

Submission

to the

Minister of Justice and Correctional Services

on the

Criminal Procedure Amendment Bill

Hd7(S18CPA)

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1. Introduction

- 1.1. The Centre for Applied Legal Studies ('CALs') is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALs is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALs connects the worlds of both academia and social justice. CALs' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights.
- 1.2. CALs operates across a range of programmes including: rule of law, business and human rights, environmental justice, basic services, and gender. A specific focus of the gender programme is the interrelation of violence and gender with other rights in the Bill of Rights.
- 1.3. Historically CALs has engaged in gendered issues through numerous submissions to Parliament. Some of CALs' submissions include submissions to the Department of Women on the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW),¹ the Speaker of the National Assembly on the Choice on Termination of Pregnancy Amendment Draft Bill,² the Director-General of Justice and Constitutional Development on the Draft Regulations to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 made in 2015,³ and to Director-General of Justice and Constitutional Development on the Draft Regulations Relating to Sexual

¹ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/CALS%20submission%20CEDAW%20Final-Oct%202015.pdf>.

² <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Submissions%20on%20the%20Termination%20of%20Pregnancy%20Amendment%20Bill%20.pdf>.

³ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Sexual%20Offences%20Court%20November%202015.pdf>.

Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) in 2018.⁴

1.4. Further, CALS represented the amicus curiae, the Teddy Bear Clinic (Teddy Bear Foundation) in *L and Others v Frankel and Others* (29573/2016) 2017 (2) SACR 257 (GJ)⁵ and *Levenstein and Others v Estate Late Frankel and Others* CCT170-17. The subject matter of the case centred around the issue of historical sexual violence and the lengthy and complex process of disclosure, where this had been acknowledged in the case of rape as set out in section 18(f) of the Criminal Procedure Act 51 of 1977 ('CPA'), yet had failed to similarly be acknowledged in the case of sexual assault and previously the common law crime of indecent assault (redefined by Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 ('SORMA') as the crime of sexual assault). On 15 June 2017 the South Gauteng High Court declared section 18 of the CPA invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in sections 18(f), (h) and (i), after the lapse of a period of 20 years from the time when the offence was committed, the confirmation hearing was argued on 14 of November 2017 before the Constitutional Court. We are currently awaiting judgment in the matter from the Constitutional Court.

1.5. The Teddy Bear Foundation ('TBF') is a not-for-profit company that specialises in providing holistic services to children who have been abused. Its mission is to minimise the secondary harm to children and their families when they enter the child protection system. TBF's vision is to ensure that children will not be abused in the future, yet where children are being abused, it is to promote their healing

⁴ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Centre%20for%20Applied%20Legal%20Studies%20-%20Submissions%20on%20the%20Draft%20Regulations%20Relating%20to%20Sexual%20Offences%20Courts.pdf>.

⁵ <http://www1.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2017/140.html&query=frankel>.

and stop any further abuse. It does this through a multi-pronged approach including providing: medico-legal examinations at its facility based within the Charlotte Maxeke Academic Hospital; forensic assessments to form the basis of court proceedings concerning violence against children; physiological assessments specifically for children for the purpose of providing them with fair access to the criminal justice system; therapeutic counseling and support; court preparation; support and outreach and schools awareness programmes.

1.6. In addition to the above, TBF has been party to a number of court proceedings in the past dealing with the interests of children, including: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC);⁶ *J v National Director of Public Prosecutions and Another* 2014 (2) SACR 1 (CC);⁷ and *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* 2015 (10) BCLR 1129 (CC).⁸

1.7. In light of the expertise of both CALS and TBF as set out briefly above, we assert that we are well placed to comment on the substance of the proposed Amendment Bill.

2. Reflections on the proposed amendment

2.1. TBF and CALS would like to take this opportunity to commend the proactive stance taken by the Minister of Justice and Correctional Services in making the call for submissions to the above Amendment Bill in relation to non-prescription

⁶ <http://www.saflii.org/za/cases/ZACC/2013/35.html>. Dealing with the constitutionality of section 15, 16 and 56(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).

⁷ <http://www.saflii.org/za/cases/ZACC/2014/13.html>. Dealing with the constitutional validity of section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).

⁸ dealing with an extension of period of suspension of declaration of invalidity in terms of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*.

applying to *all* instances of sexual violence, whether contained in statute or established in terms of the common law.

2.2. **The process of disclosure in cases of sexual violence**

2.3. As stated above the process of disclosure in instances of sexual violence is a complex and lengthy one.⁹ The memory of sexual violence in adult individuals can manifest over a period of time and may be triggered in numerous ways, including: fear or reluctance during interpersonal sexual relationships, fear around being a bad parent, self-harming behaviour or continuous feelings of anger, shame or guilt.¹⁰

2.4. A child victim on the other hand can develop dissociation during the occurrence of a sexual offence, or as an adult when memory relating to the event or re-enactment of part of the event triggers such dissociation.¹¹ Furthermore, post-traumatic stress associated with having experienced sexual violence can cause fragmented memory and as a result of these factors disclosure of the event may only occur after a long period of time.¹²

2.5. Disclosure of a sexual offence is recognised as a continuous process and not a once-off event, disclosure can thus be seen as occurring of a continuum that can be characterised by personal, direct and indirect forms of disclosure that may reveal varying amount of detail.¹³

2.6. In light of the current prescription periods for sexual offences other than rape or compelled rape, this untransformed law acts as alienating victims of sexual violence and may have the effect of traumatising victims further, as there is not

⁹ Founding Affidavit Amicus Curiae Application in *L and Others v Frankel and Others (29573/2016) 2017 (2) SACR 257 (GJ)* at 38.

