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TO: PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT
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SUBMISSION BY MEDIA MONITORING AFRICA:

CHILDREN'S AMENDMENT BILL

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INTRODUCTION

1. Media Monitoring Africa (MMA) welcomes the opportunity to provide this submission to the Portfolio Committee on Social Development (the Committee) on the Children's Amendment Bill [B18–2020] (the Bill). We note the important purpose of the Bill in, among other aspects, seeking to provide for children's right to privacy and the protection of their personal information. MMA welcomes this inclusion, noting that privacy is both an important right in itself and an enabler of other rights. Further, we are of the view that the inclusion of children's privacy rights and the protection of their personal information is a necessary inclusion, particularly in the digital era where much of our lives, and those of children, are moving increasingly online.
2. Our submission centres on the proposed inclusion of section 6A. While an important inclusion, we are concerned that the proposed section 6A does not provide adequate protection for children's privacy rights. As set out below, MMA makes three core submissions: (i) it is necessary to appreciate the nuances pertaining to children's privacy rights both on- and offline; (ii) the various facets of children's rights should be distinguished; and (iii) children's participatory rights are central to the advancement of their privacy rights. Accordingly, this submission is structured as follows:
 - 2.1. **First**, we provide a brief overview of MMA.
 - 2.2. **Second**, we emphasise the import of incorporating understandings of the applicability of children's rights in an online context.
 - 2.3. **Third**, we highlight the various facets of the right to privacy including the nuances between the protection of personal information and identity protection.
 - 2.4. **Fourth**, we address the need to include children's participatory rights when advancing their privacy rights.
 - 2.5. **Fifth**, we provide proposed textual amendments to section 6A.
3. These are dealt with in turn below.

OVERVIEW OF MEDIA MONITORING AFRICA

4. MMA is a not-for-profit organisation, based in South Africa, that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical, and critical media culture in South Africa and the rest of the continent. Through our work, we engage in a range of legislative, litigious, and advocacy processes relating to the triad of information rights, which include the rights to privacy, freedom of expression, and access to information. For MMA, children's information rights are paramount to the realisation of their best interest.

Accordingly, for nearly two decades, MMA has worked with children to advance their rights and freedoms.

5. MMA has pioneered efforts towards meaningful children's participation. We have empowered children through media literacy workshops, providing editorial guidelines and principles for the reporting of children in the media. Additionally, we have on behalf of and with children, made parliamentary submissions, submissions to various Ministries, and submissions to the United Nations Committee on the Rights of the Child.¹ In addition to these activities, MMA engages in strategic litigation on a range of media freedom and children's rights-related issues, most notably, MMA participated as an applicant in the recent matter of *Centre for Child Law and Others v Media 24 Limited and Others*.² Following the judgment, MMA developed a discussion document and guidelines on children, the media and the law, with a focus on the legal positions that inform how children are reported on in the media.
6. Further, MMA is actively involved in grappling with the applicability of children's rights online. MMA works directly with young digital citizens, Web Rangers, who are advancing their critical skills and knowledge around online safety in order to create innovative campaigns that promote safe internet usage and champion their rights in the digital world.³ Further, MMA has recently worked on a discussion document on children's rights online, which has informed a workshop with our Web Ranger participants, who in turn have contributed to the drafting of a Digital Rights Charter that seeks to give effect to an internet that is accessible, safe and empowering, and that advances the development of children in line with their rights and interests. Privacy, data protection, and identity protection emerged as central themes during the drafting of the Digital Rights Charter.
7. Our submissions to the Committee are therefore informed by the views of the children we work with, the knowledge we have garnered over the years, and our developing understandings of children's rights in the digital age.
8. For more information about MMA, please visit: mediamonitoringafrica.org.

THE IMPORTANCE OF CHILDREN'S PRIVACY RIGHTS IN THE DIGITAL ERA

9. South Africa's Constitution is often lauded as one of the most progressive in the world, including by such luminaries as the late Justice Ruth Bader Ginsburg. While we can and should be justifiably proud of our Constitution, it is really section 28, the section on children's rights, in the Bill of Rights that we can and should be most proud. Section 28(2) sets out that in all

¹ In addition to these activities MMA engages in strategic litigation on a range of media freedom and children's rights related issues. MMA also runs a unique post graduate University accredited course on reporting on children.

² *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46 (*CCL v Media 24*) (accessible at <http://www.saflii.org/za/cases/ZACC/2019/46.html>).

