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The Protection of Personal Information Act 4 of 2013: Child social media influencers and their right to privacy

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Abstract:

'Social media influencing' has developed in recent years. It is the practice of sharing ideas, practices and products on online platforms to influence other users to purchase products or engage in certain practices. This is done in exchange for remuneration from companies or the social media platforms themselves once influencers have a large enough following. A core part of social media influencing is the transparency of the influencer with their audience. To achieve this transparency, many social media influencers share rather personal information to connect with their audience. Children have also started participating in social media influencing. Both regional and South African legal frameworks recognise the child's best interests, and their vulnerability. Since children have begun to occupy an important position as social media influencers, this article provides a South African perspective on the extent to which the Protection of Personal Information Act 4 of 2013 (POPIA) protects the privacy of the child involved. The article specifically considers how the child's privacy right is impacted when participating in social media influencing, and the way in which POPIA interacts

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with such impact. The argument proposed is that the current formulation of POPIA neither specifically provides for nor fully regulates the practice of social media influencing due to the incredibly nuanced nature of the practice. The article further argues that even though POPIA addresses the issues of children's digital privacy generally, it does not extend its scope to the specific circumstances where children are social media influencers. The article ultimately seeks to question whether POPIA recognises and protects the child influencer's privacy rights.

Key words: children's rights; right to privacy; social media influencers; Protection of Personal Information Act 4 of 2013

1 Introduction

There have been significant shifts in South African law to address the changes brought about by technology, and to fulfil the state's legal obligation towards children in this new space. An example of this is the promulgation and coming into effect of the Protection of Personal Information Act 4 of 2013 (POPIA).

POPIA was founded upon the recognition of the section 14 right to privacy as included in the Constitution of the Republic of South Africa, 1996 (Constitution).¹ POPIA recognises that this right includes the right to the protection of information.² The legislative text of POPIA provides that its purpose is to implement the right to privacy through the protection of personal information while also balancing other, competing rights and interests.³ Thus, this article will seek to consider the role POPIA plays in protecting privacy, when the child partakes in the practice of what has become known as 'social media influencing'.

For the purpose of the article, 'social media influencing' should be understood as a form of 'digital marketing' whereby individuals (that is, the social media influencer) advertise products and lifestyle choices on social media platforms using their personal social media accounts. These individuals have built a trusted network of followers who rely on their opinions and support their viewpoints.⁴ Influencers will post photographs or videos of themselves encouraging their follower network to buy the product, use the service offered by the company or even make certain decisions.⁵ For example, social media influencers were used by political parties and corporations to influence political discourse and

1 Preamble to the Protection of Personal Information Act 4 of 2013 (POPIA).

2 As above.

3 Sec 2 POPIA.

4 K Weerasinghe & C Wijethunga unpublished paper presented at Australasian Conference on Information Systems (2022) 2 4; M de Veirman, L Hudders & MR Nelson 'What is influencer marketing and how does it target children? A review and direction for future research' (2019) 10 *Frontiers of Psychology* 2.

5 Nashville Film Institute 'Social media influencer – Everything you need to know' (nd), <https://www.nfi.edu/social-media-influencer/> (accessed 5 December 2023).

voter behaviour.⁶ Influencers may be paid by the companies whose products they advertise or by the social media platforms as influencers increase traffic by consumers to these platforms.⁷ Incentivisation schemes, such as the TikTok Creator's Fund and YouTube's Partner Programme, are examples of how the social media platforms create income generation opportunities for influencers.⁸

Recently, there has been a global increase in parents including or using their children to generate the content for these purposes.⁹ Parents perform an integral role in the creation of this content as children that are of a younger age may not have the ability to create, share or post this content. The type of content posted by these parents of their children may include prank videos,¹⁰ toy reviews¹¹ or vlogs.¹² Vlogging, for example, is a particularly successful area of participation for children as influencers.¹³ The content may also concern issues faced by the child in their personal life.¹⁴ This article will focus on children's participation in influencing, either alongside or under the instruction or guidance of their parent,¹⁵ and how effective POPIA is in protecting such child's privacy. In considering this, the article first provides an overview of the issue to sketch the relevant context. The article will then engage with the effects of social media influencing in relation to the child influencer's right to privacy under South African law. Finally, the article will establish whether, given these effects, POPIA provides sufficient oversight and protection of the child as a social media influencer.

