



# THE FORGOTTEN HUMAN RIGHT

THE RIGHT OF PARENTS RELATING TO CHILDREN'S EDUCATION

---

UPDATE ON AN UNEXPECTED DEVELOPMENT

Anthony Speaight KC and Shannon Hale

## **About the authors**

**Anthony Speaight KC** is past Chair of Research of the Society of Conservative Lawyers. He was a member of the Government Commission on a UK Bill of Rights (2012). He is a Bencher of Middle Temple.

**Shannon Hale** is a former Harold G. Fox Scholar at Middle Temple. She has advised judges on the Supreme Court of Canada and the Court of Appeal for Ontario, as well as Canadian Cabinet ministers in the Harper government.

Cover Image by pvproductions on Freepik

London: 1st edition July 2023, 2nd edition October 2023,  
Brief update 7 November 2023.

---

The Society of Conservative Lawyers, an association of lawyers who support or are sympathetic to the aims of the Conservative Party. Members hold a range of different views within those parameters and the views expressed in its publications are only those of their authors, and not necessarily held by all members of the Society or by the Conservative Party.

The views expressed in this paper are those of the author alone, who takes sole responsibility for all errors and omissions.

## INTRODUCTION

A week after the publication of the 2nd edition of “The Forgotten Human Right”, our paper on parental rights<sup>1</sup>, the Secretary of State for Education published a new circular letter to schools<sup>2</sup>. Its contents have taken almost everybody by surprise. Rather than announce a development of government policy, her circular makes two important statements as to the law – one as to breach of contract, the other as to copyright. These merit study, and may affect how those who wish to enhance parental rights now proceed.

---

1 Society of Conservative Lawyers, *The Forgotten Human Right: the Right of Parents Relating to Children’s Education*, 17 October 2023 available at [www.conservativelawyers.com/\\_files/ugd/e1a359\\_08b85c02c6b04ed9a841dc4aae980941.pdf](http://www.conservativelawyers.com/_files/ugd/e1a359_08b85c02c6b04ed9a841dc4aae980941.pdf)

2 Letter of 24th October 2023 available at [https://assets.publishing.service.gov.uk/media/65377f9226b9b1000faf1dd5/LETTER\\_TO\\_SCHOOLS\\_ON\\_SHARING\\_CURRICULUM\\_MATERIALS.pdf](https://assets.publishing.service.gov.uk/media/65377f9226b9b1000faf1dd5/LETTER_TO_SCHOOLS_ON_SHARING_CURRICULUM_MATERIALS.pdf)

## THE STATEMENT OF CONTRACT LAW

The circular contains this statement on the law applying to clauses in contracts between schools and external providers:

“Where contractual clauses exist that seek to prevent schools sharing resources with parents at all, they are void and unenforceable. This is because they contradict the clear public policy interest of ensuring that parents are aware of what their children are being taught in sex and relationships education.”

The boldness of this unqualified statement is almost breathtaking. The previous ministerial circular, which deplored such clauses, had implicitly assumed their effectiveness<sup>3</sup>. Whatever mental questions a legal adviser might have had, the starting principle of the common law is that contracts freely entered into are to be honoured.

### What is the legal basis for the contract statement?

There is a principle of contract law that the courts will not enforce contracts where to do so would conflict with public policy. The principle is usually seen as confined to well-recognised areas. These include interference with good government or the administration of justice, and the restraint of trade.

In the past the areas have stretched into the realm of personal relationships and morality with the courts striking down agreements to cohabit unmarried and marriage brokers’ contracts, but with the evolution of social attitudes such decisions would be unlikely today. The courts are unlikely to create wholly new categories of public policy so as to defeat a contract. Chitty on Contracts states at 18-011:

“There is a general agreement that the courts may extend existing public policy to new situations and rules founded on public policy “not being rules which belong to fixed or customary law, are capable ... of expansion and modification”. The difference between extending an existing principle as opposed to creating a new one will often be wafer thin. There will, however, be an understandable reluctance on the part of the courts to create completely new heads of public policy because of the existence of governmental bodies charged with the specific task of law reform and a more activist legislature.”

