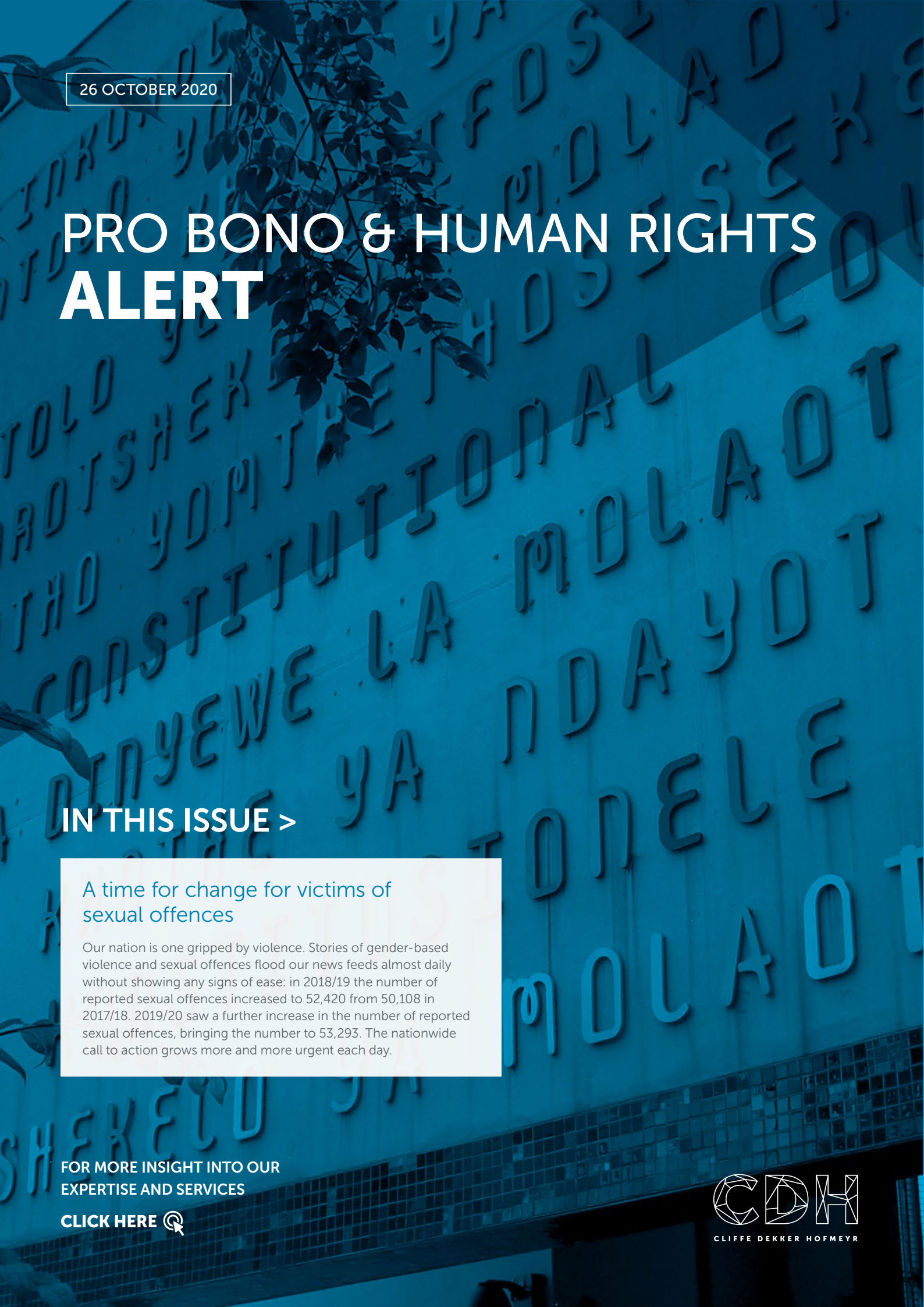

26 OCTOBER 2020

PRO BONO & HUMAN RIGHTS **ALERT**

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A time for change for victims of sexual offences

Our nation is one gripped by violence. Stories of gender-based violence and sexual offences flood our news feeds almost daily without showing any signs of ease: in 2018/19 the number of reported sexual offences increased to 52,420 from 50,108 in 2017/18. 2019/20 saw a further increase in the number of reported sexual offences, bringing the number to 53,293. The nationwide call to action grows more and more urgent each day.

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A time for change for victims of sexual offences

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Our constitutional democracy demands that our laws justly and comprehensively protect all inhabitants of our borders, particularly those who are among vulnerable groups. There are few more vulnerable than victims and potential victims of gender-based violence and sexual offences. Where our laws do not adequately take into account and respond to the realities of our country, they must be challenged vigorously.

One such challenge was seen in *NL and Others v Estate Late Frankel and Others* 2018 (2) SACR 283 (CC) (*Frankel*). Here the Constitutional Court declared section 18 of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act) irrational, arbitrary and unconstitutional. Section 18 was declared as such insofar as it did not afford the survivors of sexual assault, other than rape or compelled rape, the right to pursue a charge after a lapse of 20 years from the time the offence was committed.

In *Frankel* the court recognised that the effect of section 18 was to penalise a complainant whose delay was due to his or her inability to act, by preventing him or her from pursuing a charge, even if he or she may have a reasonable explanation for the delay. The court also recognised that there was no rational basis for the right to prosecute to lapse after 20 years in respect of other forms of sexual offences, and not for rape or compelled rape, and that while sexual offences may differ in form, the psychological harm they all produce may be similar.

