FREEDOM
OF RELIGION
SOUTH AFRICA

t +27 021 556 5502

a P.O. Box 50110
West Beach
Cape Town 7441

e info@forsa.org.za
www.forsa.org.za

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OPEN LETTER TO THE CRL RIGHTS COMMISSION ON ITS FINAL REPORT ON THE *"COMMERCIALISATION OF RELIGION AND ABUSE OF PEOPLE'S BELIEF SYSTEMS".*

Dear Ms Mkhawanazi Xaluva,

As you are aware, on 27 February 2017, Freedom of Religion South Africa (FOR SA) sent a 67 page submission (representing over six million people from 277 denominations, fraternals, churches and other religious groups) to the CRL Rights Commission (CRL) in response to its (initial) Report on the *Commercialisation of Religion and Abuse of People's Belief Systems*. This submission, which was a joint response with the SA Council for the Protection and Promotion of Religious Rights and Freedoms (representing over 22 million people from across faith groups in South Africa), was developed by a team of Advocates and Professors with decades of combined experience and expertise in the areas of religious freedom, human rights and constitutional law.

FOR SA has already repeatedly expressed our solidarity and support for what we understand to be a *bona fide* attempt by the CRL to address genuine abuses taking place in the name of religion, while highlighting our deep concern regarding their proposal to regulate and license religion in South Africa, which we view as unnecessary, unworkable and unconstitutional.

The intention of FOR SA's submission was to assist the CRL, by providing it with a comprehensive analysis of the issues raised in its Report, giving detailed reasons (both legal and practical) why its proposed solution (which effectively amounts to State regulation of religion) was unnecessary, unworkable and unconstitutional, and giving viable alternatives. However, in this instance, while we recognise that the issues identified in the Report are cause for serious concern, at present we unfortunately seem to be unable to find common ground in presenting solutions to resolve them.

Since the end of February 2017 (the deadline for submissions on the CRL's initial Report), FOR SA has tried numerous times to get an acknowledgement of receipt of our submission from the CRL. We also made multiple requests for a meeting with the CRL so that we could discuss the matter further. Despite the significant constituency which FOR SA represents, the CRL informed us that it preferred to speak to "the masses". We subsequently learned that the CRL has conducted selective private meetings, using this input to fine-tune their Report, which they intend to present to Parliament "sometime in June … but possibly before the end of May"

On 19 April 2017, we finally received word of a meeting on 26 April at the Eerste River AFM church, organised by *Great Commission Ministries*. Only after a specific request to the CRL for the amended Report (which the CRL had selectively made available to certain groupings), we were sent the amended Report the

day before this meeting, on 25 April. FOR SA duly attended this meeting, listened to the verbal and PowerPoint presentation by the Chairlady and subsequently analysed the revised "Final Report".

What is immediately evident, is that the CRL has not made any substantive amendments to their (initial) proposal for what is effectively (and for reasons which we again explain herein) State regulation of religion. They have either ignored or obfuscated the concerns and objections FOR SA (and others) had raised, while claiming to have taken them into account. The CRL's approach and attitude have made it clear that they are neither willing to meet with FOR SA or any organisation which has criticized their current proposal, nor are they willing to consider the viable alternative solutions that we (and many others) presented to them.

FOR SA believes that it is vitally important that our cherished freedom of religion is both protected and promoted. The faith community of South Africa has always enjoyed this right and our Constitution guarantees it. Freedom of religion is a fundamental human right, encompassing freedom of thought, conscience, belief, expression, assembly and association. While everyone involved in this area is bound (like every citizen) by the laws of this land, this freedom has never been regulated in South Africa and the Courts in particular have always been very wary and careful to leave the different faiths to self-regulate.

Although religion is a "profession" in the sense that some people earn a living from their involvement in it, it cannot be compared to careers like law, medicine and financial services. In these instances, there are set laws, regulations, processes and procedures against which conduct can be evaluated and licenses awarded or withdrawn, whereas the area of faith is by definition fluid and varied.

