The Exclusionary Policies of Voluntary Associations: Constitutional Considerations

Table of Contents

1 OVERVIEW

1.1 INTRODUCTION

The South African Human Rights Commission (SAHRC) is an institution established in terms of Section 181 of the Republic of South Africa Constitution Act 108 of 1996. The SAHRC and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy"[1]. The South African Human Rights Commission is specifically required to:

a. promote respect for human rights;
b. promote the protection, development and attainment of human rights;
c. monitor and assess the observances of human rights in the Republic.

Section 184(2) of the Constitution empowers the SAHRC to investigate and report on the observance of human rights in the country. Further, section 184(2)(c) and (d) affords the SAHRC authority to carry out research and to educate on human rights related matters. The Human Rights Commission Act further supplements the powers of the SAHRC.[2] Article 10 of the regulations enacted in terms of the Act regulates the manner in which the South African Human Rights Commission may conduct public hearings.

The SAHRC held a public enquiry after receiving complaints alleging violations of the rights to equality and dignity from persons excluded from joining voluntary associations. The purpose of the public enquiry into equality and voluntary associations (VAs) was to enable the SAHRC to hear representations from all interested parties and reflect on the relevant constitutional and statutory provisions in order to suggest a set of principles that would achieve an appropriate balance between associational rights and the rights of equality and dignity.

As in all maturing democracies, it has become necessary for our society to appropriately balance the variety of rights entrenched in the Bill of Rights. Some of these rights may pull or may be perceived as pulling in opposite directions. The intricate process of balancing competing rights has confronted and will continue to confront most democracies. As an American judge once put it, "my right to swing my fist ends where the other man's nose begins."[3]

This truism applied in the context of this enquiry requires the balancing of two distinct sets of rights. On one side are the fundamental rights to be treated equally, not to be unfairly discriminated against and the right to dignity, and on the other are a cluster of rights, sometimes collectively referred to as associational rights, which include the freedom of association[4], freedom of religion[5], freedom to practice and use one's language and culture[6] and the

[1] Section 184(1) of the Constitution.
[2] Human Rights Commission Act 54 of 1994.
[3] Statement attributed to Justice Oliver Wendell Holmes Jr.
[4] Section 18 of the Constitution.
[5] Section 15 of the Constitution.
[6] Section 30 of the Constitution.

right to associate in cultural, religious and linguistic communities[7]. Fortunately, many conflicts between these sets of rights reveal themselves to be more apparent than real upon closer examination, if interpreted in light of advancing the same broad visions and principles which underpin our constitutional democracy.

1.2 PURPOSE OF THE INQUIRY

The intention of the SAHRC is to draft a report providing guidelines and principles that would accommodate associational rights within a legal order that is committed to protecting equality and dignity. This would enable:

a. voluntary associations to assess their existing policies, rules and conduct against the principles suggested, consider whether changes are necessary and make such amendments as required, in order to bring their policies and practices in line with the requirements of the Constitution.

b. regulatory agencies and municipal authorities who are considering applications from VAs for licences and permission to operate to make more informed decisions that are in accordance with the Constitution.

c. the SAHRC and other 'Chapter 9' institutions to have a point of reference and a set of principles to adjudicate upon complaints lodged against VAs.

d. a national dialogue to commence on the role of VAs within the South African society and the extent to which organisations have the constitutional right to restrict access, control operational provisions and expel members.

1.3 SCOPE OF THE INQUIRY

The report will not focus on obvious transgressions of constitutional and legislative provisions such as excluding person from a holiday resort because of race. Neither will the report focus on instances where ostensibly legitimate criteria for differentiation are used as a means to disguise improper and constitutionally impermissible grounds of differentiation. Any assessment of the constitutionality of exclusionary practices must focus on the real and substantive grounds of exclusion and not merely on the labels attached to the exclusionary criteria. The report will seek to provide guidelines as to how to balance associational rights and other constitutional rights, such as equality and dignity

The hearings and the report are not meant to determine the extent to which the state can intervene generally into the private autonomy of the VAs. The

[7] Section 31 of the Constitution.

purpose of this report is more circumscribed, and is limited to suggesting principles that could be used to test the constitutionality of exclusionary policies, rules and conduct used by VAs to protect the integrity of their organisations. In the absence of a set of clearly defined facts, we cannot reach definitive conclusions, but will be providing guidelines that hopefully will be of assistance to those who have to consider different factual scenarios that emerge in the future.

Nor is the enquiry concerned with private and intimate associations but only with associations which are public in nature, having an impact on public activities and to which the public have access, including the obtaining of social and economic benefits. The SAHRC is aware of the difficulties in clearly demarcating the dividing line between private associations and public ones. However in the vast majority of cases distinctions can be made. In this regard the SAHRC is guided by the comments made by Justice Brennan in *Roberts v United States Jaycees*[8]:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.
>
> Moreover, the constitutional shelter afforded such relationships reflects the realization that individual draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Examples of intensely private relations given by Justice Brennan include the institution of marriage, the raising of children and the cohabiting with ones partner. The purpose of this report is not to reflect upon the constitutionally safeguarded zone of privacy and intimacy that exists within relationships of this nature. Justice Brennan distinguishes these associations, which have an intrinsic element of personal liberty, from associations situated at the other end of the continuum such as large business enterprises. He correctly argues that the constitutional constraints upon the State's power to regulate business enterprises is greater than it is in respect of private intimate associations. The State's power to control the selection of one's partner is virtually non-existent but not so in respect of decisions to select ones fellow employees.

Between these two extremes lie a large number of voluntary associations that contribute towards the enrichment and happiness of individuals in different ways. The State's reach into these organisations will depend on the nature of the organisation, the impact it has on the public, the extent to which it regulates economic and social mobility and the constitutional right that the association furthers and protects. According to Justice Brennan, the size,

[8] *Roberts v United States Jaycees* 468 US 609 (1984).

purpose, policies, selectivity, congeniality and other characteristics may be pertinent in determining whether a VA should be subject to state regulation.

Associational rights are often instrumental in nature; it is through associations that other constitutional rights are better protected. The nature of the constitutional right sought to be enforced by the association is a factor considered when a determination is made as to the constitutionality of exclusionary practices. Thus if the association has been formed for commercial activities, thus impacting on the right to choose a trade, occupation and profession, the State may have greater latitude in reaching into the domains of these associations. If on the other hand the constitutional rights that the association seeks to protect promote and enhance relate to religion, culture and language then the reach of the State may be more circumscribed.

2 SAHRC EXPERIENCE AND BACKGROUND

2.1 OVERVIEW OF SOME OF THE COMPLAINTS LODGED WITH THE SAHRC AGAINST EXCLUSIONARY PRACTICES ADOPTED BY VOLUNTARY ASSOCIATIONS

The examples that follow have been taken from the files of the SAHRC and demonstrate the need for a report of this nature to provide guidance and assistance to those administering VAs and to those persons who have to exercise statutory power.

1. Complaints against the Goudini Spa run by the Afrikaanse Taal Kultuur Vereenging (ATKV)

The SAHRC received three complaints from persons of the Muslim faith who alleged that admission policies of the ATKV were unfairly discriminatory. The ATKV allowed all its members a discount of 30% on the admission prices to its holiday resorts. Non-members were admitted to the resorts but were required to pay the full admission price. The ATKV requires all its members to commit to upholding the Christian faith and to promote, advance and develop the Afrikaans language and culture. The three (3) applicants, being of the Muslim faith did not wish to subscribe to the founding principles of the ATKV. They alleged that they were being unfairly discriminated against on the basis of religion. One of the complainants alleged further that he was an Afrikaner and accordingly should be entitled to the discounted admission policy.

In this instance there appeared to be a tension between the rights of a cultural and religious organisation to preserve its identity and determine its admission policies and the rights of non-Christians who claimed that the denial of the discounted admission rate amounted to unfair discrimination of the basis of religion.

The SAHRC found that while the practices of ATKV were discriminatory, they were not unfair as the organisation permitted non-Christian and non-Afrikaners to attend their resorts.

