

# ACCESS TO THE MEDICAL RECORDS OF A CHILD: LEGISLATIVE REVIEW REQUIRED

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## ABSTRACT

The interplay between the constitutional right to privacy and the right to access to information constitute the parameters within which the issue of access to a child's medical records is explored. The Children's Act and the National Health Act provide for confidentiality pertaining to medical records and encourage participation in decisions affecting an individual's health. The question arises whether existing legislation has been amended to support this right to confidentiality. An inquiry is done to establish if this right to confidentiality entails that the child is vested with the right to refuse access to his/her medical records? Current legislative provisions regulating this issue do not provide a clear answer. Recommendations are made for legislative amendments to bring clarity on this issue and to ensure that the child's right to privacy in the health-care context is optimally protected.

## I INTRODUCTION

Issues surrounding access to the medical records of a child have not received much attention in the past, particularly where the person who requested access was a parent. This could be attributed to the patriarchal Roman-Dutch heritage in which it was accepted that the parent, and in particular the father, had 'quasi-ownership' of his children.<sup>1</sup> Decisions regarding medical treatment were traditionally taken by parents. The focus has however shifted away from parental authority<sup>2</sup> towards child autonomy<sup>3</sup> as part of the move away from paternalism.<sup>4</sup>

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1 C Ngwenya 'Health Care Decision-making and the Competent Minor: The Limits of Self-determination' (1996) *Acta Juridica* 132, 133. Also see in general PJJ Olivier 'Minority and Parental Power' (1983) *Acta Juridica* 97 who explains the power that the father figure had over his children in the Roman and Roman-Dutch era.

2 The Children's Act 38 of 2005 shifts the focus from parental authority to parental responsibility. See A Skelton 'Parental Responsibilities and Rights' in T Boezaart (ed) *Child Law in South Africa* (2009) 62, 63. See further S Human 'Kinderregte en Ouerlike Gesag: 'n Teoretiese Perspektief' (2000) *Stellenbosch LR* 71.

3 The autonomy of the child and the protection of the child are two underlying themes in children's rights. See A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart *Child Law in South Africa* (2009) 265, 275.

4 See *Castell v De Greeff* 1994 (4) SA 408 (C) 429 where Ackerman J in explaining the material risk test in terms whereof a patient must be informed of all material risks to a medical procedure, stated that: 'It is in accord with the fundamental right of individual autonomy and self-determination to which South African law is moving. This formulation also sets its face against paternalism, from many other species whereof South Africa is now turning away.'

This shift in focus is evident from the constitutional right to bodily integrity<sup>5</sup> and privacy<sup>6</sup> to which children are also now entitled.

The Children's Act 38 of 2005 now empowers a child to take independent decisions regarding various aspects of his/her health care.<sup>7</sup> Closely linked to this right, is the issue of access to the medical records relating to the medical treatment to which the child consented.<sup>8</sup>

A plethora of situations can arise in the health-care context where a parent would want to gain access to the medical records of his/her child who consented independently to medical treatment. A parent would, for example, want to know the results of a 12-year-old child's HIV test, or a pregnancy test as the result may impact the parents financially in terms of further medical expenses and possibly even maintenance for their grandchild.<sup>9</sup> The child, on the other hand, may want to keep the fact that he/she underwent such a test and the results thereof confidential as part of asserting and maintaining his/her privacy and/or autonomy. A parent's wish to access the information pertaining to the medical treatment of a child stands in direct contrast to the child's right to privacy. The child's best interests, is an important consideration in weighing up these rights against each other.

If the child was able to consent to the medical treatment, it stands to reason that he or she should also have the right to grant or refuse a third party, including his/her parents, access to his/her medical records.<sup>10</sup> This issue centres on the child's right to privacy which includes the ability to control personal information, even after it has been disclosed.<sup>11</sup>

Since the Children's Act introduced specific provisions regarding confidentiality of a child's health status, it is necessary to inquire if existing legislation has been amended accordingly to support this right. I consider the principles pertaining to the child's constitutional right to privacy and the child's right to confidentiality as it pertains to his/her medical records. I further consider the legislative provisions pertaining to confidentiality of

5 Constitution of the Republic of South Africa, 1996 s 12(2)(a) guarantees everyone the right to take decisions regarding reproduction and s 12(2)(b) guarantees the right to security in and control over one's own body.

6 Ibid s 14.

7 Section 129(2) enables a child of 12 years of age to consent independently to medical treatment, to consent to an HIV test (s 130) and to receive contraceptives or contraceptive advice (s 134).

8 D Kassan & P Mahery 'Special Child Protective Measures in the Children's Act' in Boezaart (note 3 above) 185, 215–16 explains that the question of competence pertaining to consent to medical treatment is closely linked with the right to information as (informed) consent is possible only after one has considered all the relevant information pertaining to the envisaged medical treatment.

9 See in general CHimonga & A Cooke 'A Child's Autonomy with Special Reference to Reproductive Medical Decision Making in South African Law: Mere Illusion or Real Autonomy?' (2007) 15 *Int J of Children's Rights* 323 where it is emphasised that a child's autonomy, especially when it comes to reproductive decision-making, should not be considered in isolation but with due consideration to the child's family context.

10 MN Slabbert 'Parental Access to Minors' Health Records in the South African Health Care Context: Concerns and Recommendations' (2004) 7 *Potchefstroom Electronic LJ* 165 suggests that children should have the right to refuse parental access to their health records.

11 See *NM v Smith* 2007 (7) BCLR 751 (CC) para 44.

medical records and the consent required to access these records, in terms of the Children's Act, the National Health Act 61 of 2003 and the Promotion of Access to Information Act 2 of 2000 (PAIA). Suggestions for legislative review are made where current legislation proves to be inadequate in supporting the child's right to privacy in the health-care context.