It is estimated that there are over 40 000 different Christian denominations in the world today, so any attempt to regulate will inevitably cross the line and pass judgement on doctrine. As such, when the State attempts to intervene, we should be deeply concerned about the consequences and seriously question the motives, especially when there are better and less onerous solutions available.

The constitutional mandate of the CRL is "*to promote and protect the .... religious ..... rights of communities*". It is NOT mandated, either in terms of the Constitution or the CRL Act, to license and control them. So, while at first glance the current proposal of the CRL may seem fair and reasonable, a more careful analysis shows that it is a most serious threat to the right to freedom of religion. One has to look no further that Russia (where the practice of religion is State regulated and licensed) to see how the pendulum can swing - from tolerance of all faiths in the years immediately after the collapse of the USSR, to the draconian measures recently taken under Putin to suppress certain faiths.

Proverbs 18:17 says "Any story sounds true until someone sets the record straight." FOR SA has therefore decided to write an Open Letter in the interests of transparency to point out the flaws and fallacies in the CRL's Final Report,including its recommendations for the licencing of all religious practitioners and places of worship. Our hope is that this will precipitate a call for further dialogue and, at the very least, that it will slow down the current headlong rush towards what will effectively amount to "State capture" of religion.

Inaccuracies and omissions in the CRL Report

1) The CRL has followed due process in assembling its Report and making its recommendations to Parliament

   Not true. Bearing in mind that the CRL's proposal will fundamentally alter the relationship of the State with the religious community and affect the lives on multiple millions of South African citizens,

the process followed has been woefully inadequate. A lack of proper process has been the hallmark of this matter from its inception.

[EG] The method of selection of the initial "random sample" of churches/religious practitioners called to hearings; the issuing of subpoenas; the lack of (or insufficient) disclosure of (or consultation on) the subsequently proposed regulation of religion; the 3-week period initially given for comment on the initial Report; the absence of public disclosure of the amended Report; the singling out of the Christian sector etc.

Following the receipt of "many" submissions on the Report, the CRL amended the Report (incl. the proposed structure for the regulation of religion) and selectively disclosed these amendments to certain members of the religious sector only. The CRL has also stated that there is no need for further input/comment before this Report is referred to Parliament – possibly by end of May 2017.

2) <u>The CRL's claim that they are already "the first and final arbiter of religion" in South Africa</u>
Not true. Section 185 of the Constitution (and indeed the CRL Act, 2002) suggest that the CRL is first and foremost an advisory body. While the CRL Act does empower the Commission to deal with complaints where the rights of religious communities have been violated, neither the Constitution nor the CRL Act suggests that they are "the first and final arbiter of religion" in South Africa.

Despite the CRL's claims, which seem intended to send a message that any opposition to its proposal is futile, the CRL itself clearly recognises that it is NOT currently empowered to implement its plans to regulate and license religion, because they are asking Parliament to amend the CRL Act to enable them to do so.

3) <u>The CRL's proposal will empower religions to self-regulate - not to be State regulated</u>
Not true. The CRL confirmed at the Eerste River meeting and in their updated Report, that they will be the exclusive issuer of licenses for all religious practitioners and places of worship as well as the final arbiter of all matters affecting the religious community.

Chapter 9 of the Constitution clearly declares that the ***CRL is an institution of the State***. In terms of the CRL Act, the Chairperson of the CRL as well the Commissioners serving on the CRL, are appointments by the State President and are thus political appointments.

As such, if the CRL's proposal is successful, the State will have effectively captured control of all religion in South Africa.

4) <u>The CRL's claim that that the CRL Act says they "must" keep a register of religious institutions and place of worship</u>
Not true. The CRL has been empowered by the Constitution as a Chapter 9 institution to protect and safeguard the rights of cultural, religious and linguistic communities. While they "may", in terms of section 5((1)(j) of the CRL Act, choose to keep a database of such communities, they are not obliged to do so.

There is a world of difference between keeping a database of religious institutions and places of worship, and issuing / revoking licenses to permit them to practice at all. No doubt, in order to

obtain a licence, religious institutions / practitioners will have to comply with certain requirements or conditions, which are not mentioned in the Report at all.

