



THE FORGOTTEN HUMAN RIGHT

THE RIGHT OF PARENTS RELATING TO CHILDREN'S EDUCATION

Anthony Speaight KC and Shannon Hale

Foreword by Lord Sandhurst KC

(2nd edition)

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.

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.

FOREWORD

In this timely and powerful paper, Anthony Speaight KC and Shannon Hale bring a new insight into what is going on in our schools, what our children are being taught and how their parents are being excluded in some cases from knowing what is being taught. Importantly, they provide a solution. This is particularly significant at a time when the government is grappling with guidance to give schools about the teaching of the new compulsory subject, Relationship and Sex Education ('RSE').

The paper exposes the infiltration of our schools by campaigners for social change by means of "gender theory", "critical social justice theory" and "critical race theory". As the authors point out, a particular mischief is that these controversial areas are being advanced as fact. Thus, 59% of school leavers say there being taught at least one of "white privilege", "unconscious bias" and "systemic racism". The evidence shows that this is an accelerating trend.

The paper demonstrates that education is being improperly used to change social attitudes. Many providers of materials used in RSE are not conventional mainstream educational providers. There are often linked with campaigners for social change, such as Stonewall or the LGBT Consortium.

The problem is compounded by the fact that parents are not given access to materials used in the form room. Sometimes they are denied access even on the school premises. The paper explains how requests to the Information Commissioner to see teaching materials are refused on grounds of commercial confidence and copyright.

This is a serious matter. The paper reminds us: "the first thing that a totalitarian regime tries to do is to get the children, to distance them from the subversive, varied influences of our families, and indoctrinate them in their rulers' view of the world." That was the UK Supreme Court speaking in 2016. The state, our government, has a duty to respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions [Art 2 of Protocol 1

('A2P1') of the ECHR]. Parents have a right to be adequately informed of the substance and core of what is being taught to their children. If they cannot access those materials because schools withhold them, they are deprived of an essential plank of a democratic and free-thinking society. If government does nothing, it breaches its duties to us all.

To date, the government has moved over-cautiously. It is difficult for schools caught in the middle of the so-called "culture wars", especially if their contracts with providers have non-disclosure clauses. Schools need firm guidance and a clear legal framework. This paper provides that. Guidance is not enough because it does not unequivocally defeat the providers' non-compete and non-disclosure clauses.

So, the authors propose a statutory framework (appending a draft Bill which I commend). This provides that a term in a contract restricting a school from providing parents with teaching materials ceases to be binding. This is to be combined with amendments to the Freedom of Information Act so that exemptions to disclosure relating to commercial interests and breach of confidence will no longer apply to requests to schools for teaching materials. Material on a provider's platform which a school accesses to show to pupils or for a teacher's use in lesson preparation would be deemed to be 'held' by the school and publishable. In addition, schools must be placed under a duty to ensure parents have access to all usual teaching materials with the exception of lesson plans, Ofsted must be mandated to give attention to this in inspections and comment on it in its reports, in particular whether a school is complying with the ban on political indoctrination under the Education Act. Meanwhile parents would be given an individual right to sue a school which breaches its duties in respect of access to materials and political indoctrination.

The authors usefully provide a list of measures which the Secretary of State for Education could do without the need for legislation: obligations on all

schools to publish teaching materials on their websites, a formal announcement that it is the public interest for the Information Commissioner to order disclosure, a request to Ofsted to examine for and report on unbalanced and political teaching, affirmation of the existing possibilities for parents to sue schools for breach of A2P1 under the HRA and some form of accolade by certificate for schools who demonstrate their teaching materials are balanced.

This invaluable paper is a 'must read' for ministers. It demonstrates that there is a creeping tide of indoctrination by politically motivated providers of

educational materials which must be addressed. Parents have the right to know what is going on and see the materials used in class and must no longer be wrongly deprived of such access. Most importantly, it provides government the answers and the way to the right answer. I commend it to all who value a liberal education and freedom of thought and expression.

This 2nd edition incorporates improvements to the draft Bill suggested after the 1st edition, and brings the summary of research up to date to October 2023.

*Lord Sandhurst KC
Chair of Research of the Society of Conservative Lawyers,
Member of the House of Lords
October 2023*

EXECUTIVE SUMMARY

Parents have recently become concerned by reports of what children are being taught at school. While there is a broad consensus that today there should be more education than in the past about areas such as those covered by the new compulsory subject of Relationship and Sex Education (“RSE”), many have been worried by stories of the manner in which certain aspects of the curriculum being taught to their children – notably on transgender issues, “white privilege”, “unconscious bias” and climate change alarmism.

This raises the question: Who should ultimately decide the nature of a child’s education? The parent or the state?

The theory

Liberal democracy has unhesitatingly answered: the parent.

Every major declaration of rights since the Universal Declaration of Human Rights (1948) has proclaimed in one way or another that parents have the right to choose the education their children receive. Amongst these is Article 2 of the First Protocol to the European Convention on Human Rights (“A2P1”) which guarantees respect for,

“the right of parents to ensure such education and teaching in conformity with their own religious and philosophical principles.”

This is included in the rights covered by the Human Rights Act. In *Folgerø (and others) v Norway* App no 15472/02 (ECtHR 29 June 2007)¹ the Strasbourg Court linked this right with the prohibition of political indoctrination and emphasised that effective exercise of the right requires the availability of information to parents on what is being taught.

Parliament has enacted similar principles in the Education Act 1996:

– s.9: recognises the principle that children should be educated, so far as practicable, in accordance with their parents’ wishes.

– ss406, 407: forbid political indoctrination, and require balanced presentation on political issues.

In *Dimmock v Secretary of State for Education and Skills*² the High Court held that this prohibition was not confined to party political issues. The law requires fair and dispassionate balance on anything concerned with the laws or government policy.

In theory, government policy carries forward these principles. The RSE³ Guidance (13 September 2021) exhorts teachers and schools to work closely with parents. In a circular on 31 March 2023, the Secretary of State for Education said that this directive should involve giving meaningful access to parents of all RSE teaching materials.

The reality

The reality is rather different.

Information on what is actually happening has recently become available in six reports:

*Who’s in Charge? A report on Council’s Anti-racist Policies for Schools*⁴, a 2022 report by Don’t Divide Us, a movement for racial harmony, based on 173 Freedom of Information Act (“FOIA”) requests to local authorities, and a YouGov survey on 1,000 parents.

*The Political Culture of Young Britain*⁵ by Professor Eric Kaufmann, includes a YouGov survey of 1,500 18 to 20 year-olds carried out in April/May 2022.

*What is being Taught in Relationship and Sex Education in our Schools?*⁶, a report presented by

2 [2007] EWHC 2288

3 Relationship and Sexuality Education

4 Don’t Divide Us (2022). *Who’s in Charge? A report on Council’s Anti-racist Policies for Schools*. <https://dontdivideus.com/2022/07/14/whos-in-charge>

5 Kaufmann (2022). *The Political Culture of Young Britain*. <https://policyexchange.org.uk/publication/the-political-culture-of-young-britain>

6 Cates (2023). *What is being Taught in Relationship and Sex Education in our Schools*. www.newsocialcovenant.co.uk/wp-content/uploads/2023/08/nscu-education-2023-v1.pdf

1 (2008) 46 EHRR 27

Miriam Cates MP to the Prime Minister, collates a substantial volume of information on RSE teaching.

*Asleep at the Wheel: An Examination of Gender and Safeguarding in Schools*⁷ by Lottie Moore, reported in 2023 on 300 FOIA requests to schools.

Show, Tell and Leave Nothing to the Imagination: How Critical Social Justice is Undermining British Schooling by Jo-Anne Nadler published by Civitas in May 2023, including Deltapoll opinion surveys on school pupils and parents⁸.

Who are the Experts?, an investigation by Don't Divide Us into anti-racist third-party organisations in schools reported in July 2023⁹.

The stories of Clare Page, of the St Anne's C of E School, and of the Brighton Council's anti-racism teaching are illustrative of what is happening. They reveal the following, recurrent themes:

(a) The arrival of new educationalists

Much RSE and anti-racism teaching is not being undertaken by qualified school staff, but by external providers. These providers are often linked with campaigners for social change, such as Stonewall, or the LGBT Consortium.

(b) The influence of American ideologies

"Critical social justice" and "critical race theory" influenced a significant proportion of anti-racism teaching:

- Don't Divide Us analysed that less than half of the teaching materials released to them in over 150 FOIA requests presented a conventional or unbiased approach.
- 59% of school-leavers say they have been taught at least one of "white privilege", "unconscious bias", and "systemic racism". The

proportion who had been so taught was notably higher among 18-year-olds than 20-year-olds, suggesting this teaching is an accelerating trend.

As an example, in 2020 Brighton Council adopted a programme of anti-racism teaching in its schools which involved, "white people ... recognising our white privileges and unconscious bias."

There are also reports of recurrent mention in various subjects of "intersectionality", a theory developed by an African American feminist law professor, Kimberlé Crenshaw, which focuses on combining characteristics attracting discrimination.

(c) Teaching contentious theories as fact

While nobody would object to older children being taught of the existence of American ideologies, albeit that for historical reasons US society is different from ours, what is controversial is that these theories are being taught as fact.

Many external RSE providers are influenced by "Gender Theory", which emphasises a distinction between biological sex and gender identity. This theory maintains that there are not two genders, but a continuum from the most masculine to the most feminine; and that even biological sex may be placed on a spectrum with "intersex" at a central point. A survey of FOIA responses found that 72% of schools were teaching these theories.

Educate and Celebrate, an external provider of materials for schools, describes how nursery and primary schools can refashion themselves to be "gender-neutral" and suitable for "children of all genders" because young children are "fluid".

Don't Divide Us assessed the new racism in a significant number of the materials they saw as intolerant of alternative views. Most of the school-leavers in the YouGov survey who had been taught about "white privilege" and similar topics said they had not been taught that there were respectable arguments to the contrary.

The YouGov survey of parents found that the overwhelming majority of parents oppose the teaching of these theories: 69%, compared to 11%, of parents favoured balanced teaching over partisan teaching.

⁷ Moore (2023). *Asleep at the Wheel: An Examination of Gender and Safeguarding in Schools*.

<https://policyexchange.org.uk/publication/asleep-at-the-wheel>

⁸ Nadler (2023). *Show, Tell and Leave Nothing to the Imagination: How Critical Social Justice is Undermining British Schooling*. www.civitas.org.uk/content/files/Show-tell-and-leave-nothing-to-the-imagination-.pdf

⁹ Don't Divide Us (2023). *Who are the Experts?* <https://dontdivideus.com/wp-content/uploads/2023/07/DDU-who-are-the-experts-july-2023.pdf>

(d) The use of education to change social attitudes

There is evidence that some of the new providers see changing, rather than just mirroring, society as an aim of education. A feature of the radical anti-racism teaching is the importance of everybody becoming an activist. The attitude of “politics doesn’t interest me” is placed on the controversial Pyramid of White Supremacy as a building block at the base of a structure supporting genocide and unjust police shootings.

(e) Lack of transparency

Many providers of teaching materials on both RSE and racism regularly seek to prevent parents from effective access to their materials. The external providers mostly use contracts which prohibit the schools from providing copies of the teaching materials to parents. Such prohibitions can endure after the end of a contract period, which itself can be longer than one year. So, the government’s new policy of discouraging schools from entering contracts which tie their hands on access may be unable to have immediate effect.

In two cases in 2022, the Information Commissioner refused parents access to RSE teaching materials produced by an external provider – one on the grounds that doing so would prejudice the provider’s commercial interests, the other that it would involve a breach of confidence. In both cases, this determination involved a balance of the public interest, and the Commissioner found that the balancing came down against parental access. The Commissioner has also decided that materials which schools show in classrooms through “read-only access” to providers’ platforms are not held by the school, and so fall outside the FOIA’s scope. The First Tier Tribunal has upheld the Commissioner in the breach of confidence case.

Dissemination of contentious ideologies is also found in their diffusion into other subjects such as English and drama. Amongst the suggestions by one new educator is that primary school children should craft vulvas from Play-Doh to undo “phallogocentric power relations”.

This penetration of contentious ideologies, taught as fact, is contrary to the principles of education in

a liberal democracy, contrary to the ECHR, and contrary to the Education Act 1996:

- (i) It does not accord with the wishes of most parents and insinuates a philosophy at variance with the education they would wish their children to receive.
- (ii) It amounts to teaching which is “political” in the sense defined by the High Court as being unbalanced.

The rights of parents have become the forgotten human right.

The solution

The key is proper information for parents. Without information about what is happening in the classroom, they cannot know whether it is in accordance with their beliefs and wishes. YouGov found that 71% of parents considered they should have the right to access teaching materials.

The most satisfactory solution will be legislation. We provide a draft Parental Rights Bill. Its key features are:

(a) Contracts

The Bill would provide that a term in a contract restricting a school from providing parents with access to teaching materials would not be binding.

(b) Freedom of Information Act

Amendments to the Freedom of Information Act 2000 so that:

- (i) the exemptions to disclosure relating to commercial interests and breach of confidence would not apply to a request to a school in respect of teaching materials;
- (ii) material on a provider’s platform which a school accesses to show to pupils, or for a teacher’s use in lesson preparation, would be deemed to be “held” by the school.

(c) Duty to give access

Schools would be under a duty to ensure that parents had access to all digital teaching materials, with the exception of an individual teacher’s lesson plan for a particular class. This could be achieved by a school posting electronic materials on a

school website or ensuring online availability in some other way. Schools are already under increasing statutory obligations to publish information about the curriculum and other policies on the web, so this would merely build on existing practices. The materials in question would almost all be in digital form and already on a school computer somewhere. If, however, the obligation involved is considered burdensome, the requirement to publish materials on RSE and racism could come first, with other subjects published subsequently; or alternatively the first phase could apply to materials from external providers, as almost all controversy attaches to materials from bodies with partisan agendas, as opposed to conventional educational publishers..

A list of all books issued to pupils, or in a classroom, or used in lesson preparation, would have to be published online. So, too, would details of all external organisations and individuals involved in teaching lessons to pupils.

(d) Ofsted inspections

Ofsted would be mandated to give attention in its inspections, and comment in its reports, on whether a school is complying with the statutory prohibitions on political indoctrination in ss.406 and 407 of the Education Act 1996, with the principle of respecting parents' wishes, and with the parental access rights being introduced.

(e) Right of court action for parents

Parents would acquire an individual right of court action in the event of a school failing to comply with its duties in respect of parents' access to materials, or political indoctrination. Arguably this provision would be superfluous, since there is already an individual right of action under s.7 of the Human Rights Act 1998 for a failure by a public

authority, which includes a state school, to comply with A2P1. But since there is no record of any such action yet being attempted, the enactment of a clearer right of action would be beneficial.

