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To: The Chairpersons of the Joint Constitutional  
Review Committee:  
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## **SUBMISSION TO THE JOINT CONSTITUTIONAL REVIEW COMMITTEE ON SECTION 100: NATIONAL INTERVENTION IN PROVINCIAL ADMINISTRATION**

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## **A. Introduction**

1. This is a joint submission by Equal Education (EE) and the Equal Education Law Centre (EELC). EE is a membership-based, democratic movement of learners, parents, teachers and community members. Its core objective is to work towards achieving quality and equality in education in South Africa.
2. In order to achieve its objectives, EE conducts a broad range of activities. These include campaigns grounded in detailed research and policy analysis and supported by public action and mobilisation. Where necessary, EE uses the courts and legal process to advance the values of, and to contribute to, a strong civil society that holds government, private interests and individuals accountable.

3. The movement is driven primarily by its learner members who are in high schools based in five provinces including the Eastern Cape and Limpopo. EE has offices in the Western Cape, Gauteng and the Eastern Cape.
4. For the duration of its existence EE has worked extensively in the Eastern Cape. This has included work in school infrastructure, scholar transport, textbooks, school nutrition and furniture.
5. EE's Eastern Cape leaders and members have also engaged with several district, circuit and provincial officials of the Eastern Cape Education Department (ECDoE). This encompasses senior leadership including the Acting Head of Department and the MEC. In its interactions with the ECDoE, EE has specifically engaged on the issue of the section 100 intervention in that province.
6. EE therefore has intimate knowledge of the extent of the crisis in the ECDoE and the dire need for this to be effectively and expeditiously addressed.
7. In Limpopo, EE has engaged with the MEC of Basic Education on the education infrastructure crisis in that province.
8. The EELC is a public interest law centre specialising in education law. EELC works closely with EE in pursuit of their mutual goals of an equal education system and quality education for all.
9. The purpose of this submission is to propose amendments to Section 100 of the Constitution. Section 100 allows for national government to intervene in the functioning of provincial government where the province has failed to fulfil a constitutional or statutorily imposed obligation. This section reads:

***“National intervention in provincial administration***

1. *When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including -*

*a. issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and*

*b. assuming responsibility for the relevant obligation in that province to the extent necessary to*

*i. maintain essential national standards or meet established minimum standards for the rendering of a service;*

*ii. maintain economic unity;*

*iii. maintain national security; or*

*iv. prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.*

*2. If the national executive intervenes in a province in terms of subsection (1)(b)*

*a. it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;*

*b. the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and*

*c. the Council must, while the intervention continues, review the intervention regularly and make any appropriate recommendations to the national executive.*

*3. National legislation may regulate the process established by this section.”*

10. In the past five years, section 100(1)(b) has been invoked in attempts to turnaround the ailing provincial education systems of two provinces, Limpopo and the Eastern Cape. The success of these interventions have a direct bearing on addressing the systematic, pervasive and on-going violations of learners’ rights to a basic education in those provinces.

11. However, both interventions have been marred with difficulties, including confusion as to where responsibility and lines of authority lie once national government intervenes. These obstacles have significantly hindered the

success of these interventions, to the detriment of learners, parents and teachers.

12. In the Eastern Cape, notwithstanding the section 100(1)(b) intervention, the province's education system remains bedevilled with devastating troubles. This includes significant backlogs in addressing poor school infrastructure and crippling vacancies for vital posts that have remained unfilled. 46 000 qualifying learners have still not received scholar transport for the 2016 academic year and excess teachers continue to cause significant budgetary strain.<sup>1</sup> It is safe to say that the Intervention has for the most part not made significant gains.

13. In this submission EE and EELC will propose that:

- a. Section 100 be amended so as to make the enactment of legislation regulating the intervention process mandatory.
- b. The time period of reviews undertaken by the NCOP be specified as occurring at least quarterly.
- c. A subsection be introduced that will place an obligation on the national executive to report at least quarterly, in writing and orally, to the National Council of Provinces (NCOP) on progress achieved and challenges encountered in implementing the intervention.

14. The amendments suggested in this submission are aimed at ensuring a more transparent, accountable and effective process when a section 100 intervention occurs.

15. EE and EELC have recently furnished a submission to the NCOP's Select Committee on Education and Recreation concerning the section 100 intervention in the Eastern Cape. That submission focused on, amongst other things, the need for the NCOP to perform a stronger oversight role as the Eastern Cape intervention process unfolds. The submission to the Select

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<sup>1</sup> Equal Education & Equal Education Law Centre *Submission to the Select Committee on Education and Recreation on the Section 100(1)(b) Intervention in the Eastern Cape*, dated 26 May 2016 at pages 6 and 17 to 20.

Committee should be read as complementary to and at times overlapping with this one.<sup>2</sup>

### **B. Proposed Amendment to Section 100(3)**

16. Section 100(3) of the Constitution reads:

*“National legislation may regulate the process established by this section”*

17. EE and EELC propose that section 100(3) be amended so as to mandate the promulgation of legislation which will establish the regulatory framework for an effective intervention. In particular, that the word “*may*” be deleted from section 100(3) and that words “*must be enacted to*” be inserted in its place. This section would therefore read:

*“National legislation must be enacted to regulate the process established by this section”*

18. The necessity for this amendment is borne out by the constitutional demands on the State to respect, protect and realise the rights in the Bill of Rights, including the right to a basic education; the need to protect the relative independence of the different spheres of government; facilitating and advancing co-operative governance; the principle of separation of powers; and the government’s own acknowledgement of the need for legislation, and the inordinate number of promises and delays in producing legislation.

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<sup>2</sup> Same as above.

**(a) The constitutional demands on the State to respect, protect and realise the rights in the Bill of Rights, including the right to a basic education.**

19. Section 100 functions as an extreme measure through which the national executive may observe its Constitutional obligations.

20. The National Intervention in the Eastern Cape Department of Education (ECDoE) in terms of section 100(1)(b) offers insight into what is at stake in section 100 interventions: the protection and realisation of the rights in the Bill of Rights.

21. It will be shown that the lack of legislation provided for in section 100(3) has:

- a. Proved an obstacle to the effective implementation of the Intervention in the Eastern Cape.
- b. Leaves little guidance as to when an intervention can be withdrawn.

22. This held, and continues to hold, direct implications for the realisation and protection of the right to Education in the Eastern Cape. Remedying the lack of legislation should thus be read as a measure which enables fuller realisation of this and other rights. It is therefore urgent that section 100(3) be amended to reflect the *necessity* of publishing legislation.

23. The section 100(1)(b) intervention in the Eastern Cape suffered from the lack of clarity regarding the scope, powers and procedures of an intervention. This manifested in disputes over the exact powers of an intervention, and provincial resistance to the national intervention team.