2. Complaints against Klub Lekkerrus

Klub Lekkerrus is a private institution that is not open to all members of the public. The rules of the club require all applicants to submit copies of their identification documents together with the identification documents of all members of their family who might visit the resort. In addition, every application for admission must be supported by two (2) existing club members. The Cockran family, who are white, visited the club as they had done on a number of occasions in the past. However, on this occasion they were accompanied by their three year old Coloured foster child. Members of the club objected to the child's presence on the basis that the child was neither identified nor registered as an additional club member. The Cockran family was not convinced that this was the true reason for the objections by members and their subsequent ejection from the resort. They were of the view

that the race of the child was the determining factor. There were media reports that Klub Lekkerrus did not strictly enforce the rules regarding prior identification of all persons attending the club. The club consists of approximately 5000 members, is within the tourism route, is preserved as a national heritage and is marketed as a tourist attraction to those wishing to visit Limpopo. If one were to apply the criteria identified above, this club could not be regarded as an intimate association. In this case, the complainants withdrew the complaint because the publicity generated had a negative impact on the child.

3. Complaint against the United Cricket Board

Mr Van Rensburg lodged a complaint with the SAHRC alleging that a decision by the UCB to prohibit the waving of the old South African flag at the World Cricket Cup matches held in South Africa was a violation of his freedom of expression. The UCB is, in terms of settled law, a voluntary association. The SAHRC dismissed the complaint on the basis that the UCB, as a voluntary association, could not be compelled to endorse views and messages which it did not support.

4. Complaint against the Divine Culture Centre in Cravenby, Cape Town

A temple erected for the Hindu community required certain worshippers who worshipped in a manner that was different from the majority of members to pay an admission fee when they sought to use the temple to carry out their religious activities. Those upon whom the admission fee was levied complained to the SAHRC that they were being unfairly discriminated against on the basis of religious belief. Whilst the SAHRC was in the process of mediating this dispute, the complaint was withdrawn.

5. Housing Development for the Muslim Community

The SAHRC was requested to comment on the constitutionality of an advertisement for a housing development on the Durban beach front which appeared to be exclusively for the Muslim community. Subsequently the developers of the project publicly indicated that the housing development would not be exclusively for the Muslim community, but that it would cater primarily for their cultural and religious needs.

2.2 SUMMARY OF THE REPRESENTATIONS RECEIVED BY OR MADE TO THE SAHRC AT THE HEARINGS

Hearings were held over three days from the 12th to the 14th July, 2005 in Johannesburg. The chairperson of the SAHRC, Jody Kollapen, presided over the hearings and was assisted on the panel by fellow commissioners Professor Leon Wessels and Mr. Tom Manthata. Professor Karthy Govender was entrusted with the task of writing this report in consultation with and after obtaining the concurrence of the panel.

Individuals, together with cultural and religious organisations, made submissions on the constitutionality of their exclusionary practices. It was not the intention of the SAHRC either to get participants to defend their practices or to pronounce on the constitutionality of the policies, rules and conduct of the individual associations. They were invited to share their experiences, aspirations and visions with the SAHRC so as to enable it to have a better understanding of the role and importance of voluntary associations in the South African society.

The SAHRC wishes to express its appreciation to all those persons and organisations that made written submissions and oral presentations.

1. Professor SC Woolman in his personal capacity and on behalf of SABJE

Professor Woolman, a professor of law at the University of Pretoria and a recognised authority on voluntary associations, was the first person to make oral representations. Much of his legal argument and submission will be considered below. Professor Woolman made representations in his personal capacity and on behalf of the South African Board of Jewish Education (SABJE).

All the schools controlled by SABJE are, in terms of the South African Schools Act, designated as independent schools. The SABJE controlled schools have a history of allowing non-Jewish children to attend their schools and employing non-Jewish educators. Their schools however insist that all students admitted to the schools must adhere to and abide by the requirements of a Jewish education, undertake Hebrew language instructions, observe Jewish religious instructions and participate in all school sponsored religious events. The application forms make clear that the goals of the schools are to inculcate respect for the Jewish religion, its traditions, customs and institutions and to further the Zionist aims of the Jewish people. Parents and pupils admitted to the school are required to abide by the policies and participate in all the activities of the school. Thus, while the SABJE schools do not exclude non-Jewish children and non-Jewish educators, their admission is controlled in order to maintain the Jewish identity of the school.

Prof. Woolman contended firstly that the school's admission policies do not amount to unfair discrimination, and secondly that if there is differentiation on a specified ground, the admission policy constitutes fair discrimination as it is grounded in the legitimate objectives of SABJE and its schools.

He conceded that the admission policy, which provides that an applicant who refuses to take Hebrew classes or Jewish religious instructions should be refused admission, could be interpreted as either imposing indirect burdens or withholding benefits from a student on the grounds of religion. If this is the case, then the differentiation is deemed to be discrimination, and according to section 9 of the Constitution[9] and the Equality Act[10], the onus of proving

[9] Section 9 of the Constitution deals with the right to equality and the full text is reproduced in the chapter dealing with the right to equality.

fairness rests on the school. According to Prof Woolman the discriminatory admissions policy is necessary to achieve the object of SABJE of offering a Jewish education, including Hebrew language classes and Jewish religious instructions. He also pointed out that in the urban centre of Johannesburg, a child in a position to afford private school fees has a great array of options opened to him or her. There is no compulsion either directly or indirectly for non-Jewish children to seek admission to SABJE controlled schools.

Based on the decision of Van Dijkhorst J in *Wittman v Deutscher Schulverein*[11], he concludes that the constitutional right to set up and run an independent school grounded in culture, language or religion inevitably includes the right to exclude students who do not wish to adhere to school requirements that are grounded in language, culture or religion. Given the clear choice enjoyed by non-Jewish children to attend other private schools, the restrictive admission policies impact marginally on their dignity. The restrictive admission policies are however necessary in order to preserve the cultural and religious character of the schools. Professor Woolman also referred to whether SABJE could limit entrance of non-Jewish students in order to preserve its objectives. The question is hypothetical in respect of the operations of the SABJE schools but very pertinent for the purposes of this report. Prof. Woolman concluded that the only proper basis for a completely exclusionary practice would be to prevent 'capture'. He defined capture as the legitimate fear that the new members of the community could, after having obtained sufficient numbers, move to fundamentally alter the character of the school.

2. Dr Kok on behalf of the ATKV

The next person to make representations was Dr Kok on behalf of the Afrikaanse Taal en Kultuur Vereeniging (ATKV). The ATKV is a cultural organisation that serves community interests, particularly the 'deepening, advancement and extension of the Afrikaans language and culture'. Dr Kok testified that the ATKV requires adherence to the Christian faith as a prerequisite to membership. It insists upon this in order to ensure that the cultural activities are based on Christian norms and values. The ATKV has approximately one hundred and ten thousand adult members with two hundred and fifty six branches. According to Dr Kok membership is opened to persons of all races and sexes. A membership fee of R40 per month is levied per family. The organisation engages in a broad spectrum of activities including:

- The promotion of music and drama festivals and holding regular 'Christis feste'
- Training and development of young singers and composers
- Conducting training courses for writers
- Publishing and distributing Christian and secular books
- Promoting and supporting Christian and religious radio programmes

[10] The Promotion of Equality and the Prohibition of Unfair Discrimination Act 4 of 2000. We will throughout the report refer to this legislation as the Equality Act.
[11] *Wittman v Deutscher Schulverein*, Pretoria 1998 (4) SA 423 (T).

- Celebrating Christian holidays and arranging religious services.

The ATKV was established in 1930 as a cultural organisation for the upliftment of the poor and promotion of the Afrikaans culture. Until the 1980's membership of the ATKV was only open to white people.

The ATKV also holds and operates five (5) holiday resorts in the country. The resorts are open to all members of the general public, but the activities at the resort are performed in a way that promotes and advances Christianity and the Afrikaans culture. Members are able to obtain a 30% discount on accommodation charges; non-members are not afforded this dispensation.

