

## **The Fettes College Child Abuse Cover Up.**

### **Part 2: Legal Proceedings against Fettes.**

#### **Summary**

1. This paper concentrates on an action taken against Fettes College alleging historical child abuse. Please read Part 1 of this series that covers the Scottish Child Abuse Inquiry (Online at: <https://fairtrialproject.org/fettes-college-child-abuse-cover-up-judges-involved/>).
2. Fettes College (Fettes) is a boarding and day school in Edinburgh. The governing body is the Governors of the Fettes Trust (The Governors). The Senators of the College of Justice (Scotland's Senior Judges) and the Faculty of Advocates are part of the governing body. Each year, they elect one of their members to sit as a governor and represent them.
3. This causes an obvious problem when someone takes a legal action against Fettes as the senior judges are part of the governing body.
4. The main issue that arises is whether a judge, who either sits as a governor or is part of a group who elects someone to sit as a governor, can act fairly when an action involving Fettes comes in front of them?
5. The law around this issue is clear. Judges must be free from bias. The biggest danger is subconscious bias. A judge cannot act in a case where the possibility of subconscious bias exists (more on how the law tests for this later). It is obvious that the possibility of subconscious bias will exist when any senior Scottish judge hears a case involving Fettes.
6. When judges are assigned to a case, the law requires them to disclose any link they have to any of the parties and consider recusal. The senior Scottish judges have failed to do this when hearing cases involving Fettes.
7. The Governors recently reached an out of court settlement of 400k to a victim of child abuse at Fettes. Before this settlement, a senior Scottish judge heard a preliminary issue in

the Court of Session. The hearing was reported as *EG v The Governors of the Fettes Trust* [2021] CSOH 128.

8. This paper will explain why 400k is nowhere near enough and ask a) whether there was a possibility of subconscious bias for the judge at the preliminary hearing; and b) whether *EG* has been defrauded by the judges and his legal representatives?
9. Many cases taken by victims of historical child abuse (that Fettes has partially admitted) are pending in Scotland's senior courts.
10. The situation that now exists is that senior Scottish judges are a) hearing cases involving alleged child abuse at Fettes; b) failing to disclose their links to Fettes; c) responsible for the child abuse that happened at Fettes; and d) taking part in a cover-up of the extent of the child abuse.
11. It now seems that no victim of child abuse can get proper justice as the whole of the Scottish legal profession is not telling them that the judges and many other powerful people are part of the Fettes governing body.
12. This is part of the cover-up of child abuse, as the lack of unbiased judges will hinder people from taking legal actions to expose the extent of the child abuse that took place in Scottish Schools.

### **Introduction**

13. This paper, that is part 2 of 5, will explain the consequences of senior judges' a) being part of the governing body of Fettes; and b) hearing cases that involve Fettes. It will concentrate on the *EG* case as the same consequences apply to all others.

### **Facts and issues relevant to Part 2 – The legal cases against Fettes.**

14. *EG* accused a teacher at Fettes of child abuse. A preliminary hearing took place in the court of session (*EG v The Governors of the Fettes Trust* [2021] CSOH 128). Lord Clark was the judge, Dunlop QC represented Fettes and Mackenzie QC represented *EG*.<sup>1</sup>

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<sup>1</sup> Pursuer Mackenzie QC; Boni; Digby Brown LLP; Defender: Dean of Faculty; Clyde & Co (Scotland) LLP

15. The preliminary hearing was to decide whether *EG*'s request for a civil jury trial was to be allowed. *EG* lost, and the case was scheduled to be decided by a single judge. *EG* asked for one million pounds in damages.<sup>2</sup>
16. Before the hearing in front of a single judge could take place, the Scottish press reported that an out of court settlement was reached<sup>3</sup>.

#### *Failure to disclose links to Fettes*

17. No one disclosed the links of the advocates and of Lord Clarke to Fettes. Dunlop QC, the Dean of Faculty, who was acting for Fettes, said this in response to the question whether or not the links should have been disclosed:

“You are mistaken. Neither counsel is a governor of Fettes Trust. I do not know, but rather doubt that Lord Clark is either. It is true that the Dean of faculty is from time to time called upon to nominate a Member of Faculty to serve on the Board, but that does not mean that every Member of a faculty is a governor.

The entire basis for your complaint is thus mistaken: there was no reason for Lord Clark to recuse himself. Had there been, I have no doubt that Lord Clark would have raised it himself.”

18. The questions, in relation to the lawfulness of the preliminary hearing, are: a) did Lord Clark have the duty to disclose his links to Fettes?; b) did the advocates involved have a duty to disclose their own links and those of Lord Clarke?
19. Before attempting to answer these questions first, let's look at the structure of the Fettes governing body.