24. Following the Intervention's inception in March 2011, the provincial Cabinet in June 2011 made a seemingly unilateral decision that until its problem with

the Intervention's scope and power were resolved by the national task team, administrative authority would remain vested in the province.<sup>3</sup>

25. This resistance delayed the full implementation of the Intervention for nearly a year. In early 2012 the Select Committee heard that

*“the Minister of Basic Education had been chased away from the Eastern Cape and that the Minister and her team was no longer part of the Eastern Cape Intervention. The people of the Eastern Cape only accepted President Zuma and his delegation.”*<sup>4</sup>

26. The confusion and contestation had a negative effect on the functioning of the ECDoE. Following an oversight visit from 16 to 19 August 2011, the Select Committee on Education and Recreation (The Select Committee) found the main obstacle to implementation of the Intervention to be *“the tug-of-war between the head of the task team and the HOD.”*<sup>5</sup>

27. Even after the Intervention was reasserted in April 2012, local officials continued to resist the National Intervention Team's work.<sup>6</sup> This made implementation difficult and contributed to the failure of the Intervention.

28. The contestation and resistance described was shaped by the legislative vacuum which exists around section 100. The introduction of legislation contemplated in section 100(3) could have clarified the powers of the

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<sup>3</sup> Office of the Premier, Eastern Cape *Update on the Implementation of Section 100(1)(b) intervention in the Department of Education*, 15 July 2011. Included as Annexure 9 in *Save our Schools and Community and Another v President of the Republic of South Africa and Others*, Case no 50/12, Founding Affidavit of Mkhize, N at para 48. Accessible at <http://www.lrc.org.za/judgements-texts/court-papers/alphaindex/s>

<sup>4</sup> Select Committee on Education and Recreation, *Consideration of First-Term Committee Programme*, dated 8 February 2012. Accessible at <https://pmg.org.za/committee-meeting/13909/>

<sup>5</sup> *Report of the Select Committee on Education and Recreation on the oversight visit to the Eastern Cape from 16-19 August 2011*, dated 24 August 2011. Accessible at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110824sceducreport.htm>

<sup>6</sup> Department of Public Service and Administration, *Status of Administrative and Management Systems of all provincial departments put under administration by Cabinet*, Presentation to Portfolio Committee on Public Service and Administration, dated 6 June 2012. Accessible at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120606status\\_0.ppt](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120606status_0.ppt).



National Intervention Team, and provided a means of handling non-compliance with the prescripts of section 100.

29. The prolonged paralysis of and loss of accountability in the department limited the effectiveness of the Intervention. Given that the Intervention was intended to restore and improve provision of education in the Eastern Cape, the right to education was itself at stake.

30. In all areas the Intervention targeted, it failed to substantially alter the state of education provision in the Eastern Cape. This can be seen in the following:

#### Administration of the provincial department

- a. According to a news report in the Dispatch newspaper, in August 2015 officials from the office of the Premier told the provincial legislature that the collapse in the ECDoE was so extreme that it needed to be shut down entirely and started afresh. These reports came after extensive efforts by the office of the Premier to directly intervene in the department, including the ongoing deployment of many of its own officials to support the department in key areas of incapacity. Operations were described as “*unhealthy and chaotic*” with chronic incapacity linked to key positions standing vacant or not being filled by permanent staff.<sup>7</sup>

#### School Infrastructure

- b. This description of complete “collapse” echoes the experiences of EE and EELC in our work with schools in the Eastern Cape, including in the King William’s Town, East London, Dutywa, Butterworth, Mthatha, Maluti and Grahamstown districts. This has been most apparent with regard to school infrastructure, one of our core focus areas. During the course of our work we have learnt of teachers and learners in nearly 200 schools across the province enduring conditions

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<sup>7</sup> The Dispatch Live, *Calls to Shut Down Education*, dated 11 August 2015. Accessible at <http://www.dispatchlive.co.za/news/call-to-shut-down-education/>

utterly unsuitable for education. At times, building conditions have even been life-threatening. The stories we have commonly encountered include crumbling or collapsing structures, snakes entering classrooms through holes in the floor or ceiling, learners in zinc structures on the brink of heat exhaustion and rain pouring through roofs, destroying books and making it impossible to teach or learn.

- c. During visits to schools in 2015, one teacher described to EE and EELC how an entire side wall collapsed during the middle of her lesson. Another painted a bleak picture of her classroom:

*There are broken rafters, exposed wires, large cracks in the walls that run in all directions, there are pieces of metal lodged into the entrance wall serving as a frame to keep the wall from falling in. The plaster that has been placed over the wall is falling apart. As you enter the one classroom there is a huge ditch at the entrance so you have to be careful when you are walking inside.*

- d. Chillingly, a caretaker at a school in the Mqanduli area spoke to us about how in August 2015, he nearly drowned when a pit toilet collapsed at school. Yet despite these devastating infrastructure conditions the ECDoE underspent so severely on infrastructure that national Treasury halted the transfer of its remaining Education Infrastructure Grant (EIG) funding for the previous financial year. These funds - R530 million - have since been reallocated to other provinces.<sup>8</sup>

### Scholar transport

- e. Scholar transport challenges continues to plague the province. The Auditor-General has revealed irregular and highly inefficient spending on scholar transport in the Eastern Cape, including R1.9-million spent

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<sup>8</sup> Government Gazette no. 39787 dated 7 March 2016. Accessible at [http://www.gov.za/sites/www.gov.za/files/39787\\_gon227.pdf](http://www.gov.za/sites/www.gov.za/files/39787_gon227.pdf)

transporting just six learners.<sup>9</sup> Meanwhile over 46 000 pupils are eligible for scholar transport in the 2016 academic year but have not receive this, resulting in learners forced to walk lengthy distances to and from school.<sup>10</sup>

### Textbooks

- f. There have been extensive news reports on the ECDoE's failure to administer the textbook tender process on time and with proper agreements with publishers. This has resulted in textbook delivery delays across the province this year. In the Lady Frere district, not a single school out of 175 had received textbooks by the end of January. As of April 2015, many textbooks are yet to be delivered.<sup>11</sup>

### Teacher vacancies

- g. According to media reports of this year, the education system is short several thousand teachers and over 300 schools still have no full-time principal.<sup>12</sup>

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<sup>9</sup> The Auditor General's report, *A Performance Audit of the Learner Transport Scheme of the Eastern Cape Education Department*, dated February 2016 at page 38. Accessible at [http://www.agsa.co.za/Portals/0/PA\\_Audit/A%20performance%20audit%20of%20the%20learner%20transport%20scheme%20at%20the%20Eastern%20Cape%20Department%20of%20Transport.pdf](http://www.agsa.co.za/Portals/0/PA_Audit/A%20performance%20audit%20of%20the%20learner%20transport%20scheme%20at%20the%20Eastern%20Cape%20Department%20of%20Transport.pdf)

