

# Chapter 24F

## Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

**Stuart Woolman and Julie Soweto Aullo**

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### 24F.1 Introduction

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC') was the last of the Chapter 9 Institutions to be launched.<sup>1</sup> This chapter suggests why, in this case, the last shall not be first.

Two bodies of law govern the CRLC. FC ss 185 and 186 set out its objects and composition. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act ('CRLC Act') fleshes out the CRLC's mandate.<sup>2</sup> After the setting the historical stage for the advent of the CRLC, we look at how the political environment of this Chapter 9 Institution will shape these two bodies of law and will shrink the actual space within which the CRLC operates.

## 24F.2 Political background

The iniquitous policies of apartheid bequeathed a legacy of division. Yet the divide-and-conquer strategy of apartheid also succeeded in creating conditions for social

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1 Chapter 9 of the Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC'), s 181, provides for the establishment of seven 'state institutions to strengthen constitutional democracy': (a) the Public Protector, FC ss 182-183; (b) the Human Rights Commission, FC s 184; (c) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, FC ss 185-186; (d) the Commission for Gender Equality, FC s 187; (e) the Auditor-General, FC s 188-189; (f) the Electoral Commission, FC ss 190-191; and (g) the Independent Authority to Regulate Broadcasting, FC s 192. The Interim Constitution contains no similar set of provisions. See Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

2 Act 19 of 2002. The Act came into effect on 30 November 2002.

cohesion.<sup>3</sup> Even where apartheid quite consciously attempted to destroy both 'nations' and the spaces they occupied, oppressed communities

demonstrated enormous resilience. They lost neither their voice nor their desire to be heard.<sup>4</sup>

Despite this palpable desire to be heard, the new constitutional dispensation devotes little meaningful political space to the specific aspirations of various volk. And for good reason. Before the velvet revolution of 1994, most political claims based on culture, language, ethnicity and religion were greeted with suspicion, and, sometimes, outright hostility.<sup>5</sup> From the passive resistance of Ghandi, through worker movements of the early 20th century to the Freedom Charter, the preferred

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- 3 What explains the resilience of religious, cultural and linguistic communities and their ability to retain a certain level of social cohesion under conditions of enormous economic pressure and political disintegration? Freud's theory of the 'narcissism of minor difference' holds that under conditions of uncertainty and instability, people project their anxiety onto others. These 'others' become the source or the cause of the uncertainty or instability despite the fact that they may bear no responsibility for an internal state or an external state to all affairs. The us/them dynamic reinforces the identification of individuals with the group and turns the group into a safe harbour or a laager. Apartheid drove groups together at the same time as it drove them apart. See S Freud *Civilization and Its Discontents* (1929) 117 ('It is always possible to bind together a considerable number of people in love, so long as there are other people left over to receive the manifestations of their aggressiveness. I once discussed the phenomenon that it is precisely communities with adjoining territories, and related to each other as well, that are engaged in constant feuds and in ridiculing each other — like the Spaniards and the Portuguese, for instance, the North Germans and the South Germans, the English and the Scots and so on. I gave this phenomenon the name of the "narcissism of minor differences".') See also S Freud *The Taboo of Virginity* (1918); S Freud *Group Psychology and the Analysis of Ego* (1921); M Ignatieff *The Warrior's Honor* (1997). One might go so far as to claim that the 'in-group exists [solely] by virtue of a denied egoism and a deflected suspicion; the out-group by virtue of the innate suspicion displaced toward it and rationalized on the basis of difference, however minor.' See AG Burstein 'Ethnic Violence and the Narcissism of Minor Differences' (1999) 3 (Manuscript on file with author). On this account, the CRLC's promotion of difference is likely to produce greater enmity, not greater amity. But Burstein's characterization is too strong by half. Freud understood the extent to which individuals are a function of their constitutive attachments *and* that the individual transcends his basic drives by drawing down on positive group narratives. Freud is neither a methodological individualist nor a pessimist. Freud does, however, sound a cautionary note about the extent to which minor differences obstruct understanding and expedient politicians exploit minor differences. It is an admotion the CRLC ought to take seriously as it sets about this exercise in multi-cultural nation-building. See Dr M Masoga 'Panel on Religious Diversity and Nation Building', National Consultative Conference for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Durban, 30 November 2004)('The rainbow is nice. But let's forget about the nation.')
- 4 Dr P Madiba 'Opening Remarks' National Consultative Conference for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Durban, 29 November 2004)(Text of speech on file with author). Dr Madiba is currently the Chief Executive Officer for the CRLC. See also F Venter 'The Protection of Cultural, Linguistic and Religious Rights: The Framework Provided by the Constitution of the Republic of South Africa, 1996', Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 19, available at <http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/VENTER.pdf>, (accessed on 1 April 2004).
- 5 A Sachs 'Opening Remarks' Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 9 available at <http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/SACHS1.pdf>, (accessed on 1 April 2004); H Giliomee 'The Majority, Minorities and Ex-Nationalities in South Africa and the Proposed Cultural Commission' Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 37, available at <http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/GILIOMEI.pdf>, (accessed on 6 January 2005).

language of liberation was that of human rights discourse. The liberation movement's utilisation of rights discourse reflected a considered rhetorical response to romantic assertions of White, Christian, English and Afrikaner supremacy.

The liberation movement's universalist turn provides only a partial explanation for the failure of group-based claims.<sup>6</sup> Much of the white minority political

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posturing in the 1980s over alternatives to apartheid focused on the need for a 'broad-based, multi-racial government to contain possibly explosive ethnic or cultural demands.'<sup>7</sup> Representatives of the white minority insisted on various forms of constitutional protection of existing privilege in exchange for relinquishing political power.<sup>8</sup> The African National Congress ('ANC') rebuffed every attempt to entrench what it termed 'racial group rights'.<sup>9</sup> Political power would have to be traded for peace. That peace, and the retention of economic power by the white minority, would be vouchsafed by a firm ANC commitment to a justiciable Bill of Rights.<sup>10</sup>

The Final Constitution's rejection of group political rights<sup>11</sup> led some commentators to seek solace in the 'notable levels of constitutional significance' to which cultural, linguistic and religious matters were elevated.<sup>12</sup> They note that the

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6 Contemporary human rights discourse demands democratic majority rule. In South Africa, democratic majority rule meant black majority rule. Neither the rhetoric of universal human rights nor the actual demographics of South Africa supported the Swiss-like cantonal arrangements that the more sophisticated apologists for the white right offered up.

7 See J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 470. See also Giliomee (supra) at 37.

8 De Waal et al (supra) at 470.

9 See I Currie 'Minority Rights: Education, Culture and Language' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 35.