Frankel achieved the crucial imperative of developing our law in a manner that recognises and responds to the unique psychological harm suffered by victims of sexual offences. By this development, the court took the meaningful and necessary step toward placing the power back in the hands of the victim and empowering him or her to take legal action following the crucial first step of grappling with the deep-seated psychological consequences of sexual offences.

This development, while undoubtedly welcomed, only had application where a victim of a sexual offence intended to pursue criminal charges. The law governing the victim's ability to pursue a civil damages claim remained unchanged. This law was established from the 2005 judgment handed down by the Supreme Court of Appeal (SCA) in *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) (*Van Zijl*). The Court in this matter had to consider the provisions of the Prescription Act 18 of 1943 (1943 Act) as the assaults occurred prior to the commencement of the current Prescription Act 68 of 1969 (1969 Act) and found that the appellant in that matter qualified as a 'creditor' under the former Act. Importantly, the SCA clarified that prescription penalised unreasonable inaction, not the inability to act. Where, therefore, section 5(1)(c) of the 1943 Act spoke of prescription commencing

A time for change for victims of sexual offences*...continued*

The rationale and ultimately the judgment handed down in *Van Zijl* led to the introduction of section 12(4) to the 1969 Act, which is the current position.

when a wrong was 'first brought to the knowledge of the creditor', it presupposed a creditor who was capable of appreciating that a wrong had been done to him or her. The law needed to be developed in a manner showing appreciation that this presupposition is not appropriate in all circumstances.

The rationale and ultimately the judgment handed down in *Van Zijl* led to the introduction of section 12(4) to the 1969 Act, which is the current position. Section 12(4) provides that –

> *"Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18 (2), 20 (1), 23, 24 (2) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and an alleged offence as provided for in sections 4, 5, and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition."*

While this development was certainly a step in the right direction, it still presents two significant challenges for victims of sexual offence, and arguably does not give proper effect to the *Van Zijl* reasoning and judgment. First, much like section 18 of the Criminal Procedure Act that was declared irrational and unconstitutional by the Constitutional Court in *Frankel*, section 12(4) draws an arbitrary distinction between those sexual offences that are listed in the section and those that are not, in that it allows for the interruption of prescription only for the listed sexual offences. While the nature of sexual offences may differ, their emotional, physical and behavioural consequences are similarly felt. The section 12(4) distinction is irrational and arbitrary in these circumstances.

The second and most significant challenge is the evidentiary burden it unfairly places on the victim. The section requires a victim of sexual abuse to prove that her mental or psychological condition rendered her unable to institute proceedings earlier, and lead evidence as to her mental or psychological condition and the impact thereof on her ability to have instituted proceedings sooner in order to render the claim within the ambit of section 12(4). This burden infringes several of the victim's rights, including but not limited to her rights to dignity and access to courts, and results in the secondary victimization of victims of sexual abuse.

Our Cape Town Pro Bono & Human Rights Practice (Practice) recently launched action proceedings in which constitutional challenges to section 12(4) are raised on these and further grounds. In these proceedings the Practice represents two sisters who suffered sexual grooming and abuse at the hands of two men (who are brothers known to their family) from 1974 to 1980. They made no disclosures about their abuse to their parents, any other adults or the authorities. On account of their young age and trauma, they believed there was no recourse available to them. This was coupled with feelings of deep shame, guilt, embarrassment and self-blame. The traumatic sexualisation, betrayal, powerlessness and stigmatization distorted their cognitive and emotional relationship with the world, and so they lived in silence.

A time for change for victims of sexual offences*...continued*

While the recognition of the need to develop our civil law in this manner is welcomed, the Bill will not cure the core constitutional issue: the evidentiary burden placed on the victim and the consequent infringement of her rights.

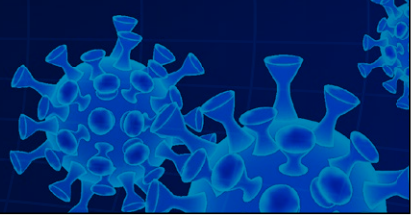
Nearly 40 years later in 2018, the sisters independently came to realise that neither of them was the cause of, or bore the responsibility for, what happened. While this realisation can partly be attributed to developments in their personal lives, it can also be attributed to the sisters becoming aware of the constitutional developments brought about by *Frankel*. *Frankel* gave them the sense that the law was developing in a way that is cognisant of the psychological effects of sexual abuse on victims and how that hinders their ability to report cases. They felt empowered to not only pursue criminal charges, but to approach our Practice to explore the possibility of a damages claim.

The Practice has instituted the proceedings not only in the interest of the sisters, but also in the interest of similarly placed victims of sexual violence and in the public interest. The proceedings have been instituted with the intention to bring the civil law in line with the *Frankel* criminal law developments, and to serve as a further source of empowerment for victims of sexual abuse.

The need to develop the civil law in this way has been recognised by our government, as demonstrated by the National Council of Provinces recently passing the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill [B 22B – 2019] (National Assembly – sec 75) (Bill). One of the Bill's objectives is to amend section 12(4) of the 1969 Act to extend the list of sexual offences in respect of which prescription is interrupted to *"any sexual offence in terms of the common law or a statute"*. At the time the Practice instituted the proceedings on behalf of the sisters, the President had not yet assented to the Bill. The Practice accordingly took the view to seek comprehensive relief notwithstanding the Bill's passing by the NCOP. While the recognition of the need to develop our civil law in this manner is welcomed, the Bill will not cure the core constitutional issue: the evidentiary burden placed on the victim and the consequent infringement of her rights.

The fight against gender-based and sexual violence requires us all to play our part together and relentlessly. In driving these proceedings our Practice will engage institutions whose objective is the promotion and protection of women's and vulnerable persons rights in further support of the proposed constitutional development.

Brigitta Mangale and Akhona Mgwaba



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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