

Charities and Public Benefit

**Response by the *Education Review Group* to the Charity Commission
consultation on the draft Public Benefit Guidance
5 June 2007**

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Executive Summary

This submission is made by the Education Review Group whose members have been drawn together by their concern for and interest in the education of the children and young people of England and Wales. The purpose of this paper is to assist the Charity Commission in taking an objective view of the position of charitable fee-paying schools. The Group has no vested interest in the fee-paying school sector but addresses the interests of the general public.

- 1.1 The Group considers the draft guidance as being a broadly accurate summary of charity law.
- 1.2 The Group acknowledges the achievements of many fee-paying schools and believes that in order to justify charitable status these benefits should be shared with the state school sector.
- 1.3 The public benefit provided by fee-paying schools should be reviewed by bodies such as Ofsted, the Audit Commission or similarly qualified, objective and independent bodies.
- 1.4 State schools are made rigorously and publicly accountable for their performance. Charitable fee-paying schools should be equally accountable in their provision of public benefit.
- 1.5 Charitable fee-paying schools must account for all the charitable funds and assets from which they benefit including endowments and free use of buildings as well as tax reliefs,
- 1.6 It is accepted by all the main political parties that any extension of academic selection will not benefit the wider state sector. Therefore to extend any subsidy of academic selection in fee-paying schools would be disadvantageous to the state sector. In order to justify charitable status selective fee-paying schools should strive to mitigate any such effect by assisting the state sector.
- 1.7 Provision of bursaries to academically gifted children from low income families benefits the individual children but further drains talent from the state sector. Such bursaries should not therefore count towards the public benefit required to justify charitable status.
- 1.8 Fee-paying schools could assist the state sector by:
 - 1.8.1 supporting state schools to achieve more representative success rates at entry to elite universities;
 - 1.8.2 offering boarding facilities to teenagers with chaotic lives from urban areas;
 - 1.8.3 providing teaching in state schools – particularly in shortage subjects such as individual sciences and modern languages at primary level;
 - 1.8.4 providing educational opportunities for young people not in education, training or employment (NEETS).
 - 1.8.5 being involved in the new national 14-19 partnerships initiative.

Charities and Public Benefit: Response by the *Education Review Group* to the Charity Commission consultation on the draft Public Benefit Guidance

Background

This paper goes into more detail than is contemplated by the generic questions posed by the Charity Commission. We are mindful that a further consultation will be conducted by the Charity Commission in relation to the education sub-sector. However, as the education sub-sector consultation ends (January 2008) at the same time as the new public benefit requirement comes into force, we thought it important to address more detailed issues at this stage. The paper discusses the four principles of public benefit set out in the draft guidance and concludes by recommending a reporting and evaluating framework.

Please find attached additional Appendices as follows:

1. Extract from Anne Mountfield's response dated 24 April 2007 to the Charity Commission consultation on public benefit together with part of a background note, not submitted
2. Paper on access to higher education by the National Union of Students
3. List of signatories

A General Comments on the Draft Guidance

Legal position

- 1.1 We consider it important to stress at the outset that the Group considers the draft guidance and legal analysis as being a broadly accurate summary of the law. Whilst some may argue that the Commission has gone too far in requiring the level of public benefit set out in its draft guidance, the Commission is right to set public benefit guidance in a modern context. Charity law is evolutionary and has to take account of modern economic and social circumstances. Legal precedents, though clearly important, are not immutable in the light of a changing context. The case law on the charitable status of fee-paying schools (much of which is archaic) should now be seen through the filter of the broadly accepted academic consensus and the views of the education sector, including the state sector. We would be concerned if, due to pressure from those with a vested interest, the draft guidance is subsequently weakened, particularly the principle that those on a low income should be genuinely capable of benefiting significantly.

Drafting Comments

- 1.2 We appreciate that the draft guidance attempts to fulfil several purposes: explaining the concept of public benefit; explaining the change in the law introduced by the Charities Act 2006; setting out the role of the Charity Commission; informing trustees about their legal responsibility in relation to

the guidance; setting out the key public benefit principles; expanding on and explaining the principles; giving guidance on how charities should report on the public benefit they deliver and how the Commission will assess this. Although the draft guidance contains generally sound information and good advice, we believe that the final form of the guidance could be more practical and user-friendly (and therefore more effective) by being more focussed in some areas and less repetitive. In particular we believe that, since the four principles are of paramount importance underpinning everything else, they should be readily identifiable as such, appropriately positioned at the beginning and cross-referenced.

- 1.3 Paragraphs C1 – C4 (which summarise the legal requirement of public benefit) could be condensed into a short introductory paragraph with any underpinning law or legal analysis being moved to the legal analysis document, which could be an appendix.
- 1.4 Paragraph C5 (the principles of public benefit) is the most important section and should have prominence. The explanation of each principle should be clearly cross-referenced to the principles themselves.
- 1.5. There is no reference throughout the guidance to the role and value of quantitative evidence. It will be important for certain categories of charities to provide quantitative evidence. This could be developed further in the sub-sector guidance. Also, it should be made clear that the judgment as to whether an activity or purpose is for the public benefit must be an objective judgment (made by the court, Commission or Tribunal - which is stated in the guidance), and that the judgment of the trustees should be arrived at by objectively constructed criteria. We are further of the view that since the judgment must be objective, wider evidence should be sought especially in difficult cases.

