Education Bill 2020

We are a group of home educators, we have commissioned Allan Norman to write a submission on our behalf to debunk the rebuttal received by the Solicitor General on 1st October 2019 regarding the legal opinion from Quinn Legal.

Please find Allan Norman's previous submission to the DESC July 2017 here regarding the Human Rights aspect of the Bill.

https://scothomeed.co.uk/wp-content/uploads/2020/07/Allan-Norman-report-IoM.pdf

Quinn Legal also provided a legal opinion regarding the Human Rights aspect of the Bill.

https://leahurst66.files.wordpress.com/2019/03/quinn-legal-opinion-isle-of-man-new-education-bill.pdf

The Attorney General rebuttal is attached also.

https://www.gov.im/media/1367280/rebuttal-161019.pdf

Yours sincerely

Voirrey Baugh
Michelle Lindsay
Maria Ulyatt

August 2020

1. Playing to the Gallery – an Overview

There is an Education Bill before Tynwald. It includes provisions for much greater regulation by the State of home education.

There is a back-history, to which I have already contributed. I currently practice as a social worker, and lecture and train as a legal academic, my legal practice in the past including having initiated around 100 judicial reviews, many with a human rights dimension. As I explained in my previous submission, human rights are a particular interest of mine, on which I have written widely. My legal casework in the past has included representing the first known case awarding compensation for a breach of human rights in relation to child protection, and a legal opinion that set out – in advance of the legislation being passed – why Scotland's "named persons" scheme would be found to be in breach of human rights law, as indeed the Supreme Court of the United Kingdom subsequently found.

In the paper that I prepared on education law on the Island in 2017, I explored the existing law and the evidence on the effectiveness of the existing law. The evidence was that greater regulation was neither needed nor justified. I pointed out,

> *the Department is seeking new powers to allow it to look for a problem, it is not seeking new powers in order to address a problem.*

In catastrophic rejection of the maxim, "if it ain't broke, don't fix it", further proposals have been brought forward. The Island's Social Affairs Policy Review Committee has observed,

> *The proposals in the Department's second public consultation, in 2019, have caused shock, dismay and outrage among home educators. We conclude that there is a case for reform of the law regarding home education. There is a risk at present that a case could arise where a child was not receiving a suitable education...*

This is extraordinarily tone-deaf: to note shock, dismay and outrage; in the following sentence to reach an unsubstantiated and contrary conclusion; and in the sentence after that to acknowledge that it is unsubstantiated, and that all this is because of a perceived "risk... that a case could arise...".

After the Bill was published, Quinn Legal, advocates on the Island, published a legal opinion that the provisions were in contravention of human rights.

Now, the Island's Solicitor-General has responded to that opinion and rejected it. I have read what is written. With a lawyers hat on, I recognise the language, and I understand the arguments, but I also see deep flaws in both. And I find myself wondering, who is the Solicitor-General writing for? Because he is not going to convince Quinn Legal that they got it wrong. And any good Judge is not going to be overawed by the fact that it is written by the Solicitor-General, nor are they going to think that it is more authoritative simply because it comes later than and dismisses Quinn Legal's arguments.

So I wondered whether the Solicitor-General is basically playing to the gallery, whether this is really about softening public opinion, and steeling Tynwald's nerve, for a change that the Department of Education, Sport and Culture want to see, rather than providing reflective advice. Since its written in legalese, I thought I would try to deconstruct it.

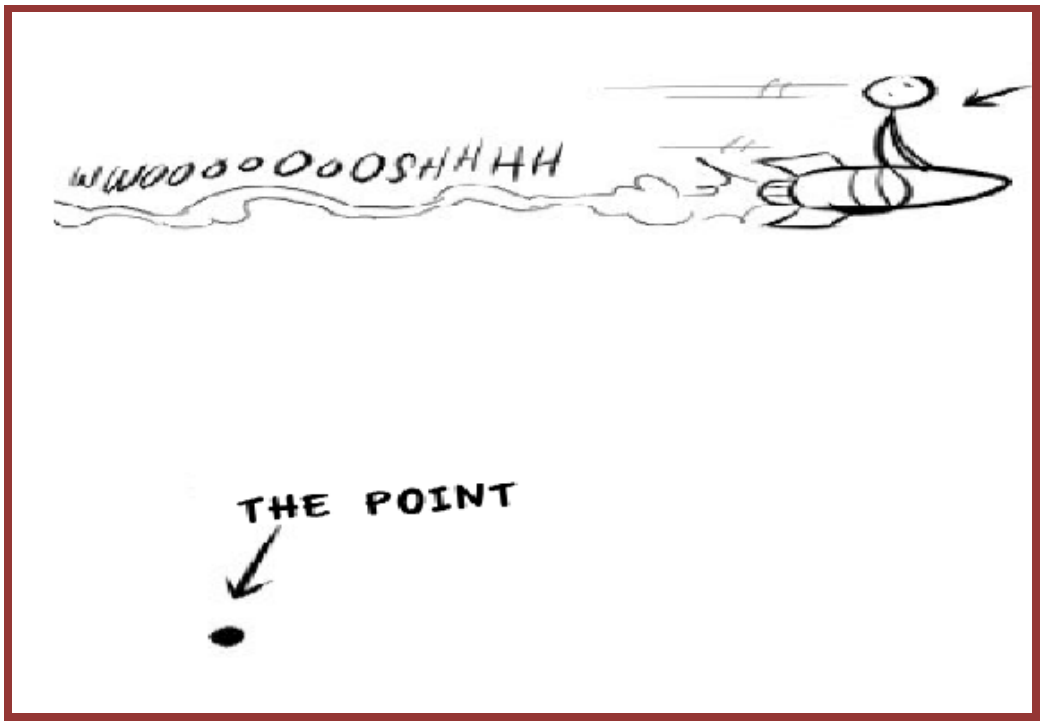
Two fundamental truths are necessary background - one about the legal system, and one about human rights.

The point about the legal system is this: common law systems such as that on the Island, are largely "adversarial" in contrast to what is termed "inquisitorial" systems elsewhere. It means that the system depends on the lawyers for each side making out the best case they can for their client.

And the point about human rights is this: the European human rights framework was developed as a tool to protect the citizen from the State. As such, the strongest rights are what are termed negative rights, the right to be free from interference, rather than positive rights, to demand that the State gives us something.

These points need to be borne in mind as we consider what the Solicitor-General has to say about the proposed new provisions. They also need to be appreciated by Tynwald and its House of Keys Committee on the Education Bill 2020, given the urgent need to revisit this with fresh eyes and an open mind. I hope this analysis will help.

2. Missing the Point Entirely – "Statutory Primacy of Parental Wishes"



The Solicitor-General devotes three early paragraphs to arguing that parents' wishes do not have "primacy". Referring both to the Island's existing Education Act, and its Human Rights Act, the Solicitor-General notes that parents' wishes are subject to limitations that are necessary for an efficient education and efficient use of resources.

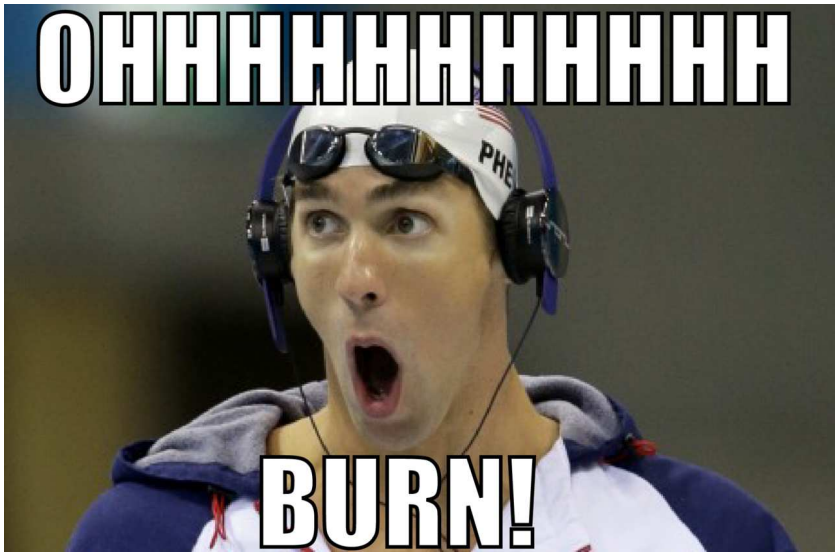
This entirely misses the point of both the importance of parents wishes and the reasons that they are limited.

The starting point is that it is for parents to ensure that their children receive an education. Most parents do not educate children themselves. They ensure that their children receive an education either by sending them to State school, or paying for a private education. Those who send their children to State school in particular are limited in what they can demand. They cannot, for example, insist on one-to-one tuition, or the very best scholars, or state-of-the-art facilities. The State has a right to set a ceiling on standards of educational provision, in effect, in the interests of efficiency and avoiding unreasonable public expenditure.

Those who educate their own children are not making unreasonable demands on the State system. The fact that the primacy of parental wishes is limited to prevent unreasonable demands on the State system is completely irrelevant where no such demands are being made.

The Solicitor-General, devoting the best part of a page to this argument, has completely missed the point.

3. The 'Ooh, Burrrn' Moment - Scotland's Named Persons case



At the foot of the 1st page, having noted the Quinn Legal opinion that the change to the law contravenes human rights, the Solicitor-General comments on one of the cases relied on. This was a 2016 case in which the Supreme Court of the United Kingdom struck down legislation passed by Scotland's Parliament, which attempted to impose a state official on every child, irrespective of consent, or whether it was necessary for the children's protection.

The Solicitor-General repeats one sentence from that case, but it is instructive to look at the words immediately before and following, for context:

> *The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way... "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only..."*[1]

The Solicitor-General suggests that that middle sentence above is "*probably obiter*". Nice bit of Latin, needs some explanation. If lawyers agree with a case, they are likely to say that the *ratio* of the case supports their own case. More Latin, but it means that their own case should succeed for the same reasons as that other case. If they disagree, they are likely to say that the case is "distinguishable", as argued by the Solicitor-General in the next paragraph. If they are on ***really*** weak ground and getting desperate, they say that the reasoning in the case is "*obiter*". This means that the particular words were not necessary to the outcome, so should not be followed.

If the words in question have come out of the mouth of the Deputy President of the Supreme Court of the United Kingdom, surrounded by sentences talking about totalitarian regimes and the absence of a power of the State to standardise children's education, then it

[1] The Christian Institute & Ors v The Lord Advocate (Scotland) [2016] UKSC 51 (28 July 2016) at para 73

takes quite a lot of courage to suggest that a Court should ignore those words. So you hedge your bets by saying "*probably obiter*" i.e. you are arguing that probably these strongly worded ideas should be ignored.

If you are a lawyer seeing your opponent describe the words of such an eminent jurist as "*probably obiter*", then you know that they are in trouble. Unless, of course, their purpose is to obfuscate the issues for some audience other than the court.