How, then, can so modern a phenomenon as the “revolution by stealth”<sup>4</sup> in schools justify a court recognising a public policy? It is likely that the

---

3 Secretary of State circular “Letter to Schools: Sharing Curriculum Resources with Parents” 31 March 2023, available at [https://assets.publishing.service.gov.uk/media/6453d448faf4aa000ce1334f/RSHE\\_letter\\_SoS\\_to\\_schools.pdf](https://assets.publishing.service.gov.uk/media/6453d448faf4aa000ce1334f/RSHE_letter_SoS_to_schools.pdf)

---

4 Jo-Anne Nadler’s striking phrase to describe the “under the radar” penetration into schools by groups imbued with North American ideologies in “Sow, Tell and Leave Nothing to the Imagination: How Critical Social Justice is Undermining British Schooling”, Civitas 2023.

circular's statement reflects a decision of the Court of Appeal some 60 years ago in *Initial Services v Putterill*<sup>5</sup>. Mr Putterill was a manager in a company which supplied and laundered towels. He resigned his position, and as he left took with him a clutch of documents. These showed that the company was colluding with its competitors to keep prices high, and that a claim in its publicity attributing a recent price rise to a new government tax was inaccurate. Putterill passed his dossier to the Daily Mail. What was revealed about Initial Services did not amount to any crime, but was embarrassing. The company brought action against Putterill on the ground that he had breached an implied obligation in his contract of employment. So clear did the company consider its case to be that it invited the court to strike out Putterill's defence.

The court agreed that disclosing the documents constituted a breach of an implied term of the employment contract; but considered there was a strong prospect of a successful defence. The reason was the court's opinion that the disclosure of the documents to the press was in the public interest. Salmon LJ and Winn LJ considered it probable that, if there had been an express term forbidding publication, a court would have refused to enforce it; and that a defence of the public interest similarly applied to an implied term. Although the case involved no more than a decision not to strike out (as opposed to a final decision), these dicta from judges of high standing carry weight. Thus, the case can be said to be authority for the proposition that if an agreement not to disclose a document is contrary to the public interest, courts will not enforce it.

That, then, raises the question: on what basis is it contended that external providers' clauses prohibiting showing materials to parents or anybody outside the school are contrary to the public interest? The first element in an answer may be supplied by the Secretary of State's circular letter of 31 March 2023<sup>6</sup>:

"The Department is clear that parents should be able to view all curriculum materials. This

includes cases where an external agency advises schools that their materials cannot be shared due to restrictions in commercial law, or a school's contract with the provider prohibits sharing materials beyond the classroom. Parents are not able to veto curriculum content, but it is reasonable for them to ask to see material if it has not already been shared, especially in relation to sensitive topics....

There is a strong public interest in parents being able to see the full content of RSHE teaching."

Thus, whilst the circular is emphatic in respect of relationship and sex education ("RSE"), and considers access to materials especially important in regard to "sensitive topics", the first paragraph quoted above appears to see the desirability of transparency applying across the board of subject areas.

A public interest in parents having access to teaching materials was accepted in the decision of the Tribunal in Clare Page's appeal from the Information Commissioner<sup>7</sup>:

"152. We accept that there is a very strong public interest in parents being properly aware of the materials that are being used to teach sex education to their children.

153. We accept that there is a very strong public interest in curriculum materials and lesson materials on sex education being shared with parents in advance of the lessons so that they can make an informed decision as to whether or not to withdraw their child from those lessons in part or in full....

158. We accept, as the Secretary of State points out in her letter of 31 March 2023, that it will not be convenient for all parents to attend a viewing of the slides at school. Further, we acknowledge that having copies of the materials to take home enables more detailed discussion with the child of the matters covered. Finally, although we find that it would be possible to make a complaint about the content

---

<sup>5</sup> [1968] 1 QB 396

<sup>6</sup> See above

---

<sup>7</sup> *Page v Information Commissioner* [2023] UKFTT 476 (GRC), First Tier Tribunal, General Regulatory Chamber

of a lesson after such a viewing, we accept that it is easier to take advice and to draft and pursue a complaint if you retain a copy of those slides. On that basis we accept that there is some residual public interest in disclosure of the slides which would not be served by the parents attending a meeting and being talked through the slides.

