

PORTFOLIO COMMITTEE ON TRANSPORT

ROAD ACCIDENT BENEFIT SCHEME (RABS) BILL [B 17- 2017]

RESPONSES FROM THE DEPARTMENT ON WRITTEN SUBMISSIONS AND INPUT AT PUBLIC HEARINGS

1. INTRODUCTION TO RESPONSES

A. SATCHWELL COMMISSION OF ENQUIRY

Several commentators referred to the Commission's report.

The Commission report formed the basis for the Department's draft policies which were consulted on prior to Cabinet approval in 2011. The Cabinet approved policy, as opposed to the Commission Report, from there on out formed the basis for the development of the two draft Bill's consulted on in 2013, and again in 2014, and the final draft Bill that was approved by Cabinet in 2017 for referral to Parliament.

The recommendations in the Commission's report were not binding on Cabinet and are not binding on Parliament.

Additionally, the judgment of the Constitutional Court, more than eight years after publication of the Commission's report, in **Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC)**, has important implications for certain of the recommendations in the Commission's report – the judgment is discussed later.

COMMISSION'S INTERPRETATION OF ITS MANDATE:

The Commission interpreted the respective components of its mandate regarding reasonable, equitable, affordable and sustainable, as follows:

- a) A reasonable system of road accident compensation should acknowledge the symbiotic relationship of road accident compensation with the broader system of social security and its objectives. There should be moderation without extremes of generosity or meanness. The system should be sensible in its ambitions and reflective of both the needs and resources of the South African society in which it is founded. The system should be purposive in conception and not a piecemeal mixture of legislative amendment.
- b) An affordable system of road accident compensation should be within the financial means of road users and South African society as a whole. The system (in its funding demands, administration costs and social security benefits) must provide value to road users in South African society.
- c) A sustainable system of road accident compensation must be efficient in its accessibility and administration. The system should be facilitative of health care and rehabilitation as also the alleviation of financial hardship and anxiety. There should be reinforcement of the broader system of social security which in turn should be supportive of road accident compensation. Any such system must be long lasting in its availability to road accident victims who are reliant thereon. Accordingly, the system must remain financially and morally viable in the eyes of all South African society.
- d) A system of road accident compensation must be equitable in that there must be proportionality between the funding of the system and the demands made thereon. There should be impartial and unbiased treatment of road accident victims and their families. The purpose and effect of such a system should be supportive of justice and fairness as between road accident victims and their families. There should be some balance or congruence between the benefits made available to road accident victims and the benefits made available to other South Africans in need.

➤ **Note:** section 2(a) of the Bill is aligned to the above objectives.

Objectives of Act

2. The objectives of this Act are to—

(a) 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**;

- The object of the scheme is not to make good the loss but to address the need.
- Contrary to what several commentators seem to suggest the object in the Bill to provide for a “reasonable” and “equitable” scheme has little to do with comparing the claimant’s loss to the benefit offered by the scheme – what is intended is a scheme that balances the needs of all claimants’ with available resources.

COMMISSION’S EVALUATION OF THE RAF SCHEME:

a) The RAF system of road accident compensation is based on exclusion rather than inclusion.

The focus of the RAF system is the presence or absence or degree of “fault”, rather than the prevention or betterment of the consequences of road accidents:

- Skills, time, money and energy are used on attributing or denying blame instead of being dedicated to road safety, emergency medical services, trauma care and early and effective medical and rehabilitative intervention.
- During the considerable period that “fault” is in dispute the road accident victim has no entitlement to any compensation.
- Transaction costs financially advantage “experts” in issues of “fault” (specialists in accident investigation and reconstruction and the legal profession).

The result is that the cause of the accident (fault) takes priority over the need for healthcare and rehabilitation, trauma care and rehabilitative intervention. Such exclusion is incompatible with the concept of social security and does not contribute towards equity or sustainability.

- b) Exclusion continues to perpetuate disparities between urban and rural sectors, the employed and the unemployed, the rich and the poor, which is not conducive to concepts of social security. Not only is such a system inequitable, it is also inefficient, unsustainable and unreasonable.
- c) Uncertainty for everyone and preferential treatment for the rich and networked is not equitable, reasonable or sustainable.
- d) Compensation funds are not allocated in a manner helpful to optimal rehabilitation outcomes for persons seriously injured in road accidents.
- e) It is not reasonable to expect a developing country such as South Africa to provide unlimited benefits or compensation to road users.
- f) The lack of moderation in the system that allows for and perpetuates disparities of wealth between road users cannot meet the standard of reasonableness.
- g) The absence of any relationship between the fuel levy and the compensation to which a victim may be entitled is not economical and is therefore unaffordable.
- h) A system of compensation without limits or boundaries is unreasonable. The absence of any correspondence between the fuel levy, risk and cover is inequitable, unaffordable, unreasonable and unsustainable.
- i) Payment of compensation in lump sums offers no security to disabled road accident victims. Road accident victims are frequently left destitute or fall back upon the State’s already overburdened resources.

j) Transaction costs enrich facilitators and not the victims of road accidents.

- Over the past weeks this Committee has heard a lot from these facilitators, some of who maintain that the existing scheme is reasonable and equitable...

COMMISSION'S FINDING OF ABUSE OF RAF BENEFITS:

- a) Abuse, in the context of a social security system funded by the taxpayer, is not limited to acts of dishonesty, misconduct or mismanagement, it also applies to the **expenditure of public funds in a manner that does not enhance or support the principles upon which a system of social security is or should be based.**

- Prof. Klopper, one of the presenters for APRAV, in a research document prepared for the RAF in 2009, entitled "A Survey of South African Road Accident Victim Compensation Legislation", concluded that:

"In the South African context, the RAF Commission came to the conclusion that approximately 30% to 55% of the fuel levy collected does not reach its intended beneficiary, the road accident victim. In my view this figure, based on the recent financial statements of the RAF has risen to 55% to 70%.

Because of the inherent financial inefficiency, the system must be redesigned to make it affordable. The way forward indicated by the RAF Commission is in my view the solution to this problem. In adopting a no-fault system with prescribed benefits, the current considerable transaction costs will be saved and the legal bill which currently stands at R2 billion, will largely disappear."

