Legal opinion:

Provision of condoms in public schools

Executive summary

The availability to pupils of condoms at public schools is potentially an important way in which the spread of HIV/Aids amongst school-going children can be countered. Current policy of the Department of Education leaves the decision whether or not to allow provision of condoms at specific schools to those specific schools. Despite this formal policy stance, the Minister of Education has publicly stated her opposition to the availability of condoms at schools, raising the possibility that the DoE's current permissive stance might be changed in favour of a blanket prohibition of condom availability at schools.

In this opinion I survey the possibilities of legal challenge a) to the current policy of the DoE with respect to condom availability at schools, and b) to a blanket prohibition of condom availability at schools, should such policy be adopted by the DoE. I conclude with respect to a) above that, due to our courts' attitude of deference with respect to evaluation of the state's approach to complex policy matters and in light of the fact that the evidence with respect to the efficacy of condom availability in schools is inconclusive either way, legal challenge to the current policy is not indicated and should not be pursued.

I proceed to consider in the alternative the viability of legal challenge to decisions taken by individual schools in terms of the DoE's current policy to prohibit condom provision to their pupils. In this respect I conclude that, depending on the specific circumstances of each school and the cogency of the reasoning on the basis of which each school's decision was taken, legal challenge to such individual decisions may be viable and could be pursued on the basis that such decisions breach the constitutional duty to respect health care rights. In addition, I suggest that such decisions of individual schools can also be challenged through administrative law review on the basis of unlawfulness and/or procedural fairness, although such review should operate only in addition to a possible constitutional challenge.

I conclude with respect to b) above that, should the DoE indeed introduce a blanket ban on condom availability in schools, legal challenge of such a policy would indeed be viable and should be pursued, on the basis that such a policy breaches the constitutional duty to respect health care rights.

BRIEF

1. I was briefed to provide my opinion about the viability of legal challenge, of a constitutional or other nature, to the National Department of Education's current policy and practice regarding the provision of condoms at schools under its control and to a blanket ban on the availability of condoms at school, should such be introduced by the DoE.

FACTS

2. In South Africa, HIV/Aids is alarmingly prevalent amongst the youth – of the estimated 5.4 million people infected with HIV nationally, 1.5 million are in the 15 to 24 age cohort.[1] In South Africa, as elsewhere in the world, access to condoms for sexually active persons is regarded as an important factor inhibiting the spread of HIV/Aids. In this light an important question is the extent to which sexually active school-going children in the 15 to 24 age cohort have unimpeded access to condoms.

3. The policy of the National Department of Education with respect to the availability of condoms at schools – sites that present themselves as easy access points to a significant portion of persons in the 15 to 24 age cohort - is set out in a 1999 policy document entitled 'National policy on HIV/AIDS, for learners and educators in public schools, and students and educators in further education and training institutions'. This document requires each individual school to draft and implement an 'implementation plan on HIV/Aids in consultation with local religious leaders, traditional leaders, medical professionals and traditional healers' taking account of 'the needs and values of the specific school or institution and the specific communities it serves'.[2] In its implementation plan each individual school is allowed to determine whether or not it will make condoms accessible at school for its learners.[3]

4. Although this is the official policy for the moment, a public pronouncement by the Minister of Education in January 2006 condemning provision of condoms at schools[4]

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[1] Dorrington, RE; Johnson LF; Bradshaw, D; and Daniel, T (2006) *The demographic impact of HIV/AIDS in South Africa. National and provincial indicators for 2006* Cape Town: Centre for Actuarial Research, South African Medical Research Council and Actuarial Society of South Africa at ii.

[2] DoE 'National policy on HIV/AIDS, for learners and educators in public schools, and students and educators in further education and training institutions' (1999) sec 12(3) and (4).

[3] DoE (n 2 above) sec 12(4).

[4] 'Schools offer condoms to pupils' *Sunday Times* 27 January 2006, available at http://www.suntimes.co.za/zones/sundaytimesNEW/topstories/topstories1138363642.aspx (accessed 30 September 2007).

raises doubt first whether this will remain the case – that is, the possibility exists that the policy might change and a general prohibition on condom provision at schools be introduced. Even if that did not happen, it is likely that many individual schools will exercise the choice allowed them under the policy in light of the Minister's views and prohibit condom provision.

ISSUES

5. In light of my brief the facts related above raise the following four legal issues:

(a) Is the current policy of the Department of Education with respect to condom availability at schools susceptible to constitutional challenge on the basis that it constitutes a failure in the state's constitutional duty, in terms of sec 27(1) and sec 28(1)(c) read with sec 7(2) of the Constitution, to *promote and fulfil* the right of everyone to have access to health care services and the right of children to basic health care services?

(b) Is the current policy of the Department of Education with respect to condom availability at schools susceptible to constitutional challenge on the basis that it constitutes a failure in the state's constitutional duty, in terms of sec 27(1) and sec 28(1)(c) read with sec 7(2) of the Constitution, to *respect* the right of everyone to have access to health care services and the right of children to basic health care services?

(c) Should the Department of Education change its current policy and introduce a blanket prohibition on the availability of condoms at schools, would such a new policy be susceptible to constitutional challenge on the basis that it constitutes a failure in the state's constitutional duty, in terms of sec 27(1) and 28(1)(c) read with sec 7(2) of the Constitution, to *respect* the right of everyone to have access to health care services and the right of children to basic health care services?

(d) Should an individual school, in terms of the current policy, decide to prohibit condom provision, would that decision be susceptible to constitutional challenge on the basis that it conflicts with the school's constitutional duty, in terms of sec 27(1) and 28(1)(c) read with sec 7(2) of the Constitution, to *respect* the right of everyone to have access to health care services and the right of children to basic health care services?

(e) Should an individual school, in terms of the current policy, decide to prohibit condom provision, would that decision be susceptible to administrative law review in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA)?

ANALYSIS

6. The five issues identified in paragraph 3 above relate to two different but related types of possible legal challenge – constitutional challenge on the basis of the section 27(1) and 28(1)(c) health care rights; and administrative law review on the basis of PAJA. In this analysis I first describe the current applicable legal position with respect to each of these two types of possible challenge and then proceed to apply the law set out thus to each of the four issues identified above.