2 Children as social media influencers

Social media influencing and children's involvement therein are not confined to a single social media platform. YouTube, Instagram and, more recently, TikTok are all examples of platforms on which social media influencers, particularly child

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- 6 M Riedl, J Lukito & S Woolley 'Political influencers on social media: An introduction' (2023) *Social Media and Society* 2.
 - 7 M Nouri 'The power of influence: Traditional celebrity v social media influencer' (2018) 32 *Advanced Writing: Pop Culture Intersections* 125.
 - 8 *TikTok*, <https://www.tiktok.com/creators/creator-portal/en-us/getting-paid-to-create/creator-fund/>, <https://support.google.com/youtube/answer/72851?hl=en> (accessed 25 February 2023).
 - 9 S Steinberg 'Sharenting: Children's privacy in the age of social media' (2017) 66 *Emory Law Journal* 872.
 - 10 <https://www.youtube.com/watch?v=-Zw3mGZGpFA> (accessed 14 September 2023).
 - 11 Nashville Film Institute (n 5).
 - 12 S Mariasih & G Tambunan 'Linking privatised large family domestic space with a public audience: An analysis of housewives who are YouTube vloggers' (2020) 28 *Pertanika Social Sciences and Humanities* 588.
 - 13 'Vlogging' refers to the practice of posting short videos on social media platforms. See M Jansen 'Growing up on YouTube – How family vloggers are establishing their children's digital footprints for them' (2017) *Masters of Media* 8.
 - 14 F Latifi 'Chronic illness influencers on TikTok are showing the reality of being sick' *Teen Vogue* 22 September 2022, <https://www.teenvogue.com/story/chronic-illness-influencers-on-tiktok-are-showing-the-reality-of-being-sick> (accessed 5 December 2023).
 - 15 Jansen (n 14) 8.

influencers, have had a presence.¹⁶ YouTube was one of the earliest platforms used for large-scale social media influencing among families.¹⁷

Instagram has also been used for the purposes of social media influencing, particularly by companies paying influencers to endorse their brands.¹⁸ An example of this is Kairo Forbes, the daughter of well-known South African performers. Kairo is only seven years old but has a prominent social media presence that has resulted in her being offered marketing deals with large companies such as Cotton on Kids¹⁹ and Roblox.²⁰

TikTok, as a more recent platform, has become impressively popular over the last few years and allows for the posting of shorter-form videos.²¹ All TikTok users have access to what is known as the 'For your page', which is programmed by a structured algorithm which allows the application to curate content for the users of the platform.²² This enables the content of influencers to reach many people who would be interested in their content quickly. TikTok, and the other social media platforms, have been used by both those already famous and 'ordinary people' to achieve fame.²³ An example of the latter is the use by parents to post their children for the purposes of social media influencing as a means to generate financial reward. This has been done through the advertising for companies or through the TikTok Creator's Fund that was set up for the purposes of TikTok paying influencers for the content posted by them once a certain level of engagement has been reached.²⁴ Although the social media platforms mentioned are different in nature, they all provide opportunities for influencers to generate financial reward through the use thereof.

This phenomenon of social media influencing has infiltrated many countries, including countries in the African region. This article focuses on South Africa, which recently has witnessed a growing trend of social media influencing involving children. For instance, Kairo Forbes, daughter of a popular former South African rapper, has over one million followers on Instagram.²⁵ Another example is Sbahle Mzizi, a young child, who has one million Instagram followers. She has also been

16 As above.

17 Jansen (n 14) 4.

18 S Kay and others 'When less is more: The impact of macro and micro social media influencers' disclosure' (2020) 36 *Journal of Marketing Management* 278.

19 K Forbes 'KairoForbes and CottonOnKids' *Instagram*, https://www.instagram.com/p/ClptalmoIgx/?utm_source=ig_web_copy_link (accessed 6 December 2023).

20 As above.

21 Y Wang 'Humour and camera view on mobile short-form video apps influence user experience and technology-adoption intent, an example of TikTok (*DuoYin*)' (2020) 110 *Computers in Human Behaviour* 1.

22 As above.

23 A Jerslev & M Mortensen 'Celebrity in the social media age: Renegotiating the public and the private' in A Elliot (ed) *Routledge handbook of celebrity studies* (2018) 169.

24 To date TikTok has not publicly provided the criteria to be part of the Creator's Fund.

25 Forbes (n 19).

offered marketing deals by large companies such as Game.²⁶ These are but two examples of a growing trend on the African continent of social media influencing. Taylor Morrison, a young girl with over 200 000 followers on Instagram, shot to fame after videos of her posted by her mother went ‘viral’.²⁷ She has since been sponsored by well-known brands, including The Crazy Store, Fashion Nova and LOL Surprise South Africa. These are but three examples of a growing trend on the African continent of children being used in social media influencing. This phenomenon has grown so much in the African region that television network Nickelodeon has created a category for Best African Kidfluencer for its annual Kids Choice Awards.²⁸ This is indicative of the relevance of the issue in South Africa and why it is worth considering. Although reference will also be made to influencers in foreign jurisdictions, this article aims to provide a South African perspective on this issue that is of global relevance. In order to do this, the article first sets out what the child’s ‘right to privacy’ entails and how it is implicated when children are social media influencers. Thereafter, POPIA will be considered on selected grounds to establish the extent to which it addresses the implications of child social media influencing on the child’s right to privacy. This will be done in order to conclude whether the protection provided by POPIA may be regarded as adequate in protecting the child influencer’s right to privacy.

