



EQUAL
EDUCATION
LAW CENTRE

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**EE & EELC SUBMISSION TO THE SELECT
COMMITTEE ON EDUCATION & RECREATION
ON THE SECTION 100(1)(B) INTERVENTION IN THE EASTERN CAPE**

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A. Executive summary

1. On 2 March 2011, National Cabinet approved an intervention into the Eastern Cape Department of Education (ECDoE) in terms of Section 100(1)(b) of the Constitution (“*the Intervention*”). The provincial department was by this time in severe financial distress, related in part to the compensation of employees. In response to the projected overspending, the National School Nutrition Programme (NSNP) and scholar transport programme had been suspended, and over 4000 temporary teaching posts had been terminated. Many schools had not received their textbooks and stationery, and widespread corruption was reported.
2. In May 2011, the Minister of Basic Education, Angie Motshekga, and the Eastern Cape MEC for Education, Mandla Makupula, signed a Memorandum of Understanding (MoU) setting the terms of the intervention. This outlined that while Section 100(1)(b) was in force, the Minister would take on the authority and obligations of the provincial department in seven areas. Some of these areas focused on the immediate stabilisation and improvement of education provision in the province - such as the resumption of essential programmes, and reinstating temporary teachers - while others related to improving financial management and planning, and tackling the administrative issues of the department.
3. Provincial leadership resisted the intervention. The contestation between provincial and national government contributed to a loss of accountability in the department, and its daily running seems to have ground to a halt. The national intervention team was forced to withdraw. In April 2012 the Intervention was reasserted.
4. In terms of Section 100(2), the National Council of Provinces (NCOP) is responsible for oversight of interventions. The NCOP is empowered to disapprove the intervention. Further, section 100(2)(c) of the Constitution obliges the NCOP to “*review the intervention regularly*” and allows it to make “*any appropriate recommendations to the national executive*”.
5. However, since the Intervention began, it has only come before the Select Committee on Education and Recreation on three occasions. The Committee also conducted two oversight visits. There is no evidence of oversight having taken place since September 2013, over two and a half years ago.
6. The current status of the Intervention is unknown. The lack of communication or evidence of the Intervention suggests that there has been a *de facto* withdrawal or downgrade. However, the Minister has never formally withdrawn or downgraded the Intervention, and has recently confirmed that Section 100(1)(b) remains in force.
7. The Intervention has been deeply flawed on a number of levels, and has failed to substantially change the functioning of the ECDoE or the state of education in the Eastern Cape.
8. The educational achievements of the Intervention have been extremely limited. By mid-2011, essential services like scholar transport and school nutrition programmes were resumed, and temporary teachers reinstated.
9. However, throughout the period of the intervention, teaching and learning in the province continued to be undermined by teacher vacancies, non-delivery of textbooks, learners in need not receiving transport, and shocking infrastructure conditions. It is not clear what, if any, further action was taken to improve any of the intervention areas.

10. The Intervention was also conceived in terms of building the capacity of the ECDoE, improving financial management and administration, and strengthening accountability. In this respect it has failed outright. While a few Treasury officials were seconded temporarily to the department, and spending stabilised, the ECDoE still suffers from widespread corruption, vacant technical and leadership posts, thousands of excess teachers and teachers on leave, and a lack of capacity to plan and spend funds effectively, embodied in underspending of the infrastructure budget in a province which arguably faces the worst infrastructure backlogs of anywhere in the country.
11. Unreliable, outdated data has led to reports of both ghost teachers and ghost students, which represent a misallocation of funds desperately needed elsewhere.
12. The Eastern Cape continues to suffer from failures in all areas targeted for intervention, and department officials have repeatedly referred to a state of collapse in the ECDoE. This confirms EE's own experience in the province. EE members in the Eastern Cape have visited or made contact with nearly 200 schools, learning of decrepit and dangerous infrastructure, late transfer of nutrition programme funds, weak or non-existent district support, corruption and a provincial leadership unresponsive to public or civil society engagement.
13. While it is clear that the Intervention has failed to strengthen the ECDoE, it remains an appropriate tool for doing so. The Minister of Basic Education is responsible for the right to education.
14. A Section 100 intervention which focuses on the administration and capacity of the department itself is in line with the principle of co-operative governance. Rather than national government taking over a few functions of the provincial department – an approach which at best will have fleeting results – a renewed intervention should focus on the underlying causes of collapse, departmental reorganisation, and capacity building, which will empower the provincial department to perform its role in future.
15. The NCOP, and particularly the Select Committee on Education and Recreation, is in a position of power regarding the future of the Intervention. Since no notice of withdrawal has ever been tabled with the Council, the Intervention remains in force.
16. This takeover offers the opportunity to finally reallocate human and financial resources appropriately, close essential gaps in oversight, and strengthen the meaningful sharing of power between central and local levels.
17. Therefore, Equal Education (EE) and the Equal Education Law Centre (EELC) recommend that:
 - 17.1. The Select Committee exercise its statutory oversight role and ascertains:
 - The current status of the Intervention.
 - What the Intervention has achieved, and what it has failed to achieve of its stated goals.
 - If the Intervention has been downgraded, on what basis has this happened?
 - 17.2. The Select Committee regularly monitor the implementation of the intervention so as to ensure that it is undertaken in a manner that properly deals with the longstanding and systemic incapacity, corruption and leadership vacuum in the ECDoE.
 - 17.3. The Select Committee recommends to the National Executive that it focus on strengthening the ECDoE itself, rendering it capable of performing its mandate. This should include but not be limited to:

- Investigating, and implementing, the rationalisation and reorganisation of the structure of the ECDoE to provide stronger oversight and support to schools and districts, increased accountability and stronger chains of command.
- Permanently filling key vacant positions in the department, including the Infrastructure Directorate.
- Applying post provisioning norms; firing teachers who are not at work; filling vacant teacher posts.
- Obtaining accurate information and building the capacity to maintain updated information and planning systems, regarding:
 - The number of schools and learners in the province, and learner movement;
 - The infrastructure needs of each school;
 - Teacher vacancies;
 - Scholar transport needs; and
 - Textbook and school furniture needs.
- Investigating and stamping out corruption.
- Facilitating access to information, for example by making all tenders and service provider agreements available on the online e-tender portal, and publishing regular progress reports.