The above conclusion contradicts Prof. Klopper's submissions to this Committee last week. One is left but to speculate on this change of heart.

- In the past financial year, the RAF paid R 8.3 Billion (unaudited) in intermediary costs. These costs are in addition to the contingency fees and other disbursements recovered by attorneys directly from claimants' compensation.
- b) A significant proportion of RAF claims for compensation can be described as false, exaggerated and opportunistic. There is a disturbing incidence of fraud.
- The below table reflects the extent of fraud and theft in relation to RAF matters:

Statistics	2011/2012	2012/2013	2013/2014	2014/2015	2015/2016	2016/2017
Number of arrests	502	290	478	325	391	88
Number of convictions	244	234	589	651	260	82

- c) Allegations of legal malpractice have received much publicity and some examples may be found in the disciplinary proceedings against attorneys initiated by the various provincial law societies.
- Noting the legal profession's submission to the Committee that legal malpractice is limited to a "few bad apples", and noting that the Commission's report was published as far back as 2002, it is necessary to test the legal profession's assurances in this regard:

THEFT: The Attorneys Fidelity Fund (AFF) is a fund that exists to assist claimants whose money is stolen by their attorney. A "generous" period of 3 months is allowed for the client to submit a claim. The AFF collects the interest earned on clients' money held in attorneys' trust accounts. The AFF uses this interest to pay claims where attorneys steal money. In a very real sense clients' money is used to make good clients' losses.

The following is noted from the AFF's Annual Reports for the past three years:

In 2015 the AFF received R445.8 million in trust interest income.

In 2016 the AFF received R632.7 million in trust interest income.

In 2017 the AFF received R610.0 million in trust interest income.

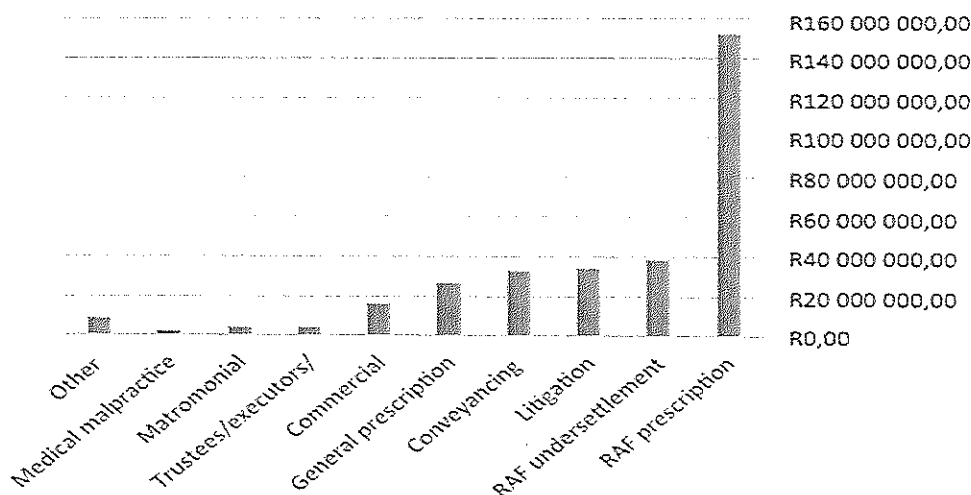
In 2015 a total of 854 new claims of theft by attorneys were reported to the AFF.

In 2016 a total of 1098 new claims of theft by attorneys were reported to the AFF.

In 2017 a total of 891 new claims of theft by attorneys were reported to the AFF.

Contrary to what has been presented to the Committee the statistics suggest that there are quite a few "bad apples" in the batch.

NEGLIGENCE: The Attorneys Indemnity Insurance Fund (AIIF) is a fund that exists to compensate claimants whose attorneys are negligent. In the Risk Alert Newsletter (No. 5 of 2017), issued by the AIIF and the AFF, it is confirmed that RAF claims are by far the largest category (almost 60%) of all claims paid by the AIIF, as illustrated in the below table:



Clearly the legal malpractice referred to in the Commission's report remains well entrenched in the current RAF system.

The Commission confirmed that there can be no doubt that the legal profession has a **financial interest** in, and **dependence on**, the current RAF scheme.

GREED: The RAF regularly receives complaints from claimants that their attorney has not paid them or that the payment received is far less than what was paid by the RAF.

Examples of this greed illustrated in the courts:

- 2014: In Ronald Bobroff and Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development and another 2014 (4) BCLR 430 (CC) the personal injury lawyers unsuccessfully contended that the Contingency Fees Act was unconstitutional because it unfairly discriminated against legal practitioners or unjustifiably limited their rights by curbing the fees they were allowed to charge. The Act places a limit of 25% on contingency fees. The legal practitioners who had been (unlawfully) charging more than the legal fee wanted to continue to charge more.

- 2016: In Masango and Another v Road Accident Fund and Others (2012/21359) [2016] ZAGPJHC 227; 2016 (6) SA 508 (GJ) (31 August 2016), Deputy Judge President Mojapelo made the following comment:

*“Ordinary a 100% increase on the normal fee in effect entitles the attorney to charge a fee for one matter as if the attorney had done two matters. A double fee is more than sufficient incentive to the legal practitioner to pursue litigation on a contingency basis. **One can therefore not understand the ever increasing rampant and persistent attempt by legal practitioners (especially attorneys) to provide for and recover more than the legitimate and legalised success fee.**”*

Having regard to the legal malpractice referred to in the Commission report, which is clearly still prevalent today, it is not surprising that more and more claimants wish to claim directly with the RAF, and successfully do so.

PRETENCE: Whilst on the issue of direct claims it is necessary to deal with an unfortunate comment by the presenter for the Law Society of the Norther Provinces. A comment was made that that the RAF is acting fraudulently by *assisting claimants to claim directly*. The presenter based this comment on the misguided premise that because the RAF Act does not provide for assistance to direct claimants the RAF is acting “fraudulently”. It is assumed that an organisation such as the LSNP has more than a passing familiarity with the law, which makes this comment all the more shocking.