3 3 Link between social media influencing and the child’s right to privacy

3.1 Right to privacy

The inclusion of the right to privacy in the South African Constitution was an important step in cementing the importance of and emphasis on privacy rights in South Africa. Its inclusion in section 14 of the Constitution sets out both general and specific grounds that are protected under the ambit of the right. Importantly, these grounds are not a closed list, and courts are free to interpret to take a more encompassing approach when interpreting this right.²⁹ The significance of the right to privacy emanates from its blatant disregard and, sometimes, the infringement of the right, under the apartheid regime.³⁰ Given the above, South

26 S Mzizi ‘SbahlMzizi’ *Instagram* 6 December 2021, <https://www.instagram.com/p/CXJLAXroMKu?hl=en> (accessed 25 February 2023).

27 B Forbes-Hardinge, <https://getitmagazine.co.za/highway-berea/blog/2022/04/28/keeping-up-with-taylor/> (accessed 14 September 2023).

28 M Zuma ‘Meet the Nickelodeon African Kidfluencer nominees’ *Sunday World* 24 March 2022, <https://sundayworld.co.za/celebrity-news/entertainment/meet-the-nickelodeon-african-kidfluencer-nominees/> (accessed 28 March 2023).

29 I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 302.

30 J Neethling, J Potgieter & A Roos *Neethling on personality rights* (2019) 46.

Africa's constitutional dispensation ushered in a shift towards viewing the privacy right as a fundamental human right.³¹

The Children's Act 38 of 2005 (Children's Act), the piece of South African legislation giving content to the rights of the child, provides in section 6(2)(a) that all matters or proceedings that concern a child should give effect to their rights as enshrined in the Bill of Rights of the Constitution. The right to privacy, as contained in section 14 of the Constitution, is one such right.

The United Nations Convention on the Rights of the Child (CRC) grants the child a right to privacy as contained in article 16 thereof. During the drafting of the CRC, it was found that recognising the child's privacy means recognising their personhood and status as right bearers.³² Hence, article 16 also applies to governments as well as individuals such as children's parents. Governments are tasked with protecting the privacy of the child and may not unduly infringe thereon.³³ CRC was domesticated into South African law in section 28 of the Constitution, which provides a detailed provision of children's rights, drawing inspiration from CRC.³⁴ Section 231 of the Constitution regulates international agreements and their status in South African law. The provision requires that an international agreement becomes law in the Republic once it is domesticated into South African law.³⁵

Other international instruments³⁶ also recognise the right to privacy. However, the Universal Declaration of Human Rights (Universal Declaration) does not automatically create legal obligations on states, unless it is given the force of *ius cogens*.³⁷ This shows a very prominent position of the right within the international law framework. This adds another level of importance to the right in the South African context. Section 233 of the Constitution also provides for the application of international law, and requires that the interpretation of domestic law provisions should be aligned with international law.

Beyond international law, there also is a regional law obligation on South Africa to protect the right to privacy. On a child law level, the African Charter on the Rights and Welfare of the Child (African Children's Charter in article 10 recognises that the child has a right to privacy that should not be interfered with, excluding circumstances where caregivers need to exercise reasonable supervision over the child. As is the case with CRC, the courts have held that the African Children's Charter inspired the drafting of section 28 as many

31 Neethling and others (n 30) 6-48.

32 S Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 270.

33 As above.

34 J Tobin 'Increasingly seen and heard: The constitutional recognition of children's rights' (2005) 21 *South African Journal on Human Rights* 86-126.

35 T W Bennett & J Strug *Introduction to international law* (2013) 27.

36 International Covenant on Civil and Political Rights art 17.

37 Bennett & Strug (n 35) 27.

principles contained in section 28 reflect the text of the Children's Charter. This domestication indicates the commitment of South Africa to realising the rights provided in these children's rights conventions.³⁸

In addition to privacy, generally, the African region has also recognised the importance of the protection of data privacy as part of the right to privacy.³⁹ On 27 June 2014 the African Union (AU) adopted the Convention on Cybersecurity and Personal Data Protection (Malabo Convention)⁴⁰ which had the objective of protecting data privacy. It provided that state parties should commit to adopting legal frameworks that strengthen the right to privacy, particularly where it concerns personal data. It also emphasises the fact that violations of privacy should be punished.⁴¹ On 9 May 2018 the Personal Data Protection Guidelines for Africa (DPA) were drafted. However, only 14 member states have to date ratified the Convention, of which South Africa is not one.⁴²

Interestingly, the African Charter on Human and Peoples' Rights' (African Charter) does not protect the right to privacy. However, its drafting in 1981 preceded the digital age in which the protection of privacy became more important.⁴³ Nevertheless, the right to privacy is still protected by African regional instruments and guidelines, and 52 African states have included the right in their constitutions.⁴⁴

This inclusion in child law-specific human rights instruments as well as human rights instruments generally reflects the importance of the right in human rights discourse. It is not a right that is only granted to a sub-set of people but rather is present across various different types of instruments. It therefore is clear that the right to privacy is important for several reasons. This article will now turn to consider how the child's right to privacy is implicated when a child is a social media influencer.

3.2 Social media influencing and the right to privacy

The Court⁴⁵ has held that the right to privacy is implicated when 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.'⁴⁶ The right to

38 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 76.

39 A Singh & M Power 'The privacy awakening: The urgent need to harmonise the right to privacy in Africa' (2019) 3 *African Human Rights Yearbook* 207.

