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To: **The Office on Institutions Supporting Democracy (OISD)**
Parliament of the Republic of South Africa
Per e-mail: oisd@parliament.gov.za

Re: **Comments on the Process to Examine the Feasibility of a Single Human Rights Body (Deadline for Comments: Friday, 30 June 2017)**

From: **Advocate N L Badenhorst**
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Date: **30 June 2017**

ABOUT FOR SA:

1. *Freedom of Religion SA* NPC (2014/099286/08) (FOR SA) is a non-profit organisation that serves to protect and preserve the constitutional right to religious freedom, and the rights of religious communities, in South Africa (www.forsa.org.za).

2. FOR SA represents the views of over 6 million South Africans from a cross-spectrum of (including many of the major) churches, denominations and faith groups, who have authorised FOR SA to speak as a united voice on behalf of religious groups in South Africa on issues affecting their religious rights and freedoms.

3. So as not to unduly burden the current Submission, we do not herein include the names of all the churches, denominations, faith groups, organisations and individuals, represented by FOR SA herein. To the extent necessary however, this can be made available.

FOR SA's INTEREST IN THE MATTER:

4. In the course and scope our work as a legal advocacy organisation, FOR SA frequently deals and engages with (the work done by) Chapter 9 institutions, including in particular:

   4.1. The CRL Rights Commission (CRL);
   4.2. The South African Human Rights Commission (SAHRC); and
   4.3. The Commission for Gender Equality (CGE).

5. As such, we (and indeed our constituency) have a direct interest in the current Process to Examine the Feasibility of a Single Human Rights Body and the recommendations made – particularly in so far as it relates to, and impacts on, the CRL, SAHRC and CGE.

6. Having carefully considered both the *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions* dated 31 July 2007 ("the Asmal Report"), and the *Report: Workshop on Report of the Ad Hoc Committee on the Review of Chapter Nine and Associated Institutions* dated 11 September 2015 ("the Workshop Report"), we hereby submit our written comments which will focus primarily on the CRL, and to a lesser extent the SAHRC and CGE.

7. In addition, we would appreciate the opportunity to appear and make verbal submissions with regard to the Report and the proposal for a "Single Human Rights Body", at the appropriate time.

THE PROPOSAL FOR A SINGLE HUMAN RIGHTS BODY:

8. While we appreciate that there may be some advantages to amalgamating some of the existing Chapter 9 institutions, we do not support the collapsing of the CRL into a single human rights body, for the following reasons:

   8.1. Human rights and equality commissions (like the SAHRC, but also the CGE) typically adopt an individualistic approach to the issue of human rights that has its origin in Western thinking, and takes as its departure point the supremacy of the individual and his/her self-interest.

   8.2. In contrast, the CRL's constitutional mandate to "promote respect for the rights of cultural, religious and linguistic communities" (s 185(1)(a)), requires an entirely different approach, namely a communitarian approach which recognises the connection between the individual and the community. This approach is closely linked to the concept of "ubuntu", which is uniquely African in origin.

   8.3. In the circumstances, it is imperative that the SAHRC (and possibly the CGE), and the CRL, remain independent of each other, but co-operating with each other in instances of overlapping jurisdiction.

ISSUES COMMON TO THE CHAPTER 9 INSTITUTIONS UNDER REVIEW:

Appointment procedures (pp 21 – 26 of the Asmal Report)

9. A study of the enabling legislation of the different Chapter 9 institutions shows that there are indeed significant differences in the appointment processes of commissioners and members of the Chapter 9 institutions.

10. In particular, we note that while Commissioners of the SAHRC and the CGE are appointed by the President on recommendation of the National Assembly (sections 193(4) and (5) of the Constitution), the same does not apply in the case of the CRL. In terms of s 11 of the CRL Act, 94 of 2002 ("the CRL Act") the Minister appoints a selection panel, who then submits the names of the selected persons to the President, who then appoints the members of the Commission from those names.

11. In this regard, we agree with the Report's finding that while "*it would be incorrect to apply a 'one-size-fits-all' approach to appointments … a reasonable degree of consistency is required*"

(page 21), and propose that the enabling legislation of the different Chapter 9 institutions be considered for amendment accordingly.

12. With regard to the issue of ***Selection criteria*** (para 2.1 on page 21 of the Report), the following:

12.1. A real problem (particularly in the context of the CRL and the CGE) is the apparent lack of legal knowledge and expertise on the part of the Commissioners, even though their functions (to a large extent) require interpretation and application of legal principles and process. So, for example:

12.1.1. Of the twelve (12) Commissioners currently serving on the CRL, only one (1) appears to have a legal degree. (See http://www.crlcommission.org.za/commissioners.html);

12.1.2. Of the eight (8) Commissioners currently serving on the CGE, likewise only one (1) appears to have legal expertise. (See http://www.cge.org.za/commissioners/);

12.1.3. In stark contrast, of the eight (8) Commissioners currently serving on the SAHRC, six (6) have legal expertise. (See http://www.sahrc.org.za/index.php/about-us/commissioners)

12.2. In this regard, we propose that the selection criteria of Commissioners (and in particular, of the Chairperson and Deputy Chairperson of the various Commissions) be revised, such as to include (a preference for persons with the necessary) legal knowledge and expertise;

12.3. A further problem is that the majority of appointments on the Commissions, is for part-time (rather than full-time) Commissioners. The limited remuneration package offered to part-time Commissioners, and the time commitment required notwithstanding the fact that the position is "part-time" only, effectively bar suitably qualified professionals (such as lawyers) from applying for these positions.