10 See Giliomee (supra) at 40. The ANC rightly insisted that minority rights *qua* static, non-demographically representative levels of political representation were unacceptable. The ANC proposed a compromise between two political positions: (1) the demand for unfettered majority rule and (2) the insistence of some whites for structural guarantees. The Bill of Rights is, in large part, the content of that compromise.

11 See Sachs (supra) at 13 ('The instruments and institutions of government are not based on cultural groups, cultural communities or representation in terms of membership of a particular community.') See also *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Sachs J) at paras 39-42 (Justice Sachs argues that the religious, linguistic and cultural rights found in the Interim Constitution — eg, IC s 32(c) — are best understood as efforts to 'concretis[e] . . . a certain measure of cultural/linguistic autonomy in the private sphere . . . . Section 32(c) appears, therefore, to be an explicit, if limited, acknowledgement of the need in certain circumstances to allow for a departure from the general principles of [non-discrimination found in IC] s 8(2) read with [IC] s 8(4) . . . . What appears to be provided for in s 32(c) is not a duty on the State to support discrimination, but a right of people, acting apart from, but in practicable association with the State, to further their own distinctive interests.')

12 See Venter (supra) at 19.

Final Constitution contains six different provisions concerned with culture, eight with language and four with religion.<sup>13</sup>

The Final Constitution, as a liberal political document, certainly carves out space within which self-supporting cultural, linguistic and religious formations might flourish. However, the drafting histories of FC s 185 and the CRLC Act give the lie to the claim that the basic law sets great store in the vindication of specific group claims based upon language, culture and religion.<sup>14</sup>

### **24F.3 Constitutional negotiations, the peculiar history of FC s 185 and the travaux preparatoire for the commission for the promotion and protection of the rights of cultural, religious and linguistic communities act**

The problem of accommodating minorities in a democratic state dominated the political negotiations that preceded the enactment of the Interim Constitution. Between 1986 and 1991, the South Africa Law Commission investigated mechanisms for the protection of group rights.<sup>15</sup> To this end, it solicited submissions from white right-wing intellectuals on anti-assimilationist strategies.<sup>16</sup> Conservative Party, Afrikaner Volkswag and Boere-Vryheidsbeweging testimony before the Commission reflected deep dissatisfaction with mere 'minority group protection'. These parties favoured 'national group protection'. National group protection meant self-determination 'in its widest form'. This widest of forms was understood by most Afrikaner nationalists to mean a right to secede.<sup>17</sup>

One substantive outcome of this 'debate' was the establishment of a 'Volkstaat Council'.<sup>18</sup> IC ss 184A and 184B gave effect to an informal agreement between the

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13 Ibid. Provisions of the Final Constitution dealing with culture, language and religion include, but are not limited to: (a) ss 9, 30, 31, 235 (culture); (b) ss 6, 29, 30, 31, 35, 235 (language); and (c) ss 9, 15, 30, 31 (religion). These various provisions were driven, at least in part, by three constitutional principles enshrined in the Interim Constitution. Two of the principles required recognition of minority rights and another required the inclusion in the Final Constitution of a provision ensuring a right of self-determination by any community sharing a common cultural and language heritage.

14 The one notable exception is land. The Final Constitution, the Constitutional Court and the Supreme Court of Appeal have recognised the legitimacy of group claims — against both the state and other private parties — grounded largely in dispossession of title based upon racially discriminatory classifications. See, eg, *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC); *Abrams v Allie* 2004 (4) SA 534 (SCA).

15 South Africa Law Commission *Group and Human Rights Working Paper 25*, Project 58 (1989).

16 South Africa Law Commission *Group and Human Rights Interim Report* (1991).

17 Ibid at 39-80.

18 See Constitution Amendment Act 2 of 1994, s 9 (Inserts Chapter 11A into Interim Constitution). IC ss 184A and 184B created the necessary environment for a Volkstaat Council and established its brief. However, neither IC s 184A nor s 184B required the establishment of either a Volkstaat Council or a Volkstaat.

National Party government, the ANC and those Afrikaner groups who wished to pursue the creation of a Volkstaat.<sup>19</sup>

According to IC ss 184A and 184B, the Council was charged with gathering the requisite data necessary to make an informed decision about the contours, the powers and the political structures of a Volkstaat. The constitutional amendment

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that created the Council also introduced a 34<sup>th</sup> Constitutional Principle. This principle required that the Final Constitution make some provision for the exercise of the right to self-determination by any community 'sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.'<sup>20</sup>

Enabling legislation for the Volkstaat Council was enacted in November 1994.<sup>21</sup> In March 1999, the Volkstaat Council concluded its activities with a presentation

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19 The exact nature of the bargain is found in the 'Accord on Afrikaner Self-Determination Between the Freedom Front, the African National Congress and the South African Government/National Party' (23 April 1994). This document was signed by General Constand Viljoen, Leader, Freedom Front; Mr. Thabo Mbeki, National Chairman, African National Congress; Mr Roelf Meyer, Minister of Constitutional Development and Communication, Government of the Republic of South Africa. The Accord took note of IC ss 184A and 184B, Constitutional Principle 34 and a previously unsigned memorandum between the ANC, the AVF and the South African government. It read, in relevant part, as follows: '1. The parties agree to address, through a process of negotiations, the idea of Afrikaner self-determination, including the concept of a Volkstaat. 2. The parties further agree that in the consideration of these matters, they shall not exclude the possibility of local and/or regional and other forms of expression of such self-determination. 3. They agree that their negotiations shall be guided by the need to be consistent with and shall be governed by the requirement to pay due consideration to Constitutional Principle XXXIV, other provisions of the Constitution of the Republic of South Africa Act 200 of 1993 as amended, and that the parties take note of the Memorandum of Agreement, as referred to above. 3.1 Such consideration shall therefore include matters such as: 3.1.1 substantial proven support for the idea of self-determination including the concept of a Volkstaat; 3.1.2 the principles of democracy, non-racialism and fundamental rights; and 3.1.3 the promotion of peace and national reconciliation. 4. The parties further agree that in pursuit of 3.1.1 above, the support for the idea of self-determination in a Volkstaat will be indicated by the electoral support which parties with a specific mandate to pursue the realisation of a Volkstaat will gain in the forthcoming election. 4.1 The parties also agree that, to facilitate the consideration of the idea of a Volkstaat after the elections, such electoral support should be measured not only nationally, but also by counting the provincial votes at the level of: 4.1.1 the electoral district; and 4.1.2 wherever practical the polling stations as indicated by the parties to, and agreed to, by the Independent Electoral Commission. 5. The parties agree that the task of the Volkstaatraad shall be to investigate and report to the Constitutional Assembly and the Commission on Provincial Government on measures which can give effect to the idea of Afrikaner self-determination, including the concept of the Volkstaat. 6. The parties further agree that the Volkstaatraad shall form such advisory bodies as it may determine. 7. In addition to the issue of self-determination, the parties also undertake to discuss among themselves and reach agreement on matters relating to matters affecting stability in the agricultural sector and the impact of the process of transition on this sector, and also matters of stability including the issue of indemnity inasmuch as the matter has not been resolved. 8. The parties further agree that they will address all matters of concern to them through negotiations and that this shall not exclude the possibility of international mediation to help resolve such matters as may be in dispute and/or difficult to conclude. 8.1 The parties also agree that paragraph 8.0 shall not be read to mean that any of the deliberations of the Constitutional Assembly are subject to international mediation, unless the Constitutional Assembly duly amends the Constitution to enable this to happen. 8.2 The parties also affirm that, where this Accord refers to the South Africa Government, it refers to the South African Government which rules South Africa until the April 1994 elections.' Talk of a Volkstaat represented the ambitions of some white Afrikaans-speaking South Africans — and the willingness of the ANC to accede to those demands necessary to secure a peaceful election and political transition. See D Basson *South Africa's Interim Constitution: Text and Notes* (1994) 237.

