

**SUBMISSIONS TO THE NCOP SELECT COMMITTEE ON SECURITY AND JUSTICE ON THE
PRESCRIPTION IN CIVIL AND CRIMINAL MATTERS (SEXUAL OFFENCES) AMENDMENT
BILL [B22 – 2019]**

Hon. Ms S Shaikh, , Chairperson for Select Committee on Security and Justice

For attention: qdixon@parliament.gov.za

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WRITTEN SUBMISSIONS PREPARED BY

THE WOMEN'S LEGAL CENTRE

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We request that we be given the opportunity to make oral submissions to the Select Committee in the event of public hearings on the Bill.



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A. INTRODUCTION

1. The Women's Legal Centre is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, education and training. We aim to develop feminist jurisprudence that recognizes and advances women's rights. The Violence Against Women programme's goal is that there is an accessible legal system that takes account of, and supports, the needs of women impacted by violence, that provides optimal services and protection by the state and private entities and reduces secondary victimisation. The programmes objectives are: ensuring that there is a legislative framework to address violence against women which is compliant with international and constitutional obligations; ensuring that the state has implementation plans in place to action legal frameworks and policies; holding the state and private entities accountable in the implementation of laws and policies, and in the development of due diligence standards relating to violence against women.

B. CONTENT OF SUBMISSION

2. This submission will cover the following:
 - 2.1 Section 18 of the Criminal Procedure Act 51 of 1977
 - 2.2 Section 12 of the Prescription Act 68 of 1969
 - 2.2.1 Exclusions / omissions of certain sexual offences in section 12 (as amended) of the proposed Bill.
 - 2.2.2 Retrospectivity of Section 12 of the Prescription Act 68 of 1969
 - 2.2.3 The constitutionality of time bar provisions on the institution of civil legal proceedings in sexual offences.
 - 2.2.4 Proposed drafting solutions to the unfair discrimination resulting in the implementation of the Bill in its current form

C. SECTION 18 OF THE CRIMINAL PROCEDURE ACT

3. The Women's Legal Centre made extensive written and oral submissions on the Bill before the Portfolio Committee on Justice and Correctional Services in February 2020.
4. We welcome the amendments made to the Bill following the submissions, specifically with regards to the amendment to clause 3 of the Bill, amending section 18(2) of the Criminal Procedure Act, which revives the right to institute a prosecution that, in any offence referred to in subsection (1)(eA) and (f), has lapsed before the commencement of the Bill.
5. This amendment aligns with the submissions made by the Women's Legal Centre who argued for the necessity of a clause in the Bill which specifically revived the right to institute a prosecution in all sexual offences matters after a period of 20 years. These arguments were made in response to the Constitutional Court judgement which declared section 18 of the Criminal Procedure Act unconstitutional in the case of *Levenstein and Others / Estate of the late Sidney Frankel and Others* CC No 170/17. The Court declared the section unconstitutional and ordered that the declaration of invalidity was retrospective to 27 April 1994.
6. It was therefore necessary to specifically revive the right to institute a prosecution for sexual offences cases which originated before 27 April 1974 i.e. 20 years from the advent of the Interim Constitution 27 April 1994.
7. The WLC welcomes and supports this amendment.

D. SECTION 12 OF THE PRESCRIPTION ACT 68 OF 1969

8. WLC acknowledges that the purpose of the Bill before Parliament, as it pertains to both criminal and civil prescription of sexual offences, is to bring the law in line with the Constitutional Court judgement in *Levenstein*.
9. As with the previous proposed amendment to section 18 of the Criminal Procedure Act which was before the Portfolio Committee on Justice and Correctional Services, where we set out our concerns regarding the application of retrospectivity, we submit that the amendment to section 12(4) of the Prescription Act also has implications in application regarding retrospectivity. We will address this below in more detail.

10. While the focus on this amendment is to bring the section in line with principles established in *Levenstein*, the WLC would appreciate the opportunity to address the Select Committee on a second aspect of civil prescription as it pertains to sexual offences, that of the constitutionality of time bar provisions on the institution of civil legal proceedings.

