustees was selected for Rolling Review as an example of a charitable museum. Museums were identified as a possible risk category, due to uncertainty over the ultimate destination of the assets upon winding up of the charity: that is, was it certain that the remaining assets would be used for charitable purposes?

We considered this in the case of Bute Museum Trustees, but before we could do so we needed to establish what was the constitution of the charity. This was not an entirely straightforward consideration: we include a brief description of this as an example of the complex constitutional arrangements we can encounter which at times the charity trustees may not be fully aware of.

The Bute Museum is situated in Rothesay on the Isle of Bute, and offers visitors the opportunity to explore the archaeological, historical and natural history of the island through its exhibitions and collections.

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Three charities are involved in the running and support of the Bute Museum: The Bute Museum Trustees – SC000639 – (BMT), the subject of our review; the Buteshire Natural History Society – SC006544 (BNHS); and the Bute Museum Endowment Fund 1987 – SC009667 (BMEF).

In order to determine what was the constitution of the Bute Museum Trustees we had to consider the relationships between these charities and the historical factors which had shaped the present day situation. The documents provided to us by the charity trustees initially included the following:

Disposition of land by the Marquis of Bute – 1927  
Deed of Trust by the Marquis of Bute – 1927  
Constitution of the Buteshire Natural History Society – 1905  
Constitution of the Buteshire Natural History Society – 1992  
Deed of Declaration of Trust 1992  
The Bute Museum Trustee Regulations 1999

Upon further investigation of these and other documents held in OSCR's files in relation to these charities, it became clear that the museum building had been conveyed in trust in 1927 by the Marquis of Bute, with further assets being provided by the Marquis in a separate endowment. At that time, and for a very long time after, the BMT owned the Bute Museum, and the BNHS owned the collections. A third trust was established in 1987 by the BNHS, the purpose of which was to support the running costs of the museum: the Bute Museum Endowment Fund (BMEF).

In 1992 the BNHS had resolved to transfer the contents of the Bute Museum to the BMT under a deed of trust, and this was done by a Deed of Declaration of Trust. This appears to have been further amended by Deed of Amendment of Trust in 1997 but there is no copy of this deed available to OSCR or the charity. The 1992 Deed modifies the terms of the original trusts, the BMT now holding in trust the building and all the facilities and collections. All trustees of the BMT are members of the BNHS; the Museum is the base for the BNHS, which undertakes a range of activities including maintaining two galleries in the Museum.

In such a complex situation (not unusual in older charities), it is probable that the constitution of the charity is made up of more than one document and that over time subsequent deeds have altered the terms of the original trusts. We concluded that the constitution of the Bute Museum Trustees is made up of the following documents, the first three being essentially incorporated into the 1992 Deed by reference:

- 1927 Disposition of land (by the Marquis of Bute)
- 1927 Deed of Trust (by the Marquis of Bute)
- 1987 Minute of Waiver and Discharge (by the Marquis of Bute)
- 1992 Deed of Declaration of Trust (by the office holders of the Buteshire Natural History Society)

The Minute of Waiver and Discharge of 1987 in respect of the original disposition of land of 1927 is significant as the original Disposition of Land of 1927 provided that the building would revert to the Marquis of Bute and his successors, should it cease to be used as a museum and library. Had this remained in force, the result would have been a breach of section 7(4)(a) of the 2005 Act, which states that a body cannot meet the charity test if '*its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose*'. However the Minute of Waiver and Discharge effectively removed this condition.

The 1992 Deed of Declaration of Trust, by which the collections were given in trust to the BMT, establishes the charity's current purposes and may therefore be regarded as its current governing

document. We considered whether the clause in that Deed which provides that on dissolution the charity assets, such as in particular the collections, be transferred to the local or other authority responsible (at the time of dissolution) for the Kelvingrove Museum and Art Gallery, was in breach of section 7(4)(a) of the 2005 Act. We concluded that this did not constitute a breach. While the clause provides for distribution of property to a body which is not a charity, nevertheless the recipient body must have purposes similar to that of the charity (in this case the charitable purpose of education of the public by the provision of the collection). The provision reflects the fact that museums have a particular interest in the provenance and integrity of their collections.

Finally, in the case of BMT we concluded that the 1992 Deed of Declaration of Trust contained a clause defining the meaning of the words 'charitable purposes' which, given the way the full dissolution clause in the Deed is drafted, results in a breach of section 7(4)(a), as it could allow for the use of the property (upon dissolution) for a purpose which, though charitable under UK tax law, would not be charitable in terms of the 2005 Act.

We have therefore issued a Direction to the charity to make the necessary amendment to its constitution within one year.

#### **The National Trust for Scotland – SC007410**

The National Trust for Scotland (NTS) was selected for review on the basis that it had a membership structure. It also charges for some of the benefits it provides.

NTS is a charity established under a series of statutes to promote the permanent preservation of land and buildings in Scotland of historic or national interest or natural beauty. It operates by directly owning or (in a few cases) managing heritage buildings or land, by providing access to these, and by campaigning for the preservation of Scotland's heritage more generally.

We looked in particular at two aspects of the public benefit part of the charity test as it applies to NTS:

##### **a) Membership structure and possible private benefit**

NTS has a membership structure with various categories of member, including honorary, life, ordinary and representative members. By far the largest category and the most relevant for our consideration are the ordinary members, who pay an annual subscription and can take part in the internal governance of the charity. These members receive significant benefits including free access to NTS properties, free publications and magazines, and the opportunity to join one of NTS's local Member Groups, which organise fundraising events, volunteer guides at properties, and members' talks and outings.

We considered the benefits to NTS's members from the point of view of private benefit and how this relates to the benefit to the public provided by the charity.

Members benefit from NTS's activities in ways that non-members do not, in terms of access to NTS properties free of charge. However, this benefit to members is in furtherance of the charity's purpose, and some aspects could equally well be regarded as simply a different way of paying for access to the charity's properties – i.e. as a form of season ticket, and in a form which provides a major part of the charity's income. This view is supported by the fact that membership is open to anyone who wishes to join.

The participation of members as volunteer guides at Trust properties and shop staff, while of benefit to the members themselves, clearly benefits the charity and its beneficiaries in general by providing services in furtherance of its purposes which would otherwise incur staff costs. The same is true of members' involvement in fundraising.

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The benefit provided by NTS is twofold: the preservation of heritage in Scotland and the provision and promotion of access to it. There is no sense that either of these benefits is confined to the charity's members nor that any of the benefits to them arising from membership are anything but incidental to the public benefit provided.

Our view is therefore that, while there is some private benefit to NTS's members as individuals, this benefit is in furtherance of its purposes and incidental to the wider public benefit provided.

#### b) Charges for access to benefit:

NTS charges for access to some of its properties, with charges ranging from £3 to £12 for a single adult visitor (this latter at some of the larger properties such as Culzean Castle and Country Park). There are also rates for families, ranging from £8-£30 for two adults and two children. These fees are comparable to those charged by similar organisations such as Historic Scotland and the National Trust.

Information on charges is readily available on NTS's website in its guide to its properties and on publicity material for individual properties.

There is very significant benefit from its activities for which NTS makes no charge. One of its main activities is the preservation of Scotland's built, cultural and natural heritage. There is benefit to the public from this activity in and of itself from the maintenance and improvement of the heritage value of property held in trust. Moreover, this activity underpins any benefit to the public from access to the properties.

More specifically, there is no charge for significant parts of the other main area of benefit, access to properties: for most of what might be described as NTS's 'natural heritage' properties (like the Mar Lodge Estate, Isle of Canna or Dollar Glen), there is no charge for access to the property, or there is a charge for certain aspects only, such as museums or visitor centres. There is also no charge for a number of the historic properties, notably the smaller ones. In other cases a voluntary donation only is requested.