20 See Constitution Amendment Act 2 of 1994, s 13(b)(Inserts Constitutional Principle 34 into Interim Constitution).

to the State President of its 'Final Report' on the logic of and the logistics for an autonomous Afrikaner state.<sup>22</sup>

Express provision for a Volkstaat died with the advent of the Final Constitution.<sup>23</sup> The desire to protect the cultural, religious and linguistic interests of Afrikaners did not. The CRLC is understood by many of the principals in the Constitutional Assembly negotiations to have been the compensation extracted by representatives of white minority parties for the elimination of any textual support in the Final Constitution for a Volkstaat Council or a Volkstaat.<sup>24</sup> The volume of complaints lodged thus far with the CRLC on issues of concern to members of various Afrikaans-speaking communities underwrites this conclusion.<sup>25</sup>

In August 1998, the Department of Provincial and Local Government ('DPLG'), which possessed ministerial authority over the CRLC, initiated discussions on proposed functions and structures of the CRLC. The first pre-commission National Consultative Conference ('NCC') engaged solicited submissions, research by the Human Sciences Research Council ('HSRC'), white papers from government and policy statements from key civil society stakeholders.<sup>26</sup> This process was repeated

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- 21 The Volkstaat Council Act 30 of 1994. The 20 members of the council provided for in the Interim Constitution were elected from among members of the Freedom Front by a joint session of the National Assembly and the Senate.
- 22 Volkstaat Council *Final Report: Findings and Recommendations* (31 March 1999).
- 23 While a Volkstaat is not mentioned by name in the Final Constitution, FC s 235 still holds out the possibility for 'self-determination' for 'any community sharing a common cultural and language heritage, within a territorial entity in the Republic'. The constitutional basis for the Volkstaat Council disappeared with the certification of the Final Constitution. The Council, as a statutory body, limped on for another two years. The Volkstaat Council Act itself has not been repealed.
- 24 Dr C Mulder claims that the Freedom Front engaged the ANC leadership in a vigorous debate about a Volkstaat. The Freedom Front's aspirations for Afrikaner territorial and political self-determination were rebuffed. The ANC would only go so far as to recognise the Freedom Charter's commitment to 'internal' cultural and religious self-determination. Both parties seemed to accept the CRLC as an institution that could satisfy the requirements of 'internal' cultural and religious self-determination. Phone Interview between Dr C Mulder, Spokesman for the Freedom Front, and Dr C Landman (5 January 2005). Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005). Confirmation of this assessment comes in the form of then Minister of Provincial and Local Government FS Mufamadi's statement that the Volkstaat Council would be phased out and its responsibilities handed over to the CRLC. Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005). The brinkmanship of white minority politicians also meant that agreement on official language policy and state-funded education in minority languages eluded the Constitutional Assembly until the very end. For a brief synopsis of the negotiations regarding the constitutional protection of minority rights, see I Currie 'Minority Rights: Education, Culture and Language' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S. Woolman *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 35.
- 25 See § 24F.4(e)(iii) *infra*.
- 26 The first pre-commission NCC was jointly sponsored by the Minister for the Department of Provincial and Local Government and the Minister for the Department of Arts, Culture, Science and Technology and was held in Pretoria on 24 September 1998.



again, a year later, in September 1999.<sup>27</sup> The second pre-commission NCC debated four theme papers: (1) the appropriate model for the

CRLC; (2) the mandate of the CRLC; (3) the relationship between the CRLC and other institutions; and (4) the relationship between cultural councils and the CRLC.<sup>28</sup>

Deliberation on the CRLC Act began in earnest in August 2001. In terms of the initial draft CRLC Bill,<sup>29</sup> the CRLC possessed only five of the powers now present in the CRLC Act.<sup>30</sup> During parliamentary debate, some members of the Provincial and Local Government Select Committees expressed concern over the CRLC's apparent inability to protect the cultural, religious and linguistic rights of communities.<sup>31</sup> Parliamentarians could not agree about whether the CRLC, as a watchdog of community rights, should have as much 'bite' as 'bark'.<sup>32</sup> Earlier drafts of clause 21 of the Bill included powers to 'facilitate the resolution of conflicts of an inter-cultural, inter-religious or inter-linguistic nature' and to 'investigate complaints of a cultural, religious or linguistic nature against any person or organ of state'.<sup>33</sup> These capacities were omitted from the August 2001 draft Bill. In the end, no mention was made of conflict resolution in the CRLC Act. The word 'conflict' was replaced with the word

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27 The second pre-commission NCC was sponsored by the Minister for the Department of Provincial and Local Government and was held in Midrand, Gauteng on 23-24 September 1999.

28 See 'Final Report: Second National Consultative Conference', Democracy and Governance, Human Sciences Research Council (November 1999) ('Report of the 2nd NCC'). The two most hotly debated issues were the role of the cultural councils and representation on the CRLC. The councils are intended to elicit, to amplify and to mediate local, geographically bounded concerns of religious, linguistic and cultural communities. They are tools for mobilisation and dispute resolution. Stakeholders articulated strong differences about (a) how such councils would be recognised; and (b) the amount of state support they should receive. Conditions of fiscal austerity have largely solved the latter problem. Financial support will be limited. The issue of how councils will be recognised — and thus who speaks for a particular community — still vexes the CRLC. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005). See § 24F.4(i) *infra*. The second pre-commission NCC was more decisive with respect to representation. A proposal for direct representation of all communities was rejected. Political legitimacy would be conferred on the CRLC through an open nomination process for its full-time chairperson and some 11 to 17 part-time commissioners.