Applicable law

Constitutional challenge

7. Two constitutional rights are relevant to any possible constitutional challenge to the Department of Education's policy and practice with respect to access to condoms at schools: the section 27(1)(a) right of everyone to have access to health care services and the sec 28(1)(c) right of children to health care services.[5] If read with section 7(2) of the Constitution, which determines that 'the State must respect, protect, promote and fulfil' all rights in the bill of rights, these two rights require the state first to refrain from interfering with existing access that people have to health care services (to 'respect' their rights); second, to protect people's access to health care services against interference from private sources (to 'protect' their rights); and third, to take affirmative measures to ensure that people indeed have access to health care services (to 'promote and fulfil' their rights).[6]

8. Of these constitutional duties, the duties to respect the rights and to promote and fulfil the rights are most clearly of use with respect to this opinion. The duty to

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[5] 27 (1) Everyone has the right to have access to –
(a) health care services …
…
28 (1) Every child has the right –
…
(c) to basic … health care services …

[6] 7 (1) …
(2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights.

respect the constitutional health care rights prohibits state interference in existing access to health care – that is, it prohibits the disestablishment of an existing health care service or the obstruction of access to such an existing service without cogent justification and without an alternative service being provided. A breach of this duty is established in two steps: First it has to be shown by the person alleging the breach that the measure in question indeed either disestablishes a health care service or operates as barrier to access to a health care service that would, but for it, have been available; second, once that has been shown, the opportunity arises for the state to justify the limitation its measure places on health care rights, by persuading the court that the measure, despite limiting health care rights, is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[7] Importantly, the opportunity for the state to justify its limitation of health care rights arises only where the limitation occurs 'in terms of law of general application'. In the case of *President of the Republic of South Africa v Hugo*[8] Kriegler J, in a minority judgment, indicated that the most basic characteristic of 'law of general application' was that it constituted a rule (that applies alike to al like cases) rather than a decision (which is a once-off and therefore *ad hoc* event, applying only to a particular case).[9] On this basis Kriegler J went on to hold that a decision of the President of the Republic to pardon single mothers of children under 13 who are in jail was not law of general application and as such not capable of justification in terms of section 36(1).[10] The implication is that once-off decisions, or practices not formalised in some form as rules, are not capable of justification in terms of section 36(1).

9. The duty to promote and fulfil constitutional health care rights in turn requires the state to act affirmatively to ensure that everyone obtains access to the health care services they need. This duty does not have its origin solely in sec 7(2) of the Constitution with respect to health care rights – it is underscored in sec 27(2), which determines that the state must 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of health care rights.[11]

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[7] See sec 36(1) of the Constitution.
[8] 1997 (6) BCLR 708 (CC).
[9] *Hugo* (n 8 above) para 76 n 7.
[10] *Hugo* (n 8 above) para 76.
[11] 27 (1) …
(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

10. This duty has been interpreted in a number of cases dealing with health care rights or the related rights to housing and social assistance, first to require that the state indeed adopts measures, of a legislative or other nature, to give effect to the constitutional rights in question. Second, the duty to promote and fulfil requires that the measures the state has adopted to give effect to health care rights meet a legal standard of reasonableness.[12] In broad terms, this standard requires that the measures must be reasonably capable of achieving the purpose of realisation of health care rights.[13] More specifically, our courts have indicated that the reasonableness standard requires that measures be comprehensive (in the sense that all aspects of the right they seek to give effect to, are addressed);[14] flexible (such that they are capable of responding to changed conditions, short terms crises, and particular contexts);[15] inclusive (in the sense that they cater for all the different degrees of need that people exhibit with respect to health care rights);[16] reasonably financed (a measure cannot be adopted as an empty promise only – if it is to be adopted, the necessary resources must be allocated to make its implementation reasonably possible);[17] and reasonably implemented (a measure cannot exist only on paper – it must indeed be implemented and the state must be able to show progress in its implementation and have a plan or programme with specific time-lines for its implementation).[18]

11. In the context of an evaluation of the viability of litigation on the basis of the right to health care services - such as this opinion is – a more important question to determine than the content of health care rights and the duties they impose on the state is the manner in and particularly the extent to which courts will be willing in a given case to enforce those rights and the duties they impose against the state by coming to an adverse finding and issuing an order against the state. Because the enforcement of health care rights often requires courts directly to pass judgment on policy matters (the subject matter of this opinion is a case in point – a court adjudicating a challenge against the state's current policy position will in essence have to decide whether or not the state's position is the correct policy decision to have taken under the

[12] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 36.
[13] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.
[14] *Grootboom* (n 13 above) para 39.
[15] *Treatment Action Campaign* (n 12 above) para 80; *Grootboom* (n 13 above) para 43.
[16] *Grootboom* (n 13 above) para 43.
[17] *Grootboom* (n 13 above) para 39.
[18] *Grootboom* (n 13 above) para 43.

circumstances) courts in enforcing these rights are acutely aware of their own technical incapacity when enforcing health care rights.

12. As a result, our courts have been careful to emphasise in all of their decisions concerning health care rights or any of the related socio-economic rights, the need to defer to the supposedly superior policy judgment of the political branches of government and the state administration there where the court's institutional capacity runs out.[19] This has meant that, in some cases, our courts have elected simply not to decide matters that were placed before them, because they feel incapable of doing so.[20] Alternatively, there where they have decided policy matters, they have been careful to couch their decisions and fashion their orders in such terms that their decision that a measure is unconstitutional does not prescribe to the state a particular course of action to follow in order to remedy the constitutional defect, but leaves as broad a margin of discretion to the state in this respect as possible.[21] Courts have also, in different cases, depending on the extent to which they have felt deference to the state is warranted, applied a stricter or more lenient standard of scrutiny to the state's measures – that is, they have interrogated the state's measures more strenuously in some cases than in others, applying at one end of the spectrum a simple rationality test[22] and at the other end a much more substantial and potentially intrusive proportionality test.[23]

13. In this light it clearly becomes important in order to determine the chances of success in any specific planned litigation on the basis of constitutional health care rights to gauge the extent to which courts will feel themselves institutionally constrained in deciding the prospective case. No explicit indication of the factors that determine the extent to which courts are willing to intervene in a particular case has so far emerged from the case law. Nevertheless, a list of such factors and their effect can be deduced from the various results generated in different cases. These are, amongst others, the following:

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[19] See eg *Treatment Action Campaign* (n 12 above) para 38.
[20] See eg *Treatment Action Campaign* (n 12 above) para 128 where the Court elects not to decide the question whether or not formula feed should be provided to mothers as substitute to breastmilk, to prevent the transmission of HIV through breastfeeding because it 'raises complex issues'.
[21] See eg *Treatment Action Campaign* (n 12 above) para 36.
[22] *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).
[23] *Khosa v Minister of Social Development* 2004 6 SA 505 (CC).