#### *The structure of the Fettes Governing Body*

20. Fettes is a boarding and day school in Edinburgh. The governing body is the Governors of the Fettes Trust. The Fettes Trust is a registered Scottish Charity (No. SCO17489). The

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<sup>2</sup> See *EG v The Governors of the Fettes Trust* [2021] CSOH 128. Can be found on-line at:

[https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csoh128.pdf?sfvrsn=357d8e82\\_1](https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csoh128.pdf?sfvrsn=357d8e82_1)

<sup>3</sup> See the BBC at: <https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-61681548> and note that all the major news outlets reported this.

Senators of the College of Justice (Scotland’s Senior Judges) and the Faculty of Advocates are members of the Board of Governors and elect one of their members to sit as a governor each year.<sup>4</sup>

21. Judges sitting in the Supreme Court(s) are known as senators of the College of Justice. The Supreme Courts are the Court of Session, and the High Court of Justiciary.<sup>5</sup> The Faculty of Advocates are a group of lawyers who can practise in the Supreme Court(s) of Scotland.<sup>6</sup>

22. The annual report<sup>7</sup> of Fettes describes the governing body thus:

“STRUCTURE, GOVERNANCE AND MANAGEMENT

The Board comprises up to nine elected governors and not more than eleven co-opted governors. The elected governors consist of up to one person elected by each of the:

- a) Senators of Her Majesty’s College of Justice;
- b) The City of Edinburgh Council, as the Local Education Authority;
- c) University Court of the University of Edinburgh;
- d) Faculty of Advocates;
- e) Society of Writers to Her Majesty’s Signet;
- f) Royal College of Physicians of Edinburgh;
- g) The Master’s Court of the Company of Merchants of the City of Edinburgh;
- h) Edinburgh Chamber of Commerce; and
- i) Old Fettesian Association from among former pupils of Fettes College.

Governors are elected or co-opted as appropriate to provide a range of skills required to enable the Trust to fulfil its object of providing education to young people.

New Governors are inducted by briefings from the Clerk to the Governors, by initial meetings with senior management and subsequent regular visits to Fettes which includes

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<sup>4</sup> See pages 3,4 and 5 of the Fettes Annual Report and Financial Statement here: <https://resources.finalsite.net/images/v1654854454/fettescom/z2oIngabhasim6k9yx5k/AnnualReportFinancialStatement.pdf>

<sup>5</sup> <https://www.judiciary.scot/home/judiciary/judicial-office-holders/senators-of-the-college-of-justice>

<sup>6</sup> See <http://www.advocates.org.uk/faculty-of-advocates/what-is-the-faculty-of-advocates> and <http://www.advocates.org.uk/about-advocates/what-is-an-advocate> for more information about advocates and their faculty.

<sup>7</sup> See the full report cited in footnote 4.

both the Senior School for pupils between the ages of 13 and 18...Governors are expected to attend all Board meetings and will also attend external courses relevant to the School and its operation or to its compliance with current regulatory requirements...

The Governors conduct a process of self-assessment from time to time and this informs the Board as a whole as to any gaps in knowledge, skills or experience deemed necessary for the proper operation of the Board of Governors..."

23. The primary problem is having the senior judges elect one of their members as a governor (this makes them a trustee of the charity). This is never a good idea, as it creates an obvious conflict of interest. Whenever someone takes a legal action in the senior courts<sup>8</sup> against Fettes, they are effectively taking an action, in part, against the judge or group of judges who are deciding the dispute.
24. Appendix D shows an extract from the original bequest of Lord Fettes and explains how the judges, advocates and others came to be part of the Fettes Governing body. What is of no doubt though, is that the Senators of the College of Justice, as a group, are part of the governing body. Likewise, the Faculty of Advocates and the other groups listed are part of the governing body. My view is that only one from each group being elected as a governor makes no difference. A person's membership in the group means, as a matter of law, they are part of the Fettes governing body.
25. If this analysis is correct then the Senators of the College of Justice, The Faculty of Advocates, the other groups and each individual member of each group is responsible for the child abuse that happened at Fettes.