³ The Web Rangers programme is run together with major partners including Google, Facebook, the Department of Communications and Digital Technologies, the Media Development and Diversity Agency and MTN. For more information please see webrangers.co.za.

matters concerning the child the best interests of the child are paramount. In our submission we seek to highlight that while children's lives are becoming increasingly digital we must ensure we are able, as a nation, to continue to live up to the high standard of our Constitution and ensure when it comes to children's rights online our laws are reflective of the principle of the best interests of the child. It is therefore crucial that this principle remains at the fore and shapes and structures our approach to children's privacy rights.

Children's digital rights

10. The digital era has fundamentally changed the ways in which the rights of children are exercised and realised, and it is becoming increasingly recognised that “[c]hildren's rights shall be respected, protected and fulfilled in the digital environment”.⁴ MMA submits that legal protections afforded to children owing to their vulnerabilities, developing capacities, and the unique position they hold as young members of our society, must equally find application in an online context.⁵ As the world moves increasingly online, and as offline and online realities merge into a continuum, rights of children must be understood, respected, protected and promoted in line with current and emerging realities. Maintaining binary distinctions between the online and offline world will not always be in the best interest of children, as “[t]he effects of varied human rights infringements online echo, extend into, and mingle with offline contexts, and unsurprisingly have roots in offline realities and norms.”⁶
11. The acceptance of the application of human rights in an online context accords with contemporary international norms⁷ – including the revised Declaration of Principles on Freedom of Expression and Access to Information published by the African Commission on Human and Peoples' Rights earlier this year⁸ – and aligns with South Africa's clear digital transformation intentions. Over the past few years, and more so over the past few months, South Africa has, in many ways, emerged as a country ready to immerse itself in the digital environment and the digital economy, and is gearing up to ensure that it is well placed to harness the benefits of technology, and is seeking to ensure that there adequate legal frameworks, protections and safeguards in place.⁹ As South Africa continues to advance its

⁴ United Nations Committee on the Rights of the Child, 'Draft General Comment No. 15: Children's rights in relation to the digital environment' (Draft General Comment) (2020) (accessible at https://researchictafrica.net/wp/wp-content/uploads/2019/07/2019_Submission-SALC_APCRIA.pdf

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en).

⁵ See MMA, 'Children's Rights Online: Towards a Digital Rights Charter' (2020) (accessible at https://researchictafrica.net/wp/wp-content/uploads/2019/07/2019_Submission-SALC_APCRIA.pdf <https://mediamonitoringafrica.org/wp-content/uploads/2020/11/1.pdf>).

⁶ Research ICT Africa and the Association for Progressive Communication, 'Submission to the South African Law Reform Commission: Discussion Paper 149 on Sexual Offences: Pornography and Children' (2019) (accessible at https://researchictafrica.net/wp/wp-content/uploads/2019/07/2019_Submission-SALC_APCRIA.pdf).

⁷ United Nations Human Rights Council (UNHRC), 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' A/HRC/38/L.10/Rev.1 (2020) (accessible at

https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/L.10/Rev.1). See further Draft General Comment above n 4.

⁸ Revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (Revised Declaration) (2019) (accessible at <https://www.achpr.org/legalinstruments/detail?id=69>).

⁹ See for example Report of the Presidential Commission on the 4th Industrial Revolution (2020) (accessible at

readiness for the Fourth Industrial Revolution, it is imperative that children's rights, and the legal frameworks that seek to ensure their protection are equally reflective of current realities.

12. MMA welcomes steps towards the advancement of South Africa's digital transformation and welcomes the many opportunities that the online world can have for children. Accordingly, MMA submits that this law reform process should be mindful of the evolving world around us, and should, to the extent possible and necessary, ensure that the safeguards and protections that are available to children are equally applicable to online contexts. MMA therefore encourages the Committee to recognise that the same rights that children have offline must be respected, protected, and promoted online. As explained below, MMA submits the children's privacy rights in an online context are particularly pressing and deserving of specific protection.

