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MEMORANDUM
[Confidential]

TO: Mr LP Nzimande, MP and
Mr VG Smith, MP
Co- Chairpersons Joint Constitutional Review Committee

COPY: Ms PN Twaya
Acting Secretary to Parliament

Mr ME Phindela
Acting Deputy Secretary: Core Business and

Ms R Begg
Division Manager: Core Business Support

FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 27 November 2017

REF: CR 16/67
145/2017

SUBJECT: Request to Review and Amend Section 100 of the Constitution

MESSAGE: Please find attached the above memorandum for your attention



Adv Z Adhikarie
Chief Legal Adviser



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LEGAL OPINION
[Confidential]

TO: Hon LP Nzimande, MP and
Hon VG Smith, MP
Co-Chairpersons Joint Constitutional Review Committee

COPY: Ms PN Tyawa
Acting Secretary to Parliament

Adv EM Phindela
Acting Deputy Secretary: Core Business; and

Ms R Begg
Division Manager: Core Business Support

FROM: Adv. Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

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SUBJECT: REQUEST TO REVIEW AND AMEND SECTION 100 OF THE CONSTITUTION, 1996

INTRODUCTION

1. Our Office received a request to advise the Constitutional Review Committee ("the Committee"), on the submission by Equal Education and the Equal

Education Law Center (“submitters”), proposing the review and amendment of section 100 of the Constitution (“the submission”).

2. The submitters are membership-based non-profit organisations, which are constituted of learners, parents, teachers and community members. Their stated objective is to promote quality and equality in education in South Africa.
3. Section 100 of the Constitution, which the submitters propose should be amended, provides for intervention of National Government in the functioning of Provincial Government, where the province has failed to fulfil a constitutional or statutorily imposed obligation.¹

FACTS

4. The submitters make out compelling arguments in support of the National intervention as provided for in section 100 of the Constitution (“section 100”), however, they contend that there is a need to strengthen the provision to make it more effective.

¹ Section 100 states that: “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 fulfill 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;
 - (iv) prevent that the province from taking unreasonable actin 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 term 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.

5. The submitters argue that section 100(1)(b) has been invoked on more than one occasion in attempts to fix challenges in Limpopo and Eastern Cape Provinces. They state that, while the aforementioned interventions may be commended, there has been lack of clarity with regard to roles and responsibilities of state actors during the intervention.
6. The lack of clarity of roles and responsibilities, according to the submitters, leads to confusion and diminished accountability, amongst state organs during an intervention. This leads to confusion and diminished accountability and is detrimental to the vulnerable interested and affected parties in South Africa.
7. The submitters provide an example of the Eastern Cape province, where a section 100(1)(b) intervention was effected but in their view, *“the province’s education system remains bedevilled with devastating troubles, including poor school infrastrucuture, crippling vacancies for vital posts that remain unfilled, 46000 leaners who qualify but are not getting scholar transport, excess teachers that cause budgetary strain”*. The submitters argue that due to the shortfalls stated above, the intervention could be said to have failed.

PROPOSALS BY THE SUBMITTERS.

8. The submitters propose the following:
 - (a) section 100 be amended so as to make the enactment of legislation regulating the intervention process mandatory;
 - (b) the time and period of reviews undertaken by the NCOP be specified as occurring at least quarterly; and
 - (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 on the progress achieved and challenges encountered in implementing the intervention.
9. The submitters contend that the proposed amendments will bolster transparency, accountability and the effectiveness of a section 100 intervention when it occurs.

Similar proposals were tabled before the Select Committee on Education and Recreation by the submitters.

10. They also propose the amendment of section 100(2) of the Constitution, which is the section that regulates the role of the NCOP when an intervention has become necessary. Section 100(2) gives the NCOP the power to exercise ongoing oversight during an intervention.²

11. They propose that the following proposal must replace section 100(2):

“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. 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.”*

12. The submitters argue that an amendment to section 100(2) will foster accountability and help the NCOP to fulfil its mandate.

