

On behalf of: Second Intervener
Statement: First of Ms Dombey, Mr Glatter,
Ms Lloyd and Ms Mountfield
Exhibits:
Date: 7 March 2011

IN THE ADMINISTRATIVE COURT
And Upper Tribunal (Tax and Chancery Chamber)

Case No: CO/2646/2010
Ref: CRF/2010/0001

BETWEEN:

THE QUEEN

- on the application of -

INDEPENDENT SCHOOLS COUNCIL

Claimant

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Defendant

-and-

THE NATIONAL COUNCIL FOR VOLUNTARY ORGANISATIONS

First Intervener

-and-

EDUCATION REVIEW GROUP

Second Intervener

**FIRST STATEMENT OF PROFESSOR RON GLATTER, PROFESSOR DOMBEY,
MS LLOYD AND MS MOUNTFIELD**

We, Ron Glatter, Margaret Lloyd, Anne Mountfield and Henrietta Dombey, care of Bindmans LLP, 275 Grays Inn Road, London WC1X 8QB will say as follows:

1. Ron Glatter is Emeritus Professor of Educational Administration and Management at The Open University, where he was Director of the Centre for Educational Policy and Management for many years. He is a member of the Councils of both the Institute of Education, University of London and the Advisory Centre for Education (ACE). He is also a trustee of the Public Law Project and of the Research and Information into State Education Trust (RISE).

- He chaired a secondary school governing body for six years and has been a governor of a primary school and a college of further education.
2. Margaret Lloyd is Chief Executive of Walking with Leaders, a business coaching consultancy. She first worked as a teacher in a state school and is a past trustee and chair of the Directory of Social Change, an organisation which campaigns for social change and social justice. She has worked in a number of mentoring roles with schools in east London.
 3. Anne Mountfield retired as Assistant Director of the Directory of Social Change. She has taught in Inner London comprehensive schools and in a major girls' independent school. She has also worked as a television researcher and as an author for children and on school issues. Publications on the charitable status of schools include "State Schools -a suitable case for Charity?" and "The Charitable Status of Schools - what needs to be done?" (DSC 1992). She has run training courses for school governors and trustees.
 4. Henrietta Dombey is Professor Emeritus of Literacy in Primary Education at the University of Brighton. After 8 years of teaching in state primary schools, she moved into teacher education and research. A past President of the United Kingdom Literacy Association and Past Chair of the National Association for the Teaching of English, she has written and edited a number of books on literacy teaching and teacher education in the area of primary literacy.
 5. We have been asked to present this statement on behalf of the second intervener, the Education Review Group ('ERG'). We have shared a draft of this statement with other members of the ERG and with our expert advisory panel¹ and are grateful for their comments and additions. Although not every proposition would be supported by every member it is our agreed contribution to these proceedings. We have been helped in preparing this statement by other members of the ERG and by the expert panel. We would also very much like to recognise the invaluable assistance that we have received from Jonathan Roberts, a PhD student at the LSE, and Hannah Morphet, a graduate student. We understand that all of these people have taken steps to confirm the accuracy of the data in this statement and on that basis we believe that the facts stated in this statement are true.
 6. The ERG was set up in 2007 in response to the Charity Commission's public consultation exercise on "Public Benefit". The ERG's specific aim was to provide independent evidence to the Charity Commission in relation to public benefit in the education sector.
 7. Members of the ERG have accumulated knowledge and experience of all areas of education provision, including the state sector of education provision - which represents provision for 93% of pupils. The group also includes lawyers, people

¹ Including Julian Le Grand, Professor of Social Policy, LSE, Professor Peter Mortimore, Former Director of the Institute of Education, University of London, Francis Green, Professor of Labour Economics, The LLAKES Centre, Institute of Education, Robin Naylor, Professor of Economics at the University of Warwick and Alan Parker, former Director of Education and trustee of the National Foundation for Educational Research.

with experience in voluntary sector management and experts in social and education policy.

8. The ERG takes the view that charitable status is not a right for independent schools but a privilege to be "earned" (note that throughout this document the terms "independent schools" and "private schools" are used interchangeably to describe fee charging schools with charitable status, unless otherwise stated).
9. It is no answer to say that it is long established that independent schools are charities. The Charities Act 2006 (CA) removed the presumption of public benefit for charities set up to advance education. The question of whether independent schools should have charitable status is clearly partly dependent on changing social and economic circumstances and has long been unexamined despite the changing social environment. Further, independent schools have changed and become ever less charitable (in the natural meaning of that word) with each passing decade. Many independent schools were originally established to educate poor boys and girls prior to the creation of the state education system.
10. Exacting standards should be set for charitable status and if they cannot be met the consequences of that must be faced - not avoided.

SUMMARY OF THE ERG POSITION

11. The starting point of this debate is sections 2 and 3 of the CA. The effect of these sections, broadly, is that a charitable purpose for the advancement of education is no longer presumed to be for the public benefit. Trustees must operate the charity in a way which best furthers those objectives.
12. Members of ERG have differing views about private schools, academic selection and bursaries. However we recognise that the question of whether fee paying schools, whether charitable or for-profit, should exist at all is a social policy question not in issue in these proceedings.
13. The rest of this statement is intended to draw on the experience of members to show how private schools could be redirected towards their charitable mission. -
14. In particular the ERG considers that:
 - a. Trustees of many independent charitable schools are making provision which goes beyond what is necessary to meet any charitable need for education. Too often schools have slipped into "gold-plated" provision at great expense for a small group. As well as breaching, or possibly breaching, the trustees' duties this may confer unlawful private benefit to the individual beneficiaries. The change in the fees charged by private schools over time and when compared to income is striking and, accompanied by the increased facilities at many private schools, suggests that provision exceeds charitable need.