(a) *The degree of deprivation at issue*. The greater the degree of need that plaintiffs exhibit with respect to health care rights, the more likely a court is to intervene on their behalf.[24]

(b) *The nature of the policy questions raised in the case* – the more complex these issues are, the less likely courts are to interfere with the state's judgment with respect to them. This is in particular true where a number of possible solutions to a question present themselves and there is no clear criterion for the court to choose between them.[25] The deference displayed by courts in this respect is, as pointed out above (see paras 10-11), informed by their perceived lack of capacity to engage usefully with policy questions, relative to the other branches of government. This deference is not a blind, one-size-fits-all form of respect for the spheres of power of the other branches of government – it is clearly informed by a considered opinion about which institutions are best placed in terms of technical capacity to take the best decisions with respect to an issue. So, for example, in the *Treatment Action Campaign*-case, the Constitutional Court, having found that the standard policy of the National Department of Health prohibiting the general provision of the anti-retroviral drug Nevirapine to mothers and their children at public health facilities at birth to prevent transmission from mother to child of HIV, breached the right to have access to health care services, declined to make a general order that Nevirapine be made available across the board at all public health facilities to all HIV-positive mothers there giving birth. Rather, the Court ordered that Nevirapine be made available at public health facilities to mothers giving birth only there where the attending physician, in consultation with the medical superintendent of the facility concerned, judged that its provision was medically warranted. In this way the Court made clear that it regarded neither itself, nor the executive branch of government, but the specific health care workers working a particular case as best-placed to make the technically complex decision at issue.[26]

(c) *The manner in which the case is argued*. It is likely that courts would feel less constrained in deciding cases where the duty to respect health care rights rather than the duty to promote and fulfil these rights is at issue. This is so in the first place for textual reasons: the duty to respect health care rights, unlike the duty to promote and

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[24] See the argument to this effect in D Brand 'Introduction' in D Brand & CH Heyns *Socio-economic rights in South Africa* (2005) 1 46 and the authorities cited there.

[25] As above.

[26] *Treatment Action Campaign* (n 12 above) para 135.

fulfil these rights, is not subject to the section 27(2) injunction that the state must take reasonable legislative and other measures, within its available resources to achieve its progressive realisation. This means that courts do not decide duty to respect cases according to the reasonableness standard outlined above, which was originally derived from section 27(2). Rather, measures which are said to conflict with the duty to respect health care rights will, as outlined in para 8 above, be subjected to scrutiny in terms of the general limitations provision of the Bill of Rights – sec 36(1). The import of this is that the sec 36(1) standard of scrutiny is as a rule a great deal stricter than the sec 27(2) derived reasonableness standard: it includes a proportionality standard, that requires a measure's adverse consequences to be in proportion to its benefits, and that no equally effective but less restrictive measure is available to the state, which standard does not as a rule form part of the sec 27(2) reasonableness scrutiny. Apart from these textual reasons why courts would be more intrusive in duty to respect cases than duty to promote and fulfil cases, there are good policy reasons for the preference. First, although this is not always the case, very often a duty to respect case will not require a court in deciding against the state to evaluate its allocation of resources, or to prescribe to it a particular allocation of resources. Second, in light of the sec 27(2) constitutional injunction that health care rights must be 'progressively realised' (ie, access to health care must be broadened and improved over time) it does seem a defensible position for courts to require from the state a more substantial justification for measures that prevent existing access to health care services (a retrogressive rather than progressive step) than for measures that are said to fail in progressively broadening or improving existing access to health care services.

(d) *Whether or not a finding against the state would have consequences for its choices relating to allocation of resources, ie the extent to which a finding against the state would require the court to prescribe allocational choices to the state* – where such prescription comes into play, a court is less likely to interfere than otherwise. Indeed, our courts have held that they will not prescribe directly to the state the manner in which resources must be allocated, but that they would not shy away from finding a measure unreasonable if that finding would have implications for the manner in which resources are allocated.[27]

[27] *Treatment Action Campaign* (n 12 above) para 38.

Administrative law review

14. Section 33 of the Constitution provides for the right of everyone to administrative justice and thus provides the basis for the legal remedy of administrative law review. In line with the injunction contained in section 33(3) of the Constitution, the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') was enacted to give effect to this right. PAJA currently embodies in practical terms the legal remedy of administrative law review – that is, any application for review of public conduct in terms of administrative law principles must be brought on the basis of PAJA.[28]

15. In its section 6 PAJA explicitly makes provision for the right of any person to take administrative action on review, and describes the grounds upon which this can be done. In broad terms, following section 33 of the Constitution, PAJA section 6(2) provides for review of administrative action on three possible grounds: lawfulness (the principle that administrators may only do that which the law authorises them to do – may not exceed their authority as conferred on them by law); procedural fairness (the principle that administrators must make it possible for those adversely affected by their decisions to participate in and influence those decisions and the principle that administrative decision-making must be impartial and must be conducted with an open mind); and reasonableness (the principle that, on its own terms, an administrative decision must be non-arbitrary, rational, effective and, potentially, proportionate and necessary).

16. The remedy of administrative law review provided for in PAJA applies only to a certain type of public conduct – administrative action. Administrative action is defined in section 1 of PAJA. According to this definition, conduct qualifies as administrative action if it complies with the following requirements:

(a) it must be a decision – ie it must amount to the exercise of discretion rather than only the mechanical application of law or policy;[29]

(b) the decision must be of an administrative nature – it must amount to the implementation of policy or legislation rather than the formulation of such (this

[28] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 93–96.
[29] *Phenithi v Minister of Education* [2006] 1 All SA 601 (SCA).

element of the definition serves to distinguish administrative action from executive, legislative and judicial conduct);[30]

(c) the decision must be taken in terms of an empowering provision;[31]

(d) it must be public rather than private; and

(e) it must adversely affect any person's rights and have a direct, external legal effect – courts have held that conduct that affects existing rights (which include constitutional rights), legitimate expectations and prospective rights meet this 'impact threshold'.