29 Bill B62-2002, *Government Gazette* No 22573 (17 August 2001).

30 Compare CRLC Bill, s 21(1) and CRLC Act, s 5(1).

31 Debate on the Bill by the Provincial and Local Government Portfolio and Select Committees: Joint Sitting (PLGP Committee) commenced on 25 September 2001.

32 Minutes of the PLGP Committee hearings of 25 September 2001, available at [www.pmg.org.za/docs/2001](http://www.pmg.org.za/docs/2001), (accessed on 04 March 2004).

33 Minutes of the PLGP Committee hearings of 24 October 2001, Appendix 1, available at [www.pmg.org.za/docs/2001](http://www.pmg.org.za/docs/2001), (accessed on 04 April 2004).



'friction'.<sup>34</sup> The majority of parliamentarians ultimately preferred to see the CRLC as a mediator between communities.<sup>35</sup>

Mediation was not to be limited to active disputes. The CRLC was also charged with the responsibility of opening up channels of communication that would identify and diffuse incipient civil unrest.<sup>36</sup> This role as mediator, rather than litigator, meant that the CRLC was only granted the power to bring matters of

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concern to the attention of 'appropriate authorities'.<sup>37</sup>

The weakness of the CRLC reflects concern about its redundancy.<sup>38</sup> The Pan South African Language Board ('PANSALB'), the Youth Commission, the Commission for Gender Equality ('CGE'), the Human Rights Commission ('SAHRC'), the Public Protector, the Judicial Inspectorate, the National House of Traditional Leaders and the Free State Centre for Citizenship, Education and Conflict Resolution have briefs that overlap with that of the CRLC.<sup>39</sup> Many MPs have expressed anxiety about the expenditure of public funds on an entity that duplicates the functions of existing institutions.<sup>40</sup> However, Parliament's stonewalling and token funding suggest that the motivations for creating a toothless institution lie elsewhere.<sup>41</sup> Without putting too fine a point on it, the CRLC's

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34 See CRLC Act, s 5(g).

35 Minutes of the PLGP Committee hearings of 24 October 2001, Appendix 1, available at [www.pmg.org.za/docs/2001](http://www.pmg.org.za/docs/2001), (accessed on 04 April 2004).

36 Minutes of the PLGP Committee hearings of 25 September 2001, available at [www.pmg.org.za/docs/2001](http://www.pmg.org.za/docs/2001), (accessed on 04 March 2004). See the submission by the South African Council of Churches (SACC).

37 Minutes of the PLGP Committee hearings of 02 October 2001, available at [www.pmg.org.za/docs/2001](http://www.pmg.org.za/docs/2001), (accessed on 04 March 2004). The prevailing consensus is made manifest in the CRLC Act. The powers of the Commission enable it to: '(g) facilitate the resolution of friction between and within cultural, religious and linguistic communities or between any such community and an organ of state, and where the cultural, religious or linguistic rights of a community are affected; (h) receive and deal with requests related to the rights of cultural and linguistic communities; (i) make recommendations to the appropriate organ of state regarding legislation that impacts, or may impact, on the rights of cultural, religious and linguistic communities.' CRLC Act, ss 5(1)(g-i). Passage of the Act did not end debate about its content. Barely a year after the Act came into force, and prior to the actual establishment of the CRLC, a Bill was introduced in Parliament to amend the powers of the Commission under the Act. A van Niekerk (MP), Private Members Legislative Proposal on 'Enforcement Powers for the Section 185 Commission' (12 September 2003), available at [www.pmg.org.za/docs/2003](http://www.pmg.org.za/docs/2003), (accessed on 04 March 2004).

38 Minutes of the PLGP Committee Hearings of 24 October 2001, Appendix 1, Submission of the Afrikanerbond, available at [www.pmg.org.za/docs/2001](http://www.pmg.org.za/docs/2001), (accessed on 04 March 2004).

39 See Report of the 2nd NCC (supra) at 10-12. For example, the CRLC is given the power, under FC s 185(3), to investigate any matter that falls within the purview of the South African Human Rights Commission. FC 185 (3) was amended by Constitution of the Republic of South Africa Amendment Act 65 of 1998, s 4.

40 Ibid.

questionable provenance, its lack of powerful constituencies, and its nominal independence give the government little motivation to take the CRLC seriously.<sup>42</sup>

## 24F.4 The CRLC

### (a) Objectives of the CRLC

- 41 Under-funding of the Chapter 9 Institutions is a common problem. Parliament has been put on notice that low levels of funding and overweening executive oversight make effective operation of these institutions difficult, if not impossible. The Corder Report is absolutely scathing in this regard. See H Corder, S Jagwanth & F Soltau 'Report on Parliamentary Oversight and Accountability' Report to the Speaker of the National Assembly (1999), available at [www.pmg.org.za/docs/2001/viewminute.php?id=811](http://www.pmg.org.za/docs/2001/viewminute.php?id=811), (accessed 10 January 2005) ('Corder Report'). Corder, Jagwanth and Soltau write that

In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions, as government departments may be slow in recognising the interests of an institution which does not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. . . .

In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities are set.

Corder, Jagwanth & Soltau 'Corder Report' (supra) at paras 7.2 and 7.2.1. The authors then cite a decision by the Constitutional Court in support of the proposition that Parliament, not the executive, is responsible for securing the independence of the Chapter 9 Institutions and for creating oversight mechanisms that ensure that they discharge their duties. See *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 98 ('It is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.') Parliament has largely abdicated those responsibilities. The Corder Report suggests that, at a minimum, the budget of each Chapter 9 Institution be subject to a separate vote — a vote distinct from that for the budget for the department with line authority, and a vote distinct from that for the budget of other Chapter 9 Institutions. See Corder, Jagwanth & Soltau 'Corder Report' (supra) at para 7.3 ('By giving the constitutional institutions a separate budget vote their status as separate constitutional entities is recognised and they would be able to emerge from the shadow of the executive. We regard this as a minimum to achieve and fulfil the requirements of the Constitution.') To satisfy other constitutional imperatives, the Corder Report advocates the passage of legislation — an Accountability and Independence of Constitutional Institutions Act — and the creation of a parliamentary oversight committee — a Standing Committee on Constitutional Institutions. *Ibid* at paras 1.1, 7.3, 7.4, 8. (These recommendations are grounded in the requirements of FC ss 55(2), 181(1), 181(2), 181(3) 181(4) and 196(3)). Parliament has not acted on any of the Corder Report recommendations. Other Chapter 9 Institutions have noted this failure to act with dismay. See N B Pityana 'South African Human Rights Commission Presentation to the Justice Portfolio Committee — Budget Review and Programmes 2001/2002' (8 June 2001), available at [www.sahrc.gov.za](http://www.sahrc.gov.za), (accessed on 11 January 2005). Chairperson Pityana writes:

After five years of operations, it is very discouraging to have to report that questions about the independence of the Commission have not been resolved . . . . National Treasury continues to

The Final Constitution is committed to 'healing the divisions of the past', 'establishing a society based on democratic values, social justice and fundamental human rights', and building a South Africa 'united in [its] diversity'.<sup>43</sup> The CRLC is similarly tasked. It is responsible for deepening our appreciation for the wide array of South African cultures, languages and religions.<sup>44</sup> At the same time it is obliged to build bridges between communities in a country riven by racial, ethnic, cultural and linguistic strife.<sup>45</sup> The CRLC has used its bridge-building mandate to arrogate to itself a third mandate — national identity formation. At a high enough level of abstraction, multicultural recognition and national identity formation appear compatible.<sup>46</sup> But as the debate at the compulsory launch

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relate to the Commission through the Justice Department. This means that we have no direct means of having queries and problems resolved . . . . Since inception, the Commission has constantly raised concerns about the manner in which its budget was set. We pointed out *ad nauseum* that at no stage was there a proper assessment of the mandate of the Commission and the appropriate level of resources necessary to execute the mandate. Initiatives by the Minister of Finance — such as his requirement in 1996 that we prepare a business plan — . . . . was promptly ignored once it was presented . . . . Another example of this insensitivity to the independence of national institutions is where, without consultation or reference to the affected institutions, the *Public Finance Management Act, 1999* prescribes in Section 66(4) that constitutional institutions 'may not borrow money, nor issue guarantee, indemnity or security, nor enter into any transaction that binds the institution or entity to any future commitment'. The effect of this, of course, is that the Commission cannot rent property in its own name, acquire property for its sole use and in its own name. This is unacceptable especially as the Human Rights Commission Act states clearly that the Commission 'shall be a juristic person'. At a stroke the rights and privileges of an independent institution have been removed without the participation of the Commission. . . . [S]uch a cavalier attitude to the law is worrisome . . . . [Another] concern has been about the treatment of the reports of the Commission by parliament. Some progress appeared to be developing when the Speaker commissioned Professor Hugh Corder to advise on the effective functioning of the oversight responsibility of parliament towards Chapter 9 institutions . . . . We are not aware that any action has been taken by parliament on the report. The rules of parliament still do not allow meaningful participation by national institutions, our reports still do not have a portal that fits in parliamentary procedures and there is no committee dedicated to receiving and reviewing the reports of the Commission.

Ibid at 4-5.

42 For more on the basis for this assessment, see § 24F.4(g) *infra*. This conclusion is grounded, in part, in Parliament's refusal to release any monies for the CRLC in the fiscal year 2004 until September 2004. Parliament agreed to release monies necessary for the CRLC's operation only when several Commissioners made the Minister and Parliament aware that the CRLC could not host its statutorily-required launch within its first year of operation if it did not receive the requisite funds. The government's identification of the CRLC with the Volkstaat Council and its evident disdain for the CRLC's activities further bear out this assessment. See § 24F.4(g) *infra*. Others are slightly more sanguine about government's attitude towards the CRLC, and attribute government's inaction to a belief, however misguided, that Chapter 9 Institutions generally ought to assist the government in carrying out its policies. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

43 See Final Constitution, Preamble.

44 See CRLC Act, s 4. Section 4 states that the mission of the CRLC is:

(a) to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;

(b) to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association;

of the CRLC in November 2004 suggests, persons and groups silenced by years of oppression often have a greater interest in being heard than they do in pledging allegiance to a nation still in the early stages of gestation. Whether such a broad brief as national identity formation is coherent — or if coherent, even plausible given the political environment and the CRLC's fiscal constraints — will surface and resurface as a theme throughout the rest of this chapter.

## (b) Composition of the CRLC

FC s 186(2) provides that the CRLC must:

- (c) to foster mutual respect among cultural, religious and linguistic communities;
- (d) to promote the right of communities to develop their historically diminished heritage; and
- (e) to recommend the establishment or recognition of community councils.

45 See CRLC Act, Preamble.

46 We are not convinced that they are compatible. Indeed, for a society in transition, multicultural recognition and national identity formation appear to pull in opposite directions. Even if individual identities are formed in open dialogue, they are largely shaped and limited by a predetermined set of scripts. Collective recognition becomes important, in large part, because the body politic has denied the members of some groups the ability to form — on an individual basis — a positive identity. In a perfect world, the elimination of group-based barriers to social goods would free individuals to be whatever they wanted to be. But even in a perfect world, claims for group recognition do not dissipate so readily. What is the basis for the demand for group recognition? In any multicultural society, two different kinds of claims for equal respect and two different senses of identity sit uncomfortably alongside one another. The first emerges from what Taylor calls a politics of equal dignity. See C Taylor 'The Politics of Recognition' in A Gutmann (ed) *Multiculturalism* (1996) 1. It is based on the idea that each individual human being is equally worthy of respect. The second issues from a politics of difference. This form of politics tends to revolve, primarily, around the claim that every group of people ought to have the right to form and maintain its own — equally respected — culture. The important distinction between the two is this. The first focuses on what is the same in all of us — that we all have dreams and that we should all be allowed to pursue these dreams. The second focuses on a specific aspect of our identity — our membership in a group or groups — and says that the purpose of our politics ought to be, ultimately, nurturing or fostering that particularity. The power of this second form of liberal politics springs largely from its involuntary character — the sense that we have no capacity to choose this aspect of our identity. It chooses us. See M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67. The problem we face in our own liberal democracy is that it is difficult, if not impossible, to accommodate both kinds of claims. As Taylor himself notes, while 'it makes sense to demand as a matter of right that we approach . . . certain cultures with a presumption of their value . . . it can't make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.' Taylor (supra) at 16. But the demand for political recognition of distinct cultures amounts to just that. Moreover, such recognition reinforces a narcissism of minor difference that, in turn, provokes anxiety about the extent to which members of other groups secure access to the most important goods in a polity. Such anxiety about a just distribution of goods — and the manner in which group affiliation distorts that distribution — necessarily interferes with national identity formation. The ANC has, for both historical reasons and for reasons associated with its vision of transformation, refused to lend significant support to politics associated with group recognition. The Constitutional Court is also predisposed towards claims of equal respect grounded in a politics of equal dignity. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 28-30 ('[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all *individuals* as members of society.') See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society . . . [E]quality means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens.')

- (a) be broadly representative of the main, cultural, religious and linguistic communities in South Africa;
- (b) be broadly reflect the gender composition of South Africa.