Children's privacy rights in the digital era

13. As the Committee is no doubt aware, the right to privacy is even more pressing when dealing with children, and is "vital for children's agency, dignity and safety, and for the exercise of their rights."¹⁰ The right to privacy of children is firmly safeguarded in article 10 of the African Charter on the Rights and Welfare of the Child (ACRWC),¹¹ as well as article 16 of the Convention on the Rights of the Child (CRC).¹² Section 14 of our Constitution also safeguards the right to privacy. Privacy, and the rights and opportunities that it enables, is of particular significance in the context of the online world. UNICEF succinctly explains:

"Children's right to privacy is multifaceted, and the physical, communications, informational and decisional aspects of children's privacy are all relevant in the digital world. Children's physical privacy is affected by technologies that track, monitor and broadcast children's live images, behaviour or locations. Children's communications privacy is threatened where their posts, chats, messages, or calls are intercepted by governments or other actors, and children's informational privacy can be put at risk when children's personal data are collected, stored, or processed. Children's

<https://www.gov.za/documents/report-presidential-commission-4th-industrial-revolution-23-oct-2020-0000>), Competition Commission, 'Draft Paper on Competition in the Digital Economy' (2020) (accessible at http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf), National Planning Commission, 'Draft Paper on Digital Futures: South Africa's Digital Readiness for the Fourth Industrial Revolution' (2020) (accessible at <https://www.nationalplanningcommission.org.za/assets/Documents/DIGITAL%20FUTURES%20-%20SOUTH%20AFRICA'S%20READINESS%20FOR%20THE%20FOURTH%20INDUSTRIAL%20REVOLUTION.pdf>). From a law reform perspective some notable developments include the coming into effect of South Africa's data protection law, Protection of Personal Information Act 4 of 2013 (POPIA) on 1 July 2021 (accessible at <https://www.justice.gov.za/inforeg/docs/InfoRegSA-POPIA-act2013-004.pdf>); and the Cyber Crimes Bill which is presently with the National Assembly (accessible at <https://pmg.org.za/bill/684/>).

¹⁰ Draft General Comment above n 4 at para 69. See also *CCL v Media 24* above n 2 at para 49.

¹¹ African Charter on the Rights and Welfare of the Child (1990) (accessible at <https://au.int/en/treaties/african-charter-rights-and-welfare-child>).

¹² Convention on the Rights of the Child (1989) (accessible at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>).

decisional privacy may be affected by measures that restrict access to beneficial information, inhibiting children's ability to make independent decisions in line with their developing capacities."¹³

14. The Draft General Comment similarly reflects the above concerns noting that the collection of children's personal data, online criminal activity, surveillance activities including the automated processing of personal data all threaten the full enjoyment of children's right to privacy. Through ubiquitous computing and the increasing datafication of everything, the threats of online privacy violations are very real. The rise of commercial exploitation and misuse of personal data, profiling, identity theft, the loss of reputation and discrimination are risks that everyone, including children, are exposed to.¹⁴ It is estimated thousands of mobile applications used by children collect their data and share it with third parties, track their location, and use collected data for the creation of child profiles in order to tailor advertising directed at them without children's or their parents' knowledge.¹⁵ Further to these concerns, research suggests that mass surveillance by states and the use of techniques such as bulk interception mean that huge amounts of data – including personal data pertaining to children – are being collected and analysed. The exercise of bulk surveillance affects every person whose communications or other signals may be intercepted. However, taking into account the rights of children, it bears particular emphasis that “[i]f governments are able to link individual profiles with data intercepted by mass surveillance, as many believe feasible, this would allow authorities to build and maintain records of children's entire digital existence.”¹⁶
15. Many children are aware of their privacy rights, and care about their privacy rights online, and in many instances understand that not all personal information should be online.¹⁷ In a recent workshop with our Web Rangers, the children noted that they have a right to privacy online and felt that online platforms need to limit the requests they make for the personal information of children. The children further noted that the nature of the online world means that their digital footprint can last indefinitely. For them, the indefinite existence of information implicates their privacy rights. Notably, the children suggested that it would be in the best

¹³ UNICEF, 'Children's online privacy and freedom of expression' (2018) at 8 (accessible at [https://www.unicef.org/csr/files/UNICEF_Childrens_Online_Privacy_and_Freedom_of_Expression\(1\).pdf](https://www.unicef.org/csr/files/UNICEF_Childrens_Online_Privacy_and_Freedom_of_Expression(1).pdf)). See further Livingston, Stoilova & Nandagiri, 'Children's data and privacy online Growing up in a digital age An evidence review' *London School of Economics* (2018) (accessible at <https://www.lse.ac.uk/media-and-communications/assets/documents/research/projects/childrens-privacy-online/Evidence-review-final.pdf>).

¹⁴ Macenaite & Kosta, 'Consent for processing children's personal data in the EU: following US footsteps?' *Information & Communication Technology Law* (2017) at 146.

¹⁵ Milkaite & Lievens, 'Child-friendly transparency of data processing in the EU: from legal requirements to platform policies' *Journal of Children and Media* (2020). at 5-6.