17. Of particular interest with respect to this opinion is the requirement in PAJA's definition that conduct be of an administrative nature. As stated above this requirement expresses the holding of the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*[32] (*SARFU*) that administrative action amounts to the implementation of policy or legislation, rather than the formulation of such. This distinction, seemingly clear, becomes difficult to apply in cases where a public entity is authorised to take a decision by legislation or a policy, but the decision amounts to the exercise of a policy discretion – that is, in implementing a prior policy decision or legislation, the decision-maker is authorised to, and has to formulate policy herself. In this respect the Constitutional Court per O'Regan J held in *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE)*[33] (*Ed-U-College*) that a distinction should be made between policy formulation in the narrow and the broad sense. Policy formulation in the broad sense, which would ordinarily not constitute administrative action, occurs outside of a legislative framework and is thus original in nature; policy formulation in the narrow sense occurs within a statutory framework and therefore still amounts to the implementation of legislation and therefore usually is administrative action.[34] Although this was not at issue in *Ed-U-College,* O'Regan J's reasoning can certainly be extended to cases where policy is formulated not in terms of or inside of a statutory framework, but in terms of a prior policy decision – such instances of policy formulation would, in terms of her reasoning, still constitute

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[30] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC) para 143.

[31] See definition of a 'decision' in PAJA sec 1.

[32] n 30 above.

[33] 2001 (2) SA 1 (CC).

[34] *Ed-U-College* (n 33 above) para 18.

implementation of the prior policy decision and would usually be administrative rather than executive action, subject to administrative law review in terms of PAJA.

18. A further point of interest for this opinion is the requirement that a decision must be taken in terms of an *empowering provision* in order for it to constitute administrative action. The term empowering provision has in other jurisdictions than South Africa been taken to refer to legislation alone, so that only decisions taken in terms of (original) legislation can there qualify as administrative action. The term is much more broadly defined in PAJA sec 1, which describes an empowering provision as 'a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.' This definition is clearly on its face broad enough to include also a policy document and indeed, although the issue has as yet not explicitly been decided by our courts, cases abound in which they have simply assumed that a policy document qualifies as an empowering provision for purposes of PAJA.[35]

19. Two general points about the grounds of review provided for in PAJA. First, with respect to procedural fairness as review ground: PAJA's prescriptions with respect to procedural fairness are found in its sec's 3 and 4. These prescriptions are general in nature – that is, they apply to all administrative decisions, irrespective of whether or not such administrative decisions are taken in terms of empowering provisions that provide differently (for example, in a more limited fashion) for procedural fairness than does PAJA.[36] PAJA does make provision that, where a specific empowering provision provides for a fair process to be followed that is different from the sort of process envisaged in PAJA, that different process instead of PAJA's process may be followed, but this is only so where the different process, although different, is nevertheless fair according to PAJA's standards. That means that, where an empowering provision provides for a certain process of notification and consultation to take place before an administrative decision is taken, but that process is less generous in its fairness than the processes provided for in PAJA secs 3 and 4, the additional procedures and guarantees provided for in PAJA would also have to be applied for the decision to be procedurally fair.

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[35] See eg *Minister of Education, Western Cape v Governing Body, Mikro Primary School and Another* 2006 (1) SA 1 (SCA).

[36] See in general in this respect *Police & Prisons Civil Rights Union v Minister of Correctional Services* (2006) 27 ILJ 555 (E).

20. Second, the ground of review of reasonableness: PAJA gives effect to the constitutional requirement of reasonable administrative action[37] by specifically requiring that administrative action be non-arbitrary,[38] rational,[39] effective,[40] and, possibly, proportionate.[41] On its face the administrative law standard of reasonableness therefore looks a lot like the standard of reasonableness applied by our courts on the basis of constitutional health care rights (see para 10 above). However, there is one important difference – in much simplified terms, PAJA's reasonableness standard is a subjective test, whilst the constitutional standard is objective. This means that, whereas in applying the constitutional reasonableness test courts can consider the totality of circumstances, information and facts at their disposal to determine, for instance, whether or not a decision is rationally related to the information (rational), in applying the administrative law test, courts are limited to considering the decision on its own terms, that is, in light only of those circumstances, information and facts that were at the administrator's disposal when coming to her decision.[42] In this respect the administrative law test is more limited in its scope and therefore potentially less stringent than the constitutional test.

21. In conclusion, two further characteristics of administrative law review in terms of PAJA militate against a choice of such review instead of constitutional challenge to a school's decision not to allow condom provision. The first relates to PAJA's time limitations: PAJA sec 7(1) determines that a review application must be brought within 180 days after the date upon which the person affected by an administrative decision is informed of that decision, becomes aware of it and the reasons for it or might reasonable be expected to have become aware of it and the reasons for it. No similar limitation applies to a constitutional challenge on the basis of health care rights. Second, in the ordinary course of things a court having found an administrative decision reviewable will not substitute the administrator's decision with its own, but will remit the matter to the administrator for it to decide afresh. It is only in exceptional circumstances that a court will go so far as to substitute the administrator's decision with its own. Although no closed list of such exceptional

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[37] Sec 33(1) of the Constitution.
[38] PAJA sec 6(2)(e)(vi).
[39] PAJA sec 6(2)(f)(ii)(cc) & (dd).
[40] PAJA sec 6(2)(f)(ii)(aa) & (bb).
[41] PAJA sec 6(2)(h).
[42] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 30-31.

circumstances exists, our courts have, for example, been willing to substitute the decision of the administrator only in cases where the administrator is found to have acted in bad faith, '(1) where the result is a foregone conclusion and it would be a waste of time to send the decision back or (2) where further delay would cause unjustifiable prejudice or (3) where the decision maker showed bias or serious incompetence or (4) where the court considers itself as well qualified as the original decision maker to make the decision.'[43] Again this is a limitation that does not apply to a constitutional challenge to a school's decision not to allow condom provision.

Application

I now set out to apply the legal position(s) set out above to the various issues identified at the start of this opinion.

The current policy

22. Were the current policy of the Department of Education with respect to condom availability at schools to be challenged either as a violation of the state's constitutional duty, in terms of sec 27(1) and sec 28(1)(c) read with sec 7(2) of the Constitution, to *promote and fulfil* the right of everyone to have access to health care services and the right of children to basic health care services (issue (a) in para 5 above), or as a failure in the duty to *respect* those rights (issue (b) in para 5 above), the challenge would confront the court with having to make a choice between the DoE's current policy and a policy of mandated condom provision at schools.

23. The underlying policy question that will be raised if a challenge along either of these lines were to be launched is therefore whether the available evidence suggests that mandated condom provision at schools is a significantly more effective measure to combat the spread of HIV infection amongst the youth than a policy simply allowing individual schools to make condoms available.

