

Report of the Portfolio Committee on Communications on the public hearings on the Films and Publications Amendment Bill [B37 – 2015], dated 20 June 2017

The Portfolio Committee on Communications (the Committee), having held public hearings on the Films and Publications Amendment Bill [B37 – 2015] from 30 to 31 August 2016, reports as follows:

1. Background

The Films and Publications Amendment Bill [B37 – 2015] (“the Bill”) was referred to the Committee on 23 November 2015 and subsequently introduced by the Department of Communications (the Department) on 23 February 2016. As mandated by Parliament, the Committee undertook to request public submissions on the Bill as well as hold public hearings. The call for submissions on the Bill was published on 7 April 2016. The public hearings were held on 30 to 31 August 2016.

A total of 32 written submissions were received from various civil society organisations; broadcasters, state law enforcing agencies, religious bodies, professional bodies and private companies in the telecommunications sector to name a few. This report is an analysis of the oral submissions during the said public hearings held at Parliament precinct, the Old Assembly Chamber. An analysis of the 32 written submissions was circulated to members prior to the public hearing process.

There is natural continuity of information stemming from the written submissions analysis document into this document due to the fact that the organisations and or individuals that made oral submissions would have been expected to submit written submissions and that the oral submissions reflect on contents of the written submissions.

In terms of the oral representations, a total of 18 individuals and or organisations presented before the Committee during the public hearings. These included representations from free-to-air public broadcasters, commercial broadcasters, associations ranging from civil groups as well as internet service providers.

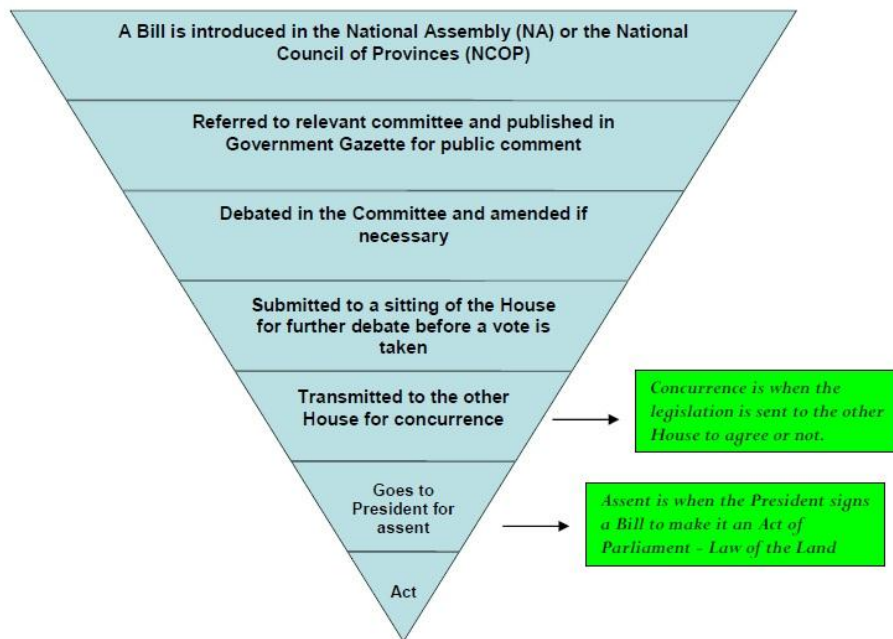
2. Context

As a proxy, it is important to re-emphasize the role of the Committee in terms of its mandate to new and existing legislation. It is well known that the role of Parliament in South Africa primarily focuses on its powers to pass new laws, amend existing laws and repeal old laws. For the Committee of the 5th Parliament, the Bill marks the first piece of legislation that has been tabled and the process to conclude on its finalisation started in earnest.

The Committee is new in the context of the Proclamations made by the President at the start of 5th Parliament where the roles and responsibilities of one department (former Department of Communications) were divided into two departments which necessitated Parliament to adopt a conducive structure to cater for (i) the newly formed Department of Communications; and (ii) the Department of Telecommunications and Postal Services. Further information regarding the Proclamations is available in the public domain.

