



Attention: Ms Tsholofelo Mooketsi
Department of Telecommunications and Postal Services
Block B, iParioli Office Park, 1166 Park Street, Hatfield, Pretoria
Email: DiscussionPaper@dtps.gov.za

30 January 2014

Dear Ms Mooketsi

**WRITTEN REPRESENTATIONS BY THE SOS COALITION ON THE NATIONAL INTEGRATED
ICT POLICY DISCUSSION PAPER**

1. INTRODUCTION AND CONCERNS WITH THE PROCESS

- 1.1. These submissions are made by the SOS: Support Public Broadcasting Coalition (“the Coalition” or SOS”).

- 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 CapeTV; and a host of NGOs and CBOs including the Freedom of Expression Institute (FXI), Media Monitoring Africa (MMA), SECTION27 and a number of academics and freedom of expression activists.

- 1.3. SOS has made written submissions on the various ICT Policy Review Process documents, all of which include broadcasting, and has been an active participant in the process in regard to the development of converged ICT Policy.
- 1.4. In Notice No. 902 published in Government Gazette No. 38203 dated 14 November 2014, the Minister of Telecommunications and Postal Services (“the Minister”) invited the public to make written representations on the National Integrated ICT Policy Discussion Paper (“the Discussion Paper”). Written comments were invited to be submitted by 15 January 2015. The submission date was later extended to 30 January 2015. As the Minister is aware, a significant proportion of the Discussion Paper is devoted to broadcasting and/or broadcasting-like content as is clear from Chapter 5 of the Discussion Paper.
- 1.5. Consequently it was confusing to see, in Notice No. 1003 published in Government Gazette No. 38206 dated 12 November 2014 (“the DoC Notice”), the Minister of Communications (“the DoC Minister”) invited the public to make written representations on eight different broadcasting related policy issues itemised in the Notice. Written comments were invited to be submitted within 30 calendar days.
- 1.6. At the outset, SOS wishes to record its very great concern that the two processes referred to above by the Minister and the DoC Minister do not even make reference to each other when both include significant policy considerations in respect of broadcasting.
- 1.7. SOS is of the view that there is a need for a single converged ICT Policy Review Process (which must include broadcasting) to produce a White Paper and, thereafter, new updated ICT legislation, including in respect of the Broadcasting Act.
- 1.8. The Coalition is further of the view that electronic communication convergence is a technological reality that must be reflected in the political structures overseeing the sector. Consequently the Coalition calls for the reintegration of the Departments of Communications and Telecommunications and Postal Services into a single entity to avoid the duplication of tasks and political paralysis that has characterised the two

departments since their separation in May 2014. In respect of the DoC Notice, the Coalition notes with dismay that all of the issues listed in paragraph 2 of the Notice have already been addressed in both the ICT Policy Review Process Green Paper and Discussion Document and there is simply no pronouncement on how these separate and seemingly duplicative (and therefore wasteful) processes are to relate to each other.

- 1.9. In our view these processes are deeply flawed because it is clear that the two Departments are not working together in the public interest on broadcasting-related matters and consequently public and private resources are being duplicated with no clear benefit. We are extremely concerned that this is simply unworkable and cannot result in a joint ICT Policy Process given the political realities that exist between the two Departments.
- 1.10. We therefore call on all role-players to work together on a single integrated and converged ICT Policy Review process along the lines envisaged in the Discussion Document. Indeed we note Minister Cwele's exhortation to "move away from the existing silo policies for the telecommunications, broadcasting and Postal sectors to provide an overarching policy framework required in the ICT environment" in the first paragraph of the Minister's Foreword to the Discussion Document.
- 1.11. We do however think it is important, despite our concerns with the process which are set out above, to acknowledge the work done and indeed to congratulate the drafters of the Discussion Paper for a comprehensive and coherent document that clearly anticipates the charting of exciting new possibilities for the ICT sector. This is very welcome.
- 1.12. In respect of these submissions, we intend to deal with issues in the order they arise in the Discussion Document for your ease of reference. In this regard we would point out that SOS has a broadcasting, particularly a public broadcasting, focus. Nevertheless where we feel that important issues of principle or public information are at stake we comment on a number of non-broadcasting-specific issues too.
- 1.13. Lastly, given the importance of the policy issues at stake, we also call for the Draft White Paper to be published for public notice and comment.

2. AD PARAGRAPH 2.2 - REGULATORY PRINCIPLES:

2.1. While SOS supports all of the principles set out in this paragraph, we are extremely concerned that three critically important principles have not even been mentioned in this paragraph, namely:

2.1.1.the principle of the independent regulation of the ICT sector which is already enshrined in s192 of our Constitution in respect of broadcasting;

2.1.2.the principle of citizen empowerment to ensure that the ICT sector plays the critically important role of providing education and information to empower citizens to participate and input into democratic decision-making; and

2.1.3.the principle of promoting competition and a diverse range of services, both of which are required if the digital divide in South Africa is to be overcome and the ICT sector to take its rightful place in the South African economy.

2.2. Consequently we call for these three principles to be enshrined in the Draft ICT Policy White Paper.

3. **AD PARAGRAPH 3.1.1 – RECENT POLICY DEVELOPMENTS:**

Further to our submissions in paragraph 1, we note that the DoC Notice is not even mentioned in this section of the Discussion Paper despite this having predated the Discussion Document and we reiterate our concerns about the ongoing separation of the two Departments.

4. **AD PARAGRAPH 3.1.2 – STATE OF THE MARKET AND MARKET TRENDS:**

4.1. We reiterate the importance of competition and diversity of services in the ICT Sector and the need to avoid the silo-ing that negates the reality of technological convergence. Consequently we are extremely concerned that while this paragraph deals with a number of ICT related activities and markets, it makes no reference whatsoever to broadcasting, let alone dealing with the state of competition across the three tiers of broadcasting, namely commercial, community and public.

4.2. As it is, SOS is concerned by certain trends in the broadcasting sector which display anti-competitiveness. We are particularly concerned by the lack of competition in the commercial television sector and also the cannibalisation of Free to Air Television (public, commercial and commercial) by the dominant subscription television broadcaster, MultiChoice. We are concerned that this is not in the public interest and requires careful consideration as part of this ICT Policy Review process.

4.3. Consequently we ask that this be addressed in the Draft ICT White Paper.

5. AD PARAGRAPH 3.4.2 - MARKET REVIEWS:

5.1. We reiterate the importance of competition and diversity of services in the ICT Sector.

5.2. Consequently we would support option four which proposes that market reviews are conducted by both ICASA and the Competition Commission and that the Competition Commission is given additional responsibilities of defining the relevant markets.

6. AD PARAGRAPH 3.7.4.1 – SPECTRUM ALLOCATION:

6.1. We reiterate the critically important principle of the independent regulation of the ICT Sector, including in respect of radio frequency spectrum planning and management which is a key area of regulatory concern in the ICT sector.

6.2. We are also of the view that spectrum must be allocated in the most efficient way possible to ensure the maximum number of services available to the people of South Africa.

6.3. Consequently we support the following options put forward in this paragraph:

6.3.1. option two in respect of role functions, namely reducing the roles of the Minister in respect of spectrum issues, which roles would go to ICASA. In this regard, SOS would not support the establishment of a spectrum management agency or similar body. Existing roles that would be appropriate for the Minister to relinquish and ICASA to perform include: coordination and approval of spectrum plans, allocating spectrum for use by the security services, and developing plans for migration of services; and

6.3.2. option three in respect of spectrum allocation principles, namely spectrum band harmonisation. In this regard, SOS supports spectrum band harmonisation, including the adoption of contiguous band assignments, to promote sharing of spectrum.

7. AD PARAGRAPH 3.7.4.2 – SPECTRUM ASSIGNMENT AND LICENSING:

7.1. We are of the view that maximising profit from spectrum assignment and licensing is not necessarily appropriate, particularly in the context of spectrum to be used for audio-visual content services, given the need to promote a diverse range of services, including

across tiers of services that are not operated on a for-profit basis such as public and community broadcasting.

- 7.2. Consequently, we support option four, the hybrid model which would implement a hybrid spectrum licensing model combining elements of the current regime and market based and spectrum commons approaches.

8. AD CHAPTER 4 – POLICY OPTIONS FOR A DIGITAL SOCIETY

- 8.1. The SOS Coalition does not want to make specific comments on this chapter but would like to put forward its vision for a new digital content landscape. The Coalition campaigns for a landscape that ensures:

- 8.1.1. a diversity of programming and content that reflects the diversity of South Africa including those marginalised through discrimination based on race, class, gender, age, disability and sexual orientation;

- 8.1.2. increased local content;

- 8.1.3. increased African language programming and content;

- 8.1.4. increased public and community programming and content;

- 8.1.5. a variety of programming genres and innovation in terms of new formats as regards these genres;

- 8.1.6. that the majority of quality programming and content is free to air and accessible to all people living in South Africa;

- 8.1.7. dialogic communications, so that all people living in South Africa have the ability both to receive and impart information, knowledge and ideas and not just be the recipients of messages from a few information providers; and

- 8.1.8. the sustainability of all broadcasters including in particular free to air broadcasters as these broadcasters are more accessible to viewers.

- 8.2. The Coalition believes that the creation of such a content landscape will go a long way to building a new empowered and empowering digital society

9. PARAGRAPH 5.1.2 – PROJECTIONS:

- 9.1. At page 150 of the Discussion Paper, reference is made to the PWC Report's projections in the broadcasting and audio-visual content sector. SOS is concerned that the discussion paper contains no real discussion on the rise of pay-tv among middle-class households.