24. The main and obvious argument in favour of mandated condom provision at schools is that the benefit of such a measure – possible increased use of condoms by sexually active school-going children, with the accompanying increased protection for such children against HIV infection – outweighs any possible negative effects. Arguments against mandated condom provision at schools would also weigh benefits

[43] *Darson Construction (Pty) Ltd v City of Cape Town and another* [2007] 1 All SA 393 (C) at 404.

against costs and posit that the costs outweigh the benefit. Here one can point to the following possible adverse consequences of condom provision at schools:

- First, condom provision at schools - whether by making sex appear safer; or by making sex at that age appear more normal or officially sanctioned, attracting less social opprobrium than before; or by increasing peer pressure to partake in sex - can encourage more children to have more sex and so dilute the message that abstinence at that age is still a safer option than safe sex.

- Second, broad sexual education and HIV awareness programmes at individual schools depend to a large degree for their success on the approval, buy-in and participation of parents and the community within which the school operates.[44] Should condom provision be mandated at a school within a community where prevailing social mores dictate opposition to such an option, the approval and buy-in upon which the broader programme's success depends can be jeopardised.

25. The cogency of either set of arguments - that is the contention either that condom provision would significantly increase condom use among sexually active school children, without significantly increasing their rate of sexual activity and without causing significant community opposition; or that it would not significantly increase condom use but would indeed encourage sexual activity and engender community opposition - of course depends on the extent to which evidence can be offered to support them. The difficulty in this respect is that there does not seem to be evidence properly supporting either set of arguments.

26. I could find no South African studies of the impact of condom provision at schools on either condom use amongst school going children or the spread of HIV infection in that age cohort, nor any on point studies from other African countries.[45] Studies from elsewhere – notably the USA – are available.[46] However, although I

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[44] D Kirby *et al* 'Impact of sex and HIV education programs on sexual behaviours of youth in developing and developed countries' (2005) 2 *Family Health International Youth Research Working Paper Series* 28 29.

[45] The study by R Hayes *et al* ('The MEMA kwa Vijana project: Design of a community randomised trial of an innovative adolescent sexual health intervention in rural Tanzania' (2005) 26 *Contemporary Clinical Trials* 430-442) does consider the impact of condom provision to school going children more generally, but does not focus on condom provision at schools.

[46] See eg Blake *et al* 'Condom availability programs in Massachusetts high schools: Relationships with condom use and sexual behavior' (2003) 93 *American Journal of Public Health* 955-961; Furstenberg *et al* 'Does condom availability make a difference? An evaluation of Philadelphia's health resource centers' (1997) 29 *Family Planning Perspectives* 123-127; Guttmacher *et al* 'Condom availability in New York City public high schools: Relationships to condom use and sexual behaviors' (1997) 87 *American Journal of Public Health* 1427-1433; Kirby *et al* 'The impact of condom availability in Seattle schools on sexual behavior and condom use' 89 *American Journal of Public Health* (1999) 182-

must emphasise my limited expertise in this respect, their usefulness seems to me to be diluted by two factors:

- First, the context within which these studies were conducted (schools within the USA) differs importantly from the context in South Africa, most importantly with respect to rates of HIV infection and the rate of spread of HIV infection in the relevant communities and with respect to the availability of condoms from places other than schools and the functioning of sexual education and HIV awareness programmes in the subject schools. In this respect it does for example seem that in a place like South Africa, with its high rates of HIV infection, any increase in condom use by sexually active children could be more significant than elsewhere where HIV infection rates are lower.

- Second, none of the available studies generated conclusive results either way. In some of the studies condom provision seemed to have no discernible effect on either condom use or rate of sexual activity.[47] Also, virtually all of the studies themselves were fatally flawed, failing to take account of variables other than condom provision to account for whatever fluctuations in rates of condom use and sexual activity were reported.[48]

27. One conclusion is suggested by the available evidence: whichever impact condom provision has on condom use and rates of sexual activity amongst school going children at a particular school depends upon a wide variety of variables specific to the individual school that cannot be accounted for in any over-arching policy position. Factors that can in this respect play a role would be the existence, nature and success of sex education and HIV awareness programmes at the school in question; community attitudes toward condom provision; the availability of condoms to children outside of school; the existing rate of sexual activity amongst children at the school; and many more.

28. In sum, no clear answer seems to be presented by the evidence to the policy question whether mandated condom provision at schools is significantly more effective in combating HIV infection than leaving the choice whether to provide to individual schools. Rather, the evidence, such as it is, suggests that the effectiveness

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187; Schuster *et al* 'Impact of a high school condom availability program on sexual attitudes and behaviors' (1998) 30 *Family Planning Perspectives* 67-72.

[47] See eg Kirby *et al* (n 61above) and Guttmacher *et al* (n 61 above).

[48] See in particular Blake *et al* (n 61 above); Furstenberg *et al* (n 61 above); and Schuster *et al* (n 61 above).

of condom provision at schools depends importantly on variables that are specific to individual schools and that would fall peculiarly within the knowledge of decision makers at individual schools.

29. In this light, I think it highly unlikely that a court adjudicating a challenge to the DoE's current policy either on the basis that it violates the duty to promote and fulfil health care rights, or that it fails to respect those rights, would find against the DoE. The underlying policy question that will be raised by such challenges is precisely the kind of question that courts would feel incapable of engaging with and with respect to which they will therefore defer to the DoE – a complex question, depending for an answer on a wide variety of unknown variables specific to particular contexts, to which no clear answer therefore presents itself in the abstract. I would submit that this kind of deference would be the courts' approach whether the challenge is presented as a duty to fulfil challenge, in which case the policy will be evaluated against the courts' reasonableness test, or as a duty to respect challenge, in which case the policy will be evaluated against the section 36(1) 'reasonable and justifiable' standard.

30. Indeed, given that the question whether condom provision at a particular school will be effective depends so acutely on context, the DoE's current policy is likely to be judged the only possible 'reasonable' or 'reasonable and justifiable' approach to the issue, as it, as our courts have shown themselves wont to do, defers to the expertise, specific knowledge and informed judgment of those best placed to determine the effectiveness of condom provision at a particular school.[49]

31. Stated differently: In order to persuade a court that the DoE's current policy is indeed unreasonable (if the duty to promote and fulfil route is followed) those challenging the policy would have to persuade a court that mandated condom provision at schools will under all circumstances lead to an increase in condom use significant enough to off-set any possible increase in sexual activity resulting from it at the same time. As there is no evidence to support such contention, this is an onus that would be impossible to discharge. Conversely, if the duty to respect sec 36(1) route is followed, all the DoE would have to do to persuade the court that its current policy is reasonable and justifiable is to show that what the most effective measure for individual schools is to combat the spread of HIV/Aids amongst their pupils depends

[49] See para 13 above.

determinatively on the circumstances specific to each school. This onus it would easily discharge.