B Principle 1: There must be an identifiable benefit

- 2.1 Principle 1 states that there must be an identifiable benefit. The essential elements of this are that the benefits must be clear and related to purpose and the disbenefits must not outweigh the benefits.
- 2.2 In relation to whether benefits are clear and related to purpose, it is important to consider who has the expertise to make this assessment. In relation to fee-paying schools, the Charity Commission should take expert advice from academics in the education field, those having responsibility for state school provision, such as local directors of education, and bodies such as Ofsted. Whilst the Charity Commission is undoubtedly in the best position to take an overall view of public benefit across the thirteen charitable heads, it is not, nor should it be expected to be, an expert in education. The education sector boasts an abundance of expertise which the Charity Commission can tap into.
- 2.3 Charity law prescribes that public benefit has to be assessed in relation to each fee-paying school. Evidence adduced by the Independent Schools Council is not calibrated on a school by school basis, but in accordance with sectoral averages. The sins of some cannot be atoned for by the charity of others. Whilst sectoral analysis can be helpful in some instances, the question of

public benefit is not a sector-based test about whether the charitable fee-paying market as a whole offers public benefit.

- 2.4 We set out below examples of where we believe charitable fee-paying schools could demonstrate public benefit. These are all subject to the general principle that interactions between fee-paying schools and state schools should be mutual:
 - 2.4.1 The boarding element of a fee-paying school, which plays such a significant role in many of the most prestigious schools, could be utilised by offering valuable residential provision for teenagers with chaotic home lives from urban areas.
 - 2.4.2 A fee-paying school might provide teaching in state schools, particularly in shortage subjects such as the individual sciences or modern languages in primary schools, prioritising schools unable to provide qualified teachers with degrees in the relevant subjects. The outcomes of this work should be assessed in terms of measurable benefits to the state school pupils concerned and the value added by the fee-paying school's contribution.
 - 2.4.3 Fee-paying schools who teach pupils in the 14-19 age range could be fully involved in the new 14-19 partnerships which are designed to provide the rich and varied curricula for this age group. Typically the partnerships consist of state schools, colleges, employers and local authorities. Charitable fee-paying schools which are acting in the public interest should be contributing to this national and all-embracing initiative.
 - 2.4.4 Specialist educational support could be provided by a fee-paying school to enable one or more specific state schools to achieve more representative success rates at entry to elite universities including Oxbridge.
 - 2.4.5 A fee-paying school which has a record of success in securing places for its pupils at the elite universities, particularly Oxford and Cambridge, could commission and participate in research which explored effective ways that the school could assist local state schools to secure a more representative number of places for pupils with the necessary aptitude or ability.
 - 2.4.6 Many urban state schools only have access to limited sports facilities. It may be that a locally identified public benefit which the independent schools could provide is sharing of facilities that the state sector might need.
- 2.5 As regards public benefit relating to charitable purpose, there must be a direct connection between the type of benefits the school claims to provide for its pupils (this can be evidenced by looking at the school's promotional literature, prospectus, inspection and annual reports) and the public benefits it provides. If a school's objects or those of an associated trust are very narrow, such as prioritising the children of past pupils, army officers or missionaries, then

either the school needs to be particularly imaginative or proactive in seeking out opportunities to provide public benefit or consideration should be given to expanding the objects by applying cy-près principles. There may even be an argument that a cy-près occasion has arisen.

2.6 The Group does not believe that there is a direct connection between benefits and charitable purposes in the following circumstances. The list is not exhaustive:

2.6.1 The letting of facilities (such as a swimming pool) in the evenings or summer holidays for general public use rather than for educational purposes. Even if no charges are made (and our anecdotal evidence is that they often are), there is no causal link between this activity and advancing education in a charity law sense. This same point would also relate to other facilities.

2.6.2 Relieving public funds (ie the fact that the state does not pay for the education of pupils at fee paying schools) should not be regarded as contributing to public benefit. We do not believe that case law to this effect would be upheld by the courts.

2.6.3 The state-private schools' partnerships initiative is funded by the DfES and therefore should not be double-counted. Sponsorship, by a fee-paying school, of an Academy which is itself fully funded by the state, should be fully audited, using the principles proposed in this submission, for the actual public benefit delivered by the fee-paying school arising from its sponsorship of the Academy.

2.6.4 Fulfilment of curriculum requirements to achieve academic qualifications (for example citizenship modules in the International Baccalaureate) or activities with state schools as part of the fee-paying school pupils' own personal development programme.

2.7 We are pleased that the draft guidance advises that benefits should be balanced against disbenefits. The term 'disbenefits' appears in the Scottish statutory public benefit test. We are aware that the term 'disbenefits' is not used in the Charities Act 2006. However, we do not believe that this omission is significant, or that it can be argued that disbenefits should be ignored. We would construe a disbenefit as being the antithesis of public benefit. The draft guidance is thus simply providing a helpful clarification, not a substantive change.

2.8 The Group considers that the following aspects and activities of fee paying schools may constitute disbenefits to the wider public. This list is not exhaustive:

2.8.1 Whilst the provision of bursaries to academically gifted children from low income families may appear to be an efficacious way of providing public benefit, it is the Group's view that this constitutes disbenefit to the wider public. It is accepted by all the main political parties that any extension of academic selection at the age of eleven on the basis of ability will not benefit the wider state sector. Bursaries of this kind are

akin to a reworking of the assisted places scheme and deprive the state schools of valuable social and intellectual capital. We would also make the point that these sorts of bursaries provide significant private benefit to the school, as they boost its league table position at the expense of the state sector. For more information on this please see paragraphs 4.5 to 4.9 of this paper.

- 2.8.2 From September 2007 the governing bodies of state schools will have a new statutory duty to promote community cohesion (Education and Inspections Act 2006) and Ofsted must include schools' contributions to promoting community cohesion in their inspections. If statute has laid down such a duty, it follows (and the courts would accept) that it must be in the public interest. The DfES has produced draft guidance for schools on this duty. Although the statutory duty itself is not expressly imposed on fee-paying schools, the draft guidance is intended to be:

“of use to independent schools in maintaining standards laid down in the Education (Independent School Standards) (England) Regulations 2003”. (See page 2 of the draft DfES guidance which can be downloaded from www.everychildmatters.gov.uk). These regulations apply to all registered independent schools including fee-paying schools.