Dr Kok stated that all the resorts are opened to everyone and all persons can attend the functions, projects and events. He argued that there was a need amongst Christians to engage in cultural activities that were conducted in accordance with Christian values. He went on to state that it was permissible to have recreational and holiday facilities where Christian norms would prevail. According to Dr Kok the ATKV exclusionary policy regarding membership amounted to discrimination on religious grounds but such discrimination served a legitimate purpose in the maintenance and promotion of its religious foundation and its commitment to Christianity. He accordingly argued that the admission policy did not amount to unfair discrimination.

3. Dr. Landman in his personal capacity and as a member of the CRL Commission

The third person to make representations was Dr Landman who is a Commissioner with the Commission on Cultural, Religious and Linguistic Rights (CRL). Dr Landman argued for the rights of organs of civil society to internal self-determination, which, in his opinion, excluded undue and prescriptive interference by external forces. He also submitted that the rights of organs of civil society to internal self-determination could be limited to the extent that it was reasonable and justifiable in an open and democratic society based on human dignity. He argued that there were dangerous tendencies emerging which indicated that the concept of a decentralised law state was being eroded, and that the State was unjustifiably intruding into the private domains of cultural, religious and linguistic communities. In essence, his submission was that the individual rights to equality and dignity were subject to the requirements of the limitations clause, as was the right to form, join and maintain cultural religious and linguistic associations. He argued that a necessary balance must be struck between competing rights. He concluded by saying that if the right to form, join and maintain cultural, religious and linguistic associations is unjustifiably encroached upon, then an open and democratic society becomes a totalitarian one.

4. Sheik Achmat Sedick on behalf of the MJC

Sheik Achmat Sedick made submissions on behalf of the Muslim Judicial Council (MJC). He stated that Islam is a religion of peace and goodwill and its principles and guidelines are clearly stated in the holy Koran. He further stated

that Islam promotes tolerance and understanding and accepts the equal rights of other religions to exist alongside it. He indicated that Muslims would abide by all the provisions of the Constitution as long as it does not violate the Sharia. He stated that Islam does not permit gay marriages and accordingly the Muslim Judicial Council would not sanction or conduct gay marriages. The MJC is a faith based organisation that represents the majority of Muslim organisations and mosque communities within the Western Cape and is a part of the National Ulama Council. He indicated that there are a number of Islamic schools that are run under their auspices. The schools follow a Islamic ethos and are clearly designed to promote Islam. The schools are open to non-Muslim children, however they are required to follow the prescribed syllabus and attend the religious observances at the schools. In response to a question from the Chairperson as to whether or not sectarian schools prevent children from different backgrounds sharing their common experiences and thus contribute to a greater fragmentation of our society, Sheik Sedick responded that the Muslim community, concerned about anti-Islamic influences in public schools, decided to create their own schools to protect and promote their values.

5. Dr PW Liebenberg on behalf of Stigting vir Nationale Minderhede in Suid Afrika (Foundation for National Minorities in South Africa)

Dr Liebenberg submitted that the present constitutional dispensation is inadequate and does not properly and fully address the issue of the nature and extent of permissible state intervention in the domain of non-state institutions. He suggested that the present Constitution should be regarded as one in transition and not the final constitution for the nation. He argued that one of the functions of the State is to protect its citizens and the citizens of other states living within its borders as well as institutions of civil society from unjustified interference by the state. He disagreed with the notion that the 1996 Constitution creates a modern liberal state and that it meets the needs of South Africa's multi-cultural, multi-linguistic and multi-religious society. He argued that the present government appears to be opting for a greater centralisation of power at the national level to the detriment of provincial and municipal levels of government. He questioned the wisdom of building in internal modifiers into many of the cultural, religious and linguistic rights. He argued that this created a perception, especially among the Afrikaners, that very little faith could be placed in constitutional guarantees and safeguards.

He argued that the present Constitution does not prevent the increased centralisation of power at the national level and that it allows a continuous and expanding process of state intervention into the private domains of the institutions of civil society. He also cautioned against allowing the State to intervene in the private domain of civil institutions on the basis that state funding is provided to these institutions. According to him, as these funds are obtained from the taxpayer, the grant of the funds does not warrant state intrusion into the private domain of civil institutions. He referred to the Declaration of the Rights of Persons belonging to National or Ethnic, Religious

and Linguistic Minorities adopted by the United Nations.[12] The essence of the Declaration is that an obligation is imposed on states to protect the existence of national or ethnic, cultural religious and linguistic identities of minorities within their respective territories. Dr Liebenberg was of the view that neither the Constitution, nor current governmental action, nor its conduct, fully complies with the provisions of this UN Declaration. He contended for what he termed 'sovereignty within the own sphere' of the civil institution. He argued that this should apply to cultural, religious and linguistic communities. Like other persons making representations he said that race, given our history, should not be a factor that justifies admission or exclusion from a civil institution.

6. Tessa Brewis on behalf of the NPC

The next set of representation were made by Ms Brewis on behalf of the Non-Profit Consortium (NPC). She contended that the freedom of association was a necessary prerequisite to a strong and vibrant civil society. She argued that voluntary associations as defined in terms of the common law should not be the only associations entitled to the right to freedom of association. Individuals should not be compelled to establish formal legal entities in order to exercise their freedom to associate. She also contended that voluntary associations should be guaranteed a degree of autonomy and that they should be free from outside interferences. The freedom of association allowed individuals in association with others to achieve a common objective. There may be conflicts between associational autonomy and the right to equality and dignity. According to Ms Brewis these potential conflicts cannot be decided at an abstract level but must be considered in the light of the circumstances before the decision makers. She suggested that the approach adopted by the Constitutional Court in *Van Heerden*[13] be adopted, where the court said:

> In the assessment of fairness or otherwise a flexible but 'situation sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.

She accordingly urged that the right to freedom of association be balanced against the right to equality and dignity in specific situations before decisions are reached as to which right should predominate.

7. Mr. Osrin on behalf of Highlands Home

Representations were made on behalf of Highlands House, a home for aged members of the Jewish Community. Written representations on behalf of Highlands House were supported with a legal opinion from Mr. David Borhgstrom, an advocate from Cape Town. In addition, Mr. Osrin, the chairman of the board, made oral representations to the panel. The home was established in 1920 and expanded over the years to meet the demand for its

[12] Resolution 47/135 of 18 December 1992.
[13] *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121.

services. It presently houses approximately 200 residents. The home is restricted to persons of the Jewish faith. It was submitted that most Jewish communities band together to maintain their identity as a community, to ensure the continuity of their community, to promote the practice of the Jewish religion and to create conditions which enable members of the community to conduct their lives in accordance with the dictates of their religion. Highlands House is run along similar lines as four other homes for the Jewish aged in other parts of the country. It was submitted that homes that are restricted to members of the Jewish faith can be found in the UK, USA, France, Canada, Argentina, Brazil, Mexico and in other countries. The home is supported by contributions by members of the Jewish Community, payments from residents, and a contribution from the state which amounts to 7.5% of the home's operating costs.

In a later submission we were informed that the state subvention is restricted to grants to individuals which is disbursed directly to the home. There is thus no direct state subvention of the home. Mr. Osrin acknowledged that by having an exclusively Jewish restrictive admission policy, the home was discriminating against non-Jewish people. However the thrust of his argument was that the discrimination was not unfair as the admission policy is designed to promote the continuity of the Jewish Community and its adherence to the principles and precepts of the Jewish religion. The home is designed to create a 'home away from home' for aged members of the Jewish Community. The home provides its residents with a Jewish environment strictly adhering to Jewish dietary laws, which are integrally linked to religious principles and practices. The contention was that the organisation, running of and facilities at the home are designed exclusively for the Jewish Community. The admission of non-Jewish residents would, according to Mr Osrin, detract unreasonably from the ability to provide the current levels of service to those seeking cultural and religious association with other Jewish persons.

Reference was made to various charitable initiatives supported by members of the Jewish Community and other community based projects, designed to establish meaningful programmes for members of the previously disadvantaged communities.