- b. The price of a private education is a factor to be taken into account when assessing whether the provider is operating as a charity². It is not enough simply to assert that the education is being provided at cost but to let that cost get out of control. We argue that price relative to income levels is a factor for the Charity Commission to take into account and that the rapid price inflation in private school fees is something that trustees should have to justify to the Charity Commission when seeking to show that their high fees nonetheless allow public benefit. An assumption is made in the Attorney-General's question A2 - that the fee represents the cost of provision - which is not appropriate to leave as an assumption and is not justified by the evidence. Equally, one of the few variables not changed at para B 1.2 of the Attorney-General's questions is that the school would charge £12,000. The answers to the Attorney-General's questions for a school charging this sum are unlikely to be the same as for a school charging £6,000 or £18,000 because the block on access from the fees charged differs considerably. (Of course we do not consider that private schools would provide public benefit simply by charging fees affordable to more people but we do argue that the current huge expense - and its consequences for access - is one of the significant problems and that the debate is impoverished by assuming that this important factor is not open to change or challenge).
 - c. Obligations to operate transparently must be strengthened if these charities are to operate in the public benefit and if the Charity Commission is to fulfil "the public confidence objective" (section 7 CA). Further, reporting obligations need to provide a systematic structure applicable from school to school and must establish a way to account for the "cost" of bursaries, which, in cash terms, is probably very low.
 - d. Private schools have significant "disbenefits" to society: for example, by removing able and committed pupils from the state sector and by being one of the most significant barriers to social mobility. For this reason they cannot show public benefit by pointing to debatable or nebulous wider benefits, such as saving money for the state or providing well educated pupils. Further, these disbenefits should be taken into account by trustees when they make decisions about furthering their charitable purpose.
15. The Attorney General's list of questions and scenarios is very specific. The independent education sector in the UK is diverse, with considerable variations in the history, fees, endowments and local circumstances of independent schools. The consequence is that each school must show individually that it is operated to meet a charitable purpose. It is not relevant, for example, that the sector as a whole provides £255.5 million in fee remission (Burgess 2, para 4). The question is whether each school is charitable. That said we will endeavour to suggest our approach to those questions as the statement progresses.

² Of course there are other conditions for being a charity (eg being non-profit distributing and having an appropriate dissolution clause) but our point here is about the price of services in particular.

Underpinning principles and background

16. The ERG suggests that the following underlying principles underpin charitable activities in the education sector.
17. Charity trustees are subject to a number of fiduciary duties. These including the following:
 - a. to use resources solely to advance the charitable objects;
 - b. to meet a charitable need and not to provide benefits in excess of the charitable need, which confer anything more than ancillary or incidental private benefit; and
 - c. to act reasonably and prudently. Therefore there is an obligation to keep expenditure under review and to consider at regular intervals whether there are more effective ways of furthering the charity's objects.
18. Secondly, we support the Charity Commission's expression of the two principles which the Independent Schools Council (ISC) most objects to:
 - a. principle 2(b): *where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted...by ability to pay any fees charged, and*
 - b. principle 2(c) *People in poverty must not be excluded from the opportunity to benefit.*
19. The ERG believes that access to benefit from the activities of independent schools is unreasonably restricted. We dispute the ISC's claim that a significant and sufficient section of the public can afford independent schools' fees. The number of people who can afford private school fees is small in relative terms: only about 7% of pupils attend private schools, about 5% in charitable private schools. When one looks school by school - as we consider one must - the exclusion is in many cases almost universal. In any event 95% of the beneficiary class is missed and in our view this restriction on access is "unreasonable".
20. Thirdly, the ERG supports the Charity Commission's principle 1(c): *Benefits must be balanced against any detriment or harm.* We note that this principle was not applied by the Charity Commission to independent schools. We consider that it is applicable to them and that it should now be applied to them.
21. Fourthly in meeting charitable objects and in assessing the public benefit, trustees should give due regard to the changing social and economic context in which independent schools operate. This includes, for example, an increasingly diverse society, widespread concerns about equality between racial, religious, gender and other groups and growing evidence about falling

social mobility. Trustees providing education in the modern context would be remiss not to take these factors into account in their decision making.

22. Fifth, independent schools should report regularly, accurately and accessibly upon their charitable activities. Bursary provision and any other schemes supposedly promoting public benefit must be transparent and accessible to all.
23. Sixth, in many cases pupils at private schools benefit (at no cost to their fee paying parents) from the accumulated value of past donations represented by the endowment fund and the buildings and land which the school uses. The school is not charged for these and the school is therefore providing charitable assets free of charge to people who can afford to pay to access them.
24. It is notable that there is no estimate available of the cost to the Exchequer of the taxation advantages of independent schools³.

A. The prudent use of resources to meet charitable need and private benefit/“gold plating”

25. As described in paragraph 17 charity trustees have a number of fiduciary duties to advance a charity’s objects in such a manner as ensures the reasonable use of resources. High fee levels and other behaviours require scrutiny by the trustees and the Charity Commission with a view to ascertaining whether this fiduciary duty is being met.
26. The ISC has referred to schools’ need to “recoup costs”, assuming that high fees reflect the cost of provision. It is important to realise that this is nothing more than an assertion. ISC provides no evidence for this proposition and individual schools do not seem to have been required to provide evidence of it for the Charity Commission’s public benefit assessments. This issue - that the service is provided at cost appears to be central to the ISC’s case that independent schools are charitable. It is therefore not something which ought to be accepted “on the nod”.
27. There are two striking facts about fee levels in the private sector (other than that they are very high):
 - a. Fee levels vary widely between different charitable independent schools.
 - b. Fee levels have risen substantially above inflation - from a high starting point. Average fees for private education have doubled in real terms over two decades⁴; they rose substantially above inflation in every year of the decade up to 2010⁵.

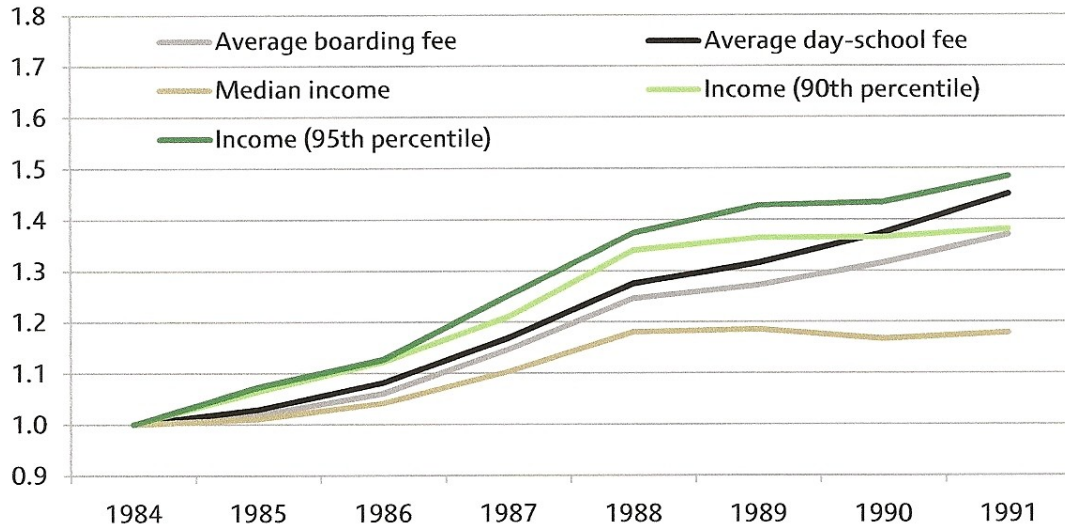
³ HMRC Correspondence to Fiona James 20th January 2011

⁴ Green, F., Machin, S., Murphy, R. and Zhu, Y. (2008), “Competition for private and state school teachers”. *Journal of Education and Work*. 21 (5): 383-404.

