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Submission

to the

Department of Justice and Constitutional Development

on the

Prescription in Civil and Criminal Matters (Certain Sexual Offences) Amendment Bill [Bxx – 2019]

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1. Introduction

1.1. The Centre for Applied Legal Studies (CALS) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Legal Practice Council. As such, CALS connects the worlds of academia and social justice and brings together legal theory and practice. CALS operates across a range of programme areas, namely: rule of law, basic services, business and human rights, environmental justice, and gender.

1.2. The Gender Programme at CALS focuses on ensuring the rights of people of all gender identities and expressions are realised and protected as set out in the Constitution of South Africa. The Programme's work largely centres on gender-based violence, and in particular the trauma and structural violence that survivors face when they are failed by the very systems intended to protect them.

1.3. CALS has consistently engaged in various gender-related issues through numerous submissions to Parliament. Most recently, these have included submissions to the Department of Women on the United Nations Convention on the Elimination of Discrimination Against Women,[1] to the Speaker of the National Assembly on the Choice on Termination of Pregnancy Draft Amendment Bill,[2] to the Director General of Justice and Constitutional Development on the Draft Regulations to the Criminal Law (Sexual Offences and Related Matters) Amendment Act made in 2015,[3] to the Director General of Justice and Constitutional Development on the Draft Regulations Relating to Sexual Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act in 2018,[4] to the Joint Multi-Party Women's Caucus on the Response to the South African Law Reform Commission's Report on 'Sexual Offences: Adult Prostitution' in 2018,[5] to the Department

[1] https://bit.ly/2SJWKrK.
[2] https://bit.ly/2GYcLt3.
[3] https://bit.ly/2VBKg7u.
[4] https://bit.ly/2ITDdps.
[5] https://bit.ly/2NHY8uc.

of Basic Education on the Draft National Policy on the Prevention and Management of Learner Pregnancy in Schools in 2018,[6] and to the Minister of Justice and Correctional Services on the Recognition of Customary Marriages Draft Amendment Bill in 2018.[7]

1.4. Most relevant to the current submission, we were invited to submit comments to the Minister of Justice and Correctional Services on the Criminal Procedure Amendment Bill in February 2018.[8] The Amendment Bill sought proactively to ensure that no sexual offences should be subject to prescription after the irrationality of distinguishing between rape compared to other forms of sexual violence was raised in ongoing litigation outlined below.

1.5. CALS intervened in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*[9] representing the Teddy Bear Foundation. At both the High Court and Constitutional Court, we supported the applicants' argument that it is irrational to draw a distinction between rape and sexual assault for the purposes of prescription. We were also able to bring evidence before the Court on the severe trauma that is caused to child survivors of sexual assault in particular, and the fact that there is typically a long delay in the disclosure of childhood sexual violence. In June 2018, the Constitutional Court found in our favour, ordering that section 18 of the Criminal Procedure Act[10] is irrational and therefore invalid, and there should be no bar on prosecuting **any sexual offences** at any time. This groundbreaking judgment is discussed in more detail below.

1.6. In light of this experience, we assert that CALS has sufficient expertise and institutional knowledge to comment on the Prescription in Civil and Criminal Matters (Certain Sexual Offences) Amendment Bill ("the Bill"). Our submissions focus on the jurisprudence around sexual offences and

[6] https://bit.ly/2XGiEQr.
[7] https://bit.ly/2tR4U7W.
[8] https://bit.ly/2P39r0W.
[9] (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC).
[10] 51 of 1977.

prescription, the submissions made by CALS on the Criminal Procedure Amendment Bill, prescription only applying to 'certain sexual offences' and the 'threshold' requirement in civil matters.

2. Reflections on the Bill

2.1. <u>The jurisprudence around sexual offences and prescription</u>

2.2. In the matter of *Levenstein* the Constitutional Court in a landmark judgment, declared that the prescription of **<u>all</u>** sexual offences is constitutionally invalid.[11]

2.3. The Constitutional Court confirmed the constitutional invalidity of section 18 of the Criminal Procedure Act which allowed the prescription of sexual offences other than rape or compelled rape after a period of 20 years. The Court declared this distinction between rape or compelled rape and other sexual offences both arbitrary and irrational.[12]

2.4. CALS, representing the Teddy Bear Foundation at both the High Court and Constitutional Court, supported the applicants' argument that it is irrational to draw a distinction between rape or compelled rape and other sexual offences for the purposes of prescription. We also brought evidence before the Court on the severe trauma that is caused to child survivors of sexual assault and the various factors that contribute to a delay in disclosing childhood sexual violence.