Where a charge is made for access, concessions are in place for various categories of those less able to pay, such as children and senior citizens, while family and single parent family tickets are available at a discount. Membership of NTS is also open to those choosing to pay an annual subscription, and this includes free access to all properties. Membership is also available at discount rates for senior citizens, young people and families.

The cost of providing the benefit is more than is charged directly to beneficiaries. NTS has significant sources of income from external grants, and donations, legacies and appeals.

#### **Conclusion**

On balance, and having regard to possible benefit to individuals other than as members of the public and possible unduly restrictive conditions, we concluded that NTS provides public benefit.

While fees are charged for access to some of the benefit NTS provides, the level of these is reasonable taking into account external comparators. The fees charged do not fully cover the cost of providing benefit. There are substantial arrangements in place to facilitate access to charged-for benefit for those unable to pay the charges from their own resources. Most importantly, much of the benefit provided by the charity is not charged for at all.

**Isobel Fraser Residential Home (SC016007)**

The Isobel Fraser Residential Home was selected for review as an example of a charity charging for the provision of care to those in need of it.

The Home is located in Inverness and provides care and accommodation to a maximum of 28 residents who are over 60 years of age and require residential care. It charges between £455 and £470 per week depending on the type and accommodation being provided and the type of care the resident is assessed as needing. These fees relate fairly closely to the national care homes fee levels accepted by local authorities for purchasing care home places.

Information on fees and admission to the home is available on request, but admissions policies and procedures are not entirely transparent.

There is no evidence of the charity providing other benefits in furtherance of its charitable purposes for which it makes no fee or charge.

The charity itself makes no provision for facilitated access to mitigate the effect of the fees charged on those unable to pay them from their own resources. However, the charity's activities occur in a context where both fee levels and help to pay fees are heavily influenced by statutory provision and public policy. Under the Community Care and Health (Scotland) Act 2002, residents who are over 65 and assessed as being in need of care can claim a set state contribution towards the cost of personal care and a further contribution if nursing care is required, funding the remainder themselves. Over and above this, there is provision for varying levels of local authority contribution to the costs of residential and/or nursing care for those with capital assets falling below statutory thresholds.

The effect of this is that of 27 residents at the time of the charity's response to the review only three were wholly self-funding, with the remaining residents receiving facilitated access at levels varying from 32% to 80% of the fees applicable to them. This is a snapshot: the proportions of self-funding, partially self-funding and local authority funded residents will fluctuate fairly widely over time depending on the circumstances of those seeking admission (which can of course change over time as their needs change or their capital assets run down to below the statutory thresholds), and the application of statutory criteria by external funding bodies.

Bearing all of these provisos in mind, the notional total annual value of facilitated access was £244,415 out of a total income in 2006-07 of £639,256 (40%).

**Conclusion**

On balance and having had regard to possible unduly restrictive conditions on access we concluded that public benefit is provided by Isobel Fraser Residential Home. Charges for residence and care are substantial, but typical of those in the sector and in line with guidelines suggested by external bodies. Eligibility for support to residents to pay these charges is determined by primary and secondary legislation. We consider that this is an appropriate guideline to use in establishing whether the arrangements result in an appropriate level of facilitated access. In practice, here this results in a large majority of residents being in receipt of support to pay the charges, some to a very substantial level.

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### Schools reviewed in Phase 1a

A brief summary is provided of the conditions in place on accessing the benefit provided for each of the schools, and how OSCR has had regard to these conditions. We have done so in accordance with the five principles set out in the **revised** Meeting the Charity Test Guidance:

- *transparency is important, whatever the scale of fees*
- *there are otherwise no absolute requirements*
- *proportionality is a factor in assessment*
- *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*
- *the cost of providing the benefit that is being charged for is relevant to assessing whether any fee or charge is unduly restrictive.*

While all the schools were subjected to the full rigours of the charity test, the summaries presented here do not provide an in-depth analysis of all elements of the charity test for each charity, but focus on the question of possible unduly restrictive fees and charges, which was identified as the risk factor in relation to schools.

Where available at the time of assessment we have used financial information from accounting year 2006/07, but owing to the timing of the assessments in a number of cases information on the financial matters from accounting year 2005-06 was used. Information on student numbers is mostly from the 2007-08 academic year. The student numbers and the financial situation appeared to us to be sufficiently stable to allow an assessment based on information relating to different years.

#### **Regius School (SC022723)**

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

Regius School is a very small independent Christian primary school in Edinburgh. It had 17 pupils in 2006 (aged 5 to 12 years) and charges most beneficiaries £3,360 per annum to attend.

The fees charged by the school are considered to be relatively low (compared to the cost of providing education in the state sector and the fees charged by other schools in the independent sector).

Information on the tuition fees in place is available from the school upon request. The school has a website which outlines the fees and charges in place.

There is little evidence of the charity providing other benefits in furtherance of its charitable purposes, for which it makes no fee or charge. We would not expect there to be significant evidence of this in a charity of this size.

The school seeks to make sure that access is open to a wide range of beneficiaries by keeping all fees as low as possible by using donated and grant income and keeping costs to a minimum (for example by keeping staff costs low, relative to publicly available state sector comparators).

The cost of providing the benefit was more than was charged directly to beneficiaries. In the past, the tuition fee has been subsidised by grants from external sources, such as Community Church Edinburgh, who in the 2005-06 financial year donated £9,333 to the School.

**Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is provided by Regius School. The requirement that parents and pupils should be in agreement with the ethos of the school is reasonable and justifiable in view of the type of education being provided.

The fees charged for access to the education provided are substantial, though in relation to external comparators they are low. However, they do not fully cover the cost of providing benefit: donations and grant income make up the difference. In addition, the school keeps its fees low by keeping costs, and thereby fees, as low as possible. This is an appropriate strategy to enable those on a range of incomes to benefit.

**Glasgow Steiner School Ltd (SC005339)**

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

Glasgow Steiner School is an independent pre-school and primary school provider. In the 2007-08 academic year there were 32 children enrolled in the pre-school ('Kinde') and 70 children enrolled in the primary school (Lower School). The full fees ranged from £3,240 per annum for the pre-school (20 hours per week) to £4,824 per annum for the Lower School. The fees charged by the school, though substantial, were considered to be relatively low (compared to the cost of providing education in the state sector and the fees charged by other schools in the independent sector).

The school has a website which highlights that all applicants will be asked to complete a Financial Declaration form so that the school can calculate the level of fee that will be payable in an individual case (exact information on the fees is not given at that point).

There is little evidence of the charity providing other benefits in furtherance of its charitable purposes, for which it makes no fee or charge. We would not expect there to be significant evidence of this in a charity of this size.

All Kinde and Lower School provision is means-tested, resulting in a sliding scale of fees and charges payable to the School. Means-tested sibling discounts are also offered. At least 70% of the school's beneficiaries pay less than the full fees.

There is evidence of extensive parental involvement which is a means used to keep the tuition fees down.

The tuition fee is often subsidised by fundraising activities and by voluntary donations. The school has been less successful recently in securing grant funding.

**Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is provided by Glasgow Steiner School. The requirement that parents and pupils should be in agreement with the ethos of the school is reasonable and justifiable in view of the type of education being provided.

The fees charged for access to the education provided are substantial, though in relation to external comparators they are relatively low. Importantly, the fees are targeted at ability to pay – not just of those that seek assistance from the school but of **all** potential beneficiaries. This enables those on the lowest incomes to benefit, and results in a very high proportion of beneficiaries paying less than the full fee.