There are, however, a number of useful measures which a Secretary of State for Education could take without the need for legislation:

(a) Publication of teaching materials

The growing list of matters which schools must publish on a website has been required by statutory instruments. The Minister already has the power by SI to add teaching materials to these obligations.

(b) Announcement of the public interest

Both of the Information Commissioner's decisions against parents were on the ground of the public interest. The government should make a formal announcement that it sees the public interest to favour ordering disclosure.

(c) Ofsted

The government could publicly request Ofsted to examine for, and report on, unbalanced and political teaching.

(d) The Human Rights Act 1998 ("HRA")

The government could publicly draw attention to the existing possibilities for parents to sue schools for breach of A2P1¹⁰ under the HRA.

(e) Establish an accolade

The government could announce that it would be granting to schools which demonstrate that their teaching materials are balanced, and published on a website, the accolade of certification as a "we respect parents' human rights" school.

¹⁰ Art. 2 of Protocol 1 of the ECHR

INTRODUCTION

The content of Relationships and Sex Education (“RSE”) and other contentious issues such as anti-racism teaching is causing great concern to some parents. For other parents, the worry is the difficulty in discovering what is being taught to their children on sensitive issues. There is a degree of consensus that children should today be taught more about sex and relationships, and more about race and equality issues, than in earlier days. But there is far from consensus on exactly what should be taught in these areas.

This paper does not pronounce on the merits of differing ideas on the substance of the curriculum. We are concerned with a deeper question – who should ultimately decide the nature of a child’s education? The state or the parent? The great authoritarian regimes would answer: “the state”. But upholders of liberal democracy must surely say: “the parent”. The state exists to serve its citizens, not the other way round.

It is, of course, convenient for parents to devolve their duty to educate their children to the state. For financial and practical reasons, the options of private schools and home educating are no more than theoretical rights for many. So long as parents are content with the nature of the education being provided by the state, there is little problem. But what if the state moves away from a broad consensus? Where there are different viewpoints on societal issues, the classical liberal educationalist would inform pupils of the various approaches. But there is a growing sense that today controversial theories are being presented to children as fact, or as the only respectable position.

Recent news stories are rife with examples. Miriam Cates MP published a report on “the nature and extent of inappropriate RSE” and wrote about how children must be protected from “sexualization and indoctrination” proffered by unregulated third-party providers whose teaching materials border on political campaigns.¹¹ Parents have also raised

11 Miriam Cates, ‘Stop sex-education radicals from infiltrating schools’ *The Telegraph* (8 March 2023) www.telegraph.co.uk/news/2023/03/08/stop-sex-education-radicals-infiltrating-schools

concerns with the “catastrophising narratives” and “alarmist’ teaching” of climate change education, which creates eco-anxiety among children and neglects to situate the discussion in a broader context, including the topics of global warming and more positive solutions achieved through technological innovation.¹²

As we shall show later, there is a school of modern educationalists which believes that it is the role of education to move attitudes in its preferred direction. Justice Lauwers of the Court of Appeal for Ontario characterises the competing viewpoints as “accommodation pluralism” and “convergence pluralism”. As its name suggests, proponents of accommodation pluralism accept the co-existence of multiple viewpoints and recognise that a diversity of ideas benefits society and that individuals with diverse views can co-exist. In contrast, those who endorse convergence pluralism champion tolerance only provided any viewpoint expressed converges on a specific, preferred set of values.¹³ Evidence suggests it is the latter perspective that is sometimes winning out in the presentation of controversial topics to children.¹⁴

This pedagogical development is at odds with every major declaration of human rights. Article 2 of the First Protocol (“A2P1”) to the European Convention on Human Rights (“ECHR”) is an example.¹⁵ In *Folgerø v Norway*, the Strasbourg Court explained that the thrust behind A2P1 “aims in short at safeguarding the possibility of pluralism

12 Louisa Clarence-Smith, ‘“Alarmist” climate change teaching leaves pupils fearing for their future’ *The Telegraph* (20 May 2023) www.telegraph.co.uk/news/2023/05/20/climate-change-alarmist-teaching-school-children-fears

13 Peter D Lauwers, “What Could Go Wrong with Charter Values?” (2019) 91 SCLR (2d) 1 at 43, footnote 182, and 60–61; Peter D Lauwers, “Liberalism and the Challenge of Religious Diversity” (2017) 79 SCLR (2d) 29

14 Namita Singh, ‘Teacher recorded calling pupil “despicable” during debate on transgender ideology’ *Independent* (18 June 2023) www.independent.co.uk/news/uk/home-news/church-of-england-kent-gender-inclusivity-b2360009.html

15 The text of A2P1 is set out under “The Theory” below.

in education, which possibility is essential for the preservation of the 'democratic society' as conceived by the Convention."¹⁶ This duty is far-reaching in that it requires the State to refrain from taking action and to take action to protect this right, and it applies to the content and manner in which education is provided as well as to "the performance of all the 'functions' assumed by the State."¹⁷ Crucially, the Court held that A2P1 requires "...that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents'

16 (2008) 46 EHRR 47 [84(b)]

17 *ibid* [84(c)]

religious and philosophical convictions."¹⁸ The Court cautioned that "the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded ["by a given school or teacher"] by carelessness, lack of judgment or misplaced proselytism."¹⁹

We shall first examine in a little more detail the theory of parental rights in education as recognized in this country today. Secondly, we shall consider how far the reality accords with the theory. Finally, we shall present constructive proposals for a solution.

18 *ibid* [84(h)]

19 *ibid* [84(i)]

THE THEORY

The rights of parents in declarations of human rights

When the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948, it proclaimed at Article 26:

“Parents have a prior right to choose the kind of education that shall be given to their children.”²⁰

Memories were then fresh of the Nazis’ programme of indoctrination in schools. The control of what children are taught is a feature which has been shared by most authoritarian regimes.²¹ Although consciousness of how authoritarian governments control education may now be less vivid, almost every subsequent major rights declaration has included some reference to parental rights in respect of education. The International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of the Child and the International Covenant on Civil and Political Rights all acknowledge some right for parents to ensure their children’s education is in conformity with their own religious or philosophical convictions. So, too, do the UN Convention against Discrimination in Education, and Recommendations of the Parliamentary Assembly of the Council of Europe.²² The outlawing of political indoctrination is the other side of the same coin.

The UK Supreme Court has placed the rights of families to bring up their own children in their own way as part of the broader picture of freedom of thought and expression in a liberal democracy:

“There is an inextricable link between the protection of the family and the protection of fundamental freedoms in liberal democracies.... The first thing that a totalitarian regime tries to

do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers’ view of the world.”²³

Of the later rights charters, the most relevant for Britain today is Article 2 of the First Protocol to the European Convention on Human Rights (sometimes referred to by the shorthand “A2P1”). Not all the provisions of protocols to the ECHR have been ratified by the UK, and not all of those which have been ratified have been incorporated in the Human Rights Act 1998 (the “HRA”). But A2P1 is included in Schedule 1 to the HRA. The material passage is in these terms:

“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]

The leading decision of the Grand Chamber of the Strasbourg Court on A2P1 is *Folgerø v Norway*.²⁴ The applicants were humanists who did not want their children to receive classes in a subject of Christianity, religion and philosophy, which was being introduced in all Norwegian schools. They wanted to remove their children from the whole of this subject, but Norwegian law allowed withdrawal from only parts of it. The Strasbourg Court held that this violated their A2P1 rights.

It is important to observe that one of the main reasons why a violation was found on the facts of the *Folgerø* case was a lack of information:

“... the operation of the partial exemption arrangement presupposed, first, that the

²⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art 48, available at: www.refworld.org/docid/3ae6b3712c.html

²¹ See Marc T Voss & Heather E Moore (2020). *Youth Under Dictators: The Indoctrination of Children in Nazi Germany and Soviet Russia*.

²² Relevant passages are set out in an Appendix to this paper.

²³ *Christian Institute v The Lord Advocate* [2016] UKSC 51 at [73] per Lady Hale, Lord Reed and Lord Hodge. The judgment, with which the other two members of the Court agreed, continued: “Within limits, families must be left to bring up their own children in their own way.”

²⁴ (2008) 46 EHRR 47

parents concerned be adequately informed of the details of the lesson plans to be able to identify and notify to the school in advance those parts of the teaching that would be incompatible with their own convictions and beliefs. This could be a challenging task not only for parents but also for teachers, who often had difficulty in working out and dispatching to the parents a detailed lesson plan in advance. In the absence of any formal obligation for teachers to follow textbooks, it must have been difficult for parents to keep themselves constantly informed about the contents of the teaching that went on in the classroom and to single out incompatible parts.”²⁵

[internal citations omitted]

We shall discuss later the importance of information in the context of this Convention right.

The right of parents in domestic education law

As what is described as a “general principle”, domestic statute law recognises the proposition enshrined in the Universal Declaration of Human Rights. Under the heading “Pupils to be educated in accordance with parents’ wishes”, s.9 of the Education Act 1996 states:

“In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.”

In theory a decision taken by a Minister or any other public authority which did not have regard to that general principle would be open to judicial review; however, we are not aware of any case in which judicial review has been sought on that ground.

The corollary to parental wishes, which is the prohibition of political indoctrination, is also

mentioned in that Act. In respect of maintained schools, s.406 provides under the side heading “political indoctrination”:

- “(1) The local education authority, governing body and head teacher shall forbid—
- ...
- (b) the promotion of partisan political views –
- (i) in the teaching of any subject in the school.”

Section 407 of that Act provides:

- “(1) The local education authority, governing body and head teacher shall take such steps as are reasonably practicable to secure that where political issues are brought to the attention of pupils ...,
- ...
- they are offered a balanced presentation of opposing views.”

The High Court examined the meaning of these two sections in *Dimmock v Secretary of State for Education*.²⁶ The case concerned the decision of Mr David Miliband, when Secretary of State for the Environment, to distribute to every school a copy of a film about climate change made by Al Gore, the former Vice-President of the USA. Mr Justice Burton described the film, which had won an Oscar for best documentary, as powerful and dramatically presented, but containing a number of scientific errors. By the end of the hearing the Government had agreed to send out a Guidance document in hard copy to every school drawing attention to nine respects in which alarmist statements in the film were scientifically unsupported and that it presented a one-sided view on controversial political issues.

The judge held that “partisan political views” were not confined to the views of a political party; he considered the best simile was “one-sided”.²⁷ He endorsed a suggestion in counsel’s skeleton argument that factors which might indicate a partisan promotion of views included: a superficial treatment typified by portraying philosophical premises as self-evident; the misleading use of

²⁵ (2008) 46 EHRR 47 [97]

²⁶ [2007] EWHC 2288

²⁷ *ibid* [45]

scientific data; the exaltation of protagonists and demonisation of opponents; the derivation of a moral expedient requiring the viewer to adopt a particular view in order to do right.²⁸ The judge said that s.406 was not breached merely by showing pupils a politically controversial film, and that the Act did not require “equal air time” for opposing views.²⁹ But what he considered the Act did require was a presentation which was fair and dispassionate. Prior to the agreement to accompany the film with Guidance approved by the Court, he considered that the Government was failing to achieve the balance demanded by statute.³⁰

The earlier case of *McGovern v Attorney-General* considered the meaning of “political”.³¹ Although that case was concerned with whether an organisation fulfilled the criteria to be a charity, there is no reason to doubt that Slade J’s exposition of the meaning of “political” has a more general application. In rejecting the application by Amnesty International to be accepted as a charity, he held that seeking to change the laws of a country or its governmental policy or decisions is “political”.

The Education Act 1996 recognises the rights of parents in its provisions on sex education. When such education is given, schools are to take such steps as are reasonably practicable to secure that,

“it is given in such a manner as to encourage those pupils to have due regard to moral considerations and the value of family life.”³²

The rights of parents in governmental policy documents

Over the last 50 years, human rights law has moved on from bare statements of principle about rights to explicit, positive duties on public authorities to make the principles real. An example is afforded by the right in Article 2 of the ECHR,

which states that “Everyone’s right to life shall be protected by law.”³³ This has been held for many years to involve not merely that the state must refrain from taking a person’s life without justification, but also a positive duty to inquire into and explain the circumstances of a death.³⁴ In the same way, the courts interpret A2P1 not merely to require the state to refrain from impeding parents’ rights regarding education but also to impose positive duties, as affirmed by the Strasbourg Court in *Folgerø*.

A further important matter, which has also been recognised by British government policy, is the importance of parents receiving information on what is being taught. Parents are not present in the classroom: therefore, the desired aim of the education in schools being in accord with parents’ wishes can hardly be achieved unless parents are made aware of what is being taught. Consequently, the parental right in respect of children’s education is vacuous if the parent cannot know what is being delivered.

The importance of information for parents has been most emphatically stated by the government in respect of the sensitive area of relationships and sex education (“RSE”). RSE was made compulsory in all schools³⁵ by legislation in 2017.³⁶ Part of the RSE scheme entailed a requirement for the Secretary of State to issue guidance, and a duty on schools to have regard to it. In 2019, the Secretary of State issued such Guidance.³⁷ Its

28 *ibid* [11]

29 *ibid* [14]

30 *ibid* [34]–[45]

31 [1982] 1 Ch 321

32 Education Act 1996, s.403

33 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2

34 A good exposition of the case-law on this topic may be found in the recent judgment of Popplewell LJ in *R (Morahan) v West London Coroner* [2022] QB 1205.

35 All pupils in primary education must receive relationships education; all in secondary education must receive RSE; and all pupils at both stages must receive health education. These requirements apply to maintained schools, academies and independent schools.

36 Children and Social Work Act 2017, ss. 34, 35, implemented by the Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019.

37 Department for Education, Guidance, “Relationships Education, Relationships and Sex Education (RSE) and

policy on the involvement of parents states:

“40. The role of parents in the development of their children’s understanding about relationships is vital. Parents are the first teachers of their children. ...

41. All schools should work closely with parents when planning and delivering these subjects. Schools should ensure that parents know what will be taught and when

42. Parents should be given every opportunity to understand the purpose and content of Relationships Education and RSE. Good communication and opportunities for parents to understand and ask questions about the school’s approach help increase confidence in the curriculum.”

That policy may sound so whole-hearted that the casual observer might think there was little more to say. In fact, there was one omission. It did not explicitly say that parents should be able to see the actual teaching materials being used. After concerns had surfaced about teaching materials containing controversial subject matter, and the difficulty of parents being allowed to see such materials, the Department for Education issued two circular letters. The particular context of these letters was that schools had contracted with external organisations either actually to come into classrooms to deliver the lessons, or to provide a full suite of teaching materials for the use by the schools’ teachers. The first letter, in October 2022, was under the signature of the then Minister of State for Schools and Childhood, Kelly Tolhurst MP. It said:

“The Department is of the view that schools should be able to agree to reasonable requests from parents to view curriculum materials and that copyright law permits them to do so. Parents are not able to veto curriculum content, however, it is reasonable for them to ask to see

material, especially in relation to sensitive topics.”