¹⁶ UNICEF, 'Privacy, protection of personal information and reputation' *UNICEF Discussion paper series: Children's Rights and Business in a Digital World* (2017) at 15 (accessible at https://www.unicef.org/csr/css/UNICEF_CRB_Digital_World_Series_PRIVACY.pdf). See further; MMA, 'First Amicus Curiae's Written Submission in *amaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others CCT278/19* (accessible at <https://mediamonitoringafrika.org/wp-content/uploads/2020/02/PSIMM-202002-MMA-Written-Submissions-as-served.pdf>).

¹⁷ Stoilova, Livingstone and Nandagiri, 'Children's data and privacy online: Growing up in a digital age' *London School of Economics* (2019). This report was developed from inputs from various children following a series of workshops hosted with children about their privacy online.

interests of child victims and survivors, as well as children who have committed online harms, to have their identity and privacy protected.

16. MMA echoes the above concerns and accepts that while the digital world provides new and exciting opportunities for children to advance their rights, there are new and emerging threats which can impede children's privacy rights. We accept that the proposed inclusion of privacy and the protection of personal information may intimate the application of privacy in relation to digital technologies, the processing of personal information, and the online context more broadly. However, owing to emerging threats and given the acute need to appropriately safeguard children's privacy rights, MMA would encourage a more explicit and nuanced incorporation of children's privacy rights.
17. Additionally, we submit that the import of this right should not be solely deferred to other legislation, but should be fully provided for, as is consistent with the scheme of the Children's Act. We submit that the Bill needs to explicitly set out the content and ambit of the right to privacy for children, both on- and offline. The Bill should further make clear that this extends to appropriate protection against unlawful data processing, data exploitation and surveillance, as well as other unjustifiable limitations on the right to privacy.

THE VARIOUS FACETS OF CHILDREN'S PRIVACY RIGHTS

18. MMA is concerned that the proposed amendments conflate the various aspects of children's privacy rights. MMA notes that there are indeed overlaps, and the nuances may in some instances be subtle, but the differences can be fairly acute, warranting differing understandings and different responses. Our main concern in this regard is the apparent conflation of **data protection** and **personal information** with **identifying information**. Here we specifically note the proposed deletion of section 74 and the explanation in the Memorandum on the Objects of the Bill, that section 74 should be deleted as it is "superfluous because of the insertion of the new section 6A."
19. MMA submits that the protection of personal information operates in a different context to that of the prevention of the publication of identifying features. The former relates to the processing of personal information, such as the collection, receipt, storage, and dissemination of personal data.¹⁸ Whereas the latter relates to the protection of the identity of children who are party to children's court proceedings, this usually applies in the context of the media publishing the identifying features of children.¹⁹ Importantly, the distinct contexts within which these facets operate warrant distinct understandings, which are discussed below.

¹⁸ See the definition of "processing" and "personal information" in POPIA above n 9.

¹⁹ See *CCL v Media 24* above n 2 which dealt with a similar provision in the Criminal Procedure Act, in which the case centred on the whether the media could disclose the identity of children participants in criminal proceedings.

The protection of personal information

20. Data protection – the protection of personal information – is a constitutional imperative that seeks to give effect to fundamental rights, particularly the right to privacy.²⁰ POPIA is the legislation that seeks to give effect to the protection of personal information, giving rights to data subjects to have their personal information processed in a lawful manner.²¹ The General Data Protection Regulation (GDPR) of the European Union similarly recognises the need to protect the fundamental rights and freedoms of people, in particular their right to the protection of personal data.²² The California Consumer Privacy Act (CCPA) also provides people with rights in the context of how their personal information is collected.²³ It is within this context – the **processing of personal information** – that the protection of children’s personal information should be understood.
21. It is becoming increasingly recognised that that “[r]especting children’s rights to privacy and the protection of personal data in the context of the internet and digital technologies means, first and foremost, that companies have a legitimate basis for processing children’s personal data and do so in a fair and lawful manner.”²⁴ Internationally, regionally, and domestically there is an increasing recognition of the need to protect the personal information of children. For example, UNICEF,²⁵ the GDPR,²⁶ and data protection laws in the United States,²⁷ Brazil,²⁸

²⁰ Singh, ‘Why POPIA is about rights – not just compliance’ (2020) (accessible at <https://altadvisory.africa/2020/06/23/why-popia-is-about-rights-not-just-compliance/>).

²¹ POPIA defines “processing” as “any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;

(b) dissemination by means of transmission, distribution or making available in any other form; or

(c) merging, linking, as well as restriction, degradation, erasure or destruction of information.”