159. We accept that there is some value in the public in general knowing the content of sex education classes taught in schools, particularly in schools funded by public money. This is limited where the information consists of one set of slides on one particular topic.”

These strong observations are in each case limited to RSE; but interestingly they acknowledge an element of public interest for the public in general, as well as an individual parent, to know the content of RSE classes.

An even more fundamental argument for the existence of a public interest, and one which contains no limitation to just one school subject, can be based on Art 2 of the 1st Protocol to the European Convention on Human Rights (“A2P1”):

“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.*” [emphasis added]

It is hard to imagine how a parent can “ensure” such conformity unless the parent has access to the materials being taught; and, as the *Page* Tribunal recognised, has this in advance of the teaching. There is surely also a strong argument

that for A2P1 to be an effective right such access should, on request, be available to *prospective* parents who are at the stage of choosing a school. Few parents will wish to move a child who is settled at a school; and broadly speaking, changes of school are not in the interests of children. The parental right to “ensure” a particular education should, therefore, be seen as pointing to a public interest in teaching materials being made available to prospective parents.

### **Is the circular a complete statement of the public interest?**

The Secretary of State’s statement on contract law is a very welcome development. But the limitations in what has been said so far should be noticed. The public interest mentioned in the circular is specific to RSE. The language is suggestive of the situation only of current parents. And there is no hint of recognition that there is a general public interest in what is being taught in schools. Even the *Page* Tribunal at [159], which was reaching a decision adverse to disclosure, accepted that there was a “value” in the public being aware of the content of sex education. One reason is the legitimate taxpayer interest in how public money is being spent. Another is because society at large is affected by significant changes in societal attitudes. So a task remains to establish once and for all that the public interest:

- (a) includes a public interest in parents having access to teaching materials for all subjects, not only RSE;
- (b) embraces prospective parents, as well as parents of children currently at a school;
- (c) extends to the public in general being aware of the classes being taught in schools.

## **THE STATEMENT OF COPYRIGHT LAW**

Copyright in a document is not lost if it is shown to another person. Nor is copyright destroyed by publication on the internet: there is much material on the internet which is the subject of copyright. But, subject to specifically defined exceptions, it is a breach of copyright if a person who does not own the copyright places a document on a

website, or even photocopies it, without the permission of the owner. The specific exceptions are a number of “permitted acts” defined in the Copyright, Designs and Patents Act 1988 (“Copyright Act”): examples are copying for private study, or citation of short passages for review or criticism. There are also “permitted acts” particular

to the field of education which allow showing illustrations as part of a lesson or in an examination question<sup>8</sup>, or copying an extract of no more than 5% of a work for instructional purposes<sup>9</sup>. An acknowledgement of the source is a statutory requirement for some of the permitted acts.

Teaching materials in the form of slides or lesson plans or the like are all potentially subject to copyright. So, if the creator of the materials is unwilling to give consent for them to be copied or published on a website, how can the public interest in their access to parents be satisfied?

This is the second matter of law which the Secretary of State addresses in her circular:

“The copyright act allows schools to copy resources proportionately, for the purposes of explaining to parents what is being taught. It is best practice to do this via a “parent portal” or if this is not possible, by a presentation. This access to the documents is accompanied by a sufficient acknowledgment of the provider’s authorship and includes a statement, that parents agree to as a condition of access, that the content should not be copied or shared further except as authorised under copyright law. Where relevant and possible, IT systems should also be in place to prevent downloading.

“Where parents cannot attend a presentation or where they are unable to view materials via a “parent portal”, schools may provide copies of materials to parents to take home on request, providing parents agree to a similar statement that they will not copy the content or share it further except as authorised under copyright law.”