<sup>10</sup> Response by the Eastern Cape Minister of Safety Liaison & Transport on 7 March 2016 to a legislature question. Response contained in *Question 19, IQP 2 of 2016* accessible at <http://www.dabhishe.org.za/wp-content/uploads/2016/04/Reply-to-question-19-IQP-2-of-2016.pdf>

<sup>11</sup> The Dispatch Live, *Call to Ditch Centralised Textbooks System*, dated 7 April 2016. Accessible at <http://www.dispatchlive.co.za/news/call-to-ditch-centralised-textbook-system/>

See also The Dispatch Live, *No Textbooks for thousands of Eastern Cape Schools*, dated 13 January 2016. Accessible at <http://www.dispatchlive.co.za/news/no-textbooks-for-thousands-of-east-cape-pupils/>, and

The Dispatch Live, *Two Months in and Still No Textbooks for Chairs and Pupils*, dated 3 March 2016. Accessible at <http://www.dispatchlive.co.za/news/two-months-in-and-still-no-textbooks-or-chairs-for-pupils/>

<sup>12</sup> The Dispatch Live, *EC schools still have no full-time principal*, dated 2 March 2016. Accessible at <http://www.dispatchlive.co.za/news/ec-schools-still-have-no-full-time-principal/>

## School Nutrition Programme

- h. In dozens of schools we have spoken with, nutrition programme funding is transferred irregularly or consistently late. As a result, learners who depend on the nutrition scheme regularly go hungry, further threatening their ability to learn, let alone thrive, in school. Many schools have been forced to reallocate funding from elsewhere in their budget to try to salvage their nutrition programmes during these funding delays, often risking other key needs of their learners in the process.

## Departmental support to schools

- i. By the accounts of most principals and SGBs visited during the course of our work, both district and provincial officials are scarce in times of need. And where officials have visited, schools are repeatedly left with false information and broken promises. One principal with whom we work very closely has documents dating back to 1991 with requests for school infrastructure support. The department's top leadership has acknowledged the extent of the crisis at this school and has made countless promises for new structures. But in 2016 the school of nearly 900 learners remains an amalgamation of zinc classrooms, brick buildings cobbled together by the community, and "temporary" prefabricated structures manufactured in 1989.

## Unreliable data leading to poor planning and resource wastage

- j. On 15 April 2016, it was reported by the Daily Dispatch newspaper that over 200 000 learners' identities could not be verified. This has renewed serious concerns of ghost pupils in the system that both waste and distort government allocation of resources.<sup>13</sup>

31. It is clear from the preceding discussion that the right to education is not fully realised in the Eastern Cape. The failings of the Intervention have direct

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<sup>13</sup> The Dispatch Live, *Thousands of EC Ghost Pupils*, dated 15 April 2016. Accessible at <http://www.dispatchlive.co.za/news/thousands-of-ghost-ec-ghost-pupils/>

implications for learners. Thus, where a lack of legislative clarity has contributed to these failings, remedying them will help to realise the right to education.

32. Further, the current status of the Intervention is unclear, with contradictory statements from different officials. Department of Basic Education (DBE) communication surrounding this has been extremely limited.
33. Were the Intervention to be withdrawn, it would be expected that a notice of withdrawal be tabled in the NCOP for approval, as happened in the case of the Limpopo intervention, when Cabinet sought approval from the NCOP for the downgrade from section 100(1)(b) to section 100(1)(a).<sup>14</sup> No notice to withdraw has been tabled for approval in the NCOP.
34. A number of officials in both the DBE and ECDoE have told EE that the intervention has been downgraded, albeit without providing documentary evidence of this. In fact, the acting HOD of the ECDoE, Sizakele Netshilaphala, stated in a meeting with EE members on 18 February 2016 that the Intervention is now largely limited to legal support to the department, given the large number of court cases which are regularly brought against it.
35. However, in March 2016 Minister Motshekga told the Portfolio Committee on Basic Education that the Intervention had not been lifted and that section 100(1)(b) was still in effect. No mention was made of what action was being taken under the intervention, although there was reference to continuing “*lapses in financial accounting, administration and management.*”<sup>15</sup> In May

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<sup>14</sup> Hansard of the National Council of Provinces, *Consideration of Report of the Select Committee on Finance - Termination of Section 100(1)(b) issued to the Limpopo Province and issuing of directives in terms of section 100(1)(a) of the Constitution of the Republic of South Africa, 1996*. Dated 25 November 2014, accessible at <https://pmg.org.za/hansard/21395/>

<sup>15</sup> Motshekga, A. *Speech by Minister Motshekga delivered at the Strategic Workshop of the Portfolio Committee on Basic Education held at the Lord Charles Hotel, Somerset West*, Dated 22 March 2016. Accessible at <http://www.education.gov.za/Newsroom/Speeches/tabid/950/ctl/Details/mid/3816/ItemID/3933/Default.aspx>

2016, the Minister again stated that the ECDoE was under a section 100(1)(b) intervention.<sup>16</sup>

36. The lack of communication or evidence of the Intervention suggests that there has been a defacto withdrawal or downgrade. However, examination of the state of education in the Eastern Cape reveals continued failures in all the areas the Intervention targeted. This is problematic in that these are areas in which the right to education is not being realised.
37. This raises the issue of when an intervention may be withdrawn. Given that an intervention is a discretionary power of the National Executive, government may choose to withdraw or downgrade the intervention without having fully solved the problems of the provincial department. In fact, this is what appears to have taken place in the Eastern Cape.
38. Legislation is thus needed to describe on what terms an intervention may be downgraded, to avoid protracted but limited interventions of the kind currently experienced in the ECDoE and protect rights, including in this case the right to education.

### **(b) The need to protect the relative independence of the different spheres of government**

39. Section 40 of the Constitution establishes the three different spheres of government, characterising these spheres as “*distinctive, interdependent and interrelated*”. The Constitutional Court has described section 40 as meaning that “(e)ach sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space.”<sup>17</sup>

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<sup>16</sup> Motshekga, A. *Basic Education Dept Budget Vote 2016/17*, Dated 10 May 2016. Accessible at <http://www.gov.za/speeches/minister-angie-motshekga-basic-education-dept-budget-vote-201617-10-may-2016-0000>

<sup>17</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 42.

40. The Constitutional Court has also recognised the significance of section 40, describing it as one of the “*fundamental premises of our government*”.<sup>18</sup>

41. Section 41 goes on to set certain tenets of co-operative government and intergovernmental relations. In terms of section 41 all spheres of government are required to:

*(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;*

*(f) not assume any power or function except those conferred on them in terms of the Constitution;*

*(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”*

42. Sections 40 and 41 of the Constitution therefore set out protective principles aimed at maintaining the parameters between the different spheres of government and preserving the institutional integrity of each sphere. The purpose of sections 40 and 41 are described by the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* as follows:

*“All the spheres [of government] are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that while they do not tread on each other’s toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 are designed in an effort to achieve this result.”*<sup>19</sup>

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<sup>18</sup> *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at para 79.