The draft guidance provides the following definition of community cohesion:

“By community cohesion we mean working towards a society in which there is a common vision and sense of belonging by all communities: a society in which the diversity of people’s backgrounds and circumstances is appreciated and valued; a society in which similar life opportunities are available to all; and a society in which strong and positive relationships exist and continue to be developed in the workplace, in schools and in the wider community”. (The draft guidance attributes this to Alan Johnson, Secretary of State for Education and Skills, speaking in Parliament on 2 November 2006).

The draft guidance further states:

“Every school – whatever its intake and wherever it is located – is responsible for educating children and young people who will live and work in a country which is diverse in terms of culture, faith, ethnicity and social backgrounds. The staff and pupil populations of some schools reflect this diversity, allowing pupils to mix with those from different backgrounds. Others do not, and need to make links with other schools and organisations in order to give their pupils the opportunity to mix with and learn with, from and about those from different backgrounds.”

Fee-paying schools can be socially divisive – many young people do not mix at all with those who have not shared a similar social experience. In relation to education, the main under-achievement by far is to be found in the lowest social classes. If charitable fee-paying schools are to contribute to community cohesion in a manner which relates to their education purpose they should work to counteract divisions which contribute to low educational achievement.

The assessment of public benefit provided by a charitable fee-paying school should be underpinned by and set against the standard expected for state schools in relation to the community cohesion obligation. We believe that promoting community cohesion should not be an optional extra for a fee-paying school which claims charitable status. Aspects of fee-paying schools which impede the promotion of community cohesion should be challenged as this would be against the public interest and therefore a disbenefit to society.

- 2.9 The disproportionate number of places at elite universities taken by those educated at fee-paying schools disadvantages the state sector. The National Union of Students has provided some statistics on this at Appendix 2. We consider it a disadvantage (and therefore disbenefit) to society if the elite universities are deprived of the best talent in the country. Whilst we accept that this is properly a concern for those universities themselves (and we understand there have been valiant attempts to address this problem with the intake of at least one Oxford college now including c70% ‘state’ educated students), fee-paying schools which operate (in relation to applications to Oxford and Cambridge) exclusively in the interests of their small ‘section of the public’ are merely perpetuating the unfairness and disadvantage suffered by the state sector and are therefore contributing to the consequential disbenefit. To avoid this charge, fee-paying schools should assist the public interest in a meaningful way, by doing what they can to facilitate a fair and open competition for places at the elite universities and particularly Oxford and Cambridge. This would involve not only sharing their particular expertise, but monitoring the effectiveness of their contribution.

C Principle 2: The benefit must be to the public or a section of the public

- 3.1 The Charity Commission guidance states that benefit can be to a ‘section of the public’ where restricting benefit in that way is relevant to the charitable purposes. It further states that public benefit will be affected where the restrictions are irrational, unreasonable or unjustified. We agree with the Commission that ‘charities should not be seen as exclusive clubs that only an elite few can join, since the benefit to the public from that is very limited.’ We also agree with the Commission that, where the purpose of a charity is more closed, inward and exclusive, there must be a greater justification in order to demonstrate that there is public benefit.
- 3.2 In relation to fee-paying schools, the Group finds it difficult to see why under the new legislation the 7% of pupils at charitable fee-paying schools constitute a wide enough group of the public for charitable status to be justified. It has to be remembered that the vast and overwhelming majority of children do not

receive the same benefits, in particular smaller class sizes, specialist teaching and extra curricular and enrichment activities.

- 3.3 It is our view that the state school sector constitutes “the wider public” in relation to school education in the UK. If the sort of benefits that we have outlined in paragraph 2.4 are not implemented by charitable fee-paying schools, then we do not believe that the section of the public is large enough.

D Principle 3: People on low incomes must be able to benefit

- 4.1 We welcome the third principle that people on low incomes must be able to benefit. We agree that a workable definition is that people on low incomes would typically cover households living on 60% or less of the average income and people living on or below the level of income support. We also welcome the clarification that it does not generally include people who are on a low income but are asset rich. We would also like clarification on whether ‘average’ means household pre-tax, post-tax or disposable income.
- 4.2 We are aware that some argue that principle 3 is not substantiated by charity case law. In particular, it is argued that the leading Privy Council case Re Resch (Re Resch’s Will trust, Le Cras v Perpetual Trustee Co Ltd [1967] 3 All E.R. 919) states that the true test is that fee paying charities should not entirely exclude the poor rather than positively include those on low income. We set out in paragraph 4.3 below another interpretation of Re Resch. It is our view that the factual matrix which we highlight is very important and will have influenced the judge’s decision making. In any event, charity law is evolutionary and any judge assessing public benefit today would have to take into account modern social and economic circumstances.
- 4.3 The facts of the Re Resch case are instructive. Lord Wilberforce drew the conclusion that the purposes of the private hospital were charitable on the basis of the following factual observations:
- There were two hospitals, one public, one private, in very close association both run by the Sisters of Charity, an order of nuns.
 - The public (general) hospital predated the private hospital.
 - The private hospital was opened by the nuns to alleviate the pressing need for more medical care than the general hospital could meet. A second purpose for the private hospital was the provision of care in more private conditions.
 - The same doctors worked in both hospitals
 - Surpluses from the private hospital were applied, inter alia, to the upkeep and maintenance of all the buildings
 - The private hospital benefited the general hospital by attracting a higher calibre of medical staff due to the more attractive conditions in the private hospital
 - The general hospital benefited the private hospital by being able to provide special medical facilities not available in the general hospital.

The purpose here is to illustrate the sort of circumstances that led Lord Wilberforce to conclude that the private hospital could be charitable. The relationship between the public and private hospital was not ancillary to

either, there was mutual interdependence and benefit. Could this be said about any current fee charging schools?

- 4.4 Paragraph G5 of the draft guidance says that in the context of fee-charging charities there should usually be reasonable access to those benefits by a sufficient section of the public including people on low incomes. We agree that token benefits where there is a nominal public benefit are not good enough.