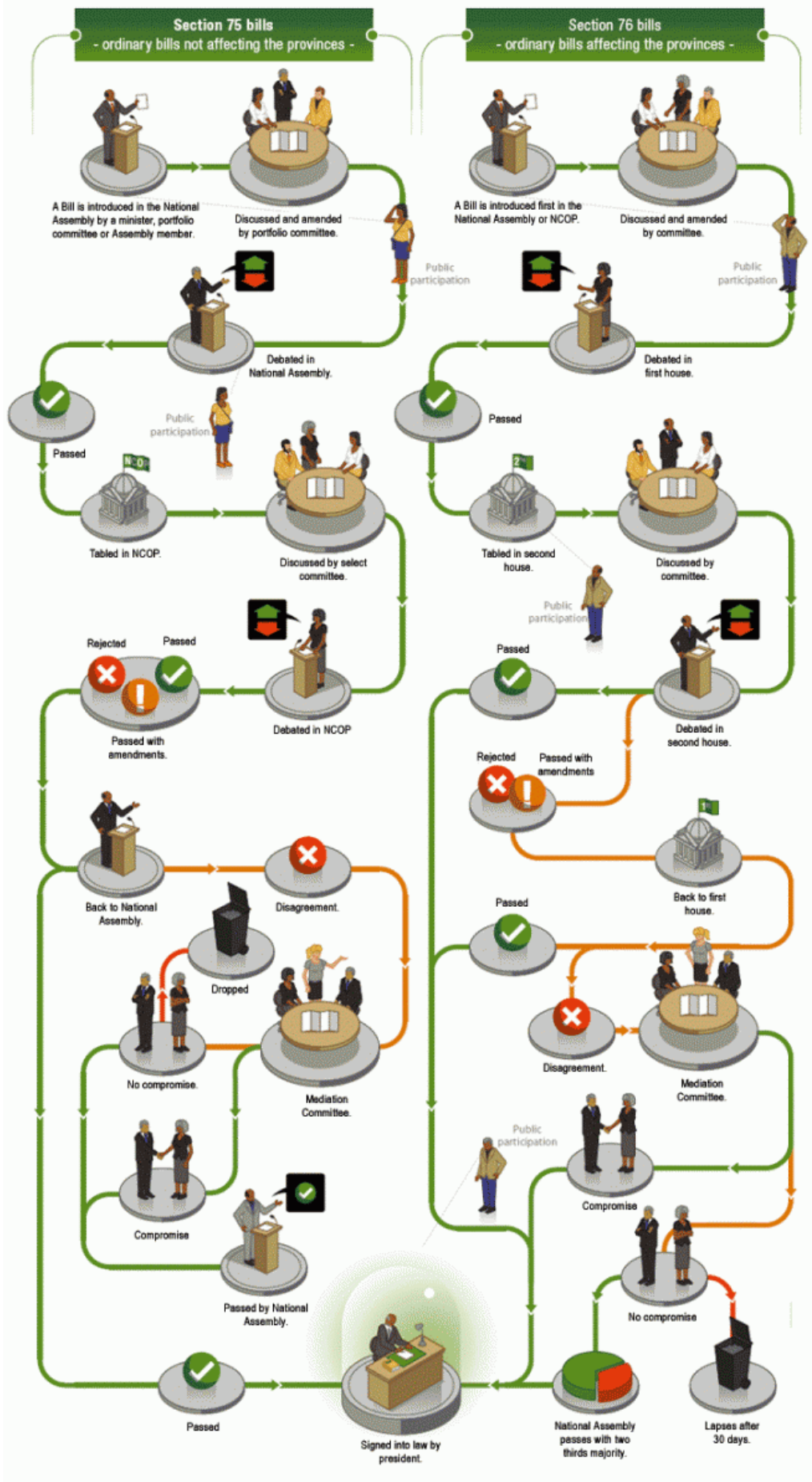
It has been approximately six (6) months since the Bill was introduced to the Committee and the process to finalisation of the Bill from Parliament side is on course. The diagram below is a depiction of the law-making process of South Africa and this Bill is no different in that it too must adhere a similar process. The Committee will finalise its debate around the Bill before it is escalated to the House for further deliberation; granted the amendments as per the Committee findings are included.

