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Submission on the Draft Online Regulation Policy

by the SOS Support Public Broadcasting Coalition

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1 Introduction

1.1 The SOS Support Public Broadcasting Coalition welcomes this opportunity to comment on the Draft Online Regulation Policy released by the Film and Publications Board on 4 March 2015[1].

1.2 The Coalition represents a broad spectrum of civil society stakeholders committed to the broadcasting of quality, diverse, citizen-orientated, public-interest programming aligned to the goals of the SA Constitution. The Coalition includes a number of trade union federations (including COSATU and FEDUSA); a number of independent unions (including BEMAWU and MWASA); independent film and TV production sector organisations (including the South African Screen Federation (SASFED)); community TV stations (including Cape Town TV); a host of NGOs and CBOs (including the Freedom of Expression Institute (FXI), Media Monitoring Africa (MMA), Right to Know (R2K) and Section 27); and a number of academics and freedom of expression activists.

1.3 We make this submission in the interest of enshrining public access to a diverse range of high-quality audio-visual content, whether online or offline, while at the same time promoting the right of informed choice in the management of access to 'inappropriate content[2]' (including via their parents in respect of children) and preventing the dissemination of material depicting' 'child pornography'[3].

1.4 We thank the Film and Publications Board for initiating the debate around the proliferation of online content, both text-based and audio-visual, and for opening the discussion around how best to define and manage those components of online content that may be undesirable or harmful in a way that is effective and minimally intrusive so that creativity of expression, freedom of speech, access to information, and the promotion of public interest content are developed and stimulated. We look forward to continuing that debate.

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1.6 This submission of the SOS Coalition adopts the following overall positions and recommendations:

- We thank the Film and Publications Board for initiating a public debate on the nature of online content and its impact on our society;
- However, we believe that the current "Draft Online Regulation Policy" is poorly drafted, unconstitutional and *ultra vires*, too far-reaching in scope, and problematic because of the wide-ranging prior classification approach adopted;

[1] *Government Gazette*, Vol 597 Pretoria, No. 38531, 4 March 2015.
[2] The difficulties in identifying and defining what constitutes 'inappropriate content' are discussed below
[3] SOS notes that the Film and Publications Act distinguishes between pornographic material – which depicts 'sexual conduct', and is lawful and protected under the constitutional provisions allowing for freedom of expression, and the in terms of the Film and Publications Act – and the depiction of 'child pornography', which, along with hate speech and incitement to violence and propaganda for war, is prohibited. The Coalition maintains, however, that "child pornography" is an inappropriate term conflating pornography with the unlawful sexual abuse of children and should, therefore, be substituted by "child abuse material".

- In addition we note that the Film and Publications Act itself may well need substantial revision to ensure a clear and constitutional basis for appropriate regulatory intervention in respect of online content;
- **Accordingly, we call upon the Film and Publications Board to withdraw the "Draft Online Regulation Policy" in its entirety;**
- **Further, we call for a meaningful public dialogue to be initiated, involving the full range of stakeholders, in order to agree on a rights-driven, evidence-based, proportionate regulatory approach to online content;**
- Such a process needs to be informed by the recommendations of the ICT Policy Review Panel and the forthcoming White Paper, the policy positions of which will establish the regulatory parameters for online content[4], as well as a careful consideration of existing institutions, policies, laws and regulations;
- Finally, we propose a number of features that we believe would mark an appropriate approach to online content, including:
    - The adoption of a platform neutral approach;
    - Proportionate light-touch intervention;
    - A limited scope of regulatory application;
    - Protection for online intermediaries,
    - Co-regulation via guidelines and a code of conduct;
    - The use of user-friendly notice and take-down procedures;
    - Making free parental control software available; and
    - Promoting online awareness and education.

1.7 At the outset we note that the "Draft Online Regulation Policy" consists in fact of several separate documents, none of which is a policy, properly understood, viz:

- A 'Schedule', which sets out the context and policy-making intention;
- An 'Explanatory Memorandum on the Draft Online Regulation Policy', which provides further background and context, but which is extensively plagiarised from a report by the Australian Law Reform Commission[5] (see below);
- The 'Draft Online Regulation Policy', which is in fact a draft regulation rather than a policy.

2 Guiding Principles

2.1 The SOS Coalition believes that as the convergence of ICT infrastructure, services and content requires policymakers and regulators from a range of sectors and jurisdictions to consult and collaborate in identifying and managing potential risks and harms in relation to access to content. The deepening of access to broadband and mobile broadband services, together with the borderless nature of online content, means that individuals, stakeholders, providers, policymakers and regulators need to work together to:

[4] This recommendation is made notwithstanding the enormous problems that have been created for an integrated, comprehensive review of policy, law and regulation across the increasingly converged ecosystem of the ICT sector by the untimely and ill-advised sundering of the former Department of Communications midway through the ICT Policy Review process.

[5] ALRC (2012) 'Classification — Content Regulation and Convergent Media: Final Report', ALRC Report 118, Australian Law Reform Commission, Sydney, February 2012, available online at http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_118_for_web.pdf.

- Protect the rights of individuals to universal access to the fullest possible range of online content in accordance with the freedoms guaranteed under the Constitution;
- Promote the opportunities and benefits gained from access to a wide range of online audio-visual and other content;
- Educate users and consumers on how to navigate the Internet safely and responsibly;
- Develop mechanisms that enable users to inform and protect themselves from what they consider to be 'inappropriate content';
- Promote the democratic and enlightened development of appropriate community standards for online content;
- Ensure that any measures to restrict content are minimally intrusive and promote an approach of informed consent.

2.2 The SOS Coalition recognises that:

- the swiftly evolving and increasingly converged and borderless nature of ICT sector makes the Internet difficult, if not impossible, to restrict and control;
- the explosion of access to online content creates a plethora of new users who seek information and guidance as to how to exercise responsible digital citizenship;
- there is a need for regulatory parity between online and offline content that is not unduly onerous on either users or providers.

2.3 The SOS Coalition further believes that any policy that seeks to regulate online content must:

- be rights-based, preserving the constitutional imperative to promote freedom of expression to the extent that this does not compromise the rights of others per the limitations clause of the Constitution;
- apply and require the enforcement of existing policy, laws and regulations that balance potential risks and harms against rights and opportunities;
- ensure that policy, laws and regulations are coherent and enforceable in keeping with the principles of constitutionality, legality and proportionality;
- have, at its heart, co-regulatory and self-regulatory mechanisms which are credible, trusted and independent of the State, and of corporate and other sectarian interests.