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### **George Heriot's Trust (SC011463)**

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

George Heriot's School is a large independent school in Edinburgh. The age range of pupils at the school is 3-18 years. At the beginning of the 2007-08 academic session, there were 1,619 pupils on the school roll (32 children in the Nursery, 626 in the Junior School and 961 in the Senior School). The fees charged by the school were as follows:

|                                    |                  |
|------------------------------------|------------------|
| Early Years (Nursery, P1 and P2)   | £5,526 per annum |
| Middle and Upper Primaries (P3-P7) | £6,729 per annum |
| Senior School (S1-S6)              | £8,322 per annum |

The fees charged for access to the education provided are substantial. They are 'average' compared to the fees charged by other schools in the independent sector, but appear high when compared to the cost of providing education in the state sector.

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 is provided is appropriate, and advises that means-tested provision is available.

There is some evidence of the charity providing other benefits in furtherance of its charitable purposes, for which it makes no fee or charge. This partly extends to the wider educational curriculum. Examples include the provision of teaching practice placements for students, placements for students training to be Early Years Workers, the moderation of examinations and offering use of the school's all-weather pitch to a local authority school, Trinity Academy, at nil or reduced charge.

The Nursery takes part in the local authorities' pre-school partnership scheme, which provides tax credits which are passed on to parents, reducing the net cost for a place at the Nursery by about 20%. There are no concessions for use of the After School Club but this is subsidised by monies from elsewhere.

The school offers full fee remission, free school books and maintenance allowances covering the cost of school uniform and other costs such as curricular school trips, to the sons and daughters of widows and widowers. These 'Foundation' and James Hardie awards are available to pupils at all stages (except Nursery). The award of such places is subject to both residential and financial criteria. Other means-tested bursaries are also available.

In total, there were 130 beneficiaries in receipt of means-tested assistance at the school in 2007-08, of which 70 were in receipt of full fee remission (100%). The total value of means-tested support amounted to £707,848.

Non means-tested support is also available by means of a variety of scholarships. In 2007-08, a further 80 pupils were in receipt of Academic Scholarships, Expressive Arts awards, and Sports Scholarships, to the value of £203,632. These awards are made at the school's discretion.

In 2007-08, the total number of pupils in receipt of awards of all types was therefore 210, with the total value of the awards currently in force amounting to £911,480 (as in other assessments, this does not include 'sibling discounts' that are not means-tested).

Therefore, in total more than 12% of the school roll was in receipt of some form of facilitated access and within that, 8% of all beneficiaries were in receipt of means-tested assistance (with 4% receiving a full fee remission).

The total value of support (from all sources, whether means-tested or not) was £911,480, representing just under 9% of the annual income of the charity for the year 2006-07. More than 75% of this was means-tested support (to the value of £707,848), representing just under 7% of the annual income.

The cost of providing the benefit to children and young people was more than was charged directly to beneficiaries through tuition fees.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is provided by George Heriot's Trust. The fees charged for access to the education provided are substantial. However, there are satisfactory arrangements to facilitate access for those unable to pay these fees from their own resources, and a strong emphasis is placed on full fee remission.

### **Hutchesons Educational Trust (SC002922)**

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

Hutchesons Educational Trust is a large independent school in Glasgow. The school operates a primary and a secondary school. At the start of the 2007-08 academic session, there were 1,750 pupils enrolled at the school; 550 in the Primary; and 1,200 in the Secondary.

The fees charged by the school range from £6,417 in P1 to £8,243 in S1; and to £8,029 in S2-6. These fees are substantial. They are 'average' compared to the fees charged by other schools in the independent sector, but appear high when compared to the cost of providing education in the state sector.

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 is provided is appropriate, and advises that means-tested provision is available.

There is some evidence of the charity providing other benefits in furtherance of its charitable purposes for which it makes no fee or charge. This partly extends to the wider educational curriculum. Examples include the provision of teaching practice placements for students, placements for probationary teachers and the moderation of examinations. Each year, a number of pupils from Hutchesons team up with pupils from Holyrood Secondary School to undertake a number of community projects. This includes running anti-sectarian workshops for Kingarth Street and Holy Cross Primaries.

The school makes provision for means-tested bursaries through the income derived from its endowed funds. These bursaries are awarded to newcomers to the Secondary school. The value of the bursaries awarded is based on financial need and academic merit. Once awarded, bursaries continue with the child throughout their attendance at the school. It is the intention of the school to significantly increase the bursary provision over the medium to long term.

A total of 45 pupils were in receipt of means-tested bursaries in the 2007-08 academic year, to the total value of £291,552. Of these 45 beneficiaries, 15 received a bursary of 100% of the fee.

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At the time of conducting the review, six external trusts supported four pupils at the school. These provided financial assistance to the value of £20,563. The circumstances concerning these arrangements are not known to the school.

In 2007-08, the total number of pupils in receipt of financial support was 49, with the total value of the awards currently in force amounting to £312,115 (as elsewhere, this does not include the sibling discount).

Therefore, 2.8% of the school roll was in receipt of some form of facilitated access, and within that 2.6% of the school roll was in receipt of means-tested support. The total value of support (from all sources, whether means-tested or not but again excluding the value of the sibling discount) was £312,115, representing 2.1% of the annual income of the charity for the year 2005-06. Means-tested support represented 90% of the total support (and less than 2% of the annual income).

The cost to the school of providing the benefit was more than was charged directly to beneficiaries through the fees. Charitable donations and fundraising income of £586,334 helped to offset the full cost of provision to beneficiaries.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is not provided by Hutchesons Educational Trust due to the fees and charges that are in place, the absence of sufficient mitigation of the impact of these fees and little other benefit being provided in furtherance of its charitable purposes, for which it makes no fee or charge.

Our conclusion is based principally on the low numbers of pupils (given the size of the school) for whom financial support to access was available, and the low overall monetary value of the support (again set in the context of the size of the school).

We recognise that arrangements are in place to facilitate access for those unable to pay these fees from their own resources, and there is strong evidence of these monies being targeted at those on lowest incomes (relative to other applicants). We also recognise that the school makes this support available from the income from its endowed funds. Nevertheless, when viewed in the context of the size of the school, we consider the range of arrangements in place to facilitate access to be insufficient to mitigate the restriction on access.

We have issued a Direction to the charity to produce, within twelve months, a plan that shows how it will increase the facilitated access arrangements for the benefit it provides, or that sets out some other strategy that will ensure that the charity meets the public benefit requirement of the charity test; and to implement that plan within three years from the Direction being issued, so that the charity test is met.

### **Lomond School (SC007957)**

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

Lomond School is a medium sized independent school in Helensburgh. The school operates a Nursery, a Junior School and a Senior School. It also has boarding facilities. In the 2007-08 academic session, there were 592 beneficiaries in attendance at the school. Of these, 39 attended the Nursery, 179 attended the Junior and 374 the Senior School. There were 70 pupils boarding at the school.

The fees charged by the school in that year were as follows:

|                     |  |
|---------------------|--|
| Nursery             | £2,850 per annum                       |
| Junior School (Day) | £3,960 to £7,485 per annum             |
| Senior School (Day) | £8,085 per annum                       |
| Boarding            | £9,210 per annum (boarding costs only) |

The day fees charged for access to the education provided are substantial. They are 'average' compared to the fees charged by other schools in the independent sector, but appear high when compared to the cost of providing education in the state sector. The boarding fee is 'average' compared to the fees charged by other boarding schools in the independent sector.

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 is provided is appropriate, and advises that means-tested provision is available.

There is some evidence of the charity providing other benefits in furtherance of its charitable purposes, for which it makes no fee or charge. This partly extends to the wider educational curriculum. Examples include the provision of teaching practice placements for students and supporting the Scottish Qualifications Agency (SQA) in examination setting, marking and examining.