The letter recognised that copyright law could preclude schools from providing electronic access to an entire resource, but said that,

“The Department would expect schools to avoid entering into any agreement with a provider that seeks to prevent schools from ensuring parents are properly aware of the materials which are being used to teach their children.”

This was a slightly question-begging statement of policy. On the one hand, it wanted parents to be “properly aware”, but on the other was not asking for them to be able to study an “entire resource”. Did this mean the parents should be able to see half of the materials being used? or a quarter? The only hint in the text of the letter was that schools should “provide examples”.

The second letter came on 31st March 2023 and was under the signature of the Secretary of State, the Rt Hon Gillian Keegan MP. This repeated many of the previous lines about the value of a good relationship between parents and schools and avoiding agreements with external providers which prevented parents being “properly aware”. But it also firmed up on what “properly aware” meant. The policy now was:

“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”³⁸

[emphasis added].

So, not only does the Department now consider that all materials must be available to parents, and that this should happen even over the opposition of external providers, but in a significant passage the letter recognised that requiring parents to come into the school premises in the evening to

Health Education: Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers” (25 June 2019, updated 13 September 2021), www.gov.uk/government/publications/relationships-education-relationships-and-sex-education-rse-and-health-education

38 Department for Education, Correspondence, “Secretary of State letter to schools about sharing curriculum resources with parents” (31 March 2023), www.gov.uk/government/publications/secretary-of-state-letter-to-schools-about-sharing-curriculum-resources-with-parents

look at material without being able to take a copy might not always amount to adequate access:

“Having to come to the school is, however, likely to be inconvenient for parents and schools, so should not be a long-term arrangement. We would expect schools to take urgent steps to either renegotiate these contracts or find an alternative provider at a suitable time, so that materials can be sent out or made available online to parents.”³⁹

The “long term arrangement” which the Department would like to see is that all RSE materials are made available online or sent out in hard copy.

The corollary of parental rights – namely, the prohibition of one-sided political presentation in teaching – has also recently featured in statements of government policy. In February 2022, the then Secretary of State for Education, Mr Nadim Zahawi, issued Guidance entitled “Political Impartiality in Schools”. The guidance reminded teachers of the principle that they should avoid presenting contested theories as fact. It contained some scenarios by way of illustration; but these seemed to tread around saying anything which might be controversial. For example, the text stated:

“Where schools wish to teach about specific campaigning organisations, such as some of those associated with the Black Lives Matter

movement, they should be aware that this may cover partisan political views.”⁴⁰

The only concrete example offered of a controversial view was defunding the police – a policy which has not been a prominent feature of discourse in Britain. This invites the comments: Why cannot the Government specify any viewpoints actually advanced in Britain which are politically partisan? Why can it not identify the organisations which promote such views? Why should schools be teaching about campaigning organisations in the first place?

Less timorous was Kemi Badenoch as Minister for Equality in 2020 when from the despatch box she said that the Government opposes “the teaching of contested political ideas as if they are accepted facts.”⁴¹ She then stated that the Government “stand unequivocally against critical race theory,” which she described as “a dangerous trend in race relations... an ideology that sees my blackness as victimhood and their whiteness as oppression.”⁴² She went on to say that any school that teaches “elements of critical race theory as fact, or that promotes partisan political views such as defunding the police without offering a balanced treatment of opposing views” was breaking the law.⁴³

40 Department for Education, Guidance, “Political impartiality in schools” (17 February 2022), www.gov.uk/government/publications/political-impartiality-in-schools/political-impartiality-in-schools

41 Hansard, 20 October 2020 (Volume 682), pp 1011–12, <https://hansard.parliament.uk/commons/2020-10-20>

42 *ibid*

43 *ibid*

39 *ibid*

THE REALITY

The question whether the reality in education today corresponds to the theory may be considered by studying firstly a number of illustrative incidents, and then four recent wide-ranging reports. The authors make no comment on the substantive merits of the content of the curriculum, but point to these case studies to illustrate the current state of affairs vis-à-vis parental rights.

The Clare Page – Haberdashers’ Hatcham College case

Clare Page appears to be a fairly typical 21st-century parent.⁴⁴ She is not a church-attending Christian and does not approach RSE with the firm adherence to a traditional sexual morality such as characterises, for example, Muslims and Christians. She is not in any category of those who might be anticipated to want an education for her daughter outside the norm. She describes her thinking as classically liberal.

Her unease at trends in current teaching began with history teaching at her daughter’s primary school, where the children were told that the pronoun “they” must be used for all historical figures, because we do not know what pronoun they would have chosen for themselves if they had had the choice.

Her discomfort became greater when her daughter was a pupil at Haberdashers’ Hatcham College. In art lessons the pupils were asked to produce posters for the Black Lives Matter movement. After researching images from the USA, pupils produced images of black clenched fists dripping with blood: these violent images were praised by the teachers and put up prominently around the school. She made a complaint but was told there was no problem.

It was the RSE teaching which caused her the greatest concern. Her concerns particularly related to the philosophical underpinning of the RSE

44 The material in the following paragraphs is drawn from: Coalition for Marriage, “Mum takes on Government over Daughters’ Education”, www.youtube.com/watch?v=_W_CKH5OjBg

lessons much more than the detail of what the children were told about sex. In common with other classes in other subjects, she understood from her daughter that “intersectionality” regularly crops up: this is a “a lens, a prism, for seeing the way in which various forms of inequality (gender, class, sexuality, or immigrant status) often operate together and exacerbate each other” a concept developed by an African American feminist law professor, Kimberlé Crenshaw.⁴⁵ As Ms Page explained, her daughter learned about “sex positivity” as well, and that these theories were “given as fact” in lessons delivered by an external provider, the School of Sexuality Education.⁴⁶

Ms Page asked to see the teaching materials being used for RSE. The school resisted, saying they did not have them, as the teaching was being undertaken by an external provider. She, therefore, telephoned the School of Sexuality Education to ask to see them. The result of that approach was a complaint from the head teacher that she had been harassing the company. She did eventually have a meeting at the school at which she was allowed to see some slides which had been used in the RSE lesson on “consent”. These were provided to the school by the School of Sexuality Education, which made a specific request that the school destroy them as soon as this meeting had taken place. Ms Page wanted to be able to take away copies, but was refused.⁴⁷

Ms Page made a Freedom of Information request to the Haberdashers’ Trust, which is a public authority within the scope of the Freedom of Information Act 2000 (“FOIA”) in its capacity as running a state-funded school. Having had no joy with that request she made a complaint to the

45 Katy Steinmetz, “She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What It Means to Her Today”, *Time* (20 February 2020), <https://time.com/5786710/kimberle-crenshaw-intersectionality>

46 Coalition for Marriage, Clare Page Interview (n44) (22:08). See also *Page v The Information Commissioner & Anor* [2023] UKFTT 476 (GRC)

47 Freedom of Information Act 2000 (FOIA) Decision IC-171936-C9H8

Information Commissioner. By a Decision Notice⁴⁸ dated 29 September 2022 the Commissioner held that the Trust was entitled to rely on s.41 of FOIA, under which information is exempt from disclosure if that would involve a “breach of confidence”.

On 6 June 2023 the First Tier Tribunal dismissed an appeal by Ms Page. The Tribunal accepted that a public interest balance had to be undertaken, and that there was a “very strong public interest” in parents being properly aware of the materials that would be used in sex education in advance of lessons.⁴⁹ The Tribunal also accepted that having materials to take home would enable more detailed discussions and facilitate the making of any complaint; and that there is “some value” in the public in general knowing the content of sex education funded by public money.⁵⁰ Despite all these factors, the Tribunal held that they were outweighed by the importance of upholding duties of confidence.⁵¹

The St Anne’s School case

The *Haberdashers’ Hatcham* case turned on the particular circumstance that the school only ever had the teaching materials for the limited purpose of a meeting with the parent to discuss the parent’s concerns. But it became clear from another, subsequent case that the outcome would have been the same if the school had always possessed the teaching materials or had created them within the school.

This case related to St Anne’s Church of England Primary School that used teaching materials provided by a company called Jigsaw, which says it works with no fewer than 7,000 schools.⁵² The school had access to much of Jigsaw’s materials through read-only access to Jigsaw’s electronic platform. A parent asked to see the lesson materials, but was refused. The parent made a

formal FOIA complaint, which ultimately led to a Decision Notice from the Information Commissioner dated 21 November 2022.⁵³

The Commissioner dismissed the complaint. In so far as the teaching materials were on Jigsaw’s platform, the Commissioner concluded that they were not “held” by the school (which was the only public authority in question), and so outside the scope of FOIA.

The school did hold copies of “knowledge progression maps”, which outlined the learning objectives for each term. But disclosure of even these was rejected.⁵⁴ The Commissioner relied on s.43 of FOIA, which creates a discretionary ground for exemption from disclosure if that would prejudice a person’s commercial interests. Jigsaw asserted that it owned the intellectual property in these progression maps, and that it would be prejudiced by them passing to the parent, as this might lead to other undertakings pirating their teaching ideas. It was argued to the Commissioner that disclosure would be likely to have “a chilling effect on the production of such materials” meaning that those producing such materials would be unwilling to invest time and resources; this, it was submitted, “would be of significant detriment to the education sector as a whole.”⁵⁵ The Commissioner decided that the balance of public interest lay in withholding the materials from the parent.⁵⁶ It is understood that appeals are being pursued against one or both of the Commissioner’s decisions; but for the moment the only realistic conclusion which we are able to draw is that parents are unlikely to succeed in obtaining copies of RSE teaching materials through the existing legal mechanism of FOIA.

The Brighton Council and Critical Race Theory

The challenges associated with parents’ efforts to access teaching materials via FOIA requests is not limited to RSE. It also extends to other political topics, such as race relations.

⁴⁸ Decision IC-171936-C9H8

⁴⁹ *Page v The Information Commissioner & Anor* [2023] UKFTT 476 (GRC) [152]–[153] (*Page Appeal*)

⁵⁰ *ibid* [158]–[159]

⁵¹ *ibid* [162]

⁵² Jigsaw, ‘Our Story’ <https://jigsawpshe.com/our-story> (accessed 24 June 2023)

⁵³ Decision IC-188308-L5M6

⁵⁴ *ibid* [10], [14], [25]

⁵⁵ *ibid* [20]

⁵⁶ *ibid* [25]

Don't Divide Us, which espouses what might be described as more conventional anti-racism approaches, published a report critiquing Brighton and Hove City Council policies concerning anti-racist teaching in schools.⁵⁷ Its report scrutinized the June 2020 announcement by the Council that it was to become an "anti-racist Council". The Council then adopted an "Anti-Racist Schools Strategy" which involved "racial literacy training" for teachers, delivered by an independent trainer.⁵⁸ Its report explains, "the form of 'anti-racism' adopted was derived exclusively from American Critical Race Theory (CRT) and presents controversial and contested concepts such as 'white privilege', 'unconscious bias' and 'systemic racism' as though they are a matter of public consensus or fact."⁵⁹ A Council publication stated:

"White people have a statutory and moral role to play in promoting a fair and just organisation and city by recognising our white privileges and unconscious bias."⁶⁰

Councillor Hannah Clare acknowledged the inspiration of CRT: "Critical race theory is our lens for developing our understanding of the complexities of racism"⁶¹

The only external consultation by the Council prior to the launch of this programme was with a group called the Brighton and Hove Educators of Colour Collective. This entity's Twitter account was started only after the Council had begun to develop its policy and had just 265 followers. The policy of secrecy did not end when implementation of the policies had begun. Only the trainers and those attending the training were allowed access to the teaching materials. Requests by parents to see the teaching materials were brushed off, and even three local councillors were denied access. A local

⁵⁷ Don't Divide Us (2022). *DDU Case Study Exposes Brighton's Racial Literacy 101 Training for Teachers*. <https://dontdivideus.com/2022/03/16/ddu-case-study-exposes-brightons-racial-literacy-101-training-for-teachers>

⁵⁸ *ibid*

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ Brighton and Hove City Council Tourism, Equalities, Communities and Culture Committee Meeting (2020), p 4, as quoted in Don't Divide Us report (n57)

resident, who was himself involved in anti-racism education and the author of a book on the subject, became alarmed at the ideological and narrow line being taken. His probing drew wider attention to the issue, and eventually documents involved in the programme were leaked to the press. This led to Brighton's activities being raised in a debate in the House of Commons and finally subject to democratic scrutiny.⁶²

As was the case with other FOIA requests related to RSE teaching materials, the Council resisted the disclosure of materials on the basis of protecting the training provider's "commercial interests". Don't Divide Us noted that this reason was a spurious way of preventing democratic scrutiny of the Council's Strategy and teaching materials.⁶³

Recent reports

In recent months there have been published four significant reports with quantitative data on what is actually happening in the classroom:

- **Who's in Charge? A report on Council's anti-racist policies for schools** – Don't Divide Us (July 2022) reported the outcome of 173 FOIA requests to local authorities and a YouGov survey of 1,000 parents.
- **The Political Culture of Young Britain** – Professor Eric Kaufmann examined the impact of ideological and population shifts on identity and politics in a report published for Policy Exchange in 2022. This reported a survey by YouGov of 1,542 young people aged 18 to 20.
- **What is being Taught in Relationship and Sex Education in our Schools?** – A report presented by Miriam Cates MP to the Prime Minister, published by the New Social Covenant Unit (March 2023). This report collated a substantial volume of material on RSE teaching in schools.
- **Asleep at the Wheel: An Examination of Gender and Safeguarding in Schools** – Lottie Moore, who has an academic background and is a Research Fellow at Policy Exchange, with a foreword by Rosie Duffield MP (Labour), Policy Exchange,

⁶² *ibid*

⁶³ *ibid*

2023 reported the outcome of 300 FOIA requests to state schools.

- **Show, Tell and Leave Noting to the Imagination: How Critical Social Justice is Undermining British Schooling** – Jo-Anne Nadler, Civitas (May 2023). This reported two Deltapoll surveys, one of 16- to 18-year-olds, the other on parents of 12- to 16-year-olds.
- **Who are the Experts? Don't Divide Us** – reported an investigation into 49 external providers of anti-racism school educational materials, analysing their connections, activities and funding.

The Cates and Moore reports are principally focused on RSE; the Don't Divide Us report is focused on teaching on racism; and the Kaufmann report is more broadly concerned with what the author calls "culture wars" issues.