### **What is the legal basis for the copyright statement?**

At first sight the passage above is puzzling. With its specific directions as to an “acknowledgement” and requirement for prior agreement by the parent, it reads as though it is setting out the terms of a defined “permitted act”. But the situation does not

---

<sup>8</sup> Copyright Act s.32

<sup>9</sup> Copyright Act s.36

correspond to any of the particular “permitted acts” in the Copyright Act.

The explanation is believed to be that the circular is reflecting, not a specific feature of the statute, but rather a general principle – namely, that copyright can be overridden by the public interest. The common law developed a general principle allowing a defence of public interest to actions for either breach of copyright, which is statutory, or breach of confidence, which is equitable.

In the 1970s this defence of public interest was considered to apply where, but only where, there had been a breach of the law or some similar “iniquity”<sup>10</sup>. By the 1980s its scope was greater. *Lion Laboratories v Evans*<sup>11</sup> concerned a company manufacturing breathalyser kits, whose employees sought to publish technical information from within the company suggesting unreliability of the products. One can understand that the judges considered this an expose which ought not to be prevented by an injunction in view of the many convictions based on breathalyser results. The Court of Appeal held that there was a sound defence of public interest, even though no crime was being committed by the company: it was held that the public interest defence was not solely confined to situations of “iniquity”, albeit that its wider application would be only in an “exceptional case”. The 1988 Act gave a seal of approval to this case law by enacting in s.171(3) that nothing in the Act affects any rule of law restricting the enforcement of copyright on grounds of public interest.

It might, perhaps, be hard to argue that the public interest in parents seeing school materials is quite as obvious as that in the public learning the unreliability of the police’s breathalyser kits, but the scope for a copyright defence became a little easier following the enactment of the Human

---

<sup>10</sup> per Ungood-Thomas J in *Nora Beloff v Pressdram* [1973] FSR 33: disclosure is “justified in the public interest, of matters, carried out or contemplated, in breach of the country’s security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeed of similar gravity”

<sup>11</sup> [1985] QB 526

Rights Act. In *Ashdown v Telegraph Group*<sup>12</sup> the Court of Appeal was concerned with an action by the politician Paddy Ashdown to restrain publication of a private note he had made of a conversation with Tony Blair as Prime Minister. A newspaper by some means obtained a copy and published a lengthy verbatim extract. Ashdown brought an action asserting breach of copyright and breach of confidence. The newspaper resisted on the ground of its art 10 ECHR right of free speech. The court gave summary judgment in favour of Ashdown. But in delivering the judgment of the court Lord Phillips of Worth Matravers, then Master of the Rolls, pronounced that in “rare” circumstances, which are “not capable of precise categorisation or definition”, the art 10 right to free speech could “override” the law of copyright. That position was achieved by application of s.171(3) of the 1988 Act and the common law public interest defence.

That being the principle in respect of art 10, it seems strongly arguable that other Convention rights, including A2P1, must also be capable of “trumping” copyright law. Therefore, having reached the conclusion that there is a public interest strong enough to render a contractual provision against disclosure unenforceable, it has, perhaps, been a small step for the Secretary of State to reach the further conclusion that copyright is here capable of being overridden. The rather particular stipulations about an acknowledgement and a parental prior agreement not to disseminate further are presumably the minister’s suggestions of arrangements which would make overriding copyright “proportionate”.

### **Is the circular a satisfactory resolution of copyright problems?**

The route to overcoming copyright hurdles which we proposed in the “Forgotten Human Right” was the statutory recognition of a licence (i.e. a permission). We proposed enacting that contracts between schools and external providers which expressly or implied authorised the presentation of materials to pupils – which would normally be the

whole point of a purchase of teaching materials – was to be interpreted as also authorising the school in discharging the “duty of access” which we have proposed. That duty of access would typically entail placing materials on a school website, available at the very least to prospective and current parents. In other situations, licences have been found to be a convenient way to avoid inappropriate copyright restrictions: an example is offered by the construction sphere, where the common law implies into the contract for an architect’s services a licence to copy the architect’s drawings to as many people as may be needed for the performance of the construction project.