2.5. The Court found it entirely irrational and arbitrary to create a random cut-off period of 20 years for prescription of sexual offences, when there is a sufficient body of evidence demonstrating that these offences inflict deep continuous trauma on survivors.[13] After analysing the historical development of section 18 and the extent to which it affects the discretionary powers of the National Prosecuting Authority (NPA), the

[11] *Levenstein* para 89.
[12] *Levenstein* para 52.
[13] *Levesntein* para 13.

Court also concluded that there was no rational basis for distinguishing rape or compelled rape from other sexual offences for the purposes of prescription.[14]

2.6. The Court accepted our expert evidence that detailed the reasons why there is often delayed disclosure relating to all sexual offences and not just rape or compelled rape. In this regard, the Court further held that even though the evidence advanced for delayed reporting only related to children – delayed disclosure or reporting stems from **all forms of abuse** and therefore these traumatic symptoms and pressures apply equally to adult survivors of sexual abuse.[15]

2.7. The Court found that using section 18 as a basis to distinguish between penetrative and non-penetrative sexual offences when they all create the same harm, is irrational.[16] The Court further concurred with us that the prescription period created by section 18 is "insufficiently cognisant of the nature and process of sexual assault disclosure".[17]

2.8. The Bill as it currently stands, at section 2, does not adequately cater for **all** sexual offences as mandated by the Constitutional Court judgment of *Levenstein*. Furthermore, it undermines the Courts finding that "sexual abuse in all forms, not only rape, infringes on the survivor's right to bodily and psychological integrity."[18]

2.9. The Bill also fails to adhere to the development of the application of prescription to sexual offences. In the matter of *Van Zijl v Hoogenhout,*[19] the Supreme Court of Appeal held that the purpose of prescription was to penalise unreasonable inaction, not the inability to act.[20] Therefore victims of sexual assault cannot be penalised for only being able to report the abusive act more than 20 years later. The Supreme Court of

[14] *Levenstein* para 12.
[15] *Levenstein* para 12.
[16] *Levenstein* para 52.
[17] *Levenstein* para 53.
[18] *Levenstein* para 27.
[19] [2004] ZASCA 84; [2004] All SA 427 ZASCA.
[20] *Van Zijl* para 19.

Appeal further held that rape had the inherent effect of rendering child survivors unable to report the sexual crimes against them, sometimes even for decades.[21] This, however, does not mean that they should be punished through prescription for the consequences of their abuse.[22]

2.10. The Constitutional Court in *Levenstein* held that the same principles applied in *Van Zijl,* which was in the context of rape*,* also finds application in *Levenstein* regarding survivors of all forms of sexual violence.

2.11. Allowing only certain sexual offences to not prescribe also offends South Africa's international law obligations. South Africa is party to various treaties such as the Convention on the Rights of Children, the Convention on the Elimination of all Forms of Discrimination Against Women, as well as the Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa, which mandates the state to prevent the gender-based discrimination that violates the rights of women and their freedom and protection.

2.12. **The Criminal Procedure Amendment Bill February 2018**

2.13. CALS was invited by the Minister of Justice and Correctional Services to make submissions on the proposed Criminal Procedure Amendment Bill regarding the non-prescription of **all** sexual offences.

2.14. We explained in the submission that the process of disclosure of sexual violence is both complex and lengthy.[23] Furthermore, the memory of sexual violence in adult individuals can manifest over a period of time and may be triggered in numerous ways. The prescription on sexual offences other than rape or compelled rape therefore undermines this reality and further alienates victims of sexual abuse by not allowing them to have adequate protection from the law.

[21] *Van Zijl* paras 7 and 9.
[22] *Van Zijl.*
[23] See Founding Affidavit Amicus Curiae application in *L and others v Frankel and others (29573/2016)* 2017 (2) SACR 257 (GJ) at para 38.

2.15. CALS submitted to the Constitutional Court in *Levenstein*, and echoed this in the above submission, that in light of the evidence around the effect of sexual offences on individuals and their disclosure of such, a reading-in of section 18(f) should include **all sexual offences** in terms of common law and statute. The Constitutional Court approved of such a reading in.[24]

2.16. It therefore goes against the Constitutional Court jurisprudence around sexual offences and prescription for the Bill to fail to treat all sexual offences equally under the law and fail to provide relief and protection through accessibility to the law for all victims of sexual assault.