The arrival of new educationalists

Several themes of relevance emerge from these studies. One is the arrival on the scene of a new type of educationalist.

Many teachers are unsure of how to teach the new subject of RSE. Accordingly, many schools are purchasing teaching materials from entities with no track record in educational publishing. In other cases, schools are hiring outside entities actually to deliver the lessons: part of the explanation for this may be that teachers feel disinclined to teach the new curriculum.⁶⁴ An example of this is provided by the Haberdashers' Hatcham case (see above). It is not clear whether the individuals thus sent into the classrooms have the professional qualifications required of salaried teachers in the state sector.

These external providers of RSE often seem to be bodies with a particular and pronounced viewpoint. The First Tier Tribunal hearing the Page appeal made the following findings in respect of the School of Sexuality Education: its teaching resources recommend to 16-year-old children they watch an 18+ Netflix programme; its website has links to other sites unsuitable for children; and its

⁶⁴ See, for example, NASUWT (The Teachers' Union), "Half of secondary teachers do not feel confident delivering RSE" (28 September 2022), www.nasuwat.org.uk/article-listing/half-secondary-teachers-not-confident-rse.html

CEO had formed "an intra-activist research and pedagogical assemblage to experiment with relationship and sexuality education" in schools.⁶⁵ Cates also observes that the leading voice for the RSE providers' market is a body called Sex Education Forum, which

"describes itself as having a thirty-year campaign history for its own specific vision of RSE, including that it becomes fully compulsory (with no parental right to withdraw), and is ideologically 'sex positive', pro-LGBTQIA+ and mindful of 'intersectionality',"⁶⁶

Cates draws attention to the 47 "partner" members of the Sex Education Forum, of whom she counts 27 as openly advocating Gender Theory; of the remaining 20, she writes that their views are unstated in the public domain, as their materials are behind a paywall, but none openly claim to present a balanced viewpoint that includes religious approaches. Cates also reports that the PSHE Association, which is the DfE-approved ratifying body for RSE, promotes Gender Theory as a fact.⁶⁷

Nobody would doubt the sincerity of these movements. But the questions are whether their commitment to one viewpoint makes it difficult for them to include a fair presentation of the more traditional perspective – which the Government's supposed policy of balance would require – and whether they are even trying to do so. Cates notes:

"... charities and activists that formerly campaigned for the repeal of Section 28 and LGBT interests, such as Stonewall and the LGBT Consortium ... form a disproportionately large part of the RSE sector."⁶⁸

One organisation which has received public funds to train schools is Mermaids, a campaign group which recently published the view that schools should ignore the Attorney-General's advice.⁶⁹

⁶⁵ Page Appeal (n49) [156]

⁶⁶ Cates (n6)

⁶⁷ *ibid* pp 35, 78–79

⁶⁸ *ibid* p 15

⁶⁹ *ibid* p 48, 80

There must be a real question whether organisations with so pronounced an agenda are best placed to provide the balance which is fundamental to education.

The Don't Divide Us report provides evidence of something similar occurring in respect of anti-racism teaching. They list 73 third-party providers of materials seen in response to FOIA requests. The names of some – for example, "Race Matters" and "No Room for Racism" – proclaim them as single interest entities. It is hard to find a generalist educational publisher on the list. The organisations are all doubtless sincere and well-intentioned; but one struggles to avoid the impression that they are producing material to advance ideas which they believe in, rather than to present a dispassionate and objective picture.⁷⁰ A striking finding is that of the 34 councils whom the authors assessed as providing unbiased teaching, not a single one was using material from a third-party provider.⁷¹

The influence of American ideologies

Another important, recurrent theme is the influence of ideologies which have been developed in North America.

70 Don't Divide Us (n4) pp 16–18

71 *ibid* pp 2, 15

Within the realm of sex and relationship discussion, an influential line of thinking is what has become known as "Gender Theory". This contends that there is a distinction between biological sex and gender identity. The former is based on physical characteristics and is assigned at birth. The latter, gender identity, is an internal sense of who a person feels himself or herself to be. Gender identities are regarded as on a spectrum, ranging from the most masculine to the most feminine: there are not just two genders. Even biological sex may be placed on a spectrum, ranging from "male" to "female" with "intersex" located at a central point thereon.⁷² An illustration of these ideas can be seen in the "Genderbread Person" graphic recently used for education in a British school.⁷³

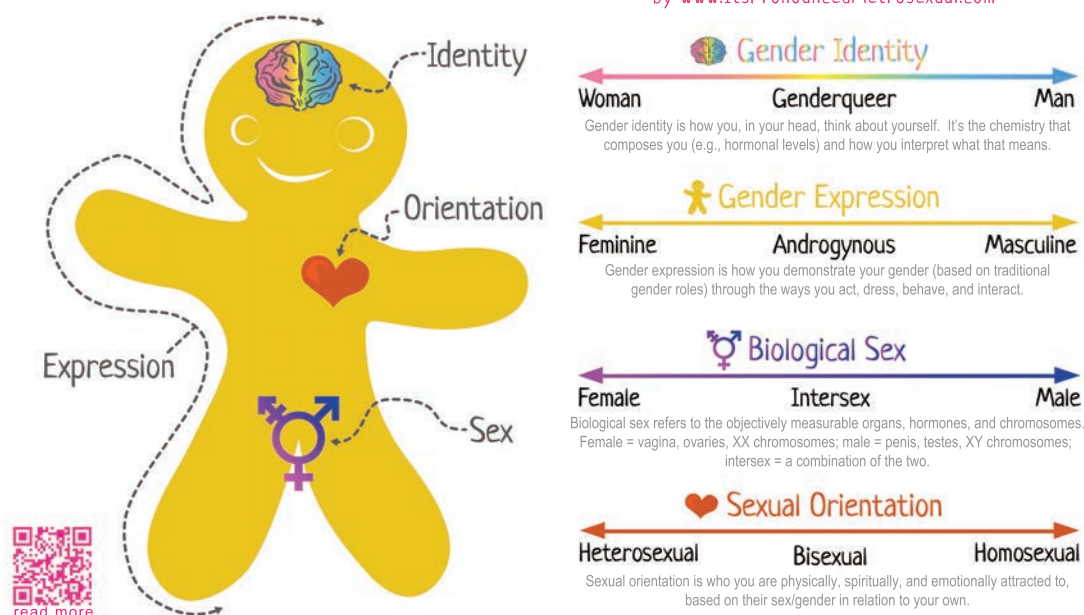
Clare Page, as already mentioned, observed a strong connection with the intersectionality theory of Kimberlé Crenshaw. The School of Sexuality Education stated in a formal response to the Department for Education:

72 *ibid* p 30

73 Graphic by Sam Killermann, who posts uncopyrighted material at www.itspronouncedmetrosexual.com. It was used in Powerpoint slides prepared by the PHSE Lead in a secondary academy school, which were obtained by a Freedom of Information request (Cates (n6) p 30)

The Genderbread Person

by www.ItsPronouncedMetrosexual.com



“In this document we firstly aim to lay out the ways in which this guidance lends itself to an intersectional feminist, evidence-based, sex positive, LGBTQIA+ inclusive RSE.”⁷⁴

Miriam Cates quotes⁷⁵ a publication by the Sex Education Forum setting out research findings based on the United States not Britain, and RSE teaching guides directing teachers to American sources such as the website Afrosexology.

Kaufmann identified the central ideology as “critical social justice”, with “Critical Race Theory” as a branch. The ideologies are, in his view, dominated by an analysis of society in which hierarchy and power are rooted in race and gender inequalities. The new thinking has transposed the Marxist analysis of victim-oppressor in class terms into a framework of victim-oppressor in identity terms. Kaufmann characterises the theories thus:

“Critical Race Theory (CRT) is a sophisticated meta-theory which argues that neutral liberal principles underlying the law and other elite institutions disguise identity-based power hierarchies, thereby permitting dominant groups to maintain their position. ... The same is true of critical gender or sexuality theory that, along with CRT, make up the totality of Critical Social Justice (CSJ). Such theories also overemphasise ancestral and gender guilt.”⁷⁶

Don't Divide Us broadly agree with Kaufman's analysis:

“CRT ... reracialises public and school culture.... Furthermore, when CRT becomes a precept for conduct and a means of making political, economic and cultural status claims, we can say that it is no longer a theory, but a partisan ideology.”⁷⁷

The Don't Divide Us report found the widespread use of teaching materials embodying a new

ideology of anti-racism. The report explained that there are two conflicting versions of racism. One associates racism with failing to treat people fairly. The other, a new, radical approach, works by treating individuals as though they belong to fixed identity groups, and regards racism, not as specific happenings when there is unfair treatment, but as a prevailing deficit of knowledge or correct moral attitudes. It said:

“Established approaches to anti-racism, such as the ‘colour blind’ ideal to see every person as a unique individual rather than first by a group identity, are being written out of our narrative about race relations in this country.”⁷⁸

The same analysis of two, sharply contrasting attitudes, was presented by the Rt Hon Kemi Badenoch as Minister for Women and Equalities in October 2023:

“It wasn't a tough decision for us to reject the divisive agenda of critical race theory. We believe as Martin Luther King once said, people should be judged by the content of their character – not the colour of their skin. And if that puts us in conflict with those who would re-racialise society, who would put up the divisions that have been torn down – well, ... bring it on.”⁷⁹

There is clear evidence that some of the new educators are firmly at variance with the colour-blindness approach. One finds this on the website of HFL Education, a leading national provider:

“Surely we should be striving for race equity, not equality? If we focus just on providing the same opportunities for everyone, regardless of race or in a ‘colour blind’ fashion, we will continue to see inequitable outcomes and under-representation of racially minoritised people in schools.”⁸⁰

The new anti-racist approach regards Britain today as a society built on a history of oppression and

74 School of Sexuality Education (2019). “Our Response”. <https://static1.squarespace.com/static/57db276f7e0abec416bc9bb/t/5f816193a65e566a0ec12fbd/1602314644682/Government+Response+FORMATTED.pdf>

75 Cates (n6) pp 77–78

76 Kaufmann (n5) p 35

77 Don't Divide Us (n9) p 8

78 Don't Divide Us (n4) p 7

79 Speech to Conservative Party Conference, 2 October 2023

80 HFL Education. Addressing Race Equity in Schools. www.hfleducation.org/blog/addressing-race-equity-schools

exploitation based on its colonial past. Therefore, it requires active anti-racist steps to eradicate the inherent disadvantages of those who belong to the group with the disadvantaged identity. Hence it deploys the concepts of “white privilege” and “unconscious bias”.⁸¹

The new anti-racism ideology is vividly illustrated by the “Pyramid of White Supremacy”. This is a graphic which originated in the United States to convey the theory that the worst outcomes, such as genocide, depend, like the stones in a pyramid, on the support of the stones below. Thus, violence and “police brutality” depend on “calls for violence”; which depend on “discrimination”; which depend on “veiled racism”; which depend on “minimization” and finally on “indifference”. Among examples of lower bricks in the structure are “denial of white privilege” and saying, “politics doesn’t affect me”. For a person to be apolitical is thus held up as contributing support to genocide. From this analysis springs the contention that everybody must become anti-racism practitioners. It would be hard to dispute that this is a radical and highly politicised approach. Nonetheless, a guidance document for Coventry schools⁸², advocated the use of the “Pyramid” reproduced above.

To assess the prevalence of the new ideology, the Don’t Divide Us report analysed teaching materials as falling into three categories:

“unbiased” – those falling within the accepted concepts of the Equality Act

“biased” – those using concepts such as structural racism and white privilege

“at risk” – those which do not explicitly use the “biased” language and concepts, but which contain traces of identity politics.⁸³

In the materials produced in response to its FOI requests it found 43% unbiased, 23% biased and

⁸¹ Don’t Divide Us (n4) p 15

⁸² Ibid pp 22, 24; Coventry schools guidance “Responding to Racism” pp 1, 7.

https://headsup.warwickshire.gov.uk/assets/1/responding_to_racism_warwickshire_version.pdf

⁸³ Ibid p 9



33% at risk: in other words, less than half presented a wholly conventional or unbiased approach.⁸⁴

Don’t Divide Us question the suitability of the use of American resources in British teaching material owing to the very different histories as to race relations:

“We conclude that the new anti-racism – a radically critical ideology based on American theoretical abstractions, that denies the progress Britain has made in becoming a successful multi-cultural society, is being legitimized in schools through the reframing of equality policies and the use of third-party anti-racist organizations.”⁸⁵

Kaufmann sought to assess the extent and impact of ideological influences by exploring whether the current attitudes of young people had been affected by recent innovations in teaching. The YouGov survey of school-leavers reported that 59% of British 18 to 20 year-olds said they had either been taught, or heard from an adult at school, about at least one of ‘white privilege’, ‘unconscious bias’ and ‘systemic racism’: these are three concepts associated with applied ‘Critical Race Theory’. This rises to 73% if there are included two themes of ‘critical social justice’ ideology, namely the idea of ‘patriarchy’ or that there are many genders. This survey found

⁸⁴ Ibid p 12

⁸⁵ Ibid p 27

evidence that more 18-year-olds had been taught in schools about such concepts than 20-year-olds: 79% of 18-year-olds had encountered at school critical social justice theory concepts, such as “white privilege” or “unconscious bias”, whereas only 68% of 20-year-olds had.⁸⁶ This suggests that the penetration of such ideas is an accelerating trend in British schools. These findings link with the changing results in surveys by the Higher Education Policy Institute of attitudes towards academic freedom. Its survey in June 2022 found that 61% of the students considered it more important that students be protected from discrimination than allowed unlimited free speech. By contrast, in 2016 only 37% supported that proposition.⁸⁷

These YouGov findings are corroborated by the Deltapoll, which found that 33% of young people aged 16 to 18 had heard at school about gender or trans ideology; 32% about structural racism 30% about white privilege; 25% about unconscious bias; and as much as 41% about “sex positivity”, which is often a label for encouraging sexual experimentation.

At a superficial glance, the ideologies of Gender Theory and of Critical Race Theory are quite distinct. But upon examination they share not only a genesis in North America but also a common preoccupation with identities. There is a similarity in analysis, and at the very least cross-fertilisation of ideas. Both posit a majoritarian oppression of minority or disadvantaged identities, and both contend that the existence, or at any rate, the scale, of this oppression has not previously been recognised as existing: therefore, for both an important aim is to open people’s eyes to unconscious biases. As is the case with philosophies, both see the need for new vocabulary, such as “heteronormativity”, which means not merely the holding of the opinion that heterosexuality is normal, but also discriminating (at least subconsciously) against those who are not heterosexual; “privilege”, which denotes the benefits people with certain identity characteristics

enjoy in society; and “intersectionality”, which explains the ways in which social categories or personal characteristics interrelate and intersect to create simultaneously power and oppression.⁸⁸ The significance of the existence of this ideology, or, if one prefers, these connected ideologies, in the present context is that in our judgment they have the character of a philosophy. As has been seen, in some respects Gender Theory and Critical Race Theory depart from the conventional liberalism, or as Clare Page would say, classical liberalism, which may also be regarded as a philosophy.