4. The Spitting out My Tea Moment – Article 8(2)

The meme above shot straight into my head when I read the 1st paragraph on the 2nd page of the Solicitor-General's opinion. The argument here is that Article 8, the human right about private and family life, allows such interference by the Island's authorities.

The arguments advanced here would be called "bold" or "brave" by lawyers. This is really lawyer-speak for outrageous or nonsense.

The Solicitor-General claims that,

> *The protection of the economic well-being of the Island would seem to be a sufficient justification for establishing in the case of those educated at home that their education will enable them to contribute effectively to society.*

Really? The economic well-being of the Island is threatened by a small handful of home educators? Moreover, since this is what human rights law requires, the assertion would have to be that a small handful of home educators are such a threat to the Island's economy that this is a reasonable and proportionate response, the least restrictive way of addressing that threat. In any case, where does this reference to contributing effectively to society come from, since it doesn't come from Article 8? Does the Solicitor-General really think that the economic well-being of the Island requires everyone's effective contribution? Where does that leave the human rights of those who are sick or disabled, retired, with a learning disability, or even just unemployed?

In the same paragraph the Solicitor-General goes on to say that,

> *Moreover, intervention in the private lives of the parents is justified to ensure the safety and well-being of their children.*

At this point, I spat out my tea again for a different reason. This is pretty much the exact argument run by Scotland's Lord Advocate in the very case the Solicitor-General refers to.

And the argument failed in the Supreme Court because "The promotion of the wellbeing of children and young people is not, however, one of the aims listed in Article 8(2)".[2]

The Solicitor General is trying to argue that this would be a justification for the change. Assuming he is familiar with Article 8, he presumably knows that these words do not appear there. Assuming that he is familiar with the caselaw, he presumably knows that the argument that Article 8 should be interpreted in this way has been lost. Presumably therefore he is counting upon the legislators in the gallery to which he is playing not being so knowledgeable.

I started by saying this is a "bold" argument. This may be a euphemism for an outrageous argument, but I fear that the Solicitor-General might be being bold because he knows or believes that the human rights culture on the Island is so weak, and understanding of the principles so poor, that he can get away with it.

[2] The Christian Institute & Ors v The Lord Advocate (Scotland) [2016] UKSC 51 (28 July 2016) at paragraph 89

5. Mandy Rice Davies Applies – "the margin of appreciation"

In the Profumo Scandal, on being told by Lord Astor's counsel that he denied having an affair with her, Mandy Rice Davies is famously said to have replied, "Well, he would say that, wouldn't he?"

The rest of the 2nd page is taken up with the margin of appreciation. This is not just lawyer-speak, it is human rights lawyer-speak. It arises out of the well-known legal problem about how far a Court should take over decision-making and substitute its own view, and how much leeway it should give to the original decision maker. The "margin of appreciation" is the leeway that a Court might give to the decision maker - that is, in this case, the Island's legislators.

And therefore, this argument in a nutshell is not that this is the right thing to do, or that this is what human rights law expects, it is what the Solicitor-General thinks that the Island's legislators could get away with.

It is worth looking at why. The Solicitor-General refers to caselaw that the right to education is a

> *weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state.. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds...*

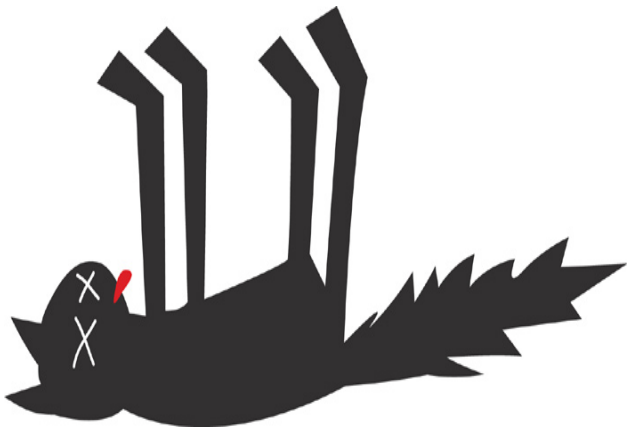
But looking carefully, it is apparent that the Solicitor-General repeats his earlier "missing the point" error. This is about what you cannot demand or insist on, it is saying that you cannot mould the State education system to suit yourself. This is not about home educators, who are not trying to mould the State education system to suit themselves.

Remember, the Solicitor-General is the government's lawyer. The government's lawyer is entitled to advise the government that he thinks they have enough leeway (enough "margin of appreciation") to do what is proposed. Since he is the government's lawyer, *he would say that wouldn't he?* But you would hope this was not built upon misunderstanding the difference between the right to demand something and the right to be left alone.

6. Slinging a Dead Cat on the Table – The Wunderlich Case

Let us suppose you are losing an argument, the facts are overwhelmingly against you, and the more people focus on the reality the worse it is for you and your case. Your best bet in these circumstances is to perform a manoeuvre that a great campaigner describes as 'throwing a dead cat on the table, mate'.

[Boris Johnson in 2013]



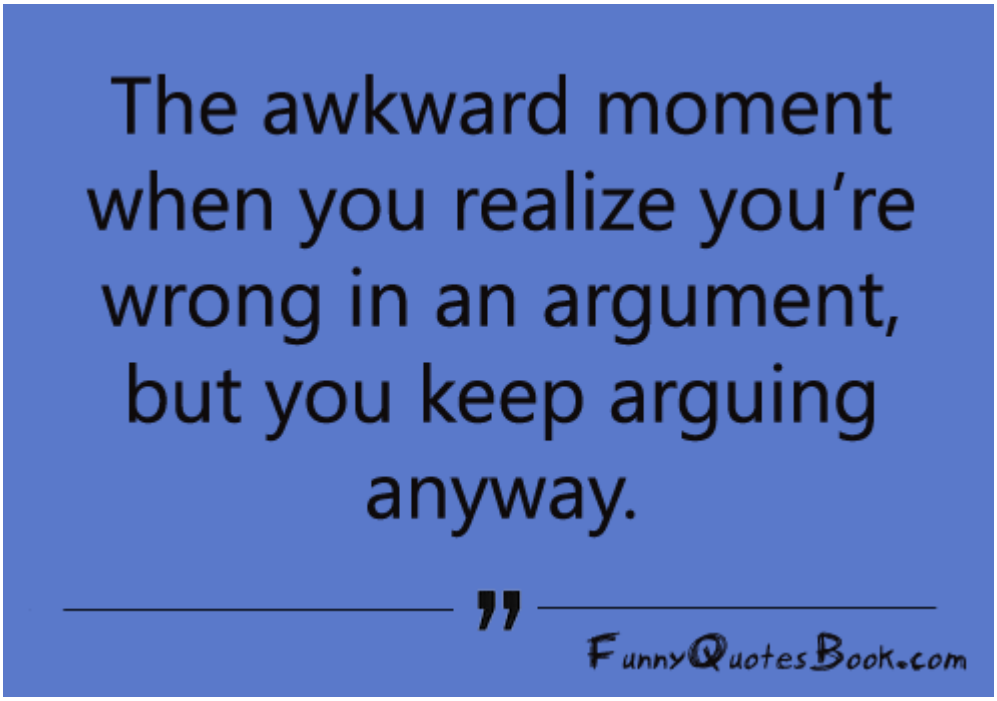
On the final page, the Solicitor-General refers to a case last year brought against Germany, which upheld Germany's rights to continue its ban on homeschooling, that has been in place for over a century. In an unwarranted dig, he says, "surprisingly Quinn Legal appear not to be aware of this decision which is not mentioned in its opinion".

As I said before, lawyers look for and understand both what has been said and what has been left unsaid. Wunderlich is a dead cat, thrown on the table to distract, but nothing to do with the argument of Quinn Legal. Wunderlich was an attempt by home educators to overturn the century-old *status quo*. Home educators on the Island are not attempting to overturn the *status quo* - rather, it is Tynwald that is trying to do that, so it is Tynwald that has to justify the interference with human rights.

I explained before the full extent of the test for making changes that interfere with human rights. You cannot just point to another country in Europe the does it differently, and copy them. You need to demonstrate that there is a good reason to make the change, to interfere with human rights, and that this is the least intrusive and most proportionate way of dealing with the social problem you have identified.

The fact that Germany's long-standing ban on homeschooling was upheld is a complete distraction from the very different legal issues on the Island.

7. Conclusion

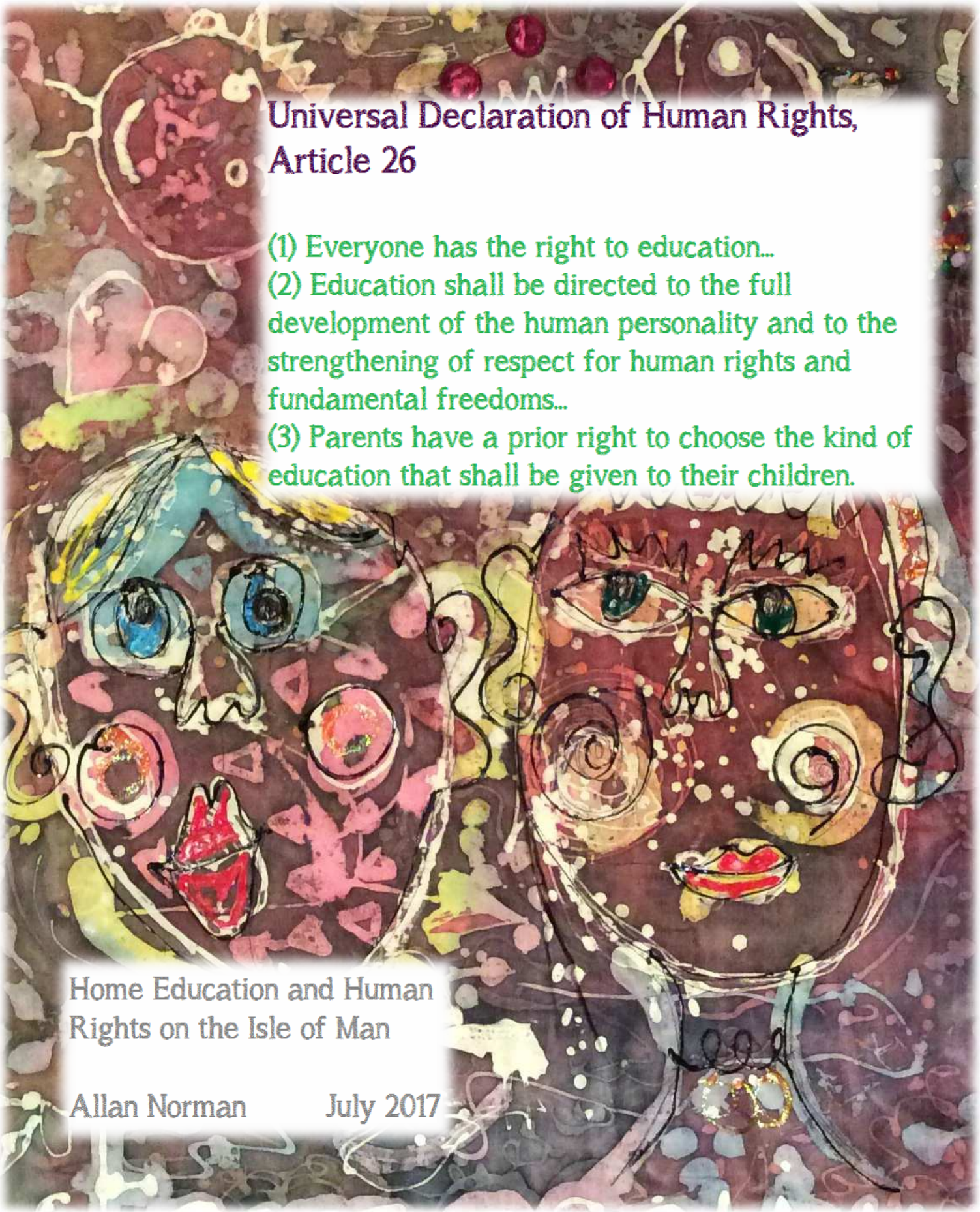


If I were instructed to write a rebuttal to the Quinn Legal opinion, I would probably have to make much the same argument as the Solicitor-General has put forward. But I know what I would be thinking. I would be troubled by the need to use obscure language to disguise the weakness of the argument, to rely upon a lack of an effective human rights culture to challenge me, to advise what leeway I think might be given instead of what human rights compliance looks like, and to fling a dead cat on the table to distract from what is troubling me.

