



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY

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To: Hon Tina Joemat-Peterson

Cc: Hon Natasha Mazzone

Hon Okkie Terreblanche

28 May 2020

Request to consider urgent amendment to IPID Act

Dear Chairperson

As you are aware, the Independent Police Investigative Directorate (IPID) has been without a permanent Executive Director since February 2019.

There have been two acting Executive Directors since then, namely Mr Victor Senna and Mr Patrick Setshedi.

It is clear that leadership instability at IPID is leading to performance concerns. These concerns have been raised by the portfolio committee and by IPID themselves in various presentations to the committee.

In a portfolio committee meeting in November 2019 I encouraged the Minister to adopt a more inclusive and transparent approach to the nomination process. This request was rejected.

In terms of Section 6 (5) of the IPID Act the Minister was required to fill the vacancy of Executive Director of IPID within a reasonable period of time not exceeding one year. The Minister failed to meet this legislated deadline which expired on 01 March 2020.

On 11 March 2020 the Deputy Minister informed the portfolio committee that the Minister had failed to nominate an Executive Director of IPID and that they would embark on a head hunting process. The committee raised concerns about the intended head-hunting process and also about the lack of information about the nomination process which did not yield a suitable candidate. At the time the committee requested detailed information regarding the shortlisting process including reasons why the applicants were deemed to be unsuitable. The Deputy Minister agreed to provide the committee with this information which has not been forthcoming.

It is important to note that it has already been more than 3 months since the Minister failed to meet the legislated deadline to nominate an Executive Director of IPID and on Friday 22 March 2020 the joint committee resolved to allow him a further three months to conclude the nomination process – which would, if the Minister uses the full three months, be 6 months after the deadline. This raises important legal and procedural questions which I believe the committee is obligated to consider.

- Why has the portfolio committee not been furnished with the details of the nomination process held earlier this year?

- Was the Minister granted an initial extension in March 2020 and on what date was an extension granted and by whom?
- Where does the authority reside to grant the Minister an extension and in terms of which Act?
- Is it permissible for a joint committee to authorize an extension?
- Could this failure by the Minister to meet the deadline lead to litigation implicating the portfolio committee?
- Does the portfolio committee have a duty to amend Section 6 of the Act so as to limit the Minister's power of appointment in furtherance of IPID's independence?

I have repeatedly raised my concerns with the committee regarding the Minister's powers to nominate the Executive Director of IPID. While the McBride judgment did not deal with the Minister's powers to nominate the Executive Director it did uphold the important principle of independence which I believe is applicable to the nomination and appointment process in Section 6 of the IPID Act.

In *McBride v Minister of Police and Another [2016]*¹ the following extract is instructive, as it relates to the principle of independence:

"[38] On the other hand, section 6 of the IPID Act gives the Minister enormous political powers and control over the Executive Director of IPID. It gives the Minister the power to remove the Executive Director of IPID from his office without parliamentary oversight. This is antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not."

Furthermore, I do not believe that the portfolio committee will be acting in the public interest if we allow the Minister to proceed with the nomination in terms of the current Act. Public confidence in IPID is critically important to its independence and the portfolio committee has a duty to the public in this regard.

In *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)*² the issue of public confidence was explained:

"This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence."

¹ [McBride v Minister of Police and Another \[2016\] Constitutional Court](#)

² [Glenister v President of the Republic of South Africa and Others 2011 Constitutional Court](#)

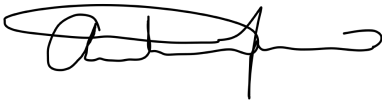
I believe that the portfolio committee is such a mechanism “designed to secure independence” and therefore has a duty, as I have explained, to amend Section 6 of the IPID Act to protect the independence of IPID insofar as the nomination and appointment process is concerned. The portfolio committee’s duty, in my opinion, further extends to inspiring public confidence in IPID and Parliament by ensuring that a rational, objective and transparent nomination process is established.

Lastly, to highlight the urgency of this request, I would like to draw your attention to the allegations surrounding the IPID investigation into corruption allegations against top police officials, including former police commissioner Kgomotso Phahlane. The Viewfinder report published today, May 28 2020, alleges that IPID investigators have been recalled from a task team investigating these high profile cases. The case involving Kgomotso Phahlane was also being investigated by IPID investigator Mandla Mahlangu who, as you are aware, was shot and killed in March this year. Now, more than ever, we need to fight to protect the independence IPID and insulate it against political interference.

I fear that our failure to amend the Act prior to the appointment by the Minister will leave a dark and heavy cloud hanging over the independence of IPID for a further 5 years and will be a black mark against the portfolio committee in the 6th Parliament.

Please respond in writing by no later than close of business on Friday 29 May 2020 indicating whether you support an urgent review of the committee’s decision to grant the Minister an extension to the nomination process so that the committee may further amend Section 6 of the IPID Act.

Kind Regards

A handwritten signature in black ink, appearing to read 'Andrew Whitfield', with a stylized flourish at the end.

Andrew Whitfield, MP