



Commission for Gender Equality
A society free from gender oppression and inequality

**Submission to the Portfolio Committee on Justice and Correctional
Services:**

**PRESCRIPTION IN CIVIL AND CRIMINAL MATTERS (SEXUAL OFFENCES)
AMENDMENT BILL [B22 – 2019]**

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1. Introduction

The Commission for Gender Equality (CGE) welcomes this opportunity to make written submission to the Portfolio Committee on Justice and Correctional Services, on the **Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill [B22 – 2019]**.

The CGE, as an independent statutory body created in terms of Chapter 9 of the Constitution of the Republic of South Africa Act, 108 1996 (the Constitution), is mandated to promote and protect gender equality in government, civil society and the private sector.

The Commission for Gender Equality Act 39 of 1996, as amended (the CGE Act) gives the Commission the power to:

- monitor and evaluate policies and practices of organs of state at any level;
- monitor and evaluate statutory bodies and functionaries;
- monitor public bodies and authorities and private businesses, enterprises and institutions to promote gender equality;
- make any recommendations that the CGE deems necessary.

The Commission also has the powers to evaluate any act of Parliament, and to make recommendations to Parliament or any legislature with regards to any law affecting gender equality or the status of women. It may also recommend to Parliament the adoption of new legislation which will promote gender equality and the status of women.

The CGE makes this written submission to you against this backdrop.



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2. Amendment of the criminal law on prescription

In its written submission to you in November 2019, the CGE welcomed the landmark Constitutional Court decision in *Levenstein and Others v Estate Late Sidney Lewis Frankel and Others 2018 (8) BCLR 921 (CC)* wherein section 18(1) of the Criminal Procedure Act 51 of 1977 was declared unconstitutional.

We continue to celebrate this progressive judgement that has made a significant impact for all survivors of all sexual violence, especially women and children.

The CGE fully supports the proposed amendment of Section 18 of Act 51 of 1977, as worded in Clause 3 of the Bill, to give effect to the Order of Constitutional Court.

The CGE notes that in terms of the order of the Constitutional Court, Parliament effectively has until **13 June 2020** to bring about the necessary changes in the law. In the light of this, the CGE takes this opportunity to offer its support the Portfolio Committee. We stand ready to assist the Committee in any way that is necessary or appropriate, in order to meet this deadline.

With regards to the declaration of invalidity, which is retrospective to 27 April 1994, the CGE understands that this **does not mean** that those victimised before 27 April 1994 do not benefit from this order. The CGE believes that this would be an incorrect interpretation of the order.



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3. Amendment of the civil law on prescription: An Opportunity

The CGE believes that this Bill presents a valuable opportunity to remove another barrier to accessing justice for all survivors of sexual violence and abuse, and especially adult survivors of childhood sexual abuse.

The CGE submits that the proposed amendments to the Prescription Act 68 of 1969, as per the Bill, do not go far enough in its development of the law. Terms such as “intellectual disability”, “disorder” and “incapacity” already have specific, limited meanings in the law, and where they do not, survivors will have to wait for the courts to interpret them over time.

However, it is widely acknowledged that the extent of gender-based violence and femicide in South Africa has reached crisis proportions. The civil law of prescription has already been developed in matters such as *Van Zijl v Hoogenhout [2004] ZASCA 84*.

Now, and further in the light of the courts’ reasoning in the *Levenstein* matter, we submit that it is time to remove prescription for South African law entirely, insofar as it still applies to debts arising from sexual offences.

3.1 Survivors seeking access to the civil courts are no different

First, the CGE submits that the same emotional and psychological trauma that prevents victims, the vast majority of whom are women and children, from reporting sexual offences to the criminal justice system, will logically also prevent them from exercising the right to claim damages in a civil court within the statutory three year period.



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The Constitutional Court, the *Levenstein* judgment held at paragraph 55:

"The evidence before us reveals what countless women and children face. It illuminates the systemic failures that enable violence and exploitation of them to occur."

At paragraph 56, the Court held:

*"Of pivotal importance to the case before us is this: that the systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator, as the applicants allege Mr Frankel to have been, is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones – let alone state officials. Combined with this is the frequent impact of deeply-located self-blame, which, as the Supreme Court of Appeal recognised in *Van Zijl*, disables the victim from appreciating that a crime has been committed against her for which the perpetrator, and not she, is responsible."*

In paragraph 53 of the judgment, the Court accepts that the 20-year prescription period, previously imposed by section 18 of the CPA, is "insufficiently cognisant of the nature and process of sexual assault



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disclosure.” The Court accepts that “(p)ersonal circumstances of the survivor may change; with time comes maturity and an ability to process the trauma suffered as a result of the violence. She may seek out psychological help, such as counselling, which empowers her to enter the criminal justice system.”

The CGE believes that this is no less true for survivors who may otherwise have approached the civil courts, were it not for the limitation of their right to do so imposed by the Prescription Act.

3.2 Broadening access to justice for survivors

Secondly, the Court’s finding at 57 paragraph highlights the reluctance of many victims, specifically in relation to the statistical small eventuality of a conviction in a criminal court, to even approach the criminal justice system for relief in the first place:

“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.” (our emphasis)



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For this reason, it is imperative to remove barriers to alternative avenues to justice for survivors, outside of the criminal system. Such alternative avenues include the civil courts, where special damages might be claimed, for example medical and psychological treatment, or loss of earnings. If it is widely acknowledged that the criminal justice system inherently presents obstacles and barriers for survivors, it follows that all possible alternatives must be as accessible as possible.

3.3 SA's commitment to more victim-centred laws and policies

In August 2018 the women of South African women rose up in country-wide protest, to demand change, resulting in the Presidential Summit Against Gender Based Violence and Femicide.

The Declaration that emanated from this summit, contains a commitment in Article 5 to review existing laws and policies applicable to gender-based violence and femicide are to be reviewed to **ensure that they are more victim-centred and responsive, and that the identified legislative gaps are addressed without delay.**

The CGE believes that this includes the Prescription Act, and that it is an appropriate time in our history and legal development as a society, to remove prescription for our law entirely, insofar as it applies claims or debts arising from Sexual Offences.



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Conclusion

The CGE recognises the need for legislative amendments. The CGE avails itself for engagement with the Portfolio Committee.