I can only hope that behind-the-scenes, the legislators are getting better advice than this.

Allan Norman

August 2020



Universal Declaration of Human Rights, Article 26

(1) Everyone has the right to education...
(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms...
(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Home Education and Human Rights on the Isle of Man

Allan Norman

July 2017

Part A - Introduction

1. I have been asked to provide an opinion on the framework for home education on the Isle of Man. I open with clarifying three points by way of introduction: why I have been asked for an opinion at this time; why the request has been directed to me; and what my standing is in relation to home education. The heart of my advice follows thereafter, under three broad headings:

   - ***Firstly***, I set out (at part B) the human rights framework of the right to education, within which any consideration of home education must be framed;

   - ***Secondly***, I review (at part C) the existing framework on the Isle of Man against the human rights framework I set out; and

   - ***Thirdly***, I raise issues (at part D) that must necessarily be considered and addressed if consideration is being given to changing the existing framework, by legislation or otherwise.

2. The request for this advice comes jointly from two sets of parents on the Island who home educate. I have been provided, with consent, with correspondence from several more sets of parents, between those parents and various branches of the Isle of Man government. My understanding is that the immediate concern that has prompted the request for my advice is proposals in the legislative programme for the Isle of Man in the coming year for new legislation relating to education, and for that legislation to include specific proposals relating to home education. The concern of the parents is that their perception of the proposals is that they tighten government control over home education in particular, rather than creating a rights-based framework for children's education.

3. Although I understand that those legislative proposals have recently been deferred, and are likely to go out for consultation later than originally anticipated, parents have expressed a separate concern that, recently, the existing legislative framework has been re-interpreted in a way that is more intrusive upon their exercise of their rights to home educate – that is to say, practice on the ground is changing even in advance of new legislation. I therefore consider that concern also.

A-1 – My Approach

4. I am a registered social worker, practising independently in England. According to the Global Definition of the Social Work Profession (International Federation of Social Workers, 2014), human rights are "central to social work". My Code of Ethics (BASW, 2012) says that,

> "Social work is based on respect for the inherent worth and dignity of all people as expressed in the United Nations Universal Declaration of Human Rights (1948) and other related UN declarations on rights and the conventions derived from those declarations."

5. My regulator, the Health and Care Professions Council, requires in its Standards of Proficiency (HCPC, 2017), that I assist people "to understand and exercise their rights".

6. Human rights are a particular interest of mine, on which I have written widely. My legal casework in the past has included representing the first known case awarding compensation for a breach of human rights in relation to child protection, and a legal opinion that set out – in advance of the legislation being passed – why Scotland's "named persons" scheme would be found to be in breach of human rights law, as indeed the Supreme Court of the United Kingdom subsequently found. I will have particular cause to make reference to that litigation and decision below, since it is highly pertinent to considering and addressing how proposed changes to the legislative framework may or may not comply with the human rights they are intended to address.

7. It is perhaps in the light of that background that I was asked to come to the Isle of Man in October 2016, when I gave a presentation addressing the human rights framework within which children's services must operate.

8. This advice, however, is related narrowly to home education. I should therefore make clear at the outset that I do not home educate, and my children have never been home educated. I have, however, frequently encountered home education issues in the course of my work. I have had cause to discuss home education issues with many parents, and with local authorities in England, in order to address disputes that have arisen.

9. My perception – as indeed I might expect given the nature of home education – is that there is no single coherent approach taken by those who home educate. The reasons

why parents find themselves home educating are many and varied, but they have included in particular:

- where children have particular disability-related needs, and parents have struggled, and failed, to secure education that addresses their needs;
- where children have experienced bullying, or were school-refusers, and parents have felt that schools were not appropriately addressing those issues;
- where children's school attendance has been poor, and has triggered action against parents, who have then felt better able to manage their children's education at home;
- where children have been discouraged from attending school, and have even been actively de-registered ("coerced de-registration"), where their presence at school was considered harmful to the interests, auditing or regulation of the school;
- where children with birthdays late in the academic year have struggled in the early years of education, and home education has left them better prepared to enter mainstream education later;
- where parents who have relocated have had to home educate temporarily, as no places were available in the short term;
- where the available subject choices, and combination of subject choices, at secondary level have prevented children from accessing education relevant to their specific plans or preferences, so that home education has been necessary to achieve them;
- where parents have been concerned that the ethos of schooling, and the conformity that is required for effective group schooling, is contrary to the interests of their child.

10. I suspect it is only the last of those categories that matches with a popular public perception of home education as an exercise undertaken by parents detached from mainstream worldviews. However, it is noticeable, reflects my own experience, and will be reflected in this advice, that many of the reasons for home education that I have encountered reflect engagement with and then disenchantment with - or even a need to address the failings of - mainstream education. Indeed, it is apparent from some correspondence I have seen on the Isle of Man, that this issue is relevant there also.

11. Meanwhile, local authorities set out a range of concerns about those who home educate:

- ❖ that schools need to address issues such as bullying and truanting in ways that take account of the wider school community and are not disruptive of the education of the wider school community;
- ❖ that the principle of choice in relation to education can be particularly costly when it becomes related to disability-related needs, so that resource implications must constrain parental choice;
- ❖ that visibility of a child within the State education sector provides some reassurance that the child's well-being can be monitored; and by implication that the comparative invisibility of the child who is home educated raises concerns that the child may be vulnerable to abuse or neglect;
- ❖ that education in classes and in a school environment, better prepare children in the necessary skills of relating to other people;
- ❖ that the subject matter covered by those who home educate does not meet State-schooling expectations of the opportunities that education ought to address.

12. In the result, it can seem that the concerns of home educators and government arise in most cases because each perceives the deficiencies and limitations of the other. The ground becomes set for a dispute over who ought to control how those deficiencies are addressed, and by what means.

A-2 – Issues on the Isle of Man

13. I have referred to the fact that draft legislation has been deferred. While correspondence addressed to home educators has referred to future opportunities that will be available for consultation once the proposals are known, those who have asked for my advice have understandably raised a prior question: what is the "pressing social concern" which is perceived to require proposed legislation? It is a good and relevant question. Some insight may be gained from an email from the Department of Education and Children's Director of Strategy and Corporate Services. In it, she stated as follows:

> "The Department's concerns about home education are that the current Education Act 2001 only requires the Department to be notified of the intent to home educate, therefore there remains the risk to the child that they are not getting an education of an acceptable standard. This matter has been described in English case law in both Harrison and Harrison v Stevenson appeal 1981, Worcester Crown Court (unreported) and R v Secretary of State for

> Education, ex parte Talmud Torah Machzikei Hadass School Trust, judicial review 1985."

14. What is startling about this is that it cannot be said to reveal any pressing social concern giving rise to a need for legislation whatsoever. The caselaw referred to is between 30 and 40 years old, and is well settled. The existing legislation referred to by the Director, the Education Act 2001, post-dates the earliest case by a full 20 years, and it is hard to see that there is any basis for assuming that it does not address the issues. (I reviewed the existing legislation, and find that it does seem to be adequate to address the risk identified by the Director above, at C-3 below.)

15. Moreover, the risk identified by the Director is "the risk to the child that they are not getting an education of an acceptable standard", and seems to arise on the basis that the Department does not receive information on standards of home education. That this might suggest that the Department is ***looking for a problem rather than has identified a problem*** is further evidenced by a response dated 26th July 2017 to a Freedom of Information request. That request asked of the Department;

> "how many written notices have been served on a parent under Section 25 (1) of the Education Act 2001 because it appeared that a child educated 'otherwise' [a home educated child] was not in receipt of a suitable education?"

16. We know from the response that the number of times that Department has even started to use the existing framework to investigate concerns about home education over the last two years can be counted on the fingers of one hand - or as the official answer puts it,

> "the Department is refusing to disclose some of the information requested… because the relatively low number of notices served may make identification of an individual or individuals possible… I can however disclose that less than 5 written notices have been served…"

17. Supplementary questions asked about the use of enforcement powers, including submitting a child for examination or assessment, the use of School Attendance Orders, and prosecution for offences. The answer to all the remaining questions is pithy, pertinent and memorable:

> "the answer is none."

18. That is to say, having identified the possibility of a concern about home education in a handful of cases, **every one of those concerns was answered and addressed without needing to make any use of existing enforcement powers at all**.

19. As I indicated, the appearance is that **the Department is seeking new powers to allow it to look for a problem, it is not seeking new powers in order to address a problem**, as not a single case in the last two academic years has required the use of any further enforcement powers.

20. Is that legitimate? It seems entirely apposite to begin with first principles, which I suggest means unpacking the human right to education.

Part B – The Human Right to Education

21. Human rights, as conventionally understood, are grounded in international treaty rights. I have already made reference to my Code of Ethics, which highlights the importance of the United Nations in this regard. In Europe, and indeed on the Isle of Man, some of those rights are embodied in the European Convention on Human Rights, and given legal effect by the Human Rights Act. Nonetheless, the meaning of those rights is found – by the European court, and by domestic courts, including the example of the UK Supreme Court which I will explore – with reference to other agreements and in particular the United Nations Convention on the Rights of the Child.

22. Going forward, I will refer to the United Nations Convention on the Rights of the Child as the UNCRC; the European Convention on Human Rights simply as the Convention; and the Universal Declaration of Human Rights as the Declaration.