⁵ Matthew Burgess supporting evidence page 38: Howarth Clark Whitehall 2010 National Independent Schools Benchmarking Survey.

28. The inflation in the fees of independent schools can be seen from the following graphs contained in a study by the Institute of Fiscal Studies, "Private Schooling in the UK and Australia" (Ryan and Sibieta 2010: pages 5-6)⁶.

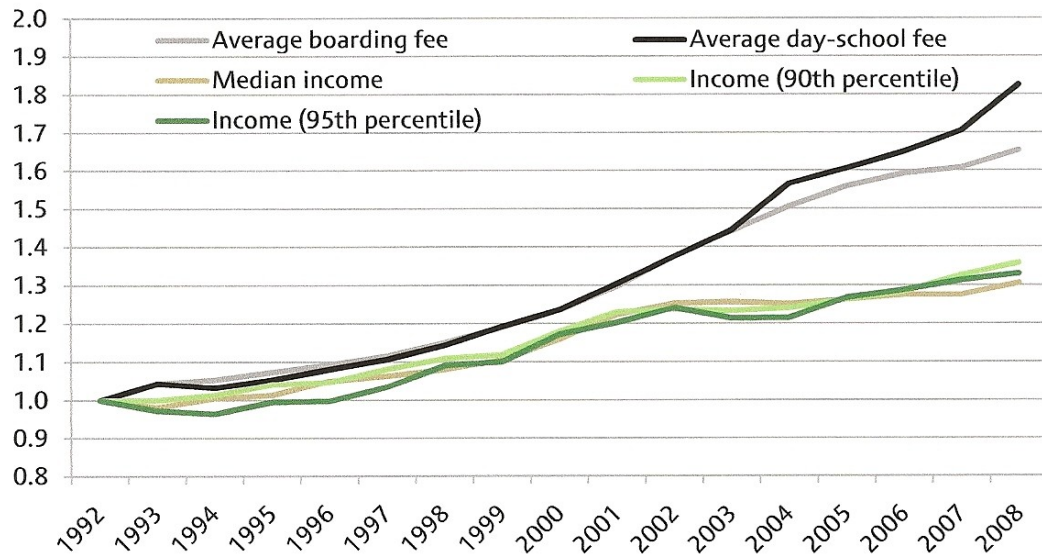
(a) 1984 to 1991 (relative to level in 1984)



29. The authors note that: "During the 1980s, independent school fees grew rapidly. Average boarding school fees rose by 37% in real terms and day-school fees by 45% between 1984 and 1991. Both increases are far in excess of the 18% real-terms growth in median disposable incomes observed over the same period". The next graph shows that between 1992 and 2008 average day-school fees grew by 83% in real terms and average boarding fees by 65%:

⁶ Ryan, C. and Sibieta, L. (2010), *Private Schooling in the UK and Australia*. London: Institute of Fiscal Studies.

(b) 1992 to 2008 (relative to level in 1992)



Sources: Independent Schools Council census 1984–2008; authors’ calculations using the Family Resources Survey.

30. For this period private school fees have moved out of proportion not only to the median income (as they also did in the earlier period) but also to the income levels of the wealthiest 5% and wealthiest 10% (which they did not do in the earlier period). The fee increase has been particularly marked since 2000. This suggests that the nature of independent schools and the nature of the service which they offer have changed significantly over the past 30 years.
31. Further, private secondary school day fees, for instance, may vary from around £9,000 per annum to over £20,000 (at Westminster School). As a benchmark, the ISC estimates annual per pupil expenditure in state secondary schools at £6,000 (Matthew Burgess’ first witness statement). There are (non-charitable but independent) schools in the profit-making group Cognita, overseen by former head of Ofsted Chris Woodhead, which charge fees from £6,855 per annum (to about £11,000) for a day school education, considerably less than most independent secondary day schools which have charitable status.
32. Both factors - fee inflation and fee variation - require justification before it can be accepted that the services are provided at cost. Moreover concern has previously been raised about the schools conduct. Private School fees have come under scrutiny by the Office of Fair Trading (‘OFT’). In what was described as “one of the biggest inquiries in its history” the OFT found “fifty of the country’s leading private schools guilty of running an illegal price-fixing cartel which investigators said had allowed them to drive up fees for thousands of parents.” (Guardian, 10 November 2005). The OFT found the “systematic exchange of confidential information as to intended fee increases was anti-competitive and resulted in parents being charged higher fees than would

- otherwise be the case." Such findings underline the general importance of robust regulation in order to maintain public confidence.
33. The high charges and the rapid price increases are obvious markers of the fact that many independent schools provide facilities which go 'beyond' the stated charitable purpose of advancing education. Insofar as they exceed expenditure reasonably necessary to provide an education, additional 'gold-plating' should not be considered charitable.
 34. As stated earlier, Trustees have a duty to meet only charitable needs such that any private benefit is ancillary or incidental. Trustees should also consider at regular intervals whether there are more effective ways of furthering the charity's objects and reaching a wider group of beneficiaries. Many independent schools have suffered from mission drift by not considering how the charity's assets can and should be used for much greater charitable effect.
 35. At one level eye-catching expenditure can be identified: for example, the maintenance of beagle kennels, a golf course or stables.
 36. This is a particular problem for charities with the objects clause given in the second schedule of the Attorney-General's questions. It is also a problem where the school has an endowment since it would seem that income from the endowment is being spent on those who can, in effect, buy access to it rather than to meet the charitable purpose most effectively.
 37. The ERG considers that the question can be asked about issues relating to core services as well. The independent sector (including non-charitable schools), for instance, offers small class sizes. At lower secondary level pupil:teacher ratios are on average 21.3 in the state sector (compared to an OECD average of 23.7) and 11.2 in private schools (compared to an OECD average of 21.8).⁷ The question which must be asked about this is not whether those parents who can afford this service like it. The question is whether this is an appropriate decision for a charity trustee to make. The trustees' duty to advance education might be better achieved by raising pupil-teacher ratios and reducing fees, a policy which would maximise the number of young people who can benefit from the school's provision.
 38. In our experience it is widely accepted in the industry that the real - or at least primary - reason why these facilities are provided is to compete for pupils from affluent families. A private business might chose to provide a much more expensive service to a smaller group of customers but a charity must consider the extent to which the benefits provided are in excess of the charitable need. Trustees must always be asking how they can use their resources most effectively.
 39. Some form of regulatory oversight or other accountability is necessary to prevent schools charging higher fees (and thus excluding a greater proportion of the population, limiting compliance with principle 2(b) as well as 2c). If the

⁷ OECD (2010), *Education at a Glance 2010*. Table D2.1, page 386. Average class size, by type of institution and level of education (2008).

fee renders the core education product unaffordable to the majority of the population trustees and the Charity Commission should closely study the asserted justification. Effective oversight and accountability will require improved transparency and reporting by schools.

