

RABS
2017-6



THE ASSOCIATION FOR THE PROTECTION OF ROAD ACCIDENT VICTIMS

A VOLUNTARY ASSOCIATION NOT FOR GAIN INCORPORATED IN TERMS OF THE COMMON LAW

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The Chairperson

The Portfolio Committee on Transport
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Attention of Me Valerie Carelse (submitted via email: vcarelse@parliament.gov.za)

30 November 2017

FURTHER COMMENT ON THE RABS BILL

1. Introduction

- a. The Association for the Protection of Road Accident Victims ("APRAV") was established in June 2014 by concerned parties responding to the Road Accident Benefit Scheme Bill ("RABS"), published by the Department of Transport on 9 May 2014 (See www.aprav.co.za).
- b. Our submission to the Department, dated 05 October 2014; and to NEDLAC, dated 27 November 2015, refer. Copies are attached for reference purposes.
- c. From the outset, we would like to refer to the RAF Commission's (RAFCOM) key mandate requirements of "...a reasonable, equitable, affordable and sustainable system..."

2. Procedural

Bill before committee not amended to provide for comments received

The Department of Transport published the revised *Road Accident Benefit Scheme Bill, 2013* ("the RABS Bill") for public comment for a period of 60 days in Government Gazette No. 37612 on 9 May 2014 – the latter period was extended to 30 October 2014. The Bill in its current form is the product of a previous call for comment published in GG 36138 of 8 February 2013. The comments received at the end of October 2014 have not been considered and the Bill which is now before the committee is the unamended Bill without any of the comments received after 30 October 2014 being considered and/or incorporated. To consider the Bill in its current form is to essentially disregard the crucial public consultation process which is central to the passing of new legislation, the disregard of which will be legally fatal to the extent that the resulting legislation may be void. In any event the Bill in its current form was referred to NEDLAC and was rejected. It follows that to debate a bill which has not considered and incorporated the views of the public and business, would be futile.

3. Policy

Responsible department

The RABS bill is essentially a social benefit scheme and as such it should be seriously considered whether it is prudent for this scheme to continue in isolation under the auspices of the Department of Transport and whether it is strictly not a matter that should be dealt with by the Department of Social Development and Department of Health. Also, the interrelationship between RABS and other social benefit schemes needs to be debated and coordinated.

Promotor and administration

- It is seriously questioned whether it is good policy for the Road Accident Fund to be the driving force behind this Bill as this entity has a vested interest by virtue of its imminent demise should RABS be passed and can therefore not objectively be the promoters of RABS.
- In addition, the proposal in the current Bill that RABS should be administered the Administrator without making any provision for the constitution of a new administrative body other than the RAF, is contrary to the whole thrust and intention of the recommendations of the Road Accident Fund commission as contained on p 1285 in their 2002 report: "It is questioned whether the proposed scheme should be administered by a government department, a parastatal or by the private sector and, absent concrete proposals from the private sector.

- The conclusion is reached that a new independent statutory authority should be established which should be called the Road Accident Benefits Scheme (RABS). Outstanding claims should be ringfenced and administered by the current RAF organisation that should operate based on an annual budget financed in part from fuel levy income and in part from an allocation from the Department of Finance.”
- The RAF is unsuited to fulfil this role as its current ethos, structure and cost is diametrically opposite to that what is required for the administration of a pure social benefit scheme. To take one aspect: Its Exco remuneration alone currently stands at R34 million p.a. of which the CEO receives approximately R5 million p.a. Its current wasted expenditure is a figure of R2 billion p.a., its legal fees approach R8 billion p.a. and its staff expenditure R1,434,772 million.
- In contrast the personnel budget of the comparable Compensation Fund (Workmen’s Compensation) is R636 375 million p.a., its executive remuneration approximately R3 million, Commissioner’s remuneration R838 000 and fruitless expenditure R436 114.

The RAF’s ethos, structure and culture are totally unsuited to the objects and ethos of RABS. This was one of the key findings of the RAFCOM. What is stated by the RAFCOM in 2002 has not changed. As recently as October 2017 a Free State judge in *Hlalele v Road Accident Fund* 5668/16 ZAFS 18 October 2017 at par 32 said the following regarding the RAF: “[32] The system at the RAF should be investigated and much better management practices shall be implemented.

- It is incomprehensible that a litigation officer, without being placed in possession of a file containing the claim documents, is instructed to handle a claim in order to instruct attorneys, communicate with them, and eventually oversee that all pre-trial processes are conducted to get the matter trial-ready to ensure that the trial runs its normal course or to give instructions to settle.
- The two litigation officers were not prepared to accept responsibility. They are quick to put blame on the attorney, but what transpired in the RAF’s offices, prior to and when the matter should have been under their control, remains a mystery.
- We have not been told why it was necessary that an apparently straightforward claim had to be referred to the Forensic Investigation Department, and more importantly, what this department did to carry out the RAF’s mandate.
- Fraud is indeed a worrisome matter and no doubt; the RAF must ensure that fraudulent claims be traced and dealt with.
- It is laudable that the RAF tries to do whatever is needed to eradicate false claims, but in casu no need was shown for such action. The outcome of any delayed action that might have been taken is a secret.

The information available to me does not indicate that whoever was tasked to do whatever, did in fact contribute positively to the challenges faced by the RAF. [33] From my experience on a weekly basis when allocated civil trials, the RAF seldom challenges the evidence of plaintiffs on the merits. A small percentage of the twelve to fifteen RAF cases set down for hearing on a weekly basis in this Division proceeds to trial. Obviously, in passenger claims it is difficult to successfully defend a claim for the reason mentioned supra, but then, such matters should proceed to trial on rare occasions only; by far the majority must be settled even before action is instituted. Unnecessary legal costs can be avoided. On the other hand, the RAF seldom investigates claims properly and its legal teams are often not able to proceed to trial in matters not involving the so-called 1% cases. Mostly, the RAF's legal teams come to court, not to settle, but to throw in the proverbial towel. In most of cases the outcome can be predicted: the merits are settled 100% in favour of the plaintiff. Witnesses are not subpoenaed and counsel (if one is appointed) is not instructed to conduct a defended trial, but receives instructions in respect of settlement only. To make matters worse, the court is often asked to stand matters down as the litigation officer cannot be contacted in order to give instructions to settle. Judges are even requested to stand matters down to the next day or even a third day. In the meantime, legal costs soar. [34] My personal experience is that, notwithstanding possible good intentions of RAF's senior management the overall system is such that it cannot be tolerated much longer.

We accept that the RAF is flooded with claims, but this country cannot afford the wasting of resources. It is not for the courts to prescribe to a litigant how it should run its business, but serious reconsideration must take place.

4. Financial

Nowhere in any of the representations made in support of RABS were there any real-world projections made. RABS is presented as the silver bullet that entirely solves the country's road accident benefit financing woes and abundant reference is made to the fact that RABS is no fault.

- In a country where 38 people die every day and as much an estimated 1 500 per day are injured, the RABS no-fault which is punted as the solution and which affords every dependent and injured a claim is simultaneously financially its biggest problem.
- Added to this, is the recommendation of the RAFCOM that the liability of the current RAF should be ringfenced and separately financed, the very crucial question of affordability arises – both in respect of transition from RAF to RABS and the future.

- It would be disastrous indeed if the RABS bill becomes law only to realise after a few years that the country cannot afford it. In this regard the RAFCOM at p 1286 recommends: “A costing exercise has been attempted with the assistance of a firm of actuarial consultants who have prepared a valuation report. The limitations of such exercise are discussed in some detail although it is believed that this exercise provides an impetus for future data capturing, compilation of statistics, analysis and research, forecasting of expenditure, product design and cost containment.
- The costing exercise that has been undertaken by the Commission should be considered a preliminary step in development of an actuarial model and valuation of the proposed road accident benefits scheme. It is suggested by the Commission that, while the report is subject to consideration by the Legislature instructions could be given to another firm of actuaries to cost the scenarios directed by the Legislature.
- Such actuarial model could be completed, and the valuation presented subsequent to and additional to the Report of this Commission.” None of the “data capturing, compilation of statistics, analysis and research, forecasting of expenditure, product design and cost containment” is evident from any of the submissions made on RABS to the Portfolio Committee.

5. Substantial problems

Claims procedure

Against the backdrop of a 60% functional illiteracy in our country and the fact that 40% of road accident victims are pedestrians and poor, RABS proceeds from the premise that the onus of initiating and driving the claim for RABS benefits lies with the RAV. A RAV is moreover called upon to finance the whole claims process. This is indeed a cynical and callous approach – more so, if one considers that a claim may lapse automatically through inaction of the Administrator or the claimant and that representation of RAV’s is frowned upon. This is completely contrary to the recommendations of the RAFCOM.

Constitutional issues

The provisions of RABS are open to constitutional challenge: Without being exhaustive, the following provisions are mentioned:

- To be considered all claims need to be submitted by the claimant personally and no representation (curtailment of the right to representation);

- ii. If the Administrator does not respond to a claim for 180 days after submission, the claim has been denied (curtailment of the right to fair administrative process);
- iii. Loss of long-term 'career path' earnings are no longer considered – i.e.: loss of income (LOI) that would have earned had there been no accident, are disregarded (curtailment of a RAV's economic rights);
- iv. benefits will be based on 75% of the claimant's earnings prior to the accident without the ability to recover the balance from the wrongdoer as is the case with COIDA claims (curtailment - COIDA has a minimum and maximum and allows claims against the wrongdoer therefore discrimination);
- v. Benefits are not inflation-linked nor guaranteed as benefits can be reviewed, revised or suspended at any time (curtailment without right of recourse);
- vi. Claimants access to attorneys is limited, therefore the constitutional right to access the courts is denied;
- vii. The nature and extent of a victim's medical treatment will be decided by the RABS Administrator (curtailment – no right of recourse);
- viii. There will be no claims for non-patrimonial loss such as pain and suffering (curtailment - COIDA retains such claims except for a claim against the employer also in breach of s 12(2) of Constitution);
- ix. There will be no financial assistance for any legal or administrative costs the victim may incur while preparing and processing their claim (curtailment and disregard of right to fair administrative process);
- x. Costs of obtaining medical and police reports will lie with the claimant – RABS will not refund these costs (curtailment and an infringement of the right of the poor creating constructive exclusion of claims of poor RAV's);
- xi. The claims of children, persons over 60 years of age, and persons earning over R220,000 pa, will be limited to emergency medical care only (curtailment, discriminatory and contrary to the 2010 judgment of the Constitutional Court);
- xii. Funeral expenses will be limited to R10,000 (curtailment - the current average is R15 000 discriminatory);
- xiii. Benefits terminate on the death of the claimant, leaving any dependents without support (curtailment in breach of s 28 of the Constitution);
- xiv. Benefits terminate after 15 years or when the claimant reaches 60, whichever occurs first (curtailment
- xv. Stringent rules will apply to qualify for long-term medical care – and will only be allowed from healthcare contractors specified by the RABS administration (curtailment and contrary to current law and the 2010 Constitutional Court judgment).

6. Conclusion

It is submitted that the adage “act in haste, repent at leisure” is appropriate.

The committee is duty bound to the citizens of this country to guard against the over-hasty introduction of an unproven, uncoded system to replace a tried and tested system of RAV compensation which has served the RAV admirably well for more seven and a half decades. As much as it is in need for improvement and alignment with South Africa, today. The current system still provides the most effective basis for balancing cost reduction with benefits to the public.

The need for the current RAF system and a system for the future, to be ‘pro-poor’ is fully supported. However, this fundamental need can not only be flaunted in words but should be supported by –

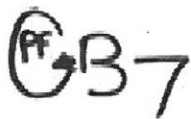
- adhering to all constitutional rights;
- protecting (and not diluting) road user rights and benefits;
- optimum efficiency and effectiveness of the ‘system’ and especially those ‘managing’ its operations;
- decreasing costs and not increasing it;
- properly completing the research recommended by the RAFCOM (2002), to ensure that the South African realities, in 2017/2018, is fully considered (level and state of education, state of public health services, cost of private health services; unemployment rate; road crash statistics; state of public roads; RAV statistics; etc.);
- being ‘pro-poor’ in its practical application and not just as a tag line;
- drawing from an industry’s 07-decade long experience;
- properly consulting the public of South Africa, in an open and transparent manner; and
- accepting that all stakeholder needs to be involved to ensure buy-in into the future.

We suggest that the above matters be fully and thoroughly canvassed and pursued before the possibility of another compensation system for our country may be considered. In this regard APRAV as an association representing the interests of RAV is more than willing to assist the committee in any way possible in arriving at a solution which will be to the benefit of both all RAV’s and our Republic.

We are creating Provincial Task Teams (in some provinces these are already functioning) solely focused on immediate solutions (to 'stop the bleeding') and longer-term solutions (to fundamentally improve this industry). We will involve all stakeholders who is interested to constructively contribute to this process and we will openly share all our research, findings, recommendations, etc. with the Portfolio Committee on Transport (i.e. we only this week completed a detailed actuarial analysis of a realistic and likely RABS Bill annual costing; and our findings are a sobering reality check versus the Departments of Transport's "RABS will be cheaper"! This is simply in reality not true.

APRAV is here to assist you in any sensible way possible, to ensure meaningful and sustainable change to the current RAF system.

Yours sincerely

A handwritten signature in black ink, appearing to read 'PB7' with a stylized 'P' and 'B'.

Pieter de Bruyn

Chairperson





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27 November 2015

COMMENT ON THE RABS BILL

1. The Association for the Protection of Road Accident Victims ("APRAV") was established in June 2014 by concerned parties responding to the Road Accident Benefit Scheme ("RABS") Bill, published by the Department of Transport on 9 May 2014 (See www.aprav.co.za).
2. Over the last 12 months APRAV focussed on a few key strategies –
 - a) established a close working relationship with all members of the Portfolio Committee on Transport as well as all role players within all relevant structures within the parliamentary law making process;
 - b) establish a working relationship with all key stakeholders within the medico legal industry;
 - c) providing detail comment and input into the drafting of the 'RABS' Bill; and
 - d) inform the public of their rights and the implications of the 'RABS' Bill.
3. We would like to reiterate, that APRAV supports the Government and the Department of Transport's conviction, that the current RAF 'system' requires change. We further recognise that, i.e. the claims procedure should be easier to follow for the public, the 'system' cost should be reduced, the time it takes for a claim to be settled should be shortened, etc. However, for the sake of all road users and those injured in road incidents, any changes to the current RAF 'system' (the public's current rights) should be fully researched, realistic, affordable to South Africa, carefully planned and be very transparent.