<sup>19</sup> *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 26.

43. By allowing national government to intervene in provincial government affairs, section 100 of the Constitution creates “*an exception to the principle of relative and limited autonomy of the spheres of government.*”<sup>20</sup>
44. A well-functioning and relatively independent province is, however, “*essential to [the] basic structure of government*”.<sup>21</sup> Section 100, by creating an inherent tension with sections 40 and 41, opens up the space for abuse of political power and a diminution of the broader constitutional scheme. In an attempt to counterbalance this possibility, section 100 allows for an intervention only in “*highly circumscribed*” circumstances.<sup>22</sup>
45. When an intervention is needed it is therefore imperative that this occurs within tightly controlled and regulated conditions in order to carefully regulate the nature of the national sphere’s incursion into provincial affairs and to avoid contestation between government spheres.
46. The need to avoid conflict in the context of a national intervention was recognised in a 2008 audit by the Department of Constitutional Development.<sup>23</sup> This audit, which focused on all intergovernmental structures, pointed to the invasive nature of an intervention and thus the need to define detailed parameters for the process that “*should preferably be spelled out in legislation*”<sup>24</sup> The audit report stated that:

“[b]ecause of the intrusive nature of the supervision process [under section 100] and its encroachment on the functional and institutional integrity of the provincial sphere, it would be advisable for the sake of

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<sup>20</sup> Above note 17 at para 56.

<sup>21</sup> *Matatiele Municipality and Others v President of the RSA and Others (No. 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele 2*) at para 29.

<sup>22</sup> Above note 17 at para 56.

<sup>23</sup> Now the Department of Provincial and Local Government.

<sup>24</sup> Accessible at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2000/appendices/001011IGR.htm>



*clarity and avoidance of future disputes to define and describe the process closely in legislation.”<sup>25</sup>*

47. A legislative framework for section 100 would also help eliminate any possible confusion that may arise from an intervention and ensure certainty regarding the delineation of responsibility and authority. The manner in which the Eastern Cape Intervention has been carried out is illustrative of this need. In its 2010/2011 Annual Report, the ECDoE already complained of poor implementation by national government which had adversely affected departmental operations.<sup>26</sup>
48. On 16 to 19 August 2011 the Select Committee on Education and Recreation conducted an oversight visit to the Eastern Cape. A member of this delegation reported that the manner in which the Eastern Cape intervention had been implemented had caused uncertainty, uncooperativeness and *“might lead to a collapse of the system”*.
49. The following month a parliamentary question was put to the Minister of Basic Education on the difficulties encountered by the Eastern Cape Intervention Team. In her reply the Minister stated that there had been confusion in the conferral of statutory delegations and misunderstandings regarding who was vested with what authority during the intervention:

*“It is for the first time in the history of the Department of Basic Education that an intervention in terms of section 100(1)(b) of the Constitution has ever been implemented in any provincial education department. There was no legal framework on which to anchor the intervention in the Eastern Cape Education Department.*

*After having resolved this matter through a detailed Memorandum of Understanding (MoU), challenges began to emerge when statutory delegations were assigned to both the National Intervention Coordinator and the incumbent Superintendent-General of the ECED.*

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<sup>25</sup> Same as above.

<sup>26</sup> Eastern Cape Department of Education, *Annual Report 2010/11*, dated 28 April 2011. Accessible at: [http://www.ecdoe.gov.za/files/resources/resource\\_301.pdf](http://www.ecdoe.gov.za/files/resources/resource_301.pdf).

*There were challenges that arose from misinterpretations of the section 100(1)(b) of the Constitution, especially where the authority on the areas of the intervention vested.”<sup>27</sup>*

50. The absence of guiding legislation thus creates breeding ground for national government to be accused of exceeding the powers conferred on it by section 100. Legislation is needed to protect the relative independence of provincial government whilst simultaneously ensuring that national government is empowered, within limits, to step in to the fold when service delivery has broken down.

### **(c) Facilitating and advancing co-operative governance**

51. The need for legislation to regulate a section 100 intervention also came to the fore when the DBE was rocked by the Limpopo textbook scandal. The Department’s response to the abysmal textbook delivery failures in Limpopo (occurring from December 2011 to July 2012) resulted in the commissioning of a report to verify the delivery of textbooks to schools in the province.

52. This report, produced by Professor Mary Metcalfe, emphasised the need for the enactment of legislation to steer the implementation of a section 100 intervention. The report noted that the absence of a legal framework to regulate the Limpopo Intervention resulted in “*uncertainty*” and “*confusion*” which had contributed to poor textbook delivery:

*“Secondary legislation is required to provide a regulatory framework to guide the operationalization of Section (100)(1)(b). The lack of regulatory guidance has caused a great deal of uncertainty and confusion, which has had serious implications for the textbook procurement process and caused delays in decision making and in operationalising decisions. The Presidential Task Team will*

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<sup>27</sup> Department of Basic Education, *Reply to National Assembly Question 2876, IQP 30/2011*, dated 23 September 2011. Accessible at [https://pmg.org.za/question\\_reply/273/](https://pmg.org.za/question_reply/273/)

*investigate the impact of Section (100)(1)(b) on the administration of education in Limpopo.*”<sup>28</sup>

53. The Metcalfe report also recorded that a Presidential Task Team would be appointed to delve into how section 100(1)(b) had negatively impacted on the administration of education in Limpopo. One of the questions which this Task Team was eventually tasked with investigating was whether *“legislation regulating the intervention contemplated in section 100(1)(b) [would] facilitate and promote the delivery of services, especially textbooks?”*<sup>29</sup>

54. Responding to this question in the affirmative, the Presidential Task Team found that legislation of this nature would enhance co-operative governance through ensuring that provinces subject to an intervention receive effective support from national government. Reinforcing the findings of the earlier Metcalfe report, the Task Team concluded, in its October 2012 report, that legislation which clearly delineate the roles and responsibilities for those involved in implementation would do much to improve a section 100 intervention:

*“the proposed legislation will provide for a more integrated cooperative governance system in which national government monitors and supports provincial government more effectively, and is able to develop a system of early warning signals of significant provincial government failures. It found that if legislation had already been passed, it would have provided greater clarity on the roles and responsibilities of the different role-players and would have made for a more effective intervention in Limpopo.”*<sup>30</sup>

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<sup>28</sup> Mary Metcalfe Report on the Verification of Textbook Deliveries in Limpopo, dated 17 July 2012 at page 19. Accessible at:

<http://www.polity.org.za/article/mary-metcalfe-commission-report-verification-of-textbooks-deliveries-in-limpopo-july-2012-2012-07-17>

<sup>29</sup> Report of the Presidential Task Team established to investigate the non-delivery and/or delays in the delivery of Learner, Teacher Support Material (LTSM) in Limpopo Schools, dated 5 October 2012 at question 7. Accessible at: <http://www.thepresidency.gov.za/pebble.asp?relid=6942>

<sup>30</sup> Same as above

55. It is clear from the Presidential Task Team report that legislation in terms of section 100(3) is urgently required not only to ensure the relative independence of the provincial sphere of government by limiting intrusion to only that which is necessary but also to advance intergovernmental co-operation.