*Did Lord Clark, in the EG case, have a duty to disclose his links to Fettes?*

26. At paragraphs 19 and 54 of *Davidson v Scottish Ministers (No 2) 2005 1 S.C. (H.L.) 7* the Judicial Committee of the Privy Council stated (summarised by the reporter in the headnote):

*“Observed that: (1) it was routine for judges, before or at the outset of a hearing, to disclose*

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<sup>8</sup> The Court of Session as opposed to the Sheriff Court.

a previous activity or association which would or might provide the basis for a reasonable apprehension of lack of impartiality; it was important that proper disclosure should be made in such cases; and proper disclosure at the outset is itself a badge of impartiality (paras 19, 54);”

27. Three judges in the Inner House of the Court of Session<sup>9</sup> in *Clancy v Caird* 2000 SC 441 stated this in relation to a judge’s duty to disclose a conflict of interest:

“...If, however, a judge finds himself in a position where he considers that there is a possible conflict of interest, it is his duty to disclose that possible conflict to the parties in the case and to propone declinature...”

28. My view is that paragraphs cited in *Clancy* and *Davidson* require Lord Clarke or any judge hearing a case involving Fettes to disclose that they are part of a group that elects a representative to sit on the Board of Governors of the Fettes Trust.

29. As well as this duty under the common law, there is a corresponding duty under Article 6 ECHR (Article 6 ECHR requires judges to be independent and Impartial<sup>10</sup>). In addition, there is, of course, a moral duty to let people know of links between a judge and a party to the case.

*The ‘rule against bias’. The danger is the possibility of subconscious bias*

30. To receive a fair hearing or a fair trial in a criminal prosecution, the rule of law requires the judge or group of judges deciding the issue to be independent and impartial<sup>11</sup>. Parties are entitled to the ‘cold neutrality of an impartial judge’<sup>12</sup>.

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<sup>9</sup> For the organisation of the Senators of the College of Justice in Scotland’s senior civil court see: <https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session> and <https://www.judiciary.scot/home/judiciary/judicial-office-holders/senators-of-the-college-of-justice>

<sup>10</sup> The fair minded and informed observer test for the real possibility of bias equals the test used by the European Court of Human Rights for independence and impartiality. See *Porter v Magill* [2002] 2 A.C. 357 at 102 and 103.

<sup>11</sup> *Davidson* at para 6.

<sup>12</sup> *Giles v Thompson*; and related appeals - [1993] 3 All ER 321 (Obiter of Steyn LJ).

31. The test used is whether a factor extraneous to the case exists that would lead the fair-minded and informed observer to conclude that there was a real possibility of subconscious bias<sup>13</sup>.
32. Is it not obvious that Lord Clark, or any other judge who is part of a group who elects a member to represent them on the board of Governors, cannot display the 'cold neutrality' required to decide the case solely on the law and facts presented?
33. It is contended that the links between Lord Clark, or any other senior judge, and Fettes would lead the fair-minded and informed observer to conclude that Lord Clark would subconsciously strive not to reach a decision unfavourable to Fettes.
34. The existence of a conflict of interest is clear. The case by *EG* was against the Governors and Lord Clark was part of a group who are Governors and elect one of their members to represent them.
35. There is a rule that a judge cannot act in their own cause<sup>14</sup>. It speaks for itself that Lord Clark, due to his links to Fettes, was acting as a judge in his own cause and automatically disqualified from hearing the case.
36. The rule against bias, the law on subconscious bias and automatic disqualification, has not been set out in any detail. It should be clear that a judge is not allowed to judge a case where they have a substantial link to one of the parties.

*Did the advocates involved in the EG case have a duty to disclose a) their own links to Fettes; and b) Lord Clarke's links to Fettes.*

37. Advocates and lawyers representing clients have a fiduciary duty to their clients. This means that they must inform their clients of any matter that may affect their right to a fair hearing and of any conflict of interest that might affect the result.
38. Advocates and lawyers also owe a duty to the court to bring up any matter that may affect the fairness of the hearing.

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<sup>13</sup> *Davidson* at paras 17, 22, 23, 25, 45, 56–58, 78–81 and *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at para 14.

<sup>14</sup> See *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet* [2000] 1 A.C. 119

39. The question that must be answered is whether this failure to disclose the structure of the governing body of Fettes, to the court and their clients, means that the advocates and solicitors involved committed criminal and civil fraud?

*Are there any others who have a duty to disclose the judge's involvement with the Fettes Governing body?*

40. There are so many that this section can only list a few:

41. Lady Wise – She is a senator of the College of Justice and the chair of the Governors. Why has she not raised concerns that the legal cases involving Fettes are being heard by her colleagues that elected her to be a governor?

42. The Lord Advocate, as part of the Scottish Government, has a duty to make sure that the legal system in Scotland is fit for purpose. Why is the Lord Advocate allowing cases involving Fettes to be heard by the Senators of the College of Justice? Why is she not raising concerns?

43. The Scottish Courts and Tribunals Service are arranging cases to be heard by judges that they know are biased (or not independent and impartial as per article 6 ECHR).