Teaching contentious theories as fact

Not only are contentious new ideologies being taught in schools: they are being taught as firm fact.⁸⁹ Nobody would object to the existence of the “gender identity” school of thought being taught to pupils of an age ready to learn about social and political ideologies in the modern world. What is controversial is the teaching of Gender Theory to young children as uncontested fact. As an example of this, Miriam Cates writes in her dossier presented to the Prime Minister:

“Olly Pike, a leading in-school ‘LGBT Edutainer’ who runs the brand Pop’n’Olly, presents a ‘video’ called Gender Explained for Kids – Part 1 on his Instagram account, which demonstrates one of the many ways the concept of a spectrum of ‘gender identity’ is introduced to children in primary school. It presents a “sliding scale that most people sit on somewhere”, from ‘Female’ to ‘Mostly Female’, ‘Partly Female’, ‘Both or Neither’, through to ‘Partly Male’, ‘Mostly Male’ or ‘Male’.”⁹⁰

Educate and Celebrate, which is another provider of materials for schools, describes how nursery and primary schools can refashion themselves to be “gender-neutral” and suitable for “children of all genders” because young children are “fluid”.⁹¹ Split Banana, another provider, advises “there is a lot of

⁸⁶ Kaufmann (n5) p 37

⁸⁷ Kaufmann (n5) pp 7, 28, 37

⁸⁸ “Racial Equity Tools Glossary” (accessed 26 June 2023), www.racialequitytools.org/glossary

⁸⁹ See Cates (n6), Kaufmann (n5)

⁹⁰ Cates (n6) p 30

⁹¹ *ibid* pp 24–25

great feminist porn out there” with an “ethical supply chain”.⁹²

Lottie Moore (Policy Exchange) undertook research by sending requests under the FOIA to a random selection of over 300 maintained secondary schools. The responses indicated that:

- 72% of schools were teaching that people have a gender identity distinct from, and potentially different from, their biological sex;
- 25% were teaching that some children “may be born in the wrong body”;
- 30% were teaching that a person who self-identifies as a man or woman should be so treated in all circumstances, irrespective of biological sex.⁹³

There is now abundant evidence to justify the concern expressed by Amanda Spielman, Ofsted Chief Inspector, that some material being taught in RSE has “no basis in any reputable scientific, biological explanation or any properly grounded understanding of human relationships.”⁹⁴

Similarly, the new anti-racism ideology is being taught as the only proper approach. Don’t Divide Us speaks of its intolerance and antipathy to freedom of speech, and says:

“What is clear is that the new definition of racism being promoted by a hardened activist base is not open to debate or tolerant of alternative views.”⁹⁵

The Deltapoll survey found that 42% of school leavers agreed with the statement, “I have been taught that Britain is currently a racist country”. A similar percentage had been taught that young men are currently a problem for society; 32% had been taught that a woman can have a penis; and 20% that a man can get pregnant⁹⁶.

YouGov found that 68% of young people who had

been taught critical social justice concepts said they were not told that there are respectable counter arguments to these ideas.⁹⁷

Lack of respect for the concept of balance in education was, perhaps, revealed in the advice of Ms Penny Rabiger, co-founder of BAMEed, on a webinar for teachers: “Watch out for the impartiality police”.⁹⁸

Thus, the evidence shows that children are being taught politically contested theories on a range of topics as fact and are not being educated on these sensitive topics in a balanced manner. This contravenes ss. 406 and 407 of the Education Act 1996 – which does not prohibit the teaching of these topics – but which does prohibit them being taught in a partisan or unbalanced way.

Furthermore, the practice of teaching these theories as fact runs strongly contrary to the wishes of most parents. Don’t Divide Us has provided us with the full, and as yet unpublished, data of the YouGov survey which they commissioned. One question was:

“For the following question, by ‘partisan’ we mean teaching one view as the right view which should be adopted, whilst by ‘non-partisan’ we mean teaching different views without saying one view is better than another. In general, do you think that schools in Britain should educate in a partisan or non-partisan way?”

⁹² *The Times*, 10 March 2023. News report by James Beal, Social Affairs Editor

⁹³ Moore (n7) p 11

⁹⁴ *The Times* (n92)

⁹⁵ Don’t Divide Us (n4) p 6

⁹⁶ Nadler (n8) pp 65–67

⁹⁷ Kaufmann (n5) p 7

⁹⁸ Flair webinar – Anti-Racist Educators: Moving From Performative to Transformative. Available at <https://flairimpact.com/moving-from-performative-to-transformative>

The result among all British parents of children aged 5 to 16 was:

partisan	11%
non-partisan	69%
don't know	20%

Teaching as fact what is, in fact, a theory – or presenting one topic from a single viewpoint without representing other perspectives – is the antithesis of the pluralism in education which is the cornerstone of the educational philosophy of the European Convention, as explained in the *Folgerø* case. Schools should inform but not indoctrinate.

The centrality of pluralism was again the critical point in recent litigation concerning RSE in Wales. The Welsh Government, which is responsible for education in Wales, introduced compulsory RSE a couple of years after the introduction of RSE in England. A group of Welsh parents challenged the absence of an entitlement to withdraw their children from RSE as incompatible with A2P1. The case was launched without any evidence of what was actually being heard in the classroom, and solely on the basis of the Guidance. The judge was persuaded by repeated statements in the Guidance about the obligation to present “a range of views” that RSE in Wales would be entirely pluralistic.⁹⁹ The Welsh Guidance went so far as expressly to say that on sensitive issues on which there are “tensions, disagreements or debates”, of which the judge considered the topic of gender identity to be a prime example, schools must provide a range of perspectives.¹⁰⁰ By contrast, the presentation in some English schools of only one perspective on gender identity is directly antithetical to human rights in education.

The use of education to change social attitudes

Miriam Cates’ research uncovered several indications that social change was expressly the aim of some modern educators. She recounts that Dr Elly Barnes and Dr Anna Carlile explain in their

⁹⁹ R (Isherwood) v Welsh Ministers [2022] EWHC 3331 (Admin) Steyn J, 22nd December 2022 [53], [58], [80]

¹⁰⁰ *ibid* [202] to [205]

RSE guidebook:

“In a nutshell, we are asking teachers to change, and not simply mirror our society.”¹⁰¹

[emphasis added]

Explicit connections with left-wing political movements were noted by Cates: Educate and Celebrate, which is a leading player in the provision of RSE teaching guidance,

“had its foundation as “a training arm” of Schools OUT UK, which included members of the Socialist Workers Party in the 2000s”¹⁰²

Don’t Divide Us make a similar observation:

“The present problem of creeping activism in schools is due less to a lack of knowledge, bad law or its (mis)interpretation, but rather competing beliefs about the fundamental meaning of education and its public role in a democracy.”¹⁰³

The Every Future Foundation, which teaches in schools, offers an Activism Academy to learn racial justice activism¹⁰⁴. In a similar vein, FLAIR Impact, who describe themselves as working in education to promote racial equity, offer a webinar to teach “What to measure (and how to measure it) to achieve cultural change”.¹⁰⁵ It is clear that certain organisations which have been allowed to enter the classroom, have agendas of socio-political change.

A London parent to whom we spoke in the course of research for this paper told us that her young daughter in a state primary school received an assignment in English classes to write letters to the Prime Minister about the inadequacy of water in Africa and to the Mayor of London complaining about policies on public libraries. These specific causes may not be particularly controversial, but the introduction of young children into political campaigning is not conventional.

¹⁰¹ Cates (n6) p 13

¹⁰² *ibid* p 15

¹⁰³ Don’t Divide Us (n4) p.26

¹⁰⁴ Don’t Divide Us (n9) p.13

¹⁰⁵ Flair webinar (n98)

Lack of transparency

Another recurring theme apparent from these reports is the culture of secrecy surrounding the disclosure of teaching materials. As explained earlier in this paper, a striking feature of recent developments has been reluctance on the part of educators to allow parents to know about what is being taught, as has already been described in the cases which led to the Information Commissioner's decisions. Of the authorities to whom FOIA requests were made by Don't Divide Us, 54% either made an inadequate response, or were unwilling to provide any materials at all.¹⁰⁶ Educate and Celebrate has published a guidebook "How to Transform Your School into an LGBT+ Friendly Place" by Dr Elly Barnes and Dr Anna Carlile which states:

"Sometimes schools choose to carry out open consultation with parents before conducting celebrations that draw on LGBT+ themes. But this can cause problems – as one headteacher noted:

*In hindsight, too much information was given to parents, which gave too much room for misinterpretation. In the end, we simply put the objectives and the learning outcomes for the event on the website. That was a real success story: you can't argue with those!"*¹⁰⁷

As Kaufmann explains, a policy of what might be called "under the radar" insertion of new ideologies into education has been seen in various ways.¹⁰⁸ Take, for example, the creeping of Gender Theory into subjects other than RSE, such as English and drama. Among the suggestions of one novel educator is that children should be asked in an art class to craft vulvas from Play-doh as an effective way of surreptitiously "undoing phallogocentric power relations":

"The vulva and clitoris-making reorients biology towards clitoral validity, subverting heteropatriarchal logics in ways that may be able to be snuck into the curriculum."¹⁰⁹

Evidence of a similar approach is provided by a report in *The Times* of a 16-year-old girl being forced to make penises and vulvas out of Play-doh in an RSE lesson¹¹⁰.

A connected reluctance to be open with parents was revealed by the responses to the Moore enquiries, in which two-thirds of schools said they would not inform a parent as soon as a child disclosed feelings of gender distress.¹¹¹

Summary: the forgotten human right

Thus, it is apparent that the content and nature of education being offered in many British schools has become significantly different from what it was only five years ago.

The introduction of compulsory RSE and the Black Lives Matter movement have been major factors in that change. Despite statutory guidance stating that schools should closely consult with parents when developing and delivering RSE, it is not clear that these consultations occur on a routine basis.¹¹² No attempt has been made to secure parental approval for the introduction of the teaching of Gender Theory, Critical Race Theory or any of the other American ideologies. Quite the contrary: a lack of transparency has surrounded the new teaching, and obstacles have been encountered by parents who have tried to see the new teaching materials, examples of which are discussed in the next section of this paper.

While there can be no objection to the teaching to older children about the existence of new ideologies, the teaching as *fact* of the new theories as to gender and race, among other theories, is a different matter. These theories are neither part of a societal consensus nor endorsed by a democratically elected government in Britain, but, on the contrary, the subject of controversy between serious thinkers. The introduction of ideas from the new theories into unexpected parts of the curriculum, such as English, art and drama, together with the striking rise in school-leavers who oppose free speech all adds to the picture of a

¹⁰⁶ *ibid* p 2

¹⁰⁷ Cates (n6) p 24

¹⁰⁸ Kaufmann (n5) p 47

¹⁰⁹ Cates (n6) pp 20, 25, 26

¹¹⁰ *The Times* (n92)

¹¹¹ Moore (n7) p 38

¹¹² RSE Guidance (n37) paras 40–42; Moore (n7) p 10

pervasive ideological climate in many schools. While there are doubtless some parents who welcome this, there must be a large number for whom it runs quite contrary to the traditional liberal values of tolerance in which they would wish their children to be educated: according to the YouGov survey 69% of parents desire their children to be educated in a non-partisan manner.

For the purpose of our argument in this paper it is irrelevant whether the new ideologies are right or wrong, good or bad. What is material is that by reason of their coherence across subjects as varied as gender and race, of their foundation in theoretical concepts, and of the action which they demand, they can reasonably be characterised as “philosophical”. Recent tribunal decisions have shown a readiness to accept the potential breadth of “philosophical belief” within the Equality Act. “Veganism” and “stoicism”¹¹³ have both been held to be capable of qualifying as such. Of particular appositeness in our context is the decision of an Employment Appeal Tribunal chaired Choudhury J in *Forstater v CGD Europe* that a “philosophical belief” was held by a person who believed that sex was biologically immutable, that there were only two sexes, and that it was impossible to change sex¹¹⁴.

Accordingly, if parents do not want such education for their children, which is based on American ideologies, their A2P1 rights are engaged. As held in *Dimmock*, facts may appear innocuous on their face but when they are marshalled in support of a political thesis or taught at the expense of competing viewpoints, they risk crossing the threshold from education to indoctrination and therefore must be presented in a balanced manner

113 *Jackson v Lidl Great Britain*, case 2302259/2019/V

114 [2022] ICR 1. The Court applied the principles suggested by Burton J in the EAT in *Grainger v Nicholson* [2010] 2 All ER 253

that fosters discussion.¹¹⁵ As a matter of law, the new thinking in respect of both RSE and anti-racism teaching is also “political” and “partisan political” within the meaning of ss.406 and 407 of the Education Act.¹¹⁶

It follows that, contrary to the European Convention on Human Rights, the UK is failing to secure that education is in conformity with the philosophical convictions of many parents, and that the government and local authorities are failing to fulfil their domestic statutory embodiment of that duty. Providing parents with access to what is being taught to their children does not guarantee that they will be able to exercise their A2P1 rights in a meaningful sense: but denying them that information renders it impossible for them to exercise those rights. Despite the scale of that failure, and despite the regularity with which parental rights secure a mention in the declarations of fundamental and human rights, relatively little interest seems to be shown in the denial of parental rights by many of the organisations which announce the protection of human rights as at the core of their work. Only faith lobbies appear to have been active on the side of parental rights.¹¹⁷ We cannot trace a single case in which Liberty, Amnesty or any other human rights lobby has itself brought, or supported a parent in bringing, an action under the Human Rights Act on parental education rights. One might, perhaps, call parents’ rights in regard to their children’s education the forgotten human right.

115 [2007] EWHC 2288

116 Cates (n6), Kaufmann (n5), Moore (7), Don’t Divide Us (n4)

117 Liberty intervened in *Bell v Tavistock & Portman NHS Trust* [2021] EWCA Civ 1363 to argue against parental involvement in the prescribing of puberty blockers to under-16s, with Amnesty joining Liberty in a press release on the matter at www.amnesty.org.uk/press-releases/amnesty-international-uk-and-liberty-joint-statement-puberty-blockers.