Means-tested support for access to the school is offered through the school's Bursary Programme. This was launched in January 2007. Bursaries are offered to both day and boarding pupils. In the 2007-08 academic session, two beneficiaries were awarded means-tested bursaries, to the value of £17,100. Bursaries of up to 100% are available. This Bursary Programme is in development, and the school has a clear strategy in place to increase the bursary provision in the next few years.

The school itself offers non means-tested rebates in the form of a Services Bursary Scheme. This assisted 38 pupils (all of whom were also in receipt of the CEA – see below), whose parents are armed service personnel, to the value of £24,510 in 2007-08.

A variety of external sources of non means-tested support has been identified in the case of Lomond School. Part funding is available from Argyll and Bute Council for children over 3 years of age who attend the nursery. This is not based on an assessment of the financial circumstances of the parents. We have not been able to establish the exact value of this, but estimated this at the most to extend to 35 children and have a value of £45,000.

The Continuity of Education Allowance (CEA) is paid by the Ministry of Defence (MOD) to serving armed services personnel that qualify for this form of assistance. The funds awarded are offered at a fixed rate, and are not means-tested. In 2007-2008, 38 boarding pupils at Lomond School were in receipt of this allowance as well as an estimated 20 day pupils. The estimated total value of this support was £718,550.

The pupils of Lomond School attract further funding from other external funding sources to help offset the full cost. These are, as far as known to OSCR on the basis of information provided by the school, not means-tested. This financial support extends to nine pupils at a total monetary value of £60,295.

In 2007-08, the total number of pupils in receipt of some form of support was therefore at the most 104, representing 17.5% of all beneficiaries (excluding, as in all cases, non means-tested sibling discounts). Two pupils were in receipt of means-tested bursaries, representing less than 1% of the school roll.

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The total value of support amounts to approximately £865,000. This represents 18.5% of the charity's income for the year 2007-06. However, means-tested support represented less than 1% of the annual income of the charity in that year.

The school is actively building up reserves/contingency funds and has an ambitious programme of capital projects. In addition the bursary programme is being developed.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is not provided by Lomond School due to the fees and charges that are in place, the absence of sufficient mitigation of the impact of these fees and little other benefit for which it makes no fee or charge being provided in furtherance of its charitable purposes.

At present, there are very limited arrangements specifically aimed at facilitating access for those unable to pay the fees from their own resources. We recognise that this is partly due to the fact that the school's means-tested Bursary Programme is still in its infancy.

Evidence has been presented of financial support from external sources. However, the impact of this support on opening up access to the school specifically for those that may not be able to pay the fees is limited, as this support is not aimed at those not able to pay, and eligibility is determined on a different basis.

We have issued a Direction to the charity to produce, within twelve months, a plan that shows how it will increase the facilitated access arrangements for the benefit it provides, or that sets out some other strategy that will ensure the charity meets the public benefit requirement of the charity test; and to implement that plan within three years from the Direction being issued, so that the charity test can be met.

### **St Leonards School (SC010904)**

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

St Leonards School is a medium sized school located in St Andrews. The School operates a Junior and a Senior School. It also has boarding facilities. In the 2007-08 session there were 458 pupils on the school roll, of whom 15 were in the Nursery, 181 were in the Junior School and 262 in the Senior School. During the 2007-08 session there were 130 pupils boarding at the school. Of these, 106 were overseas students.

The fees charged by the school range from £6,771 per annum for the Junior school to £9,339 per annum in the Senior School. The fee for boarding is an additional £12,894 per annum.

The day fees charged are substantial. They are 'average' compared to the fees charged by other schools in the independent sector, but appear high when compared to the cost of providing education in the state sector. The boarding fee is high and appears 'average' to 'high' compared to the fees charged by other boarding schools in the independent sector.

Information on fees is available from the school upon request and is also available from the school's website. The information that is provided is appropriate, and advises that means-tested support for the payment of fees is available.

There is some evidence of the charity providing other benefits in furtherance of its charitable purposes, for which it makes no fee or charge. This partly extends to the wider educational curriculum. Examples include the provision of teaching practice placements for students, for probationer teachers during their induction and working as examiners for IBO and English Examining Boards.

The school's 'Assisted Places Scheme' provides means-tested awards of up to 100% of the school fee. It is primarily designed to support day pupils of secondary school age. In the 2007-08 academic session, three beneficiaries were awarded means-tested bursaries to the value of £17,690. A dedicated fund is the process of being built up to accommodate the continued growth of this means-tested programme.

A fee remission is offered by the school to boarders that have one or more parents in the armed forces. This is not means-tested. Eleven pupils benefit from this scheme, to the value of £54,471.

We assume, although the school was not able to confirm this, that all of the pupils in receipt of this support are also supported by the Continuity of Education Allowance from the MOD. We estimate the value of this support to be approximately £165,000.

The school is not aware of any pupils being in receipt of grant funding from external sources (such as charitable trusts or foundations).

In 2007-08, the total number of pupils in receipt of awards of all types was therefore 14 with the total value of the support amounting (at most) to £237,161 (as elsewhere, this does not include the non means-tested sibling discount).

Therefore, 3% of pupils were in receipt of some form of facilitated access. The total value of support was £237,161 representing 5.5% of the annual income of the charity for the year 2005-06.

Means-tested support represented was available to less than 1% of the beneficiaries, and the value of the means-tested support arrangements represented 0.5% of the annual income for the 2005-06 financial year.

The cost of providing the benefit to children and young people was more than was charged directly to beneficiaries. The school attracts additional resources from its (separate) trading company, which lets accommodation outside of term time. The full cost of the benefit provided is therefore not directly passed on to beneficiaries.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is not provided by St Leonards School due to the fees and charges that are in place, the absence of sufficient mitigation of the impact of these fees and little other benefit being provided in furtherance of its charitable purposes, for which it makes no fee or charge.

At present, there are very limited arrangements aimed at facilitating access for those unable to pay the fees from their own resources. This is partly due to the fact that the school's means-tested 'Assisted Places Scheme' is still in its infancy.

We recognise the (relatively significant) contribution made by the trading subsidiary to covering the costs of running the school.

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The impact of financial support from external sources on opening up access to the school for those that may not be able to pay is limited, as this extends to a small number of pupils, and because this support is not aimed at those not able to pay.

We have issued a Direction to the charity to produce, within twelve months, a plan that shows how it will increase the facilitated access arrangements for the benefit it provides, or that sets out some other strategy that will ensure the charity meets the public benefit requirement of the charity test; and to implement that plan within three years from the Direction being issued, so that the charity test is met.

#### **Merchiston Castle School (SC016580)**

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

Merchiston Castle School is a medium sized independent school that provides 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.

The day fees charged by the school range 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 include the provision of lunch, dinner and supervised homework.

The day fees charged are 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 is relatively low compared to the fees charged by other boarding schools in the independent sector. Both these fees reflect the length of the school day, which runs until 9pm for all pupils.

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 is provided is appropriate, and advises that means-tested provision is available.

There is good evidence of the charity providing other benefits in furtherance of its charitable purposes, for which it makes no fee or charge. Notably, it has formed a partnership with the mentoring and counselling charity for young children, The Place2Be (SC038649). Up to 25 staff and senior pupils have 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 is 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 has formed links with Zhuhai No 1 Middle School in China. Reciprocal visits take place for the staff and pupils of both schools through the Scotland/ China Education Network.

The school offers means-tested bursaries to new applicants. Means-tested bursaries are available to pupils that pass entrance assessment, and are 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% funding is four.

The school also offers 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 are also provided (£23,518 was awarded to 12 pupils in 2007-08).

In the 2007-08 session over all of these categories (and including the means-tested support) four pupils were in support of 100% funding.

The school has 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 is at a very early stage.