The RAF’s core mandate to compensate accident victims is contained in the RAF Act. The modalities of how the RAF must go about delivering on the core mandate is contained in the Constitution, which provides that:

- a) The RAF is an organ of state, as defined in section 239.
- b) Section 195 provides for principles that govern public administration by organs of state, such as the RAF.
- c) These principles include, amongst others, that organs of state must: promote efficient, economic and effective use of resources; must be development-oriented; and, must respond to people’s needs.

The RAF’s assistance to direct claimants achieves these principles.

A claimant may lawfully elect not to utilise the services of an attorney. In exercising this election a need for assistance from elsewhere may arise. The RAF responds to this need by providing such assistance, at no cost to the claimant. This assistance will also be provided under the Bill.

A claimant who elects not to utilise the services of an attorney receives the full sum of compensation paid by the RAF, as opposed to a represented claimant who will only receive a portion of the compensation, after the attorney has recovered his fees, and the fees (disbursements) related to the advocate, medical experts, actuaries, assessors, and funders.

Consequently, 100% of the compensation paid by the RAF to a direct claimant reaches the intended beneficiary, as opposed to his counterpart who as a represented claimant will in the majority of cases receive considerably less than 75% of the compensation payment.

Compensation paid to a direct claimant is paid directly to the claimant. Compensation paid to a represented claimant is paid to the attorney, where in many instances the represented claimant waits for months to get paid his portion of the compensation whilst the attorney drafts the party-and-party bill of costs and then accounts to the other intermediaries.

Clearly the RAF’s assistance to direct claimants impacts on the legal profession’s financial interest in, and dependence on, compensation paid to represented claimants, by reducing the number of claims where fees can be earned.

It is submitted that the comment made on behalf of the Law Society of the Northern Provinces is a thinly veiled attempt to stop the RAF's direct claim initiatives in order to recoup the substantial chunk of fees that its members have had to forego because of the RAF's direct claim initiatives.

IMPACT OF THE BILL ON INTERMEDIARIES: As structured currently, the Bill does not lend itself to contingency fee agreements as there is no provision for any substantial lump-sum payment which could be used to satisfy a contingency fee payment.

This is likely the reason for the legal profession's push for so-called "lifestyle benefits" (which benefit would in practice be utilised to pay the attorney and other intermediaries) and, or, for the common-law claim to be retained, so that the common-law lump-sum payment could be utilised to recover contingency fees.

It is submitted that the significant financial interest, and the financial dependence, by the legal profession on the RAF scheme, as identified by the Commission, is likely at the heart of the legal fraternity's opposition to the Bill. It is no wonder then that the submissions to the Committee all suggest retaining the role of attorneys and experts, be it in the form of mediation, arbitration, or litigation.

B. CONSTITUTIONALITY

Almost without exception, each of the organisations that have in the past weeks presented to the Committee, placed emphasis on supposed unconstitutional aspects of the Bill. Considering that many of these presenters earn a very good living from the misfortune of RAF claimants, a living that is now threatened by the Bill, such statements do not come as a surprise.

This scare tactic to draw attention to supposed unconstitutional aspects is not new. Consider the below media release published on **26 February 2009**:

LAW SOCIETY CHALLENGES CONSTITUTIONALITY OF ROAD ACCIDENT FUND AMENDMENT ACT WHICH DEPRIVES ROAD ACCIDENT VICTIMS OF RIGHTS, PROPER TREATMENT AND COMPENSATION

The Law Society of South Africa (LSSA) today issued court papers to be served on the Minister of Transport and the Road Accident Fund (RAF), challenging the constitutionality and legality of the Road Accident Fund Amendment Act 19 of 2005 and some of its regulations, which came into effect in August 2008. The Amendment Act abolishes victims' common-law rights while at the same time reducing their compensation. This unreasonably and irrationally deprives victims of their right to obtain effective relief and violates section 38 of the Constitution. 'The LSSA has submitted in its founding papers that it is inexplicable and unjustifiable that, at the very time that the legislature has substantially reduced (and in some instances entirely removed) the right to statutory compensation, it has also deprived injured parties of the right which they have always had to seek compensation from the wrongdoer for any damages not covered by the Act,' explains Ms Sohn. According to the LSSA, it is unconstitutional for the Amendment Act to remove a road accident victim's common-law right to claim for fair compensation from the wrongdoer; and, at the same time to provide that only persons who suffer 'serious' injuries are entitled to claim general damages from the RAF...";

So, what was the outcome of this very comprehensive legal challenge?

ALL of the challenges to sections in the Act and regulations were unsuccessful in the court of first instance - Law Society of **SA and Others v Minister of Transport and Another 2010 (11) BCLR 1140 (GNP)**.

Leave to appeal directly to the Constitutional Court was granted and an appeal was lodged in respect of the abolition of the common-law right; the statutory caps; and the non-emergency medical tariff.

The Constitutional Court in **Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC)** held that: **THE ABOLITION OF THE CLAIMANT'S COMMON-LAW RIGHT TO SUE THE WRONGDOER FOR DAMAGES NOT RECOVERED FROM THE RAF PASSES CONSTITUTIONAL MUSTER**, as does the statutory caps placed on claims for loss of income and loss of support. The non-emergency medical tariff was

however struck down because certain types of life saving treatment required by especially spinal cord injured accident victims was only available from the private sector who were not prepared to provide the services based on the UPFS tariff.