9.2. SOS reiterates its concern at certain trends in the broadcasting sector that display anti-competitiveness. Again, we are particularly concerned by the cannibalisation of Free to Air Television (public, community and commercial) by the dominant subscription television broadcaster - MultiChoice. We reiterate that this development is not in the public interest and requires careful consideration and to be dealt with fully as part of this ICT Policy Review process.

10. AD PARAGRAPH 5.2.1 – EXCLUSIONS FROM DEFINITIONS:

SOS supports the proposal made in the discussion paper that data or text services and those with the provision of audio-visual and audio material is incidental, remain excluded from the definition of content services.

11. AD PARAGRAPH 5.2.2 - FOCUS:

11.1. SOS supports the principles of technological and platform neutrality.

11.2. Consequently SOS supports option three which proposes that the South African definition of content services could combine the approaches adopted in Europe and proposed in Australia, thus stipulating that all broadcasting and broadcasting-like content services be covered in the definition, but that even the minimum obligations kick in only when identified thresholds are reached (including audience levels and/or revenue).

12. AD PARAGRAPH 5.2.3.1 - EXISTING ON DEMAND/INTERNET SERVICES:

12.1. The Discussion Paper proposes that Internet radio services might require to be licensed.

12.2. SOS would not support this unless such services reach a threshold of audiences/income in South Africa.

13. AD PARAGRAPH 5.2.3.3 – THE INTERNET IS GLOBAL:

13.1. The Discussion Paper asks how, if at all, should South African policy approach Internet content providers from outside the country.

13.2. Again, SOS would not support the licensing of Internet services unless such services reach a threshold of audiences/income in South Africa.

14. AD PARAGRAPH 5.3 – FOCUS OF REGULATION:

14.1. The Discussion Paper puts forward two options regarding objectives for regulation.

14.2. SOS supports option two which would require that the focus of regulation of commercial services would be limited to, for example: universal access, ownership plurality, the promotion of South African content, the protection of children and ensuring fair competition. The public broadcaster (and to a more limited extent, community broadcasters) would be responsible for fulfilling other objectives.

15. AD PARAGRAPH 5.4.1 – LICENCE CATEGORIES:

15.1. The Discussion Paper queries whether or not the existing categories of class and individual broadcast licenses ought to remain.

15.2. SOS thinks it is vital that the draft White Paper addresses the fact that while community broadcasting licences granted a so-called “class” licence, with the licensing process being ostensibly a registration process, this is in fact not the case. For all practical purposes community sound broadcasting services are licensed on an individual basis. That is, community broadcasters are considered and granted on an individual basis, and their licence conditions are specific to that particular community broadcasting service and are contained in a specific licence applicable to that broadcasting service only.

15.3. Consequently SOS is of the view that there ought to be a recognition that calling community broadcasting licences “class” licences is a misnomer and is essentially a fiction. Therefore, SOS believes that audio-visual content service licences should only be required on the basis of spectrum usage, which licenses should be individual and service specific.

16. AD PARAGRAPH 5.4.1.1 – OPTIONS: SPECTRUM LICENSES:

16.1. The Discussion Paper queries whether or not broadcasters should have their own spectrum.

16.2. SOS is of the view that in fact spectrum ought to be assigned to infrastructure licensees with stringent obligations being placed upon them to carry licensed audio-visual providers, including specific protections to ensure equitable treatment as between such providers.

17. AD PARAGRAPH 5.4.1.2 – OPTIONS: LICENCE CATEGORIES:

- 17.1. The Discussion Paper queries whether or not new categories of broadcasting and content service licences should be set out. SOS notes that such an attempt was made in section 5 of the Broadcasting Act, 1999. These categories or classes were found to be unworkable due to the pace of technological developments, leading to innumerable permutations of potential services.
- 17.2. Consequently, SOS recommends the simplification of the licensing process, as part of option three, to focus primarily on a single service namely an audio-visual content service in recognition of the reality of technological convergence. Within this broad category, distinctions can be made between linear and non-linear services.

18. AD PARAGRAPH 5.4.1.4 – OPTIONS: PROCESS AND REQUIREMENTS:

- 18.1. The Discussion Paper queries which licenses ought to require an Invitation to Apply (ITA). SOS is of the view that in the digital era, the concept of requiring an ITA is outdated because it is premised on spectrum scarcity. This ceases to be as significant a problem in a digital broadcasting environment where spectrum usage is significantly more efficient. ITA's can be contrary to the public interest. In particular, SOS is concerned that ITAs can become a bottleneck. The problem is that new operators need to wait for the Regulator to issue ITAs. Often there are unjustified delays in this regard.
- 18.2. Consequently, SOS is of the view that the only issue in respect of licensing audio-visual content services ought to be the question of spectrum availability and that licence applications ought to be able to be considered at all times. In our view, all audio-visual content services, across all three tiers namely public, commercial and community, ought to be required to meet some form of a public value test if they are to make use of scarce spectrum resources. Examples of the kinds of issues that such a public value test could consider include at least the following four aspects:
 - 18.2.1. levels of educational or news and information programming;
 - 18.2.2. promoting diversity in language use;
 - 18.2.3. promoting cultural diversity, including local content and independent production;
and
 - 18.2.4. promoting a diverse range of services that avoids duplicating what is already available.

Should there be no value in the proposed service, the licence should not be granted.

18.3. The Discussion Paper also queries whether or not there are instances when co-regulation could be adopted in respect of licensing. SOS is of the view that co-regulation consists of the following`;

18.3.1. Self regulation by a particular industry body with its own code and enforcement procedures;

18.3.2. A process for approval of the self regulatory code and enforcement procedures by the regulator

18.3.3. And, where an audio-visual content provider is not subject to self-regulation), a statutory code and enforcement procedures are in place;

SOS is of the view that co-regulation is a more appropriate concept in respect of content regulation.

18.4. SOS supports that licensing be undertaken by an independent regulator, that a body which operates in the public interest free from political and commercial interference in accordance with the process outlined in paragraph 18.2 above.

19. AD PARAGRAPH 5.4.1.3 – OPTIONS: MULTIPLEX (MUX) OPERATOR LICENCE:

The Discussion Paper queries if there should be a separate multiplex operator licence. SOS believes that in the interests of simplifying the licensing regime that there should NOT be a separate multiplex operator licence. Multiplex tasks should be part of the operations of the network service licence holder. The network service licence holder would need to manage the relationships between the various broadcasters on the MUX.

20. AD PARAGRAPH 5.4.1.4 – OPTIONS: PROCESS AND REQUIREMENTS:

SOS believes that in the interests of simplifying the licensing regime, the Regulator should do away with invitations to apply for licences. As discussed previously, licensing ought to be determined by spectrum usage and availability and a public value test across all three tiers of audio-visual content services – public, community and commercial. These include distinctions between linear and non-linear services (See 18.2 above) There should continue to be licences for network services operators.

21. AD PARAGRAPH 5.4.1.5 MULTI-CHANNEL BROADCASTING – AUTHORISATION VS LICENSING OF CHANNELS:

SOS supports option one network licences. Licences would be given to networked audio-visual services. ICASA would be required to review its current licence conditions

for terrestrial television broadcasters in order to ensure diversity across the network. Policy and legislation should specify that the network licence conditions should be adapted if a licensee introduces additional channels. Network licences should not preclude specific conditions being set for individual channels.

22. AD PARAGRAPH 5.5. THREE TIER SYSTEM

The Discussion Paper queries the three tier broadcasting system proposing that a fourth tier should be introduced i.e. a national/ provincial free to air (FTA) non-profit broadcaster tier. SOS is opposed to introducing a fourth tier. The Coalition believes that the community tier covers both geographical communities and community of interest audio-visual content providers. The proposed fourth tier falls under the community of interest category. SOS however does acknowledge that definitions for the community of interest tier could be strengthened to ensure that national and provincial FTA non-profit audio-visual services are adequately covered.

23. AD PARAGRAPH 5.6. PUBLIC BROADCASTING:

- 23.1. Although no question about this was posed in the Discussion Paper, SOS believes it critical that policy-makers consider the SOS's Vision Document's proposal that the SABC be transformed into a Chapter 9 institution. In order to bolster debate and discussion on this we set out the following excerpt from the SOS Vision Document:

The SABC as Chapter 9 institution

South Africa is a developing country with developing country challenges. These include high levels of poverty and illiteracy. Consequently, the SABC is, for many of South Africa's people, the only source of news and information. It therefore plays a critical public information role. A democracy cannot function effectively without an informed citizenry. The SABC is therefore crucial to the proper functioning of our democracy and, when it fails to function effectively, our democracy can be said to be under threat. As a young democracy South Africa has yet to develop a national culture which respects the genuine independence of bodies such as the SABC. Legal changes alone will not change this but can play an important role in helping to develop such a culture.

It is clear the current statutory regime is insufficient to protect the interests of the South African public. Consequently the SOS Coalition calls for the transformation of the SABC into a Chapter 9 institution as a way of protecting the SABC's independence. Chapter 9 of the Constitution provides for a number of state institutions that support Constitutional democracy, including an independent authority to regulate audio-visual content services (that is, ICASA), the Public Protector and the South African Human Rights Commission. These institutions are directly answerable to Parliament, and the Constitution specifically protects the appointments and

removals of Chapter 9 institutions' governing bodies from political and other interference.

The SOS Coalition is acutely aware that being a Chapter 9 body does not insulate an institution from:

- Suffering from ineffectual leadership and from institutional ineffectiveness; and*
- Institutional weaknesses arising out of, for example, a flawed corporate structure.*

However, the Coalition believes that the more active Parliamentary oversight role that is thrust upon Chapter 9 bodies would improve the SABC's responsiveness and accountability to the public, and that the institutional problems arising out of its public and public-commercial "split" could be addressed through amendments to its governing legislation, the Broadcasting Act.