The Commission goes on to give examples of ways in which direct or first hand benefits may be provided:

- *“ providing concessions, subsidised or free places (for example, in the case of schools by offering scholarships, bursaries or assisted places, or in the case of theatres or concert halls by offering concessionary tickets);*
- *the existence of accessible insurance or other benefit schemes, for example, medical insurance schemes (but it would have to be shown that people on low incomes were able to sufficiently access the services through these types of schemes);*
- *providing wider access to charitable facilities or services. For example, some charities may provide additional facilities or services for people on low incomes who would otherwise be excluded. Some charities may lend equipment or staff out to other charities or groups which provide the same facilities or services to people on low incomes. For example, a charitable independent school allowing a state maintained school to use its educational facilities;*
- *the educational benefits to state school pupils who are able to attend certain lessons or other educational events at independent schools;*
- *benefits to pupils in state schools, who may include those from families on low incomes, arising from the collaboration and partnerships between state schools and independent schools;”*

- 4.5 As set out in paragraph 2.8.1, we are concerned that, whilst entry scholarships and bursaries to academically gifted students whose families have a low income will be of benefit to those persons, such awards often constitute a disbenefit to the state sector and the wider public as a whole. We would therefore be very concerned if the Charity Commission allowed fee-paying schools to pass the public benefit test by virtue of such provision. Not only are these awards arguably a disbenefit to the state sector, they also constitute private benefit to the individual pupils and to the fee-paying school by boosting its league table results. We also question how many young people may be eligible. For example, one could anticipate a situation where low income families are apparently welcomed in principle, but no children apply, or there are no children who can meet the criteria. This could be because children from low income families have not been to a prep school which would have prepared them for the entrance exam or their parents have not paid for private tuition. State secondary schools do not prepare their pupils for the ‘Common Entrance Exam’, for example, which is a requirement for entrance to some fee-paying schools at age thirteen. It might also be the case that low income families could not take up the offer because of transport

issues, because the pupils have no friends at the school or they or their parents feel intimidated. As only 2% of pupils at grammar schools are entitled to free school meals, is the percentage likely to be higher in fee-paying schools?

- 4.6 A distinction exists between scholarships, which are for academic merit and bursaries which are based on 'relief of need'. In our view, further to the argument given in paragraph 4.5, where merit-based scholarships involve a fee reduction for families who have previously shown their ability to pay full fees, this should not be counted as a public benefit. The Independent Schools Council's claim that for every £1 the sector receives in tax relief it gives £3 in charitable benefit includes merit-based scholarships and therefore does not satisfy the low income test.
- 4.7 Bursaries are theoretically given on grounds of need, including where a family falls on hard times. Such circumstances may impact on other grant making charities which are approached by parents to, for example, assist with fees for a family post-divorce or to make up the other half of a 'half-scholarship'. Any such grants awarded should be taken into account in the overall accounting for the charitable resources from which a charitable fee-paying school benefits, notwithstanding that the immediate beneficiary is the family.
- 4.8 In relation to bursaries based on need, any qualifying bursary should include full allowances for uniform and other necessary equipment. At present low income families may self-exclude to avoid these expenses.
- 4.9 Insofar as there are awards to low income families, then we suggest that these should not be done on the basis of academic ability. It may be a public benefit for the fee-paying schools to educate some of the most disadvantaged children such as statemented pupils, pupils qualifying for free school meals or pupils who have been excluded from other schools. Educating such pupils would not constitute private benefit because such pupils are not immediately likely to boost league table results. Fee-paying schools might need training in how to cope with and educate such pupils. Such expenses should qualify as public benefit expenditure.
- 4.10 In terms of providing access to facilities, specialist teaching and sharing of resources, these should be focussed on schools with the highest proportion of people on low incomes. Fee-paying schools could provide much needed educational opportunities for young people not in education, training or employment (NEETS). This may not be nearly as attractive to fee-paying schools as providing tutoring facilities for bright children of local state schools. However, public benefit should not simply be demonstrated by helping the more able and motivated students, but also reflect the pressing need to engage the NEETs. In particular, more imaginative ways to re-engage disaffected young people in non-academic activities should be considered. Involvement in the 14-19 partnerships would be an obvious opportunity for charitable fee-paying schools to reach and engage with a greater range of pupils with different needs and backgrounds.

E Principle 4: Any private benefit must be incidental

- 5.1 The Group is concerned that in many cases fee-paying schools provide crucial private benefit subsidised from charitable resources, including not only tax reliefs, but also the free use of charitable assets, which may well outweigh any public benefit. The 7% who attend fee-paying schools grows to a much higher percentage of those who perform well at GCSE; to an even higher one of those who achieve well at A level; to over 50% of those gaining places at Oxbridge; and then to an even higher proportion of those achieving prominence in the professions and in business. Can this skewing of the statistical probability of advancing in society really be of public benefit to the 93% who do not attend such schools?
- 5.2 A study referred to by Geoff Whitty in the ‘Tribute to Caroline Benn’ examined the outcomes for academically able pupils in independent, grammar and comprehensive schools. The differentials were quite small in academic outcomes for pupils in similar ability groups. However, there was a huge difference in terms of social networks and consequent earning power. His finding subsequently appeared on the front page of *The Times* under a story indicating it was well worth ambitious parents paying up to £100,000 for their children’s education. This long term advantage is reinforced by various studies done by the Sutton Trust about the educational backgrounds of the top professions. Whilst social networks exist in many other spheres of life (for example, through religious affiliations) the social networks made at fee-paying schools are hugely important in that they often provide routes into work experience or internships in the elite professions. Work experience or internships are the key to many jobs, for example in the media, which are not formally advertised.
- 5.3 We are concerned that due to the free use of school buildings and facilities given or purchased using charitable funds derived from historic endowments, tax-relieved and/or gift-aided legacies, bequests, donations, and development appeals, there is private benefit to parents who are wealthy and paying at the top end of the fee structure. In this respect, please see Appendix 1. If the value of the historic endowments and premises is taken into account the true annual cost of education per pupil may be considerably in excess of the fees currently charged (which even without this adjustment can be as much as £25k). When the necessary calculations are done, any such subsidy of the true cost of the schooling in a fee-paying school amounts to a private benefit to relatively wealthy families, one that demonstrates no wider public benefit, and arguably creates an element of unfair competition with entirely ‘private’ school businesses. This charitable income should be applied for the wider public benefit.