8. Mr Kriel on behalf of Solidarity

Mr Kriel, the Secretary General of the trade union Solidarity, made an oral presentation based on written representations drawn up by Professor Hennie Strydom of the University of Johannesburg. Most of the submissions were legal in nature and are also reflected upon later. It was submitted that voluntary associations take a variety of forms in modern society but have in common the commitment to band together and advance the collective interests of their members in pursuing identified objectives. Associational rights are entrenched and protected in order to give better effect to individual constitutional rights. Solidarity submitted that VAs play an important role in strengthening the democracy. If VAs become dysfunctional, the state is often tempted to arrogate to itself greater powers which can lead to a totalitarian interference in the affairs of non-state entities. It is healthier in a democracy

for the boundaries between state and non-state entities to be respected. However, Solidarity recognised that as the freedom of association is a part of a bouquet of rights and freedoms, it can only be safeguarded and protected by balanced consideration of competing rights and interests.

9. Mr. Gift Moerane and Mr. Douglas Tilton on behalf of the SACC

The final set of representations was made by South African Council of Churches (SACC). The SACC is a facilitating body for a fellowship of 26 Christian churches and associated para-church organisations. It has a combined constituency of approximately 15 million members. The SACC is committed to and strongly supports the cultivation of a culture of democracy, equality and respect for human rights. It submitted that the right to equality as interpreted provides a basis to test the constitutionality of exclusionary policies adopted by voluntary associations. The detailed provisions of section 14 of the Equality Act will also be pivotal in determining whether any discrimination is fair or not. It supported the right of VAs that pursue legal objectives and which do not compromise the constitutional rights of others to exclude new members or discipline existing members in order to realise and maintain their associational objectives. It was also submitted that associations should only receive public funds if services are provided to the public at large or to some segment of the public. An association that admits any person who subscribes to and supports its aims and objectives can be classified as an open association and should, according to the SACC, be entitled to public funding.

3 ASSESSING AND ANALYSING THE APPLICATION OF THE RIGHTS

3.1 HISTORICAL AND INTERNATIONAL CONTEXT

3.1.1 Race as an Exclusionary Criteria

All the organisations that made representations and who were questioned on the issue of race as an exclusionary criteria accepted that it would rarely, if ever, be a legitimate ground of differentiation and exclusion given our history. The Council of Churches (SACC) expressed the view that it is now generally accepted that no legitimate argument could be made on the scriptures to justify the segregation in religious institutions on the basis of race. The Afrikaanse Taal en Kultuurvereneging (AKTV) also supported the idea that race is highly unlikely to be a justifiable ground of differentiation in South Africa. This report will therefore proceed from the assumption that racial discrimination will carry a strong presumption of unfairness.

The SAHRC has had to handle complaints from people who had been turned away from hairdressing salons, holiday resorts and other public facilities on the grounds of race. In these instances, The Promotion of Equality and the Prohibition of Unfair Discrimination Act of 2000 (the Equality Act) was used to secure redress. Prior to the coming into effect of the Equality Act, the SAHRC attempted to mediate and resolve issues of racially discriminatory admission policies. For instance, Mr. Mike Mabuyakhulu, then MEC for Economic Development and Tourism in Kwazulu-Natal, referred a set of complaints against various residential and business entities operating in the KwaZulu-Natal holiday resort of St Lucia to the SAHRC. The SAHRC worked with the Department of Economic Affairs and Tourism, the St Lucia local authority and local people running lodging and business enterprises. Apologies were signed, and an equality covenant was drafted and publicly signed by representatives of the town, the Department of Economic Development and Tourism, and the representative of the SAHRC. Further, a sign was erected outside the town proclaiming the town's commitment to respecting the dignity of all persons, and workshops on equality were held for business persons and leaders in the town.

We will continue using the Equality Act and the other powers given to the SAHRC by the Constitution and legislation to seek redress on behalf of those who have been unfairly discriminated against on the basis of race, or any one of the prohibited grounds listed in section 9 of the Constitution and in the Equality Act.

3.1.2 An International Perspective

All of the submissions made to the SAHRC stressed the importance of associations in a constitutional democracy such as South Africa. Associations allow for the more effective realisation of constitutionally guaranteed rights, and enable persons to have the comfort, security, pleasure and human

companionship of interacting with others of their choice. Cheadle[14] *et al* correctly point out that freedom of association is foundational to and the corner stone of a democratic society for the following reasons:

> These reasons belong to one of two perspectives: a perspective which emphasises the need to associate in order to realise fully one's humanity- to interact-, … make common purpose and enjoy life with other persons sharing one's culture, personal, political or economic interests. The second perspective emphasises the necessity to a functioning democracy of such a freedom, for a proper and coherent expression and interplay of collective interests.

It is unsurprising that most of the organisations that made representations did so from deeply held and passionate commitments to religious, cultural and linguistic affiliations. They took the view that they were best able through their organisational structures to safeguard and protect their religious, cultural and linguistic rights, and were concerned that unwarranted state intrusion would adversely impact on this ability. The cultural liberty they are seeking to protect is a vital part of human development. A recent UN report[15] stated:

> Cultural liberty is a vital part of human development because being able to choose one's identity- who one is- without losing the respect of others or being excluded from other choices is important in leading a full life. People want freedom to practice their religion openly, to speak their language, to celebrate their ethnicity or religious heritage without fear or ridicule or punishment or diminished opportunity. People want the freedom to participate in society without having to slip off their chosen cultural moorings.

Implicit in many of the submissions was the concern that this cultural liberty, which is provided for in the Constitution, may be unreasonably curtailed in an effort to achieve an egalitarian society. Most of the submissions came from minority religious, linguistic and cultural organisations that are concerned about losing control over their organisations and the consequent impact on the cultural liberties they seek to protect.

Professor Woolman in his submissions before the SAHRC and in his writings has characterised this as 'capture'. Capture relates to the concern that control may be assumed of an organisation and that it may then be used in the pursuit of objectives that are inimical to those to which it was originally committed to achieving. Professor Woolman argues that capture "justifies the ability of associations to control their associations through selective membership policies, the manner in which they order their internal affairs and [by] the discharge of members or users."[16]

---

[14] H Cheadle, D Davis & N Haysom. *South African Constitutional Law: The Bill of Rights* (2002) at 247.
[15] Human Development Report 2004, *Cultural Liberty in Today's Diverse World*. Published for the United Nations Development Programme.
[16] S Woolman. 'Association', in Currie and De Waal, *The Bill of Rights Handbook* (5th) at 423.

A cultural or religion organisation that is established, funded and operated to promote a particular religion, culture or language should be able to protect the financial and other investments of its members. If we are to protect cultural liberties, then the law must provide means to cultural, religious and linguistic organisations, pursuing constitutionally permissible goals, to avoid capture.

At an international level, these cultural liberties are protected through various treaties. Article 22 of the International Covenant on Civil and Political Rights[17] protects the right to freedom of association with others, and article 10 of the African Charter on Human and People's Rights[18] protects the right of every individual to free association provided he or she abides by the law[19]. Article 27 of the International Covenant on Civil and Political Rights protects the rights of ethnic, religious and linguistic minorities, in a community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their language. Article 2 of the Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[20] obliges states to protect the national or ethnic, cultural, religious and linguistic identity of minorities, as well as their existence. States are required to encourage conditions for the promotion of that identity. Article 2(2) entrenches the right of persons belonging to minorities to establish and maintain their own associations.

The South African Constitution, drawing from the various international instruments, also expressly entrenches the protection of cultural liberties.

3.2 ASSOCIATIONAL AND CULTURAL RIGHTS IN THE SOUTH AFRICAN CONSTITUTION

Section 18 of the Constitution provides:

> Everyone has the right to freedom of association.

This right buttresses and supports an array of other fundamental rights such as that of the freedom of expression, religion, assembly, political rights, the right to organise and collectively bargain, etc. Without the freedom of association, the effectiveness and value of many of these rights would be significantly diminished.[21]

---

[17] Adopted by the General Assembly of the UN, Resolution 2200(xxi) of the 16th December 1966.

[18] Adopted by the Organisation of African Unity at the 18th Conference of the Heads of State and Government on the 27th June 1981, Nairobi Kenya. The treaty entered into force on 21 October 1986.

[19] In *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999), para 82, the Commission appears to be advocating that restrictions on the freedom of association must be proportionate and appropriate to the objectives of the law.

