

DRAFT ROAD ACCIDENT FUND BENEFIT SCHEME BILL 2014

1. The Draft Road Accident Fund Benefit Scheme Bill (Draft RABS Bill) was published for public comment on 9 May 2014 in the Government Gazette.
2. The South Africa Medico-Legal Society (SAMLs) comments on the Draft RABS Bill as follows:
 - 2.1 The object of the Bill to be achieved is to be kept in mind in regard to the feasibility and outcome of the provisions of the Bill. In the preamble it is stated that there is a need for an *“effective benefit system, which is reasonable, equitable, affordable and sustainable in the long term, and which optimises limited resources and facilities timely and appropriate healthcare and rehabilitation to lessen the impact of injuries and which provides financial support to reduce the income vulnerability of persons affected by injury or death from road accidents”*. The draft also states that *“there is a need to expand and facilitate access to benefits”* and to *“simplify claims procedures”*, *“reduce disputes”* and *“create certainty”*.
 - 2.2 It is submitted that the Draft RABS Bill will not satisfy these objectives.

2.3 The SAMLs objects to the introduction to the RABS Bill as drafted for the fundamental reason that under its proposed provisions:

2.3.1 victims of road accidents will be seriously under-compensated, if at all, for the *sequelae* of bodily injuries;

2.3.2 the provisions are vague and leave much to the discretion of the administrator which potentially will lead to disputes, delays and administrative court action which will be costly and thus directly or indirectly deny victims their common law and constitutional rights thus defeating the intention and purpose of the Act.

2.4 Under the provisions of the Draft RABS Bill victims of road accidents will lose constitutionally entrenched rights and rights held under common law. The loss of general damages is a loss of long-established and reasonable and equitable rights under the

common law and this loss is unacceptable in a South African context.

2.5 The provisions of the Draft RABS Bill will discriminate particularly against the rights of disadvantaged, rural and impoverished victims of road accidents.

2.6 According to the provisions of the Draft RABS Bill compensation for injuries sustained in road accidents will be limited to two main heads of damages, namely:

2.6.1 medical expenses; and

2.6.2 loss of earnings,

with some other family support benefits and burial benefits.

2.7 MEDICAL EXPENSES

The proposed method of compensation for medical expenses will result in inadequate access, if any, to reasonable medical

treatment. The proposal that fees for medical and allied services are to be compensated at a specially determined RABS tariff and by designated service providers will effectively exclude access to private healthcare. Public healthcare does not have the capacity to provide for those citizens for whom it is already responsible. It will accordingly have zero capacity to take on the additional burden of treating victims of road accidents. In the alternative any victims of road accidents that receive treatment in public healthcare facilities will deprive others of such treatment.

2.8 EARNINGS

The proposed method of compensation for loss of earnings will result at best in under-compensation for proven losses. The proposed, but yet unidentified, cap on earnings to be compensated for will prejudice all who earn above the level of the cap. For those who earn below the level of the cap compensation will be limited to 75% of the actual pecuniary loss.

2.9 GENERAL DAMAGES

2.9.1 According to the provisions of the Draft RABS Bill there will be no compensation for non-pecuniary damages such as loss of earning capacity, pain, suffering or losses of amenities and enjoyment of life.

2.9.2 By way of an example : a housewife who is not employed for remuneration despite having the capacity to work for remuneration, but who is supported by her husband in order to work at home and bring up children. As a result of permanent disfigurement and disability brought about by injuries sustained in a road accident she may be abandoned by her husband. Despite being unemployable and suffering a complete loss of earning capacity she will receive no compensation for this serious and real loss.

- 2.9.3 Victims of road accidents who suffer serious injuries resulting in chronic pain and/or losses of amenities, independence and enjoyment of life will receive no compensation for these serious and real damages.
- 2.9.4 According to the provisions of the Draft RABS Bill there will be no compensation for legal representation or independent assessment of losses by experts and there will be no right of access to courts, save under the so-called PAJA legislation.
- 2.9.5 Victims of road accidents will need to approach staff of the Fund on their own steam to apply for compensation. The least sophisticated and rural members of the public will be most compromised in terms of access to compensation and exercise of these rights.