13. With regard to the issue of ***Role of the President and Ministers*** in the appointment process (para 2.2 on page 22 of the Report), the following:

13.1. We share the Report's concern regarding the role given to Ministers in the appointment process of the CRL, and supports its recommendation that Ministers should play no role in the appointment procedure (and the amendment of the CRL Act accordingly).

14. With regard to the issue of ***Appointment of Chairpersons*** (para 2.4 on page 24 of the Report), the following:

14.1. We submit that a "*reasonable degree of consistency*" is required not only in respect of the appointment procedures for commissioners, but also in respect of the appointment procedures for the Chairpersons and Deputy Chairpersons of the various Commissions (and propose that the various enabling legislation be amended accordingly).

15. With regard to the issue of ***Public Participation in the Appointment Process*** (para 2.5 on page 24 of the Report), the following:

15.1. We have already appointed to the different procedure that applies for the appointment of Commissioners to the CRL. In terms of s 11(1)(d), the Minister must appoint "*a selection panel consisting of persons who command public respect for their fair-mindedness, wisdom and understanding of issues concerning South African cultural, religious and linguistic communities*", who will then put forward the selected names to the President for appointment.

15.2. In terms of the CRL Act therefore, the only time that the public gets to participate in the appointment process, is right at the beginning when advertisements are placed in the media and nominations for appointment to the Commission invited. Thereafter, the process is handed over to the "selection panel", who selects the names to be put forward to the President - without further notice, to, or input from, the public. This is deeply problematic.

15.3. While the CRL Act (in s 11) contemplates a process of public input and participation in obtaining the initial names to be put forward to the "selection panel", the appointment of the "selection panel" itself is entirely in the Minister's discretion and does not involve any process of public input or participation, which is further problematic.

16. In addition to the above issues (specifically dealt with in the Asmal Report), we wish to point out the following issues that are common to the CRL, SAHRC and CGE

Screening of Complaints:

16.1. The enabling legislation and/or complaint handling procedures to the enabling legislation of each of the CRL, SAHRC and CGE provide for the "screening" of complaints by the Commission. This means that, before a complaint can be accepted by the Commission for processing and investigation, the Commission has to satisfy itself that:

16.1.1. The complainant has the right or capacity to institute proceedings with the Commission (legal standing);

16.1.2. The nature of the complaint is such that it falls within the Commission's mandate and powers (jurisdiction);

16.1.3. The complainant has provided all the prescribed information, for purposes of the complaint;

16.1.4. The complaint has been lodged in the prescribed format or manner;

16.1.5. The complaint has been lodged within the appropriate timeline for the lodging of complaints (where appropriate).

16.2. In addition, the Commissions generally may (should) reject complaints that are:

16.2.1. Based on hearsay, rumour or media reports;

16.2.2. Couched in abusive, insulting, rude or disparaging language;

16.2.3. The subject of a dispute before another tribunal;

16.2.4. Anonymous;

16.2.5. Frivolous, misconceived, unwarranted, incomprehensible; or

16.2.6. Prescribed through passage of time.

16.3. In our experience however, very little screening, if any, of complaints take place and frequently the party against whom the complaint is made (the Respondent) is called upon to deliver a response to a complaint which should from the outset have been rejected by the Commission. For example:

16.3.1. In a recent case before the SAHRC, an atheist activist couple (who had never been visitors to, or members of, the church in question) lodged a complaint against a reputable church in Cape Town on the basis that the church's Biblical teachings with regard to the raising of children, violate the fundamental rights of children ("the Mosterts' case before the SAHRC"). In this case, a number of preliminary legal points were raised by the church, which in accordance with the general practice when *in limine points* are raised, should have been considered and decided by the Commission in the first instance, as they may well dispose of the matter altogether. Instead, the legal points, including *inter alia* the following, were either ignored or dismissed without reason:

16.3.1.1. The joinder of additional complainants without notice to the church either of the grounds on which such joinder was claimed, or making available to the church the representations made by such additional complainants against the church;

16.3.1.2. The fact that the SAHRC did not have exclusive jurisdiction, but was enjoined to liaise and co-operate with the CRL who had overlapping jurisdiction (which was denied by the SAHRC);

16.3.1.3. The doctrine of entanglement which militates strongly against courts (and by extension, State institutions such as the SAHRC) becoming involved in, and judging, matters of religious doctrine (as also confirmed recently the Constitutional Court in the case of ***De Lange v Presiding Bishop of the Methodist Church of Southern Africa***);

16.3.1.4. The fact that, by the time the SAHRC invited the church to respond to the allegations made against them, the SAHRC had already expressly pre-judged the matter;

16.3.1.5. The SAHRC's refusal of permission to the church to share its Preliminary Report with other implicated parties, who stood to suffer irreversible prejudice as a result of the SAHRC's adverse findings against the church; and

16.3.1.6. Non-compliance by the SAHRC with various procedures detailed in its own complaints handling procedures, as a result of which the church was prejudice.