44. Why are the groups and people on the Board of Governors not disclosing that the 'child abuse' cases are being heard by judges who are also part of the governing body?

45. Please see Appendix B for a list of some other issues and questions that arise out of the structure of the Fettes Board of Governors.

### **Conclusion**

46. The question of whether failing to disclose the links between Fettes and the Senators of the College of Justice is a) criminal fraud; b) civil fraud; and c) a human rights violation must be answered.

47. The senior judges are responsible for the child abuse that happened at Fettes. They have had a representative on the Board of Governors since the early twentieth century (See appendix C). They have allowed cases to be heard without disclosing the links between

themselves and Fettes. Now this is known, can anyone have any confidence in the Scottish Legal System?

48. The whole Scottish Legal Profession is now in disrepute. The failure to disclose the links between Fettes and the Senators and the Faculty of Advocates means that there is no possibility for justice for the tens of thousands abused in Scottish schools.
49. Shame on a) the Scottish Government; b) every person who is a member of the Scottish Legal Profession; and c) every group and every member of every group who have allowed this child abuse to occur and failed to take steps to ensure that the victims can achieve justice.
50. The offer and settlement of 400,000 to EG is derisory. Multiply by 100 to get the correct amount.

## **Appendix A – Details of other cases involving Fettes**

### *The legal proceedings active in the Court of Session against Fettes College*

1. The Scottish Courts web-site reports one active case, A133/21 Jonathan Erasmus &c v The Governors of the Fettes Trust (Fettes College).<sup>15</sup>

### *Contempt of Court Orders*

2. The prohibition of publicising some elements of two cases is shown on the Scottish Courts website (O v The Governors Of The Fettes Trust (under section 11 of the Contempt of Court Act 1981), All Scotland Personal Injury Court, Edinburgh, 27 July 2021 and EG v the Governors of the Fettes Trust (under section 11 of the Contempt of Court Act 1981), Edinburgh, Court of Session, 23 November 2020).<sup>16</sup>

### *Other cases involving Fettes*

3. There are other historic cases<sup>17</sup> and probably some that have not been reported. There will also be cases that have taken place in the Sheriff Court.

### *Reports of the Lord Advocate failing to investigate / extradite alleged offenders.*

4. Reports of the Lord Advocate failing to investigate the allegations of child abuse crimes at Fettes are found in the Scottish press.<sup>18</sup>

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<sup>15</sup> <https://www.scotcourts.gov.uk/current-business/court-rolls/court-roll?id=1ca592c1-384f-4ab0-8f92-5f9164dfac&contentType=Session>

<sup>16</sup> <https://www.scotcourts.gov.uk/current-business/court-notice/contempt-of-court-orders>

<sup>17</sup> *Fettes Trust (Governors) v Assessor for Lothian Region 1983 SLT 554n*

<sup>18</sup> <https://www.tes.com/news/boarding-schools-apologise-unreservedly-over-abuse> ;

<https://www.edinburghnews.scotsman.com/news/crime/men-consider-private-prosecution-of-fettes-teacher-facing-abuse-claims-after-crown-office-decide-not-to-pursue-south-africa-extradition-3155189>

*Many other cases are pending against Fettes*

5. There are many reports of up to 20 former pupils taking actions. See the Daily Mail for one such report: <https://www.dailymail.co.uk/news/article-10881995/Fettes-College-pays-outs-400-000-former-pupil-beaten-sexually-abused.html>

**Appendix B – Other questions and issues raised by the judges' involvement with Fettes.**

*Pinochet and Fettes College*

1. In *Pinochet* the House of Lords overturned one of their own decisions. See *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet* [2000] 1 A.C. 119
2. Senator Pinochet faced extradition to Spain. The House of Lords, by a 3 to 2 majority, said the extradition was lawful. They found that Senator Pinochet had no immunity, by being a former head of state, from the prosecution of alleged murder and torture that took place in Chile.
3. Senator Pinochet was all set to be extradited to Spain before it was discovered that Lord Hoffman, who was part of the majority, was the chair of the charity section of Amnesty International, who had intervened in the hearing.
4. On overturning the decision that allowed extradition, the House of Lords said that Lord Hoffman was automatically disqualified from sitting, as he was so closely aligned with Amnesty International. Senator Pinochet, of course, jumped on his plane and headed back to Chile.
5. The House of Lords said at 136: 'Only in cases where a judge is taking an active role as a trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.'
6. This passage from the *Pinochet* means that all the senior Scottish judges have a duty to disclose their involvement with Fettes. The 'active role as trustee or director of a charity' applies to all the Senators of the College of Justice, as they have elected one of their members to represent them as a trustee on the Board of Governors of the Fettes Trust since the early 20<sup>th</sup> century.