[20] Adopted by General Assembly resolution 47/135 of 18 December 1992.

[21] *See* Stuart Woolman "Freedom of Association" in Chaskalson et al *Constitutional Law of South Africa* at 22-6. *See also* the judgment of the Constitutional Court in *South African National Defence Force v Minister of Defence* 1999 (4) SA 469, where there appeared to be a

Section 18 has been interpreted to guarantee both an individual the right to choose his or her associates and a group of individuals the right to choose its associates.[22] The right of a group to choose its associates must mean that VAs have the right to disassociate, provided that they do not act in a constitutionally impermissible fashion.

Further, sections 30 and 31 of the Constitution respectively protect language and cultural rights and associational rights of cultural, religious, and linguistic communities.

Section 30 provides:

> Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31 provides:

> (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community-
> (a) to enjoy their culture, practice their religion and use their language;
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the bill of rights.

Section 31 is linked to section 18, and both seek to acknowledge and promote the diversity of culture, language and religion found in South Africa. Assessing the importance of section 31, Sachs J held[23]:

> There are a number of provisions designed to protect the rights of members of communities. They underlie the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association contained in s 18. Taken together they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlights the importance of individuals being able to enjoy what is called the 'right to be different'. In each case, space has to be found for members of the communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.

---

recognition that the freedom of association allowed SANDF members to form an organisation to articulate their collective grievances.

[22] *Taylor v Kurtstag No and Others* 2004 (4) All SA 317 (W) at para 37.

[23] *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC) at para 24.

By expressly sanctioning the right of persons to exercise their associational rights "with other members of the community," Section 31 permits exclusionary policies, rules and conduct provided that they are not constitutionally offensive. The issue is to determine when exclusionary policies, rules and conduct are inconsistent with any provision of the Bill of Rights.

In order to demonstrate inconsistency for the purposes of section 31(2), it must be established that the exclusionary practices infringe a provision of the Bill of Rights and that such infringement is not reasonable and justifiable in an open and democratic society, as required by section 36 of the Constitution. The onus of proving an infringement of a provision of the Bill of Rights will be on the person making such an assertion, and the responsibility of establishing the requirements of section 36 will be on the VA.[24]

A submission[25] premised on section 31(2) argued that when 'one exercises his/her freedom of association to promote cultural interests, such enjoyment of the right must not limit the rights of other persons.' The position paper argues that there is, in effect, a hierarchy of rights that has been developed by the Constitutional Court through case law. The paper then concludes:

> According to this hierarchy, the rights to human dignity and equality are superior to others. Therefore, when these core rights collide with other rights such as the right to freedom of association, the right to dignity and equality must prevail.

It is our contention that a much more nuanced balancing of rights is required than that suggested in the position paper. A mere conflict between an associational right and the right to equality cannot always result, irrespective of circumstances, in the predominance of the right to equality. The consequence of this interpretation would be to emasculate associational rights and severely restrict cultural liberties.

It is also not in accordance with the developing jurisprudence on this issue. In *Christian Education*, the Court held that section 31(2) was intended to ensure that practices offensive to the Bill of Rights were not shielded by the protection afforded by section 31(1):

> It should be observed, further, that special care has been taken expressly to acknowledge the supremacy of the Constitution and the Bill of Rights. Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to 'privatise' constitutionally offensive group practices and thereby immunise them from external

[24] *See Ferreira v Levin NO* 1996 (1) SA 984 (CC) at para 44.
[25] Discussion paper on Voluntary Associations prepared by SAHRC staff, at page 7.

> legislative regulation or judicial control. This will be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant.[26]

A 'constitutionally offensive group practice' in this context would mean any exclusionary polices, rules, or conduct adopted by the VA which are not permitted by the Constitution. In deciding whether or not these policies, rules, or conduct are permitted, regard must be had to the limitation clause, and specifically to the test of proportionality. Thus we do not start from the premise that associational rights are presumptively inferior and of less weight than the rights to equality and dignity.

3.2.1 The Proportionality Test and the Balancing of Rights

In *Taylor v Kurtstag NO*[27], the applicant sought to set aside an edict of a Jewish ecclesiastical court, effectively excommunicating him from the Jewish society for failing to comply with its decision. He argued that the edict[28] conflicted with his individual rights to religion and to cultural association. The edict, according to the community, was the only means available to it to ensure compliance with the rulings of the ecclesiastical court. The Court enquired into whether the limitation of the applicant's rights could be justified by reference to the associational rights of the community. The court concluded that the limitation on the applicant's rights was reasonable and justifiable as a failure to enforce its rulings would result in the Jewish faith not being able to protect the integrity of Jewish Law. The associational rights of the organisation took precedence over the personal rights of the individual. In reaching its conclusion, the Court assessed the full extent of the limitation on the rights of the applicant and weighed this against the associational rights of the organisation. Milan J[29] in making this assessment had regard to sections 8(1) and 8(2) of the Constitution, which provides:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of the Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.

As stated earlier, most of the complaints against VAs require a balancing of rights between natural and juristic persons. Where an individual asserts that his or her constitutional right has been infringed by another private person or entity and that other entity seeks to justify the limitation by reference to his or

[26] *Christian Education* 2000 (4) SA 757 at para 26.
[27] *Taylor* 2004 (4) All SA 317 (W).
[28] The edict is referred to as Cherem in Jewish Law.
[29] *Id.* at para 45.

her own rights, then section 8(2) has application. The Court in *Taylor* accepted the view that this would require asking the question whether there had been a constitutional limitation of the right of the complainant. This would require considering the purpose of the limitation and all the other factors referred to in section 36 of the Constitution,[30] which include:

- The right being limited and its importance to an open and democratic society.
- The nature and extent of the limitation. This would require an assessment of the extent to which the right is infringed.
- The relationship between the limitation and its purpose. This would require an assessment of the nexus or link between the restrictive admission or operational policy and the objectives and goals of the organisation.
- Less restrictive means to achieve the purpose.

Where the VA is seeking to assert its constitutionally protected right to associate or disassociate under section 31, then appropriate weight and acknowledgment must be given to it in the balancing process.

This balancing exercise between associational rights and those of individuals has already been reflected upon by courts in other countries and their decisions provide useful guidance.

In *Royal Society for the Prevention of Cruelty to Animals (RSPCA) v Attorney-General*,[31] the English courts upheld exclusionary policies of the RSPCA designed to remove and exclude members who wished to change the association's policy on hunting and blood sports. Given the society's commitment to the humane treatment of animals, policy changes favouring hunting and blood sports would effectively result in the 'capture' of the society and change in its focus and emphasis. The courts held that its exclusionary policies were consistent with the Human Rights Act of 1998. The close nexus between the objectives and the exclusionary policies and the limited impact upon the rights of the persons denied admission or excluded from the organisation adequately justified the policy of the VA, and rendered it permissible.

Clearly the impact on the complainant is of central importance in this deliberation. The more egregious the violation, the less likely that it is to be deemed fair. In *Lovelace v Canada,*[32] the applicant challenged a Canadian federal statute which provided that a Canadian Indian woman who married a non-Indian could not be registered as an Indian. Ms Lovelace married a non-Indian, and as a consequence of the law was denied the right to return to her native home in the Tobique Reservation in Canada. She argued that the law excluded her from living her life as an Indian and specifically resulted in her

[30] *Id.* at para 45, where reference is made to Rautenbach "The Bill of Rights Applies to Private Law and Binds Private Persons" 2000 TSAR 296 at 311.
[31] *RSPCA v Attorney-General* [2002] 1 WLR 448.
[32] *Lovelace v Canada* CCPR/C/13/D/24/1977, United Nations International Covenant on Civil and Political Rights Communications No 24/1977, 30th July 1981.

losing the cultural benefits of living in an Indian community and of having emotional ties to her home, family, friends and neighbours. The Committee upheld the complaint as the exclusion of Lovelace from the tribe meant that she was not able to enjoy her cultural rights as an Indian and this drastic intrusion was not reasonable and necessary to preserve the identity of the tribe.