The outcome of the Secretary of State’s different approach, coupled with her suggestion of a proportionate arrangement, is one under which the relevant section of the school website would not be accessible by prospective parents. As already said, in our view for the A2P1 right to be effective, information for prospective parents is as important as for current parents. Furthermore, the Secretary of State’s idea of what is proportionate in regard to breach of copyright might be read as precluding a parent from showing teaching material to others in order to take advice as to its content, even though the Clare Page Tribunal at [158] recognised the reasonableness of a parent wanting to take advice. Therefore, as it stands, the Secretary of State does not go as far as we would wish. However, the Secretary of State’s suggestion of what would be proportionate is only that – her suggestion. Granted the applicability of the Ashdown approach, it is clearly arguable that a proportionate recognition of the requirements of the public interest entail dissemination of materials to advisers and to prospective parents. The circular does not prevent such argument.

In “The Forgotten Human Right” we urged the Government to publicise the relevance of A2P1. We were speaking of the possibilities of actions by parents against schools under the Human Rights Act. It is pleasing to see that, in effect, though without explicitly mentioning the ECHR, the Secretary of State is recognising the relevance of A2P1 in a not dissimilar context.

---

<sup>12</sup> [2002] Ch 149

## **DOES THE CIRCULAR PROVIDE A COMPLETE SOLUTION TO THE PROBLEM? LEGISLATION IS PREFERABLE**

The Secretary of State deserves sincere gratitude for the circular of 24 October. It should improve the situation for parents. On the other hand, it is not in our view a complete substitute for the legislation which we proposed for several reasons.


First, legislation has a permanence which cannot be provided by departmental guidance: it is easy enough for a new Secretary of State to modify guidance and change Regulations. Second, a letter from a minister does not bind courts: it is possible that the propositions of law in the circular will fail to stand up in some future litigation. Third, experience to date has been that circulars and guidance from the Department have not been sufficient to secure compliance with the policy of transparency. And fourth, the propositions in the circular on their face are subject to the limitations and qualifications discussed above.

So we continue to believe that the right way for the UK to provide the rights for parents of A2P1 is a Parental Rights Bill, as proposed in our published paper. Failing that, the Bill presented to Parliament by Miriam Cates MP deserves support: a critical point in its favour (compared with the circular) is that it would require all RSE teaching materials from external providers either to be published in the public domain, or to be obtainable upon payment of a modest fee.

Short of legislation, though, the circular may point the way for parents to push further. The explicit recognition of a public interest capable of negating a contractual term, and the implicit recognition of the relevance of A2P1 should be valuable to parents in several lines of advance. One would be pressing Freedom of Information Act requests. A second could be County Court actions against school authorities under s.7 Human Rights Act.

The 24 October circular, which already builds on the 31 March circular, could also be a staging post for further steps by the Secretary of State. One could be a formal request to Ofsted to give priority in inspections to compliance with ss.406, 407 Education Act requirements for balance in presentation on public policy issues. Another could be expanding the existing Regulations on the information which schools must publish on their websites – for instance, to include details of all external providers used by a school for lesson materials, and the names and personal qualifications of outsiders presenting lessons in classrooms. A third could be the establishment of a “transparency and balance accolade” available to a school which publishes on its website all teaching materials on sensitive subjects, and ensures impartiality in the presentation of matters which are controversial either politically or philosophically.





For further information on the Society of Conservative Lawyers contact:  
The Administrative Secretary at [administrator@conservativelawyers.com](mailto:administrator@conservativelawyers.com)  
[www.conservativelawyers.com](http://www.conservativelawyers.com)

© Society of Conservative Lawyers  
Rights to be identified as publisher have been asserted in accordance with the  
Copyright, Designs and Patents Act 1988

1st edition July 2023, 2nd edition October 2023, Brief update 7 November 2023.