56. Successful intergovernmental relations would be advanced because legislation regulating the intervention process would allow for more ease of transition and help foster good relations and understanding between Intervention Teams and the provincial officials that they have been tasked to assist. In so doing it will help the two spheres of government to fulfil their obligation “*to respect and arrange their activities in a manner that advances intergovernmental relations and bolsters co-operative governance. If they do not do so, they breach peremptory requirements of the Constitution.*”<sup>31</sup>

#### **(d) Protecting the principle of separation of powers**

57. The promulgation of section 100 legislation will also guard against the impingement of the principle of separation of powers. That this is so, is evident from the string of court cases emanating from both Limpopo and the Eastern Cape relating to the national interventions in these provinces. Here the Courts have been brought into the fray and forced to make far ranging decisions intruding on executive territory when this need not be the case.

58. To illustrate, in one of the so called “textbook judgments” the Judge went so far as to carve out an extensive remedy which included placing an obligation on the DBE/the Limpopo Department of Education (LDoE) to prepare a plan which identified the “*focal point*” for textbook delivery within the national and provincial departments.

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<sup>31</sup> Minister of Police and Others v Premier of the Western Cape and Others [2013] ZACC 33; 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC) at para 64.

59. The DBE/LDoE was then obliged to submit monthly reports indicating achievements and setbacks in implementation of the plan as well as steps taken to address any setbacks that have arisen.<sup>32</sup> The Court had essentially assumed responsibility for supervising the section 100 intervention in so far as the delivery of textbooks were concerned.
60. That the Courts are required to facilitate and oversee this kind of service delivery in the context of section 100 intervention is highly undesirable. Although the involvement of the courts has at times been essential for the realisation of fundamental rights, a section 100 situation is distinct in that it already entails significant intrusion of the national executive onto provincial terrain.
61. When the courts are introduced this further blurs the constitutional parameters of government responsibility and negatively impacts on the delicate balancing act that the separation of powers doctrine requires. By clarifying the scope of duties and intervention processes, legislation can help eliminate the need to turn to the court to aid a section 100 process.
62. Relying extensively on the courts would also distort the express constitutional intent to provide checks and balances through placing a responsibility on the national executive to account directly to the NCOP when section 100 is invoked.

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<sup>32</sup> Section 27 and Others v Minister of Education and Another [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP).

**(f) The government’s own acknowledgement of the need for legislation, and the inordinate number of promises and delays in producing legislation**

63. The Portfolio Committee on Basic Education,<sup>33</sup> the Limpopo Presidential Task Team,<sup>34</sup> and the National Council of Province’s Select Committee on Finance<sup>35</sup> are amongst a number of institutions that have called for the urgent development of legislation dealing with the mechanics of a section 100 intervention.

64. Yet, despite these calls the Intergovernmental Monitoring, Support and Interventions (IMSI) Bill (intended to provide clarity regarding the processes involved in a section 100 intervention) has been stalled and conflicting reports on its status exists. The NCOP Select Committee on Cooperative Governance and Traditional Affairs (CoGTA) was advised in February 2011 that the Bill had been referred to the office of the Chief State Law Advisor for an opinion on its constitutionality. The Department’s intention was to submit the Bill to Cabinet by May 2011 and then to “*Parliamentary Process*” two months down the line.<sup>36</sup>

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<sup>33</sup> Legacy Report of the Portfolio Committee on Basic Education on its activities undertaken during the 4<sup>th</sup> Parliament (May 2009 – March 2014), dated 11 March 2014. Accessible at: <https://pmg.org.za/tailed-committee-report/1994/>

<sup>34</sup> Above note 29. In its October 2012 report, the Presidential Task Team also recommended that the IMSI Bill be submitted to Cabinet by 15 November 2013 and finalised “*as soon as possible*”.

<sup>35</sup> Report of the Select Committee on Finance on the Follow-up visit to Limpopo in terms of section 100(2)(c) of the Constitution, dated 16 November 2012. Accessible at: <https://pmg.org.za/tailed-committee-report/480/> The NCOP Select Committee of Finance in its report on a follow up visit to Limpopo stressed the need for National Treasury to ‘*urgently*’ initiate legislation in terms of section 100(3)”.

<sup>36</sup> CoGTA briefing to the Select Committee on CoGTA: Briefing and Update on Envisaged Legislation on Section 100 and Section 139 of the Constitution, dated 22 February 2011. Accessible at: [http://webcache.googleusercontent.com/search?q=cache:zKWbQSXUEycJ:pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110222briefing\\_0.ppt+&cd=1&hl=en&ct=clnk&gl=za4](http://webcache.googleusercontent.com/search?q=cache:zKWbQSXUEycJ:pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110222briefing_0.ppt+&cd=1&hl=en&ct=clnk&gl=za4)

65. But by April 2013 a CoGTA presentation reveals that the Bill would only appear before Cabinet by May 2013 and be promulgated by June/July 2013.<sup>37</sup> The CoGTA budget vote report for 2013 indicates that the IMSI Bill had been revised so as to strengthen oversight roles and “*management of interventions between the three spheres.*”<sup>38</sup> Listed under 2013/2014 priorities is the submission of the Bill to Parliament by March 2014.