3 Context/General Remarks

3.1 The draft 'Policy' claims to be premised on the need to deal with the "proliferation of illegal content in and the abuse of social media platforms which are at times used by sexual predators to lure their child victims and people who advocate racist ideologies and therefore use these platforms to undermine the government's agenda on social cohesion" and goes on to make alarmist generalisations about the "rise of self generated [sic] content, most of which involved school learners engaging in sexual activities and uploading images or video footages thereof" (p9[6]).

[6] All page number citations refer to the Government Gazette pagination.

3.2 The draft 'Policy', therefore, seems predicated on the following potential harms, none of which, *per se*, constitutes unprotected freedom of expression under the Constitution[7]:

- Proliferation of 'illegal' content in social media platforms;
- Abuse of social media platforms which are allegedly used by:
    - Sexual predators to lure child victims;
    - People who advocate racist ideologies;
- Online activities which undermine social cohesion;
- Proliferation of user-generated content, some of which includes 'sexting'.

3.3 Nowhere, however, does the 'Policy' define precisely what it means by "illegal content" or the "abuse of social media platforms"[8]. Nor does it provide any evidence in support of its assertion that the majority of user-generated content involves teenage sexting.

3.4 The Coalition is extremely concerned that a policy built on such sweeping and exaggerated foundations does not take into cognisance the real dynamics of online service provision or the real nature of the creation and consumption of online content. A clear grasp of the online environment, together with adequate empirical research into the extent of the 'problem', is needed before embarking on the complexities of creating responsive, appropriate and practical solutions towards promoting a safe online environment for users. We urge a policy response that is evidence-based, rational, proportionate and practicable.

3.5 The SOS Coalition is concerned that the draft 'Policy' seems at least partly informed by an undefined and indeterminate government "agenda" to drive "social cohesion". To our knowledge no such policy has been either debated or adopted, let alone the nature, scope and methods of promoting it. Whilst the SOS Coalition supports the notion of social cohesion, it believes this should encompass the entire polity of South Africa, and be based on a broad notion of the public interest. We believe that any narrow understanding of social cohesion is undemocratic and unconstitutional.

3.6 In any event, there already exists in South Africa both legislation[9] and institutions[10] to deal with and prosecute "child pornography" and hate speech. In addition, both the Internet Service Providers' Association (ISPA) and the Wireless Applications Service Providers' Association (WASPA), as well as the National Association of Broadcasters (NAB), have in place existing and effective co-regulatory codes of conduct, supported by operational enforcement procedures, to deal with the dissemination of 'inappropriate' content.

3.7 Whilst a number of governments and international entities share a concern about the impact of the proliferation of unregulated (and, indeed, largely unregulatable, the Coalition would argue) online content, most have focused on the protection of children rather than adults, and most have come to very different conclusions and recommendations from those of the Film and Publications Board.

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[7] RSA (1996) 'Constitution of the Republic of South Africa, 1996', Republic of South Africa, Pretoria, Section 16 (2).
[8] Themselves never defined in the policy.
[9] For example: RSA (2007) 'Criminal Law (Sexual Offences and Related Matters) Amendment Act', No 32 of 2007, Republic of South Africa, Pretoria, and RSA (2000) 'Promotion of Equality and Prevention of Unfair Discrimination Act', No 4 of 2000, Republic of South Africa, Pretoria.
[10] For example: the South African Human Rights Commission.

3.8 Such approaches include the ITU's Guidelines for Policy Makers on Child Online Protection[11], where the emphasis lies on stakeholder-supported enforceable codes of conduct, on education and awareness programmes, on widely publicised reporting and take-down mechanisms, and on the development and dissemination of free user-based content filtering software. Similar approaches feature prominently in a number of jurisdictions[12].

3.9 The Coalition is extremely concerned that the development and canvassing of this Draft Online Regulation Policy has taken place outside of, and without reference to, the recent national ICT Policy Review process. The recommendations of the ICT Policy Review Panel dealt extensively with content and its regulation, encompassing many of the same concerns and issues covered by this draft 'Policy'. The Panel's recommendations further explicitly address the self-same set of issues covered by this draft 'Policy'[13]. The resultant forthcoming government White Paper is still in formulation. We note, with dismay, that, despite being canvassed by the Panel, no formal submission from the Film and Publications Board was ever made into the process.

3.10 Similarly this Draft Online Regulation Policy appears to take no cognisance of the Cybercrimes and Related Matters Bill shortly to be released by the Minister for Justice and Correctional Services, and which will presumably impact substantively on the issues under consideration in this draft 'Policy'.

4 Legal Foundation of the Draft Online Regulation Policy

4.1 The Coalition wishes to expresses its serious concern that stakeholders are expected to comment on a draft 'Policy' that is premised on and refers to two unpublished documents, an "Online Content Regulation Strategy" and a "Films and Publications Amendment Bill" (p25).

4.2 It is impossible to comment effectively on a draft 'Policy' that is based on an unknown strategy and that refers to unknown legislative provisions.

4.3 Having said this, the Coalition is extremely concerned that much of the draft regulations contained in the policy are without clear legal foundation in the Film and Publications Act[14] as currently formulated and, hence, *ultra vires*, as we shall argue.

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[11] ITU (2009) 'Guidelines for Policy Makers on Child Online Protection', International Telecommunication Union, Geneva, available online at https://www.itu.int/en/cop/Documents/guidelines-policy%20makers-e.pdf. This work is supplemented by a range of related guidelines for parents, guardians and educators, for business, and for children themselves (available online at http://www.itu.int/en/cop/Pages/guidelines.aspx).

[12] See, for example: IGF (nd) 'Child Protection Online', Internet Governance Forum, available online at http://intgovforum.org/BPP2.php?went=22; OCSE (2013) 'The Online Media Self-Regulation Guidebook', The Office of the Representative on Freedom of the Media, Organisation for Security and Co-operation in Europe, Vienna, available online at http://www.osce.org/fom/99560?download=true; Byron, T (2008) 'Safer Children in a Digital World: The Report of the Byron Review, Department for Children, Schools and Families, London, available online at http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/DCSF-00334-2008.pdf.