The SOS Coalition is aware that making the SABC into a Chapter 9 institution would entail a Constitutional Amendment process requiring sufficient political support. Nevertheless, the SOS Coalition believes such an amendment process is critical if South Africa is serious about:

- Transforming the public broadcaster into a genuine means of empowering citizens; and*
- Wanting a public broadcaster that is committed to broad political and wide public interest.*

23.2. In this regard, SOS made detailed submissions on the kinds of changes to the Constitution are that necessitated by convergence and by the need to provide additional safeguards to the SABC in the Constitution in its 2013 submission to the Constitutional Review Committee of Parliament. For your ease of reference we set out these recommendations in full below, as a number of these impact on the proposal regarding the SABC as a Chapter 9 body too:

SOS'S PROPOSED AMENDMENTS TO CHAPTER 9

Introduction:

For the Review Committee's ease of reference we set out below the proposed amendments to or insertions in respect of sections: 181(1), 192, 192A, 193 and 194 of the Constitution, all of which are contained within Chapter 9 of the Constitution, in the manner of a Bill, that is:

*Words in **bold type** in square brackets [] indicate omissions from existing provisions*

Words underlined with a solid line indicate insertions in existing enactments

SOS's Proposed Amendments to Section 181(1) of the Constitution:

"Establishment and Governing Principles

181. Establishment and governing principles. - (1) *The following state institutions strengthen constitutional democracy in the Republic:*

- (a) The Public Protector.*
- (b) The South African Human Rights Commission.*
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.*
- (d) The Commission for Gender Equality.*
- (e) The Auditor-General.*
- (f) The Electoral Commission.*
- (g) The Independent Authority to Regulate Communications.*
- (h) The Public Broadcaster."*

SOS's Proposed Amendments to Section 192 of the Constitution:

*"Independent Authority to Regulate **[Broadcasting]** Communications*

192. **[Broadcasting] Communications Authority.**- *National legislation must establish an independent authority to regulate [broadcasting] communications in the public interest, and in particular:*

- (1) to ensure fairness and a diversity of views broadly representing South African society with regard to audio-visual content services; and*
- (2) to promote convergence and the efficient use of communications infrastructure and services."*

SOS's Proposed Insertion of Section 192A of the Constitution:

"Public Broadcaster

192A. Public Broadcaster. – National legislation must establish an independent national public broadcaster to provide audio-visual content services in the public interest and in accordance with its national public broadcasting mandate set out in such legislation."

SOS's Proposed Amendments to Section 193 of the Constitution:

***"193 Appointments.**-(1) The Public Protector, **[and]** the members of any Commission and of the Communications Authority and the Non-Executive Board members of the Public Broadcaster established by this Chapter must be women and men who-*

- (a) are South African citizens;*
- (b) and proper persons to hold the particular office; and*
- (c) comply with any other requirements prescribed by national legislation.*

(2) *The need for a Commission and the Communications Authority and the Public Broadcaster established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.*

(3) *The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.*

(4) *The President, on the recommendation of the National Assembly, must appoint:*

(a) the Public Protector, the Auditor-General and the members of-

(i) the South African Human Rights Commission;

(ii) the Commission for Gender Equality; [and]

(iii) the Electoral Commission[.]; and

(iv) the Communications Authority; and

(b) the Non-executive members of the Board of the Public Broadcaster.

(5) *The National Assembly must recommend persons-*

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote -

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission or of the Communications Authority or of a Non-executive Board member of the Public Broadcaster.

(6) *The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a)."*

SOS's Proposed Amendments to Section 194 of the Constitution:

*"194. Removal from office.- (l) The Public Protector, the Auditor-General, **[or]** a member of a Commission or of the Communications Authority, or a Non-executive Board member of the Public Broadcaster established by this Chapter may be removed from office only on-*

(a) the ground of misconduct, incapacity or incompetence;

*(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office.*

*(2) A resolution of the National Assembly concerning the removal from office of -
(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
(b) a member of a Commission or of the Communications Authority, or a Non-executive Board member of the Public Broadcaster must be adopted with a supporting vote of a majority of the members of the Assembly.*

*(3) The President-
(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal."*

24. AD PARAGRAPH 5.6.1 SABC: NATURE OF SERVICE

24.1. The Discussion Paper asks people to consider the option of establishing a public service publisher with the responsibility of "commissioning, promoting, aggregating and distributing local content, as well as with ensuring the survival of local content in the digital media environment." The proposal is for content to be made available "on a non-exclusive basis" across multiple platforms. SOS opposes this proposal. SOS notes the fact that was considered in the UK and rejected. SOS believes that this concentrates too much power and responsibility in a single institution.

24.2. However, SOS believes that it is important to set up a local content fund initially focused on supporting an efficient and effective digital migration process during the dual illumination period. Post the dual illumination period the fund should then focus on support for local content in the digital age more broadly. For ease of reference, SOS includes the summary of recommendations of this research:

- *A local content fund should be established to support an efficient and effective DTT migration process. The fund should then continue post dual illumination to drive a digital local content vision and strategy for the country.*
- *To speed up the establishment of a dedicated local content fund, the fund should be set up as a project of one of the existing public funding mechanisms. Existing funding mechanisms include the National Film and Video and Foundation (NFVF); the Industrial Development Corporation (IDC) Media and Motion Pictures Business Unit; the Department of Trade and Industry's (DTI) film rebate scheme and the Media Development and Diversity Agency (MDDA).*

- *These options were all explored including the successful DTI film rebate scheme. However, the IDC was seen as the most viable option. The IDC has the capacity and experience to administer funds, including funds that distribute grant funding. It could thus potentially establish and administer a local content fund. Over and above grant funding the IDC could offer loan financing and the expertise of its Media and Motion Pictures Business Unit.*
- *In terms of governance and management the research called for the following groupings to be represented on the board - the Electronic Communications Network Service (ECNS) licence holders (the funders of the fund, see below), producers, broadcasters, government representatives (from the Department of Arts and Culture and the MDDA) and independents (representing a combination of film school / training institutes and civil society). Each grouping should put forward two representatives to sit on the Board. A chair should be selected by board members from their number.*
- *The lion's share of the fund should come from contributions from electronic communication network service (ECNS) licensees. These licensees stand to directly benefit from a rapid and efficient digital migration process as they will get quicker access to high demand spectrum.*
- *The mandate of the fund should balance the need to ensure the production of popular local content that will drive set top box uptake and broader development goals.*
- *The fund should fund the production of audiovisual content on all platforms. In addition to local content production funding, it should fund strategic local content research, pilots, and the development of new formats across genres and very targeted mentorship and training programmes leading to production of local content. The majority of the funding should go to production of local content.*
- *The funds should be distributed to producers through a careful rules based approval system that limits the discretion of board members. For instance for production projects the rules should stipulate that the programming can only be distributed on DTT platforms (to drive DTT uptake), free to air (FTA) platforms and during primetime. Projects must have broadcaster approval and a multi-channel, multi-platform distribution plan.*
- *Funding should be primarily grant funding but could also include loan funding. Grants should not cover full project costs.*
- *Funds should be distributed to public, community and commercial audio visual content providers.*
- *In line with international best practice the fund must be committed to the principles of transparency and accountability. All funding documents and decisions must be freely available.*

25. 5.6.2 – OPTIONS: THE MANDATE OF THE SABC:

- 25.1. The Discussion Paper queries what the mandate of the SABC ought to be. SOS has considered this issue carefully and has proposed that the public mandate of the SABC ought to be set out in a Charter of the SABC. In the latest version of its Vision Document, SOS sets out its proposals for a new SABC Charter in Annexure 3 thereto and we provide it hereunder for your ease of reference. We recommend therefore that the following becomes the mandate of the SABC:

APPENDIX 3: PROPOSED CHARTER FOR THE SABC

The SOS Coalition proposes that a Charter such as the following be adopted consequent to extensive debate and discussion with citizens, audiences, interested stakeholders, etc.

The Charter of the Corporation sets out the public mandate of the SABC, which public mandate is to:

Promote the values of the Constitution and for this purpose to:

- *contribute to democracy*
- *promote respect for freedom of expression*
- *offer a forum for democratic debate*
- *reflect a range of opinions and of social, political, philosophical, religious, scientific and artistic trends*
- *reflect regional diversity*
- *give a voice to the poor and marginalised*
- *contribute to the development of an equal society, where all reach their full potential regardless of: race, social status, gender, ethnicity, age, culture, political belief, religion or sexual orientation*
- *safeguard, enrich and strengthen the cultural, political, social and economic fabric of the country*
- *reflect both the unity and diverse cultural, political, social and economic fabric of the country*
- *develop a strong and committed public broadcasting service which will service the needs of society*
- *ensure that public broadcasting services that meet the highest international technical standards are available to all*

Provide the public with programming of the highest quality and for this purpose to:

- *set industry standards for innovation, excellence, and creativity*
- *provide, in its public broadcasting services, radio and television programming that informs, educates and entertains*
- *provide a plurality of news and public affairs programming which:*
 - *meets the highest standards of journalism*
 - *provides fair, unbiased and explanatory analysis which is independent of those wielding public power*
 - *covers events in the country, Africa and the world*

- *ensure that public broadcasting services provide a reasonable, balanced opportunity for the public to receive a variety of points of view on matters of public concern, including through citizen-generated content*
- *cater for a broad range of programming, including drama and documentaries that cater specifically for the programming needs of children, women, the youth and the disabled*
- *include significant amounts of educational programming, both curriculum based and informal educative topics from a wide range of social, political and economic issues, including, but not limited to, human rights, health, early childhood development, agriculture, culture, justice and commerce contributing to a shared consciousness and identity*
- *include national sports' programming*
- *ensure programming is drawn from local, regional, national, continental and international sources*
- *ensure that public broadcasting services comply with the code of conduct for broadcasting*
- *be responsive to audience needs and account to the public on how to meet these needs*

Contribute to the development of the country's culture, languages and local cultural industries and for that purpose to:

- *encourage the development of original local programming content*
- *enrich the cultural heritage of the country by providing support for traditional and contemporary artistic expression*
- *ensure, as far as reasonably possible, that public broadcasting services provide a range of high-quality programming in all of the country's official languages to all citizen*
- *encourage the development of local content production throughout the country, particularly in marginalised regions*
- *to nurture the country's talent and carry out research and development for the benefit of audiences.*

25.2. In the Discussion Paper, various options are put forward regarding how the mandate should be developed.

25.3. SOS supports a variation of option one. We think it important that the mandate ought to be set out in law, albeit in a single place as opposed to the various sections scattered throughout the Broadcasting Act that, in fact, constitute the current mandate of the SABC. Further, we think that the legislation ought to provide for periodic and

regular reviews of the SABC's public mandate with public participation being statutorily required and enforced as part of that process.

