**TO: Ms T Joemat-Pettersson**

**Chairperson: Portfolio Committee on Police**

**COPY: Ms PN Tyawa**

 **Acting Secretary to Parliament**

**FROM: Adv Z Adhikarie**

 **Chief Parliamentary Legal Adviser**

**DATE: 11 June 2020**

**REF: 62/2020**

**SUBJECT: THE LEGAL EFFECT OF SECTION 6(5) OF THE IPID ACT**

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MESSAGE: Attached please find a memorandum for your attention**

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 **INTRODUCTIONS**

1. We received an urgent request for advice from the Office of Ms Joemat Pettersson, MP, the Chairperson of the Portfolio Committee on Police (“the Chairperson”), on the legal effect of section 6(5) of the Independent Police Investigative Directorate Act 1 of 2011 (“IPID Act”).
2. We were specifically instructed on the basis of a letter that the Chairperson received from one member of the Committee, wherein a proposal was made for an amendment to the IPID Act so as “*to protect the independence of IPID insofar as the nomination and appointment process is concerned*.” Our advice therefore will be brief and confined to the legal aspects of that letter.

**LEGAL FRAMEWORK**

1. Section 6(5) of the IPID Act provides the following: *“In the case of a vacancy, the Minister must fill the vacancy within a reasonable period of time, which period* ***must not*** *exceed one year.”* (Our emphases)

**ADVICE**

1. The aforementioned section of the IPID Act is mandatory and must be strictly followed by the Minister. The use of the word “must” in section 6(5) of the Act denotes that there is no discretion on the part of the Minister in respect of the exercise of the mandatory power that is provided in the relevant section. Further to the above, section 6(5) is silent on what must happen in the event that the Minister fails to fill the vacancy within the prescribed period. Most importantly though, the section does not clothe Parliament with the power to extend the period. The principle of legality directs that organs of state may only exercise a public power that has been given to them in terms of the law and that power must not exceed its defined scope.[[1]](#footnote-1) Notwithstanding, it is the obligation of Parliament, by virtue of its oversight authority to hold the Minister accountable if there is noncompliance with any Act.

1. As such it is our opinion that the Committee should exercise its oversight power by enquiring about the reasons for the delay and impressing upon the Minister to fulfil the function that is outlined in section 6(5) of the IPID Act without undue delay, as the time period within which the Minister should have exercised the said powers has lapsed.
2. It is noteworthy that the aforementioned legal opinion is based on the law as it currently pertains. Should the Committee, in its wisdom, be persuaded that an amendment is necessary as proposed, it has the power to initiate such an amendment or request the Department to consider introducing a bill to such effect.
3. An amendment to legislation may be done through an Executive Bill, Committee Bill or Private Member’s Bill. All these abovementioned options are set out in the Rules of the National Assembly and are also based on judicial precedent (*Ambrosini* judgement).

**ADV Z ADHIKARIE**

**CHIEF PARLIAMENTARY LEGAL ADVISER**

1. Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC). [↑](#footnote-ref-1)