40 As above.

41 Art 8(1) African Union Convention on Cyber Security and Personal Data Protection.

42 African Union 'List of countries which have signed, ratified/acceded to the African Union Convention on Cyber Security and Personal Data Protection' (2023).

43 Singh & Power (n 39) 218.

44 Singh & Power (n 39) 203.

45 *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.

46 As above.

privacy, therefore, functions to protect the information of an individual should they not wish to disclose this information to the public.⁴⁷ The information in question may also take the form of data. Data privacy is recognised as a form of ‘informational privacy’.⁴⁸ In 2009 the South African Law Reform Commission (SALRC) recognised that the growth of technology, particularly computer databases and electronic networks, necessitated data protection legislation similar to the European Union Data Directive.⁴⁹ This recognition by the SALRC reflected a responsive attitude by the law to the changing circumstances in society. In 2021 POPIA came into effect as one of the consequences of this report.

The right to privacy is not only important, but is also *relevant* in this case for the following reasons: Private information may be defined as the ‘sum total of information or facts relating to an individual in his condition of seclusion and which are thus excluded from the knowledge of outsiders.’⁵⁰ Social media influencing may involve the sharing of personal information, or information to which outsiders usually are not privy, as many influencers achieve success by publishing content that is highly curated, often involving aspects of the influencer’s personal life.⁵¹ This sharing of information allows the audience to feel closer to the influencer, which then further increases viewership and, by extension, increases popularity.⁵² Social media users, who are not already established celebrities and often do not have a specialisation such as acting or performing, rely on ‘developments in their personal lives to connect with their followers and establish their self-branding.’⁵³ In this context, this would mean that the basis of their platform is the sharing of personal and intimate details about the child.⁵⁴ For example, this information may include anything from the type of hobbies someone enjoys to information about a influencers’ medical details, diagnoses or filming of actual medical episodes⁵⁵ or, particularly in the family influencing arena, videos of neurodivergent children becoming overstimulated.⁵⁶ Because of the uniqueness of their content, there is an increased public interest in this very specialised content which increases the following of the influencer.⁵⁷ Companies are also attracted to these influencers as the range of product placement increases, particularly in countries such as the United States of America where pharmaceutical companies are highly-commercialised entities.⁵⁸ Some influencers

47 As above.

48 Currie & De Waal (n 29) 303.

49 As above.

50 Neethling and others (n 30) 46-48.

51 C Abidin ‘Aren’t these just young, rich women doing vain things online? Influencer selfies as subversive frivolity’ (2016) 2 *Social Media and Society* 3.

52 As above.

53 As above.

54 Latifi (n 14).

55 I Garcia *TikTok* 19 September 2023, https://www.tiktok.com/@ivette_boricuanena/video/7280642354950802730 (accessed 5 December 2023).

56 C Bonnelo ‘Ten vital reasons to never, ever share an autism meltdown video’ 17 August 2020, <https://autisticnotweird.com/meltdown-videos/> (accessed 5 December 2023).

57 Kay and others (n 18) 278.

58 FD Ledley and others ‘Profitability of large pharmaceutical companies compared with other large public companies’ (2020) 323 *Journal of the American Medical Association* 835.

and even established celebrities have falsely told their supporters that they or their children are suffering from challenging or rare medical issues, through the generation of such content depicting this, with such videos reaching millions of viewers.⁵⁹ This indicates how receptive the public is to this kind of content.

Additionally, one cannot control the identity of or size of the audience engaging with their content.⁶⁰ Once the content is shared, and the audience has grown, there is a lack of control over what the audience will do with the content, or whether and how they will further distribute such content.⁶¹ As the content is reshared, audience sizes increase.⁶² TikTok, for example, frequently allows older content to resurface, with content becoming popular years after it was first posted.⁶³

However, in South African law, for information to be regarded as private, the subject must subjectively expect or want the information to be treated as private.⁶⁴ At this vantage point one cannot yet draw conclusions as to what individual social media influencers expected or wanted. This, however, does warrant careful consideration of whether this content should be shared at all, particularly because of the vulnerability of children and how their interests are to be protected by those tasked with doing so.⁶⁵ This subjective expectation must, however, be objectively reasonable.⁶⁶

When determining whether the subjective expectation of non-disclosure is objectively reasonable, the court is more likely to engage in such consideration where the expectation concerns the 'inner sanctum' of a person.⁶⁷ For instance, in *NM v Smith*⁶⁸ it was found that the disclosure of medical information without full and informed consent amounts to an infringement of privacy because medical information forms part of this 'inner sanctum'.⁶⁹ In this analysis of social media influencing, it will become clear that similar types of information are disclosed. This could potentially amount to sharing of information that objectively is part of the inner sanctum of the child, that should be appropriately regulated.

59 C Young 'Family vloggers are using cancer as clickbait and coaching tears for views' *Betches* 10 September 2021, <https://betches.com/family-vloggers-are-using-cancer-as-clickbait-and-coaching-tears-for-views/> (accessed 5 December 2023).