F Protocols for assessing public benefit of fee paying schools

- 6.1 In the Group’s view, before one attempts to structure the reporting framework for public benefit, it is crucial to set out an assessment mechanism which is objective and which calls on appropriate expertise. Charitable fee paying

schools receive valuable tax breaks and therefore a wider group should input into the assessment procedures.

- 6.2 Relevant objective research relating to the social and educational context in which fee-paying and state schools operate should be reviewed and considered by those members of the Charity Commission carrying out the public benefit assessment of fee-paying schools.
- 6.3 There is a strong argument that the Charity Commission is not best qualified to quantify the public benefit provided by any charitable fee-paying school but should commission an expert assessment, possibly by Ofsted, management consultants, the audit commission or similar qualified bodies which would then be interpreted by the Charity Commission in the light of the requirements of charity law.
- 6.4 Further, the initial findings of the public benefit assessment of a fee-paying school should be considered by a local panel comprising representatives from the educational community in which the fee paying school is situated before the final report is approved and published. Such representatives might include the Director of Education and Children's Services or equivalent for the relevant local authority area, a local state school head teacher and local parents. It is important that the panel should be representative of the public experience of education both nationally and within the particular area of a fee-paying school.
- 6.5 Those persons (ie any expert, the Charity Commission and the local panel) reviewing public benefit in relation to a fee-paying school should have access to all relevant documentation. Such documentation might include: the most recent annual accounts for the school and any associated charitable foundations and trusts; the most recent inspection report; the school prospectus; and all promotional literature produced by the school. The limitations of the accounts and the inspection report should, however, be recognised. In the case of accounts that have been prepared before the new public benefit guidance and assessment regime is in force, further work will be needed to ensure that the appropriate financial records are provided. This documentation should take account of all associated charities making donations to the school or pupils, even if they do not legally form part of the foundation, and should also quantify the annual benefit to the school not only of the tax breaks but also of the free use of charitable assets, including the teaching premises. In the case of inspection reports, it should be noted that they are likely to have been produced by inspectors drawn from the fee-paying sector, rather than Ofsted inspectors familiar with the state sector. In general, the larger fee-paying schools are not inspected by Ofsted. HMC schools are inspected by the Independent Schools Inspectorate and not Ofsted. The Charity Commission needs to satisfy itself that the inspection reports a school provides as evidence in relation to compliance with the public benefit requirement are sufficiently objective.
- 6.6 The effect of any fee-paying school on its local educational community should be identified by seeking representation from members of that community. This should form part of the public benefit assessment. The Charity Commission is accustomed to publishing notices of schemes and change of charities' objects - inviting representation from the public. This would be an appropriate method of

seeking feedback on a fee-paying school's public benefit provision and would be consistent with the principle that the Courts have established that the judgment to be made on public benefit must be an objective one. The setting up of a panel and the enlisting of expert advice could be done in such a way that it does not amount to an unlawful delegation by the Charity Commission.

- 6.7 Rules of engagement should be established in relation to assessing activity or collaboration of a fee-paying school with state schools. These rules of engagement would enable the expert, Charity Commission or panel to judge in any case whether such activity or collaboration is meaningful, effective and lasting. An important underlying principle should be that interactions between state and fee-paying schools should be mutual. In addition, rules of engagement are required to assess whether, in any particular case, the activity or collaboration carried out has the effect of exacerbating the position of state schools. For example, certain types of activity might have the effect of emphasising the differences in pupils' home backgrounds, create a sense of envy or cause undue satisfaction with state provision – all of which can be counterproductive.

G Reporting and Evaluation

- 7.1 The voluntary sector as a whole is familiar with principles of transparency and accountability. For example, any charity that receives a grant from public funds such as the Big Lottery or European funds will have to account for the same. We would like to see the same principles of transparency and accountability become fundamental to the due diligence of fee-paying schools. For example, some fee-paying schools do not provide their prospectus without the applicant filling in a form with details of the child and its year of entry. This means that a member of the public cannot readily see how a fee-paying school presents itself to parents. For example, there might be a disjunction between its stated claim that it provides wider public benefit and the way it markets and advertises itself to parents. We would expect that any member of the public should be able to access information as to how the school meets its public benefit test requirements.
- 7.2 Any charitable fee-paying school which does not comply with the publicity requirements of charity law should be rebuked by the Charity Commission. This would include all fee-paying schools which do not display the fact that they are a charity and their charity registration number or that of their foundation, as appropriate, on all official printed documentation and all advertising and promotional materials for example in 'good school' guides. We believe that the requirement is widely ignored. Further, we believe that today the term 'public school' as applied to a fee-paying school has become misleading and should not be used by schools that are not open to the public generally.
- 7.3 Fee-paying schools should have to complete an annual return setting out the public benefit that they provide set against both the tax breaks that they receive and the charitable resources and assets they enjoy. This could be part of the annual report as suggested in paragraph J5 of the draft guidance, with the Charities' (Accounts and Reports) Regulations 2005 amended to take into

account the public benefit reporting requirement. It is important that the balance between public benefit provided and the benefits of charitable status enjoyed should detail both financial and property and property investments and assets used by the school itself. The return should detail whether historic charitable assets subsidise the cost of the education and to what amount. The report should also set out the schools' reserves policy which should follow standard charity guidance. In short, any reporting system should be able to identify and to quantify both the benefits of charitable status on the one hand, and on the other, the various separate public benefits claimed, with any difference between them being identified as a 'private benefit subsidy' to fee-paying parents (see Appendix 1). This requirement should be imposed on all fee-paying schools irrespective of the level of their annual income.