## II CHILDREN AS HOLDERS OF CONSTITUTIONAL RIGHTS

A child is a person under the age of 18 years.<sup>12</sup> Section 28 of the Constitution provides for specific children's rights<sup>13</sup> which stand in addition to rights that a child has in terms of other sections of the Constitution.<sup>14</sup> Section 28 does not however grant a child the right to individual self-determination.<sup>15</sup> Such right is rather derived from inter alia, the rights to privacy<sup>16</sup>

No right in the Bill of Rights<sup>17</sup> is absolute, and may be limited in terms of the limitation clause in the Constitution if this is fair and just in an open and democratic society.<sup>18</sup> The child's constitutional right to privacy, and in particular the limitation of the right, must be considered within the context of the relationship of dependence that necessarily exists between parent and child.<sup>19</sup> Exercising the rights and duties associated with parental responsibilities may in itself limit the extent to which the child can lay claim to self-determination.<sup>20</sup> The limitation of a child's rights become increasingly difficult to justify as the child grows older<sup>21</sup> and becomes more independent. Younger children generally need the assistance of their parents when wanting to do something, for example, getting their ears pierced. The older the child becomes, the less assistance they generally require from parents in everyday things. This leads to, for example,

12 Constitution s 28(3). The Children's Act lowered the age of majority to 18 years, see s 17.

13 Ibid s 28. The Constitution is classified as a 'children's rights' constitution since its approach to children is based on rights, rather than welfare. See J Tobin 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 SAJHR 86, 94.

14 J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 6 ed (2013) 599. Section 28(g) (i) of the Constitution specifically states that the rights in s 28 shall be in addition to the rights that the child has in terms of s 12 of the Constitution. See Skelton (note 3 above) 265. Also see JA Robinson 'Children's Rights in the South African Constitution' (2003) 6 *Potchefstroom Electronic LJ* 1, 12 & 16. See further *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 52 where this principle was confirmed by the Constitutional Court. Also see *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) para 38.

15 Ngwenya (note 1 above) 132–3 who points out that the child's right to self-determination should not be seen as absolute and should be weighed up with the legitimate interest of the parent or guardian to take decisions regarding what is in the best interests of the child. Also see in general Himonga & Cooke (note 9 above). Section 6(3) of the Children's Act states that the child's family must be given the opportunity to express their views in any matter concerning the child where this is deemed to be in the child's best interests.

16 Constitution s 14. Also see De Waal et al (note 14 above) 601.

17 Constitution chapter 2.

18 Ibid s 36. Also see J Neethling & JM Potgieter (ed & trans by JC Knobel) *Law of Delict* 6 ed (2010) 16–17.

19 B Bekink & D Brand 'Constitutional Protection of Children' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 181.

20 Ibid.

21 De Waal et al (note 14 above) 601. Also see Skelton (note 3 above) 276.

a 16-year-old getting body piercings without informing a parent or this might even occur against the parents' will. The child is asserting his/her independence and exercising the rights associated therewith.

In so far as a child is entitled to all rights in the Constitution, except for those with specific age requirements,<sup>22</sup> the best interests of the child is still paramount in all matters concerning the child.<sup>23</sup> The best interests of the child is a right in itself<sup>24</sup> and can as such also be limited.<sup>25</sup> This right can help determine the ambit of other rights and their limitations.<sup>26</sup> The best interests of the child, as a right, will not necessarily trump any and all other rights.<sup>27</sup> What is in the best interests of a particular child is determined on a case-by-case basis.<sup>28</sup>

### III CONSTITUTIONAL RIGHTS RELEVANT TO THE ISSUE OF ACCESS TO THE MEDICAL RECORDS OF A CHILD

The child's right to privacy is most at risk of being infringed upon if a third party gains unsolicited access to his/her medical records and the main focus in part III of this article shall therefore fall on the right to privacy. The right to access to information will be discussed as it is a right that often competes with the right to privacy where it is relied upon by a third party to gain access to the medical records of a child. The child's right to access his/her own medical information will be touched upon briefly.

#### (a) The right to privacy in the health-care context

The Constitution guarantees that everyone, including children,<sup>29</sup> shall have the right to privacy.<sup>30</sup> The right to privacy amongst other objectives seeks to protect

22 Such as the right to vote (s 19(3)(a) of the Constitution).

23 Constitution s 28(2). Also see Ngweni (note 1 above) 146 who opines that even the right to privacy and dignity is subject to the 'best interests principle' as provided for in s 30 of the interim Constitution Act 200 of 1993. Also see in general Himonga & Cooke (note 9 above) who warn that absolute autonomy of the child might not be in the best interests of the child, especially in the South African context.

24 See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) para 55. In *Minister of Welfare & Population Development v Fitzpatrick* 2000 (3) SA 422 s 28(4)(f) of the Child Care Act 74 of 1983 was declared invalid as it infringed upon the child's best interests. The provision which prohibited the adoption of South African children by non-citizens was found to infringe upon the best interests of a child, which could in this instance entail adoption by a non-citizen.

25 Skelton (note 3 above) 282. Also see De Waal et al (note 14 above) 601–2.

26 Skelton *ibid* 280. Also see De Waal et al *ibid* 601.

27 Skelton *ibid* 282. Also see De Waal et al *ibid* 602.

28 Skelton *ibid* 282. Also see R Malherbe 'The Impact of Constitutional Rights on Education' in Boezaart (note 3 above) 420, 440.

29 Kassin & Mahery (note 8 above) 222. Also see Skelton *ibid* 277; and *Johncom Media Investments Limited v M (Media Monitoring Project as amicus curiae)* 2009 (4) SA 7 (CC) where the Constitutional Court confirmed that the child is entitled to the right to privacy and dignity. The court declared the ban on publication of divorce information unconstitutional, except for the ban on publication of information that could possibly identify the child involved in a divorce matter as such prohibition aims to protect the child's right to privacy and dignity. See further Robinson (note 14 above) 15 who confirms that children have the right to privacy.