16.3.2. As a result, the church was forced to defend its Biblical beliefs, and its constitutional right to preach and teach from the Bible, before the SAHRC – at great time, effort and expense to the church. It is estimated that to date, the matter (which is currently on appeal before the SAHRC) has cost the church, a non-profit organisation who is entirely reliant on the goodwill contributions of its members and who has had to employ the services of attorneys and Counsel in relation to the matter in order to defend its constitutional right to freedom of religion and expression, in excess of one million Rand! This, when the SAHRC is spending taxpayers' (80% of whom are Christian, according to the latest census) money on investigating the Biblical beliefs of churches! (As we will later explain, in this matter the SAHRC found against the church and concluded that it may no longer teach or preach the particular Scriptures which the SAHRC found to be in violation of the Constitution, must remove any references thereto from any manuals and that the church's pastors must undergo "sensitisation" training);

16.3.3. Not long thereafter, the same atheist couple lodged a complaint against the same church with the CGE, this time on the basis that the church's Biblical teachings with regard to the roles of men and women, and human sexuality, violate certain

fundamental rights ("the Mosterts' case before the CGE"). In this case, the church raised the following preliminary legal points which again, in accordance with general practice, should have been considered by the Commission before forcing the church to deal with the merits of the complaint:

16.3.3.1. The complaint's non-compliance, in various respects, with the provisions of the CGE's complaint procedure manual, as a result of which the complaint should have been rejected;

16.3.3.2. The complainants' lack of legal standing to bring the complaint (given particularly that the complainants have never been members of, or visitors, to the church and therefore have no legal interest in the matter or indeed the outcome);

16.3.3.3. The vexatiousness of the complaint. (In this regard, the church provided the Commission with documentary proof of the ulterior motive of the complainants who self-identify as atheist activists, driving a secular humanistic agenda through vehicles such as the SAHRC and CGE);

16.3.3.4. The fact that the CGE lacked jurisdiction to deal with the complaint (on the basis of the doctrine of entanglement, referred to above);

16.3.3.5. The fact that, after not corresponding with the church for almost eleven (11) months, the CGE suddenly decided to "resurrect" the matter again; and

16.3.3.6. The CGE's obligation to liaise and co-operate with the CGE, as a result of the overlapping jurisdiction in the complaint.

16.4. Again, the *in limine* legal points were ignored or improperly dismissed by the CGE, who forced the church to deal with the merits of the complaint and defend its Biblical beliefs, and its right to preach and teach such Biblical beliefs, before the Commission. As a result, the church (which has limited resources at its disposal) again was forced by a Chapter 9 institution to expend a great deal of time, effort and money on litigation that could much better be spent on caring for the poor and vulnerable in society – while the Chapter 9 institution itself was spending taxpayers' money on investigating the church!

16.5. As previously mentioned, the Commissions' failure to do proper screening of complaints and deal with legal points raised in relation to complaints, may in some instances be attributable to a lack of knowledge regarding legal principles and process, on the part of the Commission. The general impression however is that the Commissions are not interested in the legal principles and process that should guide the investigation of complaints, and are quite happy to disregard same and force respondents into dealing with the merits of the complaint (even where there are none!).

Overlapping jurisdiction:

17. Complaints frequently fall in the jurisdiction of more than one Commission.

18. In such cases of overlapping jurisdiction, the expectation is that Commissions will liaise and co-operate with each other. Unfortunately, this has not been our experience.

19. A second problem (which potentially is a direct consequence of the above), is the fact that in cases of overlapping jurisdiction, different Commissions may (and frequently do) produce contradictory reports on the same issue. This is understandable given the different mandates and approaches of the SAHRC, CGE and CRL (as explained earlier already), but leads to legal uncertainty (and of course, forum-shopping).

20. For example:

    20.1. The Mosterts' case before the SAHRC concerned both children's rights (generally dealt with by the SAHRC) and religious rights (generally dealt with by the CRL). The SAHRC, without liaising and co-operating with the CRL in any way, found against the church and recommended that the church may no longer teach those Biblical teachings, must remove those teachings from any manuals and that the church's pastors must go for "sensitisation training". On request of FOR SA, the CRL subsequently got involved in the matter, engaged with the SAHRC and eventually brought out their own Report - in favour of the Church!

    20.2. The Mosterts' case before the CGE concerned women's rights (generally dealt with by the SAHRC) and religious rights (generally dealt with by the CRL). The CGE, without first liaising and co-operating with the CRL in any way, demanded that the Church deal with the merits of the complaint. At that stage, the church requested the CRL to intervene in the matter, who then again brought out a Report in favour of the church (on the basis that if members of the church have chosen to associate themselves with the church, to believe in the religion of the church and abide its beliefs, doing away with the beliefs would amount to a violation of the members' rights) and requesting the CGE to cease handling the case. It appears that, when the CGE refused the CRL's request, the CRL then requested an urgent meeting with the CGE to discuss their dual engagement going forward but then had a change of mind, and advised the CGE that the provisions relating to co-operation in instances of overlapping jurisdiction only applied where two or more institutions have the same approach towards dealing with the matter (which was not the case in the present instance). On this basis, the CRL urged the CGE to proceed with its own investigation and

the CRL would do the same (as it indeed did, resulting in yet another favourable Report towards the church). (Almost three years later, the matter is still pending before the CGE).

20.3. A well known Christian motivational speaker, Gretha Wiid, is currently in hot water since it was revealed that a section of one of her books which talks to young girls about puberty, sexuality, etc states as follows: "Some say that gay people are born gay. That's something I disagree with. I believe with my whole heart that God made men and women to love each other…" Following an outcry from LGBT activists who allege that her statements amounts to "hate speech" against homosexual people, this case is now being investigated by the SAHRC. This is clearly an instance of overlapping jurisdiction, where the SAHRC should be liaising and co-operating with the CRL as the protector of the rights to religious freedom (including freedom of religious expression).