40. There is an analogy in the relief of poverty. Whilst one may relieve a person's poverty by giving them a place to live, it would be excessive and beyond acceptable charitable purpose to build them a mansion. Thus, in the Attorney General's guidelines to CC40 Disaster Appeals, it is noted (point 12) that "*...charitable funds, being essentially public in their nature, cannot be used to give individuals benefits over and above those appropriate to their needs*".

B. The opportunity to benefit must not be unreasonably restricted

41. The ERG contends that:

- a. Access to charitable independent schools is unreasonably restricted by ability to pay. This lack of access stretches the concept of charity beyond breaking point.
- b. The level of fees charged is an important matter to consider and does have a significant impact on public benefit. The Attorney-General's questions fail to deal with this important variable, apparently assuming that the school fees will remain constant (at £12,000) and the work taken to widen access will vary. The ERG contends that the answers to all the questions may differ with fee level.

42. The ISC contends that a "significant section of the general public" can afford independent school fees (Matthew Burgess first witness statement, para 23, page 48). The ERG does not agree with this contention. Clearly the extent to which the fees may be considered unaffordable will differ from school to school, since, as the ISC indicates, fee levels across its charitable schools vary considerably.

43. The percentage of households able to pay the fees charged is about 7% (being the percentage of those using the schools). However, as ISC accepts, this figure masks the unaffordability of private school fees (Burgess, second statement, para 17). Even from the income groups ISC refers to access to independent schools often in practice depends upon families having other wealth to fall back on. The result of this is that even the very highly paid often rely on wealth and family money, such as from a pupil's grandparents, to pay fees - further embedding privilege from generation to generation.

44. The ISC's own data indicate the tendency of private school users to have extremely high relative incomes. On the ISC's figures 55% of independent school users have incomes which place them in the top 5% in England.

45. Furthermore this comparison - which ISC seeks to use to support its contention that a significant portion of the public can afford private school fees - appears to be based on a comparison between a sample of private school users and an analysis of the distribution of household income across all household types (Matthew Burgess⁸). To make a comparison of this kind against the incomes of all households is a limited method. It is well-established that households with children tend to be poorer than others. The Hills report notes, "Looking at median incomes for each age group, the lowest... are clearly the medians for the under-16s (in other words, families with children are poorer than others)"⁹. The consequence of such limited methodology will be to over-estimate the typicality of the income of users of private schools in comparison to the general population with children.
46. The lack of affordability of independent schools fees can be more transparently expressed by clear comparisons between the level of fees and authoritative data which describe personal and household income. Average fees in 2009 are accepted to be £24,009 per annum for a boarding place, and £10,713 per annum for a day place, as described by the ISC¹⁰. The most expensive independent schools charge over £29,000 per annum for a boarding education, including Eton College, Winchester College, Harrow School, Westminster School and Wycombe Abbey (this list is not exhaustive - 59 schools charge annual fees of £27,000 or more¹¹). There are day schools which charge fees significantly above and below the average: for instance, St Paul's charges £17,928 pa; Highfield Priory, a small primary school, charges £5,795 pa.
47. Private schools fees can, for instance, be compared to individuals' annual wages. The median before tax annual salary in the UK in 2009 was £21,221 for full and part-time wage earners, and £25,900 for full-time wage earners¹². The net earnings from these median salaries are £16,600 and £19,850 respectively. Almost the entire median wage is needed for a day place at St Paul's for one child. This is not realistic or sustainable for families.
48. A more accurate comparator is the household income of families with children, data about which is available within the Department of Work and Pensions HBAI series. According to this survey, the median net income (before housing costs) of the top quintile of couples with children is £41,860 (for a lone parent the comparable figure is £25,064)¹³. The evidence of Matthew Burgess is that just 7% of children attend independent schools (including non-charitable schools).

⁸ Second witness statement of Matthew Burgess p.6; supporting evidence p. 100.

⁹ Hills et al. (2010: p. 185), *An Anatomy of Economic Inequality in the UK: Report of the National Equality Panel*. London: Centre for Analysis of Social Exclusion, London School of Economics. See also Department of Work and Pensions (2010: p.62), *Households Below Average Income: An analysis of the income distribution 1994/95 - 2008/09*, which describes how the income distribution for children "was skewed towards the lower end of the overall population distribution."

¹⁰ISC (2010), *ISC Census 2010*.

¹¹Ibid.

¹²Office for National Statistics (2010), *Annual Survey of Hours and Earnings*.

¹³Department of Work and Pensions (2010), *Households Below Average Income: An analysis of the income distribution 1994/95 - 2008/09*. Data taken from Table 2.3ts, page 27. Weekly income multiplied by 52 to identify annual income.

The obvious inference from the above figures is that this is all that can afford it.

49. Independent schools are simply not affordable and the most expensive independent schools are inaccessible to the vast majority of the population. It is not surprising that some independent schools have been described as being restricted to children of the 'super-rich' (Daily Telegraph 2011)¹⁴.
50. The ERG notes that the extent of exclusion which fees create varies across the independent sector. In his first statement Matthew Burgess objects that the Charity Commission refused to take fee levels into account (Burgess, first statement, para 20) relying on principle 2c. It may be that there is some tension between principles 2b and 2c (although we doubt that this is anything like as great as ISC suggest, see below). However we agree with what the Charity Commission actually said in the report, which is:

“Although the fees are high, we recognise that the policy of keeping them as low as possible means that fewer people are excluded than would be the case with schools charging higher fees. This would have some impact in relation to principle 2b, but the lack of bursary provision means that there are no means-tested measures which demonstrate that people in poverty are not excluded.”

51. The ERG agrees with this, save that we suggest that the point should be assessed against data for incomes in the area and that it may, in appropriate cases, be an important point in an assessment of public benefit.
52. It should not be possible for a charity to assert that provision is made 'at cost' (where the cost is prohibitively expensive), offer bursaries to the very poorest, and exclude the vast bulk of the population. If a charity is to meet principle 2(b) it should be expected to show that its basic fee is itself affordable. At the least it should show that all possible steps have been taken to make that basic fee affordable.