THE SOLUTION

There is an emerging view that transparency is the key to making real the fundamental rights of parents. The Labour peer, Baroness Morris of Yardley, and the Conservative peer, Lord Sandhurst KC, tried to amend last year’s Schools Bill by moving an amendment in the House of Lords at Committee Stage which would have required schools to allow parents to view all curriculum materials.¹¹⁸ Kaufmann has proposed requiring schools to provide curriculum materials on request and banning schools from hiring external providers who sought commercial confidentiality clauses.¹¹⁹ Moore has recommended that schools publish all RSE material online with a clear complaints procedure for parents.¹²⁰ Don’t Divide Us recommends making it mandatory for schools to provide access to teaching materials on request, and also to publish lists of external providers invited into their classrooms.¹²¹ It was the lack of information which swung the Strasbourg Court to find for the parent in *Folgerø*.¹²²

Although at the time the Government did not accept the Morris/Sandhurst amendment,¹²³ allowing parents access to all teaching materials has, as we have seen, now become Government policy as announced in recent circulars. This surely is correct. Parents cannot exercise their rights if they are kept ignorant of what is being taught. While, of course, a school with hundreds of pupils cannot match its education to the individual wishes of every parent, what is a feasible objective is that the education should accord with the values and standards of the general consensus of society. Bringing teaching materials into the open should allow discussion in the open forum of public

118 Schools Bill [HL], Amendment number: 171F (Baroness Morris of Yardley) <https://bills.parliament.uk/bills/3156/stages/16474/amendments/10000409>
 119 Kaufmann (n5) pp 8–9
 120 Moore (n7) p 13
 121 Don’t Divide Us (n4)
 122 (2008) 46 EHRR 47
 123 The Government subsequently withdrew the Bill: Schools Bill [HL], Parliamentary Bills (9 June 2023) <https://bills.parliament.uk/bills/3156>

opinion, so that the values of that consensus can be given the scope to prevail.

Providing access to teaching materials is also strongly supported by parents. The YouGov survey commissioned by Don’t Divide Us produced this result¹²⁴:

<i>Which one of the following statements comes closest to your view?</i>	
As a parent I should have a right to access lesson plans and teaching materials being taught to my child	71%
Teachers should have a right to keep lesson plans and teaching materials confidential	18%
Don’t know	11%

YouGov’s finding has now been corroborated by Deltapoll¹²⁵:

<i>Do you think parents should or should not have the unrestricted legal right to see all Relationship and Sex Education materials and lesson plans?</i>	
Parents should have the right	77%
Parents should not have the right	14%
Don’t know	9%

Two critical questions follow. The first is: what form of parental access would make the policy meaningful? Being shown materials in a meeting on school premises, which will typically occur in the evening, and without being allowed to remove a copy, does not permit either careful study of

124 The report “Who’s in Charge?” (n4) summarises the results of the YouGov survey which DDU commissioned. In response to our request, DDU have provided to us the full dataset, from which we have taken these percentages.
 125 Nadler (n8) p.60

such materials or an exchange of ideas on whether they are appropriate. Miriam Cates writes:

“... without access to a copy, parents cannot discuss the teaching with their children with similarly privileged access to the resources that the teachers had, nor can they seek professional advice or consult with other parents. Crucially, they cannot enter the materials into a formal complaint procedure, which effectively puts third-party resources beyond scrutiny and criticism, including by school governors. Indeed, it is questionable whether Ofsted can even access these resources or include examples in their reports.”¹²⁶

So, the aim must be arrangements which allow parents to study teaching materials at leisure and at home, and to exchange views with others on what they find.

That leads to the second critical question: how can this result be achieved in practice? The most satisfactory answer is: changes to the law. Amongst the armoury of the forces who resist meaningful parental access are a host of laws. We have seen the deployment of contractual clauses, of the law on breach of confidence, and of provisions in FOIA to deny parents’ requests to view teaching materials. To those, one can add the absence of any positive and enforceable obligations on school authorities. When the law stands in the way of the public interest and fundamental rights, the law must be changed.

The authors of all the studies discussed above advocate mandatory transparency as a principle, but they do not set out details of how that would be achieved. Our purpose, as lawyers, in this paper is to offer constructive and specific suggestions as to how mandatory transparency can be achieved.

The problem of contractual clauses

To illustrate the nature of the contracts which are in use, one may consider the contract of Jigsaw, which provides RSE materials to many schools. No

blanket prohibition on access to parents appears on the face of its Terms & Conditions. But the terms do stipulate:

“4.1 The customer shall:

...

4.1.4. ensure that its Authorised Users shall comply with ... (ii) the Acceptable Use Policy ...”¹²⁷

On locating Jigsaw’s Acceptable Use Policy one finds:

“You must not:

* distribute the Supplier Materials to, or otherwise make them available to, any third parties including ... parents or guardians of the Customer’s pupils ...;

* copy or publish the Supplier Materials ...”¹²⁸

So, reading the two documents together one discovers an express prohibition on showing the materials to parents. Before leaving Jigsaw’s contract it is worth observing that a school’s obligations to them as to confidentiality endure after the end of a contract:

13.1 “Each party shall keep the other party’s Confidential Information confidential for the duration of this Agreement and ... for a period of twelve (12) months following its expiry or termination ...”¹²⁹

The Terms of Use¹³⁰ of another widely used RSE provider, Kapow, state:

“You must not print off, copy, download extracts, of any page(s) including images, video and audio files from our site for any purpose other than is specifically provided for and enabled for subscribers and trialists.”¹³¹

Jigsaw and Kapow should probably be

127 Jigsaw PSHE, “Terms & Conditions” (accessed 25 June 2023) <https://jigsawpshe.com/general-policies>

128 Jigsaw PSHE, “Acceptable Use Policy” (accessed 25 June 2023) <https://jigsawpshe.com/general-policies>

129 Ibid

130 Kapow Primary, “Terms of Use 2022” (accessed 25 June 2023) <https://www.kapowprimary.com/terms-of-use-2022>

131 Ibid

126 Cates (n6) p 29

commended at least for their openness in placing those documents on their websites: many of the other common providers do not do so.

In some cases, a school will make a fresh contract with an external provider every year; but this will not always be the case. Jigsaw offers contracts for three years as well as for one year. Kapow states that multi-year subscriptions are available on request. The published pricing of Life Lessons, another RSE provider, invite schools to discuss “multi-year contracts”¹³². So, the restrictions of existing contracts may continue to play a role for some years to come even if no future contract were ever to contain such restrictions.

The Department for Education exhorts schools not to enter into contracts with external providers which limit their ability to show teaching materials to parents.¹³³ But for several reasons we do not believe that this exhortation alone will end problematic contract clauses. As evident from FOIA decisions, the external providers assert that their motive is to prevent rivals from being enabled to pirate the work which they have developed. But as is apparent from the words of some of the external providers Miriam Cates quoted in her report, some are keen to avoid parents becoming aware of what is being taught or furnished with the tools for raising an outcry. Therefore, it may be anticipated that external providers will try to hang on to the clauses which restrict parental access: so, it is likely restrictions may continue to be present in the small print of contractual agreements.

Conversely, few school authorities have the time or inclination to scrutinise all the terms and conditions before making a purchase. And, restrictions on parental access do have an element of attraction – they operate as a frustration on the scope for “troublesome” parents whose complaints take up time for head teachers. It is no more than human nature to dislike being on the receiving end of complaints. Rooting out, and insisting on the deletion of, undesirable clauses in future contracts

may not be a high priority for some schools.

The need for Parliament to intervene

Accordingly, if the government is serious when it says that these contractual restrictions are contrary to the public interest, the natural response is surely a measure of a kind which Parliament has used to bring an end to various other types of terms which operate against the public interest – that is, legislation to render them of no effect. A well-known example is the enactment that any term of a consumer contract purporting to exclude a seller's liability for goods of unsatisfactory quality or unfit for purpose is “not binding”.¹³⁴ An example in a more limited group of agreements is provided by the ban on what are called exclusivity clauses in zero hours contracts: these are terms purporting to prevent workers, who have contracts under which they have no guarantee of how many hours of work will be available, from seeking work elsewhere.¹³⁵ In both examples, legislative intervention limiting freedom of contract is justifiable to achieve a public interest objective.

Therefore, we propose that Parliament be invited to legislate that in a contract for the provision of teaching materials to or for a school, any term will not be binding to the extent that it limits or restricts the supply of copies of the teaching materials to any parent of a child at the school. In Appendix 3 we set out examples of the wording which Parliament has used to outlaw undesirable terms in various contexts.

Experience of FOIA requests suggests that external providers will object to our proposal on the ground of a threat to their intellectual property; but our proposal would not, in fact, deny them ownership of the intellectual property in their materials. A competitor educational provider, which plagiarises text or images for its own commercial profit, would continue to commit an infringement of copyright. Copyright is not lost as soon as any publication takes place, which is evident from understanding how copyright works in common situations. An author who writes a book does not

¹³² Life Lessons, “Pricing” (accessed 25 June 2023) www.lifelessons.co.uk/ratecard

¹³³ 31 March 2023 circular (n38)

¹³⁴ Consumer Rights Act 2015, s 31

¹³⁵ Employment Rights Act 1996, s 27A

lose his copyright in the text by the publication of his book, no matter how many copies it sells. So copyright is neither lost, nor in general weakened, by dissemination.

There are also situations in which Parliament has considered it appropriate for an implied term to arise by statute. A familiar example is the implied term in a contract for the sale of goods that they be of satisfactory quality.¹³⁶ Legislation to ban terms restrictive of supplying teaching materials to parents might be reinforced by a provision that any contract by which a supplier of teaching materials expressly or impliedly authorises their presentation to school pupils – and by their nature all contracts with external providers will impliedly, if not expressly, so authorise, for otherwise the materials would be unusable by the schools – shall be interpreted as also authorising their presentation to parents of the pupils. That might underline the close connection between these provisions and giving effect to parental rights in the European Convention on Human Rights and existing declaratory domestic legislation.

Our proposals as to contractual terms would avoid schools in future inadvertently (or, indeed, deliberately) entering into contracts which restrict them from allowing parents to have copies of teaching materials. It would ensure that in future, schools, which want to allow parents good access to materials, do not have their hands tied preventing them from doing so. But this proposal will not be enough to compel schools to give good access and do nothing to create an enforceable right for parents. To achieve this objective, further measures will be needed.

Territorial scope

Education is a devolved matter in Wales as well as in Scotland and Northern Ireland. Accordingly, the legislation which we propose would apply only to England.

¹³⁶ Sale of Goods Act 1979, s 14

Amending FOIA: problematic decisions by the Information Commissioner and the Information Tribunal

One useful step towards enabling parents to enforce access would be an amendment of the Freedom of Information Act 2000. FOIA applies to “public authorities”. State schools are brought firmly within the meaning of that expression by Part IV of Schedule 1 which provides that both the governing bodies of maintained schools and the proprietors of academies are for this purpose “public authorities”. Private schools, on the other hand, are outside the scope of FOIA.

The general principle of FOIA is that any person making a request is entitled to have information held by the school authority communicated. The right is not confined to parents of pupils at a school. There are, however, a number of significant exemptions. One of the exemptions on which the Information Commissioner has relied to deny applications in respect of schools’ teaching materials is contained in s.43 under the heading “commercial interests”:

“43 Commercial interests.

...

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

The Information Commissioner applied this exemption in the St Anne’s School case (discussed above). It is not an absolute exemption. It applies where,

“in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,” ...¹³⁷

¹³⁷ Freedom of Information Act 2000, s 2(1)(b)

We are surprised that in the case of St Anne's School the Commissioner considered that the balance of public interest came down against disclosure. But, as it stands, the Act gives a wide discretion to the decision maker.

It is reasonable for Parliament to indicate how it sees the public interest, and so we propose an amendment to s.43 of FOIA to state that the exemption therein shall not exist in respect of a request for information as to any teaching material made in respect of teaching materials in use at a school.

A second relevant exemption is that created by s.41 of FOIA. Although less likely to be regularly cited, it was found to be relevant on the particular facts of the *Haberdashers' Hatcham College* case. It relates to "breach of confidence". Information is exempt if it was obtained from another person and,

"...

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Where it exists, this is an absolute exemption: it is not subject to a balancing exercise. But a right of action for breach of confidence will not succeed where there is a public interest defence. So, the public interest comes in again by another route. Again, we are surprised by the Commissioner's balancing of the public interest in the *Haberdashers' Hatcham* case. So, we make the same proposal for amendment as in respect of s.43: that is that this exemption should not apply in respect of a request for information as to any teaching material in use at a school.

One other significant limitation in the value of FOIA for parents was revealed by the *St Anne's* case. The Information Commissioner's Office held that she was not able to make an order in respect of the majority of the *Jigsaw* teaching materials, which were used by the school, because they were on *Jigsaw's* platform rather than the school's server: the school simply had "read-only" access to the slides and the like. We take this to mean that the school could present the slides to pupils in

classes through interactive white boards, or projectors, but could not download them onto the school's computers. FOIA applies to information which is "held" by a public authority. The question which will arise, we suspect, in many situations is whether a school which has paid for access to the teaching materials of an external provider, and which is authorised to show the materials in a classroom, "holds" the materials.

Information Tribunal decisions

There are two decisions of the Information Tribunal which have some bearing. In *Marlow v Information Commissioner*¹³⁸ the issue was whether an authority "held" the statutory material on the Butterworths online law library, to which it subscribed. The Tribunal distinguished three categories. In the first category it placed material which it considered to be clearly "held" for the purposes of FOIA:

"information on that database has been identified, selected, downloaded and saved on the subscriber's computer system" and "information printed direct from screen".¹³⁹

In the second category it placed material which equally clearly it considered was not "held":

"the total body of information, held on a third party's database and capable of being accessed by a public authority under subscriber rights".¹⁴⁰

The third category was a grey area

"It is not so easy to discern the stage between [the total database], at one extreme, and the downloading and/or printing of a specific item, at the other, at which it may be said that the information is "held" by the subscriber. It is conceivable that cases will exist where the subscriber has such unrestricted rights to access, use and exploit a third party's database (perhaps subject to appropriate attribution) that it may be said that information on it is "held" by the subscriber, even before an online search

¹³⁸ Appeal Number: EA/2005/0031

¹³⁹ *ibid* para 3

¹⁴⁰ *ibid*

facility is operated in order to identify a particular item or items.”¹⁴¹

The situation of a school showing pupils materials from a database to which they have read-only access may be in this grey zone, but it seems to us essentially similar to the category of holding print-outs from a web platform. In a conventional teaching scenario, a school will unquestionably “hold” textbooks which it distributes to pupils or charts which it pins up on the classroom wall. The difference to a slide presented on an interactive white board is technical, but not substantive.