20.4. Another complaint currently under investigation by the CGE, comes in the aftermath the Zizipho Pae ("Pae") incident in 2015. Pae is a former Vice President of the UCT SRC, and posted on her personal Facebook page the comment, "We are institutionalising and normalising sin. May God have mercy on us" just after same-sex marriage was legalised in all States in USA. As a result, she was suspended and eventually expelled from the SRC. She further suffered harassment, threats of violence, her office was trashed, there were demands to have her scholarship withdrawn and she was publicly labelled as a "homophobe" and a "bigot". Pae was subsequently reinstated following intervention from Freedom of Religion South Africa (FOR SA). Almost two years later, the CGE is now investigating a complaint by a homosexual activist against a well-known Christian activist / lobby group for comments they had made during the same Facebook debate when they defended Pae's views and position two years prior. Again, this is in an instance of overlapping jurisdiction, where the CGE should be liaising and co-operating with the CRL as the protector of the rights to religious freedom (including freedom of religious expression).

21. It is clear that there is a vacuum in the law regarding the legal position in the case of conflicting reports by two (or more) Commissions, resulting from overlapping jurisdiction. In this regard, it would be helpful if a framework for co-operation between the SAHRC, CGE and CRL were to be developed.

Double standards:

22. A related problem is that of double standards being applied by the Commissions, particularly with regard to the right to freedom of speech. For example:

22.1. While the SAHRC is investigating Gretha Wiid for expressing her Biblical beliefs which are alleged to be "hate speech" against LGBT people (mentioned above), a complete blind eye is turned to the hateful accusations that have been made against Gretha by LGBT activists;

22.2. In the case of Zizipho Pae (mentioned above), none of the hateful incidents or comments against Pae were investigated by the SAHRC. By contrast, the CGE is currently investigating the Christian activist / lobby group for comments made during the same Facebook debate when they defended Pae's views and position.

22.3. Again, the double standard is shown in the case of Pastor André Bekker, a former homosexual who now leads a Christian organisation that ministers to people with unwanted same-sex attraction, and to families and loved ones of people with same-sex attraction. In this case, Bekker lodged a complaint with the SAHRC against a number of LGBT activists, complaining that their denial that a person is capable of changing their sexual orientation and effectively calling persons who have changed (including Bekker himself) "liars", amount to unfair discrimination and "hate speech" against former homosexuals. The SAHRC rejected Bekker's complaint and his appeal, on the basis that the comments (by the LGBT activists), were "merely expressed opinions in the ordinary course of debate, which comments fell within the ambit of the right to freedom of expression and therefore did not amount to hate speech". However, when journalist Jon Qwelane expressed his opinion that "gay is not okay" in the ordinary course of debate, the same SAHRC took him to the Equality Court for "hate speech" in terms of PEPUDA!

23. A double standard also appears to prevail before the CRL, with regard to the issue of "culture" and "religion". While the CRL is currently seeking to regulate religion (such as to make it compulsory for all religious practitioners and places of worship to have an operating licence, issued by the CRL) and religious practices, the Commission appears to hold the view that cultural practices should not be subject to the same scrutiny and should not be interfered with. (Refer address by CRL Chairlady at the Human Rights Report Card Launch 2017, in Cape Town in March 2017).

Misappreciation, and/or overreaching of powers:

24. It appears that in some instances, there is a misappreciation by the Chapter 9 institutions of their constitutional and legislative powers and prerogatives, resulting in an impermissible overreach. For example:

24.1. In the Mosterts' case In the Mosterts' case before the SAHRC, the SAHRC's Report and findings against the church effectively purported to overturn what has been the common law position since the early 20th century, and currently is the legal position, since reasonable chastisement in the context of the home has not been abolished by Parliament of the courts. This is an impermissible overreach of the SAHRC's powers and functions, who has not been given the power by the Constitution to develop the common law, as it has effectively purportedly done in this instance. In terms of s 8(3) and 39(1) of the Constitution, the development of the common law is the function of the courts.

24.2. In both the aforementioned case and the Mosterts' other case before the CGE, the Commissions completely disregarded the doctrine of entanglement as confirmed very recently by the Constitutional Court, and involved itself in matters of religious doctrine – this, when the Constitutional Court itself maintains a "hands-off" approach to matters of doctrine!

24.3. The same is true of the CRL's current proposal for the regulation of religion and religious practices, which flies in the face of the Constitutional Court judgment of ***Prince v President of the Cape Law Society, 2002*** where it was held that people should be free to believe even if such beliefs are "*bizarre, illogical or irrational*".

24.4. In its recommendations for the broadscale of regulation of religion in South Africa furthermore, the CRL proposes that the CRL Act be amended to give the CRL the power to issue (and revoke) licences to religious practitioners and places of worship, without which they will not be allowed to operate. This cannot be achieved without an amendment of s 185 of the Constitution relating to the functions of the CRL, and which does not give the CRL (an advisory body) executive powers such as they are trying to secure for themselves through an amendment of their enabling legislation.