[13] DTPS (2015) 'National Integrated ICT Policy Review Report', Department of Telecommunications and Postal Services, Pretoria, available online at http://www.ellipsis.co.za/wp-content/uploads/2015/01/National-Integrated-ICT-Policy-Review-Report-March-2015.pdf, pp 112-113.

[14] RSA (1996) 'Films and Publications Act, No 65 of 1996', as amended, Republic of South Africa, Pretoria.

4.4 The Draft Online Regulation Policy states that it relies on Section 18 (1) of the Act, which renders "any person who distributes, broadcasts or exhibits any film or game in the Republic" subject to prior registration and prior classification through the Film and Publications Board.

4.5 However, despite the 2009 amendments to the Act, there are a number of problems in attempting to extend the scope and mandate provided for under Section 18 (1) into the online world, as the draft 'Policy' does. Some of these difficulties can be traced back to the particular and complex formulations of the Act itself, while others lie in the draft 'Policy'.

4.6 Firstly, there are a number of definitional and scoping difficulties in the Act and, hence, the draft 'Policy'. Without clear and unambiguous definitions, law and regulation are ambiguous and, hence, unenforceable. Unenforceable laws and regulations in turn undermine the principle of legality and the rule of law.

4.6.1 The Act's definition of a game as "a computer game, video game or other interactive computer software for interactive game playing" (Section 1), as it stands, precludes any web-based gaming applications that do not require explicit software downloads, of which there are many thousands out in the market[15]. Regardless of the intrinsic merits, or otherwise (see below), of pre-classification of such games, the distinction appears arbitrary.

4.6.2 The Act's definition of a film as "any sequence of visual images recorded in such a manner that by using such recording such images will be capable of being seen as a moving picture and includes any picture intended for exhibition through any medium or device" (Section 1) also leads to definitional difficulties. Its implied scope appears to centre on downloadable or streaming audio-visual content of the kind available via sites such as Netflix, but would also include any audio-visual clip from a site such as YouTube. It also would appear to include any online still image, such as those posted on sites like Facebook, Instagram or Flickr - an extraordinarily wide scope of content.

4.6.3 'Distribution' is poorly defined, but appears to require some form of commercial transaction to be considered as having taken place[16]. Neither 'Exhibition' nor 'Broadcasting' (except in relation to broadcasters licensed by ICASA who are exempted from pre-classification[17]) are ever defined.

4.7 As the above analysis shows, there is considerable lack of clarity as to what content falls under Section 18 (1) of the Act and what does not, as well as to what the logical and substantive basis is for inclusion and exclusion. It is therefore the contention of the Coalition that the draft 'Policy' is open to legal challenge of being *ultra vires* the Act.

4.8 The inclusion of the requirement for pre-classification of "certain publications" is clearly *ultra vires*. The draft 'Policy' states that pre-classification is required for "any person who distributes or exhibits online any film, game, or certain publication in the Republic of

[15] See, for example: PC Gamer (2014) 'The 100 best free online games on PC', PC Gamer, 30 May 2014, available online at http://www.pcgamer.com/the-best-free-online-games-on-pc/.
[16] RSA (1996) 'Films and Publications Act, No 65 of 1996', As amended, Republic of South Africa, Pretoria, Sections 1 & 18A.
[17] eg RSA (1996) 'Films and Publications Act, No 65 of 1996', As amended, Republic of South Africa, Pretoria, Section 18 (6).

South Africa [including] online distributors" (p26). However, Section 18 (1) of the Act makes no mention of any 'certain publications', only requiring pre-classification for films and games.

4.9 There is also a definitional problem with the 'certain publications' itself. 'Publications' are very widely defined in the Act, but 'certain publications' is never defined in the Act or in the draft 'Policy'. It is therefore unclear, and, hence, open to legal challenge, as to what exactly comprises this 'certain' subset of the broader set of 'publications'.

4.10 Further, the Act only requires pre-classification in respect of any 'publication' in specified, exceptional cases (particular types of sexual conduct, propaganda for war, incitement to violence, and hate speech) (Section 16). Therefore, requiring pre-classification of all 'certain publications' under Section 18 (1), as the draft 'Policy' and the draft regulations do, is *ultra vires* the Act because it extends the regulations to cover content not envisaged in the Act, and which therefore falls outside the scope of the legal mandate of the Film and Publications Board.

4.11 The Film and Publications Act (Section 18 (1)) only requires distributors of films and games to register as distributors. Therefore, the provision in the draft regulations requiring all distributors of online content to register as distributors of publications (Section 5.1.1) is also *ultra vires* the Act.

4.12 The Film and Publications Act contains no provisions empowering the Film and Publications Board to engage in auditing of registered distributors, and only limited monitoring and enforcement powers (Section 15A). The powers contained in the draft regulations pertaining to auditing, monitoring and enforcement (Sections 6.3, 7.4 and 13) are, thus, again *ultra vires* the Act.

4.13 The draft regulations contained in the draft 'Policy' make several references to the distribution of online content in the Republic of South Africa. This raises both definitional and jurisdictional problems, given that the vast majority of online content is hosted under domain names registered outside the jurisdiction of the .ZA Domain Name Authority (ZADNA) (eg http://www.pornotube.com) or on servers physically located outside the borders of the Republic. Indeed, content may be hosted on servers physically inside the Republic but registered outside the jurisdiction of ZADNA, or *vice versa*. The Coalition is concerned that the draft regulations are silent on this important jurisdictional issue, and contain no provisions to address it.

4.14 Most importantly, the draft regulations are, in the view of the Coalition, unconstitutional. The Constitution of the Republic of South Africa provides for the freedom of expression (limited only in respect of propaganda for war, incitement to violence or hate speech), viz:

> ***16. Freedom of expression.***—*(1) Everyone has the right to freedom of expression, which includes—*
>
> *(a) freedom of the press and other media;*
>
> *(b) freedom to receive or impart information or ideas;*
>
> *(c) freedom of artistic creativity; and*

(d) academic freedom and freedom of scientific research[18].

4.15 The Coalition is concerned that the pre-classification ambit and wide-ranging scope of the draft regulations as a whole constitute interference in the right of freedom of expression as enshrined above, and hence is almost certainly unconstitutional. In addition, specific provisions of the draft regulations also appear to be unconstitutional.