C. Reporting charitable activities

53. It is the ERG's position that there is currently a lack of transparency regarding independent schools' accounting and public benefit, and that this should be improved. The need for improved transparency is driven by a number of factors, including the Charity Commission's statutory duties to promote public confidence and the need to provide effective access to the public of activities undertaken for the public benefit. Further, standardised data, comparable across schools will ensure that informed debate is possible about particular schools. Finally, transparency is in itself a vital part of good governance.
54. Parents of prospective pupils can find abundant information about fees on school websites, but the same openness does not exist on eligibility for bursaries. According to Davies et al. (2010: p.1), "Most schools choose not to

¹⁴ Paton, G. (2011), "Middle-classes 'being priced out of boarding schools'". *The Daily Telegraph* 22 January 2011.

- disclose their criteria for awarding bursaries on their websites. This is likely to present a barrier to parents for whom bursaries are supposed to act as an incentive.”¹⁵ Davies et al. (2010: p.38) also describe how parents are often invited to communicate with the headteacher or other senior managers: “If parents have to initiate dialogue with senior figures in a school even to begin to judge eligibility for bursaries it seems likely that confident, well-informed, ‘high cultural capital’ parents will be advantaged.” Better publicity would allow potential beneficiaries to be aware that they might be a beneficiary and to seek to benefit.
55. Charging high fees is not a right for a charity and the fee structure itself, including all discretionary discounts should be open to the public. The information to be published should include: the criteria used in schools’ means tests and bursary allocations, and itemised breakdowns of schools’ charitable spending. An analogy can be drawn with pay structures where it has long been a goal of those campaigning for fair pay systems that employers must make their pay structures known - this has also tended to shine a light on historical discrimination, which even the employer was not expressly aware of. Opaque systems create many dangers, including the “people like us” syndrome.
 56. We also note the detailed reporting that is required from universities of spending on bursaries and scholarships, the number of students in receipt of bursaries and scholarships (and the differences between them), expenditure on outreach activities and progress on meeting “milestones”. We consider that the Charity Commission should require that independent schools record this sort of data, including the progress they make on widening access to education.
 57. Better reporting involves considering how provision is costed - the importance of that can be seen by its importance to this debate. For example, ISC states that private schools provided £255.5 million of means-tested fee remission (Burgess, second statement para 4). It is not clear how the ISC make their calculation. However it is probably by multiplying the full price of a place by the number of pupils. It is important to realise that this is not a cash cost. Indeed the marginal (ie extra) cost of educating any one pupil is very low. For many schools there will not even be an opportunity cost (i.e. lost revenue) from providing a bursary place because it would not otherwise have been filled (due, in some schools, to lack of fee-paying applicants) or because the school chose to limit class sizes.
 58. This lack of clarity and the lack of more detailed data on true costs is surprising because this seems to be an important part of the ISC case that the requirements of the Charity Commission would cause difficulties for private schools (eg Burgess first statement para 17).
 59. The Charity Commission public benefit assessment reports refer to the “percentage of pupils supported by bursaries”, “number of 100% bursaries awarded” and “value of means tested bursaries awarded as a percentage of gross fee income”. Referring to the number of 100% bursaries as a percentage

¹⁵Davies, P., Noble, J., Slack, K. and Vigurs, K. (2010), *Fee Remissions and Bursaries in Independent Schools*. Staffordshire University: Institute for Education Policy Research.

of total pupils is in our view the best method because it shows how many pupils the school is assisting in this direct way. It appears that the “value” as a percentage of gross fee income in the Charity Commission tables may also mean the cost based on a full fee. If so, as explained, we consider that readers should have in mind that this is not a cash cost and is only one part of assessing the impact on the school.

60. It may be that the objection to bursaries is really to the pressure on class sizes which is likely to result from free places.
61. In any event, independent schools are not strictly “spending” 5% or so of their income on bursaries - there is next to no “spend” at all. In most cases, two more pupils could be admitted per class for a minimal cash cost. An analogy can be drawn with the Court of Appeal’s conclusion that the cost of a state school place for some purposes under s.9 Education Act 1996 is ascertained by marginal cost pricing, *Oxfordshire v. GB* [2001] EWCA Civ 1358.
62. We have explained above how these schools benefit from a long build up of assets which are then provided free to those who can afford to pay to access them. We suggest that proper reporting should include an attempt to value and account for this.
63. We also note that governance of these schools is in many cases extremely complex and opaque. It is not uncommon that foundation governors / trustees differ from the school governors and the charitable trust is treated as little more than a vehicle through which the school is provided. This creates a lack of clarity to those outside the school and a real risk of confusion within it, for example a lack of knowledge of charity obligations by school governors.

D. Detriment and harm

64. The ERG supports principle 1(c) of the Charity Commission’s guidance: *Benefits must be balanced against any detriment or harm* and argues that this should be applied to independent schools. Independent schools argue that they give wider social benefits - such as easing pressure on state provision or producing well-educated pupils¹⁶. In terms of the wider ‘public good’, there are, however, numerous other factors - no less concrete and no more nebulous - which suggest significant social ‘disbenefits’ from the activities of independent schools. Particular focus is given to the barriers to social mobility erected and maintained by private schools as a sector.

Social mobility

65. The ERG considers that barriers to social mobility should be taken into account when assessing the claims of public benefit made by or on behalf of independent schools.
66. In the view of members of the ERG, social mobility is a central concern for a good society. The Milburn Report (which Matthew Burgess quotes) also

¹⁶See, for instance, Matthew Burgess second witness statement p. 8-9.

- describes social mobility as an essential ethical principle which underpins the public good: “all children should have the opportunity to fulfil their potential. Individual success should reflect innate talent and ability, not background or birth.”¹⁷
67. Social mobility is limited - and increasingly limited - in Britain. Academic research consistently finds that social mobility is more restricted in Britain than in most OECD countries. For instance, in a recent survey of eight countries (Britain, the US, western Germany, Canada, Sweden, Norway, Finland and Denmark), Britain and the US exhibited significantly poorer social mobility than the rest of the sample. According to the authors, “International comparisons indicate that intergenerational mobility in Britain is of the same order of magnitude as in the US, but that these countries are substantially less mobile than Canada and the Nordic countries”.¹⁸ Social mobility has also fallen markedly over time in Britain, so that people born in 1970 are less socially mobile than those born in 1958.¹⁹
 68. OECD (2010) reports that intergenerational mobility, measured by the extent to which sons’ earnings levels reflect those of their fathers (one method used to assess social mobility), is worse in the UK than all 11 other countries surveyed²⁰.
 69. Education is considered an essential tool in tackling inequality and enabling social mobility. But the structures and dynamics of educational systems or institutions can also inhibit or prevent social mobility. Attendance at a private school in particular creates significant social and economic advantage; yet such attendance is restricted to a small section of the population by various barriers to entry (especially fees, as described in paragraphs 44-59 above). A cycle of advantage is thus created.
 70. The advantage gained by attending an independent school is pernicious to the ideal of a meritocratic society, since pupils’ career prospects are boosted - indeed, and importantly, they are boosted_beyond the expected advantage of good educational results. Numerous studies have indicated significant premiums on wages for those who attended private school.²¹ As an example, the Hills Report finds that: “on top of their greater chances of high performance at GCSE, and greater chances of going on to higher education, men who had gone to private school were already earning 8 per cent more within four years of graduation than one would have expected given their