- 7.4 Governors and foundation trustees of fee-paying schools should be inducted and trained on public benefit and trustees' duties and liabilities. This should be reported in the annual report. The annual report should also identify any significant powers of appointment of governors. Some fee-paying schools may, for example, have governors appointed by Oxford or Cambridge Universities. This might be perceived as a significant private benefit by local state schools competing for places at such universities and needs to be reported.
- 7.5 Fee-paying schools should adopt the principles of good governance as set out in the Good Governance Code for the Voluntary and Community Sector. In particular fee-paying schools should meet the requirement for a balanced board. If all, or a very large majority, of the governors of a fee-paying school are the parents of children at the school or were also educated at fee-paying schools, this suggests that the Board does not have sufficient diversity. The trustee board of each school should have representatives from the local state sector and individuals from the local community, otherwise the governance of the school cannot be sufficiently disinterested. Independent trustees from the local community would also be a good way of ensuring that the public benefit was meaningful. Fee-paying schools should follow best practice and advertise for trustees to fill vacant positions. Another way of addressing this would be for the trustees to set up an advisory panel with representatives from the local community. However, proper representation on the Board would be preferable.
- 7.6 We are aware that some fee-paying schools may say that it is not possible to quantify public benefit and/or that it is too difficult or expensive to try. Management consultants and accountants such as KPMG or Price Waterhouse Cooper could surely manage to make appropriate assessments and calculations. The government is using such consultants to assess in very sophisticated ways the success or otherwise of their policies such as performance of Academies, identifying in detail the different social contexts and levels of deprivation and educational attainment or underachievement. Why can't the same be done of wealth and benefits in relation to fee-paying schools? The removal of the presumption of public benefit requires exactly this sort of assessment to be made and prevents the Charity Commission from waiving the requirement in any case. The fact that this sort of assessment has not been a legal requirement before does not mean that it cannot be done. It is simply not an option for charitable fee-paying schools to fail to provide sufficient evidence. It is for the schools themselves to both finance and present the necessary evidence and, in

individual cases where it is absent, the Charity Commission has no option but to draw the conclusion that there is insufficient public benefit, with the associated consequences.

- 7.7 A parallel here can be drawn with the position prior to the Charities Act 2006 of '4th head charities'. Prior to the Charities Act 2006, the Charity Commission rigorously challenged applicant charities with '4th head' objects (ie not education, poverty or religious charities) to demonstrate public benefit with sufficient evidence. The Charity Commission often resisted first registration until such evidence was presented to their satisfaction. And if, in their view, sufficient evidence was not presented, the Commission refused to register the applicant organisation.
- 7.8 State schools are made rigorously and publicly accountable for their performance, which is reported in terms of achievement and attainment of pupils and the value the school has added to the educational progress and attainment of those pupils. Any fee-paying school, which claims as part of its public benefit provision to be assisting pupils in the state sector with a primary purpose activity, should be accountable for its contribution in no less a rigorous manner. Outcomes in terms of appropriate performance indicators should be reported by the fee-paying school of the public benefit provided or the 'value added' to the particular state school pupils.
- 7.9 The Group supports the approach adopted by the Charity Commission in paragraph J6 of the draft guidance to cases where a public benefit assessment of a fee-paying school reveals too little evidence of public benefit. In such cases, the Charity Commission must act as it would in the case of any charity within its jurisdiction. The Charity Commission must use its powers to protect charitable assets. This would involve working with the trustees and using whatever powers are necessary to enable the school's public benefit requirement to be met. Amending the school's purposes may be appropriate in certain cases. In extreme cases the Charity Commission should use its regulatory powers to appoint new trustees

Appendix 1

EXTRACTS FROM A RESPONSE BY ANNE MOUNTFIELD TO THE CHARITY COMMISSION'S CONSULTATION DOCUMENT April 24 2007

The Application and use of charitable lands and assets

There is one very important omission in the Commission's document – the use and value of the charitable assets enjoyed by fee-charging school charities, assets which either were part of the original charitable endowment or which have been provided by subsequent charitable donation, much of it tax-relieved.

- 1.
2. Section J5 of the consultation document sets out some of the financial benefits conferred by charitable status. But this excludes one of the primary benefits in the case of the ancient independent schools, and of a number of other prestigious schools: the charitable assets which they utilise. These may include all, or a proportion of:
 - a) the land, buildings, teaching equipment and facilities used by the school
 - b) the estates and financial assets all of whose income is available to the school, not merely the tax relief on them.
3. The [Charities] Act [2006] allows the Commission to deal with any unwillingness by charity trustees to apply charity property for its intended purposes.
4. Major charitable assets are made available to independent school charities through their original charitable foundation, or through the establishment of subsequent charitable appeals, trusts, capital and other trust and company donations, or by means of individual legacies and gifts (often tax-relieved). At present, the free use of these assets in effect subsidises the cost of school services. It is these benefits, as well as the tax and business rates relief, which I believe must be satisfactorily accounted for. To give a hypothetical example, if the land and buildings of a school had a current valuation of £10 million, this might be regarded as conferring a subsidy of (say) £700,000 per annum to what the running costs of the school would be if it were trading on a commercial, non-charitable basis; and if it also had income from financial and other assets of (say) another £300,000, the total subsidy might be of the order of £1 million.

Drawing up a statement of public benefit

5. The Consultation Document proposes, rightly, that public benefits must be identifiable (Principle 1); and that in assessing public benefit and accounting for it in their Annual Report, the trustees should report on how a charity meets

the public benefit requirement. At Section J5 (page 39) the Consultation Document proposes;

“for example, for high fee-charging charities where the public benefit may not be immediately obvious, given the high level of fees charged, one way in which they might quantify their charity’s public benefits would be to assess and report the (financial, social or other) value of the benefits they provide, alongside the value of the tax breaks, or other benefits, they receive”.