4. We attended numerous Portfolio Committee on Transport meetings, met with relevant ANC Members and opposition party members, of said committee, provided detailed comment and input and had dozens of meetings with industry role players all over South Africa. It is clear to the executive members of APRAV, that the RABS Bill is not reasonable, fair, equitable, practical, sustainable or cost effective. The RABS Bill, in its current form, has far-reaching adverse effects on the Republic of South Africa, the public in general and specifically all road users.
5. We wish to point out that RABS was published for comment during 2013 and 2014 but that:
 - The Bill has never been considered by the Parliament's Portfolio Committee on Transport,
 - There have been no proper and valid public consultations regarding RABS and
 - The bill as it currently stands is without any amendments in response to the comments elicited by its last publication in 2014.
6. We are of the view that consideration by your body of this bill is premature. Notwithstanding this position we take this opportunity to provide an executive summary of key input we believe NEDLAC should be aware of, in considering comment and proposals on RABS in its current form: (1) Impact on the economy; (2) Impact on workers/road users/public; (3) the Constitutional issues; and (4) the key unanswered questions.

7. Impact on the economy – can South African afford RABS?

- 7.1 Government is approaching the road accident compensation question from entirely the wrong angle.
 - It is a known fact that South Africa rates is one of the worst countries as far as road safety is concerned.
 - The government is constitutionally bound to ensure a safe environment for its citizens – this includes safe road travel.
 - The government is not complying with this constitutional duty and has in the past not succeeded in significantly curbing road traffic related injuries and deaths.
 - If accidents can be effectively reduced, the compensation of road accident victims will not be an issue requiring special social legislation such as RABS.
 - In addition, there will be undoubted considerable benefits for the entire South African economy. We submit that the South African road accident victim faces double jeopardy in that he/she is overly exposed to danger while travelling on our roads and when he/she is injured, the government, notwithstanding government's failure to comply with its constitutional duty to prevent road accidents, is curtailing his/her rights by introducing legislation such as the Road Accident Fund Amendment Act of 2005 and now RABS.
 - By increasing the fuel levy by 50 cents per litre from 1 May 2015, the government is spending approximately R10 billion p.a. more on the consequences of road accidents while the RTMC is underfunded and road traffic law enforcement is less than ideal and ineffective.
 - Furthermore, the method of funding needs reconsideration. Fuel levy income is set to gradually diminish and may even eventually disappear altogether due to technological advances. We think that rather than promoting a system change which is to the detriment of its citizens and splurging on the consequences of road accidents, the government should concentrate on the prevention of road accident casualties. This will have incalculable beneficial consequences and obviate the need to expend considerable energy and resources on the consequences of road accidents.

Apart from the wrong approach, we are of the view that the Honorable Minister of Transport misidentifies the actual causes of the funding crisis in the road accident victim compensation system (RAF).

- In the first instance, the road accident victim compensation reform process is entirely driven by the perception that the system faces a R46 billion deficit.
- This deficit is an actuarial figure which is calculated on the basis that the compensation system is insurance based. This is not the case.
- The compensation system is and has always been a dedicated tax funded social benefit scheme. If this is accepted, the Government cannot use a lack of funds as a reason to change a system which has proven to be equitable and effective for more than 50 years.
- It cannot use the actuarial shortfall argument when dealing with other constitutional obligations to provide social security such as housing, care grants and medical care so how can it do so when dispensing social benefits to road accident victims?

7.2 Furthermore, the current RABS bill is based on the RAF Commission Report of 2002. The commission recommended in its report that further research be done before a no fault system is introduced. No further research has been done and RABS is now based on information which is more than 13 years old. This creates a real risk that a system which is not based on current facts has being designed and is being promoted as being novel and the ultimate solution for the perceived woes facing the road accident compensation system in our country.

7.3 The proponents of RABS base their argument that the South African road accident compensation compares unfavorably with other countries such as Australia, Canada and the USA who are all no fault based. However, it seems as if the following World Health Organisation and World Bank statistics are simply ignored:

Country	Casualties per 100 000 vehicles	Population	Unemployment	GDP in \$b
Australia	7	23 630 169	5,8%	1 560 597
Canada	9.3	35 524 732	6,5%	1 826 769
USA	13.6	323 583 004	6,2%	16 800 000
South-Africa	165.4	53 139 528	25,5%	350 630

- The accident rate and GDP alone suggest that a very careful consideration of the financial implications and affordability of no fault in South Africa is deserving of very incisive and meticulous scrutiny.
- More so, if the fact that some jurisdictions who have opted for no fault reverted to fault and that in other voices for the change in the no fault approach have arisen. Note that 5 states in the USA and 1 in Australia implemented no-fault systems and then reversed it due to the cost involved!
- This truly a situation of “act in haste and repent at leisure”. We are not entirely against a no fault system but in view of the quoted statistics, affordability and a real concern with probable diminished benefits, we cannot due to support a no fault system until such time as the casualty rate approaches those of countries who employ no fault compensation.
- In addition, the important policy question as far as South Africa is concerned, is whether no fault sits well with the enforcement of road traffic legislation compliance by South African drivers and the improvement of road safety and whether no fault will result in indirectly rewarding careless and negligent drivers for the lack of compliance with the rules of the road with tax money.
- **How can South-Africa then afford a no fault system?**

- 7.4 We have roughly estimated the cost of the introduction RABS. Because of the high unemployment rate we estimate the non-employment benefit ("no-fault") in terms of RABS alone to be in the order of R20 billion p.a. If medical costs, loss of support, loss of employment income, funeral expenses and legal costs are added, RABS benefits exceed the available budget of R30 billion p.a. by a very large margin.
- Our concern is that due to the limited budget, the only way that RABS will be able to function will be through the limitation of rights and benefits.
 - In this regard we observe a trend in past government actions (see the introduction of limitations with the Road Accident Fund Amendment Act of 2005) that budgetary aims are achieved at the expense of the rights of road accident victims and we are deeply concerned that the introduction of RABS means a further erosion and worsening of the position of the road accident victim in South Africa – especially for the more productive tax-paying section of this constituency.
 - Apart from the affordability of RABS we are concerned that RABS is not aligned to the needs of the average South African road accident victim and in essence seeks to compensate ignoring the profile of the average South African road accident victim.
 - It also abolishes the constitutionally enshrined common law rights of the road accident victim and his/her constitutional right to access to the courts.
 - We contend that the government's failure to protect the road user's constitutional right against harm and the introduction of RABS present a double jeopardy to road accident victims and is not at all a reflection of a government that cares for its citizens.
- 7.5 During the CEO of the RAF's annual submission to the Transport Portfolio, Dr. Eugene Watson admitted that the Fund's Actuaries have not yet quantified RABS.
- During a recent, so called public consultation session held in George on the 18th of September 2014, Mr. Chris Willemse of the RAF confirmed that RABS will not be dependent on NHI as a prerequisite for its implementation.
 - Mr. Willemse admitted in Kroonstad on the 25th of September 2014, that no tariffs had been agreed upon between RAF and any private sector, as it would be premature in the light of the fact that the Act is still in its early stages of development.
 - According to Mr. Willemse confirmed that RABS will be funded by the fuel levy and the current and remaining RAF claims from Parliamentary concessions.
 - We can accept that it would be an impossible task to quantify RABS, at this point in time, as many of the larger expenditures like health care cannot be qualified before service level agreements and tariffs had been agreed upon by RABS and the private sector.
 - Question is : How can the RAF say that this would be a more affordable alternative to the current RAF system of compensation if they are nowhere close to know how much the system is going to cost the taxpayer?
- 7.6 Consecutive commissions of enquiry into the compensation system held that no fault is unaffordable as it would just about double the government's compensation bill. We call on NEDLAC and Government to enter into a dialogue with APRAV and all industry role players (South African Law Society, Orthopaedic Association of South Africa, Medico-legal Society of South Africa, National Taxi Council of South Africa, just to name a few) and all other interested parties to explore a suitable solution to compensation of the South African road accident victim so that the best interests of the road accident victim and our country may be served and assured. **(APRAV has been working on solutions and all our analyses and research are available to NEDLAC!)**

8. Impact on the workers/road users/public – RABS versus RAF?

8.1 The myth that ‘no fault’ means full and automatic benefits to all

- Do we really want to compensate the hijacker and habitual criminal? Would this be appropriate for South African circumstances?
- No service level agreements had been secured between RABS and private health care victims under RABS will be no better off than under the current system.
- To speak of pre-determined benefits is a fallacy, as each and every individual victim's circumstances and requirements differ and change as they progress through the trauma of an accident and the recovery period that follows.
- RABS would be able to review, revise and terminate the claimants' benefits with a system of medical peer review that is supposed to facilitate objectivity and consistency of the medical and disability assessments.
- The fact that the administrator may withdraw benefits at any given time (taking into account budget constraints and changes in personal circumstances) would imply that the road accident victim would have no long term financial security under the RABS administrator.

8.2 Making available timely and appropriate healthcare benefits based on a reasonable tariff

- Road accident victims currently enjoy access to immediate medical care and do not have to qualify under stringent rules to qualify for long term medical care.
- Under RABS a victim will receive emergency medical care and would have to apply for long term medical care under the RABS – Administrator.
- Under the current RAF Act a road accident victim is far less at risk of being held liable for medical expenses as it would be covered by his claim, in terms of RABS only a “reasonable tariff” would be paid to contracted health care providers. This would imply that if a patient ends up receiving treatment from a non-contracted service provider, the victim would be responsible to pay the excess.
- A victim would be expected to finance further medical treatment until such time that a claim has been approved. A cumbersome system of claiming for payment and pre-authorization will most likely result in delays.
- The nature and extent of treatment falls within the sole discretion of the administrator. This will imply that the injured will be denied the freedom to choose the nature and extent of treatment.

8.3 Simplify claim procedure

- “No fault” is supposedly the “silver bullet” the RABS Administrator will be depending on for the quick and effortless administration of claims.
- In reality the victim would still have to prove that he/she was in an accident by submitting the statutory required documents, in exactly the same way as a current victim would have to do ***(Section 43(2): The Administrator shall not be liable for the provision of a benefit until a claim for such benefit is submitted in the manner set out in the rules).***
- Further, a victim would still be required to prove a nexus between the accident and injuries. To be able to do this medical reports and the necessary police documentation would have to be obtained and submitted at the victim's own expense, as the administrator will not pay for any of these costs.

- No costs would be paid towards legal fees and as such a road accident victim would be required to prepare, lodge and champion his or her own claim - RABS affords no financial assistance to formulate and file a claim (**Section 44(1) & (2) of the RABS Act**: These claims will be lodged unrepresented and the victim would be at the complete mercy of the RABS Administrator.
- Having regard to these requirements the high rate of illiteracy (it has been reported that the functional illiteracy in South Africa approaches 60%) and an unemployment levels at 25, 5% it would be very difficult for the regular road accident victim to prepare a claim, let alone afford it.
- RABS is complicated and does nothing to simplify the claim procedure in fact it rather discourages than invites road accident victims from claiming from the administrator.
- In terms of Section 48(1) the administrator is not obliged to even reply to a claim and the victim must accept that, if he has not heard from the administrator within 180 days, his claim had been denied.
- The fact that RABS has no accountability and leaves the victim totally vulnerable and at the mercy of the RABS Administrator.
- Only a road accident victims that can afford to go to court will have access to the judiciary, adding insult to injury by making him or her, a victim twice, first being involved in an accident and secondly being denied benefits by RABS.

8.4 Wider cover to persons in road accidents

- The fact that “no fault” applies under RABS does not mean wider cover, as the victim would still have to prove a nexus and compliance with the Act, before qualifying for any benefits.
- No fault is not the answer that would magically dispel all the RAF’s current problems.
- It is certainly not a fit and proper substitute for general damages as it affords no compensatory advantage for the road accident victim under RABS.
- We currently have a no fault driven compensation system in COID. Notwithstanding the system being no-fault, there have been problems in the office of the Compensation Commissioner with the payment of workplace related injury and death compensation. There are considerable delays and doctors are owed millions of Rand. Consequently, it is not the system that determines efficacy but the administration. RABS envisages a continuation of the administration of RABS by the current RAF. Reports in the media indicate that the RAF has an unsympathetic attitude and currently easily settles matters not handled by attorneys to the detriment of road accident victims. Its administration is in a shambles to the extent that the courts have on numerous occasions severely criticised and penalised the RAF with cost orders for its lackadaisical approach to road accident claims administration. It takes the RAF an average of 55 months to complete claims. The outcome of its failure to exercise good practice has resulted in an annual legal bill of R4,7 billion. It owes its own service providers in excess of R5 billion.

8.5 The myth of fewer exclusions from benefits

In reality, RABS introduces far more exclusions and less benefits than the current road accident victim enjoy.

- The claims of children are limited to emergency medical care;
- General damages are abolished;
- Funeral expenses are limited to R 10 000.00;
- Loss of earning capacity “career pathing” is abolished;
- Benefits terminate on death of the beneficiary (leaving the dependants destitute);
- Claims for loss of income support are capped;

- The claims of foreigners are limited to emergency medical care;
- Save for emergency medical care road accident victims older than 60 years have no claim.
- Save for emergency medical care victims who earn more than R 219820.00 per annum, will have no claim against RABS;
- Loss of support benefits are forfeited after 15 years or the dependent reaching the age of 60, whichever comes first;
- Loss of support benefits are terminated when a dependent child turns 18;
- No contribution towards legal or administrative costs.

It will provide a benefit which would not cover the full extent of the loss as the purpose is to encourage an injured victim to return to their workplace as to curb the culture of dependency. This is a wonderful concept but what about the people who were not employed, lost their jobs subsequent to the accident or simply cannot secure employment?