2.17. **Prescription only applying to 'certain sexual offences' and the 'threshold' requirement in civil matters**

2.18. In light of the argument outlined above, it is clearly irrational and arbitrary to impose a random time limit for prosecuting *any* sexual offences – given the severity of all these crimes, particularly against children; the lasting trauma that sexual violence of any kind inflicts on survivors; and the difficulties survivors face in coming forward to report them. It is likewise irrational to place cut-off periods on instituting civil litigation in respect of any sexual offences.

2.19. In many cases of sexual abuse, it is possible that the victim or survivor might prefer to institute action civilly, which could give them more control over how the matter proceeds and requires a different standard of proof (a balance of probabilities). Setting a time limit on instituting civil litigation ignores how responses to sexual violence play out in reality, such as the delayed nature of disclosure outlined above.

[24] *Levenstein* at para 89

2.20. The proposed amendments to section 12 of the Prescription Act, 1969, draw an irrational distinction between different sexual offences, eliminating prescription for civil matters relating to some and not others. For example, section 1 (relating to section 4(a)(a) of the Prescription Act) lists only rape, indecent assault, incest and violation of a corpse – and no other acts of sexual violence such as abduction, public indecency (in the case of 'flashing' as set out in section 9 of SORMA) or bestiality. Furthermore, section 1 (relating to section 4(a)(g) of the Prescription Act) oddly ignores only the statutory offence of bestiality as set out in SORMA. There is, however, no rational reason for setting apart some crimes from all other sexual offences as already acknowledged in the Constitutional Court jurisprudence as set out above.

2.21. In light of the Constitutional Court's decision in *Levenstein* it is further puzzling why the name of the Bill would then be 'Prescription in Civil and Criminal Matters (**Certain Sexual Offences**) Amendment Bill' when the court explicitly found that the Criminal Procedure Act should acknowledge the trauma caused by ***all*** sexual offences and thus extend non-prescription to "all other sexual offences, whether in terms of common law or statute".[25]

2.22. In addition, section 1 of the Bill (relating to section 4(a) of the Prescription Act) makes it clear that "Prescription shall not commence to run… during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition". It is our contention that this final element should be removed, and there is no need for a survivor of sexual violence to meet a 'threshold' to be able to institute civil litigation based on the offences committed against them at any time.

2.23. The section further pre-supposes that victims of any kind of sexual violence are solely in a mental state or condition that prevents them from instituting action. This argument negates non-psychological factors that

[25] *Levenstein* para 61.

may affect reporting of sexual offences, like; fear of not being believed; feelings of guilt; humiliation and embarrassment; fear of having to relive the trauma in court; the authority and the power of the abuser; and at times fear of economic loss.

2.24. The exclusion of other sexual offences creates a non-existent distinction between sexual offences, when in fact; the context and consequences of these offences are substantially the same.

2.25. The Constitutional Court in *Levenstein* argued further that *"even though the reasons for delayed reporting only relate to children, delayed disclosure or reporting stems from all forms of abuse and therefore these traumatic symptoms and pressures apply equally to adult survivors of sexual abuse".*[26]

3. Further recommendations

3.1. <u>The exclusion of sex work as a sexual offence</u>

3.2. CALS has consistently supported sex workers in their plight to have sex work recognised as work in terms of sections 22 and 23 of the Constitution. This is evident from our *amicus* intervention in the case of *S v Jordan and Others*[27] in 2002, as well as our submissions to the Multi-Party Women's Caucus summit on Sex Work in 2017.

3.3. As we have previously submitted in the Criminal Procedure Amendment Bill, we support the call from sex workers for decriminalisation of sex work as currently criminalised by section 268 of the CPA, section 11 of SORMA read with section 19 of the Sexual Offences Act 23 of 1957.[28]

[26] *Levenstein* para 12.
[27] *[2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117.*
[28] See http://www.sweat.org.za/sexworkiswork/#.

3.4. In light of the above we call on the Department of Justice and Constitutional Development to exclude sex work from the applicability of a non-prescription period in terms of civil and criminal law, as well as beginning the process of drafting legislation to uphold the rights of sex workers and decriminalise sex work in South Africa.