26. AD PARAGRAPH 5.6.3 – OPTIONS: SABC DIVISION INTO PUBLIC AND PUBLIC COMMERCIAL DIVISIONS:

26.1. SOS is of the view that the SABC must return to the sharper focus on its public mandate and policymakers must recognise that the 1999 division of the SABC into public and public commercial divisions has never been operationalised. . SOS believes the reason is that these divisions are unworkable. It is simply not possible to separate auditing, operations, advertising and commissioning in one integrated business, as the SABC is, into two operational divisions.

26.2. Consequently SOS supports a hybrid of options two (remove divisions) and four (privatise commercial services). In this regard:

26.2.1. We are of the view that given the language requirements of the SABC's public mandate, it is not possible to privatise the SABC's commercial television station, namely SABC 3, without severely hampering the SABC's ability to meet its language mandate. Nevertheless, we are of the view that consideration ought to be given to privatising the SABC's three commercial radio services, namely 5 FM, Metro FM and Good Hope. While these radio stations provide a certain amount of entertainment, they do not assist the SABC greatly in meeting key public interest aspects of its public mandate.

26.2.2. However, in making the suggestion, we think it important to stress that policymakers must ensure that the significant monies that would be raised from privatising the three SABC commercial radio stations must be marked solely for use by the SABC in meeting its public mandate.

26.2.3. We are of the view that such a privatisation would put the SABC in a better position to meet its public mandate as a public broadcaster without the distraction of having to operate a separate commercial division which caters, essentially, for advertisers' requirements.

27. AD PARAGRAPH 5.6.3 – OPTIONS: FOREIGN SERVICES:

27.1. In relation to channel Africa and international radio services available on shortwave, satellite and Internet, the Discussion Paper puts forward various options. Frankly SOS strongly objects to option one in which it is envisaged that the SABC would continue to

administer foreign content services “on behalf of government”. In our view the SABC should have its own mandate to provide foreign services as part of its news and information mandate.

27.2. Consequently, SOS supports option two.

28. AD PARAGRAPH 5.6.3 – OPTIONS: SABC PARLIAMENTARY SERVICE:

28.1. SOS is of the view that coverage of Parliament is an essential aspect of the SABC’s public mandate given Parliament’s centrality to the vitality of our democracy.

28.2. Consequently, SOS supports option two – SABC mandated to cover Parliament.

29. AD PARAGRAPH 5.6.4.1 – OPTIONS: SABC - BROAD APPROACHES, FUNDING:

29.1. The Discussion Paper puts forward two broad approaches to funding – a dedicated fund where public funding is earmarked only for the SABC and a contestable fund where a fund would be established providing funding for the SABC and other entities including community broadcasting. SOS believes that it is preferable for the SABC to be allocated its own dedicated funding through Parliamentary grants. SOS thus supports option one. However, SOS believes that funding should not be delivered via a fund but directly to the SABC to ensure the Corporation’s day-to-day functioning. SOS believes that the SABC should be funded through a combination of licence fee funding, advertising and Parliamentary grants.

29.2. Over and above this funding, SOS believes that a separate local content fund should be established. This fund should be open to funding local content across all three tiers of audio-visual services and across multiple platforms, including by the SABC. See 24.2 for full explanation.

30. AD PARAGRAPH 5.6.4.2 – OPTIONS: COST OF SABC MANDATE AND WHAT SHOULD BE FUNDED:

The Discussion Paper states that government is exploring the development of a model which could be used to cost the mandate of the SABC not only for this policy review but into the future. The Paper asks should public funds be allocated generally to the SABC rather than to specific budget item lines (option one) or should funds be earmarked (option two). SOS believes that option one should be implemented.

31. AD PARAGRAPH 5.6.4.3 – OPTIONS: SABC FUNDING SOURCES:

The Discussion Paper specifically requests input on the ideal ratio of funding, whether the SABC’s commercial revenue should be capped and possible proposals for additional

funds. SOS believes that it is difficult to stipulate the ratio of public funding required save to say that it is critical that the SABC, as a first step costs its public mandate. Public funds should be allocated to the SABC if it can show it requires further funding to fulfil its public mandate. In terms of the issue of capping commercial funding, SOS believes that a cap should be placed on the SABC. SOS believes that the SABC should be allowed to access further funds through the establishment of a local content fund. See section 24.2.

32. AD PARAGRAPH 5.6.4.4 – SABC FUNDING MECHANISMS:

The Discussion Paper requests input on the issue of licence fees. SOS believes that the licence fee creates a direct link between citizens and the Corporation. Also, SOS has noted problems that have been created internationally when public broadcasters rely solely on Parliamentary grants. At a whim these can be reduced with devastating consequences e.g. in the case of the Dutch public broadcaster. SOS thus supports a mixed funding model including licence fee funding, Parliamentary grants and capped advertising. SOS thus believes that option one “Status Quo Tweaked” is preferable. SOS supports the four proposals put forward – that the definition of TV be expanded in light of convergence to include any device capable of receiving television; that subsidies such as support for the elderly on social grants should be recovered from government, that an automatic inflation-linked increase be created and that a due diligence on the collection process is conducted to address any inefficiencies.

33. AD PARAGRAPH 5.6.5 – SABC: REPORTING, OVERSIGHT AND ACCOUNTABILITY:

The Discussion Paper puts forward a number of options to strengthen reporting, oversight and accountability of the SABC. SOS supports all of these however we note that Parliament is not in fact mentioned in this section and it is critical that Parliament remains tasked with oversight functions in respect of the SABC and its public mandate.

34. AD PARAGRAPH 5.6.6 – SABC GOVERNANCE AND MANAGEMENT:

34.1. SOS has played a leading role in raising public awareness as to ongoing problems with the SABC’s governance and management particularly at Board and executive management level.

34.2. SOS supports option two which proposes to reduce the number of Board members of the SABC in accordance with widely accepted good governance principles which support smaller more accountable Boards of Directors. SOS suggests that the SABC Board be made up of the following board members:

34.2.1. seven non-executive members; and

34.2.2. two executive members, namely the chief executive officer (CEO) and the chief financial officer (CFO). Historically there has been conflict between the position of COO and CEO. SOS believes that the CEO should take overall responsibilities for the operations of the Corporation.

35. AD PARAGRAPH 5.6.6 – SABC: APPOINTMENT OF NON-EXECUTIVE MEMBERS OF THE BOARD:

35.1. SOS supports a hybrid of option one, the status quo, in terms of which Parliament calls for nominations and, after a public process, makes recommendations of members for appointment members for appointment to the President, and of option two which envisages the establishment of an appointment committee.

35.2. SOS has expended considerable energy on this issue. In the latest version of its Vision Document, SOS sets out its proposals for a new method of appointing non-executive members of the SABC Board in Annexure 4 thereto and we provide it hereunder for your ease of reference. We recommend therefore that the following becomes the process for appointing the proposed seven non-executive Board members of the SABC:

APPENDIX 4: PROPOSED PROCESS TO APPOINT THE SABC BOARD

The SOS Coalition proposes an appointment process such as the following be adopted consequent to extensive debate and discussion with citizens, audiences, interested stakeholders, etc. The SOS Coalition further supports this appointments process generally applying to the appointment of ICASA Councillors too.

Public Participation, Transparency and Political Consensus

The appointments process in respect of the SABC Board currently has insufficiently protected the public broadcaster from interference. To strengthen this process the SOS Coalition submits that Parliament needs to embrace the principles of maximum public participation, transparency and political consensus.