30 Constitution s 14. See further J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) 17.

the ability of the individual to control the use of private information about him- or herself.<sup>31</sup> The Constitutional Court held that privacy is intimated ‘wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable’.<sup>32</sup> This aspect of the right to privacy is referred to as ‘informational privacy’.<sup>33</sup> This right protects control over access to information on the individual’s personal matters<sup>34</sup> such as health care. The right to privacy can serve to ensure that records containing information about one’s health care generally remain confidential and that third parties do not have unauthorised access to it.<sup>35</sup>

The right to privacy is closely related to the right to dignity and has in actual fact been interpreted by the courts as part of a person’s ‘dignitas’.<sup>36</sup> The High Court recently expressed the view that information contained in medical records is worth protecting as part of the individual’s autonomy and dignity.<sup>37</sup> Privacy and dignity however remain two separate legal objects.<sup>38</sup>

Privacy is infringed by intrusion<sup>39</sup> where a third party becomes acquainted with information about the individual without his/her consent, or by disclosure<sup>40</sup> where information about the individual is made public without his/her consent.<sup>41</sup> At common law, disclosure of private facts in violation of a confidential relationship, such as a doctor-patient relationship, constitutes an *iniuria*<sup>42</sup> for which a claim for satisfaction can be instituted with the *actio iniuriarum*.<sup>43</sup> Such infringement is not wrongful if it is justified by a ground of justification<sup>44</sup> such as necessity,<sup>45</sup> or consent.<sup>46</sup>

31 Neethling et al *ibid* 35.

32 *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) para 16.

33 De Waal et al (note 14 above) 302.

34 Malherbe (note 28 above) 427.

35 *Jansen van Vuuren NNO v Kruger* 1993 (4) SA 842 (A). Also see *Tshabalala-Msimang v Makhanya* 2008 (6) SA 102 (W).

36 De Waal et al (note 14 above) 296 and further at 300 where it is stated that a value served by privacy, is human dignity. Also see Malherbe (note 28 above) 427; and Neethling & Potgieter (note 18 above) 347.

37 *Tshabalala-Msimang* (note 35 above) para 27.

38 Neethling et al (note 30 above) 33 caution that privacy is often incorrectly identified with dignity and that the infringement of dignity (such as an insult) does not necessarily indicate that a person’s privacy has also been infringed.

39 Neethling & Potgieter (note 18 above) 348. Also see Neethling et al *ibid* 33.

40 Neethling & Potgieter *ibid* 348. Also see Neethling et al *ibid* 33 & 228.

41 Especially where disclosure is made contrary to the terms of a confidentiality relationship existing between the parties. See *Jansen van Vuuren* (note 35 above).

42 Neethling et al (note 30 above) 229. Also see De Waal et al (note 14 above) 295. Also see in general *Jansen van Vuuren* (note 35 above) where it was found that a medical practitioner infringed a patient’s right to confidentiality when the medical practitioner divulged the patient’s HIV-positive status to another medical practitioner.

43 Neethling et al (note 30 above) 253–4. The plaintiff will have to prove intent on the part of the party who violated the confidential relationship.

44 Neethling & Potgieter (note 18 above) 348.

45 Neethling et al (note 30 above) 241–2.

46 *Ibid* 250–1. They emphasise the importance of ensuring the validity of the consent in that the person giving consent must understand the risks and consequences of his/her decision to consent to the intrusion or disclosure.

The infringement of a constitutional right to privacy may in itself constitute a ‘constitutional wrong’ for which damages may be sought.<sup>47</sup> Caution should however be exercised to apply common law principles to interpret constitutional rights and the limitation of these rights as the common law approach entails a single enquiry into the infringement of privacy, whereas the constitutional enquiry comprises a two-step approach.<sup>48</sup> The constitutional right to privacy is broader than the common law right to privacy as the constitutional right to privacy also protects the autonomy of a person.<sup>49</sup>

The individual who seeks to enforce his/her right to privacy must have a subjective expectation of privacy which is considered to be objectively reasonable.<sup>50</sup> A patient has a reasonable expectation that the doctor will not make information about the patient (which is by its very nature about intimate aspects of the patient’s life) available to a third party without the patient’s consent.<sup>51</sup>

When discussing possible infringement of the child’s right to privacy in this article, infringement in general will be considered rather than distinguishing between infringement by way of intrusion or disclosure.

### **(b) The right to access to information in the health-care context**

Every person has the right to access to information held by the state<sup>52</sup> or by another person, which information is required for the exercising or protection of any rights.<sup>53</sup> In this regard, the right to information is closely linked to the right to privacy.<sup>54</sup> The right to access to information may be limited in the interest of ‘the reasonable protection of privacy’.<sup>55</sup> The PAIA contains provisions that allow the person to whom the information pertains to refuse

47 Neethling & Potgieter (note 18 above) 20–1 points out that a constitutional wrong does not necessarily constitute a delict.

48 *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 71. Also see Skelton (note 3 above) 274 where it is explained that the first step establishes if a constitutional right has been infringed and the second step establishes if such infringement was reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom.

49 Neethling et al (note 30 above) 220. Also see De Waal et al (note 14 above) 295.

50 Neethling et al (note 30 above) 221. If it is objectively reasonable is judged by the boni mores of society. See De Waal et al (note 14 above) 298–9. Also see *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).

51 See in general *Jansen van Vuuren* (note 35 above). See further rule 27A(b) of the ethical rules of conduct for practitioners registered under the Health Professions Act of 1974 published under Government Notice R717 in *Government Gazette* 29079 of 4 August 2006 and amended by GN R68 GG 31825 20090202 and GN R654 GG 33400 20100730. Section 14 of the National Health Act provides that information may be made available only with the written consent of the patient, by court order or any law that provides for it or if it is in the public interest. Also see Health Professions Council of South Africa ‘Confidentiality: Protecting and Providing Information’ (Booklet 10) (2008) *Guidelines for Good Practice in the Health Care Professions* para 4.1 which confirms that patients have a right to expect that information about them will be held in confidence by health-care practitioners.

52 Constitution s 32(1)(a).

53 *Ibid* s 32(1)(b).

54 De Waal et al (note 14 above) 699.

55 PAIA s 9(b).

access to the requested information in the interest of protecting the privacy of the person to whom the information pertains.<sup>56</sup>

Since a child, upon meeting certain requirements,<sup>57</sup> now has the right to take independent decisions regarding health care, the child may require access to his/her medical records to exercise this right and may want to control who else has access to these records. Such control will advance the protection of his/her right to privacy. Where a parent wishes to access the medical information of a child, the question has to be asked, what right would such a parent aim to protect?<sup>58</sup> The parent does not have a right to ‘monitor’ the child’s health-care decisions. This is emphasised by the fact that the focus has shifted away from parental authority toward child autonomy.<sup>59</sup> Could a parent argue that such access is essentially part of his/her duty of care towards his/her child? Even though this question is not explored in detail in this article, the answer will still have to be arrived at through a process of weighing up the child’s right to privacy against the parents’ interest in accessing the child’s medical records.