5) <u>The CRL states that the test for freedom of religion is the "reasonable man/person" or "objective observer" test.</u>
Not true. The Constitutional Court has already decided in *Prince v President of the Law Society of the Cape of Good Hope* that a person is free to believe something even if that belief is "bizarre, illogical or irrational". It explained its decision by stating that even if a belief is "incapable of scientific proof, [this] does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion."

Significantly, the same case established the "harm principle", which allows the Courts (and the State) to intervene when a religious practice is deemed to be harmful or illegal – in the *Prince* case, the practice of smoking marijuana. FOR SA has consistently pointed out that every one of the valid issues of concern which the CRL details in its Report, can be dealt with and resolved by the application of existing South African laws.

6) <u>The CRL's claim that abuses cannot be effectively dealt with, using the existing legal framework.</u>
Not true. South African law and its legal system is sufficient to deal with any criminal activity, whether committed by a religious leader or an ordinary person. It simply needs to be enforced.

[EG] The Court order granted against the so-called "Prophet of Doom" included any harmful products he might want to administer to his congregants and set legal precedent as to how such cases should be dealt with in future. The Limpopo Department of Health applied the *Hazardous Chemical Substances Act and Regulations*, which ALREADY regulates this type of situation.

[EG] "Prophet" Tim Omotoso was arrested, detained and appeared in Court after the alleged victims complained to the authorities. He was handled as a criminal and normal criminal procedures and process have been applied.

Curiously, in the CRL's updated Report, they mention that where a religious organisation abuses its PBO status, "*existing legislation .... needs to be enforced with due diligence.... [and] SARS has the power and responsibility to deal with the matter.*"

7) <u>Enforcing the law against offending Religious Practitioners would currently cost the State "at least R100 million annually"</u>
Not true. The CRL Chairlady made this statement without any substantiation. However, and to put it in context, this sum would enable the CRL to have an in-house legal team of at least 100 full time lawyers and support staff. While she mentioned that the CRL receives "numerous complaints", less than 20 (not all of which are in any event criminal) are mentioned in the Report. Clearly, this statement is an exaggeration.

FOR SA's submission to the CRL recommended that a unit be set up within the CRL to provide rapid response referrals of complaints to the relevant authorities for investigation, follow up and (if necessary) prosecution. This would ensure that the relevant authorities and law enforcement

agencies would be quickly alerted and mobilised to deal with any harmful or illegal activities, whether physical or financial. This recommendation was ignored by the CRL.

8) The CRL's claim that the Peer Review Committee is independent of the CRL
Not true. In terms of the updated Report, the Peer Review Committee (for each religion) is defined as "an advisory body to the CRL Rights Commission". The CRL will be represented on the Peer Review Committee and will effectively run and finance it by the provision of "research, legal support, secretariat and other necessary services."

This Committee is therefore subservient to (and dependent on) the CRL, referring matters to it and advising it on all resolutions it has taken regarding complaints. The Report clearly states that "The final decision powers shall lie with the CRL Rights Commission."

This is further proof that the CRL Report and its recommendations will effectively result in State control of religion.

9) The CRL's proposal is in line with s 18(1) of the Bill of Rights, which guarantees freedom of association
Not true. The CRL will ensure that all religious practitioners and associated places of worship MUST apply via an Umbrella Organisation to be licensed by the CRL. This is compulsory and without exception. Those who fail or refuse "will be dealt with". If you have no license, you will not be permitted to operate and if you continue, you will be committing a criminal act. All religious practitioners will therefore be compelled to associate with an Umbrella Organisation, whose structure and function will be determined by the CRL.

The CRL proposal is concerningly vague on whether (or not) itinerant and para-Church ministries would be recognised and permitted to operate, or whether "home church" movements would be valid.

10) The Peer Review Committee will not make decisions on doctrine
Not true. The Peer Review Committee (for each religion) makes decisions on whether (or not) an Umbrella Organisation will be recognised, taking into account (among other things) whether it has *"set minimum standards of good governance, ethics and acceptable religious practices as per their religious doctrine"* and whether the spiritual leaders of the Umbrella Organisation are able *"to ensure that [member of this Umbrella Organisation] remains on a good spiritual path"*.