- Legal precedent exists for section 28 of the Bill
- The common-law right to sue the wrongdoer is already abolished
- The comment by the BLA that the limitation of rights by section 28 of the Bill would not be assisted by the limitation clause in section 36 of the Constitution, on the basis that the Bill is not of "general application", is not supported by: (a) the fact that the Bill has general application; (b) the fact that an equivalent clause to section 28 in the Bill is in force, in the form of section 21 of the RAF Act, and (c) the fact that the current clause already passed constitutional muster
- The recommendation by the Satchwell Commission for the common law residual right to be retained, as supported by many commentators from the legal fraternity, DOES NOT FIND FAVOUR WITH THE CONSTITUTIONAL COURT, who in the judgment provides the following guidance:

It cannot be denied that the abolition of the residual common law claim does not worsen or improve the financial standing of the Fund. The damages recoverable through the residual common law claim and the cost of pursuing it are entirely outside the funding remit of the Fund. The party at risk is not the Fund but the negligent motorist or his or her employer. Thus on the face of it, it would not be sufficient to put up the need to reduce the ever growing deficit of the Fund as the object for abolishing the common law claim. This, however, is not the end of the matter. The scheme must be seen as a whole and not only in the light of the abolition of the common law claim. A vital part of the project to render the scheme sustainable is to place a cap on various heads of damages and to exclude all claims for general damages that are not a result of "serious injury". The excluded claims for general damages are said to be 61% of all claims for general damages and would reduce the compensation payable by the Fund by well more than a third. This means that the compensation claimable under the residual common law action against motorists would potentially increase in direct proportion to the level of the caps imposed. With the common law residual claim in place and with no legislative indemnity for negligent motorists, what the Fund would save in monetary terms because of capped liability for compensation would in effect have to be paid by liable motorists. This simply means that negligent motorists would have to bear the risk of substantially increased residual claims from accident victims. The colossal risk to which the new cap exposes all drivers (from which the Fund would previously have protected them by paying full compensation), as against the relatively small inattentiveness or oversight that could give rise to the risk, lends further support to the abolition of the common law action. What is more, the retention of the common law claim does not sit well with a social security compensation system that aims to provide equitable compensation (as distinct from the right to sue for compensation) for all people regardless of their financial ability. There are two aspects to this incongruity. The first is that the common law claim would be actually recovered only from those drivers or owners who are capable of in fact paying compensation or who are able to afford the required insurance. In my view, the number of drivers and owners who would be able to pay would be very small. It would be pointless for any person to sue in circumstances where actual recovery would not result. The second consideration is that the right to sue would be available only to those who can afford to pay legal fees or who are granted legal aid. And it is unlikely that legal aid would be granted to people who have claims that are in fact irrecoverable because of the inability of the driver or owner to pay. These two factors would have a negative effect on an equitable compensation system if the common law right of action were to be retained. Another relevant factor is that the Minister assures us that the scheme is transitional and thus an interim measure. It is a step in the journey to reform the compensation regime to motor accident victims. However, it must be said that during the interim stage, the obvious soft belly of the scheme is that it is still fault-based. Whilst recourse to a residual claim is ousted and levels of compensation are capped or, in the case of general damages arising from non-serious bodily injuries, excluded, claims of victims are constrained by the requirement of driver negligence. It seems that the constraint imposed by the fault requirement suppresses the quantum of compensation to accident victims. Its temporary retention serves an obvious role of lowering the Fund's liability to compensate victims. The saving grace may be two cardinal considerations. The Minister and the Fund have made out a compelling case for the urgent reduction of the Fund's unfunded and ballooning liability. Simply put, urgent steps must be taken to make the Fund sustainable

so that it can fulfil its constitutional obligations to provide social security and access to healthcare services. This is a pressing and legitimate purpose. The second consideration is that the government has committed to restructuring the Fund's scheme into one which would pay compensation on a no-fault basis and as part of its duty to facilitate access to social security and health care. On the evidence, there is no cause to doubt this commitment.

In 2011 the Department of Transport sourced legal opinion from counsel (Mbuyiseli Madlanga S.C. and H J de Waal) on aspects of the draft policy that informed aspects now taken up in the Bill. Counsel advised that:

"In our view the omission of general damages from the Compensation Scheme will not render it vulnerable to constitutional attack", and

"...it seems clear that the abolition of the common law claim will survive scrutiny if coupled with the introduction of the no-fault RABS"

There is little doubt, considering the impact the Bill may have on the vested financial interest of intermediaries, that the Bill will face legal challenges. However, the extensive and substantial failure of the LSSA and other's legal challenge in the past, should serve to strengthen the Committee's resolve to bring about much needed legislative reform.

C. TURN AROUND TIMES and VIABILITY OF NO-FAULT SCHEMS IN OTHER JURISDICTIONS

l) Turn Around times

RAF's Historical Claims processing turnaround times (2015FY-2017FY)				
Average reporting delay (years)				
Reporting Year	Direct claims	Represented claims	Overall_all claims	Total Nr Personal Claims
2015	1.7	1.9	1.8	62 436
2016	1.4	1.9	1.7	71 664
2017	1.3	1.8	1.6	73 860
Average Settlement delay (turn around) in years				
Settlement Year	Direct claims	Represented claims	Overall_all claims	Total Nr Personal Claims
2015	1.6	3.7	3.2	65 243
2016	1.5	3.6	3.0	72 484
2017	1.6	3.4	2.8	73 538
Overall Turn around time (years)				
Settlement Year	Direct claims	Represented claims	Non-Direct claims	
2015	3.3	5.6	5.0	
2016	2.9	5.5	4.7	
2017	2.9	5.2	4.4	
Payment Delay	0.5	0.5	0.5	
Acc to payment	3.4	5.7	4.9	

The first table shows that on average, it takes 1.3 years for a claim to be reported by the claimant directly to the RAF, and 1.8 years for a claim to be reported through the represented channel.

The second table shows that, once a claim is reported, it takes on average of 1.6 years for a claim to be settled directly with the RAF, and it takes 3.4 years for a claim to be settled for represented claims.

The last table shows that in total, it takes about 3 years from the date of accident for a claim to be settled directly with the RAF, whilst it takes approximately 5 years for a represented claim.

In the last three years, the RAF has faced cash flow shortages due to the increasing volumes of claims. As a result, there is an additional half year delay in the payment of claims after settlement.

Though direct claims are processed much more quickly than represented claims, the time it takes for a claim to be settled under the current RAF Act is too long.