32. My conclusion with respect to issues (a) and (b) described in para 5 above is therefore that a legal challenge along such lines is not viable and should not be pursued.

A possible blanket prohibition

33. Should the DoE change its current policy and issue a blanket prohibition of condom availability at schools, two important implications would result. First, the DoE would have made a choice between three possible approaches to the issue (mandating condom provision; allowing individual schools to decide for themselves; prohibiting condom provision), where, if my assessment in paras 26-28 above is correct, the available evidence does not provide an answer as to the effectiveness or otherwise of condom provision at schools as a method of prevention of the spread of HIV infection. Importantly, they will have rejected an approach that devolves the decision whether to make condoms available to those best placed to make it (individual schools) in favour of a one-size-fits-all solution. Second, any such decision would have the immediate implication that schools that currently do make condoms available to their pupils, or that allow condoms to be made available, will now have to cease doing so. This means that such schools will be forced to cease providing a health care service that, depending on each case, could perhaps be shown to have been effective in reducing or controlling the spread of HIV/Aids among their pupils. Also, schools that, in light of their peculiar circumstances, judge that to make condoms available to their pupils would constitute an effective measure to combat the spread of HIV/Aids, would now be prevented from doing so. In this light, any decision to impose a blanket ban on condom availability would to my mind be susceptible to legal challenge as a failure in the state's constitutional duty to *respect* health care rights, in two distinct but related ways.

34. First, a blanket ban can be challenged as a retrogressive step in the state's efforts progressively to realise health care rights by combating the spread of HIV/Aids – such a ban would result in a health care service, that might have been effective in particular cases in combating the spread of HIV/Aids, being discontinued. Second, such a blanket ban would operate as an impediment to access to health care services – pupils at individual schools that may have decided to make condoms available because their

particular circumstances indicate that it would be effective in combating the spread of HIV/Aids, will be prevented by it from getting access to a potentially effective health care service.

35. As will be recalled, a decision challenged as a failure in the state's duty to respect health care rights, if it can in the first place be shown to have resulted in the discontinuation of an existing health care service or to operate as an impediment preventing access to health care rights (if, therefore, it can in the first place be shown to have limited the exercise of health care rights) will then be evaluated not against the reasonableness test outlined in para 10 above, but against a more stringent standard of reasonableness and justifiability contained in sec 36(1) of the Constitution. This standard is not only usually more stringent than the ordinary reasonableness standard. The onus to persuade the court that this standard is met (that the ban is 'reasonable and justifiable') is also clearly on the state rather than that it is on those challenging the decision to persuade the court that it is not met.

36. In broad terms the section 36(1) 'reasonable and justifiable' standard requires that the measure the state seeks to justify be shown by the state to have a legitimate government purpose; to be rationally related to that legitimate purpose; to be proportionate with respect to its benefits and adverse consequences; and to be necessary, in the sense that there are no measures available to the state that would achieve the current measure's purpose, but be less restrictive of constitutional rights in the process. If my conclusion about the paucity of evidence regarding the effect of condom provision at schools on rate of condom use and rate of sexual activity amongst school children is correct, I am of the opinion that the DoE would not be able to persuade a court that a blanket ban is 'reasonable and justifiable' in terms of section 36(1).

37. The most likely argument that the DoE would use to justify a blanket ban on condom availability at schools would be that such a ban is aimed at enhancing its efforts to combat the spread of HIV/Aids amongst school children, by reinforcing the message that abstinence is the best defence against HIV infection. To make this argument, the DoE would have to be able to show that condom provision at schools indeed encourages sexual activity amongst school children and so undercuts the message of abstinence. Seeing that there is no evidence available to sustain this claim in general terms, the DoE would fail at the very first hurdle presented by sec 36(1) – it would be unable to persuade the court that there is a rational link between the ban and

its purpose of improving efforts to combat the spread of HIV/Aids among school children.

38. Also, in light of my conclusion above (para 28) that the only thing the evidence does suggest is that the decision whether or not to make condoms available at schools is best taken in light of the specific circumstances of each school by decision makers at each individual school for each individual school, the DoE will also not be able to persuade a court that its blanket ban is necessary, as required by sec 36(1). If my reading of the available evidence is accepted, there is a measure at the DoE's disposal that will achieve with respect to individual schools the ban's purpose (ie the effective combating of the spread of HIV/Aids among school children), without restricting the right to have access to health care services as severely as the blanket ban does – that is, the current policy of allowing individual schools to make the decision whether to allow condom provision according to their particular circumstances. The current policy enables individual schools to assess what the best response to the spread of HIV/Aids is under their specific circumstances and does not in doing so result in the limitation of health care rights by forcing schools to abandon condom provision or preventing schools who want to do so from providing condoms.

39. My conclusion with respect to issue (c) described in para 5 above is therefore that a legal challenge along those lines is indeed viable and, should the DoE change its policy as feared, could be pursued.

A prohibition by an individual school in terms of the current policy

40. An issue not addressed in the discussion of possible legal challenge directed at the DoE's current policy with respect to condom availability at schools is the problem that, whilst the DoE's policy might ostensibly be to allow individual schools to decide for themselves whether to make condoms available, in practice the vast majority of schools decide not to do so – that is, whilst *de jure* schools are allowed to make condoms available, *de facto* they don't.[50] In the field of unfair discrimination law our courts have been careful to recognise the existence of indirect discrimination – that is,

[50] Whilst I was not able to find more recent studies indicating the statistics with respect to condom availability at schools, a study published in 2003 and focussing on 1998-99 found that the number of schools at which condoms were available at that time was almost negligible: of the 2% of schools who hade school-based health centres, only 28% made condoms available to pupils (Santelli JS, Nystrom RJ, Brindis C, *et al* 'Reproductive health in school-based health centers: findings from the 1998-99 census of school-based health centers' (2003) 32 *Journal of Adolescent Health* 443-451).