The CRL has also stated that it is developing a "Code of Ethics", which will be enforced.

The Peer Review Committee also handles disputes that cannot be resolved between members of an Umbrella Organisation, which may well be doctrinal in nature or in application.

It is therefore inevitable that the Peer Review Committee, and ultimately the CRL, will take decisions regarding the acceptability of doctrinal belief and expression. This is fundamentally opposed to the principle of freedom of religion.

11) Umbrella organisations/Peer Review Committee will be protected from legal action
Not true. Every dispute process will take place initially in the Umbrella Organisation and will then be referred to the Peer Review Committee, who will in turn recommend the revoking of licences to the CRL.

Given the direct and substantial interest that both the Umbrella Organisation and the Peer Review Committee have in the matter, they will probably be joined as parties in any legal proceedings. A party involved in review proceedings in the High Court, can expect to fork out approximately R100,000 for the first stage of the proceedings. As such, they will face legal action in their own capacities and will not be immune from legal sanction and its associated costs.

12) People who are unhappy with a decision by the CRL can seek justice through the Courts
Not true. The only way to review a decision taken by the CRL, is by way of High Court proceedings. The costs for such an application are estimated to amount to +/- R100 000 at the first instance, which is clearly completely beyond most religious practitioners (or their places of worship). As such, for the vast majority of people there will be no appeal or recourse against an adverse decision by the CRL.

13) The CRL's claim that "funds given to a church are public funds"
Not true. The CRL made this assertion at the Eerste River meeting. While it is accurate that any donation to a Church is typically given to support the mission and mandate of that Church, these funds are NOT "public" in the same way that money collected from tax payers by SARS is public funds. Money given to a Church belongs to that particular organisation, and it will/should have accountability structures in place to ensure that there is a proper accounting for the receipt and investment of these funds to the members of this organisation.

FOR SA's concern about this comment is that the CRL may be seeking powers to demand full financial disclosure from all religious practitioners and places of worship.

Structural concerns with the CRL Report

1) Umbrella organisations are not properly defined
The CRL stated that existing denominations fulfill the oversight, training and disciplinary roles which the CRL requires and, as such, they would be recognised as Umbrella organisations and thus be effectively grand-fathered into their proposed structure.

However, there is a HUGE question mark over the ability of some of the more newly established organisations (such as Great Commission Ministries, Kingdom Leaders Network, Christian Ministers Council South Africa etc) to qualify as Umbrella organisations. They will likely need to prove that they have the ability to provide the level of specialist support, advice, oversight, governance and capacity building specified in the CRL Report and as subsequently defined by the Peer Review Committee. This in turn will require skilled staff, offices etc., all of which will require substantial and on-going financial investment.

Again, the Report is completely silent on the requirements or conditions an Umbrella organisation would have to meet, in order to be accredited as such by the Peer Review Committee for that religion.

The Peer Review Committee will also have the power to decide if an Umbrella organisation is not fulfilling its mandate, whereupon it will have its license removed and all religious practitioners who are under its authority will be forced to re-register with another Umbrella organisation.

NOTE: It is very likely that a local fraternal will not qualify as an Umbrella organisation. As such, their current members will be compelled to find another Umbrella organisation to join, who will then have authority over them and their churches.

This is directly in conflict to both the constitutional right of Freedom of Religion and Freedom of Association.

2) <u>Composition and decision making process of the Peer Review Committee is unclear</u>
According to the CRL Report, the Peer Review Committee (for each religion) is made up of one person from each Umbrella Organisation. This casts further doubt on the likelihood that a large number of Umbrella Organisations will be recognised because if this were the case, the Peer Review Committee would find it extremely difficult to function effectively.

- There is no clarity on how the Peer Review Committee will reach any valid decision. Will it be by a majority of all its members? Will it be by unanimous agreement?
- Will there be national, regional and local branches of the Peer Review Committee?
- What processes will the Peer Review Committee follow in considering the various matters which it is called upon to adjudicate by the mandate given to it by the CRL?