66. In March 2014, parliamentary questions were posed to the Minister of CoGTA on whether the Minister intended introducing legislation to regulate section 100 interventions and if so, by when.<sup>39</sup> In written reply, the Minister indicated that plans were afoot for the “*imminent*” introduction of the IMSI Bill and that it would be tabled in Parliament upon Cabinet approval. However, the Minister indicated that: “*We are awaiting the Governance and Administration Ministerial Cluster to conclude its process before the Bill can be considered by the Cabinet.*”<sup>40</sup>

67. On 30 July 2014 the various select committees affected by the Limpopo Intervention met to discuss the intervention. During this discussion the MEC for provincial treasury was recorded as saying:

*“it was the first time since 1994 that the national executive had intervened on such a large scale. The lesson learnt was that there was a need for legislation, as section 100 stated that national legislation*

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<sup>37</sup> Intergovernmental Monitoring, Support and Intervention Bill, 5<sup>th</sup> National Managers Forum presentation, dated Accessible at:

<http://webcache.googleusercontent.com/search?q=cache:bA8iNsr8DG0J:www.salga.org.za/app/webroot/assets/files/Document%2520Storer/IMSI%2520Bill%2520presentation%25205th%2520national%2520Municipal%2520Managers%2520Forum%2520-%252030%2520April%25202013.ppt+&cd=1&hl=en&ct=clnk&gl=za>

<sup>38</sup> Report of the Portfolio Committee on Co-operative Governance and Traditional Affairs, dated 14 May 2013. Accessible at: <https://pmg.org.za/tailed-committee-report/1729/>

<sup>39</sup> Parliamentary question number 2014/1240 to the Minister of Co-operative Governance and Traditional Affairs, date 3 March 2013. Accessible at: [https://pmg.org.za/question\\_reply/486/](https://pmg.org.za/question_reply/486/)

<sup>40</sup> Minister of Co-Operative Governance and Traditional Affairs reply to above, dated September 2014. Accessible at: [https://pmg.org.za/question\\_reply/486/](https://pmg.org.za/question_reply/486/)

*had to govern intervention. Yet there had been no enabling legislation since 1996.*<sup>41</sup>

68. Finally, in President Zuma's State of the Nation Address last year, he stated that the IMSI Bill would be making its way to Parliament. Yet despite this announcement and the desperate and urgent need for this legislation the Bill is yet to be promulgated and the Eastern Cape Intervention continues to occur in a legislative vacuum.

69. EE and EELC therefore submit that section 100 be amended so as to ensure the urgent introduction of legislation which will provide the framework for a national intervention.

### **C. Proposed amendment to section 100(2)**

70. Section 100(2) of the Constitution regulates the role of the National Council of Provinces in the context of section 100. This section vests in the NCOP the ultimate authority to decide on the commencement of a section 100(1)(b) intervention and also mandates it to play an ongoing oversight role once an intervention is underway. Section 100(2) reads:

*2. If the national executive intervenes in a province in terms of subsection (1)(b)*

*a. it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;*

*b. the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and*

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<sup>41</sup> Termination of Section 100 Limpopo Intervention, with Limpopo Premier and Minister of Finance. Accessible at: <https://pmg.org.za/committee-meeting/17353/>



*c. the Council must, while the intervention continues, review the intervention regularly and make any appropriate recommendations to the national executive.*

71.EE and EELC propose that Section 100(2) be amended through (i) the amendment of subsection (c) to specify the time period of review as at least quarterly; and (ii) the insertion of a subsection (d) which will explicitly mandate the executive to report to the NCOP on progress achieved and challenges encountered in implementation as well as steps taken to address those challenges. This should be in writing and orally, and should also take place at least quarterly.

72.We therefore propose the following:

*c. the Council must, while the intervention continues, review the intervention on at least a quarterly basis and make any appropriate recommendations to the national executive.*

*d. the national executive must, while the intervention continues, submit written and oral reports to the NCOP on at least a quarterly basis on the implementation of the intervention including on—*

*(i) progress achieved;*

*(ii) challenges encountered; and*

*(iii) steps taken to address any challenges*

73.We are of the view that the proposed amendments are necessary and much needed in order to foster accountability of the national executive to the NCOP while an intervention is underway.

74.The proposed amendments would well position the NCOP to fulfil its mandate to represent the province's interest and to hold the national executive to account.

75.The proposed amendments are also in line with recommendations made by the Select Committee on Education and Recreation arising from a meeting it held with the DBE on 22 March 2011. This meeting was for the Committee

to consider the notice of intervention in the Eastern Cape. The Committee ultimately recommended to the NCOP that the intervention be approved and also that the DBE furnish quarterly reports on any headway made during the intervention.<sup>42</sup>

76. The quarterly report recommendation is later reflected in a Memorandum of Understanding signed between the DBE and the ECDoE. This Memorandum outlined the scope of the intervention and the responsibilities of both the National and Eastern Cape Departments of Basic Education.

77. The MOU, however, failed to solve the problems of confusion over the demarcation of the powers and roles between province and national. More strikingly, the failure of the national executive to adhere to its undertaking to report in line with the MOU underscores the need for a quarterly reporting obligation to be constitutionally entrenched.

78. Significantly, our proposed amendments have the power to ensure that a section 100(1)(b) process occurs as expeditiously as possible and that it is not delayed by any obstacles or tardiness on the side of the national executive.

79. It would go a long way towards ameliorating the danger of a stale or intractable intervention which has simply been left hanging – precisely the type of ineffective and unaccountable intervention as that which appears, at least in form, to be ongoing in the Eastern Cape.

80. Ensuring that an intervention is carried out as speedily as possible would also help to reduce adverse public perceptions as to the legitimacy of an intervention and the possibility of ulterior political motives. Perceptions which have arisen in the context of the Limpopo intervention.

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<sup>42</sup> Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department on the Intervention in the Eastern Cape Department of Education, dated 13nApril 2011. See also Thobela Primrose Mdledle, *Law, State and Multi-Level Government*, UWC LLM Research paper at pages 57 and 58. Accessible at: [http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/4769/Mdledle\\_tp\\_llm\\_law\\_2015.pdf?sequence=1](http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/4769/Mdledle_tp_llm_law_2015.pdf?sequence=1)

81. Our courts have clarified that a lengthy drawn out process is contrary to what was intended by section 100:

*“The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed.”* (emphasis added).<sup>43</sup>

82. We submit that these amendments are justified in light of the NCOP failing to exercise its oversight role outlined in section 100(2)(c) for the Intervention into the ECDoE, and the limited information and contradictory statements issued by the government in this regard. Taken together, these amendments will empower the NCOP to better perform its oversight functions.

***(a) Ensuring that the NCOP is able to execute its constitutionally mandated functions***

**(i) Ensuring provincial interests are taken into account at a national level**

83. Section 42(4) of the Constitution reads:

*“The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.”*

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<sup>43</sup> Above note 17 at para 17.