Ms Lovelace simply had no other forum or association, other than the tribal area, within which to exercise and enjoy her cultural rights. Her exclusion thus meant an eradication of her right to enjoy her culture. This was impermissible given the fact that section 27 of the International Covenant on Civil and Political Rights protects the right to cultural associations. Section 31 of our Constitution is materially similar and it is likely that a similar result would have been achieved through an application of our limitation clause.

If an organisation can retain its cultural, religious and linguistic identity by admitting people and insisting that they abide by the norms designed to safeguard the integrity of the organisation, then in that instance, a blanket exclusionary policy may be difficult to justify in terms of the proportionality analysis. The test is thus more exacting and more comprehensive than the rational basis test, which would only require a showing that the exclusionary policy or practice is rationally connected to a legitimate associational right or interest.

Thus if a complaint is lodged that an exclusionary practice of a VA is unconstitutional, the following must be considered:

1. Does the associational right relied upon by the VA fall within sections 18, 30 or 31 of the Constitution or any other right which includes associational rights, such as the right to fair labour practices?
2. Does the assertion of the associational right infringe any other provision of the bill of rights?
3. If so, is it reasonable and justifiable in an open and democratic society as provided for in section 36 of the Constitution?

However, where the complaint is that the right to equality is being infringed by the exclusionary practices, then a slightly different assessment process is required.

3.2.2 The Right to Equality

The right most likely to be asserted by individuals against closed policies of VAs is the right to be treated equally, which includes the right not to be unfairly discriminated against on any of the prohibited grounds.

Section 9 of the Constitution provides:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against any one on one or more grounds in terms of subsection 3. National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9 has been judicially considered on numerous occasions and the Constitutional Court in *Harksen v Lane NO*[33] proposed a working formula to determine whether the right to equality has been infringed. This formula builds on earlier judgments,[34] and has since been refined by other judgments such as *Van Heerden v Minister of Finance*[35]. The following stages must be considered:[36]

(1) Does the differentiation bear a rational connection to a legitimate governmental objective? This is referred to as mere differentiation. If there is a rational connection to a legitimate governmental objective, there is no violation of section 9(1).
(2) If there is no violation of section 9(1), the applicant can proceed to determine whether the challenged law or conduct amounts to a violation of section 9(3).
(3) If the law or conduct falls within the provisions of section 9(2) (the affirmative action clause), it is very unlikely to be simultaneously unfair discrimination.
(4) If the differentiation is on a listed or specified ground, then discrimination is deemed to be established. Listed grounds refer to the list of seventeen grounds mentioned in section 9(3). If there is differentiation on a ground that is not specified, then in that event, discrimination will be deemed to be established, if the applicant proves that the ground is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to effect them in a comparably serious manner. These are sometimes referred to as analogous grounds.
(5) The prohibition is against unfair discrimination. If there is discrimination on a specified ground then unfairness is presumed. If it is on an analogous ground, then the applicant will have to prove

[33] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).
[34] *See President of South Africa v Hugo* 1997 (4) SA 1 (CC).
[35] *Van Heerden v Minister of Finance* 2004 (6) SA 121 (CC).
[36] *See* Ian Currie and Johan de Waal, *The Bill of Rights Handbook* (5th) at 235.

unfairness. In *Hugo*, the court laid down the following guidelines for determining whether the discrimination is unfair.

- The position of the complainant and whether they have been the victim of past patterns of discrimination.
- The purpose of the discriminatory law or practice and particularly whether it is aimed at achieving a worthy and important societal goal.
- The extent to which the rights of the complainant has been impaired.

(6) If the discrimination is unfair, then a determination would have to be made as to whether it is reasonable and justifiable in an open and democratic society.

In addition to the jurisprudence developed around section 9 of the Constitution, the legislature has passed the Equality Act (the Act), as required under section 9(4). Section 6 of the Act provides that neither the state nor any person may unfairly discriminate against any person. Discrimination[37] is defined as any act or omission, including a policy, law, rule or practice, condition or situation which directly or indirectly-

(a) imposes burdens, obligations or disadvantage on, or
(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

The Act replicates the seventeen grounds specified in the Constitution[38] and then includes, as a second category, the analogous grounds as prohibited grounds. The second category's definition of prohibited grounds[39] utilises the Constitutional Court's definition of analogous grounds.

(b) any other ground where the discrimination based on that other ground-
  (i) causes or perpetuates systemic disadvantage;
  (ii) undermines human dignity; or
  (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

Under the jurisprudence developed by the Constitutional Court, the applicant relying on an analogous ground had to establish the discrimination and then prove that it was unfair. He or she did not get the benefit of the presumption of unfairness that was activated in instances of discrimination on a listed ground. Section 13 of the Act materially changes that position:

- The Applicant must make out a prima facie case of discrimination.

[37] Section 1(a)(viii) of the Act.
[38] Section 1(1)(xxii) of the Act.
[39] Section 1(1)(xxii)(b) of the Act.

- In that event, the respondent must prove that the discrimination did not take place or that the conduct is not based on any of the prohibited grounds.
- If the discrimination did take place on one of the listed grounds then it will be presumed to be unfair unless the respondent proves that it is fair.
- If the discrimination occurred, but was based on an analogous ground, and if the applicant provided the criteria necessary to establish analogous grounds, then the discrimination will be deemed to be unfair unless the respondent proves that it is fair.

Thus, if the respondent proves that the grounds are analogous to a listed ground, with reference to the definition of prohibited grounds, he or she will get the benefit of the presumption of unfairness.

Finally, section 14 deals comprehensively with the criteria that must be considered before a determination is made as to whether the act or conduct amounts to unfair discrimination. Measures designed to protect or advance persons or categories of persons previously disadvantaged by unfair discrimination do not amount to unfair discrimination. Thus, an exclusively women's association set up to promote opportunities for women who were denied these in the past may be able to justify their exclusion of male members on the basis of section 14(1). An exclusively male club, not being able to rely on section 14(1) of the Act, will have much greater difficulty justifying its exclusion of female members.

Section 14 provides:

> (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
>
> (a) The context
> (b) the factors referred to in subsection (3);
> (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
>
> (3) The factors referred to in subsection (2)(b) includes the following:
>
> (a) Whether the discrimination impairs or is likely to impair human dignity;
> (b) the impact or likely impact of the discrimination on the complainant;
> (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
> (d) the nature and extent of the discrimination;
> (e) whether the discrimination is systemic in nature;
> (f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purposes;
(h) whether there are less restrictive and less disadvantageous means to achieve the purposes;
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
(ii) accommodate diversity.

The section has been criticised for its duplication and it does appear that some of the criteria identified in section 14(2)(b) overlap with and are very similar to the factors that are meant to be considered in section 14(2)(c). However, notwithstanding its shortcomings, we are of the view that section 14 provides useful guidelines on balancing the associational rights of VAs against the individual rights to be treated equally and not to be unfairly discriminated against. We are of the view that the section must be interpreted in a manner which allows for a reasonable accommodation of the VAs associational rights and those of the applicants' rights to be treated equally.

3.2.2.1 Establishing a Prima Facie Case of Discrimination

In order to commence an equality claim, the applicant must establish a prima facie case of discrimination on the part of the VA. As stated earlier, given our history and context, exclusionary practices that are racially based would have to overcome a formidable onus in order to establish that they are fair. What is adequate in any instance would depend on the circumstances of each case,[40] but at the least a suspicion must be raised that the practice or policy of the VA may amount to discrimination on a prohibited ground. However, the applicant would have to provide some evidence to justify receiving a response from the VA, a mere allegation of discrimination on a prohibited ground would not suffice. This obligation on the applicant is not meant to be unduly onerous. Any exclusion from a voluntary association because a person possesses or does not possesses an immutable characteristic will often be adequate to establish a *prima facie* case of discrimination.

We support the trend developed in the equality jurisprudence of deeming discrimination where there is a differentiation on a prohibited ground. Thus if access to a home for the aged is restricted to people of the Jewish faith, then non-Jews are being differentiated against on a prohibited ground and this would be sufficient to amount to discrimination in our law. Once this is established, then the onus shifts to the respondent to establish that the discrimination is not unfair. This is appropriate, as it is proper that an explanation be provided to a person denied access to a facility. The persons owning or managing the facility are privy to the necessary information, evidence and conclusions upon which the exclusionary policies are based and

[40] Currie and De Waal at 268.

are best placed to justify their policies. Their justifications will enable an objective decision maker to decide whether the policies amount to unfair discrimination.