25. We also mention that, following the judgment by the Supreme Court of Appeal (SCA) in ***The South African Broadcasting Corporation and others v Democratic Alliance and others, 2015,*** some Chapter 9 institutions appear to be under the impression that the effect of the judgment is that all Chapter 9 institutions have the power to make binding orders. This is not correct. The powers of the Public Protector, in terms of s 182(1) of the Constitution and in particular subpara (c) which empowers the Public Protector "*to take appropriate remedial action*", are quite different to the powers granted to the SAHRC (s 184), the CRL (s 185) or the CGE (s 187) whose recommendations are not binding and have no force of law.

The resolution of complaints:

26. The enabling legislation and/or complaints handling procedures of the CRL, CGE and SAHRC provide that complaints should ideally be resolved through conciliation and mediation by the Commission.

27. The reality however is that conciliation / mediation generally does not work in instances where there is a clash of worldviews and where parties are never going to come to an agreement, as it would entail the one or the other party compromising on their beliefs. In such instances, it is unrealistic to expect of parties to participate in conciliation / mediation proceedings – to what end?

28. In such instances, where the Commission then decides to issue a Report instead, again it is undesirable as one (belief system) will end up as "winner", and the other party (belief system) as "loser" – this when our Constitution specifically provides for pluralism, tolerance, accommodation of the other, diversity etc.

Appeal procedures:

29. The appeal procedures provided for in the different Commissions' enabling legislation and/or complaints handling manuals, seem inherently unfair or biased. For example:

    29.1. In terms of the complaints handling procedures of the SAHRC, an appeal on the merits of a complaint lies to the SAHRC Chairperson; and in the case of an appeal regarding the procedure followed by the SAHRC in a complaint, to the SAHRC's Chief Operating Officer.

    29.2. In the Mosterts' case before the SAHRC, for example, it is extremely unlikely however that the SAHRC will find any differently on appeal when their Chairperson (to whom the appeal lies) has already (when the SAHRC's findings against the church first came out), made statements to the media about the SAHRC's decision.

    29.3. In terms of the complaints handling procedures of the CRL, an appeal against the CRL's findings, similarly, lies to the Chairperson of the Commission. In terms of the complaints procedure manual of the CGE, an appeal against the CGE's findings, similarly, lies to the Commission's Chairperson.

30. We now turn to deal with each of the CRL, CGE and SAHRC Commissions specifically.

THE CRL RIGHTS COMMISSION (CRL):

31. With regard to the Asmal Report's Findings on the issue of the CRL's ***Constitutional and Legal Basis*** (para 3.1 on page 135 of the Report), the following:

31.1. Ten years after the Asmal Report, it is still not clear:

31.1.1. what constitutes "*a cultural, religious or linguistic community*" as contemplated by the CRL Act (subpara (a)); or

31.1.2. what criteria would apply for the establishment and/or recognition of community councils as contemplated by s 36 – 38 of the CRL Act (subpara (b));

31.2. With regard to the CRL's ability to institute proceedings (in its own name, or on behalf of a person or group or class of persons) in the Equality Court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 ("PEPUDA") (subparas (g) and (h)), the following:

31.2.1. While s 20(f) of PEPUDA specifically provides that proceedings under this Act may be instituted by the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (CGE), it fails to mention the CRL. (In similar vein, while the Complaints Procedure Manual of both the SAHRC and the CGE mention the power of each of these Chapter 9 institutions to institute proceedings in terms of PEPUDA, the Complaints Procedure Manual of the CRL is silent in this regard).

31.2.2. This does not however mean that the CRL does not have the power to institute proceedings (in its own name, or on behalf of a person or group or class of persons) in the Equality Court in terms of PEPUDA. PEPUDA specifically provides for any body (including the CRL) the approach an Equality Court with a complaint of unfair discrimination (including on the grounds of religion) on behalf of any person or group of people. Also, in terms of s 5(2)(g) of the CRL Act, the CRL has the power to "*perform legal acts, or institute or defend any legal action in its own name*".

31.2.3. From a consistency point of view however, and in order to avoid legal uncertainty, it is recommended that PEPUDA be amended to specifically include a reference to the CRL, alongside the SAHRC and the CGE, in s 20(f) of the Act.

31.3. With regard to the CRL's power to make recommendations for the review of legislation, we point out that the CRL will be recommending to Parliament the review of its own enabling legislation (the CRL Act), this very month with a view to empowering the CRL to issue licences to all religious practitioners and places of worship in SA. This is a clear overreach of the powers and prerogatives of the CRL as a Chapter 9 institution, who has not been granted executive powers by the Constitution. (In order for the CRL Act to be amended such, it would be necessary to amend the Constitution!).

32. With regard to the Report's Findings on the issue of the CRL's ***Institutional Governance Arrangements*** (para 3.2 on page 136 of the Report), the following:

32.1. In terms of s 14(2) of the CRL Act, the members of the Commission are appointed in a part-time capacity, but the Chairperson, the Deputy Chairperson and not more than three other members may be appointed in a full-time capacity. At the time of the Asmal Report, only the Chairperson served in a full-time capacity (subpara (a)). It is not clear how many Commissioners currently serve in a full-time, and a part-time, capacity respectively. As previously submitted however, the limitation on the number of full-time appointments (and availability of part-time appointments only), prevent suitably qualified persons from applying for appointments as Commissioners.