*What duties do the other Governors of the Fettes Trust have?*

7. In all legal dealings (such as a contract for a child to attend or a contract of employment), Fettes must inform other parties to the contract that the Senators of the College of Justice are parties to the contract.
8. This shows the problem with having judges as part of the governing body of Fettes. It makes it impossible for someone to take any action against Fettes, as it is an action against the judges.

*Is Fettes bankrupt?*

9. With the number of legal cases rising, and with the 400K paid to EG, what potential liability does Fettes have?
10. Does Fettes face bankruptcy if more people come forward and allege abuse?
11. Are Fettes adopting a delay tactic? Maybe they think the longer they delay, then the problem will disappear, as potential claimants will no longer be alive or be well enough to take actions.

*Has the Scottish Government failed to supply a legal system that is fit for purpose*

12. The Scottish Government has run a child abuse inquiry. They know that tens of thousand of children were abused in Scottish Schools. They know that the judges, due to being Governors, are responsible for the child abuse at Fettes, but they have done nothing to remedy this crazy situation.
13. Why have they not legislated to a) compensate every person who attended Fettes? b) require disclosure by parties and judges when they have links to each other? c) allow an investigation into the fitness to act of all advocates and Senators of the College of Justice; and d) contacted everyone who has had the misfortune to have had a dispute decided by groups who have admitted child abuse and offer compensation?

*What about Anthony Chenevix-Trench?*

14. A future paper will cover the appointment of a known sadist and paedophile<sup>19</sup>, Anthony Chenevix-Trench, as headteacher of Fettes from 1971 – 79.
15. I have been informed that senior members of the Judiciary, alongside other members of the Board of Governors, covered up his abuse of pupils.
16. My research shows that it is more than that. His appointment was controversial. His previous school, Eton, had warned the Governors. They went ahead regardless. The school was losing money and it was thought that having an ex-head of Eton there would increase enrollment.
17. If this is true, then his appointment was an encouragement of paedophiles. Did the Board of Governors of Fettes encourage Chenevix-Trench's child abuse at Fettes between 1971 and 1979?
18. I cannot see his appointment in any other way. But, of course, it all depends on the facts. Most of his victims will now be aged between their late 50s to early 70s. As part of publishing my research into Fettes, and the appointment of Chenevix-Trench I will ask for evidence of his abuse and its encouragement.

*What about the links between the senior Scottish Judges and the other groups on the Board of Governors of the Fettes Trust?*

17. Through Fettes a large group of prominent people are linked. The Board of Governors links the Senators of the College of Justice (the senior Scottish judges) to: The City of Edinburgh Council, as the Local Education Authority; The University Court of the University of Edinburgh; The Faculty of Advocates; The Society of Writers to Her Majesty's Signet; The Royal College of Physicians of Edinburgh; The Master's Court of the Company of Merchants of the City of Edinburgh; Edinburgh Chamber of Commerce; and the Old Fettesian Association from among former pupils of Fettes College.

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<sup>19</sup> See, among many others, the Herald: <https://www.heraldscotland.com/news/15399268.portraits-shame-paedophile-paintings-disgrace-scotlands-elite-private-schools/>

18. The question to ask here is whether anyone would be happy being involved in an action with any of these groups in the Court of Session?
  
19. I will cover the problems caused by these organisations' links to the senior Scottish judges, via Fettes, in a later paper.

**Appendix C – How did the senior judges become involved with Fettes?**

1. Fettes was set up as with a bequest by Sir William Fettes<sup>20</sup>.
2. A person closely linked to one survivor of child abuse at Fettes sent me an extract from the original 'Scheme of 1886' which sets out Sir William's request for a Governing Body constituted as follows:

"One shall be elected by the Magistrates and Town Council of Edinburgh;..the Dean and Faculty of Advocates;....the Writers to Her Majesty's Signet in Scotland etc. Furthermore, *"On the death or resignation of three of the life Governors, one shall be appointed by the Senators of the College of Justice...one shall be elected by the Chairman, Deputy-Chairman....* The Introduction ends with *"The Commissioners acting under the Educational Endowments (Scotland) Act 1928 found nothing to alter in the constitution of the Governing Body or in the main lines of the scheme of administration"*.

3. This makes the Senators and the Faculty of Advocates being part of the governing body since around 1886. The Senators only became part '*On the death or resignation of three of the life Governors*'. So, probably in the early 1900s.

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<sup>20</sup> See wikipedia - [https://en.wikipedia.org/wiki/William\\_Fettes](https://en.wikipedia.org/wiki/William_Fettes)