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 are academically strong or show talent in a particular area and would otherwise be unable to afford the fee. The first of these scholars are now attending the school.

All in all, more than 41% of the school roll (180 pupils) is in receipt of some form of facilitated access. Within that, during the 2007-08 academic session, means-tested support was offered to 3.7% of the pupils (16 pupils).

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 represents just under 9% of the total annual income of the charity in 2005-06. Of this, £100,838 is committed to means-tested support, which represents less than 1.5% of the total annual income figure.

The school attracts additional resources from rental and other income and donations. The full cost of the benefit provided is not directly passed on to the school's beneficiaries.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is not provided by Merchiston Castle School due to the fees and charges that are in place and the absence of sufficient mitigation of the impact of these fees. The key issue is 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 is therefore limited. This is particularly so given the scale of the fees.

The fees are high, and while there are some arrangements to facilitate access to benefit by those unable to pay the fees from their own resources, these arrangements are not currently on a scale sufficient to mitigate the exclusory impact of the fees charged on those from a range of incomes. We recognise that the school has started to restructure the facilitated access to place more emphasis on means-tested facilitation in future. However, this has yet to show significant impact on the overall picture on access.

We recognise that the way the school offers education increases the cost of the benefit provided. We also recognise 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 requires more significant measures to be in place to mitigate the restriction the fees place on access in particular for those less able to pay.

We have issued a Direction to the charity to produce, within twelve months, a plan that shows how it will increase the facilitated access arrangements for the benefit it provides, or that sets out some other strategy that will ensure the charity meets the public benefit requirement of the charity test; and to implement that plan within three years from the Direction being issued, so that the charity test is met.

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### **Gordonstoun Schools Limited (SC037867)**

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

Gordonstoun School is a medium sized independent school that provides day and boarding education. It is located just outside Elgin. It operates a Junior School and a Senior School. In the 2007-08 session there were 595 pupils enrolled at the School. Of these, 113 attended the Junior and 482 the Senior School. Approximately 80% of pupils board at the school. Just over one third of the school's pupils were overseas students.

The day fees charged by the school range from £9,528 per annum in the Junior school to £19,569 per annum for the Sixth Form. Boarding fees range from £6,039 to £6,642. The school's day fees include the provision of lunch, dinner and supervised homework.

The day fees charged are high, both when compared to the cost of providing education in the state sector and when compared to the fees charged by other schools in the independent sector. The Boarding fee is relatively low compared to the fees charged by other boarding schools in the independent sector. Both these fees reflect the nature of the School's curriculum, which runs over seven days of the week, for both day and boarding pupils, and the length of the school day.

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 is provided is appropriate, and advises that means-tested provision is available.

There is evidence of the charity providing other benefits in furtherance of its charitable purposes, for which it makes no fee or charge. This review has highlighted an altogether different approach to engaging with the wider educational community. This is due to Gordonstoun following the English National Curriculum (studying GCSEs and A-levels, as opposed to the Scottish system). The school has entered into a partnership with a City Academy in Leicester, the Samworth Enterprise Academy. Gordonstoun wishes to develop virtual learning opportunities for its students and the Academy is interested in the Round Square ethos and curriculum.

The range of facilitated access available for pupils at the school, as well as the depth of information provided, makes it hard to report this in a concise way. The most complicating factor is that some pupils receive support from more than one source. In the figures presented here, we have therefore not always given pupil numbers in receipt of each type of award (to avoid double counting), but have provided information on the total number of individuals assisted, and the extent to which they have been assisted.

The school itself offers means-tested bursaries ('agreed fee reductions') to new applicants to the school. The value of these can range from 10% to 100%. The total value of means-tested 'agreed fee reductions' was £872,400 in 2007-08. The school has also started to means test its sibling discount, with a value of £14,255 in 2007-08.

In addition to the means-tested support it offers itself, a significant amount of funding also comes from other, external sources. In 2007-08 the wide range of awards were given to prospective pupils from external sources that in particular support access to Gordonstoun School). These were means-tested and in total valued £215,181.

The school itself also offers non means-tested awards in the form of scholarships. This awards a maximum reduction of 10% against the appropriate fee, with one sports scholarship offering up to 100%. The total value of scholarships in 2007-08 was £287,838.

Other, non means-tested external sources of funding are also available to new applicants. In 2007-08 these had a total value of £56,726.

Taking all of the above into account, in 2007-08 more than 235 awards were made, and at least 190 individual pupils (32% of the total school roll) were assisted (as multiple awards from different sources are made in respect of some pupils, the picture is complex).

At least 80 individual pupils (13.4% of school roll) are in receipt of means-tested support; nearly 4% received more than 80% support and 16 pupils received 100% of the fee (2.7% of beneficiaries).

In 2007-08, the total value of support (from all of the above sources, whether means-tested or not) was £1,446,400 (this includes the means-tested sibling discount). This represents more than 11.5% of the total annual income of the charity in 2006-07.

More than 75% of the value of the total support was dedicated to means-tested support (to the value £1,101,836). This represents 8.8% of the charity's 2006-07 total income figure.

The school attracts additional resources from rental and other income and donations. The full cost of the benefit provided is not directly passed on to the school's beneficiaries.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is provided by Gordonstoun Schools Limited. The overall value of means-tested support available and the balance in favour of means-tested support over other means are positive indicators of high impact arrangements to facilitate access to the school.

We recognise that the fees are high, and the level of support offered to open up access should be proportionate to this. We have taken account of the value of the support offered, in real terms and in relation to the size of the school, and the prevalence of means-tested support arrangements. Within those, there is considerable emphasis placed on targeting support at those least able to afford the fees. The contribution made by the school itself to the financial support arrangements (nearly 80% of both means-tested and non means-tested support if provided by the school itself) is considered to contribute positively to its provision of public benefit.

We also note that the school provides benefit for which there is no fee or charge, through its engagement with other education providers in the state sector.

### **Governors of Donaldson Trust (SC017417)**

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

Governors of Donaldson Trust is one of seven Grant Aided Special Schools in Scotland. Based in Linlithgow, the Trust meets the educational and social needs of children and others with hearing impairment. In addition, it has a unit for pupils with specific language disorders and has an arrangement with one local authority to provide education for a small group of pupils on the autistic spectrum. In 2007-08 18 of the local authorities in Scotland have pupils placed with the Trust. Educational provision was offered for 67 children and young people aged from two and a half to 19 years. There are 17 full time residents.

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The Trust is funded by the Scottish Government, with the balance of costs being met by local authorities who take up places (on behalf of pupils). The charges levied to the local authorities are agreed on an annual basis with the Scottish Government. For the 2007-08 session, the Scottish Government approved the day fee of £21,690 per annum per pupil and £35,455 per annum for residential (boarding) pupils (this equates to £13,765 for boarding only). These fees only apply to children who are of nursery or school age, receiving education and who have been placed by Scottish authorities.

These (day) fees appear high compared to the cost of providing mainstream education in the state sector or the independent sector. However, the specialist nature of what is provided needs to be taken into account: the staff/pupil ratio in the classrooms varies from 1:1 to 1:2 depending on pupil need and the cost of providing the benefit is high.

Information on the school, and its admission arrangements, is available from the school on request and also from its website.

For all pupils at the school the fees are paid by the local authority (to levels set by Scottish Government), which 'places' pupils at the school based on an assessment of educational need. Free nursery places are also offered to hearing children who are siblings of pupils or other nursery children or teachers.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is provided by Governors of Donaldson Trust. Access is based on educational need determined by the education authorities. For the vast majority of the students, the fees charged by the Trust do not constitute a restriction: they are effectively notional, serving as a means of apportioning support costs between the Scottish Government and referring local authorities and are not a cost to the charity's beneficiaries.