Bearing the constitutional backdrop in mind, I now consider legislative provisions relevant to access to the medical records of a child. The focus falls mainly on records pertaining to medical treatment of children rather than records pertaining to surgical operations on children.<sup>60</sup> The focus will further fall mainly on the position of the child who is able to consent to medical treatment in terms of the law, rather than a child who does not have this ability for whatever reason.

#### IV LEGISLATIVE PROVISIONS CONCERNING ACCESS TO MEDICAL RECORDS OF A CHILD

What follows is a discussion of the relevant provisions of the Children’s Act affecting confidentiality of medical treatment of a child and access to such records. The provisions of the National Health Act and the PAIA will then be considered in order to determine if the child’s right to privacy is optimally protected through the various legislative provisions.

56 Ibid ss 47(3)(e) & 73(3)(e) provide for the person to whom the information pertains to withhold consent for disclosure of the relevant information.

57 For example that a 12-year-old child must be of sufficient maturity to understand the benefits and risks of the relevant procedure before he/she can consent to it. Children’s Act s 129(2).

58 De Waal et al (note 14 above) 704–5 submit that the meaning of ‘right’ in this context refers to the rights in the Bill of Rights and not contractual rights.

59 Ngwenya (note 1 above) 141. Also see Skelton (note 3 above) 276 where it is emphasised that children are individual right holders and should not be seen as ‘extensions of their parents’. See, however, Himonga & Cooke (note 9 above) who caution that child autonomy should not be considered without having regard to the child’s family relationships.

60 Different consent requirements exist for these two procedures. Space does not allow the position pertaining to both to be explored in this article.

**(a) The Children's Act***(i) Confidentiality regarding medical treatment*

Common law provides for the protection of confidentiality of information about the treatment of a patient<sup>61</sup> but there is doubt about whether such a duty of confidentiality extends to a 'child patient' in the sense that the medical practitioner is not allowed to divulge information about the child's medical treatment to his/her parents without the child's consent.<sup>62</sup> The predecessor of the Children's Act, the Child Care Act 74 of 1983, did not contain any provision specifically dealing with access to the medical records of children as patients.

From the position where there was a scarcity of legislative provisions regulating access to the medical records of a child, we now find ourselves in a position where there are various provisions affecting this issue. The law pertaining to access to medical records of children did not develop as clearly as that pertaining to consent to medical treatment of the child<sup>63</sup> even though these two aspects are very closely related.

The Children's Act, which strives to strike a balance between the protection of children and upholding their constitutional rights,<sup>64</sup> explicitly entitles a child to have access to information about his/her own health status and information pertaining to the cause and treatment thereof.<sup>65</sup> This information may be contained in documentation and the section therefore provides for access to one's own medical records. The question arises as to whether or not these documents are confidential.

The Children's Act provides for and emphasises the child's right to confidentiality pertaining to his/her health status. Section 13(1) states that:

- (1) Every child has the right to—
- (d) confidentiality regarding his or her health status and the health status of a parent, caregiver or family member, except when maintaining such confidentiality is not in the best interests of the child.

This section provides for the protection of confidentiality in the broad sense. 'Health status' is defined in neither the Children's Act nor the National Health Act. It may conceivably include a child's diagnosis, his/her HIV status, whether or not a child is using contraceptives or chronic medication and if, in a case of a female child, the child is pregnant or not.

This provision leaves no doubt that a medical practitioner with knowledge of the child's health status has a statutory duty of confidentiality towards the

61 *Jansen van Vuuren* (note 35 above).

62 Slabbert (note 10 above) 168. The House of Lords in the 1983 judgment in the case of *Gillick v West Norfolk & Wisbech Area Health Authority* 1986 (1) AC (HL) 112 took the view that a medical practitioner indeed owes a minor a duty of confidentiality, provided that the patient is mature enough to form a relationship of confidence with the medical practitioner. The question as to whether the child was mature enough had to be decided on a case-by-case basis.

63 As provided for in s 129 of the Children's Act.

64 *Kassan & Mahery* (note 8 above) 185, 223.

65 Children's Act s 13(1)(a)–(c). This information must be in a format that is also understandable to a child with disabilities. Children's Act s 12(2).

relevant child.<sup>66</sup> This provision eradicates the uncertainty that existed on this issue in common law as referred to above. Flowing from this confidentiality relationship created by s 13 of the Children's Act, it follows that information about a child's health status may only be made available with the consent of the child patient. Melodie Slabbert<sup>67</sup> opines that a logical consequence of s 13(1)(d) read with the consent requirements in the Children's Act, which lowers the age of consent to medical treatment to 12 years,<sup>68</sup> is that a child will also be able to consent to the disclosure of his/her medical records to third parties from this age. Section 13(1)(d), however, does not link the right to confidentiality to the fact that the child must have been competent to consent to the medical treatment him/herself in order to be entitled to confidentiality pertaining to such treatment. In practice, however, it would make no sense to afford a two-year-old child a right to confidentiality when he/she could not consent to the medical treatment provided and where such a child would not be able to exercise control over such information or take decisions about further health care based on the information to which the duty of confidentiality pertains. It is only logical that this confidentiality rule cannot be applied without giving due consideration to the child's age, maturity and if he/she consented to the medical treatment.<sup>69</sup>

Where a child is under the age of 12 years, his/her parent will have to consent to his/her medical treatment (except in the case of an HIV test)<sup>70</sup> and for this reason, his/her health status will have to be divulged to his/her parents in order for them to take an informed decision about proceeding with the relevant medical treatment or not. The duty of confidentiality in this instance is owed to the party who gave substituted consent on behalf of the child.<sup>71</sup>

Breaching the duty of confidentiality in respect of medical information about a child<sup>72</sup> is not an offence in terms of the Children's Act.<sup>73</sup> Should the duty of confidentiality in respect of the child's health status be breached, the child has a civil claim against the individual who breached such duty, provided the disclosure was not done in good faith<sup>74</sup> and the person was not under a duty to disclose.<sup>75</sup> The general duty of confidentiality created in the Children's

66 Ibid s 13(1)(d) confirms that this duty is now also owed to a child as a patient. Also see in general Health Professions Council (note 51 above) from which it is clear that the provisions of the Children's Act was taken seriously when drafting the guidelines.