Section 9 of the CRLC Act stipulates that the CRLC must consist of:

- (a) a Chairperson appointed by the President in terms of the Act; and
- (b) no fewer than 11 and no more than 17 other members appointed by the President in accordance with the procedure set out under the Act.<sup>47</sup>

The CRLC Act supplements these compositional desiderata with a requirement that the members of the CRLC be selected in a manner that ensures that it 'collectively possesses sufficient knowledge and experience concerning issues relevant to the promotion and protection of cultural, religious and linguistic communities and nation-building.'<sup>48</sup>

Following an invitation to South Africans to nominate qualified individuals to serve on the CRLC Commission,<sup>49</sup> the first 18 commissioners were appointed by the President of the Republic in late 2003.<sup>50</sup> At present, there are seven female commissioners (including the deputy chairperson).<sup>51</sup> The members of the CRLC

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Commission represent a broad range of South African cultural, religious and linguistic groups.<sup>52</sup>

The 'sufficient knowledge' criterion for selection has yet to play a meaningful role in the appointments process. It has, however, become an issue in terms of the operation of the Commission. Administrative officers have argued that the 'nation-building' requirement means that commissioners from a particular demographic group ought not to be used as emissaries to that group. For example, a commissioner who adheres to some form of Judaism ought not to engage members of the Jewish community on matters related to the official business of the CRLC. The ostensible rationale for this policy position is that nation-building requires communication across demographic groups. Several commissioners have rejected this position on the grounds that a commission charged with the protection of

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47 See FC s 186(1). For the procedure of appointment of the Chairperson and other members of the CRLC Commission, see CRLC Act, ss 12 and 11, respectively.

48 See CRLC Act, s 4(c).

49 See CRLC Act, s 11.

50 Of 196 nominees, 54 candidates were interviewed. The appointments were made on 30 September 2003. See South African Information Service, available at [http://www.southafrica.info/ess\\_info/sa\\_glance/constitution/culturalrights.htm](http://www.southafrica.info/ess_info/sa_glance/constitution/culturalrights.htm), (accessed on 4 April 2004).

51 The CRLC's Chief Executive Officer, P Madiba, is also a woman.

52 The profiles of the individual commissioners are available at <http://www.crlccommission.org.za/commissioners.html>, (accessed on 27 May 2004).

cultural, religious and linguistic communities must, in fact, deploy those commissioners best able to understand — from the inside — the concerns of a given community.<sup>53</sup>

### **(c) Mandate and functions of the CRLC**

Given its very recent, and substantially delayed establishment, the CRLC's chief preoccupation is with the consolidation of its power. CRLC commissioners and staff recognize that turning an institution perceived by many as a white elephant into a felt necessity is contingent upon its capacity to discharge its constitutional and statutory obligations.

The CRLC mission statement holds that the CRLC's primary aim is 'to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities. To achieve this mission, the CRLC must:

- (a) create channels of communication between the state and communities;
- (b) monitor compliance by the state and civil society with its mandate;
- (c) mediate in inter-community conflict situations and facilitate harmonious co-existence;
- (d) develop programmes that foster sensitivity, respect and understanding for cultural, religious and linguistic diversity;
- (e) lobby government departments and legislative authorities in order to recommend amending or repealing laws that undermine its aims or enacting laws in furtherance of its ends.<sup>54</sup>

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Section 5 of the CRLC Act sets out the primary responsibilities of the CRLC.<sup>55</sup> These responsibilities encompass public education and information, investigation and dispute resolution, policy and research, the creation of community councils, and the sponsorship of a national consultative conference.

The CRLC, as an independent state institution supporting constitutional democracy,<sup>56</sup> is expected to perform its functions without fear, favour or prejudice.<sup>57</sup> As the experience of other Chapter 9 Institutions attests, budgetary constraints and dependence upon government largesse can make it difficult to discharge

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53 Interviews with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (02 June 2004 and 05 January 2005).

54 See CRLC website, available at <http://www.crlcommission.org.za/about.html>, (accessed on 27 May 2004).

55 See also FC ss 185(1), (2) and (3).

56 See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC)(Chapter 9 Institutions are independent and thus cannot be a part of the national sphere of government.)

57 See CRLC Act, s 3.

constitutional obligations.<sup>58</sup> The CRLC's own experience with fiscal foot-dragging by the government suggests how easily the independence of these institutions erodes.<sup>59</sup>

#### **(d) Public education and information**

Section 5(a) of the CRLC Act requires the CRLC to conduct information and education programmes that promote public understanding of its objects, role and activities. To achieve this particular end, the CRLC Commission has depended, quite literally, on the good offices of such older and better-established sister institutions as the South African Human Rights Commission ('SAHRC') and the Commission for Gender Equality ('CGE'). The SAHRC's provincial offices have provided the CRLC with the space and the credibility necessary to hold workshops and conferences designed: (1) to introduce itself to the public and (2) to encourage people to speak to sensitive issues regarding race, culture, language, class and religion.

The CRLC has decided that in order to carry out its mandate, it must become a locus for debate and not merely an oracle making orotund pronouncements on identity politics.<sup>60</sup> As a result, the CRLC views its 'constituencies' as vital to its political success: the more communities it mobilises around language, culture and religion, the more likely it is to succeed in shaping its own agenda.<sup>61</sup> Fiscal limits and the capacity constraints will make it difficult for the CRLC to play such a role. Members of the public have already complained that the CRLC has made little effort to follow up on early initiatives and that the CRLC lacks the staff

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necessary to maintain connections with the communities to which it has already reached out.<sup>62</sup>

#### **(e) Investigation and dispute resolution**

##### **(i) Power to intervene**

The CRLC possesses the power to monitor, to investigate and to research any issue concerning cultural, religious and linguistic communities and their rights.<sup>63</sup> Similarly, the CRLC may respond to requests related to the rights of cultural, religious and

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58 See Corder, Jagwanth & Soltan 'Corder Report' (supra) at para 7.2.1; Pityana (supra) at 4-5.

59 Interview with Ms M Bethlehem, Deputy Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (1 December, 2004). Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005).

60 Interview with Dr MD Guma, Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (14 May 2004)(For example, the Chairperson would like the CRLC to assist in the creation of a receptive environment in traditional communities for debate about AIDs, ARVs and responsible sexual behaviour.)

61 Ibid.

62 Interviews with delegates to National Consultative Conference for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (29 November - 1 December 2004).



linguistic communities.<sup>64</sup> The CRLC must attempt to mediate conflicts between and within cultural, religious and linguistic communities as well as between any such community and an organ of state. These three functions suggest that the CRLC was designed to enable communities to resolve disputes amicably and to diminish the likelihood that communities would use the courts to ventilate grievances.