a measure that on its face does not discriminate against any person or group of persons but does so in practice, because of the social reality within which it is applied. Our courts have consistently held that such indirect discrimination, even there where it was not intended, falls foul of the constitutional and statutory prohibition of unfair discrimination.[51]

41. The question arises whether or not one might by way of analogy talk of an indirect breach of health care rights that occurs because of the DoE's policy – although on its face it allows the availability of condoms at schools, depending on each school's own decision, in practice it operates to prohibit condom availability, as prevailing moralities at schools generally indicate in the overwhelming majority of cases a decision against condom availability. This question is placed all the more sharply in focus in light of the Minister of Education's publicly professed opposition to condom availability at schools, which almost goes so far as to suggest a veiled intention to discourage a choice at individual schools for condom availability.[52]

42. Two problems militate against any such attempt to challenge the DoE's current policy on general terms. First, in light of the paucity of evidence indicating that indeed the availability of condoms at schools is the clearly preferable policy option in the fight against HIV/Aids, it would be virtually impossible to show that the DoE's policy can in any way be blamed for the fact that very few schools allow condom provision. The DoE would always simply be able to argue that the policy clearly works well – it allows those best qualified in terms of local knowledge and experience to make the decision, and they decide against allowing condom provision because their circumstances indicate the choice. Second, one would be confronted with a problem of remedy: any court, even having found that the current policy indirectly breaches health care rights, would be loathe to order the DoE to mandate condom provision positively in a blanket form, in a context where clearly the decision whether or not to do so is centrally determined by widely varying local conditions. As argued above (para 13) this is exactly the kind of order that a court would feel itself unqualified to issue. An order in the alternative that the policy be so adapted that it still allows a school to decide for itself, but encourages it to disregard the impression of opposition created by the Minister and possible prevailing conservative mores seems impossible to craft and even were it possible would be too complex to enforce.

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[51] See, for example *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

[52] See para 4 above.

43. In this light it seems that a better option than challenging the DoE's current policy in general terms is perhaps to focus on the decisions of individual schools in terms of that policy not to allow condom provision. Such individual decisions can be challenged along two fronts: either as a breach of constitutional health care rights or on administrative law review in terms of any of the review grounds contained in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). Any discussion of either of these two kinds of challenge to the decision of an individual school to prohibit condom provision suffers from the problem that it can for the moment only occur in the abstract: obviously the viability of either the constitutional or the administrative law challenge in a particular case would depend on the facts and circumstances of that particular case, which are not available to us. The analysis that follows consequently necessarily moves only on the abstract level.

Constitutional challenge

44. The first way in which a constitutional challenge to a school's decision not to allow condom provision can arise is where a school principle or governing body, in the absence of an implementation plan, simply decides not to allow such provision – rejecting, for example, an offer by an NGO to provide condoms, or, where condoms where previously available, discontinuing the provisioning. Such an *ad hoc* decision in the absence of an Implementation Plan would be the easiest to challenge. It would be possible to cast such a decision as a breach of the duty to respect health care rights either because it results in the retrogressive step of a discontinuation of an existing health care service, or because it operates as a barrier to access to health care services. As explained in para 8 above, in such a case two things ordinarily have to be determined: first the breach of the right in question (this the person or institution alleging the breach has to establish); and, second, where a breach has been established, that such a breach is not justifiable in terms of section 36(1) of the Constitution (here the onus is on the state to justify the breach). However, section 36(1) and the opportunity for the state to justify its breach of health care rights in terms of it apply only there where the breach occurs in terms of 'law of general application' and, as outlined in para 8 above, a once-off decision that does not constitute a rule that applies alike to like cases, does not constitute law of general application. Should a school in the absence of an implementation plan decide not to allow in a particular instance condom provision, that decision would therefore not

constitute law of general application and would not be capable of justification. This means that all those challenging such decision would have to show to be successful, is that the decision indeed discontinues existing provision of health care or operates as a barrier to health care services that would but for it be available.

45. The second way in which a challenge to a school's decision not to allow condom provision can arise is where a school adopts an Implementation Plan prohibiting the provision of condoms. Such a challenge would again best be formulated as that the school's implementation plan breaches the duty to respect health care rights – this would be possible both where condom provision was previously allowed, but has now had to be discontinued because of the adoption of an Implementation Plan prohibiting condom provision, and where condoms were never available and an Implementation Plan is adopted prohibiting condom provision, essentially simply confirming the *status quo*. In the former instance the breach would consist in the retrogressive step of removing a health care service (condom provision) that was available; in the latter it would consist in the Implementation Plan operating as a barrier to access to a health care service that would, but for the policy, be available to children at the school in question.

46. To argue that an Implementation Plan in either of the ways outlined above breaches the duty to respect health care rights two things will have to be established: first, that the Plan indeed limits access to health care; and second, once that has been established, that the limitation cannot be justified in terms of section 36(1). To show that a limitation indeed results from such an Implementation Plan would not be problematic: Where condoms were available at a school and now have to be removed, it is self-evident that access to an existing health care service has been terminated, that is, that the right to have access to health care services has been limited; where condoms were not available, but may now explicitly not be provided, all that needs to be shown is that condoms are indeed available, but cannot be provided because of the Plan's prohibition.

47. Once this has been established, for the school in question to justify this limitation of health care rights, it would amongst other things have to formulate the purpose of its prohibition; indicate that its prohibition is rationally related to that purpose in the sense that it is capable of achieving it; and indicate that there are not measures at its disposal to achieve its purpose that are less restrictive of health care rights than the decision it indeed took. Whether or not a school would be capable of making this

showing will depend entirely upon the circumstances at that school and the question whether or not there is, for example, hard evidence with respect to that school that condom availability has lead to an increase in sexual activity; and/or a demonstrable change in attitude of children, parents and the surrounding community with respect to the school's sex and HIV/Aids education programme; and/or clear evidence that condoms are readily available and accessible to children from the school outside of the school. Conversely, of course, a decision whether or not to proceed with legal action against a particular school on this basis would depend entirely on the cogency of the school's case in support of its prohibition and on the availability of evidence to support that case or the contradict it. At this point I am willing to presume that evidence either way would be easier to come by when focussing on one particular school, than would be the case in general terms.

Administrative law review

48. Any decision of an individual school to prohibit condom provision, whether embodied in or in the absence of an Implementation Plan, is, apart from challenge on constitutional grounds, also potentially susceptible to review on administrative law grounds. However, to be susceptible to such challenge, one precondition has to be met: the decision in question has to constitute administrative action as that term is defined in section 1 of PAJA.