¹⁷Panel on Fair Access to the Professions (2009), *Unleashing Aspiration: the Final Report of the Panel on Fair Access to the Professions*. London: Cabinet Office. Page 27.

¹⁸Blanden, J., Gregg, P. and Machin, S. (2005), *Intergenerational Mobility in Europe and North America*. London: Centre for Economic Performance, London School of Economics. There is insufficient data to make conclusive judgements about West Germany, but *prima facie* it has been more socially mobile than the UK.

¹⁹Ibid.

²⁰OECD (2010), *Going for Growth*. Other countries: Denmark, Austria, Norway, Finland, Canada, Sweden, Germany, Spain, France, US, Italy.

²¹Green, F., Machin, S., Murphy, R. and Zhu, Y. (2010), *The Changing Economic Advantage From Private School*. London: Centre for the Economics of Education, London School of Economics.

gender, ethnicity, degree class, subject taken and occupation” (emphasis in original).²²

71. Another study describes how male graduates who attended certain private schools received up to a 20% earnings premium compared to male colleagues who attended the same universities and attained the same class of degree. This premium increased with school fees paid: higher private school fees were associated with significantly higher wages.²³ It seems that simply being the alumnus of specific (often expensive) schools creates economic benefits.
72. The economic advantages created by attending private schools are substantial. Research has found that, notwithstanding substantial private school fee increases (see paragraph 29 above), private education generates a clear private economic benefit for those who can afford to attend: “private school remains a good investment for parents who want to opt out [of state provision]”²⁴
73. The substantial earnings premium associated with private school attendance implies that private schools reinforce inequalities across generations, and thus impede social mobility.²⁵
74. Attendance at independent schools confers other substantial advantages. Pupils from independent schools disproportionately dominate entry into the top universities in the UK²⁶. There has been a growing focus on the disproportionate access to professions which attendance at independent schools enables. Given that 7% of children attend independent schools (including non-charitable schools), the following evidence illustrates this disproportionality:
 - a. In 2006, over half (54%) of the country's leading news journalists were educated in the private sector²⁷.
 - b. Over 60 % of ministers attending the first cabinet of the Coalition government were educated in the private sector.²⁸

²²Hills et al. (2010), *An Anatomy of Economic Inequality in the UK: Report of the National Equality Panel*. London: Centre for Analysis of Social Exclusion, London School of Economics. Page 365

²³ Naylor, R., Smith, J. and McKnight, A. (2002), “Why is There a Graduate Earnings Premium for Students From Independent Schools?”. *Bulletin of Economic Research* 54: 315-339

²⁴Green, F., Machin, S., Murphy, R. and Zhu, Y. (2010), *The Changing Economic Advantage From Private School*. London: Centre for the Economics of Education, London School of Economics. Page 1.

²⁵Ibid.

²⁶Sutton Trust (2008), *University Admissions by Individual Schools*. London: Sutton Trust. The Sutton Trust defines top universities as the “13 universities... ranked the highest in an average of published university league tables.” The universities are: Birmingham, Bristol, Cambridge, Durham, Edinburgh, Imperial College, London School of Economics, Nottingham, Oxford, St Andrews, University College London, Warwick and York.

²⁷Sutton Trust (2006), *The Educational Backgrounds of Leading Journalists*. London: Sutton Trust. The study defines ‘leading journalists’ as belonging to one of four categories: national newspaper editors, national newspaper columnists, broadcast presenters, and broadcast editors.

²⁸Sutton Trust (2010), *The Educational Backgrounds of Government Ministers in 2010*. London: Sutton Trust.

- c. In 2004, over two thirds (68%) of barristers at top chambers were educated in the independent sector. 75% of Law Lords and Judges in the Appeal and High Courts went to fee-paying schools, compared to 76% in 1989²⁹.

Peer group effects

75. There is emerging (although widely not yet uniformly accepted) evidence that the nature of a child's peer group has an effect on his or her achievement in school. Research shows, for instance, that students for whom the peer group is more socially and economically advantaged tend to achieve more in school. The OECD's Programme for International Student Assessment (PISA) survey describes how, "Regardless of their own socio-economic background, students attending schools with a socio-economically advantaged intake tend to perform better than those attending schools with more disadvantaged peers. In the majority of OECD countries, the effect of the school's economic, social and cultural status on students' performance far outweighs the effects of the individual student's socio-economic background...".³⁰
76. As a corollary, a concentration of economic or social disadvantage within a peer group can negatively affect children's attainment. Thus children on free school meals (FSM) make better progress up to Key Stage 3 in schools where the numbers on FSM are smaller³¹; children attending primary schools with high proportions of pupils from working class and/or non-paid work backgrounds perform worse in reading tests when compared to children with the same individual characteristics who attend schools where the socio-economic composition is different.³² The concentration of disadvantaged and lower-attaining children poses immense challenges for attainment amongst certain state sector pupils and schools.
77. Any institutional structure which encourages the separation of committed, able or socially / economically advantaged pupils from their peer group causes a risk of harm to the majority of children who remain at other schools. The ERG acknowledges that such a dynamic is not solely attributable to independent schools: there can be similar difficulties within the state sector. That such difficulties exist in the state sector, however, does not mean that the harm created by independent schools should be overlooked.

²⁹Sutton Trust (2005), *The Educational Backgrounds of the UK's Top Solicitors, Barristers and Judges* London: Sutton Trust. The barristers chambers analysed in this study were "those recommended for commercial law by Chambers and Partners and The Legal 500 for which we have data. For 2004 these were 20 Essex Street, 7 King's Bench Walk, Blackstone Chambers, Brick Court Chambers, Fountain Court Chambers, One Essex Court and Quadrant Chambers (formerly 4 Essex Court).