67 Slabbert (note 10 above) 172.

68 Children's Act s 129(2).

69 Ibid s 7(1)(g) states that, whenever the best interests of the child standard has to be applied, the child's age and maturity amongst other factors must be considered.

70 A child under the age of 12 years may consent independently to an HIV test provided the child is mature enough to realise the risks and consequences of such disclosure. See Children's Act s 133(2)(a)(ii).

71 National Health Act s 7 authorises a list of individuals to give substituted consent.

72 Children's Act specifically s 13(1)(d).

73 Ibid s 305.

74 Ibid s 110(3)(b) states that a person who reports abuse will not be liable in a civil action for making such report in good faith.

75 Ibid s 110 places an obligation on, inter alia, a medical practitioner to report suspected abuse or neglect. If disclosure is done under this section, the medical practitioner will escape civil liability. Kassan & Mahery (note 8 above) 223.

Act<sup>76</sup> is always subject to the best interests of the child.<sup>77</sup> If disclosure is made in the best interests of the child and in good faith, it is arguably a justifiable infringement upon the doctor-patient confidentiality principle.<sup>78</sup>

The specific confidentiality provisions in the Children's Act pertaining to HIV tests and contraceptives will be discussed below.

(ii) *HIV tests*

A child of 12 years may consent to an HIV test<sup>79</sup> and if such child is HIV positive, this fact may be disclosed only with the consent of the 12-year-old child.<sup>80</sup> A child under the age of 12 may consent to an HIV test provided he/she is mature enough to understand the implications of such test<sup>81</sup> and may consent to the disclosure of his/her HIV-positive status, provided that this child is able to understand the impact of disclosing such information.<sup>82</sup> The HIV status of a child, who is mature enough to understand the impact of disclosing his/her HIV status, may be made available without his/her consent only in certain exceptional circumstances.<sup>83</sup>

The right to consent to the disclosure of his/her HIV status implies the right to refuse to disclose.<sup>84</sup> Where a child mature enough to consent to disclosure of his/her HIV status, refuses such disclosure, such decision should be respected by virtue of the child's right to participate in decisions concerning his/her own health care.<sup>85</sup> Where a health professional does not deem such non-disclosure to be in the best interests of the child, or where consent to disclose is unreasonably withheld, the Children's Court may be approached for an order authorising the necessary disclosure.<sup>86</sup> Unauthorised disclosure of a child's HIV status is an offence in terms of the Children's Act.<sup>87</sup>

The issue of unwarranted disclosure of an individual's HIV-positive status has been considered by the Constitutional Court in a case where the identities and HIV status of the applicants were published without their consent.<sup>88</sup>

76 Children's Act s 13(1)(d).

77 Ibid s 13(1)(d). Also see Kassan & Mahery (note 8 above) 223.

78 Kassan & Mahery *ibid* 223. See, however, Slabbert (note 10 above) 179 who points out the danger in a patriarchal medical setting that the 'best interests of the child' can be interpreted to favour a parent and grant access to the parent at the expense of the child's privacy.

79 Children's Act s 130(2)(a)(i).

80 Ibid s 133(2)(a)(i).

81 Ibid s 130(2)(a)(ii).

82 Ibid s 133(2)(a)(ii).

83 Ibid s 133. These exceptions include disclosure within the scope of a person's powers and duties in terms of the Children's Act, or where disclosure is required for purposes of legal proceedings or done in terms of a court order. Also see Kassan & Mahery (note 8 above) 185, 217. Section 133(2)(e) provides for a Children's Court to order disclosure where consent is being unreasonably withheld provided that such disclosure will be in the best interests of the child.

84 Kassan & Mahery *ibid* 185, 220.

85 Children's Act s 10 states that a child of sufficient maturity should participate in decisions concerning such child and due consideration must be given to his/her views.

86 Ibid s 133(2)(e). This route is suggested having regard to the serious consequences of disclosure of a person's HIV status.

87 Ibid s 305(1)(b).

88 *NM v Smith* (note 11 above).

Madala J emphasises the importance of the protection of confidential medical information as follows:

The disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure ... The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV/AIDS.<sup>89</sup>

Since children are generally viewed as a vulnerable group in our society,<sup>90</sup> the need for protecting them from indiscriminate disclosure of their HIV status is even more prominent.

### (iii) Contraceptives

A child over the age of 12 years may not be refused contraceptives in the form of condoms,<sup>91</sup> and contraceptives other than condoms may be provided to a child of at least 12 years of age upon request.<sup>92</sup> The Children's Act provides that the child is entitled to confidentiality about the provision of the contraceptives if he/she has been provided therewith in terms of either of the aforementioned provisions.<sup>93</sup> The breach of the duty of confidentiality by making public any information regarding the provision to a child of contraceptives, is a punishable offence.<sup>94</sup>

An exception to the confidentiality duty of a medical practitioner with regard to the provision of contraceptives<sup>95</sup> in the Children's Act is the duty to report suspicions of neglect or abuse to the relevant authority, designated child protection organisation, the Department of Social Development or the police.<sup>96</sup> This reporting duty appears to infringe on the child's right to privacy, but can in this particular instance be justified by the best interests of the child consideration.<sup>97</sup>

89 Ibid para 42.

90 Skelton (note 3 above) 275 points out the general vulnerability of children.

91 Children's Act s 134(1)(b).

92 Ibid s 134(2). See Kassan & Mahery (note 8 above) 221.

93 Children's Act s 134(3). An extension of the child's right to bodily integrity and more in particular the child's right to make decisions regarding reproduction as provided for in s 12(2) of the Constitution.

94 Children's Act s 305(1)(c).

95 Ibid 134(3).

96 Ibid s 110 (inserted by the Children's Amendment Act 41 of 2007). Also see Kassan & Mahery (note 8 above) 222. See further s 54(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which compels a person to report sexual abuse of a child to the police.

97 This is not always the case. Some reporting duties in terms of ss 15 & 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act *ibid*, which compelled the reporting of sexual activity of children under the age of 16 years have recently been found to be unconstitutional as it infringes the child's right to privacy, dignity and bodily and psychological integrity. See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) paras 28–9. This recent judgment deserves further discussion but due to space, such discussion is not included in this article.