Diagram of How a Law is made in South Africa



According to the Department when tabling the Bill to Parliament, the proposed amendments do not fall within any functional areas listed in Schedule Four (4) of the Constitution and as such must be dealt with in accordance with procedures set out in Section 75 of the Constitution. The Department further articulated that the Bill should not be referred to the National Council of Traditional Leaders since it does not contain provisions pertaining to customary law or customs of traditional communities.

For clarity purposes, the diagram in the following page seeks to illustrate the different routes for law-making in South Africa:



While the Committee is mandated to play an oversight role of the Department and its entities, the introduction of this specific Bill presents an opportunity to establish a legislative basis for future regulation of new forms of content in line with the work of the Committee. And it is an opportunity which calls for broad and thorough engagement by the Committee in order to protect firstly the Constitution as the supreme law of the land as well as to protect the constituency which it represents and that is the people of South Africa.

The all-pervasive and constantly growing nature of the electronic media has to a significant extent eclipsed traditional, and more easily regulated, forms of communication, such as the print, broadcast and film media. Finding effective ways of monitoring and regulating this new field of communication so as to prevent its being abused by those using it to disseminate hate speech is one of the critical challenges faced by the global community.

That said, the Act is the primary source of legislation regarding the classification of films, games and publications in South Africa. The Act sets up the Board which is empowered to appoint classification committees to classify films, games and publications referred to them by the chief executive officer of the Board. The Act further creates criminal offences around “child pornography” and grooming-type offences. Internet Service Providers (ISP’s) are required to register with the Board to facilitate the fight against “child pornography”.

All films and games have to be classified before distribution in South Africa and distributors of such films and games must be registered with the Board. Publications – dealt with separately from films and games - are assessed only on receipt by the Board of a complaint.

When the Bill was first introduced to the Committee by the Department, the intentions for such amendments were made clear that the evolution of online environment over the years has necessitated government to relook some of its legislation in order to:

- i. ensure relevance to technological developments;
- ii. continue to provide safety for citizens;
- iii. align with international best practice on matters regarding the regulation of distribution of online content;
- iv. strengthen efforts to combat the online distribution of illegal content as defined in the Films and Publications Act 65 of 1996, as amended (the “Act”);
- v. establish a co-regulation regime for classification of digital content distributed online; and
- vi. amplify responsibilities of internet service providers in matters regarding the protection consumers and children against sexual content, hate speech and racism contained in user-generated content.

There are various reasons brought by the Department as rationale for amending the Act including adverse rulings against certain sections of the Film and Publications Act including the ruling by the Constitutional Court which rendered one of the sections (section 16(2)) unconstitutional. Furthermore, the growth of online content and ability of individuals to upload and post instantly on social networks has propagated the distribution of sex material and pictures and videos depicting violence.

In the main, the Department undertook to amend the Act in order to:

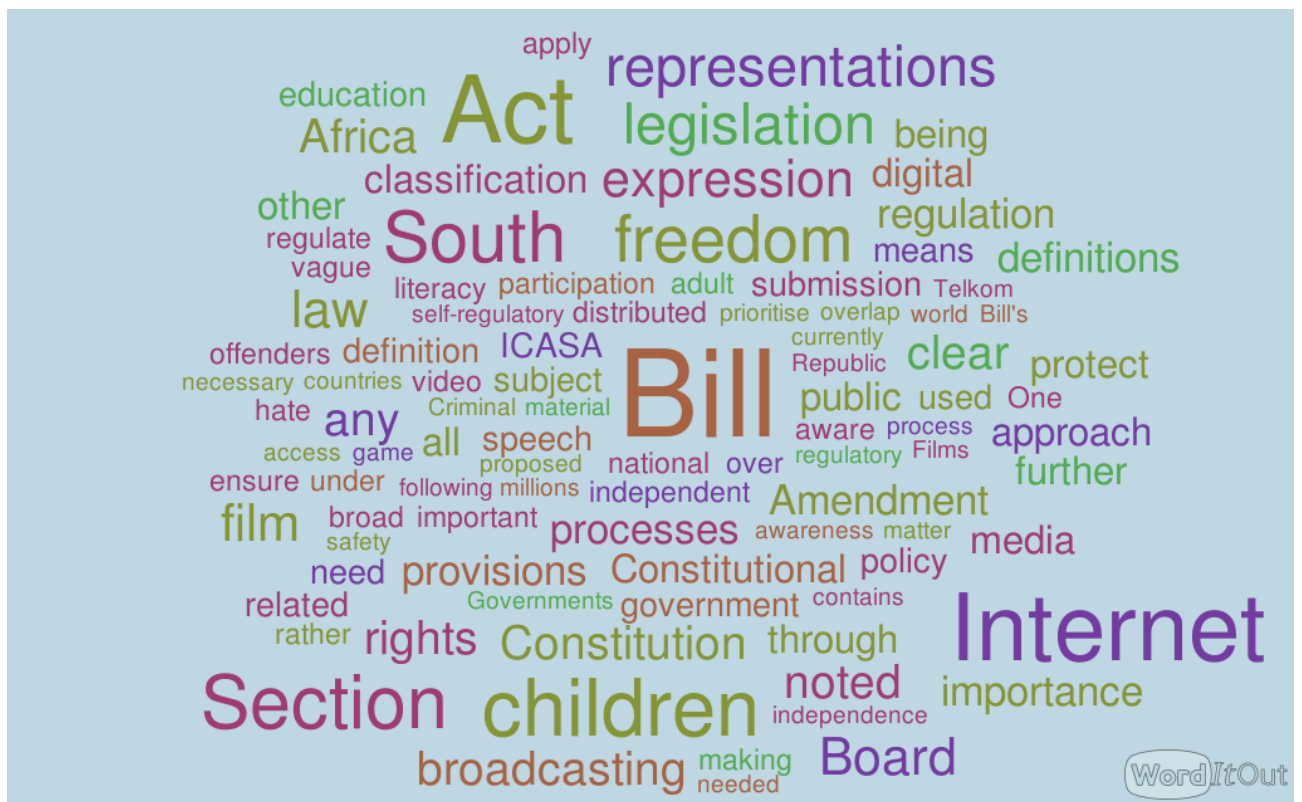
- i. extend the functions of the Board of monitoring and compliance with the Film and Publications Act;
- ii. address the shortcomings in relation to classification, compliance monitoring and usage of new media & social networking sites;
- iii. align certain definitions to various judgements of the constitutional court and the Appeals Tribunal;
- iv. revise and further regulate the functions of compliance officers;
- v. to provide for independent industry classification bodies;
- vi. to provide for exemptions in respect of online distribution of films and games;
- vii. establish a penalty committee to address public complaints and administrative offences committed by distributors and industry;
- viii. to provide for obligations attached to Internet Service Providers; and

- ix. to provide for the accreditation of foreign classification systems for online content.

Lastly, a total of eighteen (18) Sections of the Act were amended for various reasons ranging from the definitions to the objects of the Act and to more detailed amendments relating to the establishment of the Penalty Committee, exemptions of some service providers such as broadcasters and penalties for infringements.