32.2. It is still not clear, to public interest organisations such as ourselves and indeed to the public whom the CRL is supposed to serve, what the role of Commissioners are (subpara (b)). In particular, there seems to be some overlap between the functions performed by the Legal Department in the CRL and the Commissioners themselves (who are not necessarily legally qualified, but who are tasked with the resolution of complaints, disputes and the drafting of reports nonetheless).

33. With regard to the Report's Findings on the issue of ***Public Awareness*** (para 3.3 on page 137 of the Report), the following:

33.1. This year, has seen an increased awareness of the work of the CRL Rights Commission, particularly as a result of the CRL's investigation into the "Commercialisation" of religion and abuse of people's belief system and its Report, recommending the compulsory licensing of all religious practitioners and places of worship in South Africa.

33.2. The Report has however been met with great resistance and opposition by a cross-spectrum of denominations, churches, fraternals and faith groups in South Africa, particularly as a result of:

33.2.1. Certain procedural issues relating to the investigation, including:

33.2.1.1. The CRL's decision to "subpoena" religious leaders to a hearing. (While the CRL may, in terms of its Act, have been empowered to issue such subpoenas, this was not well received by the religious community who perceived the issuing of summons as hostile and would have preferred if the CRL had made its intentions and reasons for issuing subpoenas, clear from the beginning).

33.2.1.2. The unscientific method adopted by the CRL, in selecting a "*random sampling*" of 85 religious and African traditional religion leaders only for interviewing by the Commission;

33.2.1.3. The broad scope of the summons, including the range of documents that religious leaders were required to bring along and testify to;

33.2.1.4. The apparent disconnect between the summons (to investigate the "commercialisation" of religion and abuse of people's belief systems), and the outcome of the process (the broad-scale regulation of religion in SA).

33.2.2. The recommendations made in the CRL's Report (which effectively amount to State control of religion in circumstances where the CRL, an "institution of State", will through an amendment to the CRL Act be appointed the "final arbiter" of religion in SA), unnecessary, unworkable and unconstitutional.

33.3. In terms of the CRL Rights Commission's Annual Report 2015/2016 ("CRL Annual Report"), its Legal Services and Conflict Resolution Unit (LSCR Unit) received a total number of 211 complaints in the 2015/2016 financial year, 108 of which were about cultural rights, 96 religious rights and 7 linguistic rights. 24 other cases were carried over from 2014/15 financial year. Accordingly, the LSCR Unit handled 235 cases. At the end of the financial year, 106 cases (of the 235 cases) were finalized and closed, 66 of which concerned cultural rights, 32 religious rights and 8 linguistic rights (p 40 of the Report).

33.4. There is thus a marked increase from the 29 complaints received during 2004/2005 (subparas (b)and (d)). It remains a concern however that only about 50% of the cases receiving during the 2015/2016 financial year, were finalised and closed during that same year. The CRL Annual Report fails to specify the reasons for this. In particular however, we note the following:

33.4.1. In terms of the CRL Annual Report, the CRL made a decision in the year under review that Commissioners should have constant oversight to the work of the Commission. The Commission then established various oversight committees, in terms of s 22 of the CRL Act, to assist the Commission in the performance of its work, including inter alia a Legal Services and Conflict Resolution Committee (p 23 of the CRL Annual Report);

33.4.2. In terms of the CRL Annual Report further, the Legal Services and Conflict Resolution Committee is made up of the following Commissioners: "Sheila Kama (Chairperson), Richard Botha, Sheila Kama and Senior Manager" (p 71 of the CRL Annual Report);

33.4.3. As persons tasked with the oversight of Legal Services and Conflict Resolution, one would expect such persons to have legal qualifications, experience and expertise. While Commissioner Botha at least has a LL B degree, Ms Sheila Kama (the appointed Chairperson of the Committee) has no legal qualifications whatsoever. The Senior Manager referred to, presumably refers to Mr K A Sedupane, an attorney (p 24 of the CRL Report). It is not clear whether there are any other legally qualified persons in the Legal Services and Conflict Resolution Unit.

33.5. In so far as the Commission did not, at the time of the Asmal Report, have an established procedure for the public to lodge complaints with the CRL (subpara (e)), the Commission now has a Complaints Handling Manual and Complaint Form, both of which are available online on the CRL's website.

34. With regard to the Report's Findings on the issue of ***Appointments*** (para 3.4 on page 138 of the Report), the following:

34.1. S 11(1) of the CRL Act sets out the steps "the Minister" must take whenever it is necessary to appoint members of the Commission. In terms of s 1, "Minister" means the

member of Cabinet contemplated in s 2, which in turn provides that the CRL Act "is administered by a member of the Cabinet designated by the President";

34.2. Our understanding is that, at present, the designated Minister is the Minister of Co-operative Governance and Traditional Affairs. We agree with the Report's view that "*it is unclear why the Minister … should play such a central role in the appointment of Commissioners*" and that this "*may impact negatively on the independence of the Commission*" (subpara (c)). We agree with the recommendation that the relevant portfolio committee (COGTA) should invite nominations, draw up a short-list and interview the candidates before recommending a list of names to the National Assembly (and ultimately, the President) for approval (subpara (d)). This would be consistent with the appointment procedures that apply in respect of the SAHRC and CGE, and remove any perception of a compromise on the independence of the Commission.

34.3. At present, the Commission consists of twelve (12) members.

35. With regard to the Report's Findings on the issue of the CRL's ***Relationship with the Executive*** (para 3.5 on page 139 of the Report), the following:

35.1. As already mentioned above, it appears that the work of the CRL Rights Commission now resorts under the Portfolio Committee for Co-operative Governance and Traditional Affairs (rather than Provincial and Local Government, or Arts and Culture).