As regards maximum public participation Parliament needs to:

- *publish prominent advertisements in a number of high circulation national and regional newspapers and run a series of public service announcements across all SABC channels calling for nominations for potential board members*
- *give sufficient time for the nomination process*
- *appoint an appointment panel of civil society leaders to assist it in the process of short-listing, interviewing and recommending members of the SABC Board. The panel is to be made up of seven representatives of civil society, including:*
 - *a representative of a freedom of expression or other human rights organization*
 - *a media-related trade union representative*

- *a representative from the independent film and television production sector organization*
- *a broadcasting or media studies academic*
- *a freedom of expression, media or broadcasting lawyer*
- *an appropriately skilled economist with expertise in the media sector*
- *a representative of the Pan South African Languages Board.*

As regards maximum transparency, Parliament needs to:

- *publish the names of all nominees and those nominating them; including electronically on the Internet*
- *publish the long-list of candidates to be interviewed (as determined by it on the advice of the civil society panel) together with their CVs, including electronically on the Internet*
- *ensure interviews of long-listed candidates (which are to take place before the Parliamentary Portfolio Committee on Communications and the civil society advisory panel) are open to the public and to publicise these widely, including on SABC radio and television stations*
- *publish written reasons as to why the final shortlist of candidates was selected by the Parliamentary Portfolio Committee on Communications (as determined by it on the advice of the civil society panel), including electronically on the Internet*
- *publish the short-list of candidates for public comment before the Parliamentary Portfolio Committee on Communications makes recommendations to the National Assembly¹*

As regards Political Consensus, Parliament needs to:

ensure that no person can be appointed to the SABC Board without the agreement of:

- *at least five members of the civil society advisory panel*
- *at least one of the two largest minority parties represented in Parliament*

Criteria for appointment

Besides improving the actual appointments process (set out above), the criteria for appointment to the Board must be strengthened. In our view the criteria ought to be the following, namely that the Public Interest Representatives on the SABC Board must when viewed collectively:

- (a) *enjoy the confidence and trust of the broad spectrum of South African society*
- (b) *be broadly representative of South African society in terms of: race, gender, regional, economic and social interests*
- (c) *act as trustees of the public interest in that they are committed to fairness, freedom of expression, the right of the public to be informed, and openness and accountability*

¹ This is a recommendation made in – Parliament of the Republic of South Africa (2007) *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions.*

- (d) *have, collectively, qualifications and / or experience in at least the following areas: corporate governance, finance, broadcasting policy and regulation, journalism, the business of content production and the application of new technologies*
- (e) *broadly represent the following key constituencies and stakeholders in society including, but not limited to, business, labour, and NGOs active in the human rights field*

We further think it is important to protect institutional memory and to ensure the well-functioning of the Board by ensuring that Board appointments are staggered to ensure an overlap of terms of office of at least one third of Board members at any one time.

Another important issue regarding appointments is the issue of disqualification criteria. We think that the currently provisions in the Broadcast Act do not sufficiently protect the public from conflicts of interest which have arisen in relation to the previous two boards. Consequently we think that these should be bolstered to protect against political and / or commercial conflicts of interest too.

Disqualification criteria

A person may not be appointed as a Board member if he or she—

- (a) *is not a citizen of the Republic*
- (b) *is not permanently resident in the Republic*
- (c) *is a senior public servant above the level of national director*
- (d) *is employed as a member of a public body which funds or regulates the broadcasting industry*
- (e) *is a Member of Parliament, any provincial legislature or any municipal council*
- (f) *is a national office-bearer or senior employee of any party, movement or organisation of a party-political nature*
- (g) *has a direct or indirect financial interest in the broadcasting industry, other than a passive investment stake*
- (h) *is an un-rehabilitated insolvent*
- (i) *has been declared by a court to be mentally ill or disordered*
- (j) *has at any time been convicted, whether in the Republic or elsewhere, of:*
 - (i) *theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention of Corruption Act, 1958 (Act 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any other offence involving dishonesty; or*
 - (ii) *an offence under this Act*
- (k) *has been sentenced, after the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), to a period of imprisonment of not less than one year without the option of a fine*
- (l) *has at any time been removed from an office of trust on account of misconduct*

A person who is subject to a disqualification contemplated in subsection 3.5.1 (a) to (h) may be nominated for appointment as a Board member, but may only be appointed if at the time of such appointment he or she is no longer subject to that disqualification

If at any stage during the course of any proceedings before the Board it appears that any Board member has or may have an interest which may cause such conflict of interest to arise on his or her part

- *such Board member must forthwith fully disclose the nature of his or her interest and leave the meeting so as to enable the remaining Board members to discuss the matter and determine whether such Board member is precluded from participating in such meeting by reason of a conflict of interest; and*
- *such disclosure and the decision taken by the remaining Board members regarding such determination, must be recorded in the minutes of the meeting in question.*

If any Board member fails to disclose any interest as required by subsection (2) or, subject to the provisions of that subsection, if he or she is present at the venue where a meeting of the Board is held or in any manner whatsoever participates in the proceedings of the Board, the relevant proceedings of the Board will be null and void.

36. AD PARAGRAPH 5.6.6 – SABC: TERM OF OFFICE

SOS supports the proposals put forward in the discussion paper to keep the current term of office of SABC board members at five years but to put a system in place to ensure continuity on any board.

37. AD PARAGRAPH 5.6.6 – SABC: APPOINTMENT OF EXECUTIVE MEMBERS OF THE BOARD:

37.1. SOS has repeatedly argued in both Houses of Parliament and in various policy forums that a great deal of blame for the ongoing crises at a senior management level can be laid at Parliament's door for failing to address the *lacuna* that exists in the Broadcasting Act in that neither section 12 nor 13 specifies who is to appoint the executive members of the SABC Board.

37.2. As the drafters of the Discussion Paper are doubtless aware, this *lacuna* has resulted in, among other things: not a single chief executive officer finishing his or her contract since at least 2007, costly court cases involving numerous allegations of Ministerial interference and an inability of the Board and senior management of the SABC to function effectively together.

37.3. The non-executive members of the Board should be solely responsible for appointing the proposed two executive members of the Board, namely the Chief Executive Officer (CEO) and the Chief Financial Officer (CFO).

37.4. Needless to say, SOS is of the view that the Minister of Communications should have no say in respect of the appointment of executive members of the SABC Board.

38. AD PARAGRAPH 5.6.6 – SABC: Role of shareholder/Minister:

38.1. SOS strongly disagrees with the NCRF proposal that the Minister/shareholder be empowered to intervene and direct the board to take actions. Problems with Ministerial interference have been legion in the recent history of SABC and policy makers are urged to take decisive action to recommit the SABC to being a public broadcaster as opposed to a site of government interference.

38.2. SOS believes that the Minister's role should be limited to drafting the overall policy for the ICT sector including audio-visual content services, ensuring the sustainability of the SABC through the drafting of a new funding model and ensuring the Corporation's compliance with the Public Finance Management Act (PFMA).

38.3. ICASA should monitor content issues (including the SABC's licence conditions, local content regulations etc.) and the SABC's compliance with its Charter.

38.4. Parliament is then responsible for all other oversight of the SABC including directing the SABC Board and intervening when appropriate

39. AD PARAGRAPH 5.6.6 – OPTION: BOARD COMMITTEES

39.1. The Discussion Paper asks for comment on ways to involve audiences/ the public more formally in the SABC. SOS has debated these issues at length. Please see our views below copied from our SOS Vision Document.

Public

The SABC as the public's broadcaster needs to be accountable to the public.

The SOS Coalition notes that there are a number of existing opportunities for consultation with the public. These include opportunities for the public to debate broadcasting legislation, select the SABC Board, and opportunities to debate the SABC's editorial policies.

The SOS Coalition believes the ability of the public to hold the SABC accountable must be significantly strengthened to ensure active public engagement and an ability to significantly influence all aspects of public broadcasting.

The SOS Coalition therefore proposes a further range of public participation mechanisms including:

- *Public Editor / Office of the Public Editor:*
 - *Is an experienced journalist who has held a senior editorial position for at least five years in the print or broadcast media.*
 - *Is appointed by the Board and is accountable to the Board.*
 - *Is to be consulted on all editorial-related complaints involving the SABC that are laid with the BCCSA.*
 - *Is to adjudicate complaints regarding editorial content or conduct of the SABC that are laid with the SABC directly.*

- *The Editor in Chief of the SABC is required to consult the Public Editor on a regular basis regarding the SABC's overall editorial policy and direction.*
 - *Must ensure that the SABC's editorial policies and practices uphold the BCCSA's Broadcasting Code of Conduct and SABC Charter and promote the values of high quality programming and ethical standards of journalism.*
 - *Is required to promote dialogue between the public broadcaster and its audience(s), including through*
 - *addressing SABC audiences directly on radio and television current affairs programmes; and*
 - *through the publication of on-line opinions.*
 - *Is to submit annual reports to the Board, as well as to the National and Regional Stakeholder Committees, which reports are to be included in the Annual Report of the SABC.*
- *National Public Stakeholder Committee:*
 - *The National Public Stakeholder Committee is coordinated by the Board, and is made up of the SABC's key national stakeholders, including representatives from:*
 - *SABC staff unions.*
 - *Cultural industry representatives including in respect of:*
 - *independent producers,*
 - *script writers,*
 - *actors, and*
 - *technical services providers.*
 - *Educational, labour, business, sport and faith-based national bodies.*
 - *National NGOs and CBOs that deal specifically with:*
 - *youth,*
 - *women,*
 - *disabled persons,*
 - *public broadcasting or freedom of expression,*
 - *general human rights issues,*
 - *refugee matters,*
 - *social welfare matters, and*
 - *socio-economic issues.*
 - *The role of the National Public Stakeholder Committee is to ensure that the SABC is performing its public broadcasting role with specific reference to its programming, and to review the SABC's Charter periodically with a view to advising the Board and the Minister of*

Communications on changes required over time to ensure that it continues to provide an up-to-date public broadcasting mandate.