6. However, this proposes setting the claimed benefits against only the value of the ‘tax breaks or other benefits they receive’. It does not propose taking into account the value of the use of charitable assets, as described above. Yet this is likely, at least in the case of the ancient independent schools, to be the greater part of the benefit conferred by charitable status. (It should be remembered that if such an institution were found, in an extreme case, not to be providing sufficient public benefit, it would not be open to the school to ‘opt out’ of charitable status and take the assets with it: once charitable, always charitable. Instead the assets would have to be transferred to another charitable user with similar purposes.)
7. For this approach to have the desired effect of focusing trustees’ attention on the need to devote their charitable resources and the benefit of charitable status to public, not private, benefit, the Commission should consider inviting (or requiring) trustees to present a statement identifying each aspect of claimed public benefit, with a financial value attached. This would allow scrutiny and questioning on an item-by-item basis, as to whether each item does indeed constitute public rather than private benefit. It would assist the Commission to encourage trustees progressively to ensure, and where necessary redirect, the allocation of all their charitable resources to identifiable and specific forms of public benefit. This would also identify and quantify any necessary increase in fees for those who could afford them, to cover the full cost of the educational provision, including that part at present provided by the use of foundation assets.
8. Requiring school charities, like others, to include the name and registration number of the charity in all publications might help increase awareness of this distinction among the general public.

Itemised reporting on public benefit

9. This proposal for an itemised statement of public benefit is based on a theoretical distinction between:
 - a) the charity, which owns the assets, receives any tax and related benefits, and funds all public benefit activities provided by the school to any of its own students who are eligible, or to others in the wider community; and
 - b) the school as a trading enterprise which must notionally ‘pay’ the charity for the use of its assets.

10. The proposed statement is not intended to replace statutory accounts, but to be used to fulfil the requirement proposed in Section J5 of the Consultation Document for a statement in the trustees' Annual Report on how their charity 'meets the public benefit requirement'.
11. The purpose of this apparently theoretical presentation is to identify clearly what are the benefits of charitable status, and how they are directed. This should include the extent (if any) to which the charitable assets and other benefits of charitable status are used for the (private) benefit of fee-paying parents not falling into the definitions of low income in Section G1 of the Consultation Document.
12. A careful separation of 'School' and 'Foundation' accounts is not a new concept; indeed some bursars 'of the old school' have stressed to me the moral importance of this conceptual separation, even where the legal format of the school does not formally distinguish in this way.
13. Conceptual accounting also has a well-established precedent in the public sector's 'Memorandum Trading Accounts' [see Background note which follows] , where the cost of capital and other costs are assigned to a trading operation, even though not borne in cash terms, in order to show the commercial viability of the operation. In the case of a charitable foundation and its associated school, this might take something like the form set out schematically in the Annex to this note.

Annex

Possible form of reporting on public benefit

A THE FOUNDATION

Income

- Tax, business rates and similar benefits
- Donations and appeal income
- Actual income from financial and other assets
- ‘Receipts’ from the School for use of land, buildings, teaching facilities etc

Expenditure

- Bursaries, scholarships etc for low-income pupils
- ‘Subsidy’ to the School to provide ‘wider access’ educational benefits to local schools etc
- ‘Subsidy’ to the School to promote verified educational innovation and excellence, including merit-based scholarships etc (where permissible)
- Implied subsidy to the School for fee-paying pupils (free use of land, buildings, teaching facilities etc) – ‘incidental private benefit’.

Net Surplus/Deficit

B THE SCHOOL

Income

- Fees actually received
- ‘Subsidy’ from the Foundation and all other charities and donors providing grant income, appeal income for bursaries, innovation and excellence or prize funds.
- Bursary or scholarship grants etc to the School from the Foundation for the benefit of eligible low-income pupils
- ‘Subsidy’ from the Foundation for ‘wider access’ etc
- ‘Subsidy’ from the Foundation for the promotion of educational innovation and excellence
- Implied subsidy from the Foundation for fee-paying pupils (free use of land, buildings, teaching facilities etc) – ‘incidental private benefit’.

Expenditure

- ‘Payments’ to the Foundation for use of land and buildings etc, on full-cost basis without tax or business rate benefits
- Normal running costs of School

Net break even

**Background briefing note
(not included as part of the original submission)**

Memorandum Trading Accounts in the public sector

Memorandum Trading Accounts are used in the public sector (and required in Treasury guidance) to determine the right level of charges made by public sector bodies for their services; and also where a public body has to defend itself against accusations of unfair competition with the private sector, to demonstrate that it is not being subsidised. They also have the effect of making public sector bodies recognise the full costs of their operations (especially the ‘free’ use of capital) in the interests of efficiency, to avoid wrong allocation of resources. They therefore require recognition of capital costs (eg a rate of return on capital employed, depreciation) and also of costs borne by a parent Department or another public sector body but not paid for in cash (eg personnel services). Memorandum Trading Accounts are not used in place of statutory accounts

The analogy for fee-charging charities lies especially in recognising the ‘free’ use of charitable assets – whether the use of buildings, land etc used by a school, or the return on invested capital or landed estates which provide an income. Treating the school as separate from the Foundation, and requiring it to recognise the benefit it receives from the Foundation from free use of assets etc, would help to identify the extent to which fees are ‘subsidised’ from charitable resources. A Memorandum Trading Account for fee-charging schools would thus help the Charity Commission to identify the full extent of charitable resources available to a school, and then to analyse and scrutinise the charitable uses to which they are put.

HM Treasury’s Fees and Charges Guide definitions [here summarised]

- ‘Memorandum trading account’ (MTA):
“.... an informal working document, prepared before the start of the financial year in the form of a forecast to determine the appropriate level of fees and charges for a service...”
- ‘Non-cash’ costs....
- ‘Full cost’ ...