3. The oral presentations

On 30 August 2016, the Committee, chaired by Mr Maxegwana respectively welcomed eight (8) organisations and or individuals to make oral representations, namely (i) South African Communications Forum (SACF); (ii) Emma Saddler; (iii) Cause for Justice; (iv) Interactive Entertainment South Africa (IESA); (v) Interactive Advisory Body of South Africa (IABSA); (vi) e-TV; (vii) Right-To-Know; and (viii) Internet Service Providers Association (ISPA). On 31 August 2016 the Committee welcomed ten (10) more organisations for oral representations, namely (i) South African Jewish Board of Directors (SAJBD); (ii) South African Broadcasting Corporation (SABC); (iii) Press Council South Africa; (iv) MultiChoice; (v) South African National Editors Forum (SANEF); (vi) National Association of Broadcasters (NAB); (vii) GoogleSA; (viii) Media Monitoring Africa (MMA); (ix) Centre for Constitutional Justice; and (x) Association of Christian Media (ACM) in that order.



The main areas of contention in the Bill were (i) Section 1; (ii) Section 16 and (iii) Section 18. The illustration above captures the frequency of popular words from the submissions using an online App *Word It Out* to analyse word count of the most frequent or popular words that came out in the oral representations. Based on the App, issues relating to the constitutionality came out prominent justifying the view by most submissions. Specifically, Section 18 is the section where issues of constitutionality were raised the most. Issues of freedom expression were also prominent.

4. Summary of presentations 30 – 31 August 2016

While all presentations over the two (2) days expressed a general consensus and appreciation for strengthening of legislative and regulatory mechanisms of government taking into consideration the technological advances, most presenters on the day expressed concerns on various issues.

- Concurrent processes initiated by various organs of the State that either overlap jurisdiction or make reference to some parts of the subject matter contained in the Bill;
- Broad and vague definitions;

- Encroachment on a Chapter 9 institution, namely Independent Communications Authority of South Africa (ICASA);
- Functions and powers of Compliance Officers needed to be reviewed to enable efficiency and effectiveness;
- Public participation in the development of regulations, policies and directives;
- Whether the Act as amended is the correct vehicle to criminalise revenge porn;
- Prior-classification process being a burden on the industry;
- Concern over the regulating of international players in the Information Communication Technology (ICT) space;
- Concerns over the censorship-approach of the Bill;
- The importance of freedom of expression in our democracy as enshrined in the Constitution;
- Alternatives for regulating online content publishers;
- Ambiguity in defining between user-generated content and content by online distributors;
- Need to prioritise public education in the Amendment relating to online safety;
- Economic implications of the Bill and costs for regulation will be a barrier to entry;
- Capacity of the FPB to deliver on the mandate of the Bill;
- Making provisions on how to address crosscutting solutions to prosecuting online-based hate crimes, the South African Law enforcement often lacks the expertise or will to obtain information in order to prosecute online crimes;
- Composition of the tribunal not clear enough;
- Over-regulation of the broadcasting industry;
- Need for implementation of Regulatory Impact Assessment; and
- The Bill proposes parallel mechanisms to existing regulatory frameworks, i.e. Broadcasting Complaints Commission of South Africa (BCCSA) and Advertising Standards Authority of South Africa.

5. Conclusion

Based on the submissions, and for the purposes of concluding matters of the Bill, it is clear that the Committee needs to further debate on a number of issues, particularly:

- Constitutionality of the Bill;
- Broader consultative processes with relevant stakeholders including children and people living with disabilities;
- Because the Department is tasked with outcomes 12 and 14 (Social Cohesion and Nation Building) it would have been appropriate that it conducted an extensive consultation process with its entities, particularly those that would be adversely affected by the Bill, for an example the SABC's submission raised concern of over-regulation of the broadcasting sector. This could have been resolved through consultations with the SABC;
- In order to align the Bill to the National Development Plan (NDP), specifically on job creation and Small Medium and Micro Enterprise (SMME) development, the economic implications of the Bill should have been discussed at length with the Department of Planning, Monitoring and Evaluation (DPME);
- Policy and regulation should be tools to encourage investment rather than to deter;
- Committee should invite the Constitutional Review Committee in order to engage further on matters relating to the constitutionality of the Bill;
- Redefinition of existing definitions must be resolved;
- It is clear that the need for Regulatory Impact Assessment has a pivotal role in legislative development in that it would have clarified the contradictions as raised by the submissions, i.e. issues of regulatory duplicity which were raised by a number of presenters
- It is clear that the broadcasting sector is already over-regulated by various regulatory bodies and the Bill will become burdensome to the Broadcasters should it be passed in its current form;
- Pre-classification infringes on Freedom of Expression as articulated by many submission;
- Emphasis on panelising consent for production rather than distribution should be revised;
- The Committee should further engage on the independence of the Council, Appeal Tribunal and the Penalty Committee;
- The Committee should further debate whether it is not possible to transfer some of the regulatory powers to ICASA as it already has stringent regulations impacting on all broadcasters in South Africa; and

- The need to adopt a collaborative approach to prosecution of online offenders. Currently this is impeded by bureaucratic processes.

6 Committee resolutions

The following organisations were requested to provide the Committee with the list of its members: (i) Right2Know, (ii) SOS Coalition; and (iii) Media Monitoring Africa (MMA).

MMA was further requested to provide the submission that was submitted to the Films and Publications Board Draft Online Regulation Policy; and

Centre for Constitutional Rights (CCR) was requested to send an addendum on the constitutionality of the Bill.

The Centre for Constitutional Rights and MMA have since sent the documents to the Committee and are summarised below:

6.1 Centre for Constitutional Rights (CCR)

In their latest submission the Centre for Constitutional Rights highlights few areas which in their view must be reviewed by the Committee, specifically:

- i. Definition of '*artistic*' is too broad and imposes limitations to '*freedom of expression*' in respect of the arts;
- ii. Pre-classification is akin to censorship according to CCR;
- iii. The powers of the Board to dispatch classifiers to the 'distributors' premises are interpreted by CCR as contrary to the Constitution because the provision *arbitrarily permits the State to infringe on personal freedoms and associated fundamental rights*;
- iv. The lack of public participation in the appointment of the Penalty Committee, the Council as well as the Appeal tribunal. As it stands in the Bill, only the Minister appoints these persons;
- v. Genuine public participation and consultation including for interest groups by the Bill;
- vi. The impracticability of classification of online content due to the sheer volume on content in the digital space and this is tantamount to '*censorship*' and a clear violation to freedom of expression; and lastly
- vii. On whether the Bill will meet Constitutional muster; the following clauses were interpreted to say that they will fail Constitutional muster:
 - a. Clause 1 (infringes upon freedom of expression);
 - b. Clauses 15 and 19 (infringe upon right to privacy); and
 - c. Clauses 4, 5 and 6 (element of public participation, transparency and openness).

6.2 Media Monitoring Africa

Below are the conclusions and recommendations submitted to the FPB on 15 July 2015:

- i. MMA submitted that the Draft Regulations in their current form deny children some of their basic rights as enshrined in the South African Constitution, the United Convention on the Rights of the Child and African Charter on the Rights and the Welfare of the Child. Accordingly, MMA calls for the withdrawal of the regulations in their current form;
- ii. MMA submitted that future regulations consider supporting digital literacy programmes as means through which children (and adults) can learn how to navigate the online world. And perhaps endorse programmes that can help empower children to make the right choices online as well as e-Parenting programmes that can help parents learn how to support and give guidance to their children online;
- iii. Notably, MMA submitted that future regulations include children in future processes. Maintain ongoing conversation with them and allow them to rise to the occasion of providing great insights;
- iv. As expressed by the children, MMA submitted that the FPB in future regulations find ways of talking to children's rights to protection from harm in conjunction with their rights to

access to information and participation. Furthermore, MMA submitted that they frame their discussions on online safety by taking both the risks and opportunities into consideration.