¹⁰ As above, 38.

¹¹ Founding Affidavit, 38.

¹² Founding Affidavit 39.

¹³ Founding Affidavit 39.

adequate and accessible protection from the law.¹⁴ Thus ‘a prescription period that is not in tandem with nor genuinely accommodating of the length the process of disclosure takes denies victims of sexual assault [or any other sexual offence] their constitutional rights to access to justice, dignity and equality’.¹⁵

2.7. **The nature of harm in all instances of sexual violence**

2.8. As expressed by Woollett, victims of sexual violence respond differently to cases of rape or sexual assault, and it is asserted that this can be extended to the response of victims to all forms of sexual violence committed against them.¹⁶ She goes on to argue that long term sexual assault and grooming can lead to Post Traumatic Stress or dissociation which can be experienced to lessor, equal to or even worse degrees than in the case of rape.¹⁷

2.9. In support of Woollett, Omar states ‘I have observed these concepts of trauma during my consultations with victims of sexual assault. It is also apparent to me that the harm caused to these victims is similar to those I have observed in victims of rape.’¹⁸

2.10. On the sexual violation of children, Omar states that in her experience that the harm of sexual abuse is comparable to rape in the case of children.¹⁹ Omar adds to this that of both children and adults that approach TBF for sexual assault cases and rape cases exhibit Post Traumatic Stress Disorder, stigmatisation, sexual traumatisation, betrayal and powerlessness.²⁰

2.11. The submission by TBF in the above Constitutional Court matter of *Levenstein and Others v Estate Late Frankel and Others*, was that section 18(f)

¹⁴ Founding Affidavit 43.

¹⁵ Founding Affidavit 43 – 44.

¹⁶ Founding Affidavit, 23.

¹⁷ Founding Affidavit, 23.

¹⁸ Founding Affidavit, 25.

¹⁹ Founding Affidavit, 26.

²⁰ Founding Affidavit, 26.

of the CPA is inconsistent with the Constitution and invalid to the extent that it bars, in all circumstances, the institution of a prosecution for all sexual offences, other than rape or compelled rape, after the lapse of a period of 20 years from the time when the offence was committed.²¹ TBF continues to hold this and is supported by CALS in this current commentary.

2.12. TBF submitted in the Constitutional Court that the following be read into section 18 of the CPA “*Prescription of right to institute prosecution. The right to institute a prosecution for any offence, other than the offences of- ... (f) and rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, **and all statutory and common law offences of a sexual nature contained in any other law, respectively; ... shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.***”

2.13. The proposed amendment in terms of the Amendment Bill is:

2.13.1. Section 18 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for section 18 of the following section:

18. The right to institute a prosecution for any offence, other than [the offences of]—

(f) [rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively] any sexual offence in terms of the common law or statute;

²¹ Fifth Respondent’s Written Submissions in *Levenstein and Others v Estate Late Frankel and Others* CCT170-17 at 26 – 27.

2.14. In light of the above it can be seen that the submissions made by TBF, and supported by CALS, is that all sexual offences that exist in terms of 'SORMA', any other statute and common law should not have a prescription period due to the nature of disclosure of sexual violence by survivors as expressed by the proposed Amendment Bill to the Criminal Procedure Act. At the core of our submission is that there is no gradation of harm where sexual violations have occurred. Further that there may be good reasons for the delay in reporting (which are thoroughly canvassed).

2.15. We state this however with the proviso that we hold the view that SORMA, other statutes and the common law would benefit from a thorough review of the acts criminalised. We do not intend to make extensive submissions in this regard, save for what it stated below.

3. Further recommendations

3.1. CALS and TBF are of the view that certain prescribed conduct under SORMA, other statutes, and the common law, should be reviewed. This does not detract from our submissions above that no offences of a sexual nature should prescribe.

3.2. In these submissions, we deal only, and briefly, with 'Sex Work' as criminalised by section 268 of the CPA, section 11 of SORMA read with section 19 of the Sexual Offences Act 23 of 1957.

3.3. CALS and TBF call for sex work to be decriminalised in South Africa as per calls from sex workers in the country.²² We note that this call was supported at the ANC Policy Conference in December 2017.²³

²² See <http://www.sweat.org.za/sexworkiswork/#>.

²³ Available at <https://www.enca.com/south-africa/anc-resolves-to-decriminalise-sex-work>.

- 3.4. We argue that the act of continued criminalisation of sex work marginalises women in this extremely vulnerable group.
- 3.5. CALS has submitted separate submissions to the Minister of Justice and Correctional Services as a response to the South African Law Reform Commission's Report on 'Sexual Offences: Adult Prostitution', which are available at

<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20-%20Response%20to%20the%20SALRC%20Report%20on%20Adult%20Prostitution%20.pdf>