³⁰OECD (2010), *PISA 2009 Results: Overcoming Social Background - Equity in Learning Opportunities and Outcomes (Volume II)* Page 14

³¹FSM pupils attaining expected level at Key Stage 3. Schools where fewer than 5% children take free school meals - 83%; where more than 35% take FSM - 67%. Lupton, R. (2006), *How does place affect education?* London: IPPR. Page 7

³²Lauder, H., Kounali, D., Robinson, T. and Goldstein, H. (2010), "Pupil composition and accountability: An analysis in English primary schools". *International Journal of Educational Research* 49: 49-68

78. This harmful dynamic should lead us to question most currently used systems of subsidised recruitment to independent schools. In particular, it suggests that scholarships should not be considered a straightforward public benefit. Targeted support for a small number of able and motivated children may create some private benefit for those pupils. But it creates systematic 'disbenefit' to the education of the majority of children who remain in the state system by 'creaming off' able and motivated pupils. It also thwarts, for instance, the development of school specialisations and centres of excellence in the state sector, since those children with particular aptitude are targeted by the private sector.
79. Research has long shown that a 'balanced intake' of pupils - those who find learning relatively easy to balance those who do not - is a key ingredient of school effectiveness³³.
80. In the experience of the ERG these are well known issues in the education sector - and indeed generally in society. For example, the headteacher of Wellington College has acknowledged this harmful dynamic: private schools "pluck children out of their social milieu as well as taking them away from state schools, depriving those schools of their best academics, musicians, sportsmen and women and future stars."³⁴ It is also, in our experience, generally accepted that many private schools deliberately recruit academically able pupils and good sportsmen/women because of the positive effect it has on the school's reputation through league tables and other mechanisms, allowing them to 'compete' more successfully for fee-paying pupils. In our view it is not acceptable that avowedly charitable activity is undertaken to assist what is essentially the market competition of private businesses. It is all the less acceptable when it is acknowledged that such "creaming off" of children is likely to harm other schools.

Competition for resources

81. Independent schools may, finally, cause harm by reducing the supply of valuable resources available to the state sector, where the vast majority of children are educated. There is evidence, for instance, that private schools reduce the supply of teachers available to the state sector.³⁵ It is particularly significant that private schools use their pay flexibility to pay a premium to attract teachers in subjects where there is a shortage³⁶; such a policy exacerbates the shortage in state schools.
82. The state sector is also harmed by the loss of experienced teachers to the private sector. In 2007 a net transfer of 1,519 teachers from state to private

33 See, for instance, Rutter, M., Maughan, B., Mortimore, P. and Ouston, J. (1979), *Fifteen Thousand Hours: Secondary Schools and Their Effects on Children*. London: Open Books. (Reprinted 1995, Paul Chapman Publishing)

34 Seldon, A. (2008), "Enough of this educational apartheid". *The Independent* 15 January 2008

35 Green, F., Machin, S., Murphy, R. and Zhu, Y. (2008), "Competition for private and state school teachers". *Journal of Education and Work*. 21 (5): 383-404.

36 *Ibid.*

schools was recorded.³⁷ It has been said that the state suffers “a significant loss on its investment when that teacher leaves the state system”³⁸.

83. Putting this in context: the independent sector employs approximately 13% of teachers in the UK, but provides schooling for only 7% of children³⁹. This is a further factor that trustees might take into account when considering class sizes.
84. Private schools increasingly take on newly qualified teachers, thus reducing the supply available to the state sector (the private sector took nearly 8% of new teachers in 2006). There is a significant loss on the state’s investment when a new teacher exits to private provision⁴⁰; meanwhile private schools receive in effect a state subsidy because they do not have to train or give experience to teachers themselves.

E. Providing a benefit to people in poverty and how to provide bursaries

85. The ERG is concerned that bursaries can exacerbate the “peer group” effect explained above and cause further harm to the education of other pupils. This is a particular risk because at present, whether fee assistance is called a bursary or a scholarship there is generally a selective element to it. For this reason it is important that the Charity Commission goes further than it has at present and considers how bursaries are allocated - which pupils are chosen and the income level and means test used.
86. Where bursaries are used the ERG prefers an emphasis on 100% bursaries, as opposed to partial fee remission, as one aspect of not excluding those in poverty. There is a simple reason for this: without 100% bursaries people in poverty are completely excluded. The points that we have made above about lowering fees should not detract from this.
87. Certain types of fee remission often carried out by independent schools may be good practice from a commercial point of view but in our view they are not relevant to principle 2(c), the exclusion of people in poverty:
 - a. Sibling fee discounts. This does not give access to people living in poverty (although it may widen access to other groups).
 - b. Alumni fee discounts. This would exacerbate the negative impact which independent schools have on social mobility.
 - c. Fee remission based on attainments which require training paid for by parents or others, ie. private tuition.

³⁷Ibid. p.399.

³⁸Ibid. p.401

³⁹Smithers, A. and Tracey, L. (2003), *Teacher Qualifications*. London: Sutton Trust

⁴⁰Green, F., Machin, S., Murphy, R. and Zhu, Y. (2008), “Competition for private and state school teachers”. *Journal of Education and Work*. 21 (5): 383-404. .

- d. Staff fee discounts.
88. ISC argues that increasing bursaries would be unaffordable. We set out above why we are sceptical about that.
89. It is notable that the re-assessments of public benefit carried out by the Charity Commission and the initial reports on those schools which “passed” - have not expressly considered:
- a. What income level was used and how this was assessed; and
 - b. Whether the pupils could be said to be socially excluded rather than merely to satisfy an income test at a certain point.
90. All possible steps should be taken to ensure that where a school's resources are used to provide bursaries, they are in fact promoting principles 2(b) and (c); to this end there must be an effective means test. Income based assistance is notoriously open to the “cheat” problem. It would be ridiculous if bursaries went to people whose grandparents would have paid or who have discretionary family trust funds. Bursaries can create disincentive effects or effective high marginal tax rates if withdrawn when circumstances change or unfairness if left in place when not needed. Finally, it is not clear who should be assessed - for example, if the assessment is limited to those in the same household or with parental responsibility many fathers would be excluded from the assessment.
91. There is also the problem of how very small charities effectively assess parental income (indeed, potentially, income from a very wide applicant pool). It might be advisable to standardise the test across schools, so that a school could in effect “buy in” an assessment from an independent body.
92. For these reasons, schools and the Charity Commission would produce greater public benefit by not focussing on income, at least apparently exclusively, but by focussing on a range of factors including indices of social deprivation. For example bursaries might be made available:
- a. To pupils neither of whose parents started university by age 25. This would help to select for some socially disadvantaged families.
 - b. To pupils from local primary schools with a disproportionately high number of pupils on free school meals or with below average examination grades. It is very unlikely that parents would ‘cheat’ by sending their children to these schools on the chance of a bursary years later.
 - c. To pupils whose households have more people than liveable rooms. Again the ‘cheat’ risk is reduced.
 - d. By random allocation to all applicants who qualify at some basic entry level - this would reduce the chance of ‘cherry picking’ by the school which occurs to some extent with bursaries as with scholarships.