18. In a separate submission to the Constitutional Judicial Review Committee, EE and EELC will be recommending that section 100 of the Constitution be amended so as to assist in ensuring that the failures in the Intervention and aspects of its monitoring are not replicated.

B. Introduction

19. On 27 January 2011, Basic Education Minister Angie Motshekga and a Department of Basic Education (DBE) delegation visited the Eastern Cape. By then the Eastern Cape Department of Education (ECDoE) was already in deep crisis with budget overspending projected to reach R1 975 billion.¹ Reports at the time indicated that the National School Nutrition Programme (providing daily meals to about 1.6 million learners) and scholar transport programme (servicing over 100 000) had been halted as a result. Four thousand two hundred and fifty two temporary teaching posts had also been terminated, and over 1 000 schools did not receive stationery because of irregular procurement.² Corruption was widespread and much of the financial strain on the department came from paying teacher salaries, including payment of ‘excess teachers’ who refused to be redeployed to schools in need, necessitating the employment of replacements. The Auditor-General had given the ECDoE a ‘disclaimer’ audit for the financial year 2009/10, reporting a breakdown of controls in the department that made it susceptible to major fraud.³ The two years previous the ECDoE had also received adverse audit reports based on financial statements being materially misstated and not conforming with Generally Accepted Accounting Principles (GAAP).⁴
20. About a month after Minister Motshekga’s visit, Cabinet approved a national intervention into the ECDoE in terms of Section 100(1)(b) of the Constitution due to the ECDoE’s inability to fulfil its executive obligations.⁵ Under Section 100 the national executive is empowered to take “*any appropriate steps*” to remedy the situation including assuming responsibility for the implicated obligations, which the DBE opted for in this instance.
21. By financial year-end 31 March 2012, only one year post-Intervention, the ECDoE overspent by just under 2% of its budget, although this was partly as a result of under-spending on its infrastructure budget. However, Treasury noted that this stabilisation was likely temporary and related to the

¹ 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

² IOL, EC Schools on Verge of Meltdown, dated 30 January 2011. Accessible at <http://www.iol.co.za/news/south-africa/eastern-cape/ec-schools-on-verge-of-meltdown-1018738>

³ Auditor-General, *General Report on the provincial audit outcomes of the Eastern Cape, 2009-10*, dated December 2010, page 15. Accessible at <http://www.agsa.co.za/Documents/Auditreports/PFMAgeneralreportsprovincial.aspx>

⁴ Auditor-General, *General Report on the provincial audit outcomes of the Eastern Cape, 2008-09*, dated November 2009. Accessible at <http://www.agsa.co.za/Documents/Auditreports/PFMAgeneralreportsprovincial.aspx>

⁵ Section 100 reads in part:

(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.*

deployment of national and provincial Treasury officials to key positions in the provincial department.⁶

22. This 'budgetary balancing act' has not translated into a successful intervention. Six years later massive problems continue to plague the Eastern Cape education system in almost every area that the Intervention was intended to address. These include school nutrition, scholar transport, textbook delivery, the filling of teacher vacancies and school infrastructure development.
23. The precise nature of the Intervention at this stage is uncertain. The DBE has not submitted notice to the NCOP of a downgrade or withdrawal of the Intervention and the last report by the DBE to the Select Committee on Education and Recreation appears to have occurred as far back as September 2013. In fact the DBE's communication in general throughout the Intervention has been extremely vague, irregular and at times contradictory: while Minister Motshekga reiterates that Section 100(1)(b) is still in force, both national and provincial officials have claimed in meetings with EE that it has been lifted or downgraded - albeit without documentary proof
24. EE and EELC's submission provides some insight into the dire challenges existing in the Eastern Cape education system. It sets out, in brief, the history of how the Section 100 Intervention unfolded, including monitoring and oversight processes, and examines the shortcomings of the Intervention. Given that section 100(2)(c) of the Constitution obliges the NCOP to "*review the intervention regularly*" and allows it to make "*any appropriate recommendations to the national executive,*" our submission also makes recommendations regarding the committee's constitutionally mandated oversight role. This includes the need for transparency in implementation of, and reporting on, the Intervention.
25. On several measures, it is clear that the Section 100 Intervention in the Eastern Cape has failed. The Intervention was limited in scope and, while it has not been officially concluded, its practical implementation took place for a short duration. Where changes did occur, they have proven short-lived. Given the dire state of education in the province and the fact that the Intervention has yet to be formally removed, there is an urgent need to:
 - assess the Intervention,
 - extract lessons for improvement, and
 - reinvigorate implementation and oversight processes
26. It is essential that this process occurs as effectively and expeditiously as possible and that the Intervention remains in place for no longer than is absolutely necessary. The existence of an independently functioning provincial government is vital for the proper fulfilment of learners' constitutional rights.

⁶ National Treasury, *Financial Status of Provincial Departments under Administration*, Presentation to Portfolio Committee on Public Service and Administration, dated 6 June 2012. Accessible at <https://pmg.org.za/committee-meeting/14521/>