Unlike the enabling acts of other Chapter 9 Institutions, the CRLC Act grants the CRLC no independent basis upon which to bring a claim to court. This deficiency was the subject of debate prior to and subsequent to enactment of the CRLC's enabling legislation.<sup>65</sup> Parliament's considered opinion appears to be that the CRLC should not possess the power to protect cultural, religious and linguistic communities' rights or to enforce any of its recommendations. The CRLC may only make recommendations to 'the appropriate organ of state regarding legislation that impacts, or may impact, on the rights of cultural, religious and linguistic communities'<sup>66</sup> or 'bring any relevant matter to the attention of the appropriate authority or organ of state, and where appropriate, make recommendations to such authority or organ of state in dealing with such a matter.'<sup>67</sup>

The limitations placed on enforcement need not be crippling. The CRLC Act leaves open a number of other litigation strategies. The absence of an express right to litigate has not stopped other Chapter 9 Institutions, namely the Commission for Gender Equality ('CGE'), from asserting its right to do so.<sup>68</sup> Although the

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CGE has not yet initiated any case in its own name, it has exercised its litigation prerogative by lending support to or participating in cases that raise important gender issues. The CGE's intervention as an *amicus curiae* has established institutional precedent that the CRLC may well choose to follow. Another strategy, discussed more fully below, is to use other Chapter 9 Institutions — namely the SAHRC — to initiate litigation on the CRLC's behalf.

The absence of express powers to litigate will inevitably influence the role the CRLC crafts for itself. As it now stands, the CRLC views its role primarily as a

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63 CRLC Act, s 5(e).

64 CRLC Act, s 5(h).

65 A proposal to amend the Act in this regard was submitted to the Members and Legislative Proposals Standing Committee on 12 September 2003. See Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities Amendment Bill, available at <http://www.pmg.org.za/docs/2003/viewminute.php?id=3527>, (accessed on 4 March 2004).

66 CRLC Act, s 5(i).

67 CRLC Act, s 5(k).

68 See, eg, *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC); *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (2) SACR 499 (CC), 2002 (11) BCLR 1117 (CC). See also C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) in *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D.

consciousness raiser and not an agent of change.<sup>69</sup> Its enabling statute — as well as its current complement of commissioners — has created an institution less inclined to adjudicate competing claims and more disposed towards creating the conditions for mutual respect. Given the sensitive nature of the matters that fall within its purview, Parliament may have been wise to ensure that the CRLC uses the blunt cudgel of the law only as a last resort.

## **(ii) Complaints and complaint mechanisms**

At the time of writing, the CRLC has no procedure for engaging complaints or requests for intervention.<sup>70</sup> Nor does the CRLC have any draft procedures on the table.<sup>71</sup> This failure to construct adequate mechanisms to field inquiries, to investigate disputes, to reach considered conclusions in law and to use such conclusions to facilitate conflict resolution means that the CRLC currently has no way of discharging meaningfully its constitutional obligations. That no script for dispute resolution exists stands as an indictment of the CRLC and reflects an abdication of responsibility by the government.<sup>72</sup>

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## **(iii) Requests for intervention**

Over the course of its first year of operation, the CRLC has received a number of requests for intervention. At the time of writing, none of the underlying disputes have been resolved.<sup>73</sup> The CRLC's current docket does, however, provide a glimpse of some of the religious, linguistic and cultural fault lines in South Africa.

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69 Interview with Dr MD Guma, Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (14 May 2004).

70 Complaints are currently assigned to individual commissioners on an ad hoc basis. Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (05 June 2004); Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

71 That does not mean that Commissioners and staff are without notions about how requests for intervention ought to be handled. The CRLC administration will likely float two proposals. The first would have the Corporate Affairs Officer ('CAO') *qua* Legal Advisor make the initial findings. A panel of commissioners would sit as an appellate body were a party to the dispute inclined to contest the CAO's finding. A second model — based upon the existing dispute resolution mechanisms at the SAHRC — would have one member of the CRLC staff and two outsiders make the initial finding. The finding would be binding on the CRLC. CRLC commissioners would be tasked with running hearings on issues of broader social import. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

72 While the CRLC and its administration bear the lion's share of responsibility for this lassitude, the Minister of Provincial and Local Government is equally culpable. As the Constitutional Court made patently clear in *New National Party of South Africa v Government of the Republic of South Africa & Others*, a Chapter 9 Institution is entitled to craft its own procedures to discharge its brief and the state is obliged to provide the requisite financial and administrative support. 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC). The Minister must accept a significant measure of responsibility for both the absence of adequate funding and the failure to supply adequate counsel to develop the necessary dispute resolution mechanisms.

73 'List of Complaints Received' Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (07 January 2005)(On file with author).

Not surprisingly, members of Afrikaans-speaking communities have lodged a significant number of complaints. The content of these complaints demonstrates remarkable thematic variation: (1) religious education in secondary schools; (2) government subsidies for former Model C schools; (3) faith-based drug rehabilitation centres; (4) diminution in the status of Christianity; (5) language instruction in secondary school education; (6) a lack of respect for Christianity in advertising copy at an institution of tertiary education.<sup>74</sup> Complaints from other quarters are just as diverse: (1) requests for expansion of the list of 11 existing official languages; (2) a referral from the SAHRC regarding ancestral burial rights; (3) discrimination against a Reformed Presbyterian Church; (4) the predominance of Christian holidays as official holidays; (5) admissions policies for private religious schools; (6) a failure to provide sufficiently for instruction in African languages in public schools curriculum; (7) absence of Department of Education policy on resource allocation for and equity considerations involved in religious studies instruction; (8) a longstanding historical dispute between the Khoi and the San communities.

### **(f) National Consultative Conference ('NCC')**

The CRLC must convene two consultative conferences during each five-year term.<sup>75</sup> The first such conference must take place within 12 months of a new term of the Commission.<sup>76</sup> The dual purpose of the NCC is to evaluate South Africa's progress with regard to the promotion and protection of the rights of cultural, religious and linguistic communities and to take stock of its success in forging a national identity.<sup>77</sup>

The first official NCC took place in the time period required by statute.<sup>78</sup> Whether the NCC achieved its goals depends upon one's perspective.

That almost 600 delegates — representing the entire spectrum of South Africa's religious, linguistic and cultural communities — attended the NCC certainly counts in its favour. That the CRLC was able to arrange for the plenary sessions to be simultaneously translated into the 11 official languages also stands as a remarkable achievement. Groups long silenced had an opportunity to speak and to be heard.

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While we are loath to play the role of Cassandra, the results of the first official NCC do not augur well. As we have already noted, the CRLC battled to secure the funding for this statutorily mandated event.<sup>79</sup> Only after the CRLC noted that the funds for the conference could be drawn down from the unused balance of the CRLC's budget for the preceding fiscal year did Parliament agree to release the monies necessary to hold the conference. A large amount of money — some R5.5 million — was spent on this five-day affair. Given that the entire allocation for the

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74 Ibid.