NO-FAULT SCHEMS IN OTHER JURISDICTIONS

A comprehensive research study on the road accident compensation institutions in various continents of the world was conducted through the services of a service provider. A summary of the results is shown below:

Summary of Research findings on Road Accident Compensation study			
Country: Fund	Solvency (Latest)	Funding Method	Benefits Summary
Botswana: Motor Vehicle Accident Fund (MVA)	447.2% in 2011, 455.1% per recent financials	Fuel levy and revenue collected on foreign registered vehicles entering the country	<ul style="list-style-type: none"> - No-fault based - Limits on total liability - Limits on individual benefits - Regular payments as opposed to lump sum benefits (excluding funeral benefits) - Subject to deductions and minimum amount claimable - Non-pecuniary losses, such as general damages and Solatium for Grief are not included - Covers medical treatment and rehabilitation claims for Visitors to Botswana only during their stay
Namibia : Motor Vehicle Accident Fund (MVA)	20.6% in 2011, 103.1% per recent financials.	Fuel levies imposed on fuel sold in the country and rental from tenanted properties	<ul style="list-style-type: none"> - No-fault based - Limits on individual benefits - Regular payments as opposed to lump sum benefits (excluding injury grant and funeral benefits) - Subject to deductions, based on level of fault Wholly responsible for the accident, no injury grant or funeral benefits Subject to exclusions (e.g. valid driver's license) - Covers medical treatment and injury management for visitors while in Namibia - Provides death benefit if visitor killed
Canada: Insurance Corporation of British Columbia (ICBC)	129.30%	In combination with vehicle registration/licensing (compulsory)	<ul style="list-style-type: none"> - No-fault based - Limits on total liability - Limits on individual benefits - Dependent on degree of impairment - Regular payments as opposed to lump sum benefits (excluding death and funeral benefits) - Subject to exclusions - Must be a resident of Canada, or have a Canadian driver's license. - Coverage includes travel to the US

Summary of Research findings on Road Accident Compensation study

Country: Fund	Solvency (Latest)	Funding Method	Benefits Summary
Australia: Compulsory Third Party Fund (CTP)	115.50%	In combination with vehicle registration/licensing (compulsory)	<ul style="list-style-type: none"> - Fault based - Limits on individual benefits - Dependent on degree of fault (more than 25% incurs an excess) - Does not compensate the injured driver who is entirely at fault - Combinations of regular payments and lump sum benefits - Subject to deductions and exclusions - No explicit mention on foreign claims, but are liable if fault is proven in court
UK: Motor Insurers Bureau (MIB)	100%	The total expenditure of the Group is reimbursed by contributions (levies) received and receivable from its Members (companies underwriting compulsory motor insurance in the United Kingdom)	<ul style="list-style-type: none"> - No-fault based - Owners of uninsured vehicles or passengers of such are not able to claim from MIB. - Responsibility for the accident has to be agreed, decided by a Court in uninsured cases or arbitrator if the responsible driver is untraced - Claim may be reduced by a proportion, or possibly rejected if there is evidence that the claimant was partly or wholly responsible - Limits on total liability - UK Green Card Bureau supports motorists making claims after an accident with a foreign vehicle in the UK - Also covers UK resident travelling abroad with a foreign vehicle.
New Zealand: Accident Compensation Corporation (ACC)	78.10%	Motor Vehicle Account: Levies on motor vehicle ownership, excise duty on petrol and motorcycle safety levy	<ul style="list-style-type: none"> - No-fault based - Regular payments for loss of income benefits (limited to 80%) - Permanent Impairment lump sum benefit dependent on degree of impairment (case assessment under the American Medical Association model of impairment assessment) - Tiered system - Private treatment only covered after claimant undergoes acute treatment in public hospitals (funded by ACC on a biannual basis). - Private treatment through various providers that ACC is contracted with. ACC contributes regulated amounts for each type of treatment type - Subject to impairment greater than 10% - Covers medical treatment claims for visitors only during their stay - Covers the cost of transporting residents of New Zealand back to the country, but not treatment costs, disrupted travel plans, assisted travel or emergency travel for a relative (normally up to 6 months travel duration)

Case Study: Namibia

Namibia transitioned from a Fault based compensation system to a No-Fault Social Security system as a result of challenges similar to those currently facing the RAF.

Fault based compensation scheme established in 1990- Act 30

Act amended in 2001 to include limits

The Fault scheme repealed in 2007, and replaced with the No Fault system which is currently being used.

Outline covered in power point.

Newspaper articles included below for reference on challenges and issues:



MVA Fund and Law Society trade blows over legal fees

Economic news | 2005-06-23

*by *WERNER MENGES*

THE MOTOR Vehicle Accident Fund of Namibia this week fired the latest volley in an ongoing quarrel with Namibia's lawyers, once again challenging claims that legal practitioners are not charging excessive fees for representing car accident victims.

Are some "greedy" lawyers using the MVA Fund as a cash cow, to be milked for lucrative, but ultimately unwarranted, earnings, more often than not at the financial expense of the clients they represent - or are they not? This issue has been at the centre of a public spat in which claims and counter-accusations have flown back and forth between the MVA Fund and Namibia's lawyers, represented by the Law Society of Namibia, over the past three weeks. This week, it was the MVA Fund's turn to once again have its say.

Its Chief Executive Officer, Jerry Muadinohamba, issued a press release to respond to a Law Society press release in which the lawyers' body had in turn responded to public statements that the MVA Fund's chairperson, Philip Amunyela, was reported to have made at Rundu late last month.

It all started with Amunyela reported to have stated that there had been instances over the past two years where some lawyers' fees amounted to as much as 40 per cent of the amount that the MVA Fund had paid out to the lawyers' clients as compensation for injuries and damages suffered in road accidents.

Amunyela reportedly said this was "wrong" and called on the Law Society to regulate their members' fees when it came to dealing with MVA Fund claims.

His remarks appear to have struck a raw nerve in some circles at the Law Society, as complaints about legal practitioners' earnings and the affordability of their services often seem to do.

Addressing the media in response to the reports of Amunyela's statements, the President of the Law Society, Elise Angula, charged that it was "grossly misleading" to suggest that all lawyers took 40 per cent of the total amount that the MVA Fund paid out to claimants.

She stated that the Law Society took serious offence at a media statement referring to the MVA Fund as a "legal cash cow" and to "greedy lawyers," saying that such statements were simply not true as far as the whole legal profession was concerned.