4.16 The following requirements, inter alia, of the draft regulations would seem to be in violation of or an unreasonable limitation on the 'freedom of expression' clause of the Constitution as set out above:

- the requirement that any person who wishes to distribute a film, game or 'certain publication' must first register as a distributor and pay fees (Sections 5.1 & 7);
- the obligation to display the Film and Publications Board logo and classification rating on all digital content (Sections 5.1.9 & 5.3);
- the prohibition on the distribution of digital content unless it has been classified (Sections 5.4.3 & 6);
- the power granted to the Film and Publications Board to order an administrator of an online platform to take down content that the Board deems "potentially harmful and disturbing to children" (Section 7.4).

4.17 For the reasons set out above, the Coalition believes that the Draft Online Regulation Policy is lacking in proper legal context, is *ultra vires* the Film and Publications Act, and is in violation of or imposes unreasonable limitations of the right to freedom of expression in the Constitution.

4.18 Accordingly, the Coalition calls upon the Film and Publications Board to withdraw the Draft Online Regulation Policy in its entirety until these issues are resolved.

5 Definitional and Drafting Problems

5.1 The Coalition focuses in this section on the draft regulations and not on the Draft Online Regulation Policy in its entirety. Issues of principle and policy are addressed in subsequent sections of this submission.

5.2 The 'Definitions' section of the draft regulations, which contains only four entries, is problematic. Some, but not necessarily all, of these problems are highlighted here.

5.3 This means that a number of terms used in the draft regulations are not defined. These include:

- "authorised classification system";
- "certain publications";
- "clip";
- "community standard";
- "contact service";
- "exhibit";
- "illegal";

[18] RSA (1996) 'Constitution of the Republic of South Africa, 1996', Republic of South Africa, Pretoria.

- "prohibited";
- "social media";
- "storage facility";
- "streaming";
- "user-created content".

5.4 Only one definition (viz "Board") is reproduced from the Act. No others are reproduced, and there is no provision that terms not defined in the draft regulations (eg "publication") shall be deemed to have the same definition as in the Act. The Coalition views this as problematic.

5.5 The only new definition formally introduced in the draft regulations, that of "self-generated content or user-generated content (UGC)" is itself problematic for two reasons. Firstly, the draft regulations never uses the latter two terms (ie "user-generated content" or "UGC"). Instead it uses the undefined "user-created content" in several places. The Coalition prefers the term 'user-generated content', but points out that the scope of such content is extremely broad[19], rendering attempts to classify it highly problematic.

5.6 The term "publication" in the Act (and hence presumably applicable to the draft regulations) is defined as including "any message or communication, including a visual presentation, placed on any distributed network" (Section 1) is, in the view of the Coalition, impossibly wide-ranging. It would cover, for example, tweets, WhatsApp and Skype messages, Facebook posts and comments, YouTube uploads, Tinder hookups, blogs, podcasts, live streaming, even emails, and bring Intranets, closed user groups and private networks within its ambit. The Coalition views such a definition to be so broad and vague as to be meaningless and, hence, unworkable.

5.7 The term "distributor" is not defined in the draft regulations. It is only defined in the Act, and then only "in relation to a film" (Section 1), rendering its usage in the draft regulations out of context and hence meaningless. It appears that the draft regulations assume a very wide meaning for 'distributor', ranging from uploaders of user-generated content, through Internet Service Providers (ISPs) to providers of over the top (OTT) services. However, according to the Act, no provider of online content can be considered to be a distributor unless it "conducts business[20] in the selling, hiring out or exhibition of films" (Section 1). In the view of the Coalition, this definitional confusion makes the draft regulations largely unworkable.

5.8 Other definitions (eg "content provider") are introduced in passing in the draft regulations (Section 5.18), and then as a synonym for the inadequately defined "distributor". One online (but unclassified) definition of 'content provider' is a "firm which supplies text and graphics of articles on interviews, new developments, news stories, etc., that can be employed to make a publication or site more attractive and useful to its readers or visitors"[21]. This would seem to the Coalition to encompass a very different range of activities from what

[19] Defined in Wikipedia as "any form of content such as blogs, wikis, discussion forums, posts, chats, tweets, podcasting, pins, digital images, video, audio files, and other forms of media that was created by users of an online system or service, often made available via social media websites" (https://en.wikipedia.org/wiki/User-generated_content).

[20] It is unclear what 'conducts business' encompasses. Would this apply only to pay-per-view or paid downloads? Would it include services based on revenue models other than direct sales (eg Facebook)?

[21] Business Dictionary, available online at http://www.businessdictionary.com/definition/content-provider.html.

the draft regulations appear to consider a 'distributor'. Once again, in the view of the Coalition, this definitional confusion makes the draft regulations largely unworkable.

5.9 The draft regulations contain a number of background and explanatory sections that in fact either belong in the Explanatory Memorandum or duplicate formulations or issues set out there. It is the view of the Coalition that any discursive and explanatory text should be excised from a draft regulation and integrated and consolidated under an explanatory memorandum.

5.10 The Coalition is of the view that the issues set out above reflect poor drafting that does not adequately take the present or future realities of participation via online platforms into account, and recommends that the draft regulations be withdrawn in their entirety.

This submission of the Coalition now turns its attention to the substantive policy issues of the Draft Online Regulation Policy.

6 Platform-neutral Regulation

6.1 The Coalition supports the notion of platform-neutral regulation. We understand this to mean regulatory parity in the treatment of content regardless of its format or its mode of distribution. We believe that content should be judged by the same standards of appropriateness, whether it is online or offline, in digital or analogue hard-copy format. At the same time, we believe that the standards and measures applied to online, digital content should be no more stringent or onerous than those applied to other forms of audio-visual content.

6.2 Further, the Coalition believes that regulatory measures imposed to protect against 'inappropriate' or 'harmful' or 'illegal' content should adopt a far less sweeping, blanket approach. Instead they should be light-touch in nature, particularly targeted at protecting vulnerable individuals and communities, children in particular. In the case of adults, whatever measures are proposed should be aimed at enabling individuals to make informed choices about the appropriateness of any online content they consume.