The other Information Tribunal decision is *Dransfield v Information Commissioner*.¹⁴² The request was to see the operating manual for certain maintenance services in a County Council school where the services were being provided by an external contractor. The Tribunal found that the manual was held by the contractor on a computer in America; that the Council’s entitlements were limited to access for the sole purpose of determining whether the contractor was complying with its obligations in respect of the services; that the Council had no right to copy pages from the manual; and that Council was further constrained by confidentiality provisions in its contract with the maintenance contractor. In these circumstances the Tribunal decided that the information in the manual was not “held” by the Council. Furthermore, the request was to be given the entire operating manual, and there is no suggestion in the report that the school had ever used or looked at most, or, for that matter, any of it.¹⁴³ So, while confidentiality clauses are a feature in both cases, there is a big difference to a school using materials like slides for presentation slides from a digital platform.

Therefore, we consider the Information Commissioner’s decision that a school does not “hold” material on a “read-only” site which it presents to pupils or uses in any other way to be at best very technical; and also contrary to the public interest. It ought to be reversed by

Parliament. If legislating to clarify the above-mentioned “grey area” is considered too radical, an alternative approach would be an outright ban on a school showing to pupils in a lesson material which it did not hold on a server within the control of the school authority.

Remedies: amend FOIA

One way to achieve that outcome would be to amend FOIA to give a wider meaning to “hold” in respect of the particular situation of a school authority engaging an external provider. Another might be to extend the statutory provisions as to the contract terms between a school authority and an external provider so that there is a statutory implied term in every such contract to the effect that the school authority has such access and control of the content of any materials on the platform used in its school as to constitute the school authority “holding” the material for the purposes of FOIA. But we are unconvinced that a private contract will be regarded as capable of extending the meaning of statute; and so, incline to the amendment of FOIA.

We have considered whether rights of access under FOIA to teaching materials in situations where the right to receive a copy arises only by reason of the amendments to FOIA which we have proposed should be limited to parents. We incline against this. Firstly, a parent ought to be able to know what teaching is provided by a school before making the decision to send a child to the school. The upheavals in moving school for a child are such that the need for such moves should be minimised. So, it would be too limiting to confine the right to current parents of children at a school; and, as soon as one is extending to prospective parents, definition of a specific cohort entitled to access becomes problematic. In any event, the whole nature of FOIA is to create public access, rather than just privileged access for persons with a particular ground for interest.

Such amendments should be made with immediate effect. They should not be limited to future contracts with providers. The terms of contracts cannot in themselves constitute a bar to a public authority complying with FOIA obligations. Commercial entities who supply public authorities

¹⁴¹ *ibid*

¹⁴² [2014] UKFTT Case EA/2010/0152 (GRC)

¹⁴³ *ibid* para 21

know, or should know, that information may be disclosable as required by the law. The amendments which we propose are merely to reverse marginal decisions of the Information Commissioner.

With such amendments as proposed above, FOIA will have a useful role to play in achieving reality for the fundamental rights of parents, but this still cannot provide a complete solution. Firstly, its operation depends on the making by an individual of a request to a particular school: there is nothing automatic about its operation. Secondly, if and when a request is made, the steps involved in FOIA take quite a long time. In the *Haberdashers' Hatcham* case the parent made a formal request to the school on 7th December 2021. The school responded, negatively, on 21st January 2022. The parent then had to go through the step of requesting a review. The school communicated the decision on its review, negatively again, on 4th March 2022. The Information Commissioner gave a decision on 29th September 2022. So, by the time there was an Information Commissioner decision, the school was into the next academic year and the pupil in question had moved up to a new class, which may have been teaching different material. It may be hoped that the existence of the amended FOIA rights will often lead to schools behaving differently in the first place. But the level of resistance to parental access is sufficiently deep that this cannot be anticipated on every occasion.

Online publication of all teaching material

The conclusion which Lottie Moore reached is that the complete solution involves the general publication of all teaching materials online:

“Schools should be required to publish all Relationships, Sex and Health Education (RSHE) material online, and have a clear process in place for parents to raise any concerns. Parents should be given an absolute right to see all RSHE materials their child will be taught at school. If it is not published online, it must be provided to parents on request, without any requirement for the parent to come onto the school premises. All agencies that provide materials to state-funded schools must

accept that materials may be provided to parents in this way.”¹⁴⁴

We see cogent reasons to support the proposal of general publication online of digital material used for teaching in schools. We envisage that such availability would normally be on a school's own website, but it could alternatively be on any other website to which parents have access. Until recently that would have been seen as a plan involving substantial extra effort by schools; but that would no longer be so. Almost all educational material today is in electronic form. Modern classrooms are usually equipped with interactive whiteboards on which slides can be displayed. Indeed, as we have already seen, in some cases the only access to teaching materials which schools have is in the form of read-only access to an electronic platform.

Furthermore, not only do almost all school authorities today operate websites, but there is a growing list of firm legal obligations on schools to publish information online. So, there is already a precedent for requiring schools to publish material, and normally to do so by posting on a website. These requirements vary between state-maintained schools, independent schools and academies.

In respect of state-maintained schools, statutory regulations began to impose requirements to publish information on a website in 2008. The website can be one run by the school itself, or some other website, such as that of a local authority, on which the school arranges for the material to be posted. For the benefit of those who do not have access to the internet, there is also an obligation to supply a paper copy to parents on request: this is an interesting example of the regulatory regime conferring a specific right to parents. By a series of incremental steps, the list of information required to be so published by the School Information Regulations now includes¹⁴⁵:

- admission arrangements
- the last Ofsted report

¹⁴⁴ Moore (n9) p 13

¹⁴⁵ The School Information (England) Regulations, SI 2008 No 3093 (as amended)

- the most recent key stage 2 and 4 results
- the 16 to 18 results
- the content of the curriculum for each subject
- details of the allocation of the school's pupil premium allocation and strategy
- the school's charging and remissions policy
- a statement of the school's ethos and values
- the complaints procedure
- details of salaries above £100,000.

In respect of independent schools, the requirements are less detailed but still embody the principle that the publication of information is part of the obligation of a properly run school. The obligations for the provision of information form part of the "standards" with which such schools are expected to comply: schools which are reported to be failing to meet these standards are at risk of enforcement action by the Secretary of State. The relevant document is the Education (Independent School Standards) Regulations 2014. Part 6 of the Standards requires certain information to be made available to both parents of current pupils and prospective pupils. In a number of respects, the information specified is less extensive than that today required of maintained schools, but in one interesting respect it is greater: that is that there must be particulars of a curriculum which does,

"not undermine the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs."¹⁴⁶

Academies seem to slip through the net of all these regulations in so far as the provision of information is concerned: they are generally within the scope of the Standards Regulations, but the specific paragraphs dealing with information have been disapplied to academies.¹⁴⁷

The publication of all electronic teaching materials, even just on a sensitive subject, such as RSE, would, of course, add considerably to the volume

of material published on a school website. But with the capacity of modern computer servers, the quantity of material would pose few technical problems. There would be a modest time factor involved in the actual loading of the material; but granted that most teaching materials are now electronic, and so have to be held by a school somewhere, it may be that the downloading onto the central school website would save the time and effort which currently is expended loading them in some other computer. Moreover, since the requirement would merely be for publication on a website somewhere to which parents and prospective parents have access, the school website would not be the only permissible place: the obligation could be satisfied by publication on a website of the external provider or educational publisher. For example, if a group of schools, such as schools of a particular faith, write their own teaching resources, there need only be one website containing their pooled work. The same would apply to academies run by a single provider.

There would be some teaching materials which for reasons of convenience or good sense we would not include within our definition of the materials to which this requirement would apply. We would exclude a teacher's personal lesson plan for a particular class, even if created by the teacher in digital form: such notes may not be created until the evening before a class and may include comments on the needs of particular pupils. So, both for reasons of convenience and confidentiality there should be no requirement to publish individual lesson plans. Nor do we see any need to extend the scope so as to require the scanning into a computer of the pages of hard copy textbooks: textbooks are usually readily available through book purchasing outlets, and in an extreme case of difficulty there is the fallback of looking at a copy held by the British Library or one of the other deposit libraries.

One type of teaching material for which the proposal would entail a difference in practice is the read-only material made available by some of the external providers. We have already seen how this technique has resulted in materials being outside the reach of parents. If such materials are to be

¹⁴⁶ The Education (Independent School Standards) Regulations 2014, 2014 SI No 3283, Schedule para 2(1)(b)(ii) read with para 32(3)

¹⁴⁷ *ibid* para 3(2)(a), (b) and (c)

used in future, our proposals would oblige the providers either to allow schools to download the material onto their websites or to give parents access to the providers' own platforms. This would be a counterpart to our proposed amendments to FOIA which would in any event be denying to external providers the immunity from disclosure which they have been allowed to date by the Information Commissioner.

Not a charter for pirating intellectual property

The online publication need not involve access to the whole world. The baseline requirement we propose is only access to parents and prospective parents. The software involved in creating sections of websites to which access is limited to those with usernames and passwords is today commonplace. In fact, schools often already have such sections of their websites for such purposes as collecting money from parents. The teaching materials could be placed in such restricted sections of websites. But once so accessed, there should be no inhibition on the material being the subject of discussion by a parent, who wishes to seek the views of others on a text or image of concern.

Contrary to the assertions which are likely to be raised by the external providers, such publication would not be a charter for the pirating of copyright material. Copyright protection is not lost by publication on the internet. There is already abundant material on the internet which remains subject to copyright protection. A degree of protection against illicit copying can be achieved by the insertion of "watermarks" which can be easily achieved with readily available modern software. An example of the use of watermarks by a commercial concern which places much of its material on the web at the same time as having a strong vested interest in protecting its copyright is the picture library Shutterstock. The implied term which we are suggesting for contracts with providers should ensure that there exists that consent from the copyright holder which will avoid any infringement by the placing of materials on a website.

Should there be access for all subjects?

Some of the suggestions for transparency ask that it apply only to RSE materials. But we are firmly of the view that its scope should be general. First, anti-racism materials being presented in schools are quite as controversial, and infused with American ideologies, as RSE materials. Second, even for those whose concern is essentially limited to sex and relationships teaching, the growth of the practice of inserting gender ideology into many subjects tuition other than RSE means that a provision limited to RSE would have a real loophole: we have referred above to the tendency to introduce ideology-based teaching under the nominal head of other subjects such as English, art and drama. Third, the right contained in the ECHR is general, and the harm of indoctrination applies across the board of learning.

The main argument for confining publication to specific areas is to minimise the scale of the undertaking. We are not convinced that the undertaking would be unduly burdensome, bearing in mind that the obligation to publish materials would essentially apply to those already in digital form, and normally already on a school computer somewhere. Nonetheless in our 1st edition we suggested that the problem of the burden could be met by a staggered commencement date, with the earliest date for only RSE and anti-racism materials. This was met with the objection that, whilst RSE has a clear meaning (being a subject on a school curriculum and timetable), the same cannot be said of anti-racism. Our further enquiries have led us to accept that there may be problems of definition in respect of anti-racism, to the extent that anti-racism teaching is rarely presented as a discreet subject. Upon further consideration we consider that an alternative basis for staggering – if a staggered commencement date really is justified at all – would be to prioritise materials provided by an external provider. The investigations of Don't Divide Us point to the infiltration of critical race theory being confined almost entirely to materials provided by external providers with a pronounced agenda. Any such approach would mean that

materials from a publisher with a religious slant would be treated in the same way as the partisan for critical social justice; and that fits entirely with our perspective. The rights which we propose would be equally available to all parents, including those, for example, who might wish to examine teaching materials emanating from a religious organisation.

Identification of outside provider teachers

We propose that the obligation of publication extend to further information when external providers come into schools and their representatives present lessons in classrooms. We consider that parents ought to be told that this is happening. When it does happen, the identity of the provider organisation should be announced, and basic curriculum vitae details of those individuals presenting the classes should be made known, including at a minimum their name and qualifications.

It may be observed that Deltapoll found strong parental support for official registration of any external group visiting a school to present a lesson: 75% agreed with the proposition that it should be “necessary for external speakers to have registered accreditation”.¹⁴⁸

Best achieved by statute

Unlike our proposals in respect of contract clauses and FOIA, this suggestion of requirements for publication might be attempted by statutory instrument, that is to say, by further addition to the list of information required by the Regulations, thereby avoiding the need for primary legislation. But there are reasons why primary legislation is desirable. Firstly, without the new law as to contract clauses, which can be accomplished only by primary legislation, the requirement to publish electronic materials would head schools into the confusion of a legal obligation to do something contrary to their contracts. Even if a statutory obligation trumps a contractual one, it would be cleaner for the whole scheme to be implemented in one go by an Act of Parliament. Secondly, primary legislation has greater permanence:

amendment to any statutory instrument could all too easily be made by a future Secretary of State who might not wholly embrace the policy which the present government announced by the 31st March 2023 circular. Accordingly, while the introduction of a requirement for the publication online of teaching materials could be attempted by a statutory instrument as a short-term measure, this would be no substitute for the enactment of a parental rights Act of Parliament.

Enforcement

The history of this topic shows that what is declared in circulars and even statutes is not always followed on the ground. So, the enactment of a principle of parental access to teaching materials cannot be regarded as a panacea in the absence of effective enforcement. Reliance on the machinery of FOIA, valuable as it could be, is not a total solution: by reason of the time and effort required relatively few parents are likely to have the persistence to use it. Three further elements are desirable in good enforcement.

Three elements needed for enforcement

The first is clarity about the duty of school governors to ensure that the obligation for publication of teaching materials is complied with. The existing obligations on maintained schools as to the publication of information technically rest on the board of governors (rather than the head teacher).¹⁴⁹ Therefore, it will be natural for the new obligations which we propose for the publication of teaching materials to fall upon governors. In practice, much of what governors are responsible for is carried out by the head teacher; and so it will doubtless be the case in respect of publishing teaching materials. But the fact that the ultimate responsibility will rest on governors should do something to encourage governors to exercise some oversight to ensure that the obligations are discharged.

At present governors are under a statutory duty to “have regard to any views expressed by parents of

¹⁴⁸ Nadler (n8) p.60

¹⁴⁹ See School Information (England) Regulations, 2008 SI no 3093, para 10

registered pupils,”¹⁵⁰ but it seems that sometimes little attention is paid to this. We have heard accounts of parents, who express reservations about what they hear from their children of what is being taught in RSE, being treated by governors as troublemakers. Consideration might be given to enhancing this duty, although if the present law is ignored, so, too, might a stronger wording. Therefore, we are inclined to concentrate elsewhere for enforcement mechanisms.