- It is unclear how the administrator will deal with people who are economically inactive at the time of the accident;
- As the RABS Act currently stands it will have devastating consequences for children, students and young adults. If the victim is a final year graduate student and left incapacitated after a motor vehicle accident he would be regarded as an unemployed person and his income benefits would be based upon the annual national income without the prospect of having his academic history and/or prospective income taken into account. By excluding "career pathing" which is manifestly unjust victims in this category will not be able to afford additional top-up insurance and will result in a higher rate of dependency on the state as an alternative income resource.
- The whole system will for its success be dependent on administrative efficiency as the system is entirely administratively driven and heavily relies on actions and responses from a (largely illiterate) claimant. No adequate administrative capacity exists within the RAF which will continue in the guise of RABS-administrator. In fact the RAF administration is bloated and in some instances officials are generously compensated at the expense of the taxpayer. E.g. the RAF CEO's remuneration exceeds that of the State President by 75% and tops that of the President of the United States.

8.6 Defined benefits which promote affordability

- A victim will never truly be financially independent as he will be continually scrutinized by the Administrator on an ongoing basis.
- Children under the age of 18 and people over 60 are excluded from income benefits, it is a well-known fact that many people over the age of 60 are still economically active.
- Even though a child under the age of 18 would ordinarily not qualify for this benefit, RABS will not take the child's particular circumstances (careers of parents etc.) into account when evaluating his/her loss of income.
- Benefits are forfeited the moment a beneficiary dies (the result would be that the family of a beneficiary would be left destitute). The benefits received should fall into the estate of the deceased in order to support the families of beneficiaries should they fall away.
- Annual inflationary adjustments cannot be guaranteed and will be subject to affordability. We are of the opinion that benefits should be adjusted annually in line with inflation. Funeral benefits are limited to R 10 000.00, under the RABS Administrator. However, funeral expenses are costly and in many cases the cost of a casket alone can be in excess of R 10 000.00. Under the current system the RAF pays for necessary funeral expenses, which if proven, may be in excess of R 10 000.00 (this includes the plot, the service and transport costs of the deceased). According to the 2013/2014

annual report by the RAF the average funeral claim is R 11 245.00. The report confirms that funeral expenses increased by 11% per year since 2010.

- Income benefits will be capped and general damages be abolished under RABS to ensure affordability.
 - The perception exists that the current compensation system favors the rich at the expense of the poor. Ostensibly based on this perception, the compensation of higher than average income earners have since 2008 been restricted to the national average income (currently R237 850.00 p.a.). Interestingly, the limit under COIDA is presently R332,479.00 p.a. In fact, the cap engenders systemic discrimination. High income earners only receive a portion of their loss while low income earners are fully compensated. The higher the earnings, the larger the proportionate limiting effect. The cap also affects dependents whose loss of maintenance are now not fully compensated but based on a capped income of their breadwinner. The latter phenomenon, as far as we are concerned, falls foul of s 28 of the Constitution.
 - According to the 2013/2014 RAF annual report the average value of a personal claim was R 194 6786.00 per claim.
 - Only 3.8% of all claims finalized exceeded R500 000,00 and in value is less than 50% of compensation paid (page 71 of the RAF's 2013/2014 annual report). There is nothing sinister in this phenomenon. It is simply a reflection of the fact that high income earners are more likely to own a motor vehicle, travel more and be exposed to motor vehicle accidents. Why should the seriously injured (only they qualify for this level of compensation) including the quadriplegic and paraplegic road accident victims (also cynically referred to by protagonists of RABS as instant millionaires) be made a victim twice?
 - Once by negligent driving and then by being discriminated against and denied the social security they as citizens are equally entitled to.
 - The RAF Commission found that a typical South African road accident victim likely to be a black male approximately 29 years of age who is lightly injured and if employed, earns less than R8 000,00 per month. Thus, a sizeable section of road accident victims have no income whatsoever.
 - Only 3% of road accident victims earned more than R270 000,00 per annum.
 - Pedestrians constitute 40% (second largest group after passengers) of all road accident victims. Pedestrians are indicated as the highest socio economic risk group because of high rates of unemployment (60% unemployed) with an average income of less than R4 000,00 per month.
 - According to the RAF's 2013/2014 financial report the total pay-outs on general damages has decreased over the past three financial years. This may reflect the fact that currently fewer typical road accident victims are being compensated.
 - On average the amount of claims in respect of general damages has decreased by 26% per annum from 2010. It is expected that the RAF Amendment Act will result in further decreases in general damages payouts.

8.7 Rehabilitation is the key or is it?

- Rehabilitation, which includes vocational rehabilitation, is apparently a primary objective of RABS. This presupposes that all victims are employed or employable. It also ignores that approximately the vast majority of road accident victims are not occupationally affected as a result of their injuries. How this sits with an unemployment figure approaching 26% is not explained. Furthermore, it is estimated that only 16% of all road accident victims will actually qualify for rehabilitation. This focus on rehabilitation in our view is window-dressing hiding the fact that under RABS fewer victims will receive severely limited compensation.
- The first step in rehabilitation is appropriate and adequate medical treatment. RABS is reliant on a non-existent NHS. Public health facilities are incapable of providing the health care required to ensure that injuries and their consequences are not exacerbated by inadequate health care subsequent to an accident.
- Our question is, how do they plan to achieve this goal when there are no or little supportive structures in place?
- Secondly, is the intention of RABS to attempt to restore the claimant to his/her pre-accident condition by means of rehabilitation and/or vocational rehabilitation in order to prevent paying benefits in the end?
 - With this last question, it should be kept in mind that only 16% of claims constitute serious injuries, requiring some kind of rehabilitation.
 - From *this* percentage, only a small part would be suitable candidates for vocational rehabilitation. Seeing that such great emphasis is put on rehabilitation in the Bill, it appears that there might be a perception that rehabilitation will restore function, when in fact it facilitates the process of recovery from injury, yet will in only a few cases restore full function.
 - Although rehabilitation is necessary for all serious injuries to some extent, it is not a miracle maker that will erase the injury and automatically reinstate full function. They will need training from private facilities or colleges – does RABS, in such a scenario, intend to pay for training where before the accident they were unqualified (thus not restoring function, but dramatically enhancing opportunities for some individuals which might be considered “lucky” by some)?
 - It is thus clear that our current health care system is lacking from the very foundation. It would be an enormous task to develop a holistic health care system which is according to RABS already in place and such a project needs to be rolled out at a national level.
- It is our belief that people with disabilities in general and road accident in particular, should be provided the full benefit of specialized medical care, rehabilitation and when appropriate vocational rehabilitation and we offer our full support in developing such a system but are mindful of the fact that it will take years to develop (recognizing the cost and complexity of the framework of establishing National Health Insurance, Governments green paper proposes a 14 year transition period).
- Dr. Eugene Watson, CEO of the RAF, told the Business Day Live on 2 July 2014 that general damages will not be awarded under RABS to ensure that sufficient resources are available to prioritize rehabilitation. With only 16% of all road accident victims that could benefit from rehabilitation it is doubtful that rehabilitation is an adequate substitute for abolishing general damages – what about the other 84%?

See the attached actuarial comparison published recently comparing benefits under the current RAF system & the proposed RABS

9. The Constitutional issues – RABS will not withstand a Constitutional Court challenge!

- 9.1.** The issue regarding the **discrimination between different classes of road accident victims** – Section 9(1) of the Constitution. This approach is in direct conflict with section 9(1) of the Constitution. The fact that a road accident victim is denied non-pecuniary loss as opposed to a victim of occupational accident, medical malpractice, rail accident or assault who will still qualify for non-pecuniary loss.
- 9.2.** The fact that **General Damages is abolished under RABS**. RABS abolishes this right to achieve a financial saving. Financial constraints provides no ground for the curtailment of common law rights. The legislature must provide an adequate and compensatory advantage should they wish to abolish common law rights. RABS affords no compensating advantage whatsoever and to the contrary severely restricts the road accident victim's rights.
- 9.3.** The fact that a road accident victims **right to claim the excess of his claim from the wrongful party**. The RABS bill abolishes the road accident victim's right to claim compensation not paid by RABS while for example Section 36(1)(a) of COIDA, retains such rights.
- 9.4.** There is a **constitutional duty on RABS to ensure that claims are processed timeously and effectively and to ensure that benefits are allocated as soon as possible**.
- 9.5.** The fact that a road accident victim is **prevented and/or limited in his right to access the Courts – Section 34 of the Constitution**. Under RABS the road accident victim has no legal recourse or sanction to compel the Administrator (RABS) to attend to his or her claim.
- 9.6.** In terms of RABS no claim may be submitted within 60 (sixty) days of the cause of action. The administrator then has 180 days (six months) to decide whether or not benefits may be allocated – in terms of the Act the administrator need not even reply to the claim the road accident victim must accept that his claim was denied if not replied to within the prescribed period.
- 9.7.** The **right to bodily integrity**, fact that a victim will not be able to choose where and how he/she would like to receive medical treatment – **Section 12(2) of the Constitution**.
- 9.8.** The fact that a **child's right to support is affected** as no support is payable to a child living abroad regardless of the fact that the deceased had a legal obligation to pay support – **Section 28 of the Constitution**.
- 9.9.** The **Freedom Charter**, which was adopted by the Congress of the People, Kliptown on 26 June 1955. On page 3 of this charter, it is stated that "all shall be equal before the law. No-one shall be imprisoned, deported or restricted without a fair trial. No-one shall be condemned by the order of any Government official." – RABS will in no way be able to satisfy this standard.

10. There are many unanswered questions: What is DOT/RAF not telling NEDLAC?

However, we are only going to raise one - How exactly do they costs RABS without a medical tariff being decided upon?

RABS is touted as a less expensive alternative to the current system. However, no official costing of the RABS system has been published! Thus it cannot be questioned, scrutinized or even just checked.

- The RAF commission report and our preliminary calculations seem to indicate that, while emphasis is heavily being placed on universal entitlement and promised benefits, the fiscal implications of a no fault system of compensation is being grossly underestimated and underplayed.
- In the absence of a funding model and actual and actuarial calculations, no one, including NEDLAC, can scrutinise, let alone interrogate, the likely cost of RABS.
- This is a vital to be well informed on the cost implications to the road users and workers/tax payers of South Africa.
- Already in anticipation of RABS the government has increased the fuel levy in 2015 by an unprecedented 50c/l.
- It is realistic to accept that in view of the fact that all injured will now qualify for some form of compensation, the burden on the South African economy, in the absence of a drastic reduction of the casualty rate, is set to increase rather than decrease?

Alternative forms of revenue will have to be found to fund compensation as we think that the levy has now reached (if not over reached) its realistic economic ceiling. In addition

- RABS affords benefits out of dedicated tax funding to an unemployed section of the population who should realistically be compensated out of the general fiscus thereby partially shifting the burden of social security of the unemployed to the already beleaguered motorist using a very expensive formula and affording benefits which exceed current social security funding of the unemployed.
- RABS does not dovetail with current social security legislation and it is unclear how benefits and double-dipping is going to be regulated.
- RABS seeks to de-privatise road accident compensation by excising professionals with concomitant loss of income and income tax. This will no doubt have inestimable knock-on effect on employment, the economy and the fiscus in general. It is estimated that approximately R11bn is involved.
- Finally because of the way that RABS is structured, new contractual relationships is called for opening up the possibility of tenderpreneurship and personal enrichment at the expense of the motorist.

In view of these considerations it would be extremely unwise to entertain the implementation of RABS without first doing a Regulatory Impact Assessment (RIA).

11. What is the solution?

APRAV formed a Solutions Task Team in July 2014, under the guidance of Prof. Hennie Klopper. The key focus areas are, to:

- a) Facilitate input and alignment on the current (main) problem areas hampering the system.
- b) Ensure some level of consensus on the most effective solutions/alternatives (changes to the current system).
- c) Gain understanding of the possible quick win changes versus the longer term solutions.
- d) Secure and ensure public involvement.
- e) Engage all key government decision makers on a way forward to 'fix' the current system.
- f) Set-up the next steps to drive implementing changes for improvement, together with government, the public and the medico-legal industry.

The objectives are:

- a) Better application of the ± R30b annual RAF budget.
- b) Cut down the average of 55 months it takes to settle a RAF claim.
- c) Reduce process costs in determining fault and quantum.
- d) Provide for system-driven and 'automatic' claims settling for the ± 80% less severe injuries for which claims are lodged.
- e) Streamline the process in general.
- f) Significantly reduce the volume of claims clogging up the courts.
- g) Ensure the public's bodily integrity (as per the constitution) and social security (also as per the RAF Act).
- h) Ensure that the public and claimant's rights are protected and not diluted, with regards to injuries sustained in road incidents.

APRAV formed 5 sub-committees under the guidance of its Solutions Task Team Head: Prof. Hennie Klopper. These are Sub-Committees on Medical, Financial, Inter-Governmental Liaison, and Constitutional & Claimants/Public. (See the attached annexure for the scope of these solution's research teams.)

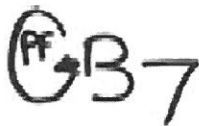
12. In conclusion

For the record, currently thousands of direct claims are left unattended, are under settled or left to prescribe by the RAF.

- Is this a taste of things to come under RABS?
- Criminal charges have been laid against the CEO of the RAF and the Board for acting outside of the Act and misrepresenting their mandate.
- The RAF does not have the resources nor do they have a legal mandate to facilitate or to administrate these claims and are a clear indication of what could be expected under the Benefit Scheme. These charges have been escalated to the Hawks under Case number: 491/04/2015 and 715/04/2015.

For the sake of being thoroughly informed of all the key issues involved in the RABS Bill but even more so, for the sake of the public and all road users in South Africa we hope that you would consider the contents of this letter before making a choice on RABS.

Yours sincerely

A handwritten signature in black ink, appearing to read 'PFB7'.

Pieter FC de Bruyn
Chairman

APRAV



RABS
2017 - 7

Valerie Carelse

From: Niel Fourie <nfourie@actuarialsociety.org.za>
Sent: Thursday, 30 November 2017 8:44 AM
To: Valerie Carelse
Cc: Wim Loots
Subject: RABS Comment - Actuarial Society of South Africa
Attachments: ASSA RABS Comments 30.11.2017.pdf

Dear Valerie

Please find attached comments form the Actuarial Society of South Africa on the RABS Bill.

