

# LAWYERS FOR **HUMAN RIGHTS**

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Submission to the Portfolio Committee on Justice and Correctional Services:

**Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill**

**[B22 – 2019]**

**For queries, contact:**

Sanja Bornman

Manager: Gender Equality Programme

[sanja@lhr.org.za](mailto:sanja@lhr.org.za) | 021 424 8561 | 083 522 2933

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**This submission is endorsed by the Centre for Applied Legal Studies.**

For queries:

Sheena Swemmer

Senior Researcher

[Sheena.Swemmer@wits.ac.za](mailto:Sheena.Swemmer@wits.ac.za) | 011 717 8609



## 1. Introduction

Lawyers for Human Rights (LHR) welcomes the opportunity to make this written submission to the Portfolio Committee on Justice and Correctional Services (the Committee), on the **Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill [B22-2019] (the Bill)**.

LHR is an independent human rights organisation with a 40-year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. To this end, it provides free legal services to vulnerable, marginalised and indigent individuals and communities who are victims of unlawful infringements of their constitutional rights.

The LHR Gender Equality Programme pursues systemic remedies for gender-based violence and discrimination in South Africa and the region. **We were admitted and made arguments as a friend of the court at the High Court hearing of *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.** In the confirmation hearing at the Constitutional Court, we participated as Sixth Respondent. **Our arguments centred on the arbitrary nature of the section 18(1) prescription period, in light of the principles and modern development of criminal law.**

These submissions will address proposed amendments of both the Prescription Act (68 of 1969), and the Criminal Procedure Act (51 of 1977).

## 2. The proposed amendments to the Prescription Act – civil law prescription

LHR does not support the amendments of this Act as proposed in the Bill for one simple reason: in light of the judgment in the *Levenstein* matter, we submit that it is in the interest of justice and the constitutional rights of all survivors of sexual offences, to **entirely scrap civil law prescription of all debts/claims that arise from the alleged commission of any sexual offence.**

We submit that extending the list of sexual offences in respect of which prescription does not commence to run under certain circumstances (regarding a debt that is based on the alleged commission of any of those sexual offences), does not go far enough for several reasons:

## 2.1 Criminal or civil law: the reasons for survivors' delay remain the same

The findings<sup>1</sup> of the Constitutional Court and evidence in the *Leventein* matter make it clear that:

- The systemic sexual exploitation of women and children depends on secrecy, fear and shame;
- Survivors are fearful of their abusers, and the possible responses from their communities if they disclose that a sexual offence has been committed against them;
- Sexual predators are often in a position of power or authority, making it easy to threaten and shame survivors into silence;
- Given these characteristics of sexual violence, survivors often feel that it is impossible for them to report what happened, even to those closest to them;
- Many survivors also feel a deeply located self-blame, which prevents the survivor from appreciating that a crime has been committed against them, for which the perpetrator is responsible.

This recognition that it can, and often does, take a survivor of a sexual offence a long time to appreciate that it is the perpetrator, and not themselves, that is responsible for the damage done, was also recognised by the Supreme Court of Appeal in 2004, in the matter of *Van Zijl v Hoogenhout*.<sup>2</sup> This case already demonstrated the flaws of the civil law of prescription, as it applies to debts/claims arising from sexual offences.

The Constitutional Court also found that “(p)ersonal circumstances of the survivor may change; with time comes maturity and an ability to process the trauma suffered as a result

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<sup>1</sup> At par 56

<sup>2</sup> (348/03) [2004] ZASCA 84; [2004] 4 All SA 427 (SCA) (27 September 2004)

of the violence. She may seek out psychological help, such as counselling, which empowers her to enter the criminal justice system.”<sup>3</sup>

LHR submits that none of the findings above are exclusive to survivors who seek to access the criminal justice system. **The same characteristics and effects of sexual offences will equally impact those survivors who may want to exercise their rights in a civil court.**

## 2.2 The State’s commitment to increasing access to justice for all survivors, through more victim-centre laws and policies

The Court in *Levenstein* made the important finding that there are good reasons why many survivors choose not to approach the **criminal justice system** for assistance, such as:

- the possibility of reprisals from the perpetrator;
- the possible lack of support from the police;
- the small statistical chance of a conviction in a criminal court.<sup>4</sup>

The **Declaration from the Presidential Summit on Gender Based Violence and Femicide**, which came about as the direct result of South African women and activists demanding radical and progressive change, made the following commitment in Article 5:

*“The 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.”*

LHR submits that the State must, in the light of Article 5 of the Declaration, seize this opportunity to **make the civil law more victim-centred and close the gap in the law of prescription**, thereby expanding access to civil courts for all survivors. **In a civil court:**

- The onus of proof on the survivor in a civil court, is lighter than it is on the State in a criminal case;
- The survivor is themselves a litigant, participating directly, and has more control over how the case proceeds through the advice and instructions of a legal team of their choice;

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<sup>3</sup> At par 53

<sup>4</sup> At par 57

- Remedies can include claims for past and future medical expenses, past and future psycho-therapy, loss of earnings due to injury or incapacity, and many other special damages in accordance with each individual case.

These remedies are not available through the criminal court, and may well be more meaningful for some survivors from the perspective of restitution, and healing.

### 2.3 Treating survivors differently is not justifiable, and will create an additional barrier to justice for the poorest and most marginalised: “mental or intellectual disability, disorder or incapacity”

The courts have clearly accepted, first in *Van Zijl* and now in *Levenstein*, that the **emotional and psychological** impact and consequences of sexual offences inherently give rise to myriad valid reasons for any survivor to delay seeking justice (whether in the civil or criminal courts).

LHR submits that the civil law of prescription cannot justifiably differentiate between **survivors of sexual offences** on the one hand, and **survivors of sexual offences who have “mental or intellectual disability, disorder or incapacity”** on the other. Both types of survivors will be suffering emotional and psychological impact and consequences, that may reasonably delay accessing the civil courts, simply by virtue of the nature of the offences against them.

In any event, terms such as “mental or intellectual disability, disorder or incapacity” already have limited definitions in existing law, and where they do not, survivors would have to rely on the interpretations of courts over (a long period of) time.

Another significant argument against lifting civil law prescription only for those survivors that have “mental or intellectual disability, disorder or incapacity”, is that the existence of these conditions will have to be proved in civil court. This will necessarily involve the retention of medico-legal and mental health expert(s) to consult, evaluate, and produce written reports, and even the testimony of these experts in court. The cost of such experts’ time in consulting, evaluating, writing, and attending at court is generally prohibitive for all but the most privileged and affluent. **This has the effect of excluding the poorest and most vulnerable and disadvantaged survivors from accessing the civil courts.**

### **3. The proposed amendments to the Criminal Procedure Act – criminal law prescription**

LHR fully supports the proposed substitution in Section 18(1) of the Criminal Procedure Act 51 of 1977, as set out in Clause 3 of the Bill. We welcome this development of the law for all survivors of all sexual offences, through the implementation of the order of the Constitutional Court in *Levenstein*.

### **4. Conclusion**

LHR thanks the Committee once again for the opportunity to make these written submissions and would likewise welcome and appreciate an opportunity to make oral submissions, should public hearings on this Bill take place.

Given the current South African context, and the ongoing fight against what the President termed the “crisis of violence perpetrated by men against women” in his State of the Nation Address this year, we urge you to seriously consider our submission on the scrapping of civil law prescription of debts and claims arising from the commission of all alleged sexual offences.