60 T de Beer & E Sadleir *Don't film yourself having sex and other legal advice for the age of social media* (2014) 154.

61 As above.

62 As above.

63 C Ahlgrim & T Tyson 'How TikTok revives old songs and turns them into new hits' *Business Insider* 11 April 2023, <https://www.insider.com/popular-tiktok-songs-from-past-decades-trending-now-2023-4> (accessed 5 December 2023); Wang (n 21) 9.

64 Currie & De Waal (n 29) 302.

65 R Songca 'Evaluation of children's rights in South African law: The dawn of an emerging approach to children's rights' (2011) 44 *Comparative and International Law Journal of Southern Africa* 344.

66 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 75.

67 *Bernstein v Bester* (n 66) para 28.

68 *NM v Smith* 2007 (5) SA 250 (CC) para 40.

69 As above.

From the above it is clear that privacy most certainly is implicated in the practice of social media influencing involving children. Children are not shielded from the impacts thereof and careful consideration of this issue is warranted. Given the fact that POPIA is the most specific piece of legislation governing data protection in South Africa today, I will consider its role in this specific context.

4 Child influencers' rights under POPIA

In order to assess whether POPIA appropriately responds to the implication of the child influencer's privacy, this article will engage POPIA on three grounds, namely, its scope, the consent clause involving the processing of children's personal information and relief mechanisms that are available.

4.1 Scope of POPIA

In order for POPIA to apply, it requires the information in question to qualify as personal information, and it must pertain to a data subject.⁷⁰ Section 1 of POPIA provides that personal information can take the form of various classes of information. These may range from information about a data subject's biographical information, such as their name or age, to their medical or criminal history. It is the author's submission that content posted by social media influencers can and has been included in many of the aforementioned categories – especially in circumstances in which the foundation upon which the platform of the influencer is built is the very defining characteristic of the child.

For instance, an example of a type of social media influencing involving children is where parents of medically-complex or particularly⁷¹ vulnerable children document their experiences with their children's illnesses or vulnerabilities. This is done on various social media platforms and has presented the same monetisation opportunities.⁷² The entire social media account is then focused on the child's everyday lived experience with their conditions.⁷³ This is but one example of how the content posted in the process of social media influencing can fall into the category of 'personal information', which would make POPIA applicable.

The aforementioned examples by no means are an exhaustive list of examples of information that can be shared in the process of social media influencing where children are involved. However, what the examples do indicate is that this kind of information is very often divulged. Therefore, the content shared

70 Sec 1 of POPIA regards a data subject to be a 'natural or juristic person'.

71 The use of the word in this context refers to the children in question having certain characteristics or aspects of their personhood that make them even more vulnerable than they would be only as a result of their minority. See J Heaton *The South African law of persons* (2017) 79.

72 Latifi (n 14).

73 As above.

of these child influencers can qualify as ‘personal information’ under POPIA. The type of personal information in question depends on the specific influencer, however. It is also true that not all influencers intend to share this information. However, POPIA does not distinguish between intentional or accidental sharing of personal information. Thus, whether or not the information was intentionally shared, it can nevertheless still be shared indirectly through references to the information or background.

Even if one were to argue that personal information does not have to be shared to become an influencer, a glance at the platforms of the most successful child influencers previously discussed indicates that this is the kind of information that is usually divulged in order to establish and expand the platforms. The sharing of personal information has also been recognised as part of the success in establishing the para-social relationship with the followers.⁷⁴ The qualification of this content as personal information under POPIA means that, on this ground, POPIA has application. The scope of POPIA is not only determined by the type of content, but also by the *objective* of the influencer posting the content.

The objective requirement of POPIA is important because its scope excludes ‘the processing of personal data’ for household or personal objectives.⁷⁵ This means that POPIA would not apply in circumstances where, for example, a list of contact numbers of friends is kept in a family home for family use.⁷⁶ In circumstances such as these, the controller of the personal information would not be defined as a ‘data controller’ and the obligations in terms of POPIA would not apply to this data, even if the data is regarded as ‘personal information’. Put simply, if the personal information is used for purely personal reasons, then it is not personal information subject to the protection provided by POPIA.

However, it does become difficult to draw this distinction in the age of social media, especially where personal information as defined in POPIA is published on social media platforms, including Facebook and Instagram.⁷⁷ This difficulty is no clearer than in the case of social media influencing where personal information is shared.⁷⁸ Where then does one draw the line to determine whether such information falls within the regulatory ambit of POPIA? This lack of clarity is compounded by the fact that sharing content of children on social media networks can also be done for the sole purpose of keeping family and friends up to date with the child’s life. This has commonly been referred to as ‘sharenting’.⁷⁹

74 Nouri (n 7) 9.

75 Sec 6(a) POPIA.

76 DP van der Merwe and others *Information and communications technology law* (2021) 439.

77 As above.

78 Nouri (n 7) 9.

79 ‘Sharenting’ is ‘the habitual use of social media to share news and images of one’s children’. See A Fox & M Hoy ‘Smart devices, smart decisions? Implications of parents’ sharenting for children’s online privacy: An investigation of mothers’ (2019) 38 *Journal of Public Policy and Marketing* 432.