23. The UN Convention on the Rights of the Child should not be understood as giving children distinctively different rights – some kind of "children's menu" of rights. Rather, as is made clear in its introductory words, and the phrases peppered throughout it "State Parties shall promote…", "State Parties undertake…", "State Parties agree…", "State Parties shall take appropriate measures…" etc, the UNCRC sets out what governments and parliaments need to do to give effect to children's rights.

B-1 – Education As the Child's Right

24. The right to education, in Article 28 of the UNCRC, opens with these words:

"States Parties recognize the right of the child to education…"

25. There are two principles of importance that should not be overlooked in the generality of that phrase. Firstly, ***education is the right of the child***, rather than of the parent. Secondly, ***not to educate is not an option***.

26. That phrase alone, however, does not determine who decides the framework for education, nor what it should look like.

B-2 – The Framing of Education as the Parents Right

27. Article 26 of the Declaration - reproduced on the cover of this advice - specifically sets out that,

> "Parents have a prior right to choose the kind of education that shall be given to their children."

28. It is important to note that this is set out as a parental ***right***, and not as a parental ***responsibility*** or parental ***duty***. Current Isle of Man legislation, which refers to a duty, needs to be interpreted to take account of this. (My understanding is that the Island's Human Rights Act may have come into force later than its Education Act 2001. Nonetheless, since it is in force, the Education Act 2001 has to be interpreted in a way that is compatible with Convention rights.)

B-3 – The Content of Education

29. I have seen reference in exchanges of correspondence to UK case law regarding the minimum content of a home education curriculum. That case law, in the face of specific challenges, sets out some minimum expectations, but certainly does not establish any principle that the State should determine the educational curriculum of home educators, nor measure their performance against a national curriculum.

30. The UNCRC, while containing no curriculum, is very instructive on the purpose – and by logical extension the nature – of the education to which all children have a right. It is instructive to reproduce it in full:

> Article 29
>
> 1. States Parties agree that the education of the child shall be directed to:
>
> (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
>
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
>
> (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
>
> (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
>
> (e) The development of respect for the natural environment.

31. It may be noted that while education for conformity, for engagement with the modern world, vocational training and education directed towards assessment and measurable attainment are ***not*** mentioned, education around a child individual needs, education to understand rights and freedoms, education to understand and respect difference, and education to respect the environment, ***do*** feature.

32. I have set out in opening some of the perceptions I have encountered on the part of both home educators and local authorities in England about the deficiencies of each other's models of education. I observe at this point that in terms of State compliance with the UNCRC, there is nothing inherently problematic with home education at all; while there are several challenges for State education to overcome to be UNCRC-compliant.

B-4 – The State's Role to Support the Parents

33. I have indicated that differences between home educators and public authorities can come to a head in clashes over who controls education. Here it is instructive, while continuing to draw on the UNCRC, to turn to the dispute that developed in Scotland, over of whether the State had the right to keep an eye on the well-being of all children

through its "named persons" scheme. The Lord Advocate on behalf of the Scottish Government and Parliament specifically advanced in argument that it was complying with the UNCRC in keeping the well-being of all children under its watchful eye:

> 89. In their submissions, the Ministers treated the promotion of children's wellbeing as being in itself a legitimate aim under article 8. They relied on international instruments in which the term "wellbeing" is used, although possibly not in quite as wide a sense as in the 2014 Act. For example, article 3(2) of the UNCRC provides:
>
> > "States Parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."
>
> The Christian Institute & Ors v The Lord Advocate (Scotland) [2016] UKSC 51 (28 July 2016) at paragraph 98

34. Here, the Supreme Court had to consider how this argument matched against legally enforceable human rights (now referring, therefore, to the European Convention on Human Rights). These legally enforceable rights create a framework in which, generally, individuals are entitled to seek assistance from the State, or to choose to manage without unwanted State interference. It is only where it is necessary and proportionate for the State to interfere (under Article 8), and more particularly where the State has a duty to protect a child from inhuman or degrading treatment (under Article 3) that unwanted State interference is generally permitted.

35. Reconciling this legally enforceable framework under which State interference is severely constrained, with the very expansive interpretation from the Scottish government of its right to oversee the well-being of all children, the Supreme Court turned back to the UNCRC:

> 72. As is well known, it is proper to look to international instruments, such as the UN Convention on the Rights of the Child 1989 ("UNCRC"), as aids to the interpretation of the ECHR. The Preamble to the UNCRC states:
>
> > "the family, as the fundamental group of society and the natural environment

> for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."
>
> Many articles in the UNCRC acknowledge that it is the right and responsibility of parents to bring up their children. Thus . . . article 18(1) provides that:
>
> > "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be **their** basic concern." (Emphasis supplied [by the Court])
>
> Articles 27(3) and 18(2) make it clear that **the state's role is to assist the parents in carrying out their responsibilities**, although article 19(1) requires the state also to take appropriate measures to protect the child from all forms of abuse or neglect. [My emphasis]

36. So, the Supreme Court reaffirmed that the primary responsibility for the well-being of children rested with parents; and that the primary responsibility of the State should be interpreted as providing support to parents in the discharge of their responsibilities. And the notion that the State had a right to oversee the well-being of all children received a simple brush off (paragraph 89):

> "The promotion of the wellbeing of children and young people is not, however, one of the aims listed in article 8(2) of the ECHR."

37. That single sentence summarises that the Supreme Court is saying that States do indeed have a role to support and assist parents in promoting the well-being of their children; but that role provides no framework to authorise arbitrary interference.

38. By analogy, I have pointed out that the right to education, like well-being, is first and foremost the child's right (see B-1 above); but the right and the responsibility to secure it, like well-being, is first and foremost that of the parents (see B-2 above). The State has a responsibility to support the parents in the discharge of their role, which it would typically do by making effective State education available for all children who need it.

39. It might also properly offer its support to home educators, and ought particularly to do so if home education is taking place because of the deficiencies of State education. But if it seeks to go further, to control, monitor, or regulate home education, that must be necessary and proportionate in pursuit of a legitimate aim. Moreover, given my opening remarks about reasons for home education frequently matching deficiencies in State education, it would be impossible for the State to discharge its responsibilities of support without first turning its attention to addressing such deficiencies.

Part C – The Current Framework in the Isle of Man

C-1 - Section 1 - General Duties of Department

40. The current framework in the Isle of Man is to be found in the Education Act 2001, as amended by the Education (Miscellaneous Provisions) Act 2009.

41. In many respects, the legislation reflects a long-standing framework, that has broadly been mirrored in England, and that reflects the understanding of human rights previously set out. However, there are significant differences of emphasis, effect and possibly interpretation, which give rise to real concerns about Convention-compliance. One of those goes to the heart of the current concerns of home educators that have been brought to my attention.

42. The 2001 Act opens, in section 1, with affirming a duty upon the authorities to promote education, and to provide a State education system. This is consistent with a human rights framework under which State authorities have duties to secure children's rights (see B-1 above); and to provide support to parents in achieving this (see B-3 above). This is unobjectionable.

43. The following subsection, 1(2) of the 2001 Act mirrors English legislation (Education Act 1996, section 9), in requiring adherence to the principle so far as possible that education reflects parental wishes:

> "In the performance of its functions under this Act the Department shall have regard to the general principle that, so far as is compatible with the provision of efficient education and the efficient use of resources, pupils are to be educated in accordance with the wishes of their parents."

44. This is consistent with the human rights principle that the framing of the child education is a parental right (see B-2 above), and that State authorities assist parents to achieve it (see B-4 above). This, too, is unobjectionable.

45. Two specific reasons are given why parental choices might not be given effect. The first relates to efficient delivery of the State education offering; and the second to the resources that might be required to give effect to parental choice. It is worth unpicking this a little more. Home education does not, in and of itself, interfere with the efficiency of the State education sector, nor does it detract from the resources available to deliver State education.

46. Properly understood, these two reasons given for not giving effect to parental choice have to be seen as constraints upon the support that is given to parents through the State offering. Whether they are appropriate constraints is a pertinent question. But it is clear what they are not: they are not a constraint on the right to home educate; nor are they any indication that the State offering is superior; nor do they provide any basis for moulding home education to the State offering.

47. My opening observations included that home education is all-to-frequently a response to the deficiencies in the State education sector, and my further observation here is that organisational and resource constraints are expressly permitted to constrain the State offering. Great care needs to be taken whenever home education is responding to the deficiencies of the State offering, in terms of support for special educational needs, addressing bullying, truancy, absence of parental choice, etc, before steps are taken to force children back into a system the limitations of which are expressly acknowledged in section 1(2).

C-2 - Section 24 - Duty of Parents and "Education Otherwise"

48. The right to home education in particular is generally accepted to derive from the words "or otherwise" now found in section 24 of the 2001 Act.

49. I pause to observe that it is an unfortunate use of language that the right of a child to an education, and the right of a parent to frame that education (see B-1 and B-2 above) are framed within Isle of Man legislation in the legislative provision setting out a "duty" upon parents. This language might not be significant, ***but for*** the immediately following provision within the Isle of Man legislation, which on its face leaves parents carrying the can for all the inadequacies of the State sector, since these are included within the duty framed. After all, I have shown that in human rights terms parents

rights are also expressed as responsibilities, and I observe that even though the equivalent English legislation now says that parents "shall cause" their child to receive an education, the language of "duty" was there in the original 1944 Education Act, and is still there in the heading of the section. Since parents have a right and responsibility to frame their children's education, and children have a right to receive one, it is not completely unreasonable to frame a duty upon the parent.

50. However, in the Isle of Man, the 2001 Act continues with these words:

> "24(2) The Department shall enforce the duty imposed by subsection (1)."

51. These words are highly unfortunate; and are not mirrored in the English legislation. I have set out the human rights framework in which the primary responsibility of the State is to support and assist parents in giving effect to their rights (B-4 above). Section 24(2) on its face includes no acknowledgement of that. Indeed, it moves from having expressed that parental right as a duty straight into punitive measures ("enforcement") against parents considered to fall short. Moreover, it does so against the backdrop of having already limited the State's own offering. I suggest that the failure to acknowledge the parental right (B-2 above), and the failure to acknowledge the State's duty of support (B-4 above), and instead moving from parental duty straight to State enforcement is not human rights compliant.

52. Moreover, *State* enforcement of a parental duty as expressed here begs more questions than it answers, as a matter of statutory construction. A parent's responsibility to secure an education for their child cannot be enforced without reference to the State education sector. After all, the Act does not require every parents to home educate. Indeed, almost all parents discharge their responsibilities through the State education sector. If that State education sector is failing, then enforcement of that "duty" surely ought to start by putting its own house in order,.

53. The following two sections do, as I have indicated, create an enforcement framework. Suffice to say that, to the extent that it appears on its face to be directed towards parents who are not educating their children that in itself is unobjectionable. Since I have opened by observing (see B-1 above) that education is a child's right, and non-education is not a permitted option, the State can certainly step in where a child is not receiving an education.