*(iv) Unequal protection of confidentiality within the Children's Act*

Breaching the duty of confidentiality in respect of medical information about the medical treatment of a child<sup>98</sup> other than the child's HIV status or the provision of contraceptives or contraceptive advice, is not an offence in terms of the Children's Act,<sup>99</sup> whereas the breach of the duty of confidentiality in respect of a child's HIV status<sup>100</sup> or the provision of contraceptives<sup>101</sup> is indeed a punishable offence.<sup>102</sup> The reason for this may perhaps be that the legislature wanted to introduce special measures to protect specific rights of children. In the case of the duty not to disclose the HIV status of a child, the legislature perhaps attempted to protect the child from discrimination on the basis of his/her HIV status.<sup>103</sup> In the case of the prohibition on making public information about providing contraceptives to a child, the legislature perhaps intended specifically to protect the child's right to bodily integrity and more in particular the child's right to make decisions regarding reproduction.<sup>104</sup>

Even if that is the case, the special protection of confidentiality with regard to a child's HIV status and the provision of contraceptives, in the absence of similar provisions pertaining to other types of medical treatment, is inconsistent since both an HIV test and the provision of contraceptives or contraceptive advice, constitute 'medical treatment'.<sup>105</sup> Information about the medical treatment of a child in a form other than an HIV test or the provision of contraceptives is only given general protection<sup>106</sup> and no sanction is imposed for the breach of this general duty of confidentiality. A child's privacy in regard to his/her HIV status or the receipt of contraceptives seems to be held in higher regard by the legislature than when other forms of medical treatment are involved.

98 Children's Act specifically s 13(1)(d).

99 A reference to ss 13 and/or 129 of the Children's Act is absent from the offences provision (s 305 of the Children's Act).

100 Children's Act as provided for in s 133.

101 A specific duty of confidentiality is owed to a child with regard to his/her use of contraceptives in terms of s 134(3) of the Children's Act.

102 Ibid s 305.

103 Section 9 of the Constitution prohibits discrimination on certain grounds contained in s 9(3). Although HIV is not one of these grounds, it is a ground related to one of the listed grounds, namely disability. The court found in *Hoffman v South African Airways* 2000 (11) BCLR 1235 (CC) that employing a policy that excludes HIV-positive persons from the employ of SAA amounted to unfair discrimination as it was based on prejudice and affected the dignity of the affected HIV-positive person.

104 As provided for in s 12(2)(a) of the Constitution.

105 The provision of contraceptives fell under the definition of 'medical treatment' under the Child Care Act 74 of 1983 that preceded the Children's Act 38 of 2005. See Kassan & Mahery (note 8 above) 221.

106 Children's Act s 13(1)(d). Also see Kassan & Mahery (note 8 above) 215.

### (b) The National Health Act

The National Health Act compels a health-care provider to inform a health-care user about his/her health status<sup>107</sup> in a language that the user understands and in a manner which takes into account the user's level of literacy.<sup>108</sup> This would be particularly relevant when informing a child of his/her health status.

The National Health Act provides for all information pertaining to a user's health status, treatment or stay in a health establishment to remain confidential.<sup>109</sup> Section 14 of the National Health Act provides that disclosure is permitted only upon the user's written consent or if so directed by an order of court or any law, and further if non-disclosure represents a serious threat to the public health.<sup>110</sup>

This National Health Act defines a 'user' of health services as:

'user' means the person receiving treatment in a health establishment, including receiving blood or blood products, or using a health service, and if the person receiving treatment or using a health service is—

- (a) below the age contemplated in section 39 (4) of the Child Care Act, 1983 (Act 74 of 1983),<sup>111</sup> 'user' includes the person's parent or guardian or another person authorised by law to act on the firstmentioned person's behalf;<sup>112</sup>

Section 14 of the National Health Act discussed above, read with the definition of 'user' in the National Health Act and the provisions pertaining to competence to consent to medical treatment as contained in the Children's Act,<sup>113</sup> implies that a child of 12 years<sup>114</sup> must give written consent for a third party to access his/her medical records as the 12-year-old child will be deemed to be a 'user'. This applies where there is not a court order, other statute or public interest that warrants disclosure of the information without consent.

Where the child is under the age of 12, the child does not qualify as a 'user' in terms of the National Health Act and his/her parents will have to consent to information about the child's health status to be disclosed.<sup>115</sup> The parents will in this instance by default have access to the child's medical records.

The National Health Act motivates participation in decision-making by health-care users.<sup>116</sup> The more intimate the information, the more important it is that an individual makes the primary decision whether to release

107 National Health Act s 6(1). Also see Health Professions Council (note 51 above) para 6.2.1 where this obligation is echoed.

108 National Health Act s 6(2).

109 Ibid s 14(1).

110 Ibid s 14. Also see rule 13(1) of the ethical rules of conduct (note 51 above) where these grounds for justifying disclosure are echoed.

111 14 years for purposes of consenting to medical treatment and 18 years for purpose of consenting to a surgical operation.

112 National Health Act s 1.

113 Children's Act s 129.

114 If the reference to Child Care Act is replaced with a reference to the Children's Act which has repealed the Child Care Act in its entirety.

115 The definition reads '... "user" includes the person's parent or guardian or another person authorised by law to act on the first mentioned person's behalf.' Substituted consent is envisaged.

116 National Health Act s 8.

information about his/her health status.<sup>117</sup> This decision should not be made by others.<sup>118</sup> Even where substituted consent for the procedure is given, the user must be consulted before giving the required consent.<sup>119</sup> It is suggested that this approach should also be followed when consent is sought to access the medical records of a user. Persons gaining unauthorised access to the medical records of a user<sup>120</sup> or who make unauthorised copies of these records<sup>121</sup> will be guilty of an offence.<sup>122</sup>

The National Health Act places heavy emphasis on confidentiality of medical information as is most evident from the provisions of s 14 which strictly prescribes the conditions under which information about a health-care user may be disclosed.

### (c) The PAIA

The PAIA came into force prior to the enactment of the Children's Act and aims to give effect to the constitutional right to access to information.<sup>123</sup> The PAIA, inter alia sets out the rights of individuals to *gain* access to medical records held by public<sup>124</sup> and private bodies<sup>125</sup> respectively.