Examples of this would be sharing photo albums of the child's milestones, such as birthdays or achievements, on platforms such as Facebook.

However, there is a fundamental difference between social media influencing involving children and sharenting. This difference lies in the fact that influencers are remunerated for the content they post. It no longer solely involves sharing updates about the child with loved ones, but rather about sharing with the rest of the world and reaping the financial reward thereof. This means that there is a clear commercial gain or objective linked to child influencers, which takes it far beyond the personal dimension. On this basis, it may be argued that the scope of POPIA indeed regulates child influencers due to its commercial dimension and the fact that it goes beyond the personal objectives exclusion from the scope.

Another crucial consideration when it comes to child influencers and their relationship with POPIA is the consent clause that is contained within the Act. The author will now consider how POPIA formulates this clause and evaluate the efficacy thereof in protecting the child influencer and their right to privacy.

4.2 Consent to post content to social media platforms: Section 35(a) of POPIA

Section 35 of POPIA provides a 'general prohibition' on the processing of children's⁸⁰ personal information. It more specifically provides a prohibition on the processing the personal information of children, unless there is 'prior consent of a competent person.' Although section 35 of POPIA provides other circumstances in which such personal information may be processed, this article will only focus on section 35(a) due to the relevance of the provision to the scope of this article.

In order to properly establish the extent to which section 35(a) of POPIA protects the child influencer's privacy, one needs to carefully consider the formulation of the general prohibition and related consent clause, and how it operates. Thus, the article now turns to the operation of 'prior consent' and 'competent person' and what this means for the child influencer's right to privacy.

POPIA provides the definition for 'consent' in section 1 as 'any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information'. Such consent thus is not required to take any specific form such as being exclusively written or verbal. The requirement further states that this consent must be given by a 'competent person'. POPIA then defines 'competent person' as 'any person who is legally competent to

80 POPIA defines a child in sec 1 as 'a natural person under the age of 18 years who is not legally competent, without the assistance of a competent person, to take any action or decision in respect of any matter concerning him- or herself'.

consent to any action or decision being taken in respect of any matter concerning a child’.

The first and, arguably, most obvious, protective function that this section serves is that it introduces an additional limitation to the sharing of personal information of children above and beyond the general limitations placed on the processing of personal information.⁸¹ It introduces another hurdle that must be overcome before the content of the child may be posted. Consent clauses are not uncommon in legislation regulating issues concerning children. This is because children have a limited capacity to act, and clauses such as these aim to protect children from the immaturity of their own judgment.⁸² For instance, section 129 of the Children’s Act gives children older than 12 years of age the right to consent to a medical operation provided that they are of sufficient maturity to do so, and duly assisted by their parents or guardians. Children under 12 thus may not themselves provide consent, and will require their parents or guardians to do so on their behalf.

This requirement of consent in and of itself protects the child’s privacy by recognising the child’s minority status and what this means for their level of vulnerability acting as a factor that influences their ability to make decisions for themselves. However, I argue that the most contentious area of the protective nature of this clause is that it is a competent person that must provide this prior consent, particularly in circumstances where, due to a child’s limited capacity, they do not have the ability to consent for themselves.⁸³ Section 18(3)(c) of the Children’s Act provides that a parent or other person that acts as a guardian for the child must provide consent where this is required by law and the child is unable to provide such consent for themselves. This then gives the parent the power to grant this prior consent in terms of section 35 of POPIA. The parent then is inadvertently providing this prior consent for themselves as social media influencing that involves children with limited capacity relies on the parents to help create, share and promote the social media content in question. The question then arises as to what this means for the child’s right to privacy.

A legal conundrum is created whereby those tasked with granting consent as a protection mechanism are the same persons to whom this consent must be granted. How then does consent effectively function as a protective mechanism? Parents are heavily incentivised to post the content of their children because of the financial reward and opportunities that may stem from social media influencing, which could be argued to influence their judgment in these circumstances.⁸⁴ This financial reward may even be used to provide for the child and positively

81 D Donnelly ‘Privacy by design’ in the EU General Data Protection Regulation: A new privacy standard or the emperor’s new clothes?’ (2022) 139 *South African Law Journal* 559.

82 Heaton (n 71) 79; L Schäfer *Child law in South Africa: Domestic and international perspectives* (2011) 11-16.

83 As above.

84 Kay and others (n 18) 278.

change their lives in a material sense.⁸⁵ Although section 35 of POPIA protects the child from any other person posting this content, it does not protect the child from the *parent*. Even if parents provide this consent, it does not mean that the consequences of social media influencing, as previously discussed in this article, will simply disappear or lessen. The child's personal and intimate details will still be exposed to very large audiences. This will still implicate their privacy. This is true even where parents grant themselves this consent without intending these negative consequences.

Although parents are tasked with protecting the best interests of their children,⁸⁶ it does not necessarily follow that what they think is the best decision for the child actually is the best decision when taking into account all relevant consequences.⁸⁷ This is no clearer than when considering that these children who are influencers, will one day become adults with full capacities. This then raises the question of whether POPIA properly provides for this. In determining this, the article will consider whether the 'evolving capacities of the child' are adequately recognised and given effect to by POPIA.