Distinction between types/categories of sexual offences for the purposes of civil prescription

11. Section 1 of the (Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill [B22 – 2019] amends section 12 of the Prescription Act 68 of 1969 to include all sexual offences, in terms of common law or statute, be subject to the prescripts of section 12(4).

12. Section 1 recognises, in line with the principles established the CC judgement in *Levenstein* discussed in detail above, that for the purposes of prescription, and more specifically the conditions set out section 12(4), that there may not be any distinction made between sexual offences. This recognition by the legislature in the Bill is welcomed by the Women's Legal Centre.

Section 12(4) of the Prescription Act

13. In terms of section 11 read with section 12(1) of the Prescription Act 68 of 1969, civil debts prescribe three, six, fifteen or thirty years from the date the debt is due.

14. The Prescription Act sets out certain circumstances where prescription will not commence to run. Section 12(4) provides prescription shall not commence to run in respect of a debt arising from the commission of an alleged sexual offence during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition. This is based on the principle that prescription does not run against one who is unable to act. This principle finds expression in the common law maxim '*contra non valentem agree, non currit praescriptio*'.

15. Prior to the introduction of section 12(4), a debt arising from a sexual offence would become due once the victim / survivor had actual knowledge of the identity of the perpetrator or was deemed to have knowledge because they could have acquired the knowledge by exercising reasonable care.

16. This was the state of the law when the Supreme Court of Appeal considered the plea of prescription in *Van Zijl v Hoogenhout*¹.
17. The effect of the judgment was to expand the ambit of section 5(1)(c) of the Prescription Act as it then was (now section 12(3)) to include situations where a person had actual knowledge of the facts and identity of the perpetrator, but not '*meaningful knowledge of the wrong*' or knowledge that the responsibility for the action lay with the defendant
18. The effect of the *Van Zijl* judgment was to create an additional ground upon which a person could argue that a debt had not fallen due and prescription had not commenced to run. The Supreme Court of Appeal had incorporated this new ground into section 5(1)(c) (what is now section 12(3)) as part of the general requirement that a person has knowledge of the identity of the debtor and facts giving rise to the debt. This 'knowledge' was interpreted to mean 'meaningful knowledge' and an appreciation of where responsibility for the wrong lay.
19. Parliament in 2006, however, elected to create an independent provision for cases involving civil debts arising from sexual offences. The motivation for introducing section 12(4) was an acknowledgment that debts arising from sexual offences require special treatment, coupled with the recognition that injustice can ensue when a period is allowed to prescribe through a debtor's own conduct thus undermining the principle of fairness to a creditor.

Retrospectivity

20. Section 10(1) provides that a debt shall be extinguished by prescription after the lapse of the [relevant prescription] period.
21. This is similar to section 18 of the Criminal Procedure Act which provides that it is the "*right to institute a prosecution for any offence*" which lapses after the expiry of the prescription periods. The offence itself does not prescribe but rather the right to do something about it.

¹ [2004] 4 All SA 427 (SCA)

22. Section 12(4) provides that prescription shall not commence to run in respect of a debt arising from the commission of an alleged sexual offence during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition. Section 12(4) makes no express provision for its retrospective or retroactive application and operation.
23. In the Bill before the Portfolio Committee, the proposed amendment provided for the section to come into operation on, and have retrospective effect to, 27 April 1994. This means that section 12(4) will apply to any debt arising from the commission of a sexual offence after 27 April 1994.
24. If the victim of a sexual offence can satisfy the requirements of section 12(4), the time bar of 3 years will only start to run once she is able to institute proceedings.
25. Section 12(4) will not have application to debt arising from sexual offences before 27 April 1994. In matters which occurred prior to 27 April 1994, the law at the time of the incident will apply.
26. As highlighted previously regarding the concerns with retrospectivity as it applies to section 18 of the Criminal Procedure Act, the effect is that it gives rise to the continued arbitrary distinction between certain sexual violence victims. Once again, depending on the nature of the sexual offence and when it occurred, different laws apply and regulate the civil claim. The exceptions contained in section 12(4) will not apply to victims who were sexually violated prior to 27 April 1994.

Constitutionality of time bar provisions on the institution of civil legal proceedings in sexual offences

27. WLC has obtained an opinion from counsel² on the constitutionality of time bar provisions with specific reference to sexual offences. The submissions below draw extensively from this opinion.