3) <u>The multi-faith Peer Review Council is undefined</u>
The organogram in the Final Report (p 42), still shows a multi-faith Peer Review Council (to the side, rather than as part of the proposed structure). The Report is completely silent however on how the Peer Review Council would be made up, or what its functions would be.

However, the CRL stated at the Eerste River meeting that this Council would only meet in exceptional circumstances where there was a dispute within a Peer Review Committee, i.e. where people of the same religion were in dispute.

To the extent that the CRL proposes the Peer Review Council to have the same composition and functions (including "religion accreditation") as in the initial Report, this remains inconsistent with the constitutional rights to Religious Freedom and Freedom of Association.

4) <u>The means of financing the CRL's proposed structure is not specified</u>
The CRL's proposal envisages a massive national, regional and local structure, all of which will need to have offices, staff and other resources. Neither the Report, nor the CRL answered the question on how the proposed structure would be financed, other than to state that "Parliament would decide".

The CRL has repeatedly claimed that it is "under-funded" and that it does not have the capacity to deal with the "current crisis". It is highly unlikely that the State will finance these costs from its current tax base, It is therefore highly probable that funding will be raised from the issuing of licenses to religious practitioners and places of worship.

South African surveys estimate that there are at least 200 000+ places of worship in this nation and there are probably at least five times as many religious practitioners. Assuming that a modest annual license fee of R1,000 is charged for a place of worship and R500 is charged for a religious practitioner, this will generate an additional R700 MILLION ANNUALLY for the fiscus!

This will be an unprecedented "tax" on the religious community of South Africa and divert funds away from its legitimate purposes and mandate.

5) <u>There is no definition on the powers that the CRL is seeking</u>
When challenged in a SABC TV interview on Morning Live on 21 April 21 that the CRL was "a toothless body", the CRL Chairlady said *"Once we amend [the CRL] Act, we will be able to calm this situation down. There will be order"*.

The CRL has given no indication of what amendments it will be asking for. However, in order to have the authority to define the structures and the processes that it proposes, together with the ability to raise the necessary finances from the religious sector to finance them, it is highly likely that the CRL will ask Parliament for wide ranging discretionary powers.

The net effect of this would be that the CRL would be able to implement its policies via the promulgation of regulations and by unilateral fiat. FOR SA's concern is that the use of such powers is open to abuse and draconian application.

6) <u>A crusade to ensure that the CRL regulates all religion</u>
Despite the serious objections raised by organisations like FOR SA and the SACRRF, whose opinions are based on law and whose constituencies include over 22 million people from across the faith community of South Africa, the CRL is pressing forward with their proposals.

While we accept the CRL's *bona fides* in seeking to understand and address the abuses taking place in the name of religion, there is no doubt that a bi-product of their recommendations would be the successful capturing of the religious community for the State, with the potential to add billions of Rands to the State coffers.

What may start off as benign can quickly turn cancerous – to the lasting detriment of freedom of religion in South Africa.

FOR SA takes this opportunity to request that the CRL reconsiders its Final Report before representing same to Parliament, particularly with a view to ensuring that it does not over-reach its Constitutional mandate in this matter. We are fully persuaded that the Religious Community of South Africa is well able to self-regulate and to make the necessary adjustments to address the valid concerns expressed by the CRL in its Report. As an organisation specifically working to protect and promote religious freedom in South Africa, and for the benefit of our (broad) constituency who has specifically mandated us to speak on their behalf in relation to this matter, FOR SA remains committed to working together with the CRL in finding solutions that are practical and constitutionally permissible.

Kind regards,

Michael Swain
EXECUTIVE DIRECTOR

FOR SA
FREEDOM OF RELIGION SOUTH AFRICA

TEL +27 (21) 556 5502 | **CELL** +27 (72) 270 1217
PO BOX 50110 | West Beach | Cape Town | 7449

WEBSITE www.forsa.org.za | **EMAIL** michael.swain@forsa.org.za