The PAIA provides that access to records of a third party must be refused if the granting of such access will result in the unreasonable disclosure of personal information about the person to whom the records pertain.<sup>126</sup> Personal information includes information about a person's pregnancy, age, physical or mental health, well-being, disability,<sup>127</sup> a person's medical history<sup>128</sup> or blood type.<sup>129</sup> This confirms the underlying goal of the PAIA to protect the privacy of the person to whom the information pertains.<sup>130</sup>

Privacy protection mechanisms are introduced into the PAIA to establish if disclosure would amount to unreasonable disclosure in which case disclosure must be refused. One such mechanism is the provision for a third party to whom the request for access to information pertains, to submit reasons why the request should be refused,<sup>131</sup> or to give written consent to such disclosure.<sup>132</sup>

117 *Tshabalala-Msimang* (note 35 above) para 32.

118 O'Regan J in *NM v Smith* (note 11 above) para 132.

119 National Health Act s 8(1).

120 *Ibid* s 17(1)(h).

121 *Ibid* s 17(1)(f).

122 *Ibid* s 17(2).

123 Constitution s 32.

124 PAIA s 34.

125 *Ibid* s 63.

126 *Ibid* s 34(1) relates to public bodies and s 63(1) pertains to private bodies.

127 *Ibid* s 1(a).

128 *Ibid* s 1(b).

129 *Ibid* s 1(d).

130 *Ibid* s 9(a).

131 *Ibid* s 47(3)(e)(i).

132 *Ibid* s 47(3)(e)(ii). This is in line with the provisions of s 14 of the National Health Act which provides that information can be disclosed only with written consent of the user unless there is a court order or other legislative provision authorising disclosure or unless such disclosure is deemed to be in the public interest.

Despite the privacy protection measures above, the PAIA states that access to a record may not be refused insofar as it consists of information about an individual's physical or mental health, or well-being, who is under the care of the requester and who is—

- (i) under the age of 18 years; or
- (ii) incapable of understanding the nature of the request, and if giving access would be in the individual's best interests;<sup>133</sup>

The effect of this provision seems to be that parents are guaranteed access to the medical records of a child who is in their care.<sup>134</sup> The privacy protection measures do not apply in cases where an application is brought for access to records of a person under the age of 18 years.<sup>135</sup> A child will thus not be granted an opportunity to object or consent to the disclosure,<sup>136</sup> because of the wording of s 34<sup>137</sup> quoted above and because the procedure created in the PAIA in terms whereof the person to whom the information pertains is granted an opportunity to consent or refuse to the request for access, is not made applicable to applications for access in terms of s 34(2), which includes access to records of a person under the age of 18 years.<sup>138</sup>

It appears therefore that, once it has been established that the requestor is a parent or caregiver and the person to whom the records pertain is a child, access is granted provided such disclosure is in the child's best interests. It is not clear who should conduct the inquiry into the best interests of the child and who bears the onus of proving that disclosure to the child's parents is or is not in his/her best interests. The question arises if a true inquiry into the best interests of the child is done at all, especially considering the fact that the child is not granted the opportunity to give reasons why access should be refused.<sup>139</sup> It appears that it is assumed, in the absence of proof to the contrary, that it would be in the best interests of the child to disclose the medical information to his/her parents.<sup>140</sup> A true inquiry into the child's best interests is not conducted.

The child's right to privacy is clearly outweighed by his/her parents' right to access to information. This must be an unintended consequence of the Act

133 Ibid s 34 pertains to public bodies and s 63 pertains to private bodies.

134 Ibid s 63(2) pertains to private bodies and contains a similar provision.

135 The provisions of ss 47 & 71 which compel a private and public institution respectively to inform the person to whom the information pertains of the request to his/her personal information and to ask the relevant person to either grant consent or give reasons why the request should be refused, is only applicable in cases where an application was made in terms of ss 34(1) or 63(1) respectively. Applications in terms of ss 34(2) or 63(2), which include applications for access to records of persons under the age of 18, is not made subject to the procedures of obtaining consent as set out in ss 47 & 71.

136 PAIA as provided for in s 47.

137 Ibid s 34(2)(d) as quoted above.

138 Ibid s 47 only refers to requests brought in terms of s 34(1) and does not include requests brought in terms of s 34(2).

139 Refer to footnote 134 above.

140 Slabbert (note 10 above) 179 who points out the danger in a patriarchal medical setting that the 'best interests of the child' can easily be interpreted to favour the parent and grant access to the parent at the expense of the child's privacy.

since one of the primary aims of the PAIA is to protect the right to privacy.<sup>141</sup> This position does not support the child's right to confidentiality as provided for in the Children's Act<sup>142</sup> and the National Health Act.<sup>143</sup>

The Protection of Personal Information Act 4 of 2013 (POPI) has recently been signed into law and the date of commencement is awaited. The POPI aims to protect the constitutional right to privacy and prohibits the processing of 'special personal information' of a child<sup>144</sup> barring certain exceptions.<sup>145</sup> The interplay between the POPI and the PAIA as well as the impact of the POPI on the child's right to privacy in the health-care context, remains to be seen.

#### V THE NEED FOR LEGISLATIVE REVIEW OF A CHILD'S RIGHT TO PRIVACY IN THE MEDICAL CONTEXT

There are legislative inconsistencies in the level of protection afforded to the child's right to privacy. For instance, the right to confidentiality appears to be 'stronger' where a child undergoes an HIV test or where a child receives contraceptives as appears from specific provisions pertaining to confidentiality in the Children's Act.<sup>146</sup> Where the child consents to and receives medical treatment other than an HIV test or contraceptives, he/she can only rely on the general confidentiality provision in the Children's Act.<sup>147</sup> This inconsistency is undesirable and does not ensure optimal protection of the child's right to privacy.

The PAIA fails to protect the child's right to confidentiality as provided for in the Children's Act and the National Health Act. It appears that the provisions of the PAIA facilitates the situation where the parent's right to access to information outweighs the child's right to privacy. This is so despite the provision in the PAIA that states that the right to access to information may be limited in the interest of 'the reasonable protection of privacy'.<sup>148</sup> The PAIA does not enable the child to exercise control over access to his/her medical records.