49. As described above, PAJA defines administrative action in its section 1 as decisions of an administrative nature, taken either by an organ of state or a natural or juristic person acting in a public capacity, in terms of an empowering provision, which has a discernable negative impact on a person or persons (see para 16 above). It seems to be uncontroversial to assume that any decision of a school not to allow condom provision, whether embodied in an implementation plan or not, would meet most of these criteria: such a decision would certainly be a 'decision' (ie it would determine the question whether or not condoms may be made available at the school); taken by an organ of state (at least state schools certainly are organs of state, as they operate in terms of legislation, under control of the state, as part of a state department) acting in a public capacity (the decision is taken in terms of powers conferred on the school by the Minister of Education, acting in terms of her own statutory powers, and centrally affects the interests of the general public), in terms of an empowering provision (as pointed out above in para 18, policy documents or guidelines such as

that issued in this instance by the DoE do constitute empowering provisions) and it would adversely affect the rights of at the very least pupils at the school (their constitutional health care rights).

50. The only possible controversial question is whether or not the decision is of an administrative nature. As described above, a decision is of an administrative rather than executive or legislative nature if it amounts to the implementation rather than formulation of policy or law. To escape the scrutiny of the administrative law, a school whose decision to disallow condom provision is taken on review might argue that the decision is of an executive rather than administrative nature, as it amounts to the formulation of policy for the school in light of its local conditions. As noted above (para 17), this argument was addressed by the Constitutional Court in the case of *Ed-U-College*. Describing a decision involving the formulation of a formula in terms of which to determine subsidy allocations to private schools O'Regan J held that a decision that amounts to the formulation of policy, but that still occurs within the limits set by legislation, is still of an administrative nature, because it still implements the legislation in question. As I argued above, this reasoning can be extended also to decisions that are in nature policy formulating decisions but that are taken within the confines of a prior policy document – as long as the policy formulation is sufficiently directed, limited and dictated by the prior policy document (empowering provision) to render it an implementation of that prior policy document, the decision, despite its policy content, remains administrative action. The empowering provision in terms of which a school may decide not to allow condom provision – the DoE's 1999 policy document entitled 'National policy on HIV/AIDS, for learners and educators in public schools, and students and educators in further education and training institutions' – prescribes the manner in which a school's Implementation Plan must be drafted ('in consultation with local religious leaders, traditional leaders, medical professionals and traditional healers') and by implication directs that the plan (and any decision in it to prohibit condom provision) must take account of local facts and circumstances in the first place. As such I would submit that the drafting of the Implementation plan, although an act of policy formulation, is sufficiently bounded by the DoE's prior policy document to constitute conduct of an administrative nature.

51. Should my conclusion in this respect be correct, there are three factors to consider which seem to militate against taking a school's decision not to allow condom

provision on administrative law review rather than challenging it in terms of the constitution.

52. The first such factor relates to PAJA's time limitations. The problem presents as follows: PAJA sec 7(1) determines that a review application must be brought within 180 days after the date upon which the person affected by an administrative decision is informed of that decision, becomes aware of it and the reasons for it or might reasonable be expected to have become aware of it and the reasons for it. The administrative decision that would have to be challenged where a challenge is launched against a school's stance of not allowing condom provision would in most cases probably be that school's Implementation Plan. Such Plan might have been adopted and publicised some time ago already, in any event longer ago than the 180 days referred to in section 7(1). Were a review application brought against a Plan that was adopted longer ago than 180 days, in response, for example, to a rejection of an offer of condom provisioning, the applicants would have to be able to show that, despite the Plan having been in place and operating for some measure of time, they were unaware of it and could not reasonably be expected to have become aware of it. In cases where the required consultation process was followed by the school before the plan was adopted and where the plan was subsequently publicised within the school and elsewhere, this might be a difficult showing to make. As pointed out above, no such limitation applies to a constitutional challenge to a school's Implementation Plan.

53. Second, as pointed out in para 21 above, a court on administrative law review is usually loathe to substitute the decision of the administrator with its own, having found such decision reviewable. Courts, except under exceptional circumstances, rather remit such decisions to the administrator for it to decide afresh. Obviously this is not the preferable remedy where one is aggrieved by a school's decision to prohibit condom provision – the preferred result would be an order directing the school to allow condoms. Again this remedial limitation does not apply to a constitutional challenge to a schools prohibition of condom provisioning.

54. Third, as pointed out in para 20 above, constitutional challenge is also preferable to administrative law review because the reasonableness standard that would apply in a constitutional challenge, being an objective standard, is potentially a more wide-ranging and therefore stricter standard than the reasonableness standard employed in administrative law review, which is applied subjectively.

55. Taken together these three factors indicate that an administrative law review challenge should be considered only where for some reason the constitutional challenge is not possible (where, for example, the decision of the school to prohibit condom provisioning clearly falls within the bounds of reasonableness) or where this is not the case, where the administrative law review challenge would add something that the constitutional challenge can not. In effect that means that an administrative law review application based on reasonableness as ground of review would always seem superfluous and that such an application would come into play only where it is possible, either in isolation or together with a constitutional challenge, to review the decision in question on the basis of procedural fairness or lawfulness.

CONCLUSIONS

In conclusion and in summary I can offer the following recommendations:

1. Constitutional challenge to the current policy of the DoE with respect to condom provisioning at schools is, in light of the available evidence with respect to the efficacy of condom provisioning at schools as measure to combat the spread of HIV/Aids, not viable and should not be pursued.
2. Constitutional challenge to a possible new policy of the DoE with respect to condom provisioning at schools, introducing a blanket ban on condoms at schools would indeed, should such policy change occur, be viable on the basis that such blanket ban would breach the state's constitutional duty to respect health care rights, and could then be pursued.
3. As long as the current policy of the DoE which allows individual schools to formulate their own stance with respect to condom provisioning remains in place, constitutional challenge to a decision of an individual school to prohibit condom provisioning would, depending on the circumstances of that case and the cogency of the reasoning of the school in support of its decision, be viable and could be pursued, on the basis that such decision breaches the school's constitutional duty to respect health care rights.
4. In the alternative to or in addition to the kind of constitutional challenge referred to in 3 above, a decision of an individual school to prohibit condom provisioning could also be susceptible to administrative law review on the

basis either that the decision in question was unlawful or was procedurally unfair.