6.3 The Coalition also believes that the standards and measures of what constitutes 'harmful' or 'undesirable' or 'illegal' content[22] needs in-depth and careful scrutiny, given that not all sections of our community necessarily share the same standards of propriety, and given that online communities are highly fragmented and almost impossible to track and manage. Such standards need to be carefully framed so that they are as generally and widely applicable as possible, recognise cultural diversity, and do not pander to narrow or sectarian interests. This means that 'mere offence' perceived by one section of our society does not constitute sufficient grounds for considering content 'inappropriate'. In addition, they should be framed in such a way, as far as possible, as to allow the notion of acceptability to evolve over time as culture and society shifts and changes. Any attempt to define a common set of minimum standards for online content needs to involve the active

[22] The terms are enclosed in quotes because the Coalition recognises the value-laden nature of each and the difficulty of arriving at a commonly agreed standard of definition.

participation of all stakeholders, including providers and users. Such a discussion further needs to take into account both the Constitution and its entrenched Bill of Rights, and existing legislation in this regard, such as the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000[23].

6.4 Further, the Coalition believes that any protective measures defined and imposed should be as minimal and least intrusive and onerous as possible (see the next section). This means that regulatory interventions should in all cases be proportionate to the extent of the 'problem', to the potential risks, and to the likely harm that will result were they not in place.

6.5 In addition, we support the adoption and implementation of measures to ensure that "any act against a child which is illegal in the real world, is illegal online, and that the online data protection and privacy rules for legal minors are also adequate"[24]. Conversely, any content and activity that is legal in the real world, should remain legal in the online environment.

7 Proportionate Intervention in the face of Unmanageable Volumes

7.1 The Coalition believes that it is essential that the Film and Publications Board recognises the challenges of dealing with the sheer volume of user-generated and other online content today, along with the borderless and globalised nature of the online environment.

7.2 For example, over 300 hours of content are uploaded on YouTube every minute of every day[25]. That translates to 500 000 years of content per annum - just on one online platform. Similarly (and these figures are now dated), in every minute of every day: 15 000 iTunes tracks are downloaded, 3 600 Instagram photos are uploaded, 278 000 tweets are shared, 1,8 million likes and 41 000 Facebook posts are recorded[26]. The sheer volume of this online content makes any attempt at comprehensive *ex ante* regulation, in the view of the Coalition, a complete impossibility.

7.3 Already the volumes are unmanageable. Research commissioned by the Film and Publications Board itself reveals that Apple chose "not to release approximately 101 000 games over its iTunes platform to the SA market as a direct result of the FPB's regulatory requirement which obliges it to submit each game for a rating prior to distribution"[27]. This suggests it is no longer technically or logistically feasible for distributors to carry the Film and Publications Board's classification ratings and logo on all their current offline content.

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[23] Available, as amended, online at http://www.justice.gov.za/legislation/acts/2000-004.pdf.
[24] ITU (2009) 'Guidelines for Policy Makers on Child Online Protection', International Telecommunication Union, Geneva, available online at https://www.itu.int/en/cop/Documents/guidelines-policy%20makers-e.pdf.
[25] YouTube (nd) 'Statistics', YouTube, available online at https://www.youtube.com/yt/press/statistics.html.
[26] Daily Mail (2013) 'Revealed, what happens in just ONE minute on the internet: 216,000 photos posted, 278,000 Tweets and 1.8m Facebook likes', Daily Mail, London, 30 July 2013, available online at http://www.dailymail.co.uk/sciencetech/article-2381188/Revealed-happens-just-ONE-minute-internet-216-000-photos-posted-278-000-Tweets-1-8m-Facebook-likes.html.
[27] Deloitte (2013) 'Market research on the prevalence of online and informal film and video game content distribution channels in South Africa', Deloitte, Johannesburg, available online at http://www.ellipsis.co.za/wp-content/uploads/2015/03/research_online_informal_distribution.pdf, p76.

7.4 This means that any regulatory intervention in respect of online content needs to be accompanied by a proper up-front regulatory impact assessment, taking into account both the rights and opportunities presented by the online environment, and the potential risks and harms. Such a regulatory impact assessment must, *inter alia*, take into account the range of applicable policy, legislation and regulations within the context of the existing institutional framework. Regulatory interventions need to be based on a clear cost-benefit analysis, accompanied by objective measures to assess effectiveness, and regularly monitored and evaluated.

7.5 Further, much online content is consumed cross-border. For example, approximately 60% of YouTube uploads are viewed outside the home country of the content creator[28]. The Film and Publications Board's own research report found that the majority of South Africans purchase online video and gaming content from "from established websites in foreign jurisdictions"[29]. This suggests the futility of attempting to regulate online content from within the narrow confines of a single country, and the need for global co-ordination and a unified approach to the regulation of online audio-visual content in collaboration with the international community.

7.6 Approaches to Internet censorship such as those adopted in countries like China, Ethiopia, Saudi Arabia, Syria, Russia and North Korea are widely considered to be authoritarian and anti-democratic, and would be unconstitutional in a country like South Africa, governed by the rule of law and guided by a Constitution that upholds a wide range of rights and freedoms.

7.7 Accordingly, the Coalition urges the Film and Publications Board to liaise and work with bodies such as the International Telecommunication Union and UNESCO to develop a globally harmonised set of standards and a common approach to dealing with the regulation of online content.

7.8 Furthermore, the challenge of such vast and unmanageable volumes of online content suggests that any blanket classification approach such as that proposed in the Draft Online Regulation Policy is entirely impractical and hence doomed to failure. Any approach to dealing with undesirable content needs to target those areas where greatest likely harm exists, and need to be proportionate to the carefully researched extent of the likely threat.

8 Scope of Regulation

8.1 The Coalition submits that the scope of the draft regulation is unworkable and unnecessarily broad. Attempting to include all "self-generated content uploaded on platforms such as You-Tube, facebook [sic] and Twitter, feature films, television programs [sic] and certain computer games which are distributed online by streaming through the internet" (p13) is both impossible in scope given the kinds of volumes noted above, but also unnecessarily intrusive.

8.2 Even the Australian Law Reform Commission, from which sections of this draft 'policy' were plagiarised (see Section 15 below), recognises that, "as it is impractical to expect all

[28] YouTube (nd) 'Statistics', YouTube, available online at https://www.youtube.com/yt/press/statistics.html.
[29] Ibid, p82.

media content to be classified in Australia, the scope of what must be classified should be confined to feature films, television programs and higher-level computer games"[30].

