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.

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