75 CRLC Act, s 13(1).

76 CRLC Act, s 24.

77 CRLC Act, s 25. See also CRLC Act, ss 26–29 (Prescribes procedures for and persons who must attend NCC).

78 The first official NCC took place between 29 November and 03 December 2004 in Durban, KwaZulu-Natal.

CRLC in 2005 is a mere R10 million, one might well ask whether such a sum for a conference is warranted. The agenda for the NCC promised that the annual report for the CRLC would both be delivered at the beginning of the conference and be addressed by the CRLC Chairperson. No such report was delivered or addressed.<sup>80</sup> One could have reasonably expected the CRLC to provide some public account of its budget, its management structure, its complaint docket and its accomplishments.<sup>81</sup> This lackadaisical attitude dovetails nicely with the demonstrably equal degree of disinterest displayed by the government. The government's disdain is evident in the failure of the State President, the Deputy President or the Minister of Provincial and Local Government to attend any of the NCC proceedings in which they had agreed to participate.<sup>82</sup> The notable absence of government representatives coupled with foot-dragging on funding intimates strongly that the state would be happy to see the CRLC go the way of the Volkstaat Council. The inability of the CRLC to create mechanisms to capture the information generated by this first NCC and to establish itself, at a minimum, as a clearing-house for concerns about religious, linguistic and cultural communities only serves to reinforce the current government's dim view of the CRLC.

### **(g) Funding**

According to both the Final Constitution and the CRLC's enabling statute, Parliament must supply sufficient levels of funding for the CRLC to discharge its

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responsibilities. The CRLC Commission may generate additional funding from private sources.<sup>83</sup>

As it stands, it is not clear that Parliament has supplied sufficient funds for the CRLC to operate effectively.<sup>84</sup> The CRLC proposed a budget of R32 million for the

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79 Interview with Ms M Bethlehem, Deputy Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (1 December, 2004). Interview with Ms P Madiba, Chief Executive Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (30 November 2004).

80 The only document produced was the text of the Chairperson's speech. The document does not constitute an annual report nor did it contain any meaningful content. The CRLC had also promised to launch a cultural-religious primer at the first statutorily mandated NCC. Interview with Dr MD Guma, Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (14 May 2004). This ecumenical document was supposed to interrogate South African cultural and religious practices and to offer other communities a window into the cultural and religious lives of their fellow citizens. No such primer was produced for the NCC.

81 The failure to produce such a document after a year of operation bears out the frustration — expressed off the record — of CRLC commissioners with the CRLC's inability to meet even the most minimal indicia of success.

82 All three accepted the invitation to speak and were accommodated in the NCC programme. All three begged off during the week prior to the launch.

83 CRLC Act, s 24(2). While private funds have the potential to solve some capacity problems, it is difficult to raise money in the absence of a strategic plan stating the aims of the CRLC. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

fiscal year 2005. Parliament responded with an allocation of R10 million.<sup>85</sup> The political appointees and the administrative staff of the CRLC themselves cannot agree on appropriate levels of funding or the nature of the budget. According to several commissioners, the CRLC administrative staff put forward a budget in which 93% of state monies would support administrative activities and personnel costs and a mere 7% would support CRLC programmes. Moreover, the CRLC administration's decision to put forward a budget without approval by an appropriately constituted CRLC executive body appears to contravene the express wording of the CRLC Act.

### **(h) Co-operation between the CRLC Commission and other institutions and organs of state**

In order to execute its mandate, the CRLC may: (a) 'make arrangements with another constitutional institution or organ of state to assist the Commission in the performance of any of its functions' and (b) 'delegate any of its powers to a constitutional institution or organ of state with which it has made the necessary arrangements for the rendering of the agreed assistance'.<sup>86</sup> In addition, where the functions of the CRLC 'overlap with those of other constitutional institutions or organs of state', the Commission is obliged to co-operate with those institutions.<sup>87</sup>

To avoid the anticipated overlap, a cross-referral docket system for the CRLC, the SAHRC and the CGE is in the offing.<sup>88</sup> The CRLC has already decided that it

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will only consider 'communal' complaints. Individual complaints are to be referred to the SAHRC and CGE.

### **(i) Cultural councils**

To carry out its mandate, the CRLC must receive significant support from the various religious, linguistic and cultural communities it is meant to serve. To this end the

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84 Other Chapter 9 Institutions have alleged that current levels of funding are inadequate to their respective tasks. See Corder, Jagwanth & Soltau 'Corder Report' (supra) at paras 7.2., 7.3, 7.4; Pityana (supra) at 4–5. However, at least one member of the CRLC does not believe that inadequate funding levels are to blame for the CRLC's and other Chapter 9 Institutions' lack of independence. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005). Advocate Thitanyana suggests that the CRLC and other Chapter 9 Institutions bear part of the responsibility for making themselves irrelevant. Advocate Thitanyana believes that a 'culture of companaros' (our locution) — made up of government officials, NGO staff and academics who all know one another — creates an environment in which little meaningful criticism takes place.

85 Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

86 CRLC Act, s 6(1).

87 CRLC Act, s 6(2).

88 Interview with Dr MD Guma, Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (14 May 2004); Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (05 June 2004).

CRLC Act makes provision for the registration of cultural councils.<sup>89</sup> These councils are meant to operate at the coalface of community conflict: serving as a conduit for information to and from the CRLC, and assisting the CRLC in managing disputes. However, issues of 'who' can legitimately represent a community and how many councils can serve any given constituency has led to yet another case of vapour lock at the CRLC. The CRLC has not registered a single cultural council because it still lacks criteria and procedures for their establishment.<sup>90</sup>

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89 CRLC Act, ss 36–38, reads, in relevant part: '36. Recommendation of establishment of community councils: 1. Persons belonging to a cultural, religious or linguistic community may form, join and maintain cultural, religious and linguistic associations and other organs of civil society as envisaged in section 31 of the Constitution. 2. The establishment of such a council would be conducive to: a. the promotion and protection of the rights of such a community; and b. the promotion and development of peace, friendship, humanity, tolerance and national unity among and within the different communities in South Africa. The Commission may recommend to a community, which is not organised, to initiate and establish a community council . . . 37. Recognition of community councils. 1. A community council envisaged in section 36(1) or (2) may, in the prescribed manner, apply to the Commission for recognition. 2. The Commission may in writing recognise a community council for purposes of participation in a national consultative conference and section. 3. A community council recognised in terms of subsection (2) may apply to the Commission or any other organ of state for financial assistance. 38. Aims of community councils. 1. The aims of a community council recognised in terms of section 37 should be to: a. preserve, promote and develop the culture, religion or language of the community for which it is recognised; or b. advise the Commission on, and assist the Commission in, matters concerning the achievement of the objects of the Commission.'

90 Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).