²²General Data Protection Regulation (2016) at article 1 (accessible at <https://gdpr-info.eu/art-1-gdpr/>).

²³ California Consumer Privacy Act (2018) (accessible at http://leginfo.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5).

²⁴ UNICEF above n 13 at 14.

²⁵ Id.

²⁶The GDPR provides particular protection for children noting that they “may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data” GDRP above n 22 at General Data at para 38.

²⁷ In the United States, the CCPA and the Children’s Online Privacy Protection Act (COPPA), and the Regulations of unfair and deceptive acts and practices in connection with the collection and use of personal information from and about children on the internet, all recognise the protection of children’s personal information and include certain safeguards such as verifiable parental consent, differing protections for children of different ages, as well as opt-in and opt-out options. See CCPA above n 23 and COPPA, 1998 (accessible at <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule>) and Regulations of unfair and deceptive acts and practices in connection with collection and use of personal information from and about children on the Internet (accessible at <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title15-section6502&num=0&saved=%7CZ3JhbnVsZWlkbGVkOjV1wcmVsaW0tdGl0bGUxNS1zZWNoaW9uNjUwMQ%3D%3D%7C%7C%7C0%7Cfalse%7Cprelim>).

²⁸The Brazilian Data Protection Law (LGPD) 13853/2019 at section III requires that processing of personal data belonging to children shall be done in their best interest, and requires that information on the processing of children’s personal data must be made available in a simple, clear and accessible manner that is appropriate for the children’s understanding (accessible at https://iapp.org/media/pdf/resource_center/Brazilian_General_Data_Protection_Law.pdf).

India,²⁹ and South Africa³⁰ all recognise the protection of children's personal information in the context of processing such information and provides safeguards to ensure that children's privacy rights are respected, protected and promoted.

22. From the above, it is clear that the protection of children's personal information is understood in the context of the processing of their personal data. This, as we will illustrate below, differs to protections needed from the public disclosure of identifying information about children.

Identify protection

23. While a child's identity is indeed an element of their personal information, identity protections in our current legal framework relate to the publication of certain identifying information which is most commonly applied in the context of media publications or information made publicly available. As the Committee is no doubt aware, in 2019 the Constitutional Court handed down judgment in *CCL v Media24* which centred on section 154(3) of the Criminal Procedure Act (CPA).³¹ Section 154(3) is relatively similar to section 74 of the Children's Act. The former relates to the prohibition of publication of certain information relating to criminal proceedings, the latter relates to the publication of information relating to children's court proceedings. Both seek to protect the identity of children from public disclosure.
24. The *CCL v Media24* case was brought about by the media's attempts to publicly disclose the identity of a child who had been abducted and was a potential but unconfirmed witness in the criminal proceedings relating to her abduction. The Constitutional Court found that it is contrary to the principle of the best interests of the child and the rights to dignity and privacy to have the identity of children who are victims, survivors, witness or are in conflict with the law, publicly disclosed. The Court declared section 154(3) unconstitutional for failing to provide sufficient identity protection to children involved in criminal proceedings. MMA notes that amendments to the CPA are presently underway. MMA notes further that other jurisdictions have similarly recognised the need to provide children with identity protection,

²⁹ The Indian Data Protection Bill, 2019, references the principle of the best interests of the child and provides that the processing of personal data of children in such manner that protects the rights of, and is in the best interests of, the child. Personal Data Protection Bill 373 of 2019 at section 16 (accessible at http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf).

³⁰ POPIA acknowledges that children are deserving of particular protection when it comes to the processing of their personal data. The personal information of a child may not be processed, unless it is carried out the prior consent of a competent person, it is necessary for the establishment, exercise or defence of a right or obligation in law, is necessary to comply with an obligation of international public law, is for historical, statistical or research purposes, or is personal information that has been made public by the child with the consent of a competent person. POPIA above n 8 at part C, sections 34-5.

³¹ Act 51 of 1977 (accessible at <https://www.justice.gov.za/legislation/acts/1977-051.pdf>). For further analysis of the case see MMA, Children, the Media and the Law (2020) (accessible at <https://mediamonitoringafrica.org/wp-content/uploads/2020/09/Discussion-Documents-Children-media-and-the-law-FINAL-min.pdf>).