### **St Mary's Music School Trust Ltd (SC014611)**

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

St Mary's Music School Trust Ltd is the only independent specialist music school and the only choir school in Scotland. It is based in Edinburgh and offers education to two distinct groups of young people – choristers and instrumentalists. The School operates a Junior and Senior School. In the 2007-08 session, there are 18 pupils enrolled in the Junior School and 53 pupils enrolled in the Senior School (71 in total).

The fees vary between the two groups:

- chorister fees (day provision only) range from £7,855 to £9,884 per annum
- instrumentalist (day) fees range from £20,953 to £23,433 per annum, and boarding fees are an additional £8,734 per annum.

The school also runs schemes that are open to the public to attend. Fees are charged for attendance at all of these activities, and range from £50-£150 for a 45 minute lesson (depending on the level and the instrument that is being taught) to £170 per week for a summer school week.

The cost of providing the benefit at St Mary's Music School is high compared to the cost of providing education in the state sector and the fees charged by other schools in the independent sector. However, the specialist nature of what is provided needs to be taken into account.

Information on the school is available on request, and from the school's website. The 'Aided Places Scheme' and the bursaries offered by the Cathedral are also widely advertised.

The St Mary's Music School (Aided Places) (Scotland) Regulations 2001 (as amended) provide that up to 45 instrumentalists (33 of which may be boarders) and up to six choristers may be funded by the Scottish Government in any given year. These awards are means-tested. Bursaries of up to 50% are also offered to Choristers by St Mary's Episcopal Cathedral, where the need is identified. The support offered to instrumentalists is also means-tested.

In 2006-07, the total remission of means-tested fees by the Scottish Government was £1,115,332. The value of means-tested bursaries offered by St Mary's Episcopal Cathedral was £65,650. The total amount of remissions offered by the school itself was £33,781.

All of the school's full time roll is in receipt of some form of facilitated access. Furthermore, in 2006-07, 15 (out of a total of 68 pupils) were awarded 100% funding. This represented 22% of pupils on the school roll at that time.

The total value of support (from all sources, whether means-tested or not) is £1,249,763 and represents over 66% of the annual income of the charity.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is provided by St Mary's Music School Trust Ltd. The fees for day and boarding pupils are substantial, but there is a statutory, government funded scheme of fee remission, which is means-tested, which makes effective provision for those unable to meet the fees from parental resources, over a range of parental incomes, with particular provision for those on low incomes.

Fees for some of the secondary benefit provided (Saturday morning and after school classes for students outwith the school) are considerable, and there is little or no provision for facilitated access to this benefit. However, given the overall scope of the activities of the charity and the benefit it provides we do not consider this to impact on its provision of public benefit.

### **Jordanhill School (SC004463)**

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

Jordanhill School was built in 1920 in Glasgow. Until 1988, it was run by Jordanhill College of Education as its 'training' school. It is now run as an independent primary and secondary school. No tuition fee is charged; the cost of running the school is met by the Scottish Government. At the start of the 2007-08 academic session there were 462 primary and 585 secondary pupils enrolled at the School (1,047 in total).

The school operates within a defined catchment area. The school determines the 'boundaries' of this catchment area by three lists. In order of priority, these are:

- list 1: children whose permanent residence is a 'designated address' (in the Jordanhill area);
- list 2: children whose permanent residence is a 'supplementary address' (in the Jordanhill area);  
and
- list 3: children who live elsewhere.

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Lists 1 and 2 comprise the house numbers of properties in streets in the Jordanhill area. List 1 normally exhausts all available places (this is especially true of the Primary School), and pupils from addresses on List 2, and especially those to whom List 3 applies, can only very occasionally get entry to the school.

The criteria/conditions on access that are in place result in the benefit being provided to only a section of the public. As part of the public benefit assessment OSCR needs to have regard to whether these conditions are 'unduly restrictive' conditions on access to the benefit provided by the school.

The school needs to restrict the number of pupils it admits as it has limited resources and is required to adhere to the statutory guidelines that dictate the maximum number of pupils that it is able to have on its school roll at any one time. In keeping with schools in the state sector, Jordanhill School does this on grounds of geography. The geographic restrictions in place are determined by a 'catchment area'. As an independent school Jordanhill is not bound by the catchment areas set by the local authority (Glasgow City Council).

The selection of beneficiaries by charities is commonplace. In principle, the fact that Jordanhill School selects its beneficiaries (by using a catchment area) as a means of balancing demand (potential beneficiaries) and supply (available places at the school), is considered reasonable and justifiable; the school does not have the capacity to provide a school for all of the boys and girls in Glasgow (this form of words is taken from its charitable purpose) and must ensure that the school roll does not exceed the maximum threshold. Based in Jordanhill, the school aims to serve the educational needs of the local community. The prioritisation of children and young people from the Jordanhill area therefore appears reasonable.

Information on admissions to the school can be found in the school's Admissions Regulations. These are available on request and from the school's website. This document is revised annually, and is explicit in listing the properties that feature on Lists 1 and 2. The school is alert to new developments being built in the local area and adds these to List 2 when they go on the market.

The introduction of List 2 by Jordanhill School can be explained as the result of a change in local demographics and new housing development that has taken place (and is planned) within the catchment area. The original boundaries of the catchment area have not changed, nor has the size of the school changed significantly. The response has been to manage how pupils have priority of access to the school by drawing up an additional List 2.

We have had regard to how catchment areas operate in determining which school a pupil attends in the state sector. Information gained from local authorities highlighted that new building developments in the existing catchment area of a school can result in pressure on school places. One approach to resolving these (other than increasing the size of the existing local school), is to make amendments to the catchment areas, for example by creating 'pockets' within an area that are allocated to the catchment of schools in neighbouring areas. As the demographics in a catchment area change over time, catchment areas can be adjusted again.

### **Conclusion**

On balance, and having had regard to possible unduly restrictive conditions and access, we concluded that public benefit is provided by Jordanhill School. We have concluded that the geographic restriction on access expressed through the list system, that Jordanhill School has in place (including the differentiation between List 1 and List 2 which both relate to addresses in the Jordanhill area) is justifiable and reasonable within the context and constraints in which it operates and that access to the benefit it provides is not unduly restricted.

However, as indicated elsewhere in the report, Jordanhill School does not meet the charity test as its constitution requires that the consent of the Secretary of State for Scotland is obtained for any changes to the memorandum and articles of association during any year in which the Scottish Education Department (SED) (now the Scottish Government) has contributed funds to the charity. This is a breach of section 7(4)(b) of the 2005 Act.

Jordanhill School has therefore been issued with a Direction to ensure that, within two years, the requirement to seek the Secretary of State's consent prior to making changes to the constitution is removed.

## 8. The Rolling Review from here

We will continue with a **risk based** approach to the Rolling Review during Phase 1b, focusing our attention on priorities identified during the consultation and during our first three years of operation.

In Phase 1a we reviewed a small number of charities in categories that had originally been identified as being high risk, and have found that the risk created no difficulty in practice, or the uncertainty has been removed by providing clarity (for example museums, membership based charities). These are satisfactory results, and account needs to be taken of these outcomes and the outcomes of the pilot, when looking forward to Phase 1b.

Since the completion of the Rolling Review Pilot in 2007 we have identified a new risk, and a means of identifying charities that might fall into this group: if a charity undertakes no activity, it is doubtful whether it is providing any public benefit. OSCR now holds accounts information for the vast majority of charities for two or more years. Repeated £0 income or expenditure may indicate that there are no activities. We will look at a small number of charities in this situation in Phase 1b.

