

## RE. THE EDUCATION BILL 2019

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### 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;<sup>1</sup> and, for that purpose, to provide efficient and comprehensive educational services in the Island.<sup>2</sup> 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<sup>3</sup> to cause him to receive: ***“suitable education, either by regular attendance at school<sup>4</sup> or otherwise”*** (emphasis added). *“Suitable education”* is defined (in relation to a child)<sup>5</sup> 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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<sup>1</sup> Section 1(1)(a)

<sup>2</sup> Section 1(1)(b).

<sup>3</sup> Any age between 5 and 16 years: section 23(1).

<sup>4</sup> Defined at section 24(3).

<sup>5</sup> 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;<sup>6</sup> the full name and address of the parent;<sup>7</sup> whether the child is receiving or is to receive education by regular attendance at school (in the Island or elsewhere);<sup>8</sup> if so, the name and address of the school;<sup>9</sup> if not, the name and address of the person(s) by whom it is being or is to be given.<sup>10</sup>
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;<sup>11</sup> becomes resident in the Island;<sup>12</sup> or ceases to be a registered pupil at a school;<sup>13</sup> or (b) at any time, within 21 days after being required by the Department to do so by notice in writing<sup>14</sup> (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,<sup>15</sup> 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 24A(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;<sup>16</sup> or (b) 2 years after the commission of the offence,<sup>17</sup> 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.

#### Enforcement of parents’ duty (section 25)

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<sup>18</sup> and in the opinion of the DESC it is expedient that the child should attend school,<sup>19</sup> 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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<sup>6</sup> Section 24A(2)(a).  
<sup>7</sup> Section 24A(2)(b).  
<sup>8</sup> Section 24A(2)(c).  
<sup>9</sup> Section 24A(2)(d).  
<sup>10</sup> Section 24A(2)(e).  
<sup>11</sup> Section 24A(3)(a)(i).  
<sup>12</sup> Section 24A(3)(a)(ii).  
<sup>13</sup> Section 24A(3)(a)(iii).  
<sup>14</sup> Section 24A(3)(b).  
<sup>15</sup> Section 24A(4).  
<sup>16</sup> Section 24A(7)(a).  
<sup>17</sup> Section 24A(7)(b).  
<sup>18</sup> Section 25(3)(a).  
<sup>19</sup> Section 25(3)(b).

21 days from the date of service) to make a “School Attendance Order” (“SAO”);<sup>20</sup> 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);<sup>21</sup> and to state the effect of section 26.<sup>22</sup>

#### 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.<sup>23</sup> Under section 27(5), if the DESC refuses such request, it shall give the parent notice in writing stating its opinion,<sup>24</sup> specifying its reasons<sup>25</sup> and the period (not less than 21 days from the date of service) in which an appeal may be brought.<sup>26</sup> 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.<sup>27</sup> Under section 27(7), on appeal, the court may confirm the refusal, or revoke the SAO.<sup>28</sup> Under section 27(8), the DESC may (with the parent’s consent) vary,<sup>29</sup> or revoke,<sup>30</sup> 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<sup>31</sup> and not receiving efficient full-time education suitable to his age, ability and aptitude,<sup>32</sup> 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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<sup>20</sup> Section 25(4)(a).

<sup>21</sup> Section 25(4)(b).

<sup>22</sup> Section 25(4)(c).

<sup>23</sup> Section 27(2)(2).

<sup>24</sup> Section 27(5)(a).

<sup>25</sup> Section 27(5)(b).

<sup>26</sup> Section 27(5)(c).

<sup>27</sup> Section 27(6)(a).

<sup>28</sup> Section 27(7)(a).

<sup>29</sup> Section 27(8)(a).

<sup>30</sup> Section 27(8)(b).

<sup>31</sup> Section 30(1)(a).

<sup>32</sup> Section 30(1)(b).

## Data relating to home education provisions in the EA

16. In reply to FoI Request IM93642I, on 26<sup>th</sup> 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 19<sup>th</sup> 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 26<sup>th</sup> 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 22<sup>nd</sup> 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 29<sup>th</sup> 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*”<sup>33</sup> 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*,<sup>34</sup> 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*”.<sup>35</sup> 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*”.

<sup>33</sup> [https://consult.gov.im/education-and-children/changes-new-education-bill-consultation/supporting\\_documents/Major%20changes%20to%20the%20Education%20Bill%20consultation%20document.pdf](https://consult.gov.im/education-and-children/changes-new-education-bill-consultation/supporting_documents/Major%20changes%20to%20the%20Education%20Bill%20consultation%20document.pdf)

<sup>34</sup> [https://consult.gov.im/education-and-children/changes-new-education-bill-consultation/supporting\\_documents/Report%20on%20consultation%20outcomes%20January%2018%20summary\\_.pdf](https://consult.gov.im/education-and-children/changes-new-education-bill-consultation/supporting_documents/Report%20on%20consultation%20outcomes%20January%2018%20summary_.pdf)

<sup>35</sup> 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.<sup>36</sup>

#### 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.

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<sup>36</sup> 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;<sup>37</sup> interviewing the child;<sup>38</sup> or interviewing the child’s parent.<sup>39</sup>
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;<sup>40</sup> or at any other place agreed between the DESC and the child’s parent.<sup>41</sup>
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);**

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<sup>37</sup> Section 78(6)(a).

<sup>38</sup> Section 78(6)(b).

<sup>39</sup> Section 78(6)(c).

<sup>40</sup> Section 78(7).

<sup>41</sup> 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".<sup>42</sup>
- 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.<sup>43</sup>

#### 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).

<sup>42</sup> 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.

<sup>43</sup> 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<sup>44</sup>).*

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) (23<sup>rd</sup> June 2017).<sup>45</sup>

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”*.<sup>46</sup>

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”<sup>47</sup>*); (2) the law must be adequately accessible; and (3) the act’s legal consequences must be reasonably foreseeable.<sup>48</sup>

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:-<sup>49</sup>

***“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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<sup>44</sup> At paragraph 73.

<sup>45</sup> <https://www.judgments.im/content/J1938.htm> (at paragraph 168).

<sup>46</sup> As to Article 8, see *Department of Infrastructure v Clarkson & others* (CHP 2010/107) (judgment 26<sup>th</sup> April 2012) <https://www.judgments.im/content/J1236.htm> (at paragraph 116).

<sup>47</sup> *Malone v United Kingdom* (1984) 7 EHRR 347, at 373.

<sup>48</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 245, at 271.

<sup>49</sup> 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.<sup>50</sup>

#### 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.<sup>51</sup>
70. The DESC has apparently offered two broad justifications for the key proposals: first, a "*safeguarding risk of isolation from professionals*";<sup>52</sup> and, secondly, "*for those children who are home educated the [DESC] doesn't know if a suitable education is being delivered*".<sup>53</sup> However, the DESC already enjoys a wide range of statutory (and criminal) powers<sup>54</sup> in order to enable it to fulfil its existing section 1(1) duty. The statistics set out above<sup>55</sup> 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

<sup>50</sup> Article 18 of the ECHR, and section 1(1) of the HRA.

<sup>51</sup> See especially questions (iii) and (iv) of the *Christian Institute* formulation.

<sup>52</sup> Paragraph 18, above.

<sup>53</sup> Paragraph 23 above.

<sup>54</sup> Paragraphs 3-15 above.

<sup>55</sup> 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)).**

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