particularly those who are involved in various legal proceedings.³²

25. MMA references *CCL v Media24* as well as the identity protections provided in other jurisdictions to illustrate the context within which identity protection is predominately understood and applied, namely the public disclosure of identifying features of children. Therefore, it is within this context – the **publication of identifying features** of children who are participants in various legal proceedings – that the identity protection of children should be understood.
26. MMA submits that on this contextual interpretation the proposed inclusion of “privacy” and “protection of personal information” in section 6A does not render section 74’s identity protection superfluous. MMA further submit that in line of the above it is clear that both facets of children’s privacy rights are critical and deserving of protection. Accordingly, MMA proposes that section 74 not be deleted, but rather incorporated in the expanded section on children’s privacy rights.
27. More specifically, MMA submits that the right to privacy should form part of Chapter 2 on General Principles and should be a stand-alone section, providing scope and meaning to children’s privacy rights. MMA submits that in order to cater for the various facets of the right to privacy, this section should be titled “children’s privacy rights”.³³ Further, MMA recommends that the Committee acknowledge the different facets of children’s privacy rights and in turn distinguish between the different ways in which children’s privacy rights should be protected. Children’s rights to privacy should be incorporated as a multifaceted right, with specific mention of the protection of children’s personal information as distinct from the identity protections afforded to children. To this end MMA proposes that each facet of children’s privacy rights be incorporated as separate subsections.

³² For example, the Indian Penal Code provides, 1860 in general terms, identity protection for victims of sexual offences, including child victims (accessible at <https://indiacode.nic.in/bitstream/123456789/2263/1/A1860-45.pdf>). The Indian Juvenile Justice (Care and Protection of Children) Act 2 of 2016 prohibits the “identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter (accessible at <http://cara.nic.in/PDF/II%20act%202015.pdf>). The Canadian Youth Criminal Justice Act, 2002 provides certain identity protections for children. Youth Criminal Justice Act, 2002 (accessible at <https://www.canlii.org/en/ca/laws/stat/sc-2002-c-1/latest/sc-2002-c-1.html>). See further the Brazilian Estatuto da Criança e do Adolescente (Child and Adolescents’ Statute) 8069 of 1990 (accessible at http://www.planalto.gov.br/ccivil_03/leis/l8069.htm). In the United Kingdom, the Youth Justice and Criminal Evidence Act, 1999 restricts the publication of identifying features of children who are alleged to have committed an offence. Youth Justice and Criminal (accessible at <http://www.legislation.gov.uk/ukpga/1999/23/part/II/chapter/IV/crossheading/reports-relating-to-persons-under-18>).

³³ We note that this would not be a significant departure from the scheme of the Act, and aligns with the current structure of which provides fairly expanded section on specific rights such as social, cultural and religious rights, access to information rights in relation to health care, and access to courts. See Children’s Act 38 of 2005 at sections 12, 13 and 14 (accessible at <https://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>).

CHILDREN'S PARTICIPATION IN ADVANCING THEIR PRIVACY RIGHTS

The right to participate

28. Child participation is one of the core principles of the CRC,³⁴ and was widely regarded as a “radical and profound challenge to traditional attitudes”³⁵ The Children’s Act accords the right to participate in all matters to every child of sufficient maturity, and is a right that is identified as one of the general principles of the Act.³⁶ Beyond being one of the general principles, the right to participation is also explicitly mentioned in certain provisions.³⁷ Children’s participatory rights have the potential to enable an array of other rights and opportunities, and can be particularly beneficial when it comes to the protection of children’s rights:

“Participation assists with children’s protection by identifying their need for protection and by improving ways of protecting them. It can promote more informed decisions about individual children and/or services, programmes and policies. Children are described as: articulate agents of change; and collaborative change agents in their communities. In sum, child participation is understood as a protection system in order to end the challenges in communities.”³⁸

29. MMA endorses the participatory underpinnings of children’s rights both domestically and internationally. Accordingly, MMA submits that children’s participatory rights are equally applicable when it comes to the protection of their privacy rights.

Participation and children’s privacy rights

30. Significant amounts of personal data of children are collected and processed in today’s increasingly digitally connected society by both public and private actors.³⁹ As explained above, this implicates children’s privacy rights. Given the meaningful underpinnings of children’s participatory rights, and the intrinsic link with privacy, dignity and autonomy, MMA submits that children’s right to participate form part of their right to privacy. We note:

³⁴ Article 12 of the CRC above n 12 provides for the child’s right to express their views freely in “all matters affecting the child”, with those views to be given due weight.