Legally speaking, there was nothing preventing lawyers from taking part of the compensation that the MVA Fund had paid to a client as fees due to the lawyer for work that had been done for the client, Angula stated.

What was not allowed, though, she added, was for a lawyer to agree to work on a contingency fee - that is, in return

for receiving an agreed percentage of whatever amount the MVA Fund would eventually pay out to a client.

She invited both the MVA Fund and the public to lodge complaints with the Law Society against legal practitioners who acted unprofessionally or dishonestly at the expense of road accident victims.

The Law Society would take action against lawyers who are guilty of such conduct as far as the law enables the organisation to act, she said.

Angula added that the Law Society's hands are also tied to some extent by the fact that it can do little but to withdraw a legal practitioner's fidelity fund certificate, which a lawyer needs to practice and receive money from the public on his own account, or to refer the matter to the Disciplinary Committee in the Justice Ministry.

The Law Society has however never received any feedback from the Disciplinary Committee on complaints over lawyers over-reaching in MVA Fund claims that it had forwarded to the committee, Angula stated.

An Amendment to the Legal Practitioners Act passed by Parliament in 2002 would strengthen the Law Society's hand in taking action against rogue lawyers, she indicated - but this change in the law has still not actually come into force.

The amendment would give the Law Society the additional power to apply to the High Court to suspend a legal practitioner from practising law once it had referred a complaint to the Disciplinary Committee.

Angula also criticised the MVA Fund's apparent suggestion that people wishing to claim compensation from the Fund should approach it directly, without using lawyers' services.

"This in itself creates an inherent conflict," she stated.

"The Fund is tasked mainly with two things: on the one hand they are to make payments to claimants in respect of damages caused as a result of an accident, on the other hand they have to protect the sustainability of the Fund.

One wonders whether the Fund would pay an uninformed, unrepresented claimant what is due to him at the expense of the Fund's sustainability.

It is unfortunate that in an attempt to restructure itself, the Fund paints one role player as the culprit instead of dealing with the past problems holistically," she commented.

According to Angula, it would be misleading to simply look at what percentage of an MVA Fund claim pay-out may have to be used to pay the fees of the lawyer who handled the claim.

What has to be looked at, is what amount of work the lawyer actually did in pursuit of the claim, and whether the fees being charged for that work are excessive in terms of the Law Society's fee scales, she argued.

She added a comment with a bit of a sting: that if the Fund was actually managed professionally and paid out claims within, say, six months, legal fees connected to a claim would also be much less.

However, if a claim took something like five years to be paid out, legal fees would obviously also accumulate, she said.

The reaction from MVA Fund CEO Muadinohamba this week was that the Fund had in the first place raised a concern only in respect of some lawyers whose fees amounted to up to 40 per cent of the compensation that a client received from the MVA Fund.

He added, though, that the Fund was "in complete disagreement" with the Law Society's stance that there was nothing wrong with lawyers taking part of the compensation to cover legal fees.

"In one instance a law firm took approximately N\$80 000 of the N\$300 000 paid to a paraplegic," he stated.

"This was in addition to N\$8 500 contributed as legal fees by the Fund.

In another case the law firm charged N\$120 000 of N\$205 000 paid by the Fund."

Stated Muadinohamba: "In disagreeing with the Law Society, the Fund reiterates the statement made by the Deputy Minister of Finance that 'such a system is not equitable, not fair and not just'."

In other words, it appears that all the Fund and the Law Society are able to readily agree on at this stage, is that they disagree.

This week, it was the MVA Fund's turn to once again have its say. Its Chief Executive Officer, Jerry Muadinohamba, issued a press release to respond to a Law Society press release in which the lawyers' body had in turn responded to public statements that the MVA Fund's chairperson, Philip Amunyela, was reported to have made at Rundu late last month. It all started with Amunyela reported to have stated that there had been instances over the past two years where some lawyers' fees amounted to as much as 40 per cent of the amount that the MVA Fund had paid out to the lawyers' clients as compensation for injuries and damages suffered in road accidents.

Amunyela reportedly said this was "wrong" and called on the Law Society to regulate their members' fees when it came to dealing with MVA Fund claims. His remarks appear to have struck a raw nerve in some circles at the Law Society, as complaints about legal practitioners' earnings and the affordability of their services often seem to do. Addressing the media in response to the reports of Amunyela's statements, the President of the Law Society, Elise Angula, charged that it was "grossly misleading" to suggest that all lawyers took 40 per cent of the total amount that the MVA Fund paid out to claimants. She stated that the Law Society took serious offence at a media statement referring to the MVA Fund as a "legal cash cow" and to "greedy lawyers," saying that such statements were simply not true as far as the whole legal profession was concerned. Legally speaking, there was nothing preventing lawyers from taking part of the compensation that the MVA Fund had paid to a client as fees due to the lawyer for work that had been done for the client, Angula stated. What was not allowed, though, she added, was for a lawyer to agree to work on a contingency fee - that is, in return for receiving an agreed percentage of whatever amount the MVA Fund would eventually pay out to a client. She invited both the MVA Fund and the public to lodge complaints with the Law Society against legal practitioners who acted unprofessionally or dishonestly at the expense of road accident victims.

The Law Society would take action against lawyers who are guilty of such conduct as far as the law enables the organisation to act, she said. Angula added that the Law Society's hands are also tied to some extent by the fact that it can do little but to withdraw a legal practitioner's fidelity fund certificate, which a lawyer needs to practice and receive money from the public on his own account, or to refer the matter to the Disciplinary Committee in the Justice Ministry.

The Law Society has however never received any feedback from the Disciplinary Committee on complaints over lawyers over-reaching in MVA Fund claims that it had forwarded to the committee, Angula stated. An Amendment to the Legal Practitioners Act passed by Parliament in 2002 would strengthen the Law Society's hand in taking action against rogue lawyers, she indicated - but this change in the law has still not actually come into force.

The amendment would give the Law Society the additional power to apply to the High Court to suspend a legal practitioner from practising law once it had referred a complaint to the Disciplinary Committee. Angula also criticised the MVA Fund's apparent suggestion that people wishing to claim compensation from the Fund should approach it directly, without using lawyers' services. "This in itself creates an inherent conflict," she stated. "The Fund is tasked mainly with two things: on the one hand they are to make payments to claimants in respect of damages caused as a result of an accident, on the other hand they have to protect the sustainability of the Fund.

