

An abstract painting featuring two stylized faces. The face on the left has large, expressive blue eyes and a red mouth. The face on the right has large, expressive green eyes and a red mouth. The background is a complex, textured composition of various colors, including reds, pinks, yellows, and blues, with swirling patterns and splatters. The overall style is expressive and somewhat chaotic.

## 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

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## **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-too-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):

<p><b>Article 4</b></p> <p>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. . .</p>
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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).