General:

² Adv. Frances Hobden and Adv. Claire Avidon, Johannesburg Society of Advocates, Thulamela Chambers.

28. The Prescription Act is the primary, but not the only, piece of legislation that imposes a time bar on the institution of legal proceedings against a defendant.
29. There is a long line of cases from the Constitutional Court considering the constitutionality of time limits imposed by other legislation for the determination of disputes before a court or tribunal³. These cases provide a useful framework to assess the constitutionality of time bar provisions and the relevant factors in any balancing of interests. In *Mohlomi v Minister of Defence* the Court held that the appropriate test required that the Court consider the availability of a real and fair initial opportunity to exercise the right taking into account the circumstances of the class of case in question.
30. There has never been a direct, facial challenge to the constitutionality of the Prescription Act. However, when interpreting and applying the Prescription Act, the Constitutional Court has accepted that prescription periods imposed by the Act limit the right to access to justice in section 34 of the Constitution.
31. In *Links v ME for Health, Northern Cape 2016 ZACC 10*, the Constitutional Court accepted that the operation of the provisions of the Prescription Act limit the right to access to justice in section 34 of the Constitution. This is because prescription prevents a dispute between two parties from being resolved by a court of law.
32. In *Makate v Vodacom (Pty) Ltd (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC)* the Court emphasised that section 39(2) must be invoked when a court is called upon to interpret the provisions of the Prescription Act because the provisions implicate constitutional rights. The Court held at para 90 that “*It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution.*”
33. In each case, the Court has been at pains to point out the legitimate government purpose of prescription periods.
34. The Law Reform Commission has commented that prescription serves the following policy objectives:

³ *Mohlomi v Minister of Defence* 1997 (1) SA 124 CC; *Moise v Transitional Local Council of Greater Germiston (Minister of Justice and Constitutional Development intervening)* 2001 (4) SA 491 CC; *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC; *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng* 2001 11 BCLR 1175 (CC)

“The primary objective of prescription is the achievement of legal certainty and finality in the relationship between a debtor and a creditor, with the emphasis on protecting a debtor against the unfairness of having to defend stale claims.

Further to this, the rules of prescription promote the timeous exercise of rights. In this regard however, although the rules of prescription are meant to quicken the diligence of a creditor, they are not meant to operate punitively and mechanically; thus personal factors relevant to a creditor’s failure to enforce a right timeously are usually taken into account for the purpose of delaying the onset or the running of prescription.

They are also aimed at enhancing judicial economy and efficiency in the administration of justice. This is best served when parties are obliged to have their disputes adjudicated upon promptly, while evidence is available and the memory of witnesses is still fresh.”⁴ (footnotes omitted)

35. In summary, the current state of the law is that the Constitutional Court accepts that time bar provisions infringe the right to access to justice and has cautioned that all statutory time bars should face judicial scrutiny. When undertaking the limitations analysis in respect of various other statutory time bars, the Courts have engaged in a careful weighing of interests balancing the right to access to justice with factors such as the length of the period, the simplicity of the particular claims procedure, the need for proper administration of public funds and the purpose of the time bar to prevent inordinate delay and preserve the quality of adjudication. In every case, the Court must determine whether the particular range and terms of the time-bar provision are compatible with the right to access to justice.
36. The Constitutional Court has accepted that the Prescription Act operates to limit the right to access to justice, but the Court has not been required to conduct the limitation analysis required to make a determination on its constitutionality. It therefore remains an open question as to whether the three year prescription period for civil debts is reasonable and justifiable as contemplated in section 36.