In the case of *S v M*⁸⁸ the Court found that children are not mere extensions of their parents and are persons before the law.⁸⁹ Being a person before the law means that children have certain rights and capacities within the existing legal frameworks.⁹⁰ Liebenberg argues that this recognition is crucial to ensure that children benefit from and are protected by their socio-economic rights.⁹¹ A child's personhood is not reduced by their minority status, even if they primarily exist within a family structure in which this status is emphasised.⁹² A balance needs to be struck between the child's autonomy as a full rights bearer, and their need to be protected given their vulnerability that is created by their minority status.⁹³ The capacity of the child also is not static in nature, but develops, changes and expands as the child matures. Accordingly, a consideration of the child's rights must be done with the child's evolving capacities in mind.⁹⁴ Under South African law, this recognition of the 'evolving capacities of the child' also includes the right of the child to participate in matters that concern or affect them.⁹⁵ The importance of participation in South African jurisprudence will first be engaged as it is an integral part of the 'evolving capacities of the child'. Participation can

85 Nouri (n 7) 1.

86 M Couzens 'The best interests of the child and the Constitutional Court' (2019) 9 *Constitutional Court Review* 374.

87 M Newbould 'When parents choose gender: Intersex, children, and the law' (2016) 24 *Medical Law Review* 478.

88 *S v M* 2008 (3) SA 232 (CC) paras 18-19.

89 *S v M* (n 88) para 18.

90 *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another* 2014 (2) SA 168 (CC) para 52.

91 S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 230.

92 As above.

93 Currie & De Waal (n 29) 601.

94 As above.

95 S Varadan 'The principle of the evolving capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 307.

be understood as the ‘substantial engagement of people in decisions that affect their lives.’⁹⁶

The Court⁹⁷ has recognised the centrality and importance of participation in the constitutional democracy.⁹⁸ Given that South Africa has a history of excluding certain groups from participating in the political and social spheres,⁹⁹ furthering the access to participation by these excluded or vulnerable groups is an important part of the South African legal system.¹⁰⁰ Children have been recognised as one such vulnerable group.¹⁰¹ Section 10 of the Children’s Act grants children a participation right, which involves the right to participate age-appropriately in matters that concern them, with due consideration given to their views and assistance by a competent person if they lack the capacity to participate independently.

CRC also recognises that the child has a ‘right to be heard.’¹⁰² Because children have limited capacity,¹⁰³ the Convention also recognises the weight given to this right to be heard and takes the child’s age and maturity into account.¹⁰⁴ Specifically, article 5 of CRC refers to the evolving capacities and requires that it be taken into account when adjudicating matters concerning children. This is done to recognise and give effect to the fact that children’s capacities change with age: the older the child is, the broader their right to participation. These articles show that the child’s autonomy is not only important as it recognises them as a right bearer, but also because it gives them a right to participate that is suitable to that specific child at their specific stage of development.¹⁰⁵

On a regional law level, the African Children’s Charter also recognises the importance of the participation of the child. Specifically, articles 7 and 4(2) when read together provide that a child’s right to participate and express their views in matters that concern them apply to ‘all matters’, not only matters of a judicial nature. Additionally, the provisions recognise that a child who ‘is capable’ has the right to participate in this way.¹⁰⁶ The consent mechanism as provided for in POPIA should ideally operate in a way that recognises the child’s evolving capacities. It should not simply be a mechanism that gives the parents a veto over the child’s views, or one that entirely disregards the limited nature of the child’s

96 S Liebenberg ‘The participatory democratic turn in South Africa’s social rights jurisprudence’ in S Liebenberg *The future of economic and social rights* (2019) 193.

97 *Mashava v President of the Republic of South Africa* 2005 (2) SA 476 (CC) para 20.

98 As above.

99 Liebenberg (n 96) 194.

100 As above.

101 Songca (n 65) 344.

102 Varadan (n 95) 307.

103 As above.

104 United Nations Committee on the Rights of the Child General Comment 12 ‘The Right of the Child to be Heard’ (2009) CRC/C/GC/12/ para 20.

105 As above.

106 Arts 7 & 4(2) African Children’s Committee.

capacity. A few key issues in the current context of child influencers' privacy and POPIA can be identified and will be considered below.

Children who participate in influencing range in age with some children partaking in the practice throughout their entire childhood.¹⁰⁷ This child will not have the same capacity throughout their whole childhood, and recognising that their capacities evolve as they become older is important to acknowledge as an approach suitable for a younger child, such as that a toddler may not suit an older one, such as an adolescent. Given these evolving capacities, a regulatory framework such as POPIA's prior consent mechanism needs to appropriately provide for both scenarios. In its current formulation, the content of the child may be posted should a 'competent person' provide the necessary consent. It neither provides for a participation process that can involve the child, nor does it acknowledge the nuances of a child's capacity that is evolving and nuanced.