35.2. It is disappointing that the CRL does not seem to make submissions to government on policies and Bills that may influence negatively on religious freedom and the rights of religious communities to preach and teach their convictions and religious beliefs, e.g. the draft Hate Crimes and Hate Speech Bill issued by the Department of Justice.

35.3. Incidentally, it also does not seem to act, as legal representative or *Amicus Curiae*, in court cases that may have a direct bearing on religious freedom and the rights of religious communities and where the CRL could potentially make a valuable contribution, for example, in the case of ***De Lange v Presiding Bishop of the Methodist Church of Southern Africa, 2015*** before the Constitutional Court; the case of ***SAHRC v Jon Qwelane*** currently pending before the Johannesburg High Court (Equality Court); or indeed the very recent case of ***OGOD v six public schools*** before the Johannesburg High Court.

36. With regard to the Report's Findings on the issue of the CRL's ***Relationship with Parliament*** (para 3.6 on page 139 of the Report), the following:

36.1. As already mentioned above, it appears that the CRL currently reports to the Portfolio Committee for Co-operative Governance and Traditional Affairs (subpara (a)).

36.2. It is a pity that the CRL was only established after PEPUDA, which offers very little protection against unfair discrimination on grounds of conscience, religion and belief, was passed. The CRL could make a real meaningful contribution to religion in South Africa by investigating ways in which religious freedom rights can legislatively be strengthened (either by an amendment to PEPUDA, or through the Charter for Religious Rights and Freedoms).

37. With regard to the Report's Findings on the issue of the CRL's ***Relationship with Chapter Nine and Associated Institutions*** (para 3.7 on page 140 of the Report), the following:

37.1. While the Constitution, and indeed the CRL Act, require the CRL to co-operate with other Chapter 9 institutions (subpara (a)), our impression (as already explained above) is that this does not really happen.

38. With regard to the Report's Findings on the issue of the CRL's ***Financial Arrangements*** (para 3.8 on page 141 of the Report), the following:

38.1. In terms of the CRL Annual Report, the Commission reduced its staff component from 43 to 33 posts because of monetary challenges since 2014 (p 76).

38.2. We have already pointed to the lack of legally qualified staff, including the Commissioners themselves.

39. With regard to the Report's ***General Conclusions and Recommendations*** with regard to the CRL (paras 4 - 5 on pages 140-144 of the Report), the following:

39.1. It is our firm view that the CRL remains a key role player in our developing democracy, and that it should be allowed to continue as an independent body, separate and distinct from the SAHRC and CGE (para 5(b)(vi);

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC):

40. With regard to the Report's Findings on the issue of the SAHRC's ***Constitutional and Legal Mandate*** (para 2 on page 167 of the Report), the following:

40.1. The SAHRC was appointed to champion all fundamental rights in the Bill of Rights, not just certain rights (see also para 3.2(d) on page 172 of the Report);

40.2. Unfortunately, the SAHRC appears to have become the champion of LGBT rights, and the antagonist of religious freedom rights and the rights of religious communities. This is evident from the SAHRC's past and present investigation of, and interference with, the Biblical beliefs of Christians, for example:

40.2.1.1. The Mosterts' case against a church (already mentioned above);

40.2.1.2. The current case of Gretha Wiid (already mentioned above);

40.2.1.3. In the case of Creare Training Academy (a Christian training academy in Bloemfontein) a few years ago, the SAHRC found that although Creare's beliefs regarding same-sex relationships are Biblical, their beliefs are not acceptable and directed Creare to undergo "sensitisation" training;

40.2.1.4. Various Christian wedding venues and guesthouses, have been taken to task by the SAHRC for being unable, on grounds of their Christian conscience and belief, to host same-sex marriages;

40.2.1.5. The institution, on behalf of LGBTs, of "hate speech" proceedings against Christians (e.g. the case of Rev. Oscar Bougardt) or persons who, out of moral conscience, do not endorse same-sex relationships (e.g. the case of Jon Qwelane) in the Equality Court or otherwise;

40.2.1.6. Acting as the legal representatives for LGBT persons, in proceedings against Christians (e.g. in the case of alleged unfair discrimination against LGBTs by a Christian guesthouse in Wolseley, opened up in the Bellville Equality Court);

40.2.1.7. The double standard that appears to apply in respect of unpopular statements made by Christians (which are frequently investigated on grounds of "hate speech"), and hateful statements made against Christians (which are not investigated). (See examples of this above).

41. With regard to the Report's Findings on the issue of ***Constitutional and Legal Basis*** (para 3.1 on page 171 of the Report), the following:

41.1. It is pointed out that the SAHRC Act has since been amended. The Act that currently applies, is the South African Human Rights Commission Act, 40 of 2013 (that came into operation on 5 September 2014).

42. With regard to the Report's Findings on the issue of ***Appointments*** (para 3.3 on page 176 of the Report), the following:

42.1. Given the SAHRC's constitutional mandate and responsibility to promote respect for all human rights, including religious freedom rights, it is important that appointments to this Commission be broadly representative of a range of religious convictions or beliefs and further, amongst the Commissioners, have at least some expertise in religious(-legal) matters – particularly also to prevent the possibility of conflicting decisions in cases of overlapping jurisdiction with the CRL.