8.3 It is the view of the Coalition that the Draft Online Regulation Policy unreasonably attempts to extend its ambit to include user-generated content in all its forms. Given the impossibility of covering all online content, the Coalition recommends a differential approach, based on clear and objective criteria, to setting the scope of possible regulation. Again, even the Australian Law Reform Commission recognises the need for limitations in scope, noting that "obligations to classify content would not generally apply to persons uploading online content on a non-commercial basis"[31].

8.4 The Coalition thus submits that the default position should be that online audio-visual and textual content is ***not*** subject to prior classification. Criteria that would invoke the need for classification would need to be clearly and objectively stipulated, as well as be technology-neutral, and should be based on:

(1) genre of the content (ie feature films, games);
(2) status of the content (ie commercial - for sale or for hire);
(3) constitutional status of the content, very tightly and precisely defined, in respect of Section 16 of the Constitution;
(4) likely audience for the content (ie targeted at South African users).

9 Pre-publication Approach

9.1 The Coalition notes that the draft 'Policy' states that "it is the responsibility of the platform provider in consultation with the FPB to determine the scope of what must be classified" (p14). We reject the approach of the Draft Online Regulation Policy to push the responsibility for content classification onto Internet intermediaries and platform providers.

9.2 The Coalition further notes that the draft 'Policy' states that "all digital content in the form of television films and programmes streamed online via the internet shall first be submitted to the Board for pre-distribution classification" (Section 6). We submit that this violates the exemption of licensed broadcasters under the Film and Publications Act (Section 18 (6)). In addition it is unconstitutional in that it violates the constitutional provision requiring an "independent authority [ie ICASA] to regulate broadcasting in the public interest"[32], which in turn would include the regulation of all broadcast-like content.

9.3 The Coalition believes that pre-publication classification is unduly onerous on small-scale or non-commercial distributors of online content who lack the resources and personnel to comply with its administrative burdens.

9.4 The Coalition further notes that prior restraint of publication has previously been ruled by the courts to be impermissible. In 2007 the Supreme Court of Appeal ruled in favour of Midi Television on this very issue, noting that "the prior restraint of publication, though

[30] ALRC (2012) 'Classification — Content Regulation and Convergent Media: Summary Report', ALRC Report 118 Summary, Australian Law Reform Commission, Sydney, February 2012, available online at http://www.alrc.gov.au/sites/default/files/pdfs/publications/summary_report_for_web.pdf, p 15.
[31] Ibid.
[32] RSA (1996) 'Constitution of the Republic of South Africa, 1996', Republic of South Africa, Pretoria, Section 192.

occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice"[33]. In addition, in 2012 the Constitutional Court ruled Section 16 (2), inter alia, of the Film and Publications Act to be "constitutionally invalid, because it provides for prior restraint of publications based on vague and overly broad criteria" and pointed to the "dangers of prior restraint to freedom of expression generally, in any situation where it is not implemented only to prevent grave injustice and within tightly formulated parameters"[34].

9.5 Similarly the provisions of the draft regulations requiring prior registration of online content providers (Section 10) are both overly broad in application and constitute, in the view of the Coalition, an unconstitutional assault on the right to freedom of expression, and should be withdrawn.

9.6 Further the imposition of unspecified prescribed fees (pp 28 & 34-35) in relation to the distribution of online content constitutes an unduly onerous impediment on the exercise of freedom of expression and is, therefore, in the view of the Coalition, unconstitutional.

9.7 The Coalition therefore submits that the 'prior restraint of publication' approach of the draft 'Policy' in providing that it is impermissible to distribute digital content in South Africa unless such content is first classified and the classification is displayed on the content, is both inappropriate and unconstitutional, and should therefore be abandoned, except in the very few limited cases set out in 8.4 above. We therefore recommend that all 'prior restraint of publication' provisions of the draft regulations be withdrawn in full.

10 Limitation of Liability on Internet Intermediaries

10.1 The Coalition submits that Section 7 of the draft regulations constitutes an abrogation of the limitation of liabilities in respect of Internet intermediaries. Section 7.3 (p33) in particular provides that:

> *online distributors must ensure that they comply fully with their obligations as set out in section 24C of the Act by ensuring that they take reasonable steps as are necessary to ensure that their online distribution platforms are not being used for the purposes of committing an offence against children, and report suspicious behaviour by any person using contact services to the Board and South African Police Services.*

10.2 This provision of the draft regulations is *ultra vires* Chapter XI of the Electronic Communications and Transactions Act[35], which provides for limitation of liability of service providers, and in terms of which all members of the Internet Service Providers' Association (ISPA) are exempt, having been recognised by the Minister of Communications as an "industry representative body".

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[33] Supreme Court of Appeal (2007) 'Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)', (100/06) [2007] ZASCA 56; [2007] SCA 56 (RSA) ; [2007] 3 All SA 318 (SCA) (18 May 2007), Paragraph 15.

[34] Constitutional Court (2012) 'Print Media South Africa and Another v Minister of Home Affairs and Another', (CCT 113/11) [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) (28 September 2012), Paragraphs 113 and 107.

[35] RSA (2002) 'Electronic Communications and Transactions Act, No 25 of 2002, Republic of South Africa, Pretoria.

10.3 Further, the above provisions are in conflict with international good practice as enshrined in the 'Manila Principles on intermediary liability', which proceed from the following set of premises:

> *1. Intermediaries should be immune from liability for third-party content in circumstances where they have not been involved in modifying that content.*
>
> *2. Intermediaries must not be held liable for failing to restrict lawful content.*
>
> *3. Intermediaries must never be made strictly liable for hosting unlawful third-party content, nor should they ever be required to monitor content proactively as part of an intermediary liability regime*[36]*.*

10.4 The Coalition believes, in principle, that it is improper to hold Internet service providers, content aggregators and other Internet intermediaries liable for content provided by third parties, to which they merely provide access. Further, it is inappropriate to assign to them a monitoring and policing function that has no foundation in law.

