

**PORTFOLIO COMMITTEE WORKING DRAFT AS ON
15 OCTOBER 2012**

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]

BILL

To give effect to the Republic's obligations in terms of the United Nations Convention [Against] 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] 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[,] enacts as follows:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions
2. Objects and interpretation of Act
3. Acts constituting torture
4. Offences and penalties
5. Factors to be considered in sentencing
6. Extra-territorial jurisdiction
7. Liability
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Schedule

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;

["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;

"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; or
- (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[.]; and

"victim" means any person, who has or has allegedly been subjected to an act of torture.

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;
 - (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]**;
- (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.

(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] for such purposes as 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, when such pain or suffering is inflicted by or at the instigation of, or with the consent, or acquiescence of a public official, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

ALTERNATIVE OPTION – FOLLOWING WORDING OF CONVENTION:

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 on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official, but it does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Offences and penalties

4. (1) Any **[public official]** person 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 liable 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) No exceptional circumstances whatsoever, including but not limited to [A] a state of war, threat of war, internal political instability, national security 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 an accused 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]** Any discrimination against the **[complainant] victim**;
- (b) the state of the **[complainant's] victim's** mental or physical health;
- (c) whether the **[complainant] victim** had any mental or physical disability;
- (d) whether the **[complainant] victim** was under the age of 18 years;
- (e) whether the **[complainant] victim** was raped or indecently assaulted;
- (f) the use of any kind of weapon to harm, threaten, or intimidate the **[complainant] victim**;
- (g) the infliction of serious mental or physical harm to the **[complainant] victim**;
- (h) the conditions in which the **[complainant] victim** 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] victim**.

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 accused 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 an accused 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

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—

- (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;
- (c) provide assistance and advice to alleged 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.

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.