The National Health Act<sup>149</sup> and the Children's Act specifically promote participation in decision-making in matters affecting the child user's health.<sup>150</sup> Where a child has the capacity to consent to his/her own medical treatment,

141 PAIA s 9(b).

142 Children's Act s 13(1)(d).

143 National Health Act s 14.

144 POPI s 4(5) read with ss 26 & 34. When the POPI was still in the form of a Bill, s 25(a) prohibited the processing of special personal information concerning a child who is subject to parental control in terms of the law. This provision was removed when the Bill became an Act. The POPI contains its own definition of 'child' in s 1 which may cause interpretation issues if it is considered within the context of the Children's Act and the consent provisions therein.

145 POPI ss 27–33 contain these exceptions.

146 Sections 133 & 134 contain specific provisions pertaining to the confidentiality owed to a child with regard to his/her HIV status and the fact that he/she received contraceptives.

147 Children's Act s 13(1)(d).

148 PAIA s 9(b).

149 National Health Act s 8.

150 Children's Act s 10.

his/her views have authoritative value and should be respected, unless this is not in the best interests of the child.<sup>151</sup> Even where there is a lack of capacity to consent, the child still has a right to participate in the decision-making process.<sup>152</sup> This approach should also be followed when the question of access to the medical records of a child is raised. In other words, where a child was deemed mature enough to consent to his/her own medical treatment, his/her views in respect of who should be allowed access to his/her medical records, should be respected as part of his/her right to participate in decision-making in the health-care context. The National Health Act and the Children's Act guarantee access to information regarding the child's own health status.<sup>153</sup> Privacy protection, which includes the ability to control your personal information<sup>154</sup> considered with the emphasis on participation in health decisions, leaves little doubt that a child mature enough to consent to his/her medical treatment<sup>155</sup> should also be allowed to consent to the disclosure or non-disclosure of the medical records containing the information about the medical treatment to which he/she consented.

## VI RECOMMENDATIONS

Having considered the relevant legislative provisions, the following is recommended to ensure the optimal protection of the child's right to privacy in the health-care context:

- a) An express confidentiality right should be introduced into the Children's Act<sup>156</sup> to provide for the confidentiality of information pertaining to medical treatment other than an HIV test or contraceptives so as to ensure equal protection of confidentiality of information pertaining to all forms of medical treatment of a child. An appropriate sanction for the breach

151 Kassan & Mahery (note 8 above) 215.

152 National Health Act s 8. Also see Kassan & Mahery *ibid* 215.

153 Children's Act s 13(1)(b) provides for access to information about the child's own health status and s 13(1)(c) provides for access to information pertaining to the causes and treatment of the child's health status. Also see s 6(1) of the National Health Act.

154 See *NM v Smith* (note 11 above) para 44.

155 Kassan & Mahery (note 8 above) 212 state that it may be difficult to establish the maturity of the child in a limited amount of time. Also see, in general, Himonga & Cooke (note 9 above) who point out the difficulties in establishing the maturity of a child for purposes of taking health-care decisions). It is however my view that, since the issue of maturity is addressed when seeking consent from the child for the medical treatment, this dilemma does not present itself as pertinently at the stage when consent is sought to access the medical records of the child. Once it has been established that the child is mature enough to consent to the medical treatment, a separate inquiry into the child's maturity at the stage of seeking consent to access his/her medical records is not necessary, unless the child's capacity to consent has been affected by the medical treatment or some other factor, in which case the provisions pertaining to substituted consent should apply.

156 In particular, s 129(2) dealing with consent to medical treatment of a child.

- of this specific confidentiality right should also be included, something which is currently absent from the Act.<sup>157</sup>
- b) The provisions of the PAIA that currently guarantee the provision of health information to a caregiver or parent of a child under the age of 18 years need to be amended to accord with the confidentiality provisions of, particularly, the Children's Act and the National Health Act to afford a child the opportunity to consent or object to the disclosure of information about him/her.
  - c) As a general rule, it should be accepted that a child who is capable of consenting to his/her own medical treatment (he/she passed the test for competence in accordance with the relevant legislative requirements) has a right to grant or refuse a third party access to his/her medical records.<sup>158</sup>

The above suggestions should contribute to consistency in the interpretation of the child's right to privacy in the health-care context and should place all types of health-care information relating to a child on an equal footing as far as privacy protection is concerned.

These suggestions aim to place a child in control of his/her private information, thereby promoting his/her autonomy as part of the constitutional right to privacy.<sup>159</sup> The principle that the best interests of the child is of paramount importance in every matter concerning the child, is cemented into our law<sup>160</sup> and is therefore not at risk of being compromised by strengthening the child's right to privacy as suggested above.<sup>161</sup> The general rule suggested in (c) above, will eradicate uncertainty that currently exists amid the various legislative provisions, as to when a child may consent and perhaps, more importantly, when a child may refuse access to his/her medical records.

These developments in the law might, understandably so, not be welcomed by parents and caregivers as it might be perceived as giving too much power to a child who, due to the very nature of childhood, may not always be able to take the best possible decision in a particular set of circumstances. Yet, children are given certain rights from a very young age by virtue of our liberal Children's Act and other pieces of legislation. Stressing the best interests consideration in all matters concerning the child as incorporated in the legislation discussed above, is the best possible safety net that the law has to offer to attempt to safeguard a child against his/her potential bad judgment when exercising his/her rights in the health-care context.

157 Such an inclusion will be in line with the principle that norms of greater specificity should be relied on before resorting to norms of greater abstraction. See *Ferreira v Levin NO 1996 (1) SA 984 (CC)*. This will avoid difficulties in interpreting the measure of confidentiality that a child is entitled to with regard to medical treatment other than an HIV test or contraceptives.

158 Slabbert (note 10 above) 168 & 180.

159 Neethling et al (note 30 above) 220.

160 Constitution s 28(2); and s 7 of the Children's Act.

161 The confidentiality provisions in the Children's Act have been made subject to the best interests of the child. The Children's Act also provides for the Children's Court to be approached where keeping medical information about a child confidential is not deemed to be in his/her best interests. The court may order disclosure of the relevant information only if it will be in the best interests of the child.