54. These two sections do not, on their face, create any right to enforce any particular regime of home education in which the curriculum, the hours in which it is delivered,

the place in which it is delivered, or any other such element is enforceable. Any attempt to apply it thus would fall foul not only of human rights principles, but of section 1(2) of the 2001 Act also.

55. Between these clear propositions (that enforcement where a child receives no education is unobjectionable; but enforcement of the child receiving a particular form of home education is impermissible) is a grey area. It is an area that would benefit from being less grey, so I will attempt to unpick it.

56. I have said (A-2 above) that it appears that that Department is seeking powers to look for a problem, rather than to address a problem. How might it find a problem that it has not found with its existing powers? There are at least these two possibilities:

- By seeking new powers to go looking for the problem, for example powers of access to the child; or to require reporting; or

- By redefining the problem it is looking for, for example by being more prescriptive about what constitutes a "suitable education".

57. I consider each of these in turn, as I consider the following two sections.

C-3 – Section 24A - "The Parents of the Child Must Notify..."

58. Section 24A contains provisions requiring notification of arrangements for the education of a child. I have seen a suggestion that the general wording of the opening words of that section, "***the parent of the child must notify the Department in writing of the arrangements made***" is sufficient to allow the Department to explore the nature of the educational provision.

59. That cannot be right. The section itself is mandatory and prescriptive in relation to what needs to be notified, and when. It contains no broader enabling powers to extend its own notification requirements by means of subsidiary legislation, guidance or discretion. To read that this power enables additional information to be sought is incompatible with the human rights requirements (set out in the box at D-2 below), that lawfulness requires accessibility, foreseeability, precision, and protection from arbitrariness.

60. In any event, the requirement in the 2001 Act is that suitable education is

"efficient full-time education suitable to his age, ability and aptitude and to any special educational needs he may have".

61. I venture to suggest that in the light of Article 29 of the UNCRC (see B-3 above) and what it says about the nature and purpose of education, education is best seen as deficient where it is not directed towards the individual child and their understanding of their rights and freedoms; and is not deficient merely because it does not mirror State education in terms of place, hours, curricular, assessment, audit etc. Moreover, State education ought to be measured against the same criteria found in Article 29.

C-4 – Section 25 - "If It Appears to the Department..."

62. Section 25 contains the detailed provisions for "enforcement of parent's duty". I have already commented that that phraseology is unfortunate (C-2 above) and that any such enforcement must be constrained by the actual terms of the legislation rather than being conceived as a freestanding power of the Department (both C-2 and C-3 above). The actual provision to enforce is triggered by it appearing that a child is not receiving suitable education.

63. The phrase "if it appears" is critical to the understanding of this provision. It reflects an uncomfortable compromise between the rights of parents on the one hand, and the wishes of the State on the other to protect the rights of children. It is an uncomfortable compromise for both parties. For parents, it is uncomfortable because it embodies the principle that their right to home educate is not unfettered, and that there may come a point at which the State steps in. For the State, it is uncomfortable because it embodies the principle that the right of the State to step in is not unfettered, and there may be a point before which it has no such right to step in.

64. While uncomfortable for both parents and authorities, the existence of such a threshold is critical to human rights compliance. Because States can interfere in private life where it is necessary and proportionate to do so; because failure to educate a child is not a permissible option; because states have a human rights duty to protect children from inhuman or degrading treatment, for all these reasons there must come a point at which States can intervene. Equally, however, because interference in family life must not be arbitrary, unnecessary or disproportionate; because the right to direct and choose a child's education is a parental right; because the primary role of the State is to support parents rather than impose upon them, for all these reasons the right of the State to interfere has to be limited.

65. Moreover, the ways in which the rights of the state are limited are sufficiently clear by the phrase "if it appears…". In particular:

- ❖ interference must not be discriminatory, must not be based upon any presumption that a particular characteristic of an individual or family automatically gives rise to concerns;

- ❖ interference cannot be universal either, there can be no presumption of the appearance of concern in every case, since the concern must be triggered by facts specific to the case in issue;

- ❖ interference must be triggered by something, and the decision to interfere must be justiciable (that is to say, the Department cannot say "we thought we had concerns and that is enough", the Court can always go behind such an assertion to find out whether the appearance of concern had a genuine basis).

66. In summary, the existing provisions do leave something to be desired in terms of felicitous use of language, and in particular the unnecessary and misleading section 24(2). Overall though, properly interpreted, they do represent a balance between the competing rights and responsibilities, and can be interpreted in a Convention-compliant way. The better approach to any exercise revisiting the legislation would be to address the infelicitous drafting, and to prevent tightening up the language to prevent authorities overreaching themselves. What is to be feared is a loosening of language or extension of power that would encourage authorities to overreach themselves.

Part D – Changing the Law

67. In opening, I observed that my understanding is that legislative changes, including in relation to home education, have been proposed.

68. In closing, I highlight therefore issues arising from this advice that the legislature (the Tynwald) need to have in mind in any proposed changes:

- ❖ Can existing legislation be interpreted in a Convention-compliant way?
- ❖ what process and rationale is required when considering legislative changes?

D-1 –Can Existing Legislation Be Interpreted in a Convention-Compliant Way?

69. Like its earlier English counterpart, the Human Rights Act 2001 requires legislation to be interpreted where possible, in a Convention-compliant way. That would mean:

- That State authorities cannot "blame-shift", by taking punitive action against parents who are dissatisfied with the State offering, while deficiencies in that offering are not addressed; and

- That State authorities acknowledge they do not have authority to monitor children's education any more than to monitor their well-being; the authority to do so may arise from a partnership relationship between parent and State in educating the child; or from the existence of specific concerns about non-education that trigger the State's duty to protect a child from not being educated; but cannot arise simply because the intention to home educate has been notified, or because home education differs from State education; and

- That the purpose of education, both home education and State education should be understood to be the fulfilment of the potential of each individual child, including in particular their understanding of their rights and freedoms.

D-2 – What Process and Rationale Is Required When Changing Legislation?

70. States, through their international human rights obligations, commit to actively legislating to bring about these obligations (see UNCRC at Article 4) and to finding the necessary resources to do so (see UNCRC, again at Article 4):

> Article 4
>
> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources. . .

71. Changes in legislation, like any other interference with human rights, need to fulfil all the staged requirements set out in the "named persons" case already explored. As there are no specific proposals to evaluate, I do not attempt to do so. Suffice to say if the nature of those proposals were, as those who have asked for this advice fear, to impose a blanket requirement upon home educators to report upon the nature of the

education delivered to their children, such proposals are unlikely to be lawful. By way of reminder and in conclusion, the various requirements for lawfulness against which any proposals need to be measured, are set out in the box below [paragraph numbers in square brackets]:

Requirements for Convention-compliant legislation, taken from The Christian Institute & Ors v The Lord Advocate (Scotland) [2016] UKSC 51 (28 July 2016)

"In accordance with the law"

[79]. In order to be "in accordance with the law" under article 8(2), the measure must. . .

- have some basis in domestic law. . .
- be accessible to the person concerned. . .
- [be] foreseeable as to its effects. These qualitative requirements of accessibility and foreseeability have two elements.
    - First, a rule must be formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his or her conduct. . .
    - Secondly, it must be sufficiently precise to give legal protection against arbitrariness. . .
- [80] . . .this court has explained that the obligation to give protection against arbitrary interference requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. This is an issue of the rule of law and is not a matter on which national authorities are given a margin of appreciation. . .
- [81] In deciding whether there is sufficient foreseeability to allow a person to regulate his or her conduct and sufficient safeguards against arbitrary interference with fundamental rights, the court can look not only at formal legislation but also at published official guidance and codes of conduct. . .

"Proportionate Interference"

[90] It is now the standard approach of this court to address the following four questions when it considers the question of proportionality:

- ❖ whether the objective is sufficiently important to justify the limitation of a protected right,
- ❖ whether the measure is rationally connected to the objective,
- ❖ whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
- ❖ whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (ie whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure).

Allan Norman July 2017

RE. THE EDUCATION BILL 2019

OPINION

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1. We are instructed by Tristram Llewellyn Jones and Voirrey Baugh. Mr Llewellyn Jones and Mrs Baugh are parents who home educate their respective school age children in the Isle of Man.

2. We are instructed to consider the extent of compatibility with the Human Rights Act 2001 of key proposals in the Education Bill 2019 which deal with, or impact upon, home education.

Home education: the current statutory framework

General duties of the Department (section 1)

3. Under section 1(1) of the Education Act 2001 (**"EA"**), the Department of Education, Sport and Culture (**"DESC"**) has a duty to promote the education of persons, and in particular persons under the age of 18, resident in the Island;[1] and, for that purpose, to provide efficient and comprehensive educational services in the Island.[2] Under section 1(2), in the performance of its functions under the EA, the Department shall have regard to the general principle that: ***"so far as is compatible with the provision of efficient education and the efficient use of resources, pupils are to be educated in accordance with the wishes of their parents"*** (emphasis added).

Duty of parents of children of compulsory school age (section 24)

4. Under section 24(1), it is the duty of the parent of every child of compulsory school age[3] to cause him to receive: ***"suitable education, either by regular attendance at school[4] or otherwise"*** (emphasis added). *"Suitable education*" is defined (in relation to a child)[5] as: *"efficient full-time education suitable to his age, ability and aptitude, and to any special educational needs he may have"*. Under section 24(2), the DESC has a duty to enforce the parent's duty under section 24(1).

Duty to notify Department of arrangements for child's education (section 24A)

5. Under section 24A(1), where a child of compulsory school age is not a registered pupil, the parent must: ***"notify the Department in writing of the arrangements made for the child to receive education"*** (emphasis added) (a **"section 24(A)(1) notification"**).

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1 Section 1(1)(a)
2 Section 1(1)(b).
3 Any age between 5 and 16 years: section 23(1).
4 Defined at section 24(3).
5 Likewise at section 24(3).

6. Under section 24A(2), such notification must state the full name, address and date of birth of the child;[6] the full name and address of the parent;[7] whether the child is receiving or is to receive education by regular attendance at school (in the Island or elsewhere);[8] if so, the name and address of the school;[9] if not, the name and address of the person(s) by whom it is being or is to be given.[10]

7. Under section 24A(3), the parent of a child must give a section 24A(1) notification: (a) within 3 months after the child attains the compulsory school age;[11] becomes resident in the Island;[12] or ceases to be a registered pupil at a school;[13] or (b) at any time, within 21 days after being required by the Department to do so by notice in writing[14] (a **"section 24A(3)(b) notice"**).

8. Under sections 24A(4)-(5), a parent who, without reasonable excuse, fails to give a section 24A(1) notification within the time allowed,[15] or fails to comply with a section 24A(3)(b) notice, is guilty of an offence and liable on summary conviction to a fine not exceeding £1,000. Under section 24A(6), proceedings for offences under subsections (4)-(5) shall only be brought by the DESC.