⁴ South African Law Reform Commission Revised Discussion Paper 147 (Project 125) ‘Harmonisation of Existing Laws Providing for Different Prescriptive Periods’ (2018) p10 paras 1.25-1.27

The Prescription of Civil Debt arising from Sexual Offences:

37. The jurisprudence applicable to time bar provisions generally, and the provisions of the Prescription Act specifically, applies equally to the prescription of civil debts arising from sexual offences

38. In *Bothma v Els*,⁵ the Constitutional Court held that when considering whether to grant a stay of private prosecution of a sexual offence a court must take into account the nature of the offence. Sachs J held:

“Society demands a degree of repose for its members. People should be able to get on with their lives, with the ability to redeem the misconduct of their early years. To prosecute someone for shop-lifting more than a decade after the event could be unfair in itself, even if an impeccable eyewitness suddenly came forward, or evidence proved the theft beyond a reasonable doubt. Everything will depend upon the circumstances. All the relevant factors would have to be weighed on a case-by-case basis. And of central significance will always be the nature of the offence. The less grave the breach of the law, the less fair will it be to require the accused to bear the consequences of the delay. The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us “Molato ga o bole” (Setswana) or “ical’aliboli” (isiZulu) – there are some crimes that do not go away

39. Section 11 of the Prescription Act imposes different prescription periods for different kinds of civil debts and different kinds of debtors. A thirty year prescription periods applies to secured debts, judgment debts, debts arising from taxation, and debts owed to the State in respect of mining rights. A fifteen year prescription period applies to any debt owed to the State arising out of the loan of money or sale or lease of land by the State. A six year period applies in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract.

40. Outside of these categories of debts, the Prescription Act treats all remaining civil debts the same. There is a prescription period of three years regardless of whether the conduct giving rise to the claim for delictual damages was traumatic sexual assault causing serious bodily and psychological harm, or the failure to pay an invoice for services rendered.

⁵ 2010 (2) SA 622 (CC)

41. Section 12(4) delays the commencement of the prescription period for debts arising from sexual offences, but only if the plaintiff can demonstrate that they were unable to institute the proceedings for a period of time. Apart from this, prescription operates in the normal way for these civil debts.
42. It must be considered whether the curtailment of the right to access to justice, and the state's obligation to assist people to vindicate their constitutional rights through private law remedies, is reasonable and justifiable under section 36 of the Constitution.
43. Many of the same factors considered by the courts in the limitation analysis of time bar provisions apply equally when considering the infringements in the context of sexual offences.
44. The class of cases affected by prescription where the debt arises from a sexual offence are a unique class of case that requires 'peculiar sensitivity'. The Constitutional Court and Supreme Court of Appeal have consistently found that a different approach and standard is required when considering the application of time-bar provisions to conduct constituting sexual offences. More than 15 years ago, the SCA in *Van Zijl* recognised the sui generis sequelae that flows from chronic child abuse, which inhibits a victim's ability to seek redress for the violence⁶. The SCA held that as a result of the particular nature of sexual abuse and its consequences, "[a]ll these factors call for a peculiar sensitivity when applying statutory time limits to proceedings arising from sexual abuse committed against a child during the period in question"⁷.
45. Civil claims arising from conduct that constitutes a sexual offence have a number of unique features:
- 74.1 It is a class of case that is characterised by an inability of victims to timeously seek criminal or civil redress. Since the SCA's decision in *Van Zijl*, and the introduction of section 12(4) in the Prescription Act, a significant amount of research and evidence is now available which shows that most survivors of sexual violence do not come forward and seek redress due to "rape trauma syndrome, the now recognised patterns of emotional, physical, cognitive and behavioural disturbances"⁸. The Constitutional Court in *Levenstein* concluded that "[a]ll these features of survival of sexual trauma make it rational to be reluctant to report and

⁶ *Van Zijl*, para 14

⁷ *Van Zijl*, para 7

⁸ *Levenstein*, paras 54-58

to avoid reporting.”⁹ The Court recognised that certain characteristics of sexual violence (such as secrecy, fear and shame) make it feel and seem impossible for victims to come forward and assert their rights.¹⁰ The Court held at paragraph 57:

“All these features of survival of sexual trauma make it rational to be reluctant to report and to avoid reporting. And this is before even considering the effect of rape trauma syndrome, the now recognised patterns of emotional, physical, cognitive and behavioural disturbances that approximately one in three survivors of sexual assault develop. Even if a survivor is fully aware that she was abused, she naturally weighs up the possibility of reprisals from the perpetrator together with the possible lack of support from the police and statistically small eventuality that reporting will actually, eventually, result in a conviction in a criminal court.”