84. The meaning of this section has been elaborated on by the Constitutional Court on a number of occasions. In *Matatiele and Others v President of the RSA and Others* the Constitutional Court described section 42(4) as furthering the “*basic and fundamental objectives*” of ensuring that provincial issues are considered in the national sphere of government.<sup>44</sup>

85. In *Doctors for Life* the Constitutional Court describes the NCOP’s role of protecting and advancing provincial interests as a “*unique*” one, aimed at, amongst others, ensuring responsiveness on the side of national government regarding provincial issues:

*“The NCOP performs functions similar to the National Assembly but from the distinct vantage point of the provinces. Its role is both unique and fundamental to the basic structure of our government. It reflects one of the fundamental premises of our government, which sees national, provincial and local governments as spheres within a single whole, which are distinctive yet interdependent and interrelated. The NCOP ensures that national government is responsive to provincial interests while simultaneously engaging the provinces and provincial legislatures in the consideration of national policy. From this perspective, the NCOP plays a pivotal role as a linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests.”*<sup>45</sup>

86. Section 100(2) facilitates the NCOP’s role as both guardian and champion of provincial interests in a national intervention. Through this section the NCOP is empowered to ensure that the best interests of an affected province remain at the centrefold of the intervention process. The section does this by

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<sup>44</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) 2007 (1) BCLR 47 (CC) at para 39:

*“One of the basic and fundamental objectives of our constitutional democracy is to establish a democratic government which is constituted as national, provincial and local spheres of government. What is more, section 42(4) of the Constitution describes the role of the NCOP as being to ensure that provincial interests are taken into account in the national sphere of government. The construction of the provisions of the Constitution must be informed by these basic and fundamental objectives.”*

<sup>45</sup> Above note 18 at para 79.

allowing the NCOP to make recommendations to the national executive regarding an intervention. The NCOP is, however, best positioned to do so if the national executive regularly appraises it of the status of the intervention and difficulties experienced during implementation.

87. The proposed amendments will ensure that the NCOP remains continuously versed on developments within the province. This in turn would enhance the NCOP's ability to ensure that provincial interests can inform the manner in which the national executive shapes and reshapes an intervention to attain success.

88. The proposed amendments will also better facilitate the NCOP's role in ensuring an effective and speedy resolution to an intervention. Ensuring that an affected province is restored to a fully functioning and relatively independent one as swiftly as possible is inherently in the best interest of the province and also in our democracy.

**(ii) Ensuring Co-operative governance**

(a) Effective and transparent governance

89. Section 41(1)(c) of the Constitution obliges all spheres of government and organs of State *“to provide effective, transparent, accountable and coherent government for the Republic as a whole”*.

90. The co-operative governance obligations imposed by section 41(1)(c) resonates in section 72(1)(b) of the Constitution. This latter section requires the NCOP to *“conduct its business in an open manner”*. Section 72(2), subject to one exception, forbids the NCOP to exclude the public from a committee sitting. The NCOP is therefore required to allow the public access to any review hearings undertaken in fulfilment of its section 100(2)(c) obligations.

91. These provisions exist in order to foster the founding constitutional values of transparency and accountability,<sup>46</sup> values which the Constitutional Court has described as pivotal to the survival of our constitutional democracy.<sup>47</sup> However, the accountability aspect of governance in the section 100 intervention in the Eastern Cape has been severely curtailed by the dearth of reporting by the national executive to the NCOP.<sup>48</sup>
92. This is significant because the information generated during the section 100(2)(c) reporting process provides a unique opportunity for the public to hear directly from the national executive as to its section 100(1)(b) remedial work in a province. This information is desperately needed so that the public can remain informed as to whether and, if so, how, the national executive has been responsive to service delivery failures in their province. These are failures which have resulted in severe and ongoing violations of fundamental rights.
93. Information emanating from section 100(2)(c) review sittings will also equip civil society with the tools needed to assess and adequately interrogate how an intervention has impacted on a province and, through this course, to hold government to account. The proposed amendments will ensure that there is a minimum quarterly review process through obliging the NCOP to review, and the national executive to report on an intervention in that manner. The proposed amendments will therefore enhance transparency and accountable governance in the context of section 100.
94. The need for transparent and accountable reporting is clearly depicted in the context of the Eastern Cape Intervention. Here the NCOP's role has been made more difficult by irregular and vague reporting by the national executive. On the rare occasions when there have been public announcements concerning the Intervention, these have been limited to confirming that it remains in force, without specifying its achievements, its

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<sup>46</sup> As reflected in Section 1 of the Constitution.

<sup>47</sup> *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 80.

<sup>48</sup> Above note 1 at pages 14 and 15. See also above note 43 at pages 59 to 66.

current focus, or future plans. South Africans are left to conduct guess work as to who is ultimately responsible for the administration and proper functioning of an entire province.

95. A number of officials in both the DBE and ECDoE have told EE that the Eastern Cape intervention has been downgraded, albeit without providing documentary evidence of this. However, in March 2016 Minister Motshekga told the Portfolio Committee on Basic Education that the Intervention had not been lifted and that section 100(1)(b) was still in effect. No mention was made of what action was being taken under the intervention.<sup>49</sup>
96. The helpful role such an amendment could play is illustrated by the issue of the withdrawal of the Eastern Cape intervention. For instance, departmental officials suggest that the Intervention has undergone a *de facto* downgrade or withdrawal. Were the Intervention to be withdrawn, it would be expected that a notice of withdrawal would be tabled in the NCOP for approval, as happened in the case of the Limpopo intervention, when Cabinet sought approval from the NCOP for the downgrade from section 100(1)(b) to section 100(1)(a).<sup>50</sup> But no notice to withdraw has been tabled for approval in the NCOP.
97. Imposing an obligation on the national executive to report quarterly to the NCOP would ensure transparency in determining whether there has been proper compliance with constitutional and, if introduced, statutory obligations. It could help to avoid a situation, such as in the Eastern Cape, where important procedure has not been followed. Should our proposed amendments be introduced the national executive would be forced to clarify the status of an Intervention at every step.

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<sup>49</sup> Motshekga, A. *Speech by Minister Motshekga delivered at the Strategic Workshop of the Portfolio Committee on Basic Education held at the Lord Charles Hotel, Somerset West, Dated 22 March 2016.* Accessible at <http://www.education.gov.za/Newsroom/Speeches/tabid/950/ctl/Details/mid/3816/ItemID/3933/Default.aspx>

<sup>50</sup> Hansard of the National Council of Provinces, *Consideration of Report of the Select Committee on Finance - Termination of Section 100(1)(b) issued to the Limpopo Province and issuing of directives in terms of section 100(1)(a) of the Constitution of the Republic of South Africa, 1996.* Dated 25 November 2014, accessible at <https://pmg.org.za/hansard/21395/>

(b) Co-operation, friendly relations, mutual support, communication and consultation

81. Section 41(1)(h) of the Constitution provides that all spheres of government and organs of State must:

*“co-operate with one another in mutual trust and good faith by—*

- (i) fostering friendly relations;*
- (ii) assisting and supporting one another;*
- (iii) informing one another of, and consulting one another on, matters of common interest;*
- (iv) co-ordinating their actions and legislation with one another”*

82. The Constitutional Court has described the NCOP as institutionalising the constitutional principle of co-operative government. A principle that requires *“a spirit of consultation and co-ordination:”*

*“The NCOP institutionalises the principle of co-operation and communication by involving the nine provinces directly in the national legislative process and other national matters. . . Thus the NCOP represents the concerns and interests of the provinces and as well as those of local government in the formulation of national legislation*