9. Under section 24A(7), proceedings for a section 24(A)(4) offence may be commenced within: (a) 6 months from the date on which evidence, sufficient in the opinion of the DESC to justify a prosecution, comes to its knowledge;[16] or (b) 2 years after the commission of the offence,[17] whichever period last expires. Under section 24A(8), for the purpose of section 24A(7), a certificate signed on behalf of the DESC as to when such evidence came to its knowledge is deemed conclusive; and there is a rebuttable presumption that a certificate purporting to be so signed is so signed.

<u>Enforcement of parents' duty (section 25)</u>

10. Under section 25(1), if it appears to the DESC that a child of compulsory school age in the Island is not receiving suitable education, either by regular attendance at school or otherwise, it shall serve a notice in writing on a parent of the child, requiring him to satisfy it within the period specified in the notice (not being less than 15 days from the date of service of the notice) that the child is receiving such education (a **"section 25(1) notice"**).

11. Under section 25(2), a section 25(1) notice may require the parent on whom it is served to submit the child for examination or assessment for the purpose of the notice. Under section 25(3), if such parent fails to satisfy the DESC, within the period specified, that the child is receiving suitable education[18] and in the opinion of the DESC it is expedient that the child should attend school,[19] the DESC shall make and serve on the parent a further notice in writing. Such further notice shall inform the parent of its intention (after the expiration of the period specified in the notice, not less than

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6 Section 24A(2)(a).
7 Section 24A(2)(b).
8 Section 24A(2)(c).
9 Section 24A(2)(d).
10 Section 24A(2)(e).
11 Section 24A(3)(a)(i).
12 Section 24A(3)(a)(ii).
13 Section 24A(3)(a)(iii).
14 Section 24A(3)(b).
15 Section 24A(4).
16 Section 24A(7)(a).
17 Section 24A(7)(b).
18 Section 25(3)(a).
19 Section 25(3)(b).

21 days from the date of service) to make a *"School Attendance Order"* (**"SAO"**);[20] to specify the school which the DESC intends to name in the SAO (and if it thinks fit, one or more schools which it regards as suitable alternatives);[21] and to state the effect of section 26.[22]

School attendance orders (SAO's) (sections 26-28)

12. Under section 26(1), after the expiry of the notice period under section 25(4)(a), the DESC may make and serve on any parent of the child an SAO, in the prescribed form, requiring the parents of the child to cause him to become a registered pupil at a school named in the SAO. Under section 26(8), subject to any variation made by the DESC and unless revoked, the SAO shall continue in force for so long as the child is of compulsory school age.

13. Under section 27(2), if the parent of a child subject to an SAO applies to the DESC, stating that arrangements have been made for the child to receive suitable education otherwise than at school, specifying those arrangements, and requesting that the SAO be revoked on that ground, the DESC shall comply with the request, unless of the opinion that the arrangements are not satisfactory.[23] Under section 27(5), if the DESC refuses such request, it shall give the parent notice in writing stating its opinion,[24] specifying its reasons[25] and the period (not less than 21 days from the date of service) in which an appeal may be brought.[26] Under section 27(6), a parent may appeal to a summary court against the refusal on the ground (*inter alia*) that satisfactory arrangements have been made for education of the child otherwise than at school.[27] Under section 27(7), on appeal, the court may confirm the refusal, or revoke the SAO.[28] Under section 27(8), the DESC may (with the parent's consent) vary,[29] or revoke,[30] the SAO, if it considers it expedient.

14. Under section 28(1), where an SAO is in force, any parent of the child who fails to comply with its requirements is guilty of an offence and liable on summary conviction to a fine not exceeding £1,000. Under section 28(2)(b), in proceedings for such an offence, it is a defence for the accused to show that he is causing the child to receive suitable education otherwise than at school.

Education supervision orders (ESO's) (section 30)

15. Under section 30(1), on the application of the DESC, a juvenile court, if satisfied that a child is of compulsory school age[31] and not receiving efficient full-time education suitable to his age, ability and aptitude,[32] may make an *"Education Supervision Order"* (**"ESO"**), putting him under the supervision of the Department of Health and Social Care. Under section 30(2)(a), where an SAO is in force and is not being complied with, there is a rebuttable presumption that the child is not receiving efficient full-time education. Section 30(4) and Schedule 5 provide further as to ESO's.

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20 Section 25(4)(a).
21 Section 25(4)(b).
22 Section 25(4)(c).
23 Section 27(2)(2).
24 Section 27(5)(a).
25 Section 27(5)(b).
26 Section 27(5)(c).
27 Section 27(6)(a).
28 Section 27(7)(a).
29 Section 27(8)(a).
30 Section 27(8)(b).
31 Section 30(1)(a).
32 Section 30(1)(b).

Data relating to home education provisions in the EA

16. In reply to FoI Request IM93642I, on 26th July 2017, the (then) Department of Education and Children (**"DEC"**) indicated that:-

    16.1. *"less than five"* written notices had been served in the last 2 academic years under section 25(1) of the EA;
    16.2. 0 children educated *"otherwise"* had been submitted for examination or assessment under section 25(2) of the EA;
    16.3. 0 SAO's had been served to a parent under section 26(1) of the EA;
    16.4. 0 SAO's had been subsequently revoked under section 27(2) of the EA; and
    16.5. 0 parents had been convicted of an offence under section 28(1) of the EA.

17. In reply to a Tynwald question on 19th February 2019, the Minister for the DESC indicated that:-

    17.1. no written notices had been issued for the academic year 2017/18 or the 2018/19 to date;
    17.2. the statistics at paragraphs 16.2-16.5 above were unchanged.

18. The Minister added further comments, including:-

> ***"For children who attend school, the [DESC] can see if a child is not receiving a suitable education, but for those children who are home educated the [DESC] doesn't know if a suitable education is being delivered"*** (underlining added).

19. In reply to FoI Request IM93752I, on 26th July 2017, as to whether the DEC had made *"any study"* on home schooling on the Isle of Man, the DEC stated: *"no such study has been carried out"*.

20. In reply to FoI Request IM99328I, on 22nd August 2017, as to the number of children currently registered as home educated, the DEC stated the totals as: Primary: 35; Secondary: 22; Total: 57.

21. In reply to a House of Keys question on 29th January 2017, as to how many children were registered as home educated in each year from 2008 to the present, the Minister for the DESC answered:-

> ***"The [DESC] only keeps data on the children of compulsory school age, who are currently registered as home educated. This registration under the [EA] is only required when the parents decide to home educate. The figures below are not definitive as children may move off Island or register at school on/off Island and the parents do not inform the [DESC] as they are currently not required to under the [EA]. Some parents will also let us know that they are still home educating so the year in the table below is the year the [DESC] last received notice from the parents. The [Bill] will require parents who choose to home educate to inform the [DESC] of any changes to these arrangements. From this database we currently have 141 children who are currently home educated."***

22. The numbers were then itemised as follows: 2009: 1; 2010: 7; 2011: 6; 2012: 9; 2013: 4; 2014: 3; 2015: 17; 2016: 29; 2017: 26; 2018: 39. Total: 141.

Consultation document (October 2017)

23. The DESC published a *"Consultation document" "Major changes in the new Education Bill"*[33] in October 2017. In it, the DESC stated:-

> ***"Introduction***
>
> ***Our proposal***
>
> ***We want to ensure that education legislation:***
>
> - ***is up to date***
> - ***covers education provision for lifelong learning***
> - ***complies with safeguarding requirements***
> - ***enables the Department to deliver an education provision that meets the needs of Isle of Man residents and businesses.***
>
> ***…***
>
> ***Home Education***
>
> ***…***
>
> ***At present the Department has no way of ensuring that parents who choose to home educate meet the suitable education provision in Section 24 of the Education Act 2001.***
>
> ***Home education is not, in itself, a risk factor for abuse or neglect. However, there is potential that these children can become 'invisible' and in these cases there is a safeguarding risk of isolation from professionals. The aim is to establish an appropriate scope of duties for the Department to ensure that children do not go unseen.***
>
> ***The Department is seeking to add another subsection to the existing clause 24 to allow the Department to introduce regulations which may require parents to provide evidence to the Department of the Education of the educational provision their children are receiving"*** [underlining added].

24. In a *Summary analysis of responses of the public consultation on the principles of the Education Bill 11/10/17 to 22/11/17 including Department response – January 2018*,[34] the DESC stated:

> ***"The new Bill will contain enabling clauses to allow us to determine what will be required from parents who choose to home educate. It is envisaged that we will work with these parents to form the guidelines we and the Home Educators will work within"*** [underlining added].

Key proposals in the Education Bill 2019 ("the Bill") as to home education

25. The effect of the Bill would be to repeal the EA and the Education (Miscellaneous Provisions) Act 2009. Key proposals in the Bill as to home education are set out in this section. They are further considered, below, as to the extent of their compliance with the Human Rights Act 2001 (**"HRA"**).

(i) Principles of education (clause 6 of the Bill) / General duty of Department (clause 7 of the Bill)

26. Clause 6(1) of the Bill sets out: *"the fundamental principles of education in the Island"*.[35] Under clause 6(2), a public authority: *"must have regard to the fundamental principles when exercising a function under this Act or any other function [sic] relation to education"*.

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33 https://consult.gov.im/education-and-children/changes-new-education-bill-consultation/supporting_documents/Major%20changes%20to%20the%20Education%20Bill%20consultation%20document.pdf

34 https://consult.gov.im/education-and-children/changes-new-education-bill-consultation/supporting_documents/Report%20on%20consultation%20outcomes%20%20January%2018%20summary_.pdf

35 Clause 6(1).

27. Under clause 6(3) of the Bill, one of the 9 such fundamental principles is that: *"children, young persons and their parents should have **a reasonable degree of influence** over the kind of education which is provided to them"* [emphasis/underlining added].

28. Clause 7(4)(d) of the Bill provides that, in exercising functions under the Act, the DESC: *"**must aim…: to take account of** the wishes of children, young persons and their parents"* [emphasis/underlining added].

29. The above proposals would constitute significant changes to the current general duty on the DESC at section 1(2) of the EA (see paragraph 4, above). They would significantly downgrade the current statutory primacy of parental wishes, as a general principle to which the DESC must mandatorily have regard, when exercising its statutory functions (subject only to the existing caveat: "*so far as is compatible with the provision of efficient education and the efficient use of resources"*), to:-

    29.1. the level of: *"a reasonable degree of influence"* (see clause 6(3) of the Bill);
    29.2. such designation being also shared by parents with children and young persons;
    29.3. such designation also constituting only one of 9 fundamental principles to which (for example) the DESC must have regard; and, in addition (see clause 7(4)(d) of the Bill) to:-
    29.4. a factor which the DESC must: *"aim… to take account of"*;
    29.5. such designation likewise also being shared with the wishes of children and young persons.

30. The above proposals as to parental wishes (**"Key Proposal # 1"**) would apply generally (and not only to home education).