One wonders whether the Fund would pay an uninformed, unrepresented claimant what is due to him at the expense of the Fund's sustainability. It is unfortunate that in an attempt to restructure itself, the Fund paints one role player as the culprit instead of dealing with the past problems holistically," she commented. According to Angula, it would be misleading to simply look at what percentage of an MVA Fund claim pay-out may have to be used to pay the fees of the lawyer who handled the claim.

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The reaction from MVA Fund CEO Muadinohamba this week was that the Fund had in the first place raised a concern only in respect of some lawyers whose fees amounted to up to 40 percent of the compensation that a client received from the MVA Fund. He added, though, that the Fund was "in complete disagreement" with the Law Society's stance that there was nothing wrong with lawyers taking part of the compensation to cover legal fees. "In one instance a law firm took approximately N\$80 000 of the N\$300 000 paid to a paralegic," he stated. "This was in addition to N\$8 500 contributed as legal fees by the Fund. In another case the law firm charged N\$120 000 of N\$205 000 paid by the Fund. "Stated Muadinohamba: "In disagreeing with the Law Society, the Fund reiterates the statement made by the Deputy Minister of Finance that 'such a system is not equitable, not fair and not just'. "In other words, it appears that all the Fund and the Law Society are able to readily agree on at this stage, is that they disagree.



MVA Fund seeks to improve efficiency

Economic news | 2006-03-14

by *STAFF REPORTER

THE Motor Vehicle Accident Fund of Namibia (MVA) held a two-day symposium in Windhoek last week to discuss changes to legislation to improve its efficiency and service.

The MVA Fund says it has been experiencing problems with financial sustainability and is aiming at developing a model fund that would focus more on accident victims and countering fraudulent claims. The meeting was part of the positive evolution of the Fund towards essentially being a caregiver, instead of being just a compensation provider for the victims of road accidents.

"This is more than just an attitude and will positively impact on the ability of the Fund to react quickly to people in need, without having to contest liability as is currently the case," the Fund said after the symposium.

It said the recommended improvements to the law governing the MVA Fund were in keeping with the general overhauling of the Fund that has been spearheaded over the last year by its CEO, Jerry Muadinohamba.

The MVA Fund was established to help people affected by vehicle accidents and it says the changes to the law would further improve its efficiency and effectiveness.

It wants to expand its services to providing trauma care, rehabilitation, medical treatment, accident response, income for dependents and general accident and injury prevention.

The meeting was attended by officials from the Ministry of Justice, the law society, representatives from the insurance industry, presenters from the medical fraternity, including Methealth, as well as representatives from similar accident funds from other SADC countries who shared their own experiences and recommendations.

The main objective of the MVA Fund is to provide compensation for losses or damage arising out of motor vehicle accidents. However, the payment of compensation depends on determining fault in accordance with the principles of the laws of delict, the basis of current legislation.

The Fund says that places the burden of proof on the

claimant to establish fault on the part of the driver or owner of the motor vehicle that caused the accident.

Muadinohamba, recently voted Best Business Communicator of the Year, said the symposium was held specifically to propose and discuss a draft bill that will address the shortcomings in the way the Fund operates, based on the experience of the last five years.

The symposium was part of an ongoing consultative process and its recommendations will be considered for incorporation in the final bill that will be tabled before Parliament.

2. RESPONSES TO COMMENTS

- A. THE LAW SOCIETY OF SOUTH AFRICA
- B. DSC ATTORNEYS
- C. THE BLACK LAWYERS ASSOCIATION
- D. THE LAW SOCIETY OF THE NORTHERN PROVINCES
- E. ACUIDES-INDWE INTERMEDIARY SUPPORT SERVICES
- F. WESTERN CAPE DEPARTMENT OF TRANSPORT AND PUBLIC WORKS
- G. APRAV

Section	Comment	Response
2(a) Objects	The provisions of the Bill are not reasonable, affordable, sustainable and equitable.	<p>The objectives in the Bill mirror the Commission Report objectives and the definitions as referred to in that report.</p> <p>The Bill proposes a system that is reasonable in that it acknowledged the symbiotic relationship of road accident compensation with the broader system of social security and its objectives., e.g. the number of persons covered is increased by up to 40%; and, the age limits are set where other social security benefits become available.</p> <p>The Bill proposes an affordable system of road accident compensation which will be within the financial means of road users and South African society as a whole, as indicated earlier a 20% saving is anticipated with up to 40% more persons receiving cover.</p> <p>The Bill proposes a system that is efficient in its accessibility and administration; that is facilitative of health care and rehabilitation; and that alleviates financial hardship and anxiety, more especially at the lower income levels.</p> <p>The Bill proposes a system that will be equitable in that there will be proportionality between the funding of the system and the demands made thereon.</p>
	RAF is a fair, equitable, reasonable and affordable compensation system.	<p>Not according to the findings of the Satchwell Report, referred to earlier.</p> <p>The fault requirement and requirement to prove a loss exclude many accident victims and their dependents who</p>

		<p>contribute to the RAF Fuel Levy. The poor contribute at the same rate as the rich, but recover proportionately much less, thereby subsidising the rich. This is not fair, equitable or reasonable.</p> <p>RAF revenue and expenditure are not matched - claims liability provision increased by 22% from R 154 to R 188 Billion (2016/17) and by 14% to R 215 Billion (2017/18 unaudited).</p> <p>The RAF Fuel Levy is R1.93 / litre of fuel sold, producing an income of approximately R 3 Billion per month (2017/18). The recent 30 cent increase is only expected to start flowing in from July / August. Claims of approximately R 3.3 Billion is settled per month (2017/18).</p> <p>Payments in excess of R 9.3 Billion to over 3900 creditors are outstanding, as at 11 May 2018. Because of the cash-flow constraints thousands of writs are served on the RAF each year; furniture, computers and other assets are regularly attached by creditors and sold in execution; and the RAF bank accounts are attached, resulting in the disruption to operations, claims processing, and payments.</p> <p>Legal fees and disbursements paid of R 7.5 Billion (2016/17) and R 8.3 Billion (2017/18 unaudited), which fees are in addition to the balance of contingency fees and other disbursements not recovered from the RAF.</p>
	<p>A vast number of victims will not have funds to pay an attorney to assist them with a claim. These victims will not be aware of their rights and prescription periods.</p>	<p>RAF currently already assists close to 1 in 3 claimants to claim. Unlike the RAF the proposed scheme will provide defined benefits on a no-fault basis – room for legal disputes are consequently massively reduced. Why would an attorney be required, more especially since the administrator is:</p> <p>a) Obligated in terms of section 5(a) to assist claimants.</p>