Please do not hesitate to contact us if you have any questions or want to meet.

Best wishes

Niel Fourie
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30 November 2017

Ms DP Magadzi
Chairperson
The Portfolio Committee on Transport

c/o Ms Valerie Carelse
By email: vcarelse@parliament.gov.za

Dear Ms Magadzi

COMMENTARY ON THE ROAD ACCIDENT BENEFIT SCHEME BILL

Introduction

The Actuarial Society of South Africa ('the Actuarial Society') welcomes the opportunity to comment on the Road Accident Benefit Scheme Bill ('the RABS'). Actuaries have expertise in the design, pricing and financial management of benefits and insurance products and in the management of operational and enterprise risk. Actuarial input has been used by the Road Accident Fund (RAF) and the development of the RABS to date. Our commentary stems from the Actuarial Society's vision to serve through providing ongoing thought leadership in the understanding, modelling and management of financial and other measurable risk.

The long-term financial soundness of any benefit provider, and by implication its ability to pay claims as and when they fall due, depends on:

- A sound benefit design that meets the aims of the benefit provider;
- An understanding of the expected cost of these benefits;
- An appropriate model for revenue collection to pay for these benefits;
- Appropriate risk mitigation measures; and
- Sound financial management and administration practice.

1. Benefit Design

1.1. Introductory comments on the benefit design

The RABS provides for benefits in respect of income support (in case of injury), family support (in case of death), health care services and funeral costs. By comparison the RAF provides for compensation in respect of loss of income, loss of support, medical costs, funeral expenses and general damages (compensation for pain and suffering).

The RABS aims to provide benefits in the form of regular payments based on defined benefit formulae. The RAF provides lump sum compensation based on each specific claimant's circumstances.

The RABS covers more accidents than the RAF and includes accidents involving more types of vehicles and in places other than public roads. In addition, claims are made on a no-fault basis meaning that even criminally negligent drivers can now claim. This is expected to increase claim volumes relative to the RAF.

The RABS incorporates an Average Annual National Income (AANI) and an Annual Income Cap. For those earning below the AANI, the RABS functions as a social welfare system. For those earning between the AANI and the Annual Income Cap, the RABS functions in a similar way to an insurance product which seeks to indemnify losses suffered by the road user. For those earning above the Annual Income Cap, the RABS offers insurance-type cover at low levels and may provide no cover at all in certain cases.

The RABS is therefore a mixture between a social welfare system and an insurance system and the philosophy behind the design should be carefully considered. A clear need exists for both a national social welfare system and an insurance system for road accident victims. The combination of both these needs in one system can potentially lead to the introduction of risks and behavior that are difficult to manage. This is particularly the case if the social welfare benefits offered by the RABS are higher than the social welfare benefits offered through the country's national system.

The level of the AANI was not specified in the latest version of the RABS bill but is believed to be R52 527 per annum in current terms. A number of actuaries active in quantifying loss of support and loss of earnings claims have commented that the AANI is large relative to the current and projected incomes of many claimants (although this could change following the introduction of the South African National Minimum Wage in 2018). A more generous benefit is not only more expensive if claim patterns remain the same but may encourage more claims, particularly suicides and fraudulent claims, from very low income earners and the unemployed. A strict definition of injury that links the medical condition to a specific accident may assist in limiting fraudulent claims arising where there is a very minor injury or where the injury arose from a different cause. However, as the AANI has no equivalent under the RAF, the true cost of the AANI may be difficult to quantify from RAF data alone.

The Annual Income Cap is believed to be set at the same level as the Cap in terms of 17(4)(c) of the RAF Act (R262 366 per annum as of July 2017). Its application under the RABS limits the claims of higher income earners much more severely and may result in no claim being paid despite a significant loss of earnings capacity. This has important implications given that the common law right to sue for delictual damages has been removed. It is suggested that a variety of benefit maxima and capping methodologies are tested in order to ensure that all South Africans have recourse to a benefit while containing costs.

There are certain benefits not covered under the current RABS proposals and paragraphs 1.2 to 1.12 detail some of the adjustments to the benefit design that could be considered.

1.2. Inflation-linked benefits

It is noted that the temporary income support, long-term income support and family support benefits are not guaranteed to increase with inflation which may result in the real value of these benefits declining over time. A price inflation guarantee may assist in this regard but linking the benefits to wage inflation may be a better match to the loss that has been experienced.

It should also be noted that wage inflation is typically a margin above price inflation, the latter usually measured by the Consumer Price Index (CPI). Most of the Sectoral Determinations issued by the Department of Labour regularly adjust the minimum wage applicable to various sectors by a margin above CPI. Similar comments hold for the wage increases regulated by Bargaining Council Agreements or negotiated by labour unions, including government employees.

1.3. Allowance for earnings progression

The RABS benefits are based on historic earnings or the AANI for those technically unemployed at the time of the accident. This may penalise young workers at the start of their careers and those about to commence higher-paying jobs (e.g. students). These claimants would otherwise expect earnings progression significant in excess of inflation for the first part of their careers. This may have a particularly harsh effect on poorer families who may have invested significantly in the education of their children.

1.4. Varying the waiting period on the temporary income support benefit

Waiting periods eliminate small claims arising from minor injuries and allow for administration and assessment. However, for a seriously injured worker, the 60 day waiting period may cause severe hardship. The impact of different waiting periods could be assessed as well as the option to back-pay a claimant who reaches the 60-day mark. Alternatively the extent of the back-pay could also vary or a guaranteed minimum level of support during the initial 60 day period can be considered.

1.5. Benefits to children completing studies and disabled children

The family support benefit ceases when a child turns 18. This means that it may end before the child completes school and will almost certainly end before any further education and training is obtained. This may result in children in poorer communities not finishing their schooling, particularly as the child support grant would cease at the same age.

At the very least we would suggest that support be extended until the end of the academic year in which a child reaches their 18th birthday. It is however desirable that some flexibility be allowed around the cut-off point for support. For instance, many children take one or two years longer to complete Grade 12. This may be particularly true for a child that has suffered the disruptive event of losing a breadwinning parent in a road accident.

We understand that RABS provides for support to other dependants that were legally entitled to support from the deceased. Children over the age of 18 that pursue tertiary studies and disabled children can be classified as such other dependants. We however feel these are special categories of dependants and consideration should be given to special treatment.

For instance, children that wish to pursue tertiary studies could be assisted by approving a support benefit for a further three years, while they are in the last year of school. This will allow a child to apply to the relevant tertiary institutions while at school, rather than having to wait to be classified as another dependant after leaving school.

Disabled children may have been dependent on the breadwinner for life. A special category for these children could reduce the risks for an already vulnerable group. Consideration should also be given to implementing a flexible benefit formula for these children. Currently the support benefit for these children is similar to the benefit for other children, but typically the needs of a disabled child will be higher and on par with that of an adult (higher medical costs, need for special schools and assistive devices lead to increased needs).

1.6. Benefits to foster children and orphans

Foster children have no right to claim under the RAF and appear to be excluded under RABS as well. Given the realities of South African family structures, this may penalise this already vulnerable group. However,

if foster children can claim under RABS it is suggested that the benefits for any orphaned child will cease when they are fostered by another family that can support them. The foster child grant should also be deductible from their benefits.

1.7. Benefits to extended family members through the family support benefit

The RABS allows for siblings, grandparents and other family members to claim more easily than under the RAF. This may add to administrative costs, increase the overall claim cost and reduce claims for closer dependents such as spouses and children. There are various options that can be explored with respect to claims for extended family members.

1.8. Maximum claim periods

There is a maximum claim period of 15 years for widows, which may be penal for young widows who may not have the skills to secure employment. These widows and their children may face significant hardship prior to qualifying for the Older Persons Grant. If the 15-year limit is to be retained, extending the vocational training program to widows may reduce the negative impact of the limitation.

There is no such 15-year limitation for parents.

The temporary and long-term income support benefits under the RABS terminate at age 60. Many claimants would however have expected to work until age 65, or even longer. An employed claimant above the age of 60 at the time of an accident will receive no benefit despite suffering a loss. This could cause significant hardships for this demographic, especially since many would have amassed inadequate retirement savings and would have relied on working a few more years.

Consideration should therefore be given to extending the income support benefit to say age 65, or possibly to allow for some flexibility depending on an individual's circumstances. One of the advantages of settlements under the RAF is that such individual circumstances are taken into account for each claimant, which is lost when a defined benefit is applied to each claim without discretion.

1.9. Benefit formulae and earnings definitions

Schedule 1 of the RABS Bill, read together with subsections 35, 36 and 38 set out the formulae and earnings definitions that apply to income and family support benefits. It is crucial that the formulae and definitions are well defined, unambiguous and cater for the large majority of claimants and scenarios. It is important to ensure that unintended consequences that may be present in the current draft be eliminated before implementation of the legislation.

It is recommended that the outcome of the formulae/definitions be investigated for a sufficiently large sample of representative claimants to understand current shortcomings or unintended outcomes of the legislation.

A small sample of issues that may need clarification or correction includes the following:

1. Are fringe benefits included in the earnings definitions?
2. Will earnings include an allowance for employer retirement contributions, given that no benefit will be received after age 60? Should the support benefit to children be inclusive of such retirement contributions?
3. How will salary allowances that are in respect of business use rather than personal use be treated?

4. How will the earnings of self-employed individuals be determined?
5. The long term income benefit formulae seems to suggest no benefit will be paid if the loss is less than 25% of salary?
6. Why is the before accident earnings capped but not the after accident earnings? Perhaps consideration should be given to capping benefits rather than earnings.
7. The total family support benefit payable to multiple spouses seems to be of similar magnitude than would be payable to just one spouse. This seems to be rooted in the Black Laws Amendment Act 76 of 1963. Many would view this Act as archaic and unfair and a more modern approach should be considered when setting the benefit formulae.
8. How will delayed losses be handled? For instance, many accidents may not lead to an initial loss but could eventually result in early retirement (often delayed by several years if not decades). Will the benefit be based on inflation adjusted earnings as at the date of accident or earnings as at the date of early retirement?

Damages actuaries are well versed in the numerous practical complications that can arise for a variety of claimants. The Damages and Compensation Committee of the Actuarial Society would welcome the opportunity to assist with such an investigation.

1.10. Tax evasion

Where it is evident that a claimant has evaded taxation, the RABS should make provision for compensation based on the tax that should have been paid and the administrator should contact SARS to recover any unpaid tax.

1.11. Repatriation of remains

There is currently no repatriation benefit in the RABS although this may be an extremely important benefit in poorer communities where the deceased was working and living away from home. Reducing the benefit available for children's' funerals may help to meet the cost of providing this benefit.

1.12. Concluding remarks on the benefit design

It is important that the ultimate benefit design of the RABS is viewed as equitable. This term may be defined differently by different stakeholders but an understanding of how the current RABS proposals differ from the established case law and corresponding RAF settlements will be critical. There may be ways of providing similar benefits to those provided by RAF at reduced cost and these options should be explored, if this has not been done already. In addition, the benefits might be compared to what an individual could claim if the injury or death arose from some other cause, such as a train accident, negligent management of road works or medical negligence. Given that the cause of a motor vehicle accident may not be clear-cut and general damages may be payable from claims arising from other causes, this consistency may avoid lengthy and unnecessary litigation.

Any additional benefit will come at a cost and hence when considering the comments received from stakeholders and finalising the benefit design, it is important to be able to vary various aspects of the benefit design simultaneously to assess the overall impact on cost and financing. This exercise should consider not only the cost of benefits at inception but into the future.

2. Costing

Actuarial input has already been given in respect of the costing of RABS. It is critical that input is given on an ongoing basis as the benefit design evolves and new data emerge.

It is expected that the introduction of the RABS will lead to a reduction in certain expenses such as legal costs and certain expert fees. At the same time it will lead to more onerous administration of claims, additional medical and rehabilitation costs etc. The net impact of the reduced costs on one hand and increased costs on the other hand will be a crucial component for the costing of the RABS.

The RABS will not cover general damages and this will lead to significant savings. The removal of general damages is however not something that is exclusively associated with the RABS and a similar saving could occur if implemented under the RAF.

The costing of the RABS will rely on numerous assumptions and it is important to interpret the results of a costing exercise in this context. Some of the crucial variables that will play a role in costing the RABS include the following:

1. The move to a no-fault system will result in more claims as well as a likely change in the average size of a claim. These variables may be difficult to predict based on current South African data alone, but could be illustrated through various scenarios.
2. The degree to which benefits are assumed to be linked to inflation will have a crucial impact on the projected cost of the scheme.
3. The assumptions regarding medical tariffs and fee structures that will be in place, for the provision of health care services to claimants, will impact on the cost projections.

Given the number of variables involved, a degree of variability will be associated with the results of a costing exercise. This could be explored through investigating various optimistic, realistic or pessimistic scenarios. Costing the RABS is a complex exercise where the outcomes may be best viewed as falling within a range of possibilities. Actuaries are well equipped to assist decision makers in understanding and interpreting the results of such a costing exercise.

3. Financing

The RAF is currently underfunded and financing will need to be sourced to settle all outstanding claims as well as claims that are incurred but not reported. This finance will need to be sourced at the same time as finance for the RABS.

The initial financing requirements under the RABS will be significant if a fully funded system is pursued and it may be difficult to raise the necessary finance through the fuel levy alone. There are a number of options that could be explored including raising funds from general tax revenue, reinsuring RABS benefits through the private sector to gain access to capital and limiting the scope of RABS to low-income earners and compelling those earning above the AANI to purchase compulsory insurance through the private sector.

It is clear that the security of the RABS is a priority, however security can be provided by means of government guarantees using a pay-as-you-go funding system. There are thus a range of financing options that need to be explored in parallel with the benefit design in order to fully understand the trade-offs involved.

4. Risk management

It is common practice in insurance-type arrangements to institute measures to limit risks that may undermine the viability of an insurer. These may include operational risks, such as fraud, and claims risks, such as extremely high volumes of claims. A particular risk for the RABS may be a high level of fraudulent claims e.g. through staged or self-inflicted accidents. This is particularly the case given a high level of unemployment and the potentially generous benefits on offer under the RABS.