Such acknowledgment is especially necessary and important as a feature of the internet is the ability to access information that is not only recent, but also enables the access of and engagement with content that is less recent.¹⁰⁸ This also means that content posted by influencers is able to resurface many years after it was first shared. For instance, there are examples of influencers being impacted by racist tweets that they made years before they became well-known.¹⁰⁹ These tweets, in many cases, have impacted the influencer's earning potential as many brands have dissociated themselves from the influencer because of the effect that the content has on the brand image.¹¹⁰ Although neither a South African, nor even African example, it is indicative of the potential consequences for these children. What does this mean for the child who is placed before the world by their parents for the purposes of being an influencer? The impact of this is that content shared by parents of their children in the practice of influencing can persist beyond childhood and can impact the child well into adulthood. This remains true even if the content is deleted, or if the child stops participating in the practice of social media influencing at any stage.

It is the author's submission that the POPIA prior consent mechanism does not adequately provide for the child's evolving capacities through recognising their right to participate, nor does it acknowledge that the child influencer will one day reach adulthood and may have different opinions, feelings and views on their exposure.

107 General Comment 12 (n 104) para 20.

108 De Beer & Sadleir (n 60) 154.

109 Wang (n 20) 9.

110 R Reyes 'Influencer Lunden Stallings apologises during honeymoon amid backlash to resurfaced racist tweets: Utterly disgusted and ashamed' *New York Post* 4 October 2023, <https://nypost.com/2023/10/04/influencer-lunden-stallings-apologizes-over-resurfaced-racist-tweets/> (accessed 5 December 2023).

The closest example of what could happen to child influencers is considering child actors who reached adulthood and expressed regret at being thus exposed at such a young age.¹¹¹ Child actors form part of a much more regulated industry but have still been impacted into adulthood by decisions made by their parents to expose them to the performing arts.¹¹² What would this then mean for the child influencer, who partakes in a far less regulated industry, in the years to come? This is an important oversight to recognise as permanent consequences of this nature require far more complex regulation and participation by the child than simple consent by the parent.¹¹³

Even though POPIA places some hurdles and limitations on children's involvement in social media influencing with regard to the general prohibition and associated consent requirement, it does not appear as if the current formulation and the effect thereof by any means are sufficient for the reality of the technological age.

4.3 Relief provided by POPIA

The adequacy of the relief provided for POPIA will now be considered. This will be done in order to assess whether the child will even be able to do anything about this content should they not agree with it being shared to begin with, or no longer wish it to be available to the public at a later stage.

Section 74 of POPIA is the regulating section with regard to any complaints raised in relation to the sharing of personal information. The section enables an aggrieved person¹¹⁴ to submit a complaint to the regulator¹¹⁵ should there be interference with the protection of their personal information. POPIA defines interference in section 73 as 'any breach of the conditions for the lawful processing of personal information as referred to in chapter 3'. This would include the regulating provisions of the personal information of children as contained in Part C of chapter 3 of POPIA. The effect hereof is that if the child, or later adult, is not satisfied with the posting of the content or the way in which consent was obtained, they may approach the regulator in this regard. Sections 75 to 99 of POPIA set out the procedure in terms of which these complaints may be brought and appealed. In summary, these complaints must be brought by the data subject – in this instance the child – or whoever acts as an authorised representative in proceedings of this nature. The process involves various administrative steps that – if the child cannot take these on their own – need to be taken by the parent. This again introduces a potential problem in this case as parents may not want

111 L Abascal 'This new film deep dives into Mary-Kate and Ashley's cultural legacy' *Dazed* 30 June 2022, <https://www.dazeddigital.com/fashion/article/56450/1/mary-kate-ashley-olsen-twins-sisters-fame-film-zara-meerza-wetransfer-wepresent> (accessed 30 March 2023).

112 As above.

113 Newbould (n 87) 478.

114 Sec 1 of POPIA defines person as 'a natural or juristic person'.

115 Sec 74 POPIA.

to remove the content. The best interests of the child principle would demand such removal, but getting to this end would not be easy for a child, particularly where the child does not have the means to do so themselves. Additionally, even if the child were able to approach the regulator and lodge this complaint, deleting the content will not mean destroying the content, and the effects of this content remaining in the public domain indefinitely, as previously discussed, may persist.

5 Conclusions and recommendations

It has been submitted that the relevant sections of POPIA as analysed above are not sufficient to deal with the protection of personal information of child social media influencers. Social media influencing, particularly where children are involved, is a very complex issue. POPIA's relief mechanisms, while theoretically available, arguably are unlikely to be practically possible for children to make use of, or even in instances where children do make use of them, successful. Given this, it cannot be regarded as adequate to respond to this changing landscape. While POPIA does place certain hurdles in place to deal with the processing of children's personal information when considering its scope, general prohibition clause and relief available, it is the author's argument that these are not sufficient in their current formulation. More effective regulation of child influencers is required in order to address these deficits, and appropriately provide for the child's rights in the short and long term. The internet and its influence are growing quickly and constantly. The law needs to keep up with these developments and provide appropriate and effective regulation where this may be necessary; a regulation that POPIA does not provide, but a regulation that is desperately needed.