Extract from ‘Government Accounting’ (H M Treasury) [which includes]

“...An MTA will be as simple or as sophisticated as the nature of the service dictates. However, it should always include the total cost of all the resources used in supplying the service, both cash and non-cash....”

Appendix 2

Widening Participation and Independent Schools – a paper prepared by the National Union of Students

The Sutton Trust has analysed access to the top 13 universities (ranking based on the average of newspaper league tables) from statistics published by the Higher Education Funding Council (HEFCE). In addition to actual entry statistics, HEFCE also published benchmark statistics, which showed what the numbers should be based on entry qualifications and subjects taught at the institution.

In summary this analysis shows that:

- Children from independent schools account for 7% of the school population and for 39% of the entry to top universities, compared to a benchmark of 28%.
- Children from less affluent social classes account for 50% of the school population and only 13% of entry to top universities and children who live in poor areas account for 33% of the population but only 6% of top university entry, both much lower than the benchmarks.
- The chance of getting into a top 13 university is approximately 25 times greater if you come from an independent school than from a lower social class or live in a poor area and is about double what it should be.

Figures for the top 5 universities show an even more exaggerated pattern of admissions in favour of independent schools with 4,600 from independent schools or almost half of the 9,600 total entry and only 980 from less affluent social classes and 450 from poor areas.

Obviously it's a little bit old, but they do an update of sorts in in 2004 and 2005, with these reports: <http://www.suttontrust.com/reports/Missing-3000-Report-2.pdf> and <http://www.suttontrust.com/reports/Stateschooladmissionstoourleadinguniversities.pdf>

This showed that things have, to some extent, improved:

Firstly, compared with 1997, the total number of young entrants to the leading universities has increased by 6,000 a year, and this increase has come almost entirely from the state sector, where numbers have risen by 5,900 to 22,800, or 35%. This means that over the last five years, over 15,000 additional state-educated young people have gained access to the first-rate teaching, facilities and employment prospects offered by the top institutions.

Secondly, it is not just state school pupils from the middle and higher social classes who are benefiting from this shift. Numbers of students admitted from low participation backgrounds have increased by 49% since 1997, compared with 20% for those from the more affluent postcode areas, and a general increase in student numbers of 22%.

Lastly, far from requiring the lowering of standards, the widening of access to our leading universities has not required any compromise on quality or bias against private schools. The average A level score for entrants to the leading 13 has actually

risen since 1997, and there remain some 3,000 state educated pupils each year who achieve the A level grades necessary to enter our top institutions, but who, for a variety of reasons, do not end up there.

The 3,000 figure is the important one - the Trust shows that the 13 top universities miss their benchmarks for state school participation consistently by about 10% and this equates to 3,000 pupils who have the grades but do not go to those universities, instead opting for newer universities which the Trust thinks - in part - is driven by the fact that these unis might be closer to home.

More generally, only 53% of young entrants to Oxford were from state school, and 57% to Cambridge, in 2004/05 (the latest figures). This compares to a total state school intake of 86.9% across the HE sector - which in itself is a figure rather lower than the proportion of school children educated at state schools (approx 93%). More stats on this are here: http://www.hesa.ac.uk/pi/0405/t1a_0405.xls

This table shows that in 2001/02 only about 4 of the 20 Russell Group universities exceeded their benchmark for state school admission:

http://www.planning.ed.ac.uk/pub/Analyses/Stud_HEFCE_RG_0102.htm

and the majority were significantly below where they should be.

Article from the telegraph about elite universities having a bias towards Independent Schools.

<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/02/24/nuni24.xml>

But there's an AimHigher report here which has some useful info: [http://www.aimhigher.ac.uk/sites/practitioner/resources/Conf%20Summary%20report%20final%20\(2\).pdf](http://www.aimhigher.ac.uk/sites/practitioner/resources/Conf%20Summary%20report%20final%20(2).pdf)

What pathways do BME students use to reach HE?

BME groups enter HE predominantly through FE and vocational routes with vocational rather than traditional academic qualifications. Chinese and Indian students are an exception and are most likely to enter HE via the AS/A2 route and with a higher level of qualification on entry than other BME groups. With differential rates of acceptances between FE and 6th form applicants, FE students are seemingly disadvantaged at this stage.

Acceptances from students with an FE background are 79% compared to those from students in 6th form schools and colleges at 88%-90%. 7

Bangladeshi and Pakistani students enter HE with a significantly lower level of academic achievement. Black Caribbean groups, particularly males, are underachieving at school and are least likely to be in gifted and talented programmes.

Appendix 3

Signatories

Conor Gearty	Professor of Human Rights Law, LSE and barrister, Matrix Chambers
Professor Peter Mortimore	Former Director of the Institute of Education, University of London
Fiona Millar	Writer and former Special Advisor, School Governor
Dr Robert Garnett	Director of Children and Young Peoples' services, Nottinghamshire
Anne Mountfield	Former Assistant Director of the Directory of Social Change
Tony Mitchell	National Executive member of the Campaign for State Education and SEA, former teacher in state schools between 1953 and 1987
Gemma Tumelty	President, the National Union of Students
Margaret Lloyd	Chair of trustees, Directory of Social Change
Melissa Benn	Writer
Margaret Tulloch	Secretary of Comprehensive Future and school governor, in a personal capacity
Bryony Pawinska	Chief Executive, the College of Optometrists, formerly CEO of the Institute of Career Guidance and two Educational Business Partnerships, former school governor and member of the Black Country Learning and Skills Council
Joan Sallis	
Clio Whittaker	family learning tutor and former Parent Governor Representative on Camden Council
Philip Miles	in a personal capacity
Rosamund McCarthy	Solicitor, in a personal capacity
Mary Groom	Solicitor, in a personal capacity