*Indeed, the principle of institutional co-operation and communication finds expression in the principle of co-operative government to which chapter 3 of the Constitution is devoted. The role of the NCOP should be understood in the light of the constitutional principle of co-operative government, which shares similarities with the principle of Bundestreue. The basic structure of our government consists of a partnership between the a national, provincial and local spheres of government which are distinctive, interdependent and interrelated. The principle of co-operative government requires each of the three spheres to perform their functions in a spirit of consultation and co-ordination with the other spheres.”<sup>51</sup>*

98. Despite this mandate, the Eastern Cape intervention has been riddled with uncooperativeness and in some instances blatant obstruction on the side of

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<sup>51</sup> Above note 18 at paras 81 to 82.



provincial officials.<sup>52</sup> There has also been a breakdown in communication between the national executive and the NCOP, as is evident by the fact that the national executive last reported to the NCOP on its section 100 activities almost three years ago.<sup>53</sup>

99. The proposed amendments will go a long way towards ensuring a constant flow of information between the NCOP and the national executive, and in turn, between the national executive and its intervention team. Ensuring that all role players remain abreast of developments surrounding the intervention will help stimulate co-operation, communication and consultation amongst government spheres. It will also better position the national executive and the affected province to mutually support each other in the process.

***(iii) Holding the executive to account***

100. Parliament as a whole is obliged to scrutinise and oversee executive action.<sup>54</sup> And section 55(2) of the Constitution obliges Parliament to establish mechanisms to ensure that it is able to do so:

*“(2) The National Assembly must provide for mechanisms-*  
*(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and*  
*(b) to maintain oversight of-*  
*(i) the exercise of national executive authority, including the implementation of legislation; and*  
*(ii) any organ of state.”*

101. Section 66(2) of the Constitution specifically empowers the NCOP to require the national executive, including a Cabinet member, to attend a meeting of the NCOP or of one of its select committees.

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<sup>52</sup> Above note 1 at pages 9 to 11.

<sup>53</sup> On 11 September 2013. Section 100(1)(b) interventions in Limpopo and Eastern Cape: Minister & Department of Basic Education progress reports. Accessible at <https://pmg.org.za/committee-meeting/16343/>

<sup>54</sup> Section 42(3) of the Constitution.

83. Section 69 further empowers the NCOP to summon any person to provide evidence or to produce documents<sup>55</sup> and to receive petitions, representations or submissions from any interested persons or institutions.<sup>56</sup>
84. Section 92(2) of the Constitution goes on to impose an obligation on Cabinet to account to Parliament and 93(2) does the same in respect of Deputy Ministers. Significantly, section 92(3)(b) places an obligation on Cabinet to “*provide Parliament with full and regular reports concerning matters under their control.*”
85. It is therefore of little surprise that the Constitutional Court has described Parliament’s responsibility to hold the executive to account as its ‘*primary*’ obligation.<sup>57</sup> In the case of section 100 interventions, the NCOP bears a special responsibility for oversight, that of regular review and making any appropriate recommendations to the national executive. In the case of the ECDoE, much of the direct oversight work fell to the NCOP’s Select Committee on Education and Recreation.
86. However, the Select Committee, and the NCOP more broadly, have not exercised their oversight functions adequately. Between 22 March 2011 and 11 September 2013, the Committee was briefed on the Intervention progress by the DBE three times (once annually during that time), and undertook two oversight visits to the Eastern Cape (in 2011 and 2012). The last time the Intervention was scrutinised by the Select Committee was as far back as 11 September 2013.
87. The Fourth Democratic Parliament sat for the last time in March 2014. In the Select Committee’s report on its activities for the Fourth Parliament (2009-2014), it noted various difficulties it faced in monitoring the Intervention, including slow or no approval of their oversight visits and that the NCOP

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<sup>55</sup> Sections 69(a) and 69(c) of the Constitution.

<sup>56</sup> Section 69(d) of the Constitution.

<sup>57</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016) at para 44.

had taken a year to consider the Committee's report on its second oversight visit. This, it noted, "*showed that the Council failed to appreciate the seriousness and urgency of the Eastern Cape intervention.*"<sup>58</sup>

88. The Select Committee resolved "*in [the] future to strengthen oversight, particularly of provinces which are unstable.*"<sup>59</sup> However the Intervention was not considered during the sitting of the Fifth Parliament (beginning May 2014). That this is precisely the period in which information about the Intervention is at its scarcest illustrates the important role that the Select Committee's oversight can play.

89. While a reasonable interpretation of *regular review* would entail a greater degree of oversight than has been exercised, the subsection would nonetheless benefit from greater specificity as to the time period required. The proposed amendments to section 100(2) will serve as constitutionally endorsed guidance on the minimum required of the NCOP to discharge its responsibilities under section 100(2)(c). In so doing it will enable the NCOP to better play its oversight role.

90. The proposed amendments will offer equal guidance to the national executive on its obligations to account to the NCOP on accomplishments, progress and setbacks experienced in restoring the province to adequate function. Placing an explicit obligation on the national executive to report its progress (or lack thereof) to the NCOP would institutionalise the requisite relationship between legislature and executive in this context, and empower the NCOP to play its role more effectively. It is an eminently sensible and constitutionally desirable amendment, as it serves to further complement and enhance the already existing 100(2)(c) review obligation on the NCOP.

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<sup>58</sup> Select Committee on Education and Recreation, *Report of the Select Committee on Education and Recreation on its activities during the Fourth Parliament*, dated 19 March 2014 at article 13.3. Accessible at <https://pmg.org.za/policy-document/589/>

<sup>59</sup> Same as above.

## ***D. Conclusion***

91. Effective, well-functioning and relatively independent provincial governments are essential to the survival of our constitutional democracy. However, when service delivery at a provincial level malfunctions pervasive and devastating violations of fundamental rights (as illustrated in the context of basic education) occur.
92. Recognising the potential for a crisis of this magnitude, the Constitution creates a mechanism, through section 100, for national government to temporarily step in and restore a Province to an acceptable level of operation.
93. This mechanism can, however, only succeed if national remains constantly accountable to the NCOP as to its actions in the province and how it intends to fulfil its mandate.
94. When the national executive long overstays this role a province becomes even more vulnerable to the dangers of the national executive exceeding the scope of its powers. It also opens up the door for public perceptions of ulterior political motivations.
95. If section 100 interventions are to succeed it is important that national legislation is enacted to regulate this very politically sensitive process. This will ensure that all officials involved, both national and provincial are aware of their responsibilities and properly equipped to ensure success.
96. EE and EELC's proposed amendments are significant in that altering the Constitution in this manner will significantly impact on the success of a national intervention into provincial affairs.