C. How the Section 100 intervention unfolded in the Eastern Cape

(1) Cabinet decision and MoU

27. On 2 March 2011, Cabinet approved an intervention into the ECDoE in terms of Section 100(1)(b) of the Constitution. At an early stage, the DBE identified two broad objectives: immediate stabilisation of the education system (conceived in terms of financial over-expenditure and the non-delivery or suspension of various essential programmes), and solving the administrative, management and structural issues faced by the ECDoE over the long-term.⁷
28. On 31 May 2011, a Memorandum of Understanding (MoU) was signed by the Minister of Basic Education and the Eastern Cape MEC for Education, Mandla Makupula, to outline the scope of the Intervention, and the respective powers and responsibilities of the national and provincial departments of education. This was partly in response to the absence of national legislation surrounding the implementation of Section 100, which is envisaged by Section 100(3) of the Constitution.
29. The MoU began by stating that the province had not been meeting its obligations to deliver school education.⁸ Article 3 of the MoU identified seven areas of intervention:
- Personnel and provisioning budget, particularly post-provisioning norms and compensation of employees;
 - Textbook and stationery procurement and delivery;
 - Scholar transport provision and management;
 - The National School Nutrition Programme (NSNP) implementation and management;
 - School infrastructure development;
 - Improving systems and operations around planning, accountability, supply chain management and human resource capacity; and
 - *“all other auxiliary services necessary for the provisioning and delivery of quality education.”*⁹
30. As a Cabinet member, the Minister was *“mandated to take over all the statutory obligations and functions conferred on the Provincial Authorities in terms of the Constitution, education legislation and other relevant laws,”*¹⁰ as they related to the designated areas of intervention. Within these areas, the Minister was to *“withdraw and reallocate all administrative delegations”*, while the roles of the MEC and the HOD would be to provide support to the Minister with implementation of the mandates.¹¹

⁷ Briefing to Select Committee on Education and Recreation, *Department of Basic Education on Notice of intervention into Eastern Cape Department of Education in terms of Section 100 of the Constitution*, dated 22 March 2011. Accessible at <https://pmg.org.za/committee-meeting/12797/>

⁸ Memorandum of Understanding between the National Government (represented by the Minister of Basic Education) and the Eastern Cape Provincial Government (represented by the Eastern Cape MEC for Education) concluded on 31 May 2011.

⁹ Above note 8 at Article 3.

¹⁰ Above note 8 at Article 2.4.

¹¹ Above note 8 at Articles 2.6 – 2.9.

The new roles would be outlined in supporting documents, including an Implementation Framework and Operational Plan.

31. The MoU also committed the Minister of Basic Education to table implementation progress reports in the NCOP on “*at least ... a quarterly basis*”, in line with its statutory oversight role.¹² Subject to the oversight role of the NCOP, the intervention would last for three years.¹³

(2) Provincial resistance, national withdrawal

32. Soon after the MoU was signed, Mathanzima Mveli was appointed as the National Intervention Coordinator, meaning that the Minister had officially delegated responsibility for the Intervention to Mveli. This involved authority over the province’s functioning which would otherwise have been vested in the MEC. However, the ECDoE had apparently raised issues with the MoU, or its interpretation, and there was resistance to the loss of authority by provincial leadership.¹⁴ President Zuma subsequently made an ‘education monitoring visit’ to the Eastern Cape, partly as an attempt to resolve differences between the national and provincial departments.
33. On 7 June 2011 the President set up a task team made up of five Ministers to support the Intervention.¹⁵ One issue that the provincial leadership raised was that the Intervention was having a negative effect on the day-to-day running of the ECDoE, removing any sense of accountability.
34. At an Eastern Cape executive council meeting on 28 June 2011, the MEC for Education claimed: “*administration in the department was grinding to a halt since some officials were not cooperating on the grounds that the department was subject to S100 Intervention and by implication the Province has no authority to make decisions.*”¹⁶ The provincial Cabinet determined that until the issues arising from the MoU were resolved by the national task team, the administrative delegations would remain vested in the province.
35. Following an oversight visit from 16 to 19 August 2011, the Select Committee on Education and Recreation (hereafter referred to as the Select Committee) reported that staff and the public had been left confused by the intervention:

¹² Above note 8 at Article 8.4.

¹³ Above note 8 at Article 9.2.

¹⁴ *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>

¹⁵ Above note 14 at para 49.

¹⁶ 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>

“An announcement was made to senior management and at a press conference that the powers of the Head of Department were taken away and that created a number of administrative and management problems. Following these announcements, certain senior managers did not cooperate with various processes which were under way prior to the intervention. These included amongst others: lower levels of cooperation with the Auditor General, including non-attendance of Audit Meetings; the department was unable to submit its Annual Report to the Auditor General on time as the responsible manager believed he no longer had to report and account to the head of department and despite repeated requests he refused to submit the report; certain staff members saw an opportunity to take advantage of the intervention to escape the disciplinary processes which were under way long before the intervention. It was further noted that a practice emerged where certain staff wrote directly to the Minister contrary to the disciplinary code and procedure. A number of disciplinary hearings were delayed as the affected employees wrote to the Minister seeking her decision to set aside the disciplinary hearings.”¹⁷

36. Further, there was anger at the prospect of the ECDoE being expected to cover the cost of decisions made by the national intervention team, seemingly as a result of restoring teaching and learning or other programmes. At the oversight visit, the HOD told the Select Committee that the Coordinator of the Intervention team (Mweli) had committed the ECDoE to a projected additional expenditure of R702 million by settling a legal case against the department around the filling of teacher posts *“without the requisite authority.”*¹⁸ The province was also concerned that *“despite the DBE having sought to specify the terms of the intervention, it appeared that the intention was basically to take over the entire administration of the Department.”*¹⁹
37. During the same oversight visit, the Intervention team Coordinator told the Select Committee of the systemic issues faced by the ECDoE, including a *“strategic leadership vacuum”*, *“a culture of entitlement as opposed to hard work”*, *“a high turnover of political and administrative leadership”*, as well as a poor organisational structure which provided only weak support to schools and weak internal financial controls.²⁰
38. At this stage the Select Committee found that the main obstacle was *“the tug-of-war between the head of the task team and the HOD.”*²¹ It further recommended that the intervention proceed according to the principles of collaborative governance. By September 2011, the DBE made reference to *“tensions already at breaking point.”* They claimed *“the relentless alleged abuse of power, intimidation and harassment meted against senior managers and staff of the [ECDoE] by the [HOD] of that department, added to the litany of obstacles.”*²²

¹⁷ 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>

¹⁸ Above note 17 at Item 3.3.

¹⁹ Above note 17 at Item 3.3.

²⁰ Above note 17 at Item 4.

²¹ Above note 17 at Item 15.1.

²² Minister of Basic Education, Reply to National Assembly Question 2607, Dated 9 September 2011. Accessible at https://pmg.org.za/question_reply/273/

39. This provincial resistance seems to have been, at least in the short term, effective. On 14 September 2011, the President issued a press statement which stated that implementation of the Intervention would be the responsibility of the provincial government, while the DBE would monitor and support.²³ This ran counter to both Section 100(1)(b), and the MoU, which stated that the Minister assumed responsibility for the obligations in question. Around this time, a document titled “*Service Delivery Areas Which Need Urgent Attention*” was filed in court by the HOD as evidence that national and provincial government had agreed that the ECDoE would implement the key service delivery objectives under the Intervention, while national government would supervise, monitor and assist.
40. Areas previously described as under national Cabinet responsibility now shifted to the Eastern Cape MEC and Eastern Cape Premier. The only area to remain with the National Executive was school infrastructure development.²⁴ A report from 27 October 2011 indicated that the Intervention Team Coordinator had been withdrawn, and control handed back to the province.²⁵ Despite this, the DBE told Parliament in September 2011 that “*The Intervention Team ... have completed the diagnostic analysis and the scoping exercise, and have drafted a detailed Implementation Plan, and submitted it to the Minister of Basic Education for consideration.*”²⁶
41. Nevertheless, 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.*”²⁷ This presumably refers to the task team established by President Zuma and composed of various Cabinet ministers. When a court ordered both the Minister and MEC to proceed with post provisioning in February 2012, the Minister issued a statement that power to do so was now held by the HOD.²⁸

²³ The Presidency, *President Zuma upbeat at Eastern Cape Education Progress*, dated 14 September 2011. Accessible at <http://www.presidency.gov.za/pebble.asp?relid=4855>

²⁴ *Service Delivery Areas Which Need Urgent Attention*, filed in Case No 520/11. Included as Annexure 12 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>

²⁵ Daily Dispatch, ‘*EC teacher posts to be filled*’, dated 27 October 2011. Included as Annexure 13 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>

²⁶ 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/

²⁷ 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/>

²⁸ Above note 14 at para 67.

(3) SADTU challenge, renewed intervention

42. However, the HOD's attempts to proceed with post provisioning invoked the ire of SADTU who launched a number of court cases in this regard. One case sought to halt post provisioning on the grounds that under Section 100(1)(b), the province did not have authority to do this.²⁹ SADTU teachers engaged in a 'go slow' in early 2012, demanding the HODs dismissal, claiming he had lost authority to run the province due to Section 100(1)(b).³⁰
43. In response to this confusion, the Eastern Cape-based organisation Save Our Schools and Community, and the Catholic Institute of Education, brought a case to clarify whether national government was fully implementing the takeover, and asked that the Intervention either be fully implemented or withdrawn to allow the province to run its own affairs. The court found that the Intervention remained in operation and that the National Executive should continue to implement the intervention.³¹
44. On 18 April 2012 Cabinet reaffirmed the Intervention. The HOD stepped down soon afterwards, which further facilitated the proceeding of the Intervention.³² The focus at this point was primarily financial management and stability, as well as organisational capacity, rather than on the provision of education services.³³ Implementation plans had been developed but permanent working arrangements were still unclear.³⁴ There was also an attempt to limit or reduce the amount spent on teacher salaries, the plan for which included adherence to post provisioning norms, an audit of the payroll and developing an anti-corruption policy. Both Treasury and the Department of Public Service and Administration (DPSA) played a role. National and provincial Treasury officials were deployed to key positions in the ECDoE, including Chief Financial Officer (CFO), and to support areas including supply chain management, risk and internal control, and internal audits.³⁵
45. Despite the removal of the HOD, the DPSA noted that "*there appears to be a measure of resistance by many staff members to the intervention activities.*" Incorporating provincial staff towards a

²⁹ Above note 14 at para 69.

³⁰ Above note 14 at paras 68-73.

³¹ *Save our Schools and Community and Another v President of the Republic of South Africa and Others*, Case no 50/12, Final Court Order of Justice Pickering, at para A2 and B1. Accessible at <http://www.lrc.org.za/judgements-texts/court-papers/alphaindex/s>.

³² Department of Basic Education, *Minister Angie Motshekga on Advocate Modidima Manny's resignation*, Press statement dated 23 April 2012. Accessible at <http://www.gov.za/minister-angie-motshekga-advocate-modidima-mannya-resignation>

³³ 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

³⁴ Above note 33.

³⁵ National Treasury, *Financial Status of Provincial Departments under Administration*, Presentation to Portfolio Committee on Public Service and Administration, dated 6 June 2012. Accessible at <https://pmg.org.za/committee-meeting/14521/>

handover and withdrawal had “*proven to be slow*”. This “*bodes major challenges towards sustainability beyond the intervention*.”³⁶

46. By April 2013, a year after the reaffirmation of Section 100(1)(b), the Minister stated that the Intervention had yielded encouraging results and that she thought it could be downgraded to Section 100(1)(a). However, this required Cabinet approval and for the time being the Eastern Cape remained under national authority.³⁷ It was further stated that the downgrade may involve national government focusing only on finance and educator appointments, although these seem to have already been the key intervention areas for some time.³⁸ The positions of HOD and CFO had now been filled, and the budget stabilised.
47. In May 2013 the Minister stated: “*We are considering steps towards a carefully planned handover to the [ECDoE], but we will definitely have to come through the NCOP to give members a full report.*”³⁹ Responding to a question in the National Assembly, the Minister replied in August 2013 that no decision had yet been made to downgrade the Intervention. However, a month later she stated “*We are finalising our exit programme with them and we do hope that in good time, again through the committee, we will be announcing the exact date as to when we are leaving the Eastern Cape.*”⁴⁰
48. Nonetheless, in March 2014 the MEC for Education in the Eastern Cape told the Portfolio Committee on Basic Education that the Section 100 team was permanently stationed in the province.⁴¹ In August 2014 the Minister reiterated that the DBE was assessing its progress in the Eastern Cape.⁴² In her budget vote speech this month, the Minister again stated that the Eastern Cape Department of Education was under a section 100(1)(b) intervention and acknowledged that stabilisation was yet to be achieved.⁴³

³⁶ Above note 33.

³⁷ Department of Basic Education, *Eastern Cape Education is still under Section 100(1)(b)*, dated 10 April 2013. Accessible at <http://www.gov.za/eastern-cape-education-still-under-section-100-1-b>

³⁸ <http://digitalclassroom.co.za/digitalclassroom/latestnews/news2013/315basiceducationreportsprogressintheeasterncape> dated 12 April 2013

³⁹ NCOP Debate on Appropriations Bill, dated 16 May 2013. Accessible at <https://pmg.org.za/hansard/18359/>

⁴⁰ Department of Basic Education, *Reply to NA question 243*, Reply received 11 September 2013. Accessible at <https://pmg.org.za/hansard/18414/>

⁴¹ Portfolio Committee on Basic Education, *Report of the Portfolio Committee on Basic Education on an oversight visit to the Eastern Cape*, dated 11 March 2014. Accessible at <https://pmg.org.za/taled-committee-report/1996/>

⁴² Department of Basic Education, *Reply to NA Question 638*, reply received August 2014. Accessible at https://pmg.org.za/question_reply/515/

⁴³ 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>

(D) Monitoring and oversight of the Intervention

49. Section 100(2) of the Constitution describes the oversight requirements of a Section 100(1)(b) intervention. This is the responsibility of the NCOP. Section 100(2) states:

(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 may make any appropriate recommendations to the national executive.

50. The Minister tabled notice of the Intervention with the NCOP on 15 March 2011. The Intervention was unanimously approved by the NCOP.⁴⁴

51. The MoU signed by the Minister and MEC, provided that:

“The Minister shall table, at least on a quarterly basis, reports to inform the NCOP about the developments and progress made in the implementation of the section 100(1)(b) intervention in the Eastern Cape Education Department.”⁴⁵

52. Neither these reports, nor reference to them in relevant NCOP or Committee meeting minutes, can be found on government websites or other publicly available repositories. However, since the commencement of the Intervention, the Select Committee took on much of the monitoring and oversight on behalf of the broader NCOP. Between 22 March 2011 and 11 September 2013, it 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 (2011 and 2012).

53. The Select Committee was generally supportive of the Intervention. Following a DBE presentation on 15 February 2012, the Committee Chairperson, Ms Makgate, praised the department for the progress it had achieved so far and assured it of the support of the Committee to “turn around” the ECDoE.⁴⁶ This came at a time when the DBE had largely surrendered authority back to the province. Despite a tendency towards overstatement of the Intervention’s achievements and downplaying

⁴⁴Above note 8 at Article 2.3.

⁴⁵Above note 8 Article 8.4.

⁴⁶Select Committee on Education and Recreation, *Ministerial and Departmental Briefings on Interventions in the ECDoE*, dated 15 February 2012. Accessible at <https://pmg.org.za/committee-meeting/13933/>

challenges, the presentations remain a useful source of information that would not otherwise have been publicly accessible.

54. The Select Committee's visits to the Eastern Cape were more revealing, as they involved meeting national and provincial government representatives, stakeholders and unions. The Select Committee also conducted site visits. The Select Committee visited from 16 to 19 August 2011, at the height of the contestation between national and provincial government over the Intervention. While supportive of the need for the Intervention, the Committee highlighted that it had led to a great deal of confusion for staff and the public, and placed the blame on *"the tug-of-war between the head of the task team and the HOD."*⁴⁷
55. The Select Committee recommended that the DBE and ECDoE proceed in the spirit of co-operative governance and mutual collaboration. It further requested that both departments provide the NCOP with a comprehensive problem analysis, final intervention plan, details of the administrative functions taken over, and details of the delegations of powers, amongst other wide-ranging findings. We were unable to ascertain whether these recommendations were followed. Site visits by the Select Committee to four schools placed on record some of the appalling conditions: massive infrastructure backlogs, including poor or no sanitation, damaged structures and insufficient classrooms, teacher vacancies and many learners still in need of scholar transport. School nutrition programmes did, however, appear functional.⁴⁸
56. The last time the Intervention was scrutinised by the Select Committee was as far back as 11 September 2013, more than two and a half years ago. 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 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."*⁴⁹
57. The Select Committee resolved *"in [the] future to strengthen oversight, particularly of provinces which are unstable."*⁵⁰ 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.

⁴⁷ Above note 17 at Item 15.17.

⁴⁸ Above note 17.

⁴⁹ 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/>

⁵⁰ Above note 49.

(E) Current Status of the Intervention

58. The current status of the Intervention is unclear, with contradictory statements from different officials. DBE communication surrounding this has been extremely limited. 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 current focus, or future plans.
59. 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).⁵¹ No notice to withdraw has been tabled for approval in the NCOP.
60. 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.
61. 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.”⁵² In May 2016, the Minister again stated that the ECDoE was under a section 100(1)(b) intervention.⁵³

⁵¹ 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/>

⁵² 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>

⁵³ 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>

(F) State of Education in the Eastern Cape during and Post-Intervention

62. The education crisis in the Eastern Cape was precipitated by budget overspending; in response, essential programmes were suspended towards the end of the financial year. The intervention aimed for an immediate stabilisation of the ECDoE, by restoring services including school nutrition and scholar transport, reinstating temporary teachers, and ensuring the delivery of textbooks and stationery (LTSM). However, examination of the specific actions taken to improve provision of education in the Eastern Cape reveals severe limitations in what was achieved, and little sign of progress once essential services were resumed.

Administration of the provincial department

63. 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.⁵⁴

School Infrastructure

64. This description 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 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.
65. 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.

66. 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

⁵⁴ 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/>

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.⁵⁵

Scholar transport

67. Having exhausted its budget for that financial year by August 2010, the scholar transport programme resumed in July 2011.⁵⁶ Responsibility for this had been transferred to the provincial Department of Transport, although the ECDoE retained responsibility for verifying routes and learner numbers.⁵⁷
68. While around 110 000 learners were being transported in late 2010, the “verified number of learners” transported was only 53 000 by August 2011.⁵⁸ A later report put the number at 56 461.⁵⁹ This suggests either that a massive number of needy learners had been left out, or that the programme had been massively abused – or a combination of the two.
69. The new conditions for receiving scholar transport assistance are onerous and appear to have been designed to drastically reduce the number of learners who qualify, in order to reduce budgetary strain.
70. Scholar transport did not run smoothly. While merely anecdotal, both of the schools visited by the Select Committee on Education and Recreation during their oversight visit in March 2012 still suffered from learners in need not being provided with scholar transport.⁶⁰ Other reports were made of unpaid scholar transport providers.⁶¹ These continued: in March 2013 a member of the NCOP stated that the Eastern Cape had “scholar transport that is not functional throughout the province.”⁶²

⁵⁵ Government Gazette no. 39787 dated 7 March 2016. Accessible at http://www.gov.za/sites/www.gov.za/files/39787_gon227.pdf

⁵⁶ Parliament of the Republic of South Africa, *Eastern Cape Schools Revival*, Press Statement dated 16 April 2012. Accessible at http://www.parliament.gov.za/live/contentpopup.php?Item_ID=2095&Category_ID=

⁵⁷ Select Committee on Education and Recreation, *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, At item 3.2.3. Accessible at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110824sceducreport.htm>

⁵⁸ Select Committee on Education and Recreation, *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, At item 3.2.3. Accessible at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110824sceducreport.htm>

⁵⁹ Parliament of the Republic of South Africa, *Eastern Cape Schools Revival*, Press Statement dated 16 April 2012. Accessible at http://www.parliament.gov.za/live/contentpopup.php?Item_ID=2095&Category_ID=

⁶⁰ Select Committee on Education and Recreation, *Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape from 13-16 March 2012, following the Intervention by the National Department of Basic Education*. Tabled 8 August 2012. Accessible at <https://pmg.org.za/taled-committee-report/533/>

⁶¹ City Press, *Motshekga takes full control of Eastern Cape Education*, dated 25 April 2012. Accessible at <http://www.news24.com/Archives/City-Press/Motshekga-takes-full-control-of-Eastern-Cape-education-20150430>

⁶² Van Lingen, EC. *Unrevised Hansard of the National Council of Provinces*, 5 March 2013. Accessible at <https://pmg.org.za/hansard/18379/>

71. 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 transporting just six learners.⁶³ Meanwhile over 46 000 pupils are eligible for scholar transport in the 2016 academic year but do not receive it, resulting in learners forced to walk lengthy distances to and from school.⁶⁴

Textbooks

72. Former HOD Modidima Manny claimed that by August 2011, stationery had been delivered to all Section 20 schools.⁶⁵ Procurement of textbooks for both Section 20 and Section 21 schools was to be done centrally. However, the same issue of LTSM non-delivery reared its head when schools opened in 2012. The Minister confirmed reports of both Section 20 and Section 21 schools having not received their LTSM at this time.⁶⁶

73. 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.⁶⁷

Teacher vacancies

74. National Intervention Coordinator Mwelil had, by August 2011, settled a court case regarding the filling of teaching posts.⁶⁸ In response to a question in the National Assembly, the Minister of Basic

⁶³ 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

⁶⁴ 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.dabisho.org.za/wp-content/uploads/2016/04/Reply-to-question-19-IQP-2-of-2016.pdf>

⁶⁵ Select Committee on Education and Recreation, *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, At item 3.2.4. Accessible at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110824sceducreport.htm>

⁶⁶ Minister of Basic Education, *Reply to National Assembly Question 208, 17 February 2012*. Reply received July 2012. Accessible at https://pmg.org.za/question_reply/395/

⁶⁷ 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/>

⁶⁸ Select Committee on Education and Recreation, *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, At item 3.3. Accessible at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110824sceducreport.htm>

Education stated on 9 September 2011 that over 4 000 temporary teachers had been re-employed, “though this was done through a High Court order.”⁶⁹

75. Teacher vacancies continued, however. In February 2012 a case was brought, resulting in a court ordering the Minister and MEC to comply with post provisioning norms.⁷⁰ In March 2013 it was stated in the NCOP that the Eastern Cape had 8 300 teacher vacancies.⁷¹
76. According to media reports of this year, the education system is short several thousand teachers and over 300 schools still have no principal.

School Nutrition Programme

77. 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

78. 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 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 1989.

Unreliable data leading to poor planning and resource wastage

79. 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.⁷²

⁶⁹ Minister of Basic Education, *Reply to National Assembly Question 2607*, dated 9 September 2011. Accessible at https://pmg.org.za/question_reply/273/

⁷⁰ *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 67. Accessible at <http://www.lrc.org.za/judgements-texts/court-papers/alphaindex/s>

⁷¹ Van Lingem, EC. *Unrevised Hansard of the National Council of Provinces*, 5 March 2013. Accessible at <https://pmg.org.za/hansard/18379/>

⁷² 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/>

(G) Shortcomings of the Intervention

(1) Legislative vacuum

80. The Intervention suffered from a great deal of confusion, contestation, and resistance. This was enabled in part by a legislative vacuum around, and within, Section 100 of the Constitution.
81. Section 100(2) states that the NCOP must “*review the intervention regularly*”, but does not state what period of time counts as regular review, nor what the review must entail. Section 195 of the Constitution provides that public power must be exercised diligently and in a manner promoting accountability. These principles inform the oversight duties set out in section 100(2) of the Constitution and require effective, regular and meaningful oversight.
82. Section 100(3) of the Constitution provides that “*National legislation may regulate the process established by this section.*” No such legislation exists. The State has contemplated for some time the need for legislation to more clearly define and describe the processes and roles involved in a Section 100 intervention. In February 2011, the Department of Co-operative Governance and Traditional Affairs (CoGTA) briefed the Select Committee on CoGTA on the status of a Bill which would meet this need, called the Intergovernmental Monitoring, Support, and Intervention (IMSI) Bill. The committee was told that the Bill had been referred to the office of the Chief State Law Advisor for an opinion on its constitutionality. The department intended to submit the Bill to Cabinet by May 2011 and then to “*Parliamentary Process*” two months later.⁷³
83. However, this did not happen. Sporadic reference has been made to the Bill since; in President Zuma’s State of the Nation Address in February 2015, he stated that the Intergovernmental Monitoring, Support and Interventions (IMSI) Bill 2013 would be making its way to Parliament.⁷⁴ To date legislation on the implementation of a Section 100 intervention is yet to be enacted. In fact the Bill is yet to be gazetted.
84. Regulatory clarity is much needed if interventions are to prove effective. However, the absence thereof does not disempower the Intervention in the ECDoE, nor does it excuse abuse of power or dereliction of duty.

⁷³ 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

⁷⁴ Statement issued by the Presidency, *SONA 2015 Legislation to Come Before Parliament*, dated 15 February 2015. Accessible at: <http://www.thepresidency.gov.za/pebble.asp?relid=19039>

(2) National-provincial contestation

85. As described in *Section C*, the Intervention has been characterised by contestations between provincial and national spheres of government regarding who holds final authority for decisions in the province. This contributed to confusion for staff and the public, as well as inertia and loss of accountability as the weak chains of command that did exist were rendered even more tenuous.
86. While the removal of the HOD in 2012 allowed for a fuller intervention, the resistance of ordinary provincial officials continued and limited its effectiveness. This local-level resistance is indicative of the difficulty of achieving systemic change in the Eastern Cape. However, this is precisely the reason that the Intervention must focus on organisational renewal; this can only be rooted out with stronger lines of accountability and oversight.

(3) Limited information, limited action

87. Access to information around the details of the Intervention, its ongoing status, achievements and challenges has been extremely limited.
88. While the Intervention has been in force for five years now, the Intervention seems to have been severely limited since at least September 2013. As the preceding discussion on the state of education in the Eastern Cape shows, the Intervention has not succeeded in eliminating the widespread failures of the ECDoE regarding school infrastructure, scholar transport, textbook provision, teacher vacancies, and school nutrition programmes.

(4) Insufficient organisational reform and capacity building

89. The DBE recognised the need to build capacity in the Eastern Cape. From the outset, a second phase of the intervention was contemplated to tackle administrative and structural issues, including systemic planning, accountability, supply chain management and human resources capacity. To this end the Treasury and Department of Public Service and Administration (DPSA) were brought in as well. A DPSA presentation in June 2012 revealed a focus on financial management and stability, organisational capacity and data integrity.⁷⁵ There were plans to audit the payroll to remove ghost teachers and those not at work, develop an anti-corruption policy, and adhere to post provisioning norms. As mentioned earlier, national and provincial Treasury officials were deployed to key positions in the ECDoE, including CFO, and to support areas including supply chain management, risk and internal control, and internal audits.⁷⁶

⁷⁵ 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

⁷⁶ National Treasury, *Financial Status of Provincial Departments under Administration*, Presentation to Portfolio Committee on Public Service and Administration, dated 6 June 2012. Accessible at <https://pmg.org.za/committee-meeting/14521/>

90. The rhetoric of cleaning up and capacity building obscured what was actually achieved. Post provisioning norms were not complied with. The payroll audit and removal of ghost and non-working teachers did not occur.
91. The system's health seems largely to have been assessed in terms of a stable budget, and improved audit scores. At financial year-end on 31 March 2012, the ECDoE overspent by just under 2% of its budget.⁷⁷ The DBE reported that the ECDoE had improved financial management to the extent of receiving a qualified audit opinion rather than a disclaimer, and that most critical technical posts had been filled.⁷⁸
92. The improvement in financial management was likely due to the Treasury officials seconded to the ECDoE. This was not a long-term programme, though, nor did the officials join the department permanently. As such, Treasury noted that the stabilisation was likely temporary. At the time, the DPSA stated that incorporating provincial staff towards a handover and withdrawal had "*proven to be slow*". This warned of "*major challenges towards sustainability beyond the intervention.*"⁷⁹
93. While a stable budget is important, it is limited as an indicator of the systemic health of the ECDoE, and in fact often conceals problems when viewed in isolation. For instance, the balanced budget included two cases where there were large disparities between expenditure and budgeted amount. Teacher salaries still ran well over budget. This was counterbalanced by underspending on infrastructure.⁸⁰
94. The balanced budget thus indicates that (i) teacher post provisioning and vacant teaching posts remains unsolved, and (ii) the department still lacked capacity to plan and spend its funding efficiently, slowing progress on eliminating infrastructure backlogs and likely affecting other areas of the department's business.
95. The Intervention did not result in lasting organisational renewal or capacity growth. On 16 May 2013, Minister Motshekga stated that "in terms of schools in the Eastern Cape and Limpopo, in the respect of these provinces, we think that much has been delivered in those areas giving rise to Section

⁷⁷ National Treasury, *Financial Status of Provincial Departments under Administration*, Presentation to Portfolio Committee on Public Service and Administration, dated 6 June 2012. Accessible at <https://pmg.org.za/committee-meeting/14521/>

⁷⁸ Department of Basic Education, *Section 100(1)(b) interventions in Limpopo and Eastern Cape: Minister & Department of Basic Education progress reports*, presentation to Select Committee on Education and Recreation, dated 11 September 2013. Accessible at <https://pmg.org.za/committee-meeting/16343/>

⁷⁹ Above note 33.

⁸⁰ National Treasury, *Financial Status of Provincial Departments under Administration*, Presentation to Portfolio Committee on Public Service and Administration, dated 6 June 2012. Accessible at <https://pmg.org.za/committee-meeting/14521/>

100(1)(b).⁸¹ Just a day later, however, ECDoE HOD Mthunywa Ngonzo referred to a state of collapse in his department.⁸²

⁸¹ NCOP Debate on Appropriations Bill, dated 16 May 2013. Accessible at <https://pmg.org.za/hansard/18359/>

⁸² Daily Dispatch, *Ngonzo describes education collapse*, dated 17 May 2013. Accessible at <http://www.dispatchlive.co.za/news/ngonzo-describes-education-collapse/>

(H) What could an effective intervention look like?

96. Section 100 provides a key bulwark against a failing provincial department, by setting out a legal means for the national government to step in and shore up executive obligations which are largely provincial competencies.
97. The NCOP, and particularly the Select Committee on Education and Recreation, is empowered to play a critical role regarding the future of the Intervention.
98. In the case of the Limpopo intervention, Cabinet sought approval from the NCOP for the downgrade from Section 100(1)(b) to 100(1)(a). The Select Committee on Finance tabled a report in the NCOP which recommended the downgrade.⁸³ That recommendation was endorsed following a debate within the Council, after which each provincial delegation voted for or against its termination.⁸⁴
99. The NCOP therefore may, if it properly exercises its oversight role in a regular and engaging manner, be able to prolong an intervention, promote a more effective process, and recommend appropriate terms of reference. It must use its power to do so.
100. Provincial authority is conceived in terms of the principles of co-operative governance. The State legal opinion on the Draft Implementation Protocol for the Eastern Cape intervention noted that: *“the provinces form part of a separate sphere of government whose powers and functions must be respected.”*⁸⁵ Section 100 interventions are expected to be exceptional and urgent measures, but ones which should nonetheless be made in this spirit.
101. The principles of co-operative governance are complementary to a national intervention that aims to build capacity within the provincial department. If an intervention is to be (i) an exceptional (rather than a regularly recurring) measure and (ii) conducted in the spirit of co-operative governance, it must include more than the short-term fulfilment of provincial obligations by national government. Gains achieved through this will be fleeting at best as they will not have attended to underlying structural weaknesses that caused the department’s failure in the first place. These failures would likely recur, necessitating a further intervention. Instead, the intervention should aim to renew and restore the provincial department to a position of capacity, empowering rather than disempowering it, so that it need not require further national administration in the future.

⁸³ Select Committee on Finance, *Report of the Select Committee on Finance on 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 11 November 2014, accessible at <https://pmg.org.za/tailed-committee-report/2228/>

⁸⁴ 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/>

⁸⁵ Office of the Chief State Law Adviser, *“Draft Implementation Protocol (version 3A) on Section 100(1)(b) intervention to be implemented in the Eastern Cape Department of Education, dated 11 April 2011, at page 6.*

102. It is clear from the preceding discussion in *Section F* that the Intervention has not resulted in substantial improvements in the provision of education in the Eastern Cape. However, given the extent of the department's structural weakness, it remains an appropriate instrument for a turnaround. The DBE has stated that the Intervention is still in force and, in the absence of notification of withdrawal, is still directly responsible for the provincial obligations it took over. It is not clear, given the ongoing crisis in delivering quality education in the province, why the Intervention would have been downscaled (in practice if not in form).
103. The NCOP must take advantage of this opportunity to exercise its statutory oversight role, and ensure that the DBE strengthens the ECDoE's bureaucracy as a whole, rather than simply shore up individual functions or offices. Though there have been some meaningful improvements over the last two decades, by all accounts the department largely remains an ad-hoc amalgamation of former-Ciskei and -Transkei structures.
104. As a result, functions are often duplicated while others see vacant top leadership posts for months on end; districts have grossly unequal amounts of power and receive varying levels of departmental support; transformative plans are repeatedly drawn with few to no accountability measures in place to ensure their completion; and schools constantly engage in power struggles with district and provincial leadership with little hope of redress.
105. Central to several of these challenges is the hiring of permanent, principled leadership. In the past two decades, there have been 15 HODs, six MECs and several CFOs. "Acting" positions have become the rule rather than the exception. Epitomising this phenomenon, this year's Annual Performance Plan is signed off by an Acting Deputy General, an Acting Chief Financial Officer, and Acting Superintendent-General (who is also an Accounting Officer) and the Member of the Executive Council. If the Eastern Cape is to have any hope of turning around the current education crisis, new and lasting leadership will be key.
106. Following the Premier's calls for a fresh start, this takeover offers the opportunity to finally reallocate human and financial resources appropriately, close essential gaps in oversight, and solidify the share of power between central and local levels.
107. The continuation of the Intervention must be accompanied by a greater, and more regular, degree of oversight than has thus far been exercised by the NCOP.

(I) Key recommendations

108. Therefore, Equal Education (EE) and the Equal Education Law Centre (EELC) recommend that:
- 108.1. The Select Committee exercise its statutory oversight role and ascertains:
- The current status of the Intervention.
 - What the Intervention has achieved, and what it has failed to achieve of its stated goals.
 - If the Intervention has been downgraded, on what basis has this happened?
- 108.2. The Select Committee regularly monitor the implementation of the intervention so as to ensure that it is undertaken in a manner that properly deals with the longstanding and systemic incapacity, corruption and leadership vacuum in the ECDoE.
- 108.3. The Select Committee recommends to the National Executive that it focus on strengthening the ECDoE itself, rendering it capable of performing its mandate. This should include but not be limited to:
- Investigating, and implementing, the rationalisation and reorganisation of the structure of the ECDoE to provide stronger oversight and support to schools and districts, increased accountability and stronger chains of command.
 - Permanently filling key vacant positions in the department, including the Infrastructure Directorate.
 - Applying post provisioning norms; firing teachers who are not at work; filling vacant teacher posts.
 - Obtaining accurate information and building the capacity to maintain updated information and planning systems, regarding:
 - The number of schools and learners in the province, and learner movement;
 - The infrastructure needs of each school;
 - Teacher vacancies;
 - Scholar transport needs; and
 - Textbook and school furniture needs.
 - Investigating and stamping out corruption.
 - Facilitating access to information, for example by making all tenders and service provider agreements available on the online e-tender portal, and publishing regular progress reports.
109. In a separate submission to the Constitutional Judicial Review Committee, EE and EELC will be recommending that section 100 of the Constitution be amended so as to assist in ensuring that the failures in the Intervention and aspects of its monitoring are not replicated.