The second further element of enforcement should rest with Ofsted. As the official inspection agency, Ofsted is the natural body to ensure that schools are complying with expected standards. We do not suggest any novel task for Ofsted to perform, but we are concerned by the reports that Ofsted gives the impression of being somewhat selective in its priorities. We are told that complaints by Ofsted regarding a lack of impartiality, as required by ss.406 and 407 of the Education Act 1996, are rare if not unknown. That suggests that it has not been a high priority for Ofsted’s inspections. We, therefore, suggest that Ofsted should be given a statutory obligation to inspect, and report on, the existing statutory duties of schools under ss.406 and 407 of the Education Act 1996. This could extend also to compliance with parental access to teaching materials, and the extent to which a school is paying regard to, and its efforts to comply with, the statutory principle that, so far as possible, pupils are to be educated in accordance with the wishes of their parents.¹⁵¹

The third element of enforcement which we propose is an individual right of action in court by parents. The whole history of the Strasbourg Court and the Human Rights Act 1998 (“HRA”) shows that what has transformed the ECHR from vacuous declarations into a highly meaningful instrument has been the right of individual petition to Strasbourg and the right of individual action against a public authority under s.7 of the HRA. There should be created a similar right of action for any parent in the event of a failure of a school to discharge its existing obligations in respect of

political impartiality or its new obligations in regard to the publication of teaching materials. Arguably this proposal is otiose since there is already an individual right of action open to a parent under the HRA on the ground that a state school has acted incompatibly with a parent’s A2P1 rights. By s.6 of the HRA it is unlawful for a public authority, which includes a state school, to act in a way which is incompatible with Convention rights – which includes A2P1, the parental right to ensure teaching in accord with their own philosophical convictions. We consider that a parent who holds conventional liberal values should be able to say that, since Gender Theory and Critical Race Theory amount to a “philosophy”, and one that is at variance with the parent’s own “philosophy”, there is teaching of a conflicting philosophy as fact which violates the parent’s A2P1 rights. That could give a good cause of action under the HRA. But the enactment we suggest would create a clearer right of action.

Liability for financial damages on the part of a school is likely to be rare, but provision should be made for the availability of an injunction as a remedy. Such actions should normally be brought as low-cost proceedings in the County Court. In practice we anticipate that actions will be infrequent: as with complaints pursuant to FOIA, few parents will have the time or inclination. The value, however, of the possibility of individual parental action is to keep schools “on their toes”.

Miriam Cates MP’s Bill

On 27 June 2023 Miriam Cates MP, who had already played so distinguished a role in drawing attention to the reality of what has been happening in some schools, introduced a private member’s Bill. Its short title is Relationships and Sex Education (Transparency) Act 2023.

The text of the Bill which she has in mind had not yet been published at the time of drafting this edition of this paper. The title suggests that her Bill would be concerned with access only to RSE teaching materials. That would contrast with our proposal which is for legislation covering teaching materials for all subjects.

¹⁵⁰ Education Act 2002, s 21 as amended by the Education and Inspections Act 2006, s 38

¹⁵¹ Education Act 1996, s 9

What can be done without primary legislation?

We have argued above that a complete solution requires primary legislation. We are appending the text of a possible Parental Rights Bill.¹⁵² Amongst the aspects of reform which require primary legislation are the amendments to FOIA in respect of when material is “held”, and the modifications to the law of contract in respect of clauses which operate against the public interest. But some valuable improvements can be accomplished without primary legislation. In this final section we outline action which the Secretary of State could take without requiring parliamentary time.

Adding to existing publication requirements using existing statutory powers

The move with the biggest impact would be the introduction of the requirement for publication of teaching materials by adding this to the existing publication obligations in statutory instruments. As discussed above there is already a growing list of obligations on school authorities for publication on websites.

The Secretary of State currently has a statutory power in respect of both maintained schools and independent schools (including academies) to make regulations requiring the provision by the school authorities of such information as may be prescribed (s.537 of the Education Act 1996). The power is wide and subject to no relevant limitations. Moreover, the appropriateness of its exercise in relation to the matters which we propose may be regarded as reinforced by s.537(3):

“(3) Where the Secretary of State exercises his power to make regulations under this section he shall do so with a view to making available information which is likely to—

- (a) assist parents in choosing schools for their children;
- (b) increase public awareness of the quality of the education provided by the schools concerned and of the educational standards achieved in those schools;”

¹⁵² Our Bill would apply only to England. Education is a devolved competence in Scotland, Northern Ireland and Wales.

The power is subject to the negative regulation procedure, that is the least onerous procedure in terms of parliamentary time. In so far as the publication of information is concerned, to date the Secretary of State has exercised that particular power in respect only of maintained schools. The relevant statutory instrument is the School Information (England) Regulations 2008.¹⁵³

The statutory instrument for the provision of information by independent schools is the Education (Independent School Standards) Regulations 2014.¹⁵⁴ Interestingly these regulations were made, not under a mere statutory power, but under a positive statutory duty. By s.94 of the Education and Skills Act 2008, it is enacted:

“(1) The Secretary of State must by regulations prescribe standards for the purposes of this Chapter about the following matters—

- (a) the quality of education provided at independent educational institutions;
- (b) the spiritual, moral, social and cultural development of students at independent educational institutions;
- (c) the welfare, health and safety of students at independent educational institutions;
-
- (f) the provision of information by independent educational institutions;”

We consider that that provision, like the power under the Education Act 1996 discussed above, is wide enough to authorise the making of the requirements for publication online of teaching materials which we propose. Furthermore, the exclusion of academies from the publication provisions is contained in the regulations themselves (as opposed to the enabling statute), and so it would be within the Secretary of State’s power by appropriate drafting to extend the publication obligations to academies. The power too, is subject to the negative parliamentary procedure.

¹⁵³ SI 2008 No 3093

¹⁵⁴ SI 2014 No 3283

An alternative route by the use of statutory instruments could be by amendment to the regulations by which RSE was introduced.¹⁵⁵ These effected amendments to the Education Acts 1996 and 2002 and several earlier statutory instruments.

In other words, the Secretary of State possesses sufficient statutory power to make regulations for all the provision of information which we propose. This could cover both the publication online of teaching materials, and also the identification of external provider organisations and the qualifications of individuals providing education on their behalf.

Another useful move which might be made by the Secretary of State would be a formal and public announcement that she considers it to be in the public interest for parents to have access to all teaching materials; and for external providers to be identified, and the qualifications of individuals giving classes to be made known. This announcement would not bind the hands of the Information Commissioner, or still less the Information Tribunal, in the exercise of statutory powers. And the outcome of the *Page* appeal suggests that this might make a limited difference in respect of FOIA. But it would be a relevant factor, and in marginal cases might tip the balance in the outcome of FOIA applications: it would be relevant both to the balancing exercise under s.43, and the assessment of breach of confidentiality (applicable under s.41).

A further step by the Secretary of State would be to make a request for Ofsted to give attention in its inspections to whether the law as to political impartiality under ss.406 and 407 of the Education Act 1996 is being complied with, and to include comment thereon in its reports. While such a request would be less strong than the enactment of a statutory obligation, it may well be that Ofsted

would in practice comply. We suspect that there is insufficient appreciation that the High Court has ruled that any controversial position is “political” for this purpose: the Secretary of State could usefully draw wider attention to the ruling in the *Dimmock* case.

The Secretary of State could also publicly draw the attention of both schools and parents to the existing availability of the individual right of action by a parent under the Human Rights Act in the event of a state school acting incompatibly with a parent’s A2P1 rights. As we have mentioned, it must be at least arguable that the teaching of Gender Theory and Critical Race Theory to the child of a parent who espouses conventional liberal values is teaching which is not “in conformity with [the parent’s] ... philosophical convictions”. The mere fact of the government saying this might cause a few ripples in some quarters. In fact, if the government were to be looking for an excuse not to make parliamentary time for a Parental Rights Bill it might hardly do better than to tell parents they could be suing already.

Most of the proposals in this paper are “sticks”, but “carrots” can also be of equal value. The explosion of attention to “diversity” must owe a great deal to the award of accolades by organisations such as Stonewall. So, our final suggestion is that consideration be given to a “Parental Human Rights” certification to schools which demonstrate that they publish teaching materials to parents, that they make no contracts with external providers which inhibit their ability to do so, and that all their education on controversial subjects is balanced, with no single viewpoint presented as fact. In a perfect world this certification would be administered by central government; but, in the absence of government performing such a role, in a free society, voluntary organisations can do so. A well-designed logo with the message “we respect parents’ human rights” might soon become sought after by any school keen on attracting applications for places.

¹⁵⁵ The Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019, SI 2019 No 924

APPENDIX 1: DRAFT BILL

Parental Rights Bill

A BILL to reform the law relating to parental rights to access teaching materials

BE IT ENACTED by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1 Introduction

The purposes of this Act are:

- (a) to facilitate the exercise by parents of the right recognized in Article 2 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states in part—
“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.”
- (b) to improve the monitoring of, and enforcement of, sections 406 and 407 Education Act 1996.

2 Access to teaching materials

- (1) School authorities must ensure that current and prospective parents have access to all teaching and curriculum materials used in their schools. This obligation is referred to herein as “the duty of access”.
- (2) To the extent that school authorities place materials on a publicly available website operated by the school, they will be deemed to have complied with the duty of access in respect of such materials.
- (3) To the extent that materials are not on a publicly available school website, school authorities must comply with the duty of access in one of the following ways:
 - (a) Placing them on a website, or part of a website, accessible to registered users by usernames and passwords, provided that registration for such use is available to all current and prospective parents.
 - (b) Publishing the address of a website operated by a third party to which current and prospective parents have access, and on which the materials have been placed.
 - (c) In the case of a book available for sale to the general public through book trade outlets, publishing the title, author and publisher of the book.
- (4) For the purpose of the duty of access, “teaching and curriculum materials” includes all text, visual or graphic materials presented to pupils in the course of a lesson through electronic or hard copy means, textbooks supplied to pupils, other books and materials made available to pupils in their classrooms, and materials used by teachers for the preparation of lessons, but does not include an individual lesson plan prepared by a teacher for a particular class.

3 Third-party providers

- (1) In the event that external providers are engaged to present lessons to pupils, school authorities must inform current and prospective parents of the name of the provider

organisation, and must notify the parents of pupils in any class involved of the details of all individuals delivering instruction on behalf of external providers, including their name and qualifications.

- (2) The duty of access applies to all teaching and curriculum materials used or provided by such third-party organisations or individuals.

4 Contractual arrangements

- (1) In a contract for the provision of teaching or curriculum materials to or for a school, any term is not binding to the extent that it limits or restricts the performance of the duty of access to such materials for any current or prospective parent in such manner as the school authorities may choose.
- (2) A contract by which a provider of teaching or curriculum materials expressly or impliedly authorises their presentation directly or indirectly to pupils shall be interpreted as authorising also the performance of the duty of access to such materials for any current or prospective parent in such manner as the school authorities may choose.
- (3) It is an implied term of any contract for the provision of teaching or curriculum materials to or for a school that the provider will facilitate the school authorities in the communication of the information constituted by such materials if and when so obliged under the Freedom of Information Act 2000.

5 Freedom of Information requests

The Freedom of Information Act 2000 is amended by the insertion of a new section in the following terms:

“79A, Teaching materials

- (1) Teaching materials made available to a school by an external provider in electronic form on a “read-only” basis are deemed to be held by the governing body or proprietor of the school, as the case may be, for the purposes of section 1 of this Act if and when accessed for presentation to pupils, or for use by a teacher for lesson preparation.
- (2) The provisions contained in section 41 of this Act (“information provided in confidence”) have no application in respect of a request for information as to any teaching or curriculum material in use at a school.
- (3) The provisions contained in section 43(2) and (3) of this Act (“commercial interests”) have no application in respect of a request for information as to any teaching or curriculum material in use at a school.”

6 The duty of balance in education and Ofsted

- (1) Section 11(2) of the Education Act 1996 (which makes provision for the purposes of the exercise of the Secretary of State’s powers) is amended by the insertion after the words “encouraging diversity” of the additional words “promoting balance and impartiality in presentation to pupils”.
- (2) Section 5(5A) of the Education Act 2005 (which makes provision for the particular matters on which the Office for Standards in Education, Children’s Services and Skills (Ofsted) shall inspect and report) is amended by the addition of the following words:
 - “(e) the schools’ compliance or otherwise with sections 406 and 407 of the Education Act 1996;

- (f) the school's compliance or otherwise with the duty of access under this Act.”.

7 Enforcement and remedies

An action for injunctive relief and/or damages may be brought against a school authority by any person who is a current parent or prospective parent in respect of a school, for which that school authority is responsible, on the grounds of:

- (a) failure to discharge the duty of access under this Act; or
- (b) failure to comply with sections 406 (“political indoctrination”) and/or 407 (“duty to secure balanced treatment of political issues”) of the Education Act 1996.

8 Definitions

In this Act:

- (1) “parent” has the meaning given by section 576 (meaning of “parent”) of the Education Act 1996.
- (2) “pupil” has the meaning given by section 3 (definition of pupil etc) of the Education Act 1996
- (3) “current parent” means the parent of a pupil currently being provided with education at a school.
- (4) “prospective parent” means any parent who notifies a school of an interest in considering applying for a place for a child or young person at the school.
- (5) “school authorities” means the governing body in the case of a maintained school, the trust board in the case of an academy, or such proprietor or other body or bodies as are responsible for the running of a school;

9. Commencement, extent and short title

- (1) This shall come into force on such date as may be prescribed by an order made by the Secretary of State.
- (2) An order may make provision for the duty of access to commence ,
 - (a) on different dates for different subjects within a school curriculum;
 - (b) on dates for materials used or provided by external providers different from other materials;
 - (c) on dates for materials in digital form different from other materials;
 - (d) on dates different for different categories..
- (3) The provisions in section 4 shall apply only to contracts made after the commencement of this Act.
- (4) This Act extends to England only.
- (5) This Act may be referred to as the Parental Rights Act [2023].

APPENDIX 2:

RIGHTS OF PARENTS IN MAJOR INTERNATIONAL DECLARATIONS OF RIGHTS

Article 26.3 of the Universal Declaration of Human Rights states:

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

Article 13.3 of the International Covenant on Economic, Social and Cultural Rights provides:

“The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.”

Article 29.1(c) of the Convention on the Rights of the Child stipulates:

“1. States Parties agree that the education of the child shall be directed to:

...

(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 civilisations different from his or her own.”

Article 2 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

“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.”

Article 18.4 of the International Covenant on Civil and Political Rights affirms:

“The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

Article 5.1(b) of the UNESCO Convention against Discrimination in Education (CADE) states:

“1. The States Parties to this Convention agree that:

...

(b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group or persons should be compelled to receive religious instruction inconsistent with his or their convictions.”¹⁵⁶

156 See: www.unesco.org/en/legal-affairs/convention-against-discrimination-education#item-2



For further information on the Society of Conservative Lawyers contact:
The Administrative Secretary, The Lodge, Deaks Lane, Cuckfield RH17 5JB
administrator@conservativelawyers.com
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.