43. With regard to the Report's Findings on the issue of ***Public Awareness*** (para 3.4 on p 177 of the Report), the following:

43.1. While there is general public awareness of the SAHRC and its functions, it would be fair to say that the public perception of the SAHRC in the religious community of South Africa, is not that favourable – because of the stance it has taken pro homosexuals and against Christians.

43.2. This is unfortunate, given the SAHRC's constitutional mandate and responsibility to promote respect for all human rights, including religious freedom rights and the rights of religious communities, in South Africa.

44. With regard to the Report's Findings on the issue of ***Relationship with Parliament*** (para 3.5 on p 179 of the Report), the following:

44.1. The SAHRC's initial decision to investigate the doctrinal beliefs of a church (in the Mosterts' complaint before the SAHRC) was mentioned in, and caused great upset amongst Members of Parliament, in the National Assembly;

44.2. Following the SAHRC's findings against the church (in the same case), and upon reporting to the Justice Portfolio Committee on budgetary matters recently, the SAHRC was hauled over the coals again for challenging the doctrinal beliefs of churches when there are

real human rights abuses that they should be investigating (and spending taxpayers', the vast majority of whom are Christian, money on).

45. With regard to the Report's Findings on the issue of ***Relationship with Chapter 9 and Associated Institutions*** (para 3.7 on page 181 of the Report), the following:

45.1. While it is noted that the SAHRC has "*a formal arrangement with the CGE regarding the handling of cases and complaints by the legal departments of both institutions*" (subpara (f)(i)), there does not appear to be a similar arrangement in place with the CRL.

45.2. In this regard, we reiterate our proposal for the development of a framework of co-operation between the different Commissions.

THE COMMISSION FOR GENDER EQUALITY (CGE):

46. With regard to the Report's Findings on the issue of the CGE's ***Constitutional and Legal Basis*** (para 2.1 on page 148 of the Report), the following:

46.1. While the CGE was originally established to champion the rights of women and their role in society (see also para 3.4(b) of the Report), the Commission appears to have redefined "gender" and "gender equality" as meaning "LGBT rights", and reinvented its mandate as the champion of LGBT rights which noticeably have become a core focus of the Commission's work. This was not the original mandate given to the CGE either in terms of the Constitution, or the CGE Act, 39 of 1996 ("CGE Act").

47. With regard to the Report's Findings on the issue of ***Appointments*** (para 3.3 on page 152 of the Report), the following:

47.1. At present, the Minister responsible for the CGE is the Minister in the Presidency for Women, not the Minister of Justice and Constitutional Development (subpara (b)).

48. With regard to the Report's Findings on the issue of ***Relationship with Chapter 9 and Associated Institutions*** (para 3.5 on page 155 of the Report), the following:

48.1. Our impression certainly is, as suggested in the Report, that there is "*limited co-operation*" between the CGE and other Chapter 9s (subpara (d)) and that they should be working more closely together (subpara (e)) – also with a view to avoid "*forum shopping*".

48.2. We see no reason why the CGE cannot / should not collapse into a single human rights body, and support such proposal.

49. With regard to the Report's Findings on the issue of ***Relationship with Parliament*** (para 3.8 on page 158 of the Report), the following:

49.1. The Commission now reports to the Portfolio Committee on Women, Children and People with Disabilities, not Justice and Constitutional Development (subpara (a)).

50. With regard to the Report's Findings on the issue of ***Relationship with Civil Society*** (para 3.9 on page 158 of the Report), the following:

50.1. The general perception of the religious sector in South Africa, is that the CGE (like the SAHRC) has a bias in favour of LGBT rights, and against religious (Christian) rights. In this regard, we mention:

50.1.1. The investigation of, and interference with, the Biblical beliefs of churches (as for e.g. in the Mosterts' case before the CGE, where it is alleged that the church in question unfairly discriminates and commits "hate speech" against LGBT people);

50.1.2. The investigation of Christian wedding venues who, on grounds of their Christian conscience and beliefs, are unable to conduct same-sex marriages; and

50.1.3. The current investigation of a Christian activist / lobby group, following a complaint laid against them by a homosexual activist.

51. With regard to the Report's ***General Conclusions*** (para 4 on page 162 of the Report) and ***Recommendations*** (para 5 on page 162 of the Report), the following:

51.1. We submit that the Commission's apparent lack of appreciation for its legal and constitutional mandate (para 4(b)), is directly attributable to the lack of legal knowledge and expertise on the Commission; and

51.2. We agree that the relationship between the Commission and civil society, the religious sector in particular, is unsatisfactory and requires urgent attention (subpara 4(e)).

CONCLUSION:

52. In our current socio-political climate, Chapter 9 institutions remain as critically important to our democracy as they were when they were first established in terms of our South African Constitution in 1996.

53. Twenty years later however, there is a definite need to review the organisation and functioning of these institutions, and improving and strengthening them so that they can fulfil their function as "watchdogs" in your constitutional democracy effectively and optimally.

54. While there may be some advantages to amalgamating some of the Chapter 9 institutions into a single human rights body, we submit that the constitutional mandate of the SAHRC (and possibly the CGE) and the CRL respectively, and the different approaches (to be) adopted by these Commissions as explained above, would be best served if the SAHRC (and possibly the CGE) and the CRL continue to exist and function separately, but in instances of overlapping jurisdiction, co-operatively.

END.