- *The National Public Stakeholder Committee should submit a written report annually to the SABC Board, which report is to be included in the SABC's Annual Report.*
- *In performing its tasks, the National Stakeholder Committee is required to promote dialogue between the public broadcaster and its various audiences and stakeholders including electronically.*
- *Provincial / Regional Public Stakeholder Committees*
 - *The Board is to coordinate the establishment and running of nine Provincial / Regional Public Stakeholder Committees, each of which is made up of key provincial / regional stakeholders, including:*
 - *Community-based regional or provincial groupings, and*
 - *Audience feedback panels.*
 - *The Provincial / Regional Public Stakeholder Committees should each submit a written report annually to the SABC Board and to the National Public Stakeholder Committee, which report is to be included in the SABC's Annual Report.*
 - *In performing its tasks, the Provincial / Regional Public Stakeholder Committees are required to promote dialogue between the public broadcaster and the various regions and provinces in South Africa on programming issues, including electronically.*

40. AD PARAGRAPH 5.7.1 - REACH OF COMMUNITY BROADCASTERS:

- 40.1. SOS supports the extension of coverage of community television to support provincial and even national community broadcasters of interest depending on spectrum availability.

41. AD PARAGRAPH 5.7.2 - OPEN ACCESS TV:

- 41.1. SOS believes that a model for open access TV should be explored further. ICASA's Digital Television Content Advisory Group (DTCAG) is putting similar proposals on the table. DTCAG is suggesting that the SABC adopt a channel commissioning model to create partnerships with public, private and community broadcasters and providers to ensure cost effective and efficient use of the SABC's DTT channel capacity.

42. AD PARAGRAPH 5.7.3 – COMMUNITY BROADCASTING: STRENGTHENING LICENSING AND MONITORING:

SOS supports the various suggested mechanisms for strengthening oversight and monitoring of community broadcasting as set out in this paragraph of the Discussion Paper.

43. AD PARAGRAPH 5.7.4 – COMMUNITY BROADCASTING: FUNDING AND SUSTAINABILITY:

43.1. SOS supports the various suggested support mechanisms for community broadcasting as set out in this paragraph of the Discussion Paper. However SOS is concerned that such mechanisms will be insufficient to address the sustainability crisis in community broadcasting sector.

43.2. Consequently, SOS also suggests that policy-makers consider the following additional mechanisms, namely, that:

43.2.1. community broadcasters could also access the proposed local content fund;

43.2.2. increased public funding for the Media Development and Diversity Agency;

43.2.3. The issue of public private partnerships for community broadcasters, particularly community television broadcasters, be squarely addressed. It is common knowledge that such partnerships are already operational. In our view, clear regulatory guidelines and principles must be laid down in order to ensure not only the financial sustainability of the community broadcasting sector but also to ensure that the fundamental principles of community broadcasting, namely, its not-for-profit nature and community involvement and control are retained in the public private partnership model. SOS also supports the exploration of partnerships with public and community organisations i.e. public-public and public-community partnerships.

44. AD PARAGRAPH 5.8 – PRIVATE BROADCASTING: OPTIONS FOR DIGITAL RADIO:

SOS supports option one in respect of digital radio. We endorse ICASA's decision not to make a determination on the switch off of AM and/or FM signals and to facilitate the licensing of DRM and DAB radio services alongside these.

45. AD PARAGRAPH 5.9 - COMPETITION RELATED ISSUES:

SOS believes that dealing with competition issues in the broadcasting sector is of critical concern. SOS has constantly called on ICASA to institute competition hearings. SOS believes that ex-ante regulations need to be instituted to ensure diversity of voice and ownership. These need to be instituted in terms of premium content, vertical integration, access to audiences and ease of switching services for customers.

46. AD PARAGRAPH 5.9.1 - COMPETITION BETWEEN FTA AND PAY TV SERVICES – PAY TV ADVERTISING RESTRICTIONS:

SOS believes that FTA broadcasters must be protected since they are the broadcasters that are most accessible to all citizens. SOS believes that there should be restrictions on subscription broadcasters' access to advertising. SOS thus supports Option 2 – increase the limits. However, SOS believes that these limits are not sufficient. We believe that subscription broadcasters should not have access to any advertising. Advertising revenues should be freed-up for FTA broadcasters.

47. AD PARAGRAPH 5.9.2 - FAIR COMPETITION IN THE FTA MARKET:

SOS believes that e.TV is correct in stating that the SABC has pursued anti-competitive practices. SOS thus supports option two – regulator/s to be required to address the issue. SOS believes that ICASA should take primary responsibility for this since ICASA has the specialist knowledge of the broadcasting sector. ICASA should conduct a hearing within a specified period to determine appropriate measures to be taken.

48. AD PARAGRAPH 5.9.3 – COMPETITION - EASE OF SWITCHING/ TECHNICAL ACCESS:

SOS believes this is an important competition issue. SOS supports option two – policy promotes open access/ interoperability. Option two stresses that the policy and linked legislation must include specific proposals.

49. AD PARAGRAPH 5.9.4 - COMPETITION - PREMIUM CONTENT:

Again SOS believes this is an important competition issue. SOS believes that ICASA and the Competition Commission needs to play a joint role in regulating this issue. SOS supports option four – policy sets out specific provisions.

50. AD PARAGRAPH 5.9.5 - COMPETITION – VERTICAL INTEGRATION:

50.1. SOS supports option two – strengthen provisions. Option two calls for specific provisions on vertical integration including investigating a wholesale content rights regime and policy provisions related to carriage of independent channels/ services and/ or cross-ownership / cross-platform rules.

51. AD PARAGRAPH 5.9.6 – COMPETITION – DISCOVERABILITY OF CONTENT

51.1. SOS supports the regulation of this issue on both linear and non-linear services. SOS supports the UK provisions that call for an EPG Code that deals predominantly with issues of prominence but also has requirements for fair competition.

52. AD PARAGRAPH 5.10.1 – DIVERSITY: OWNERSHIP:

SOS supports the general proposal put forward in this paragraph of the Discussion Document that ICASA should be given the power to determine ownership limitations subject to a statutory obligation to develop a diversity of voices test that can be used to assess the diversity of available broadcasting and audio-visual services periodically. Nevertheless, SOS proposes to indicate its preference for the kinds of ownership restrictions that ICASA should be regulating for, in the following paragraphs.

53. AD PARAGRAPH 5.10.1.1 – LIMITATIONS ON THE NUMBER OF RADIO LICENSEES:

53.1. SOS supports the recommendations made by ICASA and identified in this paragraph of the discussion document, namely, to:

53.1.1. dispense with the distinction between AM and FM licences;

53.1.2. provide for a percentage-based rather than numerical limits and that “no person may control more than 35% of the number of commercial sound broadcasting services”; and

53.1.3. one person may not exercise control over more than two commercial radio licences that have the same areas or substantially overlapping areas.

53.2. However, SOS proposes that ICASA be given the power to grant exemptions from the above restrictions on good cause shown in the public interest.

54. AD PARAGRAPH 5.10.1.2 – LIMITATIONS ON THE NUMBER OF TELEVISION LICENCES:

54.1. SOS has long been concerned by the lack of public consultation at the time ICASA took the decision that ownership restrictions contained in the Electronic Communications Act, 2005 (“the ECA”) would not apply to subscription broadcasters. SOS supports such restrictions in order to ensure diversity.

54.2. Consequently, SOS supports option three put forward in the Discussion Paper, namely that the limitation would be increased to apply to all audio-visual content (linear) services, whether free-to-air or subscription.

55. AD PARAGRAPH 5.10.1.3 – CROSS-MEDIA CONTROLS:

55.1. SOS has long been concerned by the unworkability of the existing cross media control provisions in section 66 of the ECA and supports ICASA's proposed amended wording in respect of linear audio-visual content services and newspapers. However SOS is of the view that new media platforms require the expansion of certain definitions in respect of cross media control.

55.2. Consequently, SOS supports option four put forward in the Discussion Paper, namely, that limits would be extended beyond print media/broadcasting to cover other platforms distributing news, including news websites with significant public influence (measured by audience and/or revenue).

56. AD PARAGRAPH 5.10.1.4 – FOREIGN OWNERSHIP LIMITATIONS:

56.1. SOS supports ICASA proposed limitations in relation to foreign ownership of commercial audio-visual content service licensees. We are of the view that this is important for two reasons, namely:

56.1.1. to support Broad-Based Black Economic Empowerment (BBBEE); in that it is often difficult for BBBEE operators of Greenfields audio-visual content service licensees to find significant sources of funding within South Africa and increasing the levels of foreign investment make such investment partnerships possible; and

56.1.2. to support diversity in audio-visual content services in general; in the acts the broadcasting sector in South Africa is increasingly dominated by a single subscription group which wields significant market power, including in respect of advertising, and it is unlikely that a South African entity would, on its own, be able to make significant changes to the market structure.

56.2. Consequently, SOS supports option two sets out in this paragraph of the Discussion Paper, which proposes to increase the percentage of foreign ownership in commercial audio-visual content service licences.

57. AD PARAGRAPH 5.10.2 –DIVERSITY IN NEWS:

57.1. SOS has long had a concern to promote citizen-empowerment through the media to enable South Africa's people to participate fully in public decision-making and in the democratic process more generally. This, of necessity, means that news and current affairs programming is of the highest importance.

57.2. Consequently, SOS supports options three (strengthen ICASA's focus on diversity of news) and four (focus on local news) of the options put forward in this paragraph of the Discussion Paper. SOS welcomes these proposals and looks forward to the success of the proposed interventions.

58. AD PARAGRAPH 5.10.3 – LANGUAGE DIVERSITY:

58.1. SOS has long had a concern to promote citizen-empowerment through the media to enable South Africa's people to participate fully in decision-making and in the democratic process more generally. This, of necessity, means providing programming in peoples' home languages. However, we recognise that providing commercial programming in all 11 languages is extremely difficult due to market realities, particularly the requirements of advertisers.

58.2. Consequently, SOS supports option two of the options put forward in this paragraph of the Discussion Paper, which proposes to focus on the SABC's obligations to meet the language requirements of its public mandate by reviewing the SABC radio footprints to ensure expanded national access of all languages through the introduction of digital radio.