Duty to arrange for education (clause 62 of the Bill)

31. Section 24(1) of the EA (see paragraph 4, above) would, in effect, be replaced by clause 62 of the Bill (*"Duty to arrange for education"*). Under clause 62(1) of the Bill, each parent of a child of compulsory school age must ensure that the child receives suitable education: ***"whether or not by regular attendance at a school"*** (emphasis added). *"Suitable education"* is defined at clause 62(2). The DESC is required to enforce the clause 62(1) duty in accordance with the Act's provisions.[36]

Duty to notify Department of arrangements otherwise than at school (clause 64 of the Bill)

32. Under clause 64(2)(e) of the Bill, section 24A of the EA is amended to include a new requirement by a parent of a child of compulsory school age who is not a registered pupil to provide the DESC with: *"**any other information requested by the Department**"* (emphasis/underlining added) (**"Key Proposal # 2"**).

33. Under clause 64(4)(a) of the Bill, section 24A(4) of the EA is amended to require notification during the period of 12 months before the child reaches compulsory school age.

[36] Section 62(3).

Enforcement: notice requiring information (clause 65 of the Bill)

34. Under clause 65(1) of the Bill, section 25 of the EA is amended to remove, from the words *"suitable education"*, the existing qualification: *"either by regular attendance at school **or otherwise**"* (emphasis/underlining added).

35. Under clause 65(2) of the Bill, the DESC is permitted to issue: *"guidance as to the criteria to which it will have regard in determining the suitability of education for the purposes of subsection [sic]"*. Such guidance may, in particular, make provision by reference to:-

> ***"(a) educational outcomes (including but not limited to examinations and qualifications);***
> ***(b) educational methods and processes;***
> ***(c) opportunities for social interaction and integration"*** [emphasis/underlining added] (**"Key Proposal # 3"**).

School attendance order: pre-issue procedure (clause 70 of the Bill)

36. Clause 70(2) of the Bill would substitute: *"If the Department believes that the child should attend school"* (in the new equivalent to the current section 25(3) of the EA), from the existing text: *"in the opinion of the Department it is expedient that the child should attend school"* (underlining added).

School attendance order: duration and revocation (clause 73 of the Bill)

37. Clause 73(4) of the Bill would substitute: *"The Department must revoke the [SAO] on an application [by a parent on the grounds that arrangements have been made for the child to receive suitable education otherwise than at school] **unless not satisfied that the arrangements are satisfactory**"* (in the new equivalent to the current section 27(2) of the EA), from the existing text: *"the Department shall comply with the request [to revoke the SAO], **unless it is of the opinion that those arrangements are not satisfactory**"* (emphasis/underlining added) (**"Key Proposal # 4"**).

38. Thus the bar for parents to reach to revoke a SAO has been elevated by reversal of the current test.

Contravention of school attendance order (clause 74 of the Bill)

39. Clause 74(1) of the Bill would increase the maximum penalty for failure to comply with a SAO to 6 months' custody or a level 5 fine (**"Key Proposal # 5"**).

40. Under clause 74(4) of the Bill, proceedings for an offence under clause 74 may only be brought by the DESC.

Definition: "home education" (clause 77 of the Bill)

41. Clause 77 of the Bill defines home education (*"education provided to a child in accordance with a decision by the child's parent to arrange for the child to be educated otherwise than at a school or college"*).

Departmental assessment (clause 78 of the Bill)

42. Under clause 78(1) of the Bill, the DESC: ***"must assess the educational development of children in the Island receiving home education"*** (emphasis/underlining added) (**"Key Proposal # 6"**) (see also section 78(5) below).

43. Under clause 78(2) of the Bill, the DESC may provide advice and information on request to a parent of a child receiving home education.

44. Under clause 78(3) of the Bill, the DESC: ***"must make arrangements to allow children receiving home education to have access to school or college facilities to the extent that the Department thinks appropriate"*** (emphasis added) (**"Key Proposal # 7"**).

45. Under clause 78(4) of the Bill, the DESC: ***"must maintain a register of children in respect of whom the DESC is notified under section 64 that the child is being home educated"*** (emphasis/underlining added).

46. Under clause 78(5) of the Bill, the DESC: ***"must carry out assessments from time to time of the educational development of each child receiving home education"*** (emphasis/underlining added) (**"Key Proposal # 6"**) (see also section 78(1), above).

47. Under clause 78(6) of the Bill, the assessment may include assessing the child's work;[37] interviewing the child;[38] or interviewing the child's parent.[39]

48. Under clause 78(7) of the Bill, the assessment may take place: in the child's home with the consent of the child's parent;[40] or at any other place agreed between the DESC and the child's parent.[41]

49. Under clause 78(8) of the Bill, a parent of a child receiving home education: *"**must comply with any request by the Department to provide information for the purposes of the assessment**"* (emphasis added) (**"Key Proposal # 8"**).

50. Under clause 78(9) of the Bill, the DESC must make *"regulations about the methodology of assessments"* under this section.

Summary of the key proposals

51. The key proposals of the Bill are summarised below:-

51.1. downgrading the weight to be attached to parental wishes (Key Proposal # 1);

51.2. the imposition of a duty upon a parent of a home educated child to provide the DESC with any information requested (Key Proposal # 2);

51.3. the DESC being enabled to issue guidance as to outcomes, methods and processes, opportunities for social interaction and integration (Key Proposal # 3);

37 Section 78(6)(a).
38 Section 78(6)(b).
39 Section 78(6)(c).
40 Section 78(7).
41 Section 78(8).

51.4. the change to the applicable test to reversing a SAO (Key Proposal # 4);

51.5. the increase of the maximum penalty for breaching a SAO increased to custody/Level 5 fine (Key Proposal # 5);

51.6. the imposition of a duty upon DESC to carry out assessments of the educational development of home educated children (**Key Proposal # 6**);

51.7. the imposition of a duty upon the DESC to allow home educated children access to school/college facilities (**Key Proposal # 7**); and

51.8. the imposition of a duty upon a home educated child's parent to comply with DESC request to provide information (Key Proposal # 8).

Compatibility of the key proposals with the HRA

Relevant provisions of the HRA

52. It is unlawful for a public authority to act incompatibly with a Convention right: section 6(1) of the HRA. The DESC acts, generally (and would act, if the Bill were enacted), as a *"public authority"*.[42]

53. The key proposals of the Bill set out above primarily engage the following ECHR provisions:–

53.1. Article 8 (*"Right to respect for private and family life, home and correspondence"*);
53.2. Article 9 (*"Freedom of thought, conscience and religion"*); and
53.3. Article 14 (*"Prohibition of discrimination"*) of the ECHR 1950.

54. Article 6 (*"Right to a fair trial"*) of the ECHR is also engaged. Article 6 is primarily relevant to the issue of proceedings being brought by the Department under clause 74(4) of the Bill (see paragraph 79 below).

55. Article 2 of the First Protocol (*"Right to education"*) is also engaged, albeit that Article 2 is subject to a reservation.[43]

Article 8 & Article 9

56. Article 8 provides:-

> ***"1. Everyone has the right to respect for his private and family life, his home and his correspondence.***
>
> ***2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."***

57. Collectively, the key proposals in the Bill engage each individual element of Article 8(1).

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[42] A public authority does not include a person exercising functions in connections with proceedings in Tynwald, the Legislative Council or the House of Keys: section 6(4) of the HRA.

[43] And is accepted: *"only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure in the Isle of Man"*.

58. The Supreme Court has acknowledged generally, when considering Article 8, that: *"Within limits, families must be left to bring up their children in their own way"* (*The Christian Institute & others v The Lord Advocate* [2016] UKSC 51[44]).

59. Manx case-law has emphasised, for example, the need for proportionality when considering Article 8, in the context of the making of a care order: see *X v DSHC & others* (SoGD) (23rd June 2017).[45]

60. Article 9 provides:-

> ***"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.***
>
> ***2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".***

61. Article 9(1) enshrines a: *"freedom… to manifest… belief… in…* (in this context, a particular type of) *teaching"* (ie. home education). Such freedom is subject to the limitations set out in Article 9(2).

62. Article 8(1) and Article 9(1) enshrine qualified, not absolute, rights. In each case, the limitation must be: *"prescribed by law"*; pursuant to a *"legitimate aim"* (ie. those aims set out in Article 8(2) and Article 9(2)); and *"necessary in a democratic society".*[46]

63. For a limitation to such a right to be *"prescribed by law"*, it must: (1) have some basis in domestic law (and be compatible with the rule of law, so that there is: *"a measure of legal protection in domestic law against arbitrary interference by public authorities with the right safeguarded"*[47]); (2) the law must be adequately accessible; and (3) the act's legal consequences must be reasonably foreseeable.[48]

64. As to *"necessary in a democratic society"*, the ECtHR stated in ***Zehentner v Austria*** (2011) 52 EHRR 22 at § 56:-

> ***"… an interference will be considered necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention…"*** [underlining added].

65. As to proportionality, the Supreme Court in *The Christian Institute* stated:-[49]

> ***"90. It is now the standard approach of this court to address the following four questions when it considers the question of proportionality:***
>
> ***(i) whether the objective is sufficiently important to justify the limitation of a protected right,***

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44 At paragraph 73.
45 https://www.judgments.im/content/J1938.htm (at paragraph 168).
46 As to Article 8, see *Department of Infrastructure v Clarkson & others* (CHP 2010/107) (judgment 26th April 2012) https://www.judgments.im/content/J1236.htm (at paragraph 116).
47 *Malone v United Kingdom* (1984) 7 EHRR 347, at 373.
48 *Sunday Times v United Kingdom* (1979) 2 EHRR 245, at 271.
49 At paragraph 90.

(ii) whether the measure is rationally connected to the objective,

(iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

(iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (ie whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure)."

66. Where the ECHR identifies the legitimate objective of a limitation to a right, the respondent must establish that it was, in good faith, seeking to advance one or more of those objectives.[50]

Article 14

67. Article 14 provides:

> ***"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".***

68. Article 14 is engaged due to the clear potential for home educators to be discriminated against, in the enjoyment of their Article 8(1) and/or Article 9(1) rights.

Discussion

69. As drafted, the overall scheme of the Bill, insofar as it relates to regulation of home education, is, in our opinion, generally prescriptive towards coercive (especially considering Key Proposal # 5). To date, however, even assuming, for now, the existence of a legitimate aim (see paragraph 70 below), we have not been instructed as to the advancement, by the DESC, of a *"pressing social need"* sufficient to warrant the proposed far-reaching level of interference with the Article 8(1), Article 9(1) and Article 14 rights of parents on the Isle of Man who choose to home educate their school-age children. Put concisely, the proposals fail the proportionality test.[51]

70. The DESC has apparently offered two broad justifications for the key proposals: first, a *"safeguarding risk of isolation from professionals"*;[52] and, secondly, "*for those children who are home educated the [DESC] doesn't know if a suitable education is being delivered".*[53] However, the DESC already enjoys a wide range of statutory (and criminal) powers[54] in order to enable it to fulfil its existing section 1(1) duty. The statistics set out above[55] clearly demonstrate the DESC's negligible requirement to use its existing powers under the EA, over a number of years, and do not suggest a *"pressing social need"*. Indeed, they suggest quite the reverse.