93. With appropriate training, independent schools might well benefit the public by providing places to 'looked after' children (who may benefit from the comparative stability of a boarding education) or children with learning or behavioural difficulties.
94. No doubt there are many other examples of creative ways to allocate places which reach out beyond a simple focus on income, even if an income element is involved.
95. In the past the ISC has recognised that "public benefit ... includes widening access to ensure that the benefits of independent schools are available to children whose parents cannot afford full fees"⁴¹.

F. Indirect public benefit issues arising from the Attorney-General's questions

96. The ERG does not accept that the suggested indirect benefits in paragraphs 2.1 to 2.6 of the Attorney-General's questions would, at least in the quantities suggested, alone provide public benefit sufficient to support charitable status (save for the £1million donation in 2.5, depending on the charity's resources and the frequency of donations). We suggest that control of fees and provision of subsidised access is necessary - and achievable - in all cases.
97. The ERG would like to advance two broad proposals by which independent schools might be redirected towards their supposed charitable mission:
 - a. Changing their funding or charging structure, and
 - b. Engaging in constructive and substantive partnership activities with state schools beyond those listed in the Attorney-General's questions.

Changing funding / charging structure

98. There are several precedents in the education sector for providing education at a price based on families' ability to pay. These include:
 - a. Swedish nursery provision: there are systems in which fees are related to family incomes and number of children from a family who use a nursery. There is also a maximum fee cap. Through this funding system lower income families and those who have more children pay relatively less⁴².
 - b. The London Early Years Foundation is a large childcare charity in London. It administers a two-tier charging system for nursery care based on parental income (there is also a very limited third tier for parents facing particular hardship). Discounts to lower income parents are subsidised from the fees of more advantaged parents, from surpluses achieved on government contracts, and from philanthropic sources.

⁴¹ Shephard, J. (2004), Letter to the *Guardian* 5 August 2004

⁴² Brink, A., Nordblom, K. and Wahlberg, R. (2007), *Maximum Fee vs. Child Benefit: A Welfare Analysis of Swedish Child-Care Fee Reform*. IZA Discussion Paper 2748. Bonn: Institute for the Study of Labor (IZA).

99. In other words the means test could be applied not just to those seeking lower fees but to all parents, so that contributions were linked to ability to pay across the income scale. The idea of making a contribution to an educational community according to ability to pay accords with intuitive conceptions of charity.
100. There are also alternative funding models such as opting into the state sector.

Partnership activities

101. The ERG accepts that sustained and extensive partnership between independent and state schools can provide recognisable public benefit. The ERG in this context draws on the judgements in *Re Resch* to make a distinction between direct access and direct benefit. We accept that direct benefit may be achieved through other activities, and typically through partnership arrangements.
102. There is evidence of the positive benefits which partnerships between schools can bring to overall educational outcomes. The London Challenge initiative has shown, in particular, notable benefits accruing from collaborations between schools and between teachers.⁴³
103. There is risk that partnerships may be considered patronising by state schools and their pupils - or that the state schools will sense they are being used as tools in order to enable an independent school to be eligible for charitable status. It should also be recognised that independent schools are not expert in all aspects of education provision. The benefits of collaboration are as likely to flow towards the independent school from the state school which educates relatively more pupils with a wider range of needs at a lower cost. It should be noted that there are some independent schools which do not have the skills to contribute in these ways at all.
104. Partnership work between independent and state schools should be (1) costed, according to agreed measures; and (2) measured by outcome. In order to fulfil public benefit requirements, private schools should provide transparent accounts of the partnership activities which they undertake with state schools. A descriptive list of activities is insufficient. Reports should include evaluation of the impact and outcomes of private schools' contributions. Examples of evaluation might be:
- a. Impact on exam grades or university entrance at a particular school.
 - b. Evaluation by staff at the state school.
105. Such evaluations should be an essential component of the evidence base by which the Charity Commission makes decisions about schools' charitable status.

⁴³See, for instance, Ofsted (2010), *The London Challenge*. London: Ofsted.

106. The reason why we cannot accept the suggestions made in the Attorney-General's questions are adequate in the scale suggested, though cumulatively and in much greater scale they might be, if accompanied by the measures on fees and bursaries we set out above, are as follows:
- a. Q2.1 - placing exam papers on line. There are numerous other sources of this data, including the stores of past papers from exam syndicates that most schools keep. The addition of papers from many hundreds of independent schools would add little value.
 - b. Q2.2 - 3 hours of science provision per week. This might be one part of a sustained and extensive partnership. However the number of pupils affected is very low.
 - c. Q2.3 - Interview technique for 10 hours. Again this could be one part of an overall package - focussed on certain higher education institutions where the private school may have more experience - but affects very few pupils and is only 1 hour each.
 - d. Q2.4 - permitting 3 football pitches to be used. This should be costed at the rental price of a football pitch. In a few urban areas it will be high. However in the vast majority of cases it is negligible.
 - e. Q2.6 - facilities for 6 hours for adult education. Again, this should be costed at the rental price of the facility - which is probably already available cheaply elsewhere.
107. The sort of arrangements in the London Challenge involve institutional link ups with senior managers having responsibility for both institutions. Outcomes are measured, seeking significant improvement. There is work on systems and staff training within the school. No doubt providing some direct teaching and some access to facilities would be a part of the proposal but the aim should be for staff to feel responsible for both institutions and to seek to advance the education of pupils at both institutions.

CONCLUSION

108. In sum, the ERG shares the concerns expressed by a leading private school practitioner, who has described the UK's fragmented education system as "educational apartheid"⁴⁴. As we said in paragraph 10 exacting standards should be set for charitable status and if they cannot be met the consequences of that must be faced - not avoided.

I, Ron Glatter, believe that the facts in this statement are true.

⁴⁴Seldon, A. (2008), "Enough of this educational apartheid". *The Independent* 15 January 2008.

Signed:.....

Ron Glatter

I, Henrietta Dombey, believe that the facts in this statement are true.

Signed:.....

Henrietta Dombey

Dated:

I, Margaret Lloyd, believe that the facts in this statement are true.

Signed:.....

Margaret Lloyd

Dated:

I, Anne Mountfield, believe that the facts in this statement are true.

Signed:.....

Anne Mountfield

Dated: