

MEMORANDUM ON THE OBJECTS OF THE PREVENTION AND COMBATING OF TORTURE OF PERSONS BILL, 2012

1. PURPOSE OF BILL

The purpose of the Prevention and Combating of Torture of Persons Bill (“the Bill”), is to give effect to the Republic’s obligations in terms of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”); to provide for the offence of torture of persons and other offences associated with the torture of persons; and to prevent and combat the torture of persons within or across the borders of the Republic; and to provide for matters connected therewith.

2. OBJECTS OF BILL

2.1 The proposed Bill comprises a Preamble and 9 clauses. The Preamble reminds—

- (a) of the shameful history of gross human rights abuses, including the torture of many of the citizens and inhabitants of South Africa;
- (b) that South Africa has, since 1994, become an integral and accepted member of the community of nations;
- (c) that South Africa is committed to bringing persons who carry out acts of torture in any form to justice; and
- (d) that South Africa is committed to carrying out its obligations in terms of the Convention.

2.2 The provisions of the Bill can be summarised as follows:

2.2.1 Ad Clause 1

Clause 1 contains various definitions.

2.2.2 Ad clause 2

Clause 2 outlines the objects and interpretation of the Bill. The objects are to give effect to the Republic’s obligations concerning torture in terms of the Convention; to provide for the prosecution of persons who commit offences referred to in this Act and for appropriate penalties; to provide for measures aimed at the prevention and combating of torture; and to provide for the training of persons who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, on the prohibition and the combating of torture. When interpreting the Bill, a court must promote the values of Chapter 2 of the Constitution and the achievement of the objects of the Bill.

2.2.3 **Ad clause 3**

Clause 3 deal with acts that constitute torture and for purposes of this Bill, 'torture' means any act or omission, by which severe pain or suffering, whether physical or mental, is intentionally inflicted by a public official on a person—

- (a) in order to—
 - (i) obtain information or a confession from him or her or a third person;
 - (ii) punish him or her for an act he or she or a third person has committed, is suspected of having committed or is planning to commit; or
 - (iii) intimidate or coerce him or her or a third person to do, or to refrain from doing, anything; or

(b) for any reason based on unfair discrimination,

but 'torture' does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.

This definition is essentially identical to the definition of torture in the Convention.

2.2.4 **Ad clause 4**

The prohibition of torture is dealt with in clause 4 and provides that any public official who commits torture, attempts to commit torture, or incites, instigates, commands or procures any person to commit torture, or any person who participates in torture, conspires with a public official to aid or procure the commission of or to commit torture, will be guilty of an offence. The Bill provides for appropriate penalties for the offences.

2.2.5 **Ad clause 5**

Clause 5 of the Bill provides the court with factors to be considered in sentencing a person convicted of an offence under the Bill.

2.2.6 **Ad clause 6**

Clause 6 deals with the extra-territorial jurisdiction and provide that a court of the Republic has jurisdiction in respect of an act of torture committed outside the Republic which would have constituted an offence under clause 4(1) or (2) had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the person to be charged—

- (a) is a citizen of the Republic;
- (b) is ordinarily resident in the Republic;
- (c) is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform

- or aircraft registered or required to be registered in the Republic and that person is not extradited pursuant to Article 8 of the Convention; or
- (d) has committed the offence against a South African citizen or against a person who is ordinarily resident in the Republic.

2.2.7 **Ad clause 7**

In terms of clause 7 nothing contained in this Act affects any liability which a person may incur under the common law or any other law.

2.2.8 **Ad clause 8**

Clause 8 places a duty on the State to promote awareness of the prohibition against torture. One or more cabinet ministers, designated by the President, must cause programmes to be developed in order to conduct education and information campaigns regarding the prohibition against torture, and to provide assistance and advice to victims of torture.

2.2.9 **Ad clause 9**

Clause 9 provides for the amendment of laws which is provided for in the Schedule to the Act.

2.2.10 **Ad clause 10**

Clause 10 contains the short title of the Bill.

2.2.11 **Schedule**

The Schedule provides for laws amended and provide as follows:

- (a) Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977), by including the offences referred to in clause 4(1) and (2) of the Bill in the list of offences for which a peace officer or private person may arrest a suspect without a warrant of arrest and Parts II and III of Schedule 2 to the Criminal Procedure Act, 1977, by listing the offences referred to in clause 4(1) and (2) of the Bill as offences in respect of which—
- (i) bail may not be granted before a first appearance in court; and
 - (ii) an accused may not be released on warning in lieu of bail.
- (b) Schedule 1 to the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) by including the offences referred to in clause 4(1) and (2) of the Bill in the list of offences in respect of which—
- (i) preservation of property orders; and
 - (ii) forfeiture orders,

may be made.

3. CONSULTATION

The Bill was prepared after consultation with the Ministers of Police and Correctional Services. Consultation also took place with the following role-players when the Bill was initially prepared:

- (a) Society of University Teachers;
- (b) Legal Resources Centre;
- (c) University of the Western Cape;
- (d) Centre for Applied Legal Studies;
- (e) Lawyers for Human Rights;
- (f) National Director of Public Prosecutions;
- (g) Magistrates Commission;
- (h) Law Society of South Africa;
- (i) General Council of the Bar of South Africa;
- (j) Open Society Foundation for South Africa;
- (k) KZN Campaign against Torture;
- (l) NICRO;
- (m) The South African Human Rights Commission;
- (n) Law Faculty of the University of Pretoria; and
- (o) Chief Justice.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

The State will incur financial implications in so far as it relates to the payment of compensation to victims of torture, a liability the State already has if a person currently claims damages for injuries sustained as a result of assault, for instance. The State will also incur financial implications as a result of the duty on the State to promote general awareness programmes on torture. It is, however, not possible to quantify these financial implications at this stage.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the

procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.