3.2.2.2 Assessing the Context

Regard must be had to the context in which the discrimination has occurred for the purposes of making a determination as to whether it is unfair. It has been argued that:

> Attention to context refers to the method of adjudication that seeks to understand the overall impact of the discriminatory action in the context of people's lives and is able to uncover and address systemic discrimination.[41]

The Act starts from the generally accepted premise that systemic inequalities and unfair discrimination remain deeply embedded in our society and it seeks, through the prohibition of unfair discrimination and the promotion of substantive equality, to redress this social malaise. Thus an assessment of unfairness must have regard both to the mischief which the Act was meant to eradicate and its visions and aspirations.

An interpretation of unfairness has to be contextualised within the challenges that confront this society. It was also apparent to us that VAs, especially those that promote cultural, religious and linguistic objectives, provide a forum for associational activities that give meaning and fulfilment to the lives of people. Most of the representations received emphasised the importance of these cultural liberties and associational rights to the lives of people. In the South African context there are a number of VAs that exist to promote parochial causes and interests and make positive contributions in this regard. Under an assessment of the context, we need to recognise this reality and determine how it can be accommodated without unfairly discriminating or unjustifiably violating people's rights.

3.2.2.3 Impact on the Complainant

Section 14(3) incorporates two general enquiries.[42] The first part focuses on the impact of the discrimination on the complainant and the second part assesses the justification for the discrimination. The first part reflects, in large part, the unfairness enquiry developed by the Constitutional Court in deciding unfairness in section 9(3), while the second part includes the general principles that have to be considered in deciding whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

---

[41] Albertyn, Goldblatt and Roederer, *Introduction to the Promotion of Equality and Prevention of Unfair discrimination Act 4 of 2000* (WUP) at 42.
[42] *Ibid* at 43.

Policy or conduct that excludes a person from admission on the basis that they belong to a particular group is more likely to be deemed unfair discrimination than instances when admission to a VA is restricted to a particular group. Thus a cultural organisation that excludes Zulus is more likely to amount to unfair discrimination than an organisation that excludes all persons except persons committed to preserving and enhancing the Zulu culture. An exclusion of a specific group would seriously and adversely impact on the dignity of persons belonging to that group. In instances where this occurs, a greater onus would lie on the party justifying the discrimination to demonstrate the necessity for the policy given the objectives of the association.

Similarly a VA which excludes all persons other than persons belonging to a particular group will have a more onerous task of justifying its policy and conduct than one that allows all persons but requires them to subscribe to the goals, visions and objectives of the VA. This is not to state that closed admission criteria will always be deemed to be unfair discrimination. Factors that would be relevant in this context would be the reason for the closed admission policy, a clear nexus or link between the closed admission policy and legitimate interests and rights of the VA, the interest or right that is being preserved by the closed admission policy, the number of people admitted to the VA, why less restrictive admission policies would not suffice to protect the interests and rights of the VA and whether alternative opportunities exist for the person being turned away.

Highlands House, which restricts admission to its home to people of the Jewish faith, argued that exclusively Jewish homes for the aged exist in many constitutional democracies such as the US and Canada. It was submitted that the admission policies of these homes have not been deemed to be inconsistent with the constitutions of these countries and continue to exist. In the US, federal law appears to permit this.

The Fair Housing Act as codified in Chapter 42 of the United States Code deals with discrimination in housing.

Section 3604 regulates discrimination in the sale or rental of housing and other prohibited practices and provides:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful-
>
> > (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familiar status, or national origin.

This prohibition is subject to section 3607, which exempts religious organisations or private clubs.

> Nothing in this subsection shall prohibit a religious organisation, association, or society, or any non-profit institution or organization operated, supervised or controlled by or in conjunction with a religious organisation, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

A further exception is made for private clubs not open to the public which provide lodgings for its members as incidental to the primary purpose of the club.

Thus in the US, a religious organisation, or an organisation operated in conjunction with a religious organisation, may restrict admission to people of the same religion provided that the property is not run for commercial purposes.

There can be no doubt that homes for the aged like Highlands Home play a useful and constructive role for members of the community that it serves. It provides them with the comfort and security of being in an environment that is supportive of them and is deeply committed to upholding and promoting their religion in all its manifestations without compromise. This provides great solace and reassurance at a time when religion and religious affiliations are particularly important in the lives of people. These homes are often set up and operated largely from funds obtained from the community that they serve. The reality is that opening the home to persons of different religious beliefs may profoundly change the character of the homes, as a variety of compromises, some pertaining to religious beliefs, may have to be made. This may diminish the fund raising potential to such an extent that the existence of the homes may be threatened. Self-supporting institutions also reduce the fiscal burden on the state and enable state funding to be diverted to needier communities.

We are of the opinion that a home for the aged set up and maintained by a religious organisation for the primary purpose of providing for the religious and other related needs of those in the community in the twilight of their lives, and which does not discriminate on the basis of race or any other irrational criteria, and is not operated for commercial gain, may be constitutionally permissible.

Exclusionary policies and the justification offered for their adoption must be assessed on their individual merits. In the past there was no need to justify far reaching exclusionary polices and there may have been a tendency to adopt polices that went beyond that which were reasonable to protect the legitimate rights and interests of the VA. Even if these policies were adopted under the previous legal order, they would, if challenged now, have to be defended with reference to current constitutional rights and obligations. The past legal order was premised on norms of exclusion while the current Constitution is inclusionary and promotes equality, human dignity and freedoms. In

reappraising and reassessing their policies, VAs must have regarded to this important paradigm shift in our law.

An important issue is the degree to which the exclusion precludes the unsuccessful applicants from enjoying the benefits that being a member of the VA offers. If these benefits can be obtained elsewhere without unreasonable inconvenience and hardship to the unsuccessful applicant then the actual impact on the right to dignity would be reduced. Thus a factual assessment has to be made of the nature of the deprivation resulting from the exclusion. This would include the size and the nature of the VA, the existence or otherwise of alternatives where the benefits offered by the VA could be accessed and the actual cost to the applicant of accessing the benefits from the alternative sources. This list is not meant to be a closed one.

If the applicant was a victim of past patterns of discrimination that led to systemic disadvantage, then policies, rules or conduct that could have the effect of perpetuating this must be subject to close scrutiny. Women, as a category, are generally regarded as having being subjected to and continue to be subject to systemic disadvantage.[43] VAs that adopt policies, rules and conduct excluding women would have to demonstrate a reasonable apprehension that the inclusion of women would adversely and prejudicially affect the attainment of the objectives of the VA, and that the exclusion of women would not have the effect of perpetuating disadvantage against women.

3.2.2.4 Justification for Exclusionary Policies, Rules or Conduct

In the unfairness analysis, the impact on the complainant is pitted against the justification offered by the VA in support of its exclusionary policies, rules and conduct. It is permissible for an organisation, whose objectives are to pursue constitutionally legitimate goals and to advance constitutionally sanctioned rights, to adopt rules and modes of operation designed to prevent 'capture' or to forestall significant and undesirable change, from its perspective, by those whose objects and interests are contrary to those of the VA. This justified the RSPCA's insistence that persons who supported blood sport not be permitted to become members and those members who advocated blood sports could be excluded, discussed previously.