³⁵ See Kellet, ‘Children and young people’s participation’ in Montgomery, Heather and Kellett, Mary (eds) *Children and young people’s worlds: Developing frameworks for integrated practice* (2009) at 56 (accessible at https://www.open.edu/openlearn/ocw/pluginfile.php/617769/mod_resource/content/1/e807_reading_chpt3_childrena ndyoungpeoplesparticipation.pdf). See further, Ombudsman for Children’s Office, ‘Participation in Decisions-making’ (accessible at https://www.oco.ie/app/uploads/2018/12/OCO_Participation-Guidelines_English_WEB.pdf). For various participation models, see Nonformality, ‘Participation Model: Citizens, Youth, Online’ (2011) (accessible at <https://www.nonformality.org/wp-content/uploads/2011/07/Participation-Models-20110703.pdf>).

³⁶ Children’s Act above n 33 at section 10. See further, Jamieson, ‘Children and young people’s right to participate in residential care in South Africa’ *International Journal of Human Rights* (2016).

³⁷ Children’s Act id. See for example, sections 49, 61 and 69.

³⁸ Collins, ‘A child’s right to participate: Implications for international child protection’ *International Journal of Human Rights* (2016) at 20.

³⁹ Milkaite & Lievens, ‘Child-friendly transparency of data processing in the EU: from legal requirements to platform policies’ *Journal of Children and Media* (2020).

“The inclusion of the voices and experiences of young people in the decisions made about safety and security online and promotion of their safety, privacy, and access to information is not a novel concept, but is one that is not always recognised, particularly when conservative ideas, and magnified concerns regarding harms outweigh the respect children deserve when it comes to listening to children, and allowing them an opportunity to express their views and opinions.”⁴⁰

31. The Draft General Comment makes a notable recommendation in relation to children’s privacy and the processing of their personal information that we seek to bring to the attention of the Committee. States should ensure that children, their parents or caregivers have access to the data stored, to rectify data that is inaccurate or outdated and to delete or rectify data unlawfully or unnecessarily stored by public authorities or private individuals or bodies. States should further ensure the right of children to withdraw their consent and object to personal data processing, at least in cases where the data controller does not demonstrate legitimate, overriding grounds for the processing.⁴¹
32. We further reference the GDPR which includes a requirement that privacy notes and information and communication that is addressed to a child must be clear and in plain language so that a child will be able to understand what will happen to their personal data and what rights they have.⁴² Additionally, we seek to reference the Brazilian Data Protection Law (LGPD) which provides:

“Information on the processing of data referred to in this article [article 14: processing of children and adolescents’ personal data] shall be provided in a simple, clear and accessible manner, taking into account the physical-motor, perceptive, sensorial, intellectual and mental characteristics of the user, using audiovisual resources when appropriate, in order to provide the necessary information to the parents or the legal representative and that is appropriate for the children’s understanding.”⁴³

33. Accordingly, and aligned to the concept of children’s participation, and the notions above of access to information about the processing of personal information, MMA submits that there should be scope for children to participate in decisions that implicate their privacy and their personal information.
34. To illustrate this submission, MMA references some of its current work in relation to understanding the terms and conditions of various social media platforms. It is becoming

⁴⁰ See MMA, Children’s Digital Rights above n 5 at 27 referencing the Feminist Principles of the Internet (FPI), ‘Children’ (2016) (accessible at <https://feministinternet.org/en/about>).

⁴¹ Draft General Comment above n 4 at para 72-73.

⁴² Id at para 58.

⁴³ LDGP above n 28 at article 14(6).

increasingly apparent that the terms and conditions of social media platforms are in many instances unruly, complex, vague or rely on misleading language. This leads to many online users, particularly children, forfeiting their rights, and handing over unfettered power to social media companies.⁴⁴ Privacy policies which often include reference to how personal information is collected, stored and used, are often equally as vague as misleading and can have detrimental implications for the protection of personal information if not properly understood.

35. Terms and conditions, and policies that fail to sufficiently inform children of the impact of their participation and their decisions, impede children's participatory rights, and in turn, may have considerable consequences for their privacy rights and for the protection of their personal information.
36. For children to participate online meaningfully and effectively, they need to fully understand the terms and conditions and policies that affect their personal information and their privacy. This means that processes that require children to make decisions that will affect them must be "authentic, inclusive and meaningful and should take into account the evolving capacities of children", such processes must enable them to learn constructive ways to influence the world around them, as well as understand the outcomes and consequences of the decisions they make.⁴⁵
37. Therefore, MMA submits children should be appropriately informed of how their personal information is collected, stored, and processed. Terms and conditions, and associated policies of social media platforms and other online spaces that are used by children, which may implicate their privacy, their personal information, and any other rights, must be provided with child-friendly versions of all policies. Such policies must take into account the evolving capacities of children and must be drafted in a manner that enables children to make informed decisions online.