74.2 The conduct giving rise to the debt implicates a number of constitutional rights. Sexual violence implicates a number of rights in the Bill of Rights including sections 9, 10, 11, 12 and 28.¹¹

74.3 The state bears an obligation to assist victims of the conduct to gain both civil and criminal redress. Section 7(2) of the Constitution imposes a duty on the state to “*respect, protect, promote and fulfil*” the rights in the Bill of Rights. This obligation is positive, direct, and powerful.¹² The state’s duty extends beyond its own action,

⁹ Levenstein, para 57

¹⁰ Levenstein, para 56

¹¹ F v Minister of Safety and Security and Another 2012 (1) SA 536 (CC) at para 56

Section 9(1) and 9(2): Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms

Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 11: Everyone has the right to life.

Section 12(1)(c); Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources and not to be treated or punished in a cruel, inhuman or degrading way.

Section 12(2)(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.

Section 28: Every child has the right to be protected from maltreatment, neglect, abuse or degradation. A child’s best interests are of paramount importance in every matter concerning the child.

¹² S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC) at para 11; Christian Education SA v Minister of Education 2000 (4) SA 757 (CC) at para 47; Carmichele v Minister of Safety and Security 2001(4) SA 938 (CC) at paras 44 to 45; Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at para 20.

and it must also take steps to protect these rights against damaging acts that may be perpetrated by private parties.¹³

74.4 Lastly, it is a class of case where the institution of civil proceedings is an important mechanism for protecting and vindicating constitutional rights. Civil claims may also protect constitutional rights by acting as a deterrent. The Constitutional Court has accepted that private-law delictual remedies serve to protect and enforce a constitutionally entrenched fundamental right.¹⁴ Civil claims can be an effective response to the infringement of constitutional rights caused by conduct that constitutes a sexual offence. This is particularly so in light of the practical difficulties many survivors face in ensuring criminal charges are effectively investigated and prosecuted. The laws, practices and procedures governing civil actions have the ability to either obstruct or facilitate the protection and enforcement of fundamental rights. Prescription provisions that apply without the necessary sensitivity to the unique nature of claims arising from sexual conduct act to obstruct the vindication of constitutional rights through delictual remedies.

46. These unique features of civil debts arising from sexual offences mean that in many cases survivors of sexual assault do not receive a real and fair initial opportunity to exercise their right to access to justice before prescription commences to run, and the three-year period lapses

47. The infringement of the right to access to justice on this category of debtors is particularly grievous in light of the many constitutional rights implicated by sexual offences.

48. While the current section 12(4) delays prescription on account of psychological condition, or on account of intellectual disability, disorder or incapacity in terms of the proposed amendment in the current Bill, all the other factors discussed above and recognised in *Levenstein* which lead to delay in reporting, and by implication would lead to delays in instituting civil proceedings are not taken into account. The realities of the psychological and societal barriers facing sexual violence victims to reporting and instituting civil claims are reinforced by prescription periods.

¹³ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at para 27.

¹⁴ *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA) at para 21

49. The concept of prescription of sexual offences in all criminal matters has been accepted as not applicable or appropriate. The reason for this is that sexual offences are sufficiently serious enough for them not to prescribe.
50. It was accepted in the CC *Levenstein* judgement that there are numerous reasons why victims do not report the offence immediately and may delay that reporting for as long as more than 20 years.
51. Given that the CC has accepted this, it is inappropriate that a limitation is placed on civil prescription of 3 years, even with the provisions of delay in section 12(4).
52. Section 12(4) currently recognises that sexual offences are a particular category of offence that requires special arrangements to allow for the institution of civil proceedings outside of the normal 3-year prescription period.
53. However, in practice, where a victim institutes civil proceeding for damages arising from a sexual offence more than 3 years after the incident, the victim as plaintiff bears an evidentiary burden to show that she was unable to institute proceedings within 3 years due to her mental or psychological condition.
54. This places both a legal and emotional burden on the victim. With the amendment to section 18 of the Criminal Procedure Act, it is recognised that to put any limitation on the reporting of any sexual offence for the purposes of instituting a criminal prosecution is unconstitutional. We submit that this is the opportune time for Parliament to extend the same rationale to the institution of civil proceedings for a debt arising from a sexual offence.
- 55. Section 12 should therefore be amended to reflect that prescription shall not commence to run in respect of a debt based on the commission of a sexual offence.**