The value of working with the umbrella organisations was demonstrated in working with the Scottish Pre School Play Association (SPPA) during the Pilot programme of the Rolling Review. We have identified the need to work with the Development Trusts Association Scotland, as a follow up on our conclusion in Phase 1a that one of its members could not meet the charity test due to one of its purposes being non-charitable. We will continue this approach in Phase 1b, exploring where we can streamline assessments by agreeing model constitutions and reporting, an approach we already adopt for new applications. This would relieve the burden on individual charities (particularly small organisations) and reduce the resource commitment for OSCR.

In summary, in Phase 1b we will continue with a risk based approach and focus in particular on charities

- where we believe a specific risk continues to exist
- where uncertainty has not yet been clarified
- where a new risk has been identified.

In addition we will:

- include a random element where resources allow
- undertake work with umbrella organisations where appropriate.

Both the Pilot and Phase 1a of the Rolling Review have shown that the issue of the definition of the terms 'charitable' in the constitutions of bodies on the Register can cause organisations to fail the charity test. In our *Annual Report and Accounts 2007-08* we have made recommendations to

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Ministers and Parliament as to how this might be resolved, but given the likely nature of any solution (which would be legislative) a resolution in the short term cannot be expected. The risk of organisations on the Register not being able to meet the charity test due to this issue therefore continues to exist.

However, as there is no one particular type of charity in which this risk arises, and given that this can be viewed as more of an 'administrative' than substantive failure of the charity test, we believe that the proportionate approach to this risk is to address it only as and when it arises in the review of charities that have been selected on the basis of other risks factors, or that have been selected randomly.

### **8a. Summary proposals for Phase 1b**

In Phase 1b we shall therefore look at a small number of charities in the following groups.

Specific risk or uncertainty: possible unduly restrictive conditions in place on accessing benefit:

- *independent schools*
- *care homes, rehabilitation centres, private hospitals.*
- *universities (may also pose a risk in relation to the extent of possibly non-charitable activities, or activity not in pursuit of purpose).*

Specific risk or uncertainty: constitution may expressly permit Scottish Ministers or a Minister of the crown to direct or otherwise control the charity's activities:

- *NHS Endowment Funds.*

Specific risk or uncertainty: potential problems surrounding charitable purposes:

- *student associations and student unions*
- *cattle societies, breeders' societies and similar.*

Specific risk or uncertainty: charity appears to have no activity and may not be providing public benefit:

- *charities with two or more years of £0 income or expenditure.*

In addition, we shall work with umbrella organisations or parent bodies where we can, in particular to streamline assessment by agreeing model constitutions and reporting.

### **8b. Information about future Rolling Review activity and decisions**

In Phase 1b we will publish a monthly list of those charities that are undergoing Rolling Review. Positive results for individual charities will not be entered on the Scottish Charity Register. However, notice of any Direction issued to a charity that does not meet the charity test will be shown against an individual charity's Register entry, together with a section 33 report, outlining the issues at stake. This information will be removed once the charity has complied with the Direction within the timeframe allocated.

We do not intend to publish a further detailed report on Rolling Review activity in the way we have for the Pilot and for Phase 1a, nor announce results in groups, but will produce individual or thematic studies where significant items of interest arise.

### **8c. Timing of Phase 1b and looking ahead to Phase 2**

We plan to start Phase 1b from January 2009, adopting the approaches to selection and working with umbrella bodies as outlined above.

However, the Rolling Review does not and should not take place in isolation from other work undertaken in OSCR. In this context it is important to note that in 2009 we will be consulting on the proposals for a revised reporting regime to OSCR, which ideally integrates financial reporting with reporting on activity, including reporting on public benefit within Charity Trustees' Annual Reports. For smaller charities in particular, this integrated reporting would potentially streamline requirements, avoiding the need for separate reporting to OSCR in relation to the Rolling Review as well as Annual Returns and Accounts. The public would be able to see even more clearly from Charity Trustees' Annual Reports how the charity is delivering public benefit.

Our current thinking is that any new regime would be implemented from 2011 at the earliest, and this would have an impact on how the next phase of the Rolling Review might be shaped. In the meantime, we will continue with the relatively low volume but risk based approach of Phase 1b, taking forward the approach to assessment and reporting we have outlined here which is intended to provide all charities, and the public, with clear guidance of what is expected as charities demonstrate to OSCR that they meet the charity test.

## **9. Recommendations**

The lessons of the Rolling Review, and our experience elsewhere, is that an up to date constitution is an essential precondition of good and effective governance of any charity. We therefore continue to recommend that charity trustees should review their constitutions and ensure that these are up to date with the legislative requirements and fit for purpose given the current activities of the charity.

Experience also shows the value of charities working with umbrella bodies to agree model constitutions, which will enable us to streamline the Rolling Review process and enable charities to avoid some of the more obvious difficulties they may encounter in meeting the charity test.

### **Action points for charities**

- make sure that your Charity Trustees' Annual Report describes your charity's activities and shows how the charity provides public benefit
- make sure that your charity's constitution is up to date, is in keeping with the requirements of the Charities and Trustee Investment (Scotland) Act 2005, and accurately reflects your charity's activities
- if your charity is part of a membership or group structure, consider establishing or updating a model constitution, and working with the umbrella body to do so.

## Rolling Review – Phase 1a

OSCR's decisions on 30 charities

### APPENDIX 1 – Decision Framework Rolling Review

|                  |  |
|------------------|--|
| Charity Name     |  |
| Alternative Name |  |
| Charity Number   |  |

#### Title File

|   |  |  |
|---|--|--|
| 1. Does OSCR hold a Title File for the Charity? |  | If <b>yes</b> , is this paper or electronic? |
|---|--|--|

|   |  |   |
|---|--|---|
| 2. Does the Title File hold a copy of the charity's constitution or governing document? |  | If <b>yes</b> , when was this signed and dated? |
|---|--|---|

|   |  |  |
|---|--|--|
| 3. Is this the charity's most recent Constitution or governing document?<br><br>If not sending out the Review of Charitable Status Form, contact will need to be made with the charity to establish this. |  | Please provide details, where appropriate, indicating where an up-to-date copy has been requested. |
|---|--|--|

#### Annual Return

|   |  |   |
|---|--|---|
| 1. Has OSCR closed an Annual Return from the Charity in the last 12 months? |  | If <b>yes</b> , please provide the accounting period end date & the date the AR was closed. |
|   |  | If <b>no</b> , please give the date of the last known AR held on file.                      |

|   |  |  |
|---|--|--|
| 2. For information, what is the purpose(s) of the organisation as stated on its AR? |  |  |
|---|--|--|

|   |  |  |
|---|--|--|
| 3. Are those selected in the AR in keeping with the purpose(s) as identified in the constitution or governing document? |  | If <b>no</b> , please highlight any immediate anomalies or doubts. |
|---|--|--|

**Trustee Report**

|                                |  |   |
|--------------------------------|--|---|
| 1. Is there a trustees report? |  | If <b>no</b> , please send the Review of Charitable Status Form, Guidance Note and Important Information Sheet to the charity.<br><br>Date sent to charity: |
|                                |  | If <b>yes</b> , please continue to Q6, below.   |

|  |  |   |
|--|--|---|
| 2. Does the trustees report provide a sufficient description of the activities of the charity? |  | If <b>no</b> , please send the Review of Charitable Status Form, Guidance Note and Important Information Sheet to the charity.<br><br>Date sent to charity: |
|  |  | If <b>yes</b> , please continue to the public benefit section, below.   |

**Review of Charitable Status Form**

|   |  |   |
|---|--|---|
| 1. <b>Review Form check</b><br>Is the Review Form complete? |  | If <b>no</b> , please detail and request what is missing. |
|   |  |   |

|   |  |   |
|---|--|---|
| 2. <b>Documentation check</b><br>Was additional documentation received? |  | If <b>yes</b> , please detail what supporting evidence has been returned. |
|   |  |   |