13. The Submitters further propose that section 100(3) of the Constitutions should be amended by replacing the following: *“National legislation may regulate the process established by this section”* with *“National legislation must be enacted to regulate the process established by this section”*.

14. They argue that the necessity of the amendments is borne out by the constitutional obligation on the state to promote, respect, and realise the Bill of

² Section 100(2) states that “ 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 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.

Rights, including the right to basic education. Furthermore, that the state has the constitutional obligation to facilitate co-operative governance and enhance the principle of separation of powers and the amendments would bolster co-operative governance.

LEGAL OPINION

15. The Constitution is the supreme law of the Republic. All law or conduct that is inconsistent with it is invalid, and obligations imposed by it must be fulfilled.³ The Constitutional Court is the final arbiter on all constitutional matters.⁴
16. The Government of the Republic of South Africa is constituted by three spheres:
- (i) national;
 - (ii) provincial; and
 - (iii) local spheres.⁵
17. The aforementioned spheres are distinctive yet interrelated and interdependent. Each sphere has its own area of responsibility; however, there are functional areas of concurrent national and provincial powers. The latter provides for overlaps that are constitutionally sanctioned.⁶
18. The Constitution enjoins the spheres to **not** intrude the powers and functions of another. Despite being distinctive, the Constitution authorises National and Provincial Executives to intervene in Provincial and Local Administration respectively within certain constitutional constraints.⁷
19. Section 100 of the Constitution provides for the preconditions for an intervention by the National Executive in the affairs of the Provincial Executive, however, there must be clearly stated reasons, as to why an intervention is necessary. An intervention cannot be arbitrary.⁸

³ Section 2 of the Constitution of the Republic of South Africa, 1996.

⁴ Section 167(3) of the Constitution of the Republic of South Africa, 1996.

⁵ Chapters 4, 6 and 7 of the Constitution.

⁶ Same as above.

⁷ Section 100 and 139 of the Constitution.

⁸ Section 100 of the Constitution.

20. The National Executive may only intervene when a Province cannot or does not fulfil Executive obligations, which are imposed by the Constitution and or legislation. The National Executive must take appropriate steps to ensure the fulfilment of the obligation. These steps may include:

- (i) issuing directives stating the failure and steps that must be taken to remedy such failure.⁹
- (ii) assuming responsibilities for the relevant obligation in that province to the extent necessary.¹⁰

21. Interventions are provided for in the Constitution, to provide for the peculiar circumstances under which the National Executive may intervene in Provincial affairs. It creates an obligation on the National Executive to intrude on the powers of another under special circumstances. It is common cause that previous interventions, particularly in the sphere of education in the Eastern Cape have not been successful.¹¹

22. Furthermore, it is an established fact that there are no guidelines more than the principle that is stipulated in section 100 of the Constitution to implement interventions and this has caused confusion in the past with regard to roles and responsibilities of state actors.¹² The lack of clarity regarding the scope, powers and procedures of an intervention has led to disputes of exercise of power of an intervention in the Eastern Cape.¹³

⁹ Section 100(1)(a) of the Constitution.

¹⁰ Section 100(1)(b)(i)-(iv) of the Constitution.

¹¹ In March 2011, the National Executive intervened and took over the administration of the Eastern Cape Department of Education in terms of section 100(1)(b) of the Constitution. The National and Provincial Departments signed a memorandum of understanding ("MoU"), regarding the intervention which agreed that the National Minister of Education, bore the legal responsibility to deliver education in the Eastern Cape.

Despite the MoU, there were well reported challenges regarding the roles and responsibilities between the National and Provincial Executives. The matter was brought to Court by *Save our School and Community and the Catholic institute for Education*. This case was settled out of court without bringing the much needed clarity to the implementation of section 100 intervention. The lack of guidelines or regulations regarding the intervention meant that both the National and Provincial departments could claim that they did not have final authority.