		<p>b) Obligated in terms of subsection 6(i)(iii) to create public awareness on the Bill – which includes awareness in respect of the obligation to assist as envisaged in section 5(a).</p> <p>c) Able to contract with contracted health care providers appointed per section 31 which contracted health care providers will also serve as points of origination for claims by victims who seek treatment.</p> <p>d) Empowered in terms of section 45 to access information from numerous sources to identify potential claimants, source data, and to render such assistance.</p> <p>e) Obligated in terms of 30(1)(k) to pay the claimant's medical report costs related to the claim.</p> <p>The comment seems to suggest that a common-law fault-based scheme, where attorneys are active, results in victims being more aware of their rights, so claims do not prescribe. Why would this be? Might this be because of the referrals by touts of accident victims to attorneys, for a fee?</p>
	<p>COID and UIF has built up reserves because claimants are not assisted by attorneys. The same will happened under RABS where attorneys will not be present to hold it accountable as with RAF.</p>	<p>Why are attorneys not holding COID and UIF accountable? The legislation does not exclude attorneys. So why are attorneys only holding the RAF accountable?</p> <p>The difference seems to lie in the 25% contingency fee PLUS disbursements which the attorney can recover from the claimant's damages paid by the RAF as a lump-sum.</p> <p>RABS will make structured payments, as opposed to lump-sum payments, and there are no general damages awards from which attorneys will be able to recover the type of fees which they currently recover under the RAF dispensation.</p>
	<p>RAF can be better managed by using one expert and by settling claims long before a trial date is allocated.</p>	<p>In as far as is practical the RAF already requires its claim handlers to attempt to</p>

		<p>agree with the plaintiff attorney to use a single expert.</p> <p>As regards earlier settlement and the practice by plaintiff attorneys, in the judgment of <i>Motswai v Road Accident Fund</i> [2014] JOL 32299 (SCA) a senior plaintiff attorney gave evidence to the Supreme Court of Appeal, as follows:</p> <p><i>In regard to the procurement of medico-legal reports by the plaintiff's attorneys, Mr Krynauw says that the procedure he adopts is to obtain the reports after the close of pleadings and once a trial date has been allocated. And even though they endeavour to obtain reports some months before the trial it is often practically difficult to do so because examinations and assessments have to be booked far in advance.</i></p> <p>Two significant point can be distilled from the above: firstly, that the plaintiff attorney waits until after the statutory 120 days to serve summons, then for a trial date, and only then takes steps to assess the quantum of the claim through obtaining medical expert reports; and, secondly, that it is particularly difficult to get an appointment with an expert – the same would apply to the RAF.</p> <p>In its comments to the Rules Board for Courts of Law, in relation to proposed amendments to the rules that govern expert notices and reports, Adams & Adams Attorneys, <i>inter alia</i>, provided the following comment:</p> <p><i>"In some instances injuries sustained may take 18 to 24 months to stabilise. A period of 12 months is required to brief experts and to adequately prepare for a trial date, failing which the matter will not be ripe for a hearing thereof. Where the experts involved identify further medical issues that require the input of additional experts or addendum reports from experts, it is not easy to obtain appointments for the</i></p>
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		<p><i>patients', since most expert diaries are booked fully in advance for anything from 6 to 12 months, if not more. A plaintiff would be required [in terms of the proposed amendment to the rules] to do a large amount of work and have the expert reports prior to the issuing of summons, thereby resulting in pre-litigation cost being incurred and not being recoverable by the plaintiff on the party-and-part scale, should the party ultimately succeed in the action. Medico-legal reports obtained prior to summons will be outdated by the hearing date, resulting in addendum reports, and additional cost."</i></p> <p>The above inputs highlight the practice by plaintiff attorneys to only really prepare to settle a claim after summons has been served, closer to the trial date.</p> <p>In Daniels & others v RAF & others [2011] JOL 27218 (WCC) the duty placed on the RAF to settle claims is described as follows:</p> <p><i>It is evident upon a consideration of the aforementioned provisions of the Act that the compensation scheme provided thereby contemplates that a claimant will, when submitting a claim, provide the Fund with sufficient relevant information to enable it (i) to investigate whether it is liable (in other words, whether the insured driver was causally at fault in regard to the injuries or death upon which the claim is founded) and, if so, (ii) also to determine the amount of compensation payable. The interval of 120 days that is required to pass between the filing of a claim and the accrual of a right to the claimant to institute action against the Fund to enforce payment of a claim for compensation is obviously intended to permit the Fund sufficient opportunity to carry out the required investigations and, if indicated, to settle the claim, or attempt to settle it before the institution of litigation...</i></p>
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		<p>The practice by attorneys is to prepare the claim for trial, not to submit a complete claim to the RAF to settle earlier. In this regard it is worth noting that an attorney who settles a claim within the 120 day period will write considerably less fees than an attorney who settles the claim after a trial date has been allocated.</p>
	<p>A dual system of no-fault, coupled with an opt-out option for the fault based common-law claim is proposed, coupled with private liability insurance mandated by the Bill.</p>	<p>The proposal runs contrary to the guidance already provided by the CC referred to above:</p> <p><i>The colossal risk to which the new cap exposes all drivers (from which the Fund would previously have protected them by paying full compensation), as against the relatively small inattentiveness or oversight that could give rise to the risk, lends further support to the abolition of the common law action. What is more, the retention of the common law claim does not sit