10.5 The Coalition therefore submits that Section 7 of the draft regulations be withdrawn in its entirety.

11 Co-regulation

11.1 The Draft Online Regulation Policy claims to "introduce elements of co-regulation into the classification system" (p15). However, there is not a single element of co-regulation anywhere in the draft 'Policy'. Co-regulation usually involves the development and enforcement of a code of conduct or set of guidelines by a stakeholder, industry representative body, subject to regulatory approval.

11.2 There are numerous examples of effective co-regulation in South Africa: inter alia, the Broadcasting Complaints Commission of South Africa (BCCSA); the Internet Service Providers' Association (ISPA); the Wireless Applications Service Providers' Association (WASPA). All of these operate approved, enforceable and effective codes of conduct covering the conduct of their members, including in respect of the dissemination of online content.

11.3 It is the view of the Coalition that a true co-regulatory approach, working with content-providers and online intermediaries to develop, approve and apply an appropriate code of conduct or set of guidelines is far preferable to the top-down authoritarian approach adopted in the draft regulations. The Coalition notes that the Film and Publication Board's own research recommended just such a partnership with these self- and co-regulatory bodies[37].

11.4 In this regard, the Coalition notes and welcomes the recently announced Memorandum of Understanding between the South African National Editors' Forum and the Film and Publications Board as an example of precisely the kind of platform-neutral co-

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[36] The 'Manila Principles on intermediary liability' (https://www.manilaprinciples.org/) have been endorsed by over 50 organisations, including Article 19, the Association for Progressive Communications, the Electronic Frontier Foundation (US), ISPA and Network Platforms South Africa.

[37] Deloitte (2013) 'Market research on the prevalence of online and informal film and video game content distribution channels in South Africa', Deloitte, Johannesburg, available online at http://www.ellipsis.co.za/wp-content/uploads/2015/03/research_online_informal_distribution.pdf, p3.

regulatory mechanisms we believe are needed - albeit that newspapers, including online newspapers, are specifically excluded in law[38] from the provisions of the draft regulations. Further consideration, however, needs to be given as to how to address the rights (and any obligations) of the non-mainstream press, including bloggers and citizen journalists.

11.5 There are, further, a number of international voluntary self-regulatory codes of conduct and guidelines in existence, covering appropriate content in the main. These include the YouTube Community Guidelines[39] and Play Store Ratings[40] and the Facebook Code of Conduct[41].

11.6 It is the view of the Coalition that the Board should engage with major international online content platforms with a view to recognising and approving and harmonising their self-regulatory guidelines and codes of conduct. Again this was one of the key recommendations, seemingly not adopted, of the Film and Publication Board's own research[42].

11.7 In addition, it is the view of the Coalition that the Board should provide for the evaluation and endorsement of a range of international and globally harmonised classification models, such as the International Age Rating Coalition (IARC) and the Pan European Game Information (PEGI). Such endorsement will prevent regulatory duplication and lessen the regulatory burden on the Board, and on content providers and content intermediaries.

11.8 The Coalition notes that the ITU also endorses a co-regulatory approach, "both in terms of helping to engage and sustain the involvement of all relevant stakeholders and in terms of enhancing the speed with which appropriate responses to technological change can be formulated and put into effect"[43].

11.9 The Coalition therefore believes that the complex nature of the online content environment calls for a multi-stakeholder co-regulatory approach. We therefore call on the Film and Publications Board to engage substantively in self-regulatory and co-regulatory approaches for the control of 'inappropriate' online content.

12 Notice and Take-down

12.1 Rather than the 'prior restraint of publication' approach that underpins the draft 'regulations', the Coalition recommends a notice and take-down approach be adopted as the central procedure towards the management, classification and removal of undesirable online

[38] RSA (1996) 'Films and Publications Act, No 65 of 1996', As amended, Republic of South Africa, Pretoria, Section 16 (1).
[39] YouTube (nd) 'Community Guidelines', YouTube, available online at http://www.youtube.com/yt/policyandsafety/communityguidelines.html.
[40] Google (nd) 'Content ratings for apps & games', Google, available online at https://support.google.com/googleplay/android-developer/answer/188189?hl=en.
[41] FB (nd) 'Code of Conduct', Facebook, available online at http://investor.fb.com/documentdisplay.cfm?DocumentID=10737.
[42] Deloitte (2013) 'Market research on the prevalence of online and informal film and video game content distribution channels in South Africa', Deloitte, Johannesburg, available online at http://www.ellipsis.co.za/wp-content/uploads/2015/03/research_online_informal_distribution.pdf, p3.
[43] ITU (2009) 'Guidelines for Policy Makers on Child Online Protection', International Telecommunication Union, Geneva, available online at https://www.itu.int/en/cop/Documents/guidelines-policy%20makers-e.pdf.

content, via an independent transparent process of arbitration. This would entail the consultative development of a clear, objective and evidence-based set of criteria for the classification or removal of undesirable online content, preferably via a co-regulatory approach as suggested in Section 11 above.

12.2 What is required, therefore, is a complaints-based mechanism that would allow consumers of online content to lodge complaints in respect of the appropriateness of items of online content, which could potentially lead to take-down orders or the imposition of 'trigger warnings' or classification labels.

12.3 This too is in line with the approach recommended by the ITU, which envisages that a "mechanism is established and is widely promoted to provide a readily understood means for reporting prohibited content found on the Internet, for example, a national hotline which has the capacity to respond rapidly and have illegal material removed or rendered inaccessible"[44].

13 Parental Control Software

13.1 The Draft Online Regulation Policy recommends the use of content filtering software to control access to undesirable content. It states: "Internet intermediaries, including application service providers, host providers and internet access providers will bear the responsibility of putting in place content filtering systems to ensure that illegal content or content which may be harmful to children is not uploaded in their services" (p14).

13.2 The Coalition submits that such an approach constitutes an unwarranted interference in the freedom of choice of consumers of online content and an illegitimate limitation on the constitutional right "to participate in the cultural life of their choice"[45].

13.3 That being said, content filters do have a role to play in managing access to 'inappropriate' content. A number of existing examples of such user-controlled content filters can be found, for example, via YouTube Safety Mode or Google's search filters. The Coalition believes firmly that the adoption and implementation of any such filtering software should take place at the client side, at the discretion of the user and by consumer choice.