59. AD PARAGRAPH 5.10.4 – AUDIENCE DIVERSITY:

59.1. SOS believes that this is a critical issue and thus supports option one – ICASA to review and recommend. SOS refers the Department to the excellent research and specific audience diversity tool being designed by the Media Policy and Democracy Project based at Unisa and the University of Johannesburg.

60. AD PARAGRAPH 5.11 - SOUTH AFRICAN MUSIC AND TELEVISION CONTENT:

60.1. SOS is in support of option one – status quo plus. This option calls for the status quo to remain but with an emphasis on the need to continue to reinforce South African content and music in all genres with a graduated approach. The policy would make a commitment to explore pay or play options so that these could be implemented.

61. AD PARAGRAPH 5.11 NON-LINEAR /ON DEMAND SERVICES

61.1. SOS supports option three – content requirements only apply when on-demand services reach set revenue targets / subscription or user levels.

62. AD PARAGRAPH 5.12.1 – MUST CARRY RULES:

62.1. SOS has long had a concern about the increasing cannibalisation of free to air broadcasting by the dominant subscription broadcaster. Consequently we think it is

important to ensure that free to air broadcasting not be seen to be a “Cinderella” option for the poorer and the marginalised. We are of the view that all free to air programming must be available on a subscription broadcasters bouquet.

62.2. Consequently, SOS supports option four put forward in this paragraph of the Discussion Paper, which proposes that subscription broadcasters would be required to carry all free-to-air television licences.

63. AD PARAGRAPH 5.12.1 – MUST CARRY RULES – WHO PAYS?:

63.1. SOS has long had a concern about the increasing cannibalisation of free to air broadcasting by the dominant subscription broadcaster. This includes using extremely popular free-to-air television as key to its bouquet strategy without any real benefit accruing to the free-to-air television broadcasters.

63.2. Consequently, SOS supports option two put forward in this paragraph of the Discussion Paper, which proposes that free-to-air television broadcasters must be fairly compensated for carriage by subscription broadcasters according to the value they add to the networks. The regulator would be tasked with setting out the criteria for determining value.

64. AD PARAGRAPH 5.12.2 – PROMINENCE OF PUBLIC INTEREST PROGRAMMING/ PUBLIC BROADCASTERS:

SOS supports option one – prominence is regulated. This option calls for the Regulator to ensure prominence of certain content/ channels/ services and develop rules where necessary.

65. AD PARAGRAPH 5.12.3 – EVENTS OF NATIONAL INTEREST:

SOS supports option two – status quo plus. This would ensure that the following principles would be captured in policy and legislation: the rights must be made available at reasonable fees, pay-tv providers must finalise any sub-licensing agreement timeously and anti-hoarding provisions must be introduced.

66. AD PARAGRAPH 5.13 UNIVERSAL ACCESS: ACCESSIBILITY AND INCLUSION:

SOS sees this principle of universal access as critical and commends the Department on its list of options. SOS is in support of all the proposals put forward.

67. AD PARAGRAPH 5.14. – PROTECTION OF CHILDREN CLASSIFICATION AND CONTENT STANDARDS:

SOS notes the various recommendations that are put forward in this paragraph of the Discussion Paper.

67.1. SOS is of the view that content regulation ought to be primarily conducted through self-regulatory bodies and codes, provided these have been approved by regulators such as ICASA.

67.2. SOS is also of the view that there is a plethora of content regulatory bodies and codes which have been set up on an incremental and *ad hoc* basis without due regard for the increasing convergence of technologies and platforms and the challenges posed by widespread use of social media.

67.3. SOS is of the view that the current regime, where regulation and/or co-regulation is technology-specific, will prove unworkable in the era of convergence. Consequently, SOS is of the view that statutory bodies such as ICASA and the Film and Publications Board (“FPB”) together with self-regulatory bodies such as the Broadcasting Complaints Commission of South Africa (“BCCSA”) and the Press Council, as well as bodies such as the Internet Service Providers Association and the Wireless Applications Service Providers Association need to come together to develop a co-regulatory scheme for audio-visual content services across all platforms: print, cinema, broadcasting, Internet etc.

68. AD PARAGRAPH 5.15. – COMMERCIAL COMMUNICATIONS AND EDITORIAL INTEGRITY:

SOS notes the various recommendations that are put forward in this paragraph of the Discussion Paper. SOS agrees that mechanisms should be introduced requiring transparency so that viewers are aware when programming is advertiser funded – in the same way provisions are made to ensure awareness of sponsorship and rules set to enforce editorial independence of sponsored material.

69. AD PARAGRAPH 5.16. – PIRACY:

SOS notes and supports the various recommendations put forward in this paragraph of the Discussion Paper to combat piracy.

70. AD PARAGRAPH 6.9. – INTELLECTUAL PROPERTY REGIME IN SOUTH AFRICA:

70.1. SOS notes the various recommendations that are put forward in this paragraph of the Discussion Paper. SOS is concerned that intellectual property-related recommendations are not sufficiently broadcasting-focused and consequently they fail

to address the critical intellectual property rights issue that has hampered local content development. This is, the antiquated and out of date intellectual property rights regime applicable to the commissioning of independent television productions.

70.2. Two of SOS's members, namely the South African Screen Federation and the Independent Producers Organisation, together with the SABC, jointly commissioned a [research study](#)² into the intellectual property regimes applicable to commissioned programming by broadcasters internationally. The results of the study were published in 2009 but to date no action to implement the recommendations has been taken.

70.3. We urge the policymakers responsible for the development of the draft ICT White Paper to have regard to the research study and to consider including the recommendations thereof in the draft ICT White Paper in order to promote the growth of the South African television production sector.

71. AD PARAGRAPH 7.4. – OVERARCHING LEGISLATIVE FRAMEWORK:

SOS notes the contents of this paragraph in the Discussion Paper. SOS is perturbed that no mention is made of section 192 of the Constitution which requires the independent regulation of broadcasting. We are of the view that the constitutional requirements must form the basis of any discussion of the legislative framework for the ICT sector which, of necessity, includes broadcasting.

72. AD PARAGRAPH 7.4.3 – OVERSIGHT AND ACCOUNTABILITY:

72.1. SOS believes that oversight and accountability is critical. SOS suggests that Parliament develop an oversight system to track key performance indicators (KPIs) in the short, medium and long term for institutions such as the SABC, ICASA, DoC and the MDDA.

73. AD PARAGRAPH 7.5.1 – LICENSING AND REGULATION OF ICT SECTOR – SUBMISSIONS ON ICASA

73.1. The Discussion Paper stated that while submissions on the Green Paper indicated challenges with ICASA, none suggested concrete solutions to these, beyond the need to increase the capacity and ensure the Regulator is adequately resourced. The Discussion Paper asked for concrete recommendations. SOS recommends, as discussed above, that Parliament develops an oversight system to track KPIs in the short, medium and long term for ICASA. Also, as funding is often cited by ICASA as a

² <https://www.scribd.com/doc/254183693/UNLOCKING-THE-CREATIVE-AND-ECONOMIC-POTENTIAL-OF-THE-SOUTH-AFRICAN-TELEVISION-SECTOR-RECOMMENDATIONS-FOR-LEGAL-REGULATORY-AND-COMMISSIONING-PRACTIC>

reason for its failure to enforce monitoring and compliance, it ought to be allowed to keep licence and administrative fees.

74. AD PARAGRAPH 7.5.2 – ICASA: STATUS AND INDEPENDENCE:

74.1. SOS has long been concerned about the level of independence enjoyed by ICASA and therefore strongly supports the option put forward in this paragraph of the discussion paper which suggests amending the Constitution to reinforce ICASA's independence further. In this regard:

74.1.1. we reiterate not only the need to strengthen ICASA but also to provide for the SABC becoming a fully fledged Chapter 9 institution;

74.1.2. SOS is of the view that strengthening ICASA does not only include an amendment to section 181 of the Constitution but also consequential amendments to sections 192, 193 and 194. Further there is need for a new section hundred and 192A to provide the SABC; and

74.1.3. in an ICT environment characterised by technological convergence, it is simply not possible to separate out broadcasting from other audio-visual services provided over a range of platforms such as computers, mobile devices and the Internet. Consequently it is imperative that independent regulation of the electronic communications sector is protected under the Constitution and not only broadcasting as is currently the case.

74.2. SOS made detailed submissions on the kinds of changes to the Constitution are that necessitated by convergence and by the need to provide additional safeguards to the SABC in the Constitution in its 2013 submission to the Constitutional Review Committee of Parliament. For your ease of reference we set out these recommendations in full below:

SOS'S PROPOSED AMENDMENTS TO CHAPTER 9

Introduction:

For the Review Committee's ease of reference we set out below the proposed amendments to or insertions in respect of sections: 181(1), 192, 192A, 193 and 194 of the Constitution, all of which are contained within Chapter 9 of the Constitution, in the manner of a Bill, that is:

Words in **bold type** in square brackets [] indicate omissions from existing provisions

Words underlined with a solid line indicate insertions in existing enactments

SOS's Proposed Amendments to Section 181(1) of the Constitution:

"Establishment and Governing Principles

181. Establishment and governing principles. - (1) *The following state institutions strengthen constitutional democracy in the Republic:*

(a) *The Public Protector.*

(b) *The South African Human Rights Commission.*

(c) *The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.*

(d) *The Commission for Gender Equality.*

(e) *The Auditor-General.*

(f) *The Electoral Commission.*

(g) *The Independent Authority to Regulate Communications.*

(h) *The Public Broadcaster."*

SOS's Proposed Amendments to Section 192 of the Constitution:

*"Independent Authority to Regulate **[Broadcasting]** Communications*

192. **[Broadcasting] Communications Authority.**- *National legislation must establish an independent authority to regulate [broadcasting] communications in the public interest, and in particular:*

(3) *to ensure fairness and a diversity of views broadly representing South African society with regard to audio-visual content services services; and*

(4) *to promote convergence and the efficient use of communications infrastructure and services.*"

SOS's Proposed Insertion of Section 192A of the Constitution:

"Public Broadcaster

192A. Public Broadcaster. – National legislation must establish an independent national public broadcaster to provide audio-visual content services in the public interest and in accordance with its national public broadcasting mandate set out in such legislation."