**Rolling Review – Phase 1a**  
OSCR’s decisions on 30 charities

**Constitution**

Using the charity’s most recent constitution or governing document, please complete the following:

|  |  |  |
|--|--|--|
| <p><b>1. Charitable Purposes</b><br/>Do the body’s purposes consist only of one or more of the charitable purposes?<br/>(YES/NO)</p> | <p>If <b>yes</b>, please identify the charitable purposes which apply, and enter the relevant text from the founding document.</p> |  |
|  | <p><b>Purpose(s) under section 7(2) (to go on register)</b></p>  | <p><b>Relevant text (enter from founding document)</b></p> |
|  |  |  |
|  |  |  |
|  |  |  |
| <p>If <b>no</b>, what are the issues?</p>  |  |  |

|   |                          |   |
|---|--------------------------|---|
| <p><b>2. Does the body’s constitution/founding document allow it to distribute or apply its property for non-charitable purpose(s)?</b><br/><br/>(in the case of unincorporated associations, there is an issue if there is <b>no</b> provision covering distribution of assets, or <b>no</b> dissolution clause and applicants should be told to insert one)</p> | <p>Yes<br/>or<br/>No</p> | <p>If <b>yes</b>, please outline the issue raised and enter the relevant provision from the founding document</p> |
|   |                          |   |

|   |                          |  |
|---|--------------------------|--|
| <p><b>3. Does the body’s constitution expressly permit Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities?</b></p> | <p>Yes<br/>or<br/>No</p> | <p>If <b>yes</b>, please outline the issue raised and enter the relevant provision from the founding document.</p> |
|   |                          |  |

|  |                          |  |
|--|--------------------------|--|
| <p><b>4. Is the body a political party or is one of its purposes to advance a political party?</b></p> | <p>Yes<br/>or<br/>No</p> | <p>If <b>yes</b>, please outline the issue raised and enter the relevant provision from the founding document.</p> |
|  |                          |  |

|  |           |  |
|--|-----------|--|
| 5. Does the founding document allow remuneration of trustees outwith the provisions of the Act (link to Trustee checklist) section 67 (2-3)? | Yes or No | If <b>yes</b> , please outline the issue raised and enter the relevant provision from the founding document. |
|  |           |  |

|  |           |  |
|--|-----------|--|
| 6. Has a check been made as to whether any of the proposed trustees are disqualified under s69-70? | Yes or No | If <b>yes</b> , are any trustees disqualified? If so, how? |
|  |           |  |

**Public Benefit**

|   |   |  |
|---|---|--|
| 1. Is public benefit intended to be provided? | If <b>yes</b> , please detail the nature of the benefit(s), how they will be provided, what restrictions apply, and the extent of any private benefit or disbenefit |  |
|   | <b>Nature of Benefit</b>  |  |
|   | <b>How will it be provided?</b>   | Please summarise here:   |
|   | <b>Are there any <u>undue</u> restrictions to Benefit?</b>  | Please summarise your decision here, using the Restrictive Conditions Framework for reference: |
|   | <b><u>What is the extent of Private Benefit or Disbenefit?</u></b>  | Please summarise your decision here, using the Private Benefit Framework for reference:        |

**Review of Charitable Status – Conclusion**

|   |  |  |
|---|--|--|
| Does the charity continue to meet the charity test? |  | If <b>yes</b> , please confirm below and note here any comments to be fed back to the charity: |
|   |  | If <b>no</b> , please explain why and outline any directions to be issued.                     |

## APPENDIX 2 – Framework for assessment of restrictive conditions

|  | <b>Charity name and number</b><br>(notes for clarification)  |
|--|--|
| <i>Are there other restrictive conditions besides fees?</i>          |  |
| <i>How do these work – are they justifiable and reasonable?</i>      |  |
| <i>What are the fees/charges?</i>                                    |  |
| <i>Cost of providing the benefit relative to external comparator</i> | It may not always be possible to find external comparators. Explain comparator used.   |
| <i>Fee charged relative to cost of provision</i>                     |  |
| <i>What are the arrangements to facilitate access?</i>               |  |
| <i>Cumulative impact of assisted access</i>                          | Assess both extent of support (how many beneficiaries supported) and level of support (to what extent support provided). Assess spread of support. |
| <i>Monetary value of assisted access</i>                             |  |
| <i>Monetary value of assisted access as percentage of income</i>     |  |
| <i>Transparency and publicity of support</i>                         |  |
| <i>Other benefit not subject to fee?</i>                             | Describe range of benefit not subject to fee (related to charitable purpose?). Assess importance and impact.                                       |

### Appendix 3 – Framework for assessment of private benefit

- **Benefit, other than benefit to the public**

|   |                  |   |
|---|------------------|---|
| <p>1. Is there evidence of private benefit in the (applicant) charity’s activities, i.e. benefit <u>other than benefit to the public</u>?</p> | <p>Yes or No</p> | <p>If <b>yes</b>, please explain the nature of the benefit identified.</p>  |
|   |                  | <p>If <b>yes</b>, please explain who – other than as a member of the public – stands to benefit. Examples include a private individual, a corporate body, the organisation’s members or its charity trustees.</p> |

|  |                  |  |
|--|------------------|--|
| <p>2. If appropriate, is the corporate entity identified above a registered charity?</p> <p>Public benefit, where provided indirectly by another registered charity or public body is normally considered to be acceptable and meets the charity test.</p> | <p>Yes or No</p> | <p>If <b>yes</b>, please describe briefly, below.</p> <hr/> <p>If <b>no</b>, is it a public body? If so, please describe briefly, below.</p> |
|--|------------------|--|

|  |                  |   |
|--|------------------|---|
| <p>3. If appropriate, is the corporate entity identified above a commercial or private body?</p> | <p>Yes or No</p> | <p>If <b>yes</b>, please describe briefly, below.</p> |
|--|------------------|---|

- **Benefit by members as members and not as members of the public**

|  |                  |  |
|--|------------------|--|
| <p>4. In the case of membership-based organisations, are the members and the beneficiaries of the (applicant) charity synonymous?</p> <p>If applicable, the conditions or criteria of access for members and non-members should be considered separately, as a possible undue restriction.</p> <p>This will help to establish how open or closed the membership is considered to be.</p> | <p>Yes or No</p> | <p>If <b>yes</b>, what is the charity’s justification for this?</p> <hr/> <p>If <b>yes</b>, does this seem reasonable?</p> <p>If <b>no</b>, how is benefit accessed by the wider public?</p> |
|--|------------------|--|

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• **Benefit as necessary or incidental to the pursuit of the organisation’s charitable objects**

|   |                  |   |
|---|------------------|---|
| 5. Are the organisation’s purposes charitable?  | <b>Yes</b> or No | If <b>yes</b> , what are the organisation’s charitable purposes?                              |
| 6. Is the identified private benefit <b>necessary</b> to the pursuit of the organisation’s charitable purposes?   | Yes or No        | If <b>yes</b> , what is the organisation’s justification for this? Does this seem reasonable? |
|   |                  | If <b>no</b> , why not?   |
| 7. Is the identified private benefit <b>incidental</b> to the pursuit of the organisation’s charitable purposes, i.e. a <u>secondary, unintended or minor</u> consequence of the public benefit provided? | Yes or No        |   |
|   |                  | If <b>no</b> , why not?   |

• **Conclusion**

|   |           |   |
|---|-----------|---|
| Does the identified private benefit outweigh the potential benefit to the public? | Yes or No | Please summarise below. This conclusion should be transferred to the Review of Charitable Status Checklist: |
|---|-----------|---|

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**RR Donnelley** B58052 10/08

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