

REPUBLIC OF SOUTH AFRICA

PREVENTION AND COMBATING OF TORTURE OF PERSONS BILL

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 35412 of 1 June 2012)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 21—2012]

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BILL

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; 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.

PREAMBLE

SINCE section 12(1)(d) of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way;

AND MINDFUL that the Republic of South Africa—

- * has a shameful history of gross human rights abuses, including the torture of persons and other cruel, inhuman or degrading treatment or punishment of many of its citizens and inhabitants;
- * has, since 1994, become an integral and accepted member of the community of nations;
- * is committed to the preventing and combating of torture of persons, among others, by bringing persons who carry out acts of torture to justice as required by international law;
- * is committed to carrying out its obligations in terms of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

AND SINCE each State Party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa
as follows:—

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Definitions

1. In this Act, unless the context indicates otherwise—
 - “**accused person**” means any person who has committed or allegedly committed an act of torture; 20
 - “**complainant**” means any person who has or has allegedly been subjected to an act of torture;
 - “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
 - “**Convention**” means the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 and ratified by the Republic on 10 December 1998; 25
 - “**court**” means a court contemplated in section 166 of the Constitution;
 - “**public official**” means—
 - (a) any person holding public office and exercising or purporting to exercise a public power or a public function in terms of any legislation; 30
 - (b) any person acting in a public capacity; or
 - (c) any person acting with the consent or acquiescence of a person contemplated in paragraph (a) or (b); and
 - “**torture**” has the meaning assigned to it in section 3. 35

Objects and interpretation of Act

2. (1) The objects of this Act are to—
 - (a) give effect to the Republic’s obligations concerning torture in terms of the Convention, in particular—
 - (i) the recognition that the equal and inalienable rights of all persons are the foundation of freedom, dignity, justice and peace in the world; 40
 - (ii) the promotion of universal respect for human rights and the protection of human dignity;
 - (iii) that no one shall be subjected to acts of torture or other cruel or inhuman treatment or punishment; 45
 - (b) provide for the prosecution of persons who commit offences referred to in this Act and for appropriate penalties;
 - (c) provide for measures aimed at the prevention and combating of torture; and
 - (d) 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. 50
- (2) When interpreting this Act, the court must promote the values of Chapter 2 of the Constitution and the achievement of the objects referred to in subsection (1).

Acts constituting torture

- 3.** For the purposes of this Act, “torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted, by a public official or any person acting on behalf of 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 discrimination of any kind,
- but does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.

Offences and penalties

- 4.** (1) Any public official who—
- (a) commits torture;
 - (b) attempts to commit torture; or
 - (c) incites, instigates, commands or procures any person to commit torture,
- is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.
- (2) Any person who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture, is guilty of the offence of torture and is liable on conviction to imprisonment, including imprisonment for life.
- (3) Despite any other law to the contrary, including customary international law, the fact that an accused person—
- (a) is or was a head of state or government, a member of a government or parliament, an elected representative or a government official; or
 - (b) was under a legal obligation to obey a manifestly unlawful order of a government or superior,
- is neither a defence to a charge of committing an offence referred to in this section, nor a ground for any possible reduction of sentence, once that person has been convicted of such offence.
- (4) A state of war, threat of war, internal political instability or any other public emergency may not be invoked as a justification for torture.
- (5) No one shall be punished for disobeying an order to commit torture.

Factors to be considered in sentencing

- 5.** If a person is convicted of any offence under this Act, the court that imposes the sentence may consider, but is not limited to, the following aggravating factors:
- (a) Racial discrimination against the complainant;
 - (b) the state of the complainant’s mental health;
 - (c) whether the complainant had any physical disability;
 - (d) whether the complainant was under the age of 18 years;
 - (e) whether the complainant was raped or indecently assaulted;
 - (f) the use of any kind of weapon to harm the complainant;
 - (g) the infliction of serious physical harm to the complainant;
 - (h) the conditions in which the complainant was detained;
 - (i) the role of the convicted person in the offence;
 - (j) previous convictions relating to the offence of torture or related offences; and
 - (k) the physical and psychological effects the torture had on the complainant.

Extra-territorial jurisdiction

- 6.** (1) A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence under section 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, lawfully 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) If a person is alleged to have committed an offence contemplated in section 4(1) or (2) outside the territory of the Republic, prosecution for the offence may only be instituted against such person on the written authority of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution, who must also designate the court in which the prosecution must be conducted.

Liability

7. Nothing contained in this Act affects any liability which a person may incur under the common law or any other law.

General responsibility to promote awareness 20

8. (1) The State has a duty to promote awareness of the prohibition against torture, aimed at the prevention and combating of torture.

(2) Without derogating from the general nature of the duty referred to subsection (1), one or more Cabinet members, designated by the President, must cause programmes to be developed in order to— 25

- (a) conduct education and information campaigns of the prohibition against torture aimed at the prevention and combating of torture;
- (b) ensure that all public officials who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, are educated and informed of the prohibition against torture; 30
- (c) provide assistance and advice to victims of torture; and
- (d) train public officials on the prohibition, prevention and combating of torture.

Amendment of laws

9. The laws specified in the Schedule are hereby amended to the extent indicated in the third column thereof. 35

Short title

10. This Act is called the Prevention and Combating of Torture of Persons Act, 2012.

SCHEDULE**Laws amended
(Section 9)**

Number and year of law	Short title	Extent of amendment
Act No. 51 of 1997	Criminal Procedure Act, 1977	1. The amendment of Schedule 1 and Parts II and III of Schedule 2, by the inclusion of the offences referred to in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2012.
Act No. 121 of 1998	Prevention of Organised Crime Act, 1998	2. The amendment of Schedule 1 by the inclusion of the offences referred to in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2012.

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 Bill comprises of a Preamble and 10 clauses. The Preamble is mindful—

- (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 Act. 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 Act, a court must promote the values of Chapter 2 of the Constitution and the achievement of the objects of the Act.

2.2.3 Ad clause 3

Clause 3 deals 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 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 offence 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, is guilty of an offence. The Bill provides for appropriate penalties for these offences.

2.2.5 **Ad clause 5**

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

2.2.6 **Ad clause 6**

Clause 6 deals with extra-territorial jurisdiction, and provides that a court of the Republic has jurisdiction in respect of an act 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, lawfully 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 contained in the Schedule.

2.2.10 Ad clause 10

Clause 10 contains the short title.

2.2.11 Schedule

The Schedule provides for laws amended, 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 of 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) the 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.

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