SOS's Proposed Amendments to Section 193 of the Constitution:

"193 Appointments.-(1) *The Public Protector, **[and]** the members of any Commission and of the Communications Authority and the Non-Executive Board members of the Public Broadcaster established by this Chapter must be women and men who-*

(a) *are South African citizens;*

- (b) and proper persons to hold the particular office; and*
- (c) comply with any other requirements prescribed by national legislation.*

(2) The need for a Commission and the Communications Authority and the Public Broadcaster established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint:

(a) the Public Protector, the Auditor-General and the members of-

(i) the South African Human Rights Commission;

(ii) the Commission for Gender Equality; [and]

(iii) the Electoral Commission[.]; and

(iv) the Communications Authority; and

(b) the Non-executive members of the Board of the Public Broadcaster.

(5) The National Assembly must recommend persons-

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote -

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission or of the Communications Authority or of a Non-executive Board member of the Public Broadcaster.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a)."

SOS's Proposed Amendments to Section 194 of the Constitution:

"194. Removal from office.- (l) The Public Protector, the Auditor-General, [or] a member

of a Commission or of the Communications Authority, or a Non-executive Board member of the Public Broadcaster established by this Chapter may be removed from office only on-

(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of -
(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
(b) a member of a Commission or of the Communications Authority, or a Non-executive Board member of the Public Broadcaster must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President-
(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal."

74.3. It is also important to note that SOS supports option three of the Discussion Paper which, *inter alia*, specifically recognises ICASA's discretion as to how it addresses Ministerial policy directions.

75. AD PARAGRAPH 7.5.3 – ICASA: OVERSIGHT AND ACCOUNTABILITY:

75.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

75.2. SOS supports the recommendations regarding additional reporting requirements for ICASA.

75.3. SOS is further of the view that the current performance management system provided for in section 6A of the ICASA Act, 2000 ("the ICASA Act") is unconstitutional due to the role that is played therein by the Minister. Consequently, SOS strongly urges policymakers to consider the recommendations of the Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, 2007, at pg. 203, in which it is recommended that the provisions relating to ICASA's performance management system "should be revised to remove the role of the Minister in this regard". We

concur with this recommendation and continue to be of the view that the 2014 amendments to section 6A of the ICASA Act do not go far enough to address the constitutionality concerns regarding Ministerial involvement. SOS is of the view that the performance management system ought to be managed entirely by Parliament without Ministerial involvement at all.

76. AD PARAGRAPH 7.5.4.1 – ICASA: RESPONSIBILITIES:

SOS notes the proposals put forward in this paragraph of the Discussion Paper and supports all of them.

77. AD PARAGRAPH 7.5.4.2 – ICASA: SPECTRUM MANAGEMENT:

77.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

77.2. SOS supports option one as proposed in this paragraph of the Discussion Paper, in terms of which ICASA would retain responsibility for managing the frequency spectrum but would be required to strengthen its capacity in this regard.

78. AD PARAGRAPH 7.5.4.3 – ICASA: COMPLAINTS AND COMPLIANCE:

78.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

78.2. SOS supports option one as proposed in this paragraph of the Discussion Paper, in terms of which ICASA would retain responsibility for establishing a Complaints and Compliance Committee.

78.3. However, SOS is of the view that ICASA's monitoring and enforcement capabilities must be significantly overhauled and strengthened so that there is not such a reliance on complaints-driven enforcement but that ICASA itself can enforce compliance with laws, regulations and licence conditions arising out of its own monitoring activities.

79. AD PARAGRAPH 7.5.5 – REVIEWING ICASA'S DECISIONS:

79.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

79.2. SOS supports option one as proposed in this paragraph of the Discussion Paper, in terms of which only a court can review ICASA decisions.

80. AD PARAGRAPH 7.5.6 – ICASA STRUCTURE:

80.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

80.2. SOS generally supports the current ICASA councillor appointment procedures set out in section 5 of the ICASA Act, subject to:

80.2.1. suggestions for strengthening the public participation and transparency thereof as set out in paragraph 35.2 above for SABC non-executive Board members and which we reiterate ought to apply to the ICASA councillors' appointment process, are implemented, and

80.2.2. amendments being made thereto to ensure that the appointing authority is the President and not the Minister. In this regard, SOS is of the view that the current appointment provisions system provided for in section 5 of the ICASA Act are unconstitutional due to the role that is played therein by the Minister. Consequently, SOS strongly urges policymakers to consider the recommendations of the Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, 2007, at pg. 202/3, in which it is recommended that the provisions relating to ICASA Councillors' appointments "be reviewed to support and assert the Authority's independence further.... The Committee recommends that the legislation be amended as follows: i. The President, on the recommendation of the National Assembly, should appoint the councillors. ii. regarding qualifications of councillors for appointment, at least a third of those appointed should have technical expertise. This will obviate the need for technical advisers". We concur with these recommendations.

80.3. Consequently, SOS supports option one as proposed in this paragraph of the Discussion Paper provided the above suggested changes are implemented.

81. AD PARAGRAPH 7.5.7 – ICASA FUNDING:

81.1. To protect ICASA's independence SOS supports option two – self-funded. This option calls for ICASA to be completely self-funded. Its budget however would still be approved by Parliament and it would be required to hand over surplus funds collected.

82. AD PARAGRAPH 7.6 – SELF-REGULATION AND CO-REGULATION:

82.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

82.2. SOS reiterates that it is of the view that content regulation ought to be primarily conducted through self-regulatory bodies and codes, provided these have been approved by regulators such as ICASA.

82.3. SOS also reiterates its view that there is a plethora of content regulatory bodies and codes which have been set up on an incremental and *ad hoc* basis without due regard for the increasing convergence of technologies and platforms and the challenges posed by widespread use of social media.

82.4. SOS reiterates that the current regime, where regulation and/or co-regulation is technology-specific, will prove unworkable in the era of convergence. Consequently, SOS is of the view that statutory bodies such as ICASA and the Film and Publications Board (“FPB”) together with self-regulatory bodies such as the Broadcasting Complaints Commission of South Africa (“BCCSA”) and the Press Council, as well as bodies such as the Internet Service Providers Association and the Wireless Applications Service Providers Association need to come together to develop a co-regulatory scheme for audio-visual content services across all platforms: print, cinema, broadcasting, Internet etc.

83. AD PARAGRAPH 7.7 – UNIVERSAL SERVICE:

83.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

83.2. SOS supports option two as proposed in this paragraph of the Discussion Paper, in terms of which the Universal Service And Access Agency (“USAASA”) would be dissolved and its existing:

83.2.1. regulatory functions transferred to ICASA; and

83.2.2. policy-making functions transferred to the Minister. In this regard, SOS reiterates the functional impossibility of having two separate Ministers be responsible for making policy with regard to universal service and access in respect of electronic communications given the technological reality of convergence between broadcasting and telecommunications.

84. AD PARAGRAPH 7.8 – COMPETITION:

84.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

84.2. SOS supports option two as proposed in this paragraph of the Discussion Paper, in terms of which both policy and the law should more clearly delineate their areas which would be subject to *ex ante* regulation and should outline other ways that ICASA and the competition commission could work together, including, for example, requiring

them to hold joint enquiries on certain issues or that ICASA must consult the competition commission in specific instances.

85. AD PARAGRAPH 7.9 – CONSUMER PROTECTION:

85.1. SOS notes the proposals put forward in this paragraph of the Discussion Paper.

85.2. SOS supports the implementation of both option one, maintaining the status quo of having both ICASA and the National Consumer Commission dealing with consumer protection issues as well as option three which would require the strengthening of ICASA's consumer protection function.

86. AD PARAGRAPH 7.11 – PROTECTION OF CHILDREN, CONTENT STANDARDS AND CLASSIFICATION:

86.1. SOS reiterates that it is of the view that content regulation ought to be primarily conducted through self-regulatory bodies and codes, provided these have been approved by regulators such as ICASA.

86.2. SOS also reiterates its view that there is a plethora of content regulatory bodies and codes which have been set up on an incremental and *ad hoc* basis without due regard for the increasing convergence of technologies and platforms and the challenges posed by widespread use of social media.

86.3. SOS reiterates that the current regime, where regulation and/or co-regulation is technology-specific, will prove unworkable in the era of convergence. Consequently, SOS is of the view that statutory bodies such as ICASA and the Film and Publications Board ("FPB") together with self-regulatory bodies such as the Broadcasting Complaints Commission of South Africa ("BCCSA") and the Press Council, as well as bodies such as the Internet Service Providers Association and the Wireless Applications Service Providers Association need to come together to develop a co-regulatory scheme for audio-visual content services across all platforms: print, cinema, broadcasting, Internet etc.

87. CONCLUSION

SOS thanks the Minister of Telecommunications and Postal Services for the opportunity to make these representations. Please do not hesitate to contact the writer should SOS be able to be of any further assistance.

Yours Faithfully,

A handwritten signature in black ink, appearing to be 'J. J. J.', with a long horizontal line extending to the right.

Sekoetlane Jacob Phamodi
Coordinator