In *Wittman v Deutscher Schulverein,*[44] a mother registered her child at a private school after signing acknowledgments recognising the character of the school and agreeing to abide by its practices. She subsequently sought to compel the school to desist from insisting that her child participate in certain religious observances that were conducted by the school as part of their religion. The constitutional right to maintain independent educational institutions that promote religion, culture and language was held to include the right to exclude persons who did not wish to engage in the religious practices

[43] *President of the RSA v Hugo* 1997 (4) SA 1 (CC) at para 38.
[44] *Wittman v Deutscher Schulverein,* Pretoria 1998 (4) SA 423 (T).

of the school. In *Boy Scouts of America v Dale*,[45] the US Supreme Court upheld the expulsion of an assistant scout master on the basis that the Scout movement had a right not to associate with persons whose presence significantly affects the group's ability to advocate its viewpoint. Dale, a gay person and a gay and lesbian activist, was a long time member of the boy scouts. The Boy Scouts argued that homosexual conduct was contrary to the values embodied in the Scout Oath and Law and hence their right to 'expressive association' include the right to exclude Dale from their organisation. The US Supreme Court accepted this argument and found in favour of the Boy Scouts, overturning the lower court decision which had found for Dale on the basis that his inclusion would not significantly affect the members' ability to carry out their purposes. It should be noted that the prohibition against discrimination on the basis of sexual orientation is more strongly protected and entrenched in our law than it is in the United States.

In this context, an assessment must be made of the constitutionally protected interest or right being pursued. As stated earlier, the pursuit of commercial objectives would most often require greater inclusivity. Associational rights aimed at making effective cultural liberties such as language, religious and cultural freedoms must be afforded appropriate and proportionate weight.

Once a constitutionally sanctioned objective is identified, then the VA must demonstrate that the inclusion of the applicant would materially and significantly affect their ability to carry out their objectives in order to justify his or her exclusion.

In *Roberts v United States Jaycees*,[46] the court had to weigh the associational rights of the Jaycees organisation against the legitimate state interest in stopping discrimination against women and establishing equality. The Jaycees only admitted males between the ages of 18 and 35. The Jaycees argued that forcing it to admit women would violate its right as an organisation to protected speech. The Court found that the Jaycees regularly engage in a variety of civic, charitable, lobbying, fundraising and other activities. There was no evidence to suggest that the admission of women would impede the organisation's ability to engage in its activities. It was thus held that even though the state law, which prohibited discrimination against women, infringed some of the rights of the Jaycees, it was justified as being necessary to accomplish a legitimate state purpose. It is submitted that a similar result would be reached through the application of section 14 of the Act. The lack of an adequate link between the exclusionary policies of the organisation and its goals and objectives would result in the same conclusion.

The Equality Act requires that in the unfairness enquiry consideration be had as to whether there are less restrictive and less disadvantageous means to achieve the objective.[47] An assessment has to be made as to whether the means adopted are reasonably carefully designed to achieve the objective without limiting the right more than is necessary. If the objective can be

[45] *Boy Scouts of America v Dale* 530 U.S. 640, 120 SCt 2446 (2000).
[46] *Roberts v US Jaycees* 468 U.S. 606 (1984).
[47] Section 14(3)(h) of the Act.

achieved by insisting that all persons seeking to join the organisation subscribe to its aims and objectives, then a blanket prohibition on persons falling outside a designated group may be difficult to justify. It follows from this that organisations must be given the flexibility to enforce pre-agreed rules, provided that these are consistent with the Constitution.

In *Taylor v Kurstag*, the first decree by the Beth Din (the Jewish Ecclesiastical Court) was quite extreme. The defaulting party was excommunicated in every manner and this meant that, "he may not be included in a minyan, nor allowed entry into a Shul, no one may associate with him in any way nor do business with him or any of his companies."[48] A second and subsequent decree ameliorated the more drastic consequences of the first by allowing him to attend a synagogue and allowing people to do business with him or his companies. It is conceivable that the first decree may have been more drastic than is reasonably required to achieve the objective of enforcing compliance with the rulings of the Ecclesiastical Tribunal. Had that been the case, the respondents may not have justified their intrusion into the rights of the applicant.

Section 14(2)(c) also requires that cognisance be taken of whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned. It appears to us this enquiry is materially similar to that which has to be undertaken under section 14(2)(a) and (b).

It is recommended that VAs adopting exclusionary policies have regard to the following:

1. Identify the right or interest that it seeks to protect;
2. Identify the rights that may be infringed or limited by the adoption of the policy;
3. Determine alternative ways of achieving its objectives;
4. Adopt the alternative that achieves its objectives without unreasonably and unfairly limiting or restricting rights;
5. Maintain reasons as to why a particular method or means was adopted and other alternatives discarded or disregarded.

This would mean that proper decisions would be made at the outset and reflect the necessary deliberation and balancing that needs to be done in order to arrive at a constitutionally permissible conclusion.

3.2.2.5 Contribution to the Broader Community

Section 14 of the Act[49] requires that regard be had to whether the respondent has taken reasonable steps to address the disadvantage associated with one or more of the prohibited grounds and to accommodate diversity. VAs, while

[48] *Taylor* 2004 (4) All SA 317 at para 9.
[49] Section 14(3)(i) of the Act.

being primarily concerned with promoting their aims and objectives, are part of the broader South African society. This general clause would require an assessment to be made of efforts made by VAs to contribute to the attainment of substantive equality and steps taken to promote respect for the dignity of all persons. Many VAs are members of broader forums that seek to promote the well being of all people in South Africa. An assessment has to be made on the extent to which a VA interacts with the broader community or whether it is restricted to exclusively serving the interests of its members. In making this assessment, regard must be had to the holistic manner in which the VA interacts with the broader community. Financial contributions cannot be the sole and definitive criteria in reaching this conclusion.

3.3 STATE SUBSIDIES

One of the issues that emerged in our public hearings was the consequence of state subsidization. It may be incongruent for the state to directly subsidize a VA that adopts a closed admission policy. Thus a sectarian home for the aged that only admits Muslim persons may, if it wishes to continue receiving a state subsidization for the home, have to adopt a more inclusive admission policy.

Much more difficult questions arise in respect of instances, where admission is open to all persons, but the VA requires people being admitted to subscribe to the values and principles of the organisations. Thus the AKTV may be open to all, but may require its members to undertake to promote and commit themselves to Christian values. The SACC suggested that such organisations should be eligible for direct state subsidization. We are not convinced that this argument will provide a solution. Persons admitted subject to subscribing to certain beliefs may in effect be excluded from the organization because of their unwillingness to subscribe to the prescribed principles, and thus the two policies might have the same *de facto* effect.

All voluntary associations pursuing constitutionally permissible purposes, goals, and objectives should be eligible to apply for state funding. We think that the allocation of state funding should depend on the following criteria:

1) does the voluntary association seek to achieve an objective that is either directly or indirectly protected by the Constitution,
2) the extent to which the organization seeks to improve the quality of life and free the potential of all people by contributing to the progressive realization of socio-economic rights,
3) the nature, purpose, and objectives of the organization, and the benefit it actually confers on the community it serves and the broader South African society,
4) the extent to which the organization addresses disadvantage arising from past patterns of discrimination,
5) competing priorities in respect of budgetary allocations.

If an organization is engaging in constitutional and legally sanctioned conduct, then the state is precluded from denying funding to that body solely because it disapproves of its policies, practices, or activities.

4 CONCLUSION

This report does not seek to regulate intimate associations, for the reasons given in our introduction. Additionally, in our opinion, VAs run for commercial gain would find it difficult to justify exclusionary practices, given such an association's objectives. In between these two extremes lie a whole range of associations that seek to achieve a variety of constitutionally sanctioned objectives and which adopt exclusionary admission policies.

One of the founding themes of our Constitution is that of inclusivity, and the commitment to the principle that South Africa belongs to all who live in it, united in our diversity. We strive in this report, through a set of guidelines, to achieve an appropriate and reasonable accommodation between the cultural, religious, and linguistic liberties of individuals and organizations, and the rights to dignity, equality, and associational rights of other individuals.

The Constitution is a transformative document, seeking to fundamentally change the underpinnings of society to a new order based on human dignity and equality. Past policies premised on exclusion based on irrational criteria such as race must be re-evaluated in light of this new inclusive order. The SAHRC needs to stress that all VAs must see themselves primarily as part of the broader South African society, and not as separate entities divorced from that society.

Whilst the Constitution celebrates the diversity of the South African people, it is also important to emphasize our commonality of identity as opposed to simply focusing on the issues that divide us. The SAHRC hopes that the framework suggested by this report would achieve the correct balance between protecting those organizations which make our society strong, and ensuring the equality, dignity, and cultural rights of all South Africans.