¹² Refer to the above footnote.

¹³ Refer to footnote 11.

23. We submit that the lack of guidelines necessitates that the legislation that is envisaged by section 100(3) of the Constitution be enacted.¹⁴ Parliamentary Committees have in the past also noted that legislation is necessary in order to clarify the powers and functions, roles and responsibilities during an intervention.¹⁵
24. We submit with respect that, the submitters have made a compelling case in law, citing practical examples of the challenges with section 100 interventions. In the past, the lack of clarity regarding the powers and functions as well as the scope of the intervention has led to sustained prejudice, for those who are dependent on the state to realise their socio-economic rights. Creating legislation that clearly sets out the powers and functions of state actors during an intervention would improve service delivery and bolster co-operative governance and strengthen the separation of powers.
25. We note that legislation is not the only tool to elaborate the powers and functions, roles and responsibilities; however, it remains one of the most effective mechanisms of setting formalised rules, with detailed consequences in law for failure to perform.
26. The Presidential task team and academics such as Professor Metcalf have supported the idea that enactment of legislation to steer the implementation of section 100 intervention is necessary. *“the proposed legislation will provide for a more intergrated 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 governments failures. The Presidential task team also noted 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.”*

¹⁴ The submitters argue that the provincial executive in the Eastern Cape unilaterally decided that the intervention by the task team would administratively vest in the province and this led to delays in the implementation of the intervention by over 12 months.

¹⁵ NCOP Select committee on Education and Recreation, in an oversight report during an intervention in the Eastern Cape Department of Education.

27. The Portfolio Committee on Basic Education, the Limpopo Presidential Task Team, and the National Council Province's Select Committee on Finance are amongst a number of institutions that have called for the urgent development of legislation dealing with the mechanics of a section 100 intervention.
28. No such legislation has been proposed, regardless of the concessions by various stakeholders, including Parliament. Section 100 currently makes it discretionary to enact this demonstrably crucial piece of legislation that will set out guidelines for implementing interventions. There is a need to make the enactment of the said legislation a constitutional obligation. This will motivate the enactment of legislation as proposed.
29. The second proposal to amend section 100(2) of the Constitution is not supported. The Constitution sets out principles which are elaborated in legislation. We submit that there is no justification in law to amend the current section 100(2) of the Constitution. The proposal to elaborate the oversight role of the NCOP with regard to an intervention may be provided for in legislation.

ADVICE

30. The National intervention as provided for in section 100 of the Constitution is a crucial mechanism to ensure delivery of services and uniformity within the Republic of South Africa. Whilst a section 100 intervention may present an intrusion on the "autonomy" of a province, the purpose of this section is to be interpreted very narrowly, such that it does not empower the National Executive to frivolously interfere with Provinces.¹⁶
31. Enacting legislation would provide the safeguards to prevent the possible abuse of a section 100 intervention on frivolous grounds.
32. Whilst the need for legislation has been noted by Government Institutions, Academics and the Presidential Task Team as far back as 2011, there has been no legislation introduced to cure the unintended mischief in law.

¹⁶ The constitution grants Province specific powers which may not be unjustifiably interfered with, when no proper cause has been established, as the latter would render such an interference unconstitutional.

33. We submit that justifications in law, citing practical challenges, in support of amending section 100(3) of the Constitution, in order to make the enactment of legislation, a constitutional obligation to elaborate roles and responsibilities of all state actors, have been established.
34. The intervention is remedial in nature, as it is intended to assist the Provincial Administration to carry out its obligations in law. Setting out in strong rules such as legislation would be beneficial in making Government more efficiently, within clearly defined rules. We support the amendment of section 100(3) of the Constitution.
35. The above notwithstanding, this matter remains one where the Committee may make a policy decision to revisit section 100 of the Constitution and consider, amongst others, making an enactment of legislation to support interventions mandatory.



Adv Z Adhikarie

Chief Legal Adviser