Digital literacy

38. MMA submits that children's right to participate online is likely only to meaningful to the extent that children are digitally literate. In this regard, we encourage the Committee to consider the importance of enhancing the ability of a child to have appropriate critical media and information literacy skills and digital and technical skills. Some of the key competencies associated with digital literacy include the ability to navigate and explore new spaces, cognisant of risks and harms. It includes the ability to use protection features, to use the internet in a safe way, and to understand the concept of a digital footprint.⁴⁶ We emphasise the following:

⁴⁴ See, Tease&Seize (accessible at <http://teaseandseizeapply.co.za/>). We use the terms and conditions as an umbrella terms to include privacy policies, terms of service, cookie policies and community standards / guidelines.

⁴⁵ UNICEF, the Global Compact and Save the Children, 'Children's Rights and Business Principles' (2005) (accessible at https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FCRBP%2FChildrens_Rights_and_Business_Principles.pdf).

⁴⁶ UNICEF, 'Children in a Digital World' (2017) at 76 (accessible at https://www.unicef.org/publications/files/SOWC_2017_ENG_WEB.pdf). See also Web rangers <https://webrangers.co.za/>.

“Media and information literacy skills facilitate meaningful and active participation with online services. Children need to know how to use and engage with online content, which includes knowing how to be safe, sensible, and respectful of others while online. Just as children learn about what is appropriate and safe offline, they equally need to learn how to navigate these issues online. This includes making informed choices regarding the personal content they communicate, understanding the importance of privacy and avoiding risk, all while exercising their right to freedom of expression online. Being digitally literate allows a child to develop an appreciation of the many opportunities of the online world.”⁴⁷

39. MMA urges the Committee to have regard to the import of digital literacy and incorporate it, as appropriate, into the Bill to give effect to the scope of children’s privacy and participatory rights.

TEXTUAL RECOMMENDATIONS TO SECTION 6A

40. As explained above, MMA suggests that section 6A be fleshed out to ensure that it is in line with both the purpose of the Children’s Act to “give effect to certain rights of children as contained in the Constitution”, and the purpose of the proposed amendments to “provide for children’s right to privacy and protection of information”. In line with the submissions above we propose the following text to be incorporated into section 6A:

6A. Children’s Privacy Rights

- (1) Every child has the right to have their privacy respected, protected, and promoted, both on- and offline.**
- (2) A child’s right to privacy includes but is not limited to:**
 - (a) The protection of their personal information. Where applicable the provisions of the Protection of Personal Information Act 4 of 2013 will apply. Safeguards for ensuring the protection of children’s personal data must include the following:**
 - (i) Any processing of the personal information of a child must be done in such a manner that protects the rights of, and is in the best interests of, the child.**
 - (ii) Where the personal information of a child is collected, the child must be informed about how the data is collected and used. Information on the processing of personal information shall be**

⁴⁷ MMA, Children’s Digital Rights above n 5 at 19.

provided in a simple, clear and accessible manner, taking into account the evolving capacities of children, to ensure that a child will be able to understand what will happen to their personal data.

- (iii) Any person or entity processing the personal information of children must adopt privacy policies for such purposes. Such policies must be user-friendly and accessible for parents and caregivers with diverse digital literacy and literacy skills. All privacy policies must be accompanied by child-friendly versions, taking into account the evolving capacities of children, and must be drafted in a manner that enables a child to make informed decisions about their personal data.**
- (iv) Children must be protected against all forms of unlawful data processing and data exploitation.**
- (v) Surveillance regimes that may impact children must be subject to the privacy rights and the principle of the best interests of the child and must include child-sensitive safeguards.**

(b) The protection from the publication of identifying information:

- (i) No person shall publish in any manner, including via social media or other online platforms, any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings. Provided that the presiding judge or judicial officer may authorise the publication of such information as they may deem fit if the publication would, in their opinion, be just and equitable and in the public interest taking into account the principle of the best interests of the child.**
- (ii) Where applicable the provisions of the Criminal Procedure Act 51 of 1977 will apply.**

- (c) Appropriate and accessible digital, media, and information literacy trainings must be made freely available to all children to ensure their privacy and participatory rights are adequately safeguarded.**

CONCLUDING REMARKS

41. MMA appreciates the opportunity to provide this submission to the Committee and would

welcome the opportunity to make further submissions, including at any oral hearings that may take place. Notwithstanding the important strides that have been made in, there is still work to be done to ensure that the privacy rights of children are properly and appropriately safeguarded. Please do not hesitate to contact us should you require any further information.

**Media Monitoring Africa
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