- 2.9.6 Many victims of road accidents, particularly those who suffer serious head injuries, will not have the knowledge or mental capacity to exercise their limited rights to compensation.
- 2.9.7 Staff of the Fund who are not suitably trained medical experts or occupational therapists will be compromised in their capacity to understand and evaluate physical disabilities.
- 2.9.8 Staff of the Fund who are not suitably trained medical experts or psychologists will be more seriously compromised in their ability to understand and evaluate abstract disability such as those claimed from psychological trauma, head injuries, chronic pain and depression.
- 2.9.9 Should the Fund appoint medical experts, psychologists and occupational therapists to evaluate

claims, the findings of such experts will be tainted by the lack of independence.

2.9.10 By way of an example : a 30 year old clerk earns R10 000,00 per month and becomes totally unemployable due to head injury. His actual loss of earnings, disregarding inflationary increases, will be $R120\,000,00 \times 35 = R4,2$ million. His legitimate claim for loss of earnings will be 75% of $R120\,000,00 \times 35 = R3\,150\,000,00$. If an official of the Fund makes him an offer of R50 000,00 he will not understand the extent to which his rights under the provisions of the Fund will or are being compromised and may in ignorance accept the offer. It is well known that staff members of the Fund have persuaded claimants to accept settlements that are way below to what they are entitled to under the present legislation and a number of summonses have already been issued against the RAF for such under-settlements.

This will surely be exacerbated in the future under the proposed RABS Draft Bill.

2.9.11 If the disabled clerk does not accept the offer his only right of appeal will be to a tribunal appointed by the Fund. Without legal representation and medical expertise the disabled clerk will not be in a position to formulate his legitimate claim and will not be able to put his case properly to the tribunal. Even if he is supported by independently funded legal representation and medical expertise the findings of the proposed tribunals will be flawed by the lack of independence.

2.9.12 Many trained personnel will be required to make the system function. This is not available and will cause long delays depriving victims of desperately needed funds. Experience in other departments, i.e. the Compensation Commissioner's department, has

proven that payments are delayed for years as a result of inadequate staff or untrained staff.

- 2.10 The effect of the provisions of the Draft RABS Bill will be that all victims of road accidents will be under-compensated for real damages suffered as a result of their injuries.
- 2.11 Wealthy citizens will be particularly compromised by the cap on loss of earnings, at least those of them who are suitably informed will be in a position to insure themselves against real damages sustained in road accidents.
- 2.12 Poor citizens will be particularly compromised by the combined effect of the 75% limitation on proven pecuniary losses, the lack of access to reasonable healthcare and the lack of compensation for non-pecuniary losses.
- 2.13 The retirement age of 60 is unrealistic and will deprive victims of funds at a stage of their lives when they are unable to supplement their income. This is a serious deprivation of common law rights.

The trend worldwide is for retirement ages to be later in life as the effects of inflation and longer life expectancy has made that necessary.

- 2.14 The fact that legal costs will not be paid is a serious deprivation of citizens' legal rights under the Constitution and will effectively deny victims the right to legal representation. The failure to pay the administrative costs for submission of claims is similarly a serious deprivation of the rights of victims.
- 2.15 The clause that the administration is not liable for negligence but only liable in cases of wilful wrongdoing is unconstitutional and will make it practically impossible to sue the Fund for negligent misadministration of the provisions of the Act.
- 2.16 All citizens who lack detailed knowledge of the provisions of the Act and all who lack medical and allied expertise and who lack legal expertise and competence will be compromised by their ignorance and lack of access to fair representation.

3. All in all, the Draft RABS Bill does not satisfy the intention behind the Bill as stated in the preamble.

Yours faithfully

CHAIRPERSON OF THE SOUTH
AFRICAN MEDICO-LEGAL SOCIETY