71. Further, the DESC had not commissioned *"any study"* on home education, at least as of July 2017, shortly before the present proposals were first published. If, for example, such a study had been commissioned, and had raised (for example) serious evidence as to non-compliance by the DESC

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50 Article 18 of the ECHR, and section 1(1) of the HRA.
51 See especially questions (iii) and (iv) of the *Christian Institute* formulation.
52 Paragraph 18, above.
53 Paragraph 23 above.
54 Paragraphs 3-15 above.
55 Paragraphs 16-17.

with its existing duty under section 1(1) of the EA as a result of insufficient regulatory or enforcement powers, our opinion might have differed. As currently drafted, however, the Bill primarily appears to seek to impose, via primary legislation, a particular philosophy or approach towards the provision of home education on the Isle of Man (ie. that home education is only, and exceptionally, to be permitted if subject to prescriptive, and potentially open-ended, regulation and enforcement). Such approach fails to recognise the significant level of legal protection afforded, under Article 8(1), Article 9(1) and Article 14 of the ECHR, to those who practise home education. As matters stand, Isle of Man home educators would be discriminated against in the enjoyment of their Article 8(1) and Article 9(1) rights. Such discrimination violates Article 14.

72. To the extent that a tension exists as between the DESC's duty, under section 1(1) of the EA, and the rights afforded under Article 8(1), Article 9(1) and Article 14, the Bill, as currently drafted, falls significantly short of resolving such tension in a manner which achieves compatibility with such rights.

73. We turn to the individual Key Proposals in the Bill.

74. In our opinion, in isolation, neither Key Proposal # 1 nor 4 is, of itself, incompatible with Article 8(1), Article 9(1) or Article 14. However, for the reasons set out at paragraphs 69-72 above, when in combination, to some extent, with Key Proposal # 5, but in particular with Key Proposals # 2, 6 and 8, in our opinion it is more doubtful whether such proposals are compatible with Article 8(1), Article 9(1) or Article 14.

75. In our opinion, in isolation, Key Proposal # 3 is similarly not necessarily, of itself, incompatible with Article 8(1), Article 9(1) or Article 14; but it becomes so, in combination with, to some extent, Key Proposals # 1, 4 and 5, and certainly with Key Proposals # 2, 6 and 8.

76. In our opinion, Key Proposals # 2, 6 and 8 fall very significantly short of compliance with Article 8(1), Article 9(1) and Article 14, for the reasons set out at paragraphs 69-72 above. The difficulties with Key Proposals # 2 and 8 are exacerbated by the open-ended and potentially far-reaching scope of the proposed powers, which reinforces that they are not compatible with Article 8(1), Article 9(1) or Article 14.

77. Further, in our opinion, it is the combination of any or all of such proposals with Key Proposal # 5 – which raises the prospect of a custodial penalty in default – which raises particular concern as to HRA compatibility generally. Key Proposal # 5 is not, in our opinion, compatible with Article 8(1), Article 9(1) or Article 14, when available to be used, in particular, in combination with Key Proposals # 2 and/or 6 and/or 8.

78. In our opinion, it is difficult to reach a definitive conclusion on whether Key Proposal # 7 complies with Article 8(1), Article 9(1) or Article 14. Clause 78(3) is, it has to be said, ambiguously worded. If the provision, once enacted, is used or interpreted to connote a requirement (rather than merely a permission) then, in our opinion, the position is clearer, and in our opinion, the proposal would not comply with Article 8(1), Article 9(1) or Article 14.

Article 6

79. In our opinion, it is questionable as to whether the DESC's existing power of prosecution complies with Article 6(1), given the DESC's additional, and potentially conflicting, role in providing evidence sufficient to justify prosecution.

The Equality Act 2017 ("the 2017 Act")

80. We have not been instructed to opine on compliance of the Bill with the 2017 Act, which is not yet fully in force. However, with regard to the protected characteristic of *"belief"* (see section 11(2)) and (for example) the prohibition on direct discrimination at section 14(1), there is much in the Bill which would likewise, and similarly, engage the provisions of the 2017 Act.

Conclusion

81. For the above reasons, we have concluded that, as drafted, the Key Proposals set out above do not comply with Article 8(1), Article 9(1) or Article 14 of the ECHR. Available options to challenge any alleged breach of Convention rights, within the Bill, would include: (a) seeking to amend the Bill, prior to, or during, its consideration in Tynwald; or (b) if the Bill were to be enacted as drafted, for any person directly affected, claiming that he or she is or would be a *"victim"* of the alleged unlawful act, to bring proceedings against the DESC, under section 7(1) of the HRA, seeking a declaration of incompatibility (under section 4(2)).

Quinn Legal
30 Ridgeway Street
Douglas
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IM1 1EL

18th March 2019

Dear [redacted]

Your email below refers.

I have considered the Quinn Legal opinion dated 18 March 2019 said to address *"the extent of compatibility with the Human Rights Act 2001 of key proposals made in the Education Bill 2019 which deal with, or impact upon, home education".* I have had the benefit too of discussing the issues with [redacted], Chief Legislative Drafter .

First, the opinion treats the provision within s1(2) of the 2001 Act that, as establishing what it terms "the statutory primacy of parental wishes" which is a distortion. Instead s 2(1) requires the Department to have regard to parental wishes within the context of its broader objective of providing efficient education and the efficient use of resources. Section 2(1) provides: " In the performance of its functions under this Act the Department shall have regard to the general principle that, so far as is compatible with the provision of efficient education and the efficient use of resources, pupils are to be educated in accordance with the wishes of their parents"

While not mentioned by Quinn Legal, in the same way, by its Human Rights Act 2001 Tynwald's enshrinement of the Convention right (to education) as set out in Article 2 Protocol 1, that *"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions"* is subject to the express designated reservation (see Schedule 3 Human Rights Act 2001) that "*the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure in the Isle of Man".*

Thus the provisions within the Education Bill 2019 providing that "children…and their parents should have a reasonable degree of influence over the kind of education which is provided…" (clause 6(3)) and that the Department "must aim… to take account of the wishes of the children and their parents…" does not constitute a wholescale departure from the existing position. Rather, it has long been the case that he Department will take into account the views of parents, but to regard those views as having some kind of "primacy" or paramountcy to the exclusion of the interests of the State is wrong. The Quinn Legal opinion acknowledges the Department's practice of facilitating home schooling over many years.

Quinn Legal then address other provisions within the 2019 Bill which combine – not to prevent or prohibit home schooling – but to introduce additional provision for the Department's regulation and oversight of same, something for which Amanda Spielman has argued in her role as HM Chief Inspector of Education for England, advocating a proper registration system (see, *inter alia*, the article in the Times Educational Supplement of 31 October 2018). In the view of Quinn Legal various of such proposals either contravene or potentially contravene Convention rights as enshrined within the Human Rights Act 2001 with particular mention made of Articles 8, 9, 14 as well as Articles 2 and 6: it is said that all of the Bill's proposals highlighted by Quinn *Legal "engage each element of Article 8" and the author refers to the Supreme Court decision in The Christian Inst. & others v The Lord Advocate [2016] UKSC 51 wherein "Within limits, families must be left to bring up their children in their own way."* This observation is probably *obiter,* given the actual result in The Christian Institute case, but in any event the key words here, are "within limits" which echo the effect of the designated reservation mentioned above.

The right of respect for family and private life (article 8) is qualified by the provision of article 8(2) which permits interference necessary in a democratic society for national security, public safety, economic well-being …protection of public health, order or morals or the protection of the rights and freedoms of others. The protection of the economic well-being of the Island would seem to be a sufficient justification for establishing in the case of those educated at home that their education will enable them to contribute effectively to society. Moreover intervention in the private lives of the parents is justified to ensure the safety and wellbeing of their children. Article 8 was, of course, at the heart of The Christian Institute case, but the level of intervention here is very different from that proposed in the CI case (indeed, so different as to be entirely distinguishable). Moreover the circumstances in which intervention will occur will be easily ascertainable because of the obligation to make regulations under clause 80(6).

In my respectful view the provisions within the 2019 Bill as identified by Quinn Legal do not breach the Articles - nor A2P1 - of the ECHR or indeed any other Convention right as asserted or at all and I do not regard the Bill as being incompatible with the Convention. I have regard for the following:

- It is well-established that the national authorities have a wide margin of appreciation in implementing social and economic policies, and that their judgment as to what is in the public or general interest will be respected unless that judgment is 'manifestly without reasonable foundation' See *James v United Kingdom* (1986) 8 EHRR 123 at [46]. Our own Appeal Court has just recently reiterated (in the context of a human rights challenge) that it is "vital" that there be due regard "to the fact that national authorities have a wide margin of appreciation in implementing social and economic policies and that the State's judgment on such issues should be respected unless it is manifestly without reasonable foundation": see Alder v Lloyds Bank International and Attorney General – judgment 18 January 2019 at paras 92 and 93 (https://www.judgments.im/content/J2475.htm).
- The Strasbourg court takes a broad view of what constitutes education, noting in *Campbell and Cosans v. United Kingdom* (1982) 4 EHRR 293 at 41 as follows: "*The right to education guaranteed by the first sentence of Article 2 (P1-2) by its very nature calls for regulation by the State, but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols"*
- Domestically (UK) the House of Lords considered A2P1 *Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363: Lord Bingham observed that the guarantee in A2P1 was *"[I]n comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil … The test, as always under the Convention, is a highly*

pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?'

- On 10 January 2019, the European Court of Human Rights unanimously ruled, in the case of *Wunderlich v. Germany* (App. no.: 18925/15) (https://hudoc.echr.coe.int/eng#{"itemid":["001-188994"]}) that the German ban on homeschooling did not breach the right to private and family life under Article 8 of the European Convention on Human Rights. Surprisingly Quinn Legal appear not to be aware of this decision which is not mentioned in its opinion - the ECHR's judgment is wholly at odds with the Quinn Legal conclusion that the proposed measures within the 2019 Bill "fail the proportionality test": the Court confirmed that neither the German prohibition on home schooling nor the authorities' removal of a child from parental custody to enforce school attendance violated Article 8 – instead they "*fell within the Contracting States' margin of appreciation in setting up and interpreting rules for their education systems...*" (para 50). The decision demonstrates again that in considering the reasons adduced to justify the measures in question the Court will give due account to the margin of appreciation to be accorded to the competent national authorities.

The measures criticised by Quinn Legal fall far short of those declared not to be incompatible in the *Wunderlich* case: the 2019 Bill or indeed those criticised in the Christian Institute case: the Government does not seek to prohibit home schooling and its proposals as to same cannot be regarded as being so intrusive as to be disproportionate to the State's legitimate aim in making provision for regulating education systems.

H.M. Solicitor General
Attorney General's Chambers

1/10/19