13.4 If the Film and Publications Board takes the need for freedom of choice and user discretion in respect of content filters seriously, it should consider developing and making available downloadable freeware that allows consumers full discretion in the setting and customisation of parameters in accordance with their online content consumption preferences and choices.

14 Awareness and Education

14.1 It is the considered view of the Coalition that the top-down and authoritarian approach embodied in the Draft Online Regulation Policy is inappropriate in a modern, democratic society protected by an enlightened constitution. Rather than pre-emptive censorship-style intervention, the Film and Publications Board should promote informed user choice in the

[44] Ibid.
[45] RSA (1996) 'Constitution of the Republic of South Africa, 1996', Republic of South Africa, Pretoria, Section 30.

consumption of online content and should encourage users to take responsibility for their choice of online content. This, too, was one of the recommendations of its own research[46].

14.2 The Coalition therefore calls for an approach to online content that is centred on the rights and opportunities of users, rather than weighted towards dealing with risks and harms.

14.3 The Coalition therefore endorses the approach recommended by the ITU, viz:

> *Draw on the knowledge and experience of all stakeholders and develop Internet safety messages and materials which reflect local cultural norms and laws and ensure that these are efficiently distributed and appropriately presented to all key target audiences. Consider enlisting the aid of the mass media in promoting awareness messages. Develop materials which emphasise the positive and empowering aspects of the Internet for children and young people and avoid fear-based messaging. Promote positive and responsible forms of online behaviour[47].*

15 Plagiarism

15.1 Finally, the Coalition feels it needs to draw to the attention of the Board that large portions of the explanatory memorandum in the draft 'Policy' have been plagiarised from a range of sources, principally the content classification report of the Australian Law Reform Commission, which, although endorsing a classification scheme, envisages one of a rather different nature. It is of grave concern to the Coalition that the prevalence of such plagiarism reflects a haphazard and slapdash approach to policymaking. Policy and regulation can never be a matter of copy and paste. It requires due consideration of the concrete realities of the South African context, along with meaningful engagement of the full range of stakeholders.

15.2 The table below presents some, but by no means all, examples of plagiarism in the Draft Online Regulation Policy.

Draft Online Regulation Policy	**Australian Law Reform Commission**[48]
• Platform-neutral regulation • Clear scope of the type of content to be classified • Co-regulation and industry classification • Regulatory Oversight and guidance by the FPB (pp 12-13)	• Platform-neutral regulation • Clear scope of what must be classified • A shift in regulatory focus to restricting access to adult content • Co-regulation and industry classification • Classification Board benchmarking and community standards • An Australian Government scheme • A single regulator (pp 13-14)

[46] Deloitte (2013) 'Market research on the prevalence of online and informal film and video game content distribution channels in South Africa', Deloitte, Johannesburg, available online at http://www.ellipsis.co.za/wp-content/uploads/2015/03/research_online_informal_distribution.pdf, p3.
[47] ITU (2009) 'Guidelines for Policy Makers on Child Online Protection', International Telecommunication Union, Geneva, available online at https://www.itu.int/en/cop/Documents/guidelines-policy%20makers-e.pdf.
[48] ALRC (2012) 'Classification — Content Regulation and Convergent Media: Summary Report', ALRC Report 118 Summary, Australian Law Reform Commission, Sydney, February 2012, available online at http://www.alrc.gov.au/sites/default/files/pdfs/publications/summary_report_for_web.pdf.

Draft Online Regulation Policy	Australian Law Reform Commission[48]
The key concern for these parents and learners was that whilst there is a need for adults to be free to make their own informed media choices and for children to be protected from material which may cause harm, there continues to be a community expectation that certain media content, including digital content, be accompanied by classification information based on decisions which reflect the community's moral standards (p10)	The major principles that have informed media classification in Australia—such as adults being free to make their own informed media choices, and children being protected from material that may cause harm—continue to be relevant and important. While a convergent media environment presents major new challenges, there continues to be a community expectation that certain media content will be accompanied by classification information, based on decisions that reflect community standards. (p10)
A strong underlying theme of many of the submissions, particularly from industry players, was that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content which is now available to South Africans. (p12)	A strong underlying theme of many submissions to this Inquiry was that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content now available to Australians. (p11)
Most online distributors and members of civil society drew attention to aspects of the classification and content regulation framework in that it is failing to meet intended goals, and that it creates confusion for media content industries and the wider community. (p11)	Respondents drew attention to aspects of the classification and content regulation framework that are failing to meet intended goals, and that create confusion for media content industries and the wider community. (p11)
The intention is to avoid inconsistencies manifest under the current classification regime and enable a new classification framework to be more adaptive to changes in technologies, products and services arising out of media convergence. (pp13-14)	The intention is to avoid inconsistencies manifest under the current scheme, and enable a new classification framework to be more adaptive to changes in technologies, products and services arising out of media convergence. (p14)

16 In Conclusion

16.1 Whilst the Draft Online Regulation Policy has been useful in stimulating public debate around the regulation of online content, the Coalition believes strongly that they adopt an inappropriate approach to the issue, that they are poorly drafted, unworkable, unlawful and unconstitutional.

16.2 Accordingly the Coalition calls upon the Film and Publications Board to withdraw the Draft Online Regulation Policy in its entirety.

16.3 Further the Coalition calls for a structured, participatory, stakeholder-based approach to the issue of online content, integrated into the ICT Policy Review process, and taking into account the substantive proposals set out above and contained in other stakeholder submissions.

16.4 In addition the Coalition calls for the Film and Publications Act to be revised in accordance with the forthcoming ICT White Paper, and harmonised with local and international good practice and legal and regulatory instruments.

16.5 Should the Film and Publications Board elect to hold hearings in respect of the Draft Online Regulation Policy, the Coalition requests the opportunity to engage with the Board and to present its views.

16.6 For further information, please contact the SOS Support Public Broadcasting Coalition via:

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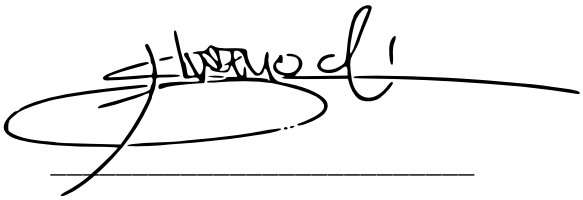
Kind Regards,



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Coordinator: SOS Coalition

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