Actuaries can assist with a thorough risk analysis and advising on risk management practices while the design of the RABS is being finalised. One suggestion would be to initially introduce no-fault cover at a low benefit level, which could gradually be extended to higher levels of cover as more is learnt about claimant behavior.

A further suggestion is to have a range of professionals on the RABS board, with a specific set of skills being covered. Although the current wording of the bill refers to the appointment of members with a range of skills, there is no requirement to have at least one individual on the board with each of the stated skills. We recommend that this aspect of the bill be reviewed.

5. Financial management and administration practices

The administration of the income benefits, some of which may be very small, could be very expensive. There are ways to reduce these costs, such as setting minimum monthly income as is currently done for government grants.

There are provisions for lump sum benefits to be provided instead of income benefits. While this may simplify administration, it may allow beneficiaries in poor health to obtain a lump sum higher than the value of the income benefits that they would otherwise have received. Any commutation would thus require the input of a suitably-qualified actuary and may require medical underwriting. These costs would need to be taken into account when deciding if a benefit should be commuted or not.

The current RABS proposals mean that insurance benefits are not deducted from RABS benefits. Insurers are however required to make submissions to RABS. Both the submission requirement and the non-deductibility of insurance benefits have implications for the private sector and we encourage policymakers to engage with insurers in this regard.

The actual claiming process involves the driver compiling a road accident report. Although there are penalties for non-compliance, this requirement may make it impossible for passengers and pedestrians to claim a benefit.

Any administration costs need to be factored in with the expected benefits costs and financed accordingly.

6. The way forward

It is clear that considerable thought has been put into the design of the RABS and its objectives and actuarial input has already been sought on benefit design, reserve estimates and costing. However, actuarial modeling will be required when considering feedback to the bill and on an ongoing basis. We believe that a full actuarial modelling exercise including financing options and risk management practices would add value to the final benefit design and financing decisions, particularly if the model is sufficiently flexible in terms of the benefit design and financing options to allow policymakers to explore different

options and scenarios. Such an exercise would also include stress-testing to ensure that RABS will be able to meet its obligations with a high degree of certainty.

As an alternative, policymakers can also consider commissioning an independent peer review of the technical work that underlies the RABS. Given the impact of the pending legislation on claimants and tax payers, such actuarial involvement could form an important part of the due diligence process that precedes the formal adoption of such important legislation.

There is precedent for such actuarial involvement. The Actuarial Society, in conjunction with the private sector, has developed an actuarial model to quantify the implications of various scenarios under National Health Insurance and this model is currently being used by the Ministerial Advisory Committee and National Treasury.

Although further actuarial involvement may come at a cost, we believe the value it will add will be substantial in light of our comments. We would welcome an opportunity to engage further with policymakers on specific aspects of the general observations and commentary in this document and on facilitating an expanded actuarial modelling exercise including financing options.

Yours sincerely

Niel Fourie

Public Policy Actuary

nfourie@actuarialsociety.org.za

This letter was dispatched electronically without e-signature



Western Cape
Government

MINISTRY OF TR

RABS
2017 8(a)

Our Reference: TPW1/3/1 – RABS Bill [B17-2017]

TO The Portfolio Committee on Transport

ATTENTION Ms V Carelse

PER EMAIL vcarelse@parliament.gov.za

Dear Sirs

COMMENTS ON THE ROAD ACCIDENT BENEFIT SCHEME BILL [B17 – 2017]

1. Thank you for the opportunity to comment on the Road Accident Benefit Scheme Bill [B17 – 2017] ("**the Bill**").
2. We attach hereto, marked as "Annexure A", the Western Cape Government's comments in relation to the Bill for consideration.

Yours sincerely,

DONALD GRANT
MINISTER OF TRANSPORT AND PUBLIC WORKS

Date: 30 November 2017

Comments on the Road Accident Benefit Scheme Bill ("the Bill")

Submitted by: The Western Cape Government

COMMENTS:

Draft regulation	Comment/s	Suggestion / Recommendation
Part A — General comments		
Bill not supported	The Bill, in its current form, is not supported for the reasons set out in these comments	Please refer to the below comments.
Summary of concerns	<p>The concerns relating to the Bill may be summarised as set out hereafter.</p> <p>One of the objectives of the Bill is <i>"to provide an effective benefit scheme in respect of bodily injury or death caused by or arising from road accidents, which benefit scheme is reasonable, equitable, affordable and sustainable"</i> (clause 2(a)).</p> <p>While this is a laudable objective, the proposed scheme falls far short of this objective and may even have the effect of depriving a person who was injured in a road crash (and his or her dependants) of much-needed income and other benefits.</p> <p>As a whole, the proposed scheme is not in the interests of the public and, thus, cannot be supported. It would appear that it is designed mainly to limit the financial liability of the Administrator without regard for the devastating effect it may have on South Africans, particularly those who are indigent. It could lead to many South Africans who are severely injured being trapped in a life of poverty.</p>	<p>In the circumstances, it is proposed that a full Regulatory Impact Assessment ("RIA") be conducted in relation to the Bill.</p> <p>It is important that all the consequences of the Bill be investigated. Some of the matters which should be investigated are what the costs of implementation will be and whether the proposed scheme is indeed more affordable and sustainable than the current RAF scheme, whether there is truly a need for the proposed scheme, whether the proposed scheme is practical and whether the Administrator will have the capacity to effectively manage the proposed scheme.</p> <p>At the workshop in relation to the Draft Bill that was held in Cape Town on 17 September 2014 ("the Cape Town</p>

	<p>In this regard, the proposed scheme includes, amongst others, the following devastating features, which are not supported:</p> <ol style="list-style-type: none"> 1. An injured person cannot submit a claim for general damages, such as pain and suffering, loss of amenities of life, disfigurement and emotional suffering; 2. The innocent victim of a road crash can no longer sue the common law wrongdoer (i.e. the person who caused the road crash) in the two instances contemplated in section 21(2) of the Road Accident Fund Act, 1996 (Act 56 of 1996) ("the RAF Act").¹ Apart from the apparent financial implications which this holds, it is also likely to foster a culture in which wrongdoers do not take responsibility for their actions and this could, in turn, negatively impact upon the behaviour of drivers on the road. In the light of the fact that, according to the National Injury Mortality Survey conducted by the Medical Research Council, approximately 17 000 people are killed on South Africa's roads every year, this can only be described as a disastrous policy direction. South Africa, as a nation, has legally acknowledged that road trauma incidents are not inevitable and unpredictable. They are caused. Thus, the more we, as a nation, refuse to accept that and 	<p>workshop"), one of the presenters stated that the costs of implementing the Draft Bill was being determined by actuaries.</p> <p>Once the RIA has been finalised, it should be made available to the public. Similarly, the costing that was determined by the abovementioned actuaries should be made available. There should also be consultation with the public and all relevant government departments regarding any further drafts of the Bill.</p>
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¹ Section 21(1) of the RAF Act abolished the right of persons to sue the common law wrongdoer (this was introduced by the Road Accident Fund Amendment Act, 2005 (Act 19 of 2005)). However, section 21(2) states that this does not apply "if the [Road Accident] Fund or an agent is unable to pay any compensation" or "to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury of the death of another person as a result of the driving of a motor vehicle".

	<p>place the rights of reckless drivers above those of their victims, the more deaths we are likely to see on the road;</p> <p>3. The Administrator is not responsible to contribute towards the costs of a claimant, such as medical or legal costs to prepare and submit a claim or to lodge an appeal. Thus, unless an injured person has the means to pay for legal fees, he or she will be forced to justify his or her claim to the Administrator without the assistance of an attorney;</p> <p>4. An injured person will receive less benefits than he or she enjoys under the current system, but he or she is likely to incur more costs (as described above, these include medical and legal costs);</p> <p>5. The proposed system places an onerous administrative burden on claimants and is not simple or easily accessible;</p> <p>6. The claims procedure is lengthy and could lead to injured persons being without an income for an extended period of time. This could leave injured persons in a severely strained financial situation. In this regard, the Administrator has 180 days (approximately 6 months) within which to determine a claim and, if an appeal is lodged against a decision of the Administrator, the Appeals Committee has a further 180 days to decide the appeal;</p> <p>7. The Administrator may require injured persons (including severely injured and disabled persons) to submit to regular</p>	
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re-evaluations of their conditions. While this assists the Administrator in avoiding fraudulent claims, it does not allow genuinely injured persons to move on with their lives; they will constantly be under the threat of further, potentially invasive (whether mentally or physically) assessments;

8. It does not appear that injured persons will be entitled to private health care by a health care service provider of their choice. The Administrator enters into agreements with health care service providers. Where health care services are provided by non-contracted health care service providers, and there is no prescribed tariff in respect of such services, the person who paid for the services will only be entitled to the "reasonable costs" of the health care services; and
9. The system effectively denies an injured person access to courts and leaves an injured person at the mercy of the Administrator. In this regard, it is noted that an injured person must go through two assessment procedures (the initial claim process and then an appeal process) before he or she may approach a court, but only for a review of a decision of the Appeals Committee.

The proposed scheme creates the impression that more persons will have access to benefits as a result of a no-fault system. However, there is no guarantee that a person will necessarily receive compensation in full from the Administrator. Persons may need to supplement their income and benefits with personal insurance, but, unfortunately, the reality is that not many South Africans may have the financial means to afford such

insurance. The entire system is seemingly aimed at benefiting the Administrator at the expense of, amongst others, injured persons and frustrating and discouraging injured persons from submitting claims.

While it is appreciated that the proposed benefit scheme may be aimed at reducing the likelihood of inflated claims, it should not do so by removing the rights of legitimate claimants. The benefit scheme should, instead, put proper control measures in place to deal with inflated claims, which, in some cases, are as a result of legal practitioners who inflate claims in order to obtain a larger fee.

A further concern is that the capping of benefits may have certain unintended consequences. In this regard, it may result in injured persons pursuing claims against other government departments (for example, the Departments of Health and Transport), as the injured persons could potentially receive more compensation from such departments than they would be entitled to under the benefit scheme. This will put a financial strain on these departments.

In the end, no-fault and fault systems both have their advantages and disadvantages. Subject to the concerns expressed in this document in relation to the proposed system, it may be prudent for the drafters to consider whether it would be possible to combine the no-fault and fault systems in a manner which gives the most comprehensive compensation to the victims of road crashes. In this regard, the drafters are urged to have regard to the way in which other countries regulate this area. Further, more stringent penalties for negligent drivers will hopefully contribute to a far more effective system which encourages responsible use of South African roads.

<p>Consistency with WHO report and Moscow Declaration</p>	<p>The name of the Bill is not consistent with the World Health Organisation's report titled "World report on road traffic injury prevention" ("the report").</p> <p>In this regard, the report states that "[t]he term "accident", which is widely used, can give the impression, probably unintended, of inevitability and unpredictability — an event that cannot be managed. This document prefers to use the term "crash" instead, to denote something that is an event, or series of events, amenable to rational analysis and remedial action".²</p> <p>The report is cited as follows in the first resolution of the Moscow Declaration, 2009, to which South Africa is a signatory:</p> <p style="padding-left: 40px;">"Hereby resolve to:</p> <p style="padding-left: 80px;">1. <i>Encourage the implementation of the recommendations of the World report on road traffic injury prevention</i>".³</p> <p>Thus, South Africa is encouraged by international treaty to avoid the use of the word "accident" to describe road trauma incidents. The Bill should not ignore this obligation.</p> <p>In the circumstances, the Bill should be called the "Road Crash Benefit Scheme Bill" and the</p>	<p>Revise the Bill for consistency with WHO report and Moscow Declaration.</p> <p>Follow the principle of "prevention is better than cure".</p> <p>Model the scheme on schemes such as those used in Australia.</p>

²See chapter 1 of the report, at page 7.

³ See page 3 of the Moscow Declaration, 2009.

word "accident" should be replaced with the word "crash" throughout the Bill.⁴ Care must be taken when the Bill is translated, to ensure that words do not denote that road trauma incidents are inevitable and unpredictable.

Further, the principle of "prevention is better than cure" should be integrated into the proposed system. Thus, any crash benefit scheme which is funded by the taxpayer should have as a primary function the prevention of road trauma in South Africa and, as a secondary function, the provision of care once that trauma has occurred. The Bill should be redrafted in line with this principle. As taxpayers' funds will be used to support the proposed benefit scheme, it is important that the scheme does whatever it can to prevent road trauma from occurring and thereby limit the amount of funds required to be paid out to beneficiaries.

As indicated earlier, it would appear that the benefit scheme is aimed at, amongst other things, minimising the costs of the Administrator in an effort to ensure that the scheme is sustainable. Instead of providing for an onerous and restrictive scheme, it may be more practical and effective for the scheme to be modelled on a scheme such as the one which is operated by the Transport Accident Commission ("**the TAC**") in Victoria, Australia. The TAC is funded largely by vehicle registration fees. It spends approximately Aus\$49m per annum on marketing road safety. This is the equivalent of approximately R450m. The TAC also spends approximately Aus\$60m per annum on "hotspot" treatments — that is, it funds the state road agency to construct infrastructure interventions that lower the crash rate at specific locations which have been identified as dangerous.

⁴ Please note that the term "road crash" will be used throughout these comments.

	<p>It is thus recommended that the Bill be reviewed to include this as a primary function, which should be carried out in consultation and co-operation with all other state entities which are involved in road safety, particularly law enforcement, roads departments and other relevant bodies (e.g. the Road Traffic Management Corporation).</p>	
<p>Funding model for public sector</p>	<p>The public sector is currently the default service provider of treatment to victims injured in road crashes; a situation that may be attributed to the advent of the legislation issued in terms of the RAF Act.</p> <p>Besides the overwhelming numbers currently presenting at the public sector, there are severe challenges in terms of the limited resources and budgetary constraints. The onerous claiming process and the current backlogs on unpaid claims suggest that an alternative funding model be explored for the public sector.</p>	<p>It is recommended that a funding model that funds the respective departments of health upfront for the treatment of road crash victims be considered (e.g. an arrangement which is similar to the arrangement with the public sector in terms of the previous Multilateral Motor Vehicle Accidents Fund Act, 1989 (Act 93 of 1989)).</p>
<p>Commenting period unreasonable</p>	<p>The commenting period in respect of the Bill is unreasonable.</p> <p>The call for comments opened on 2 November 2017 and the closing date is 30 November 2017. This affords the public 28 days within which to comment on the Bill. Given the length, complexity and far-reaching implications of the Bill, the commenting period is unreasonable.</p> <p>It is noted that the Bill was amended after it was published for comment in 2014. Thus, the public should be afforded a reasonable</p>	<p>Extend the closing date for comments.</p>

	opportunity to comment on the amendments and the Bill as a whole, given the implications.	
Use of the word "shall"	The word " <i>shall</i> " is outdated. It is recommended that all references to this word be removed from the Bill and be replaced with appropriate wording. In some cases, it can be replaced with the word " <i>must</i> ".	Replace the word "shall" with appropriate wording.
Government Gazette	For the sake of certainty, the term " <i>Government Gazette</i> " (and not " <i>Gazette</i> ") should be used in the Bill and it should be in italics.	Use the term " <i>Government Gazette</i> ".
<u>Part B — Comments on specific provisions</u>		
Clause 1: definition of "injured person"	N/A	Revise the definition so as to include mental injury.
Clause 1: definition of "medical report"	N/A	Revise the definition so as to state that the report should be completed by a medical practitioner.
Clause 1: definition of "road accident"	The word " <i>incident</i> " is vague and should be explained. For example, it may be prudent to explain whether the " <i>incident</i> " contemplated in the definition is one which causes harm to a person or property.	Expand on what is meant by " <i>incident</i> ". Further, revise the definition to include pedestrians or cyclists involved in a road crash.
Clause 4: Financial year	N/A	The comma that appears

		after the phrase "1 April each year" should be deleted.
Clause 7: Composition and appointment 7(1)(b) & 7(4)	A person with at least 10 years' experience in public finance will most probably be employed by the State.	Reconsider the clauses in light of the comments.
Clause 8: Chairperson and Deputy Chairperson 8(3)	Clause 8(3) is written in the Coode style, which is an outdated style of drafting. It is recommended that it be rewritten so that it follows a more modern sentence structure.	Revise the clause.
Clause 9: Term of office 9(1)	N/A	The words "for one further period of not exceeding three years" should be changed to "for a further period of not more than three years" or "for a further period not exceeding three years" or "for a further period, provided that it does not exceed three years".
Clause 9: Term of office 9(2)	In terms of the wording of this clause, there is nothing that prevents the Minister from appointing an interim Board for a term of one year and then reappointing the same interim Board for further terms of one year after the initial one-year term has expired (and, in this way, bypass the requirements of clause 7).	This clause should be redrafted to ensure that the Minister does not have the power to appoint an interim Board on an indefinite basis.
Clause 10: Vacancies	This clause is written in the Coode style. See	Revise the clause.

	the above comments in this regard.	
Clause 13: Meetings 13(1)	N/A	It may be prudent to state the minimum number of meetings which the Board must have annually.
Clause 13: Meetings 13(2)(c)	N/A	It is recommended that the presiding officer should only have a casting vote in the event of a deadlock.
Clause 15: Duties 15(1)(b)(iv)	This clause envisages that the Administrator will have employees who are executives and senior managers. It is important that the Bill (whether in this clause or elsewhere) makes provision for the appointment of other employees of the Administrator (for example, employees who attend to administrative tasks).	Make provision for the appointment of other types of employees.
Clause 19: Dissolution of Board by Minister 19(1)(c)(i)	The words " <i>by or under this Act</i> " are used in the second last line of this clause. It is noted that a power is exercised " <i>under</i> " the provision which grants the power and a duty is performed " <i>in terms of</i> " the provisions which impose the duty. The clause should be revised in light of these principles.	Revise the wording accordingly.
Clause 19: Dissolution of Board by Minister 19(2)(b)	N/A	Consider replacing " <i>first meeting</i> " with " <i>appointment</i> ".

Clause 27: Limitation of Administrator's liability 27(4)	<p>This provision seems to suggest that persons who are illegally in the country will only be entitled to emergency health care services. On what basis can this be justified? This clause should be reconsidered in light of the provisions of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), particularly the provisions of the Bill of Rights.</p>	<p>Reconsider in light of the provisions of the Constitution.</p>
Clause 28: Exclusion of liability of owner, driver and employer of driver	<p>The proposed abolition of the common law right to sue the wrongdoer in the instances provided for in section 21(2) of the RAF Act is not supported.</p>	<p>Delete the clause.</p>
Clause 30: Liability of Administrator in respect of health care services 30(1)(e)	<p>It is unclear what type of accommodation is contemplated in this clause. This should be explained in the Bill.</p>	<p>Clarify what is meant by this provision.</p>
Clause 30: Liability of Administrator in respect of health care services 30(2)(f)	<p>It is unclear what would constitute a service provider "<i>who normally provides the health care service</i>". This should be clarified. Further, this clause may have the effect of excluding certain service providers from the network of service providers which may treat injured persons and hence should be reconsidered.</p>	<p>Revise in light of comments.</p>
Clause 31: Contracted health care service providers	<p>Clause 31(1)(c) indicates that the Administrator may enter into an agreement with a contracted health care service</p>	<p>See comments.</p>

<p>31(1)(c)</p>	<p>provider for <i>"an agreed fee structure, which may differ from the prescribed tariff"</i>.</p> <p>The public sector would want to retain its Uniform Patient Fee Schedule (UPFS) tariff structure as opposed to operating on two different tariff structures. If an injured person is treated by a health care service provider in the public sector, then the tariff structure of the public sector should be applied; the health care service provider should also not have to conclude a contract with the Administrator to that effect.</p> <p>Further, it is noted that the Bill is silent on the supply of a remittance advice that should accompany any payments to the health care service provider. It is requested that the draft regulations specify the detail that will be included in the remittance advice.</p>	
<p>Clause 31: Contracted health care service providers</p> <p>31(2) & Clause 32: Non-contracted health care service providers</p>	<p>These clauses, when read together, create a system which has the potential to severely prejudice, amongst others, injured persons and non-contracted health care service providers. These clauses are, therefore, not supported.</p> <p>It would appear that an injured person may be liable to pay the costs of a contracted health care service provider if the services provided fall outside of the agreement between the Administrator and such contracted health care service provider. In this regard, the phrase <i>"[n]o person"</i> is very wide and could potentially include an injured person within its ambit.</p> <p>This system, therefore, places an onerous financial obligation on injured persons. This is</p>	<p>Revise the clauses in light of the comments.</p>

	<p>problematic, because many South Africans do not have the financial means to pay for health care services.</p> <p>The situation is compounded by the fact that an injured person would need to pay for the services upfront. Thereafter, he or she may submit a claim to the Administrator to recover the costs.</p> <p>The difficulty, however, is that there is no guarantee that the injured person will be reimbursed in full for the costs. In this regard, it is noted that the Administrator's liability may be limited to a "<i>reasonable tariff...which must be prescribed</i>" and if there is no prescribed tariff, then the Administrator's liability will be limited to "<i>the reasonable costs of the health care service</i>". The problem that arises is that there is no clarity regarding what will constitute "<i>reasonable costs</i>" or who will determine whether the costs are reasonable or not.</p> <p>It is not only injured persons who may be prejudiced under this system. In this regard, the Administrator will also only be liable to non-contracted health care service providers in terms of a prescribed "<i>reasonable tariff</i>" or, where there is no prescribed tariff, then it will be liable for "<i>the reasonable costs of the health care service</i>".</p> <p>There is, accordingly, no guarantee that a non-contracted health care service provider will be paid for the actual costs of the health care service provided. This may lead to non-contracted health care service providers being hesitant to treat injured persons, particularly where there is no prescribed tariff in respect of the relevant services. The knock-on effect of this is that an injured person could</p>	
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potentially be denied access to health care services and he or she may no longer be able to receive treatment from a health care service provider of his or her choice.

Another concern is that it appears that, should an injured person be treated by a non-contracted health care service provider, he or she may be liable for the difference between the prescribed "*reasonable tariff*" and the actual costs of the health care service. At the Cape Town workshop, one of the presenters confirmed that a claimant may be subject to "balance billing" if he or she is treated by a non-contracted health care service provider, as opposed to if he or she is treated by a contracted health care service provider (in which case, he or she will not be subject to "balance billing"). This will place a further financial burden on an injured person, which will be compounded if the non-contracted health care service provider initiates legal proceedings against the injured person to recover the costs.

In the light of the above, the proposed system has the potential to place a significant financial burden on injured persons, which is compounded by the fact that an injured person does not have recourse against the common law wrongdoer. The system also prejudices non-contracted health care service providers who, it would seem, will not necessarily be paid the actual costs of the health care services provided. Overall, the system appears to be designed to limit the costs of the Administrator at the expense of injured persons, non-contracted health care services providers and other parties (for example, persons who pay the costs of the health care services on behalf of the injured

	person).	
Clause 33: Individual treatment and rehabilitation plan General	<p>It is unclear what the content of the individual treatment and rehabilitation plan will be. This should be clarified in this clause.</p>	<p>Clarify the content of the individual treatment and rehabilitation plan.</p>
Clause 33: Individual treatment and rehabilitation plan 33(1)	<p>This clause leaves an injured person entirely at the mercy of the Administrator, who "<i>may determine <u>at any time</u> that future health care services should be provided...in terms of an individual treatment and rehabilitation plan</i>" (emphasis added).</p> <p>An injured person will, therefore, not have any certainty as to whether his or her treatment will be regulated in terms of a plan. He or she will also not have certainty as to the treatment that he or she will be receiving.</p> <p>The clause should, therefore, be amended to state that the need for the preparation of an individual treatment or rehabilitation plan must be determined with reference to the facts of the case, as well as representations from the injured person and any relevant experts. Further, should an injured person need to consult with an expert, the Administrator should pay the costs related thereto.</p>	<p>See comments.</p>
Clause 33: Individual treatment and	<p>This clause provides that a beneficiary will be given the opportunity to participate in the preparation and costing of his or her</p>	<p>See the comments.</p>

<p>rehabilitation plan</p> <p>33(1)(b)</p>	<p>treatment and rehabilitation plan.</p> <p>This clause may lead to injured persons being exploited by the Administrator, particularly those who are uneducated. The difficulty with this clause is that, in reality, not many lay people would be in a position to provide valuable inputs on their treatment or the costing of such treatment. They would, therefore, need to defer to the expertise of their health care service providers. The problem that arises is that the health care service providers would need to be paid for their participation in preparing and costing the plan. As these fees will not be paid by the Administrator, they will be for the injured person's account. It is unlikely that indigent South Africans would be in a position to pay these fees and, as such, they would be forced to forego the assistance of a health care service provider in this process. They would, therefore, inevitably have to accept a plan and costing which is determined by the Administrator (and the latter will presumably have experts at its disposal).</p> <p>It is, therefore, recommended that the Administrator be liable to pay the costs of the health care service providers referred to in this clause.</p> <p>With regard to the injured person's employer, it is unclear to what extent an employer would be able to add valuable inputs on the preparation and the costing of the plan. The employer's role should, therefore, be clarified. Further, the position of an unemployed claimant, who will not be able to be assisted by an employer, should be clarified (this also applies in relation to clause 37(1)(b)).</p>	
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<p>Clause 33: Individual treatment and rehabilitation plan</p> <p>33(1)(c) & (d)</p>	<p>It is unclear in which circumstances it would be unreasonable for a beneficiary to withhold consent. It is also unclear who would determine whether the consent has been unreasonably withheld. This should be clarified.</p> <p>Further, what would happen should the curator withhold consent?</p> <p>Further, to what extent will the beneficiary's dependants be involved in this process? Should consent be obtained from them?</p>	<p>Clarify the matters specified in the comments.</p>
<p>Clause 33: Individual treatment and rehabilitation plan</p> <p>33(2)</p>	<p>The beneficiary should have a choice as to which health care service provider will perform the assessment.</p>	<p>Revise the provision accordingly.</p>
<p>Clause 33: Individual treatment and rehabilitation plan</p> <p>33(3)(a)</p>	<p>It is unclear what process will be followed to appoint the "other health care service provider". This should be clarified.</p>	<p>Clarify the process that will apply.</p>
<p>Clause 33: Individual treatment and rehabilitation plan</p> <p>33(3)(b)</p>	<p>This clause states that the liability of the Administrator for payment of health care services will be limited to the health care services provided for in the plan.</p> <p>This clause does not take into account the fact that in certain instances an injured person may need treatment which is not specifically provided for in the plan (for</p>	<p>See comments.</p>

	<p>example, where the injury was not immediately apparent at the time that the plan was prepared and hence no treatment was provided for in the plan).</p> <p>In the circumstances, the plan should be subject to revision (and expert consultation), depending on the requirements of the injured person and the Administrator should be liable for the costs of the further treatment.</p>	
<p>Clause 34: Liability of Administrator in respect of income support benefits</p> <p>34(1)</p>	<p>It is unclear why persons who are not ordinarily resident in South Africa should not be entitled to a temporary or long-term income support benefit.</p> <p>There may be circumstances where it would be appropriate for the Administrator to grant a person who is not ordinarily resident in South Africa a temporary or long-term income support benefit. A blanket prohibition is, therefore, not recommended. However, if such persons are to be provided with benefits, and they are foreigners, it is important that the impact of any relevant immigration laws on the scheme should be considered.</p>	See the comments.
<p>Clause 34: Liability of Administrator in respect of income support benefits</p> <p>34(2)(b)</p>	<p>The term "<i>reasonable period</i>" is vague and open to interpretation. It is recommended that a specific period be inserted in this clause.</p> <p>Further, there may be reasons why a person is unable to provide the documents listed in this clause. Thus, the Administrator should have the power to condone the late filing of documents, depending on the circumstances.</p>	<p>Insert a specific period.</p> <p>Further, provide for the Administrator to condone late filings.</p>

Clause 35: Temporary income support benefit 35(2) & 35(3)	<p>These clauses, when read together, may have the effect of penalising a person who is required to submit tax returns, but whose tax affairs are not in order. It would seem that if such person cannot provide the Administrator with his or her tax assessments, his or her income will be deemed to be equal to the average national income. This does not appear to be fair. This clause should be revised accordingly.</p>	<p>Revise the clause accordingly.</p>
Clause 35: Temporary income support benefit 35(2)(a)	<p>N/A</p>	<p>Insert a comma after the word "legislation".</p>
Clause 35: Temporary income support benefit 35(3)	<p>This clause does not take into account the potential future earning capacity of children and students, particularly gifted students, who are studying towards obtaining degrees in certain professions (for example, medicine and law). Again, the Department should ensure that the provisions of the Bill are constitutional. This clause has the potential to offend against, for example, section 9 (Equality), section 10 (human dignity) and section 28 (Children) of the Constitution. This clause should be revised accordingly.</p>	<p>Revise the clause accordingly.</p>
Clause 35: Temporary income support benefit	<p>It is unlikely that a medical practitioner would be able to confirm whether an injured person is unfit to perform his or her pre-crash occupation or work due to a physical or</p>	<p>Revise accordingly.</p>

35(4)(a)	psychological injury, if he or she only conducts a physical examination of the injured person. A psychological assessment should also be performed. The clause should, accordingly, be amended to provide for a psychological assessment as well. This comment also applies to clause 35(4)(b).	
Clause 35: Temporary income support benefit 35(4)(c)	N/A	The costs of any further assessments should be covered by the Administrator.
Clause 35: Temporary income support benefit 35(4)(d)	It is unclear why this confirmation is required, particularly as the medical reports contemplated in clauses 35(4)(a) and 35(4)(b) would confirm the reasons for the injured person's inability to work or earn an income. Unless the injured person is a medical practitioner, he or she cannot be expected to provide a confirmation in relation to medical matters. The same applies to any other person who might have knowledge of the reasons why the injured person is unable to earn an income.	Delete the clause.
Clause 35: Temporary income support benefit 35(5)(c)	It is unclear why a severely injured or disabled person cannot immediately benefit in terms of a long-term income support benefit. Severely injured or disabled persons should not have to subject themselves to two application procedures, both of which involve physical and psychological assessments, amongst other things.	Revise the clause accordingly.

<p>Clause 35: Temporary income support benefit</p> <p>35(5)(c)(i)</p>	<p>In terms of this clause, an injured person is not entitled to be paid a temporary income support benefit for the first 60 days after the date of the road crash. This is likely to have a negative effect on an injured person's finances. In the circumstances, this clause is not supported and should be deleted.</p> <p>At the Cape Town workshop, it was stated that the first 60 days have been excluded because claimants who are employed would generally have access to certain employee benefits if they are unable to work for the first 60 days. The problem that arises is that not all claimants are formally employed (e.g. some may be unemployed, self-employed, informally employed, at the beginning of their career paths or children). This clause will severely prejudice such claimants and should be deleted.</p>	<p>Delete the clause.</p>
<p>Clause 35: Temporary income support benefit</p> <p>35(5)(c)(iii)</p>	<p>In terms of this clause, a temporary income support benefit will only be made available to persons who are aged 18 years or older. It is unclear why benefits will not be provided to persons who are younger than 18 years.</p> <p>On the face of it, this clause imposes an arbitrary threshold. This clause effectively excludes economically active children from receiving a temporary income support benefit (for example, children in the entertainment industry). It could also potentially affect child-headed households, where younger siblings are dependent upon the income of their older siblings. This clause has the potential to offend against the provisions of the Constitution; for example, sections 9</p>	<p>Revise the clause accordingly.</p>

	(Equality), 10 (Human dignity) and 28 (Children).	
Clause 35: Temporary income support benefit 35(5)(c)(iv)	<p>Clause 35(5)(c)(iv) deprives an injured person of an income once he or she reaches the age of 60 years. This could lead to such person being unable to support him- or herself or his or her dependants. This provision will have a particularly devastating effect on severely injured or disabled persons. The age limit seems arbitrary. Further, this clause has the potential to offend against the provisions of the Constitution; for example, sections 9 (Equality) and 10 (Human dignity).</p>	Delete the clause.
Clause 35: Temporary income support benefit 35(5)(e)	N/A	<p>The clause should make provision for an injured person to apply for a lump sum payment, as the payment of monthly installments may not be appropriate or desirable in every case.</p>
Clause 35: Temporary income support benefit 35(6)	<p>It is understandable that there should be measures in place to curb fraudulent claims. There should, however, be a balance between the need for these measures and protecting the right of a person to human dignity.</p> <p>In the circumstances, injured persons should not be continuously subjected to assessments in relation to their ability to work or earn an income. Thus, requests for further assessments and for injured persons to submit medical reports should be reasonable. This also applies in respect of assessments which are requested for the purposes of the long-term income support benefit. The Administrator should also</p>	See the comments.

	cover the costs of any further assessments.	
Clause 35: Temporary income support benefit 35(7)	The purpose of this benefit is to provide a temporary income to an injured person. Given that the costs of living increase annually, the income should also be increased annually and not " <i>subject to affordability, from time to time</i> ".	Revise accordingly.
Clause 36: Long- term income support benefit 36(1)(b)(ii)	N/A	See the comments in relation to clause 35(4)(d).
Clause 36: Long- term income support benefit 36(1)(d)	The Administrator should cover the costs of any assessments which must be performed by the medical practitioner for the purposes of preparing a medical report envisaged in this clause.	See the comments.
Clause 36: Long- term income support benefit 36(5)(b)	N/A	It is recommended that any increases be made in consultation with the injured person.
Clause 36: Long- term income support benefit 36(7)(c)(i)	As stated earlier, it is unclear why a severely injured or disabled person may not immediately have access to a long-term income support benefit. It is recommended that the Bill be amended to provide for this.	Amend accordingly.
Clause 36: Long- term income	N/A	Please refer to the comments relating to clause 35(5)(c).

support benefit 36(7)(c)(ii) &(iii)		
Clause 36: Long-term income support benefit 36(8)	<p>Please refer to the comments relating to clause 35(6).</p> <p>The Administrator should strike a balance between the need to curb fraudulent claims and the need to ensure that injured persons, particularly severely injured or disabled persons, are not continuously required to prove that they qualify for the long-term income support benefit, as this could be stressful, traumatic, time-consuming, costly and humiliating, amongst other things.</p> <p>Where it is evident that an injured person would need a long-term income support benefit indefinitely, it would serve no purpose to require him or her to undergo various assessments and vocational training programmes. It may, therefore, be prudent for the Bill to provide for certain categories of injured persons to be exempted from further assessments or the requirement to attend vocational training programmes (for example, severely disabled persons).</p>	<p>See the comments.</p>
Clause 36: Long-term income support benefit 36(9)	<p>N/A</p>	<p>Please see the comments relating to clause 35(7).</p>
Clause 36: Long-term income support benefit 36(10)	<p>N/A</p>	<p>Please see the comments relating to clause 35(5)(e).</p>

Clause 37: Vocational training programmes	<p>There may be circumstances where it would be inappropriate for the Administrator to require an injured person to participate in a vocational training programme. For example, an injured person may not be physically able to participate (for example, a severely disabled person). Further, to the extent that an injured person is no longer able to be employed in his or her previous profession (or profession of choice), it may affect his or her human dignity to be required to participate in a vocational training programme which is aimed at assisting such person to obtain employment in an area other than the one in which he or she was previously employed (or in a profession other than his or her profession of choice). Some injured persons may find it demeaning to be employed in a lesser capacity or in a field other than in their pre-crash field (or profession of choice). A further concern is whether the Administrator will reduce an injured person's benefits if he or she is later employed in a capacity in which he or she earns less than prior to the road crash.</p> <p>Further, injured persons, if they are able to obtain employment, have a right to choose their profession and not to have a profession forced upon them. In this regard section 22 of the Constitution states that "[e]very citizen has the right to choose their trade, occupation or profession freely". This right can only be limited in terms of section 36 of the Constitution.</p>	Revise the clause in light of the comments.
Clause 37: Vocational training	It is unclear what the injured person's role will be in relation to the " <i>preparation</i> " of the	Revise the provision accordingly.

<p>programmes</p> <p>37(1)(b)</p>	<p>vocational training programme. This should be clarified.</p> <p>Further, it is unlikely that a lay person, who does not have expertise in this area, would be able to provide valuable input in relation to the costing of the vocational training programme. They should, therefore, be afforded the right to be assisted by appropriate experts on this matter.</p> <p>Injured persons should also have a choice in relation to the vocational training programmes which they will be required to participate in. They should also be permitted to be assisted by experts of their choice who can guide them in relation to which vocational training programmes would be appropriate for them to participate in.</p> <p>In the circumstances, the clause should be revised to state that beneficiaries may be assisted by experts of their choice and that the costs will be covered by the Administrator. As stated earlier, many South Africans do not have the means to pay for the costs of consultants and experts. If the Administrator does not cover these costs, it is likely that beneficiaries will not be able to participate in the process and thus they will be at the mercy of the Administrator in relation to which programmes they must attend.</p>	
<p>Vocational training programmes</p> <p>37(1)(c)</p>	<p>In terms of this clause, an injured person must consent in writing to participate in a vocational training programme, but if the injured person "unreasonably" withholds his or her consent, the Administrator may "require" an injured person to participate in a programme.</p>	<p>Revise the provision in light of the comments.</p>

	<p>This clause is concerning, as it means that the Administrator may force an injured person to participate in a vocational training programme. It also appears that the Administrator has the power to decide whether an injured person is unreasonably withholding his or her consent.</p> <p>As stated earlier, there may be reasons why an injured person would not want, or be able, to participate in a vocational training programme. In these circumstances, the Administrator should be sensitive and not force such persons to participate in these programmes.</p> <p>The need for an injured person to participate in a vocational training programme should be based on objective factors, with due regard to representations from the injured person and relevant experts and any other appropriate factors.</p>	
<p>Clause 37: Vocational training programmes</p> <p>37(2)(b)</p>	<p>There may be reasons why it would not be appropriate for an injured person to participate in a vocational training programme.</p> <p>An additional issue is that there is no guarantee that an injured person will be employable or find employment after the vocational training programmes have ended. This calls into question the usefulness of these programmes.</p>	Delete the clause.
<p>Clause 38: Liability of Administrator in respect of family</p>	<p>It is unclear why a dependant should be deprived of a family support benefit simply because he or she is not ordinarily resident in</p>	<p>This clause should be revised to provide that family support benefits are also payable to</p>

support benefit 38(1)	<p>South Africa.</p> <p>The need for a dependant to be paid this benefit flows from the fact that he or she was supported by a family member (or the family member had a duty to support the dependant) and such family member died as result of a road crash which occurred in South Africa.</p> <p>The fact that the dependant does not live in South Africa is irrelevant. The effect of depriving the dependant of this benefit is that he or she may not be able to support him- or herself or his or her dependants.</p>	<p>dependants who are not ordinarily resident in South Africa.</p>
Clause 38: Liability of Administrator in respect of family support benefit 38(2)(b)	<p>The term "<i>reasonable period</i>" is vague.</p>	<p>Replace the term with a specific period.</p>
Clause 38: Liability of Administrator in respect of family support benefit 38(5)	<p>It is unclear why the pre-accident income of the surviving spouse will be used in calculating the family support benefit, because, notwithstanding the surviving spouse's income, he or she had the full benefit of the deceased spouse's income during the course of his or her lifetime.</p>	<p>Delete the clause.</p>
Clause 38: Liability of Administrator in respect of family support benefit 38(7)(b)	<p>These terms are also used in clause 36(6).</p>	<p>Cross-refer to clause 36(6). Alternatively, these terms should be defined in clause 1.</p>

Clause 38: Liability of Administrator in respect of family support benefit 38(13)(a)	<p>It is unclear what criteria will be used to determine whether a person "remains a dependant".</p>	<p>Clarify what is meant by the phrase.</p>
Clause 38: Liability of Administrator in respect of family support benefit 38(14)	<p>See the comments in relation to clause 35(7).</p>	<p>The family support benefit should be subject to annual increases, given that the cost of living increases every year.</p>
Clause 38: Liability of Administrator in respect of family support benefit 38(15)	<p>N/A</p>	<p>See the comments in relation to clause 35(5)(e). The same comments apply.</p>
Clause 39: Liability of Administrator in respect of funeral benefit	<p>Any funeral benefit which is paid must take into account the actual costs of funerals in South Africa.</p>	<p>It is important that appropriate research be conducted before an amount is settled on. The amount should also be increased from time to time, depending on whether funeral costs have increased.</p>
Clause 40: Termination, suspension and revision of benefits	<p>The Administrator should only have the power to terminate the benefit if such false or misleading information is material for the purposes of the claim. Where the false statement or misleading information is of a</p>	<p>Revise the clause accordingly.</p>

40(2)(a)(iv)	minor nature, then the Administrator should not have the power to terminate the benefit.	
Clause 40: Termination, suspension and revision of benefits 40(2)(b)(i)	Whether the refusal is unreasonable should be determined with reference to all the relevant facts. There should be a balance between the need to curb fraudulent claims and the right of an injured person to human dignity. Further, injured persons should be allowed to carry on with their lives without the threat of potentially having to undergo assessments by the Administrator.	See the comments.
Clause 40: Termination, suspension and revision of benefits 40(2)(b)(ii)	N/A	See the comments in relation to clause 40(2)(b)(i). Further, the Bill should clarify how the Administrator will deal with situations where, due to religious beliefs, injured persons may not be willing to submit to certain treatments (for example, blood transfusions).
Clause 40: Termination, suspension and revision of benefits 40(2)(b)(iii)	N/A	See earlier comments relating to vocational training programmes.
Clause 40: Termination, suspension and revision of	N/A	See earlier comments relating to vocational training programmes.

benefits 40(2)(b)(iv)		
Clause 40: Termination, suspension and revision of benefits 40(3)	N/A	The words "with an opportunity" should be replaced with the words "with a reasonable opportunity".
Clause 40: Termination, suspension and revision of benefits 40(3)(a)	N/A	The clause should be revised to state that the Administrator must take reasonable steps to locate the beneficiary.
Clause 42: Substitution of recipient of certain benefits	N/A	The words "who has been" should be inserted before the word "appointed" (in the second line of the clause).
Clause 42: Procedure for claiming benefits 42(3)	<p>In terms of this clause, the Administrator may assist certain persons to submit claims, if it is necessary to do so. This clause is inconsistent with clause 5(a), which places an obligation on the Administrator to assist (the word "must" is used).</p> <p>In any event, the phrase "[i]f necessary" is problematic for two reasons. Firstly, it is unclear what criteria the Administrator will use to determine if it is "necessary" to provide assistance.</p> <p>Secondly, if the Administrator does not deem</p>	Revise the clause in line with clause 5(a).

	<p>it “necessary” to provide assistance, then the relevant person would have to complete the claim forms without any assistance. This could result in persons completing claim forms incorrectly which could, in turn, prejudice their applications. Alternatively, a person would have to approach an external consultant, at his or her own cost, for assistance.</p> <p>The above situation is not acceptable. Given the complexity of the benefit system and the claims procedure, the Administrator should always make officials available to assist potential claimants with their claims.</p> <p>While it is by no means clear, it would seem that the Bill is attempting to limit lawyers' fees by encouraging claimants to complete forms without the assistance of lawyers. The difficulty is that, given the complexity of the claims process, claimants may, in any event, need to consult lawyers and other experts to assist them in completing the claim forms correctly.</p>	
<p>Clause 43: Obligations of claimant and beneficiary 43(1) & (2)</p>	<p>These clauses, when read together, effectively amount to duress. In this regard, unless a person complies with the requirements of clause 43(1), the Administrator will not process a person's claim.</p> <p>This is particularly concerning in the case of clause 43(1)(e), where a person must give permission for the Administrator to access certain information held by a third party. Some of the information held by a third party may be of a confidential nature and a person might have a valid reason for not wanting to disclose it to the Administrator (particularly where it could result in the infringement of his or her constitutional rights). For example, the</p>	<p>In the circumstances, clause 43(2) should be amended to state that a person may refuse to comply with clause 43(1) on reasonable grounds.</p>

	fact that a person is HIV-positive.	
Clause 43: Obligations of claimant and beneficiary 43(1)(a)	N/A	The purpose of the interview should be clarified in this clause.
Clause 44: Information to be furnished to Administrator by third parties	<p>The clause in its current form is not supported.</p> <p>The Administrator should not have the power to solicit personal information regarding a claimant without due regard to appropriate law, including, amongst others, the Constitution, the Protection of Personal Information Act, 2013 (Act 4 of 2013) and the laws regulating the processing of patient information by medical practitioners (particularly in light of doctor-patient confidentiality).</p>	Reconsider the clause in light of the comments.
Clause 46: Claims lapse in certain circumstances 46(3)(a)	It is unclear what is meant by the term " <i>superior force</i> ". It should be defined or explained in the Bill.	Define or clarify the term.
Clause 46: Claims lapse in certain circumstances 46(3) – in re prescription	While it is noted that this clause follows section 13 of the Prescription Act, 1969 (Act 68 of 1969), for the sake of fairness, it is recommended that the three-year prescription period should only start to run after the relevant impediments in paragraphs (a) or (b) cease to exist.	Revise the clause accordingly.

<p>Clause 47: Time periods for determination of claims</p>	<p>The Administrator has approximately 6 months within which to accept or reject a claim. This time period is too long and should be reduced.</p> <p>There may be claimants who are unable to work and earn an income during this time as a result of the road crash. It would be unreasonable to expect them to wait 6 months (or longer, if it is necessary for them to lodge an appeal) for their claim to be accepted or rejected. A claimant, especially an indigent claimant, is likely to be placed under severe financial strain during this time. This is unacceptable.</p> <p>Further, clause 47(1) indicates that the Administrator will accept or reject a claim within 180 days, failing which an appeal may be lodged.</p> <p>The RAF has a history of negating its responsibility by not responding to claims within its own time lines and expects the service providers to simply resubmit the claims, which is an unnecessary duplication of effort and resources. Importantly, as the current RAF system does not record the additional or follow-up attendances and admissions, it is unlikely that accurate statistics on the quantum of claims from the service providers were available when clause 47(1) was drafted.</p> <p>In the circumstances, it is recommended that clause 47(1) be amended to read that a claim will be deemed to be accepted if the Administrator does not revert regarding whether a claim was accepted or rejected. This places the onus on the Administrator to honour its administrative responsibilities as</p>	<p>Revise the clause accordingly.</p>
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	enshrined in the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).	
Clause 47: Time periods for determination of claims 47(3)	It is unclear who will be lodging the appeal. Is it the claimant? If so, why would he or she lodge an appeal against the acceptance of his or her claim (unless, perhaps, the Administrator only accepts a portion of the claim and not the whole claim)?	Revise the clause in light of the issue raised.
Clause 55: Appeals 55(5)	The period which the Appeals Committee has to determine an appeal is too long and should be reduced. In this regard, it may take up to 6 months for a claim to be determined. If the appeal process takes a further 6 months to finalise, it would mean that an injured person (particularly one who is indigent) may not have an income for a year. This is likely to lead to a severe financial strain on the injured person and his or her dependants.	Reduce the period within which the Appeals Committee must determine the appeal.
Clause 55: Appeals 55(6)	In terms of this clause, a claimant may only approach a court after all the internal dispute resolution mechanisms have been finalised — but the claimant may only institute review proceedings. Claimants should be able to approach a court at any time and for any appropriate relief. At the Cape Town workshop, Adv De Waal conceded that review proceedings are generally limited in their scope and the relief which may be sought.	Revise the clause accordingly.
Clause 56: Professional and other fees	This clause will have a devastating effect on	In the circumstances, it is recommended that this

	<p>claimants. Many South Africans are indigent and would not be able to afford to pay medical and legal costs. While it is understood that the new social security scheme is aimed at, amongst other things, reducing the liability of the Administrator in order to make it sustainable, the Administrator's financial savings should not be at the expense of claimants.</p> <p>If these costs cannot be recovered from the Administrator, then the claimant would be responsible to pay them. This could, in turn, cause claimants to forego obtaining medical or legal assistance, which would leave them completely at the mercy of the Administrator. The latter will most likely act in its interests and not in the interests of the claimant. The proposed clause 56 is thus likely to lead to unfair results.</p>	<p>clause be amended to provide for the Administrator to be liable for a claimant's costs (including medical and legal costs) should he or she qualify for a benefit — this should, of course, be within reasonable limits. Alternatively, a claimant should be able to approach a court at any stage in the claims process in order to recover his or her costs from the Administrator.</p>
Clause 57: Liability for administrative decision-making	N/A	<p>The Administrator should not only be liable for "<i>intentional wrongdoing</i>", but also for negligence.</p>
Clause 60: Regulations and certain notices by Minister 60(1)(a)	<p>Private health care service providers should be encouraged to participate in the proposed system. Any tariffs which will apply in relation to private health care service providers should be consistent with private tariffs. If not, private health care service providers may be hesitant to treat injured persons, which could lead to injured persons not being able to access certain health care services. It is, therefore, important that the Minister consults with, amongst others, the private health care sector to assist the Minister</p>	<p>See comments.</p>

	in determining an appropriate tariff.	
Regulations and certain notices by Minister 60(3)	N/A	<p>The words "<i>at least</i>" should be inserted after the word "<i>allow</i>" in the second line of the clause, as there may be circumstances where more time should be given to the public to comment on the draft regulations (particularly where the regulations deal with complex matters).</p>
Clause 62: Offences 62(1)	<p>There may be legitimate reasons why a person fails to appear before the Administrator or refuses to take an oath or affirmation. It is unlikely that a person who is unable to earn an income as a result of a road crash would have the means to pay a hefty fine.</p>	Delete the clause.
Clause 62: Offences 62(2)	<p>It is possible that the information, although false or misleading, is immaterial to the application or of a minor nature.</p> <p>Thus, it would not be appropriate to criminalise the provision of all false or misleading information. Further, the sanctions are inappropriate, given the nature of the contravention and the fact that many claimants may not have the means to pay the fine. They could potentially then have to serve a prison term.</p>	Revise the clause accordingly.
Clauses 64 & 65 Insertions into	A separate Amendment Bill should be drafted.	Delete these clauses and prepare a separate

Road Accident Fund Act, 1996 (Act 56 of 1996) ("RAF Act")		Amendment Bill in respect of the RAF Act.
Schedule 1 Items 1 and 2	<p>It would appear that the calculations in items 1 and 2 of Schedule 1 only take into account 75% of a claimant's pre-accident income. For the sake of fairness, the calculations should be on the basis of the full pre-accident income (i.e. 100%). Items 1 and 2 should be amended accordingly.</p> <p>Further, the calculations are inadequate in that they do not take into account factors such as loss of future promotions, early retirement, loss of productivity, the potential for future surgery, the working environment of the claimant and the fact that a claimant who is seriously injured would not be able to compete equally with others in the labour market.⁵ The calculations should, therefore, be amended accordingly.</p>	Revise these items in light of the comments.

⁵ See <http://www.polity.org.za/article/government-hoodwinks-public-by-introducing-road-accident-benefit-scheme-administrator-2014-06-18>.

RABS

2017-8(b)



Western Cape
Government

MINISTRY OF TRANSPORT

Ms DP Magadzi

Chairperson of the Portfolio Committee on Transport

For attention: Ms Valerie Carelse

Email: vcarelse@parliament.gov.za

Dear Madam

Re: Road Accident Benefit Scheme (RABS) Bill [B 17 - 2017] – Comments

Kindly find attached the comments of the Western Cape Government on this Bill.
The comments are additional to those submitted on earlier versions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'DAC Grant'.

DAC GRANT MPL
MINISTER OF TRANSPORT AND PUBLIC WORKS

Date 17 November 2017

TEMPLATE: Comments on Draft National Legislation

Name of Department:	Transport & Public Works		
Matter: (Title of Legislation)	Road Accident Benefit Scheme Bill		
Contact Person:	Hector Elliott	Due Date for comments:	22 Nov 2017
Email:	hector.elliott@westerncape.gov.za	Date of Submission	16 Nov 2017
Telephone:	083 669 9609	Legal Services Ref. No.:	
Submitted To:			

COMMENTS:

Clause (Indicate clause/ regulation Number)	Comment (State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision)	Suggestion (Suggested deletion/amendment/ addition)
General	The department has previously recommended that the Road Accident Benefit Scheme, and its enabling bill, align with the 2007 World Health Organisation (WHO) recommendation to replace the word "accident" with the word "crash" in all communication which refers generally to road trauma incidents. This, per the WHO, avoids the unintended consequence of reinforcing the widespread perception of road crashes as inevitable, and not subject to rational analysis and prevention. Since this recommendation was made in previous comments on the RABS bill, national government has in general adopted this approach, including in the National Road Safety Strategy recently approved by the National Cabinet. It is recommended that this approach be adopted here, not only in line with international best practice and treaty obligations, but also in line with the most recent national policy stance on the subject.	As per the previous comments, it is recommended that the word "accident" be substituted throughout with the word "crash".
7.(1)(a)-(f) read with 6	The range of Powers accorded the Administrator in Section 6 provides encouragement that the RABS Bill has the potential to put the RAF onto a pro-active footing. The best practice approach of pro-active investment in road safety awareness and engineering interventions, as well as financial investments to enable self-funding,	It is recommended that the fields of expertise listed in 7(1)(b) be expanded to include "investment management, marketing, road design, transport systems, traffic law enforcement".

	<p>has been recommended by the WCG in previous comments.</p> <p>The composition of the Board, as contemplated in Section 7, would exclude all expertise from the fields of engineering, marketing and law enforcement. These are the fields which are best placed to advise the Administrator on approaches which will proactively limit the liability of the RAF, as opposed to best manage injuries once they have already occurred.</p>	<p>It is recommended that the Bill directly require the Administrator to establish an investment portfolio designed to produce income to progressively reduce the burden on the economy of the fuel levy apportioned to the RABS. This need will become increasingly urgent as transition to alternative working arrangements (such as work-from-home), alternative fuel sources (especially electric vehicles), public transport and mobility as a service (MAAS, such as Uber or Lyft) becomes more entrenched, and the quantity of fuel sold in the Republic correspondingly declines. Legislation should thus establish a timeline for the development of this income-bearing investment portfolio. The Bill should also make direct provision for:</p> <ol style="list-style-type: none"> 1. the establishment of significant funding to be set aside for the treatment of "hotspots" or hazardous locations through engineering interventions (in line with the Safe Systems approach adopted in the National Road Safety Strategy). 2. The establishment of significant funding to be set aside for road safety education, particularly
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		in the development of high quality marketing campaigns designed to reach priority demographics and positively influence road safety outcomes.
28	<p>The potential unintended consequences of a "no fault" system being imposed in South Africa were included in previous comments. It is noted that the systemic issues of poor driver behavior and uneven and often ineffective road policing and justice system mechanisms have not been substantially resolved, and it is recommended that this clause not be included in the bill while current conditions prevail. For example, for 2015 the Road Traffic Management Corporation recorded 11 144 fatal crashes, 40 117 major crashes (in which serious injuries were caused) and 132 609 minor crashes (in which slight injuries were caused). The RTMC published a breakdown of "Factors Contributing to Fatal Crashes" (quoted in the National Road Safety Strategy 2017, p.27) in which it stated that 73.6% of fatal crashes were caused by "Human Factors". Given these numbers taken together, it would be expected that the courts would be convicting several thousand persons of culpable homicide each year, assuming effective police investigations and prosecutions were taking place in all cases. Much more significantly, due to the possibility of the responsible party having died in the crash, tens of thousands more would be convicted of reckless and negligent driving as a result of major and minor crashes. While conviction rates are not released, there is no evidence that they are any higher for this category of offence than other serious crimes which cause death or injury to other persons. The previous position of the RAF with regard to removing access to redress via a civil suit can</p>	Remove Clause 28.

	only contribute to a culture of impunity. Under the prevailing circumstances, and the pressing need to evolve the RAF into an organ of state which adopts a pro-active stance to road trauma in addition to a re-active stance, the intention to transition to a "no fault" system appears premature.	

Comments noted and supported.



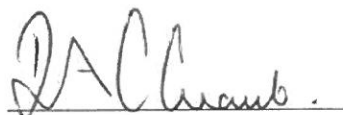
Kyle Reinecke

DDG: Transport Management

On behalf of HOD, Transport and Public Works

Date: 17/11/2016

Comments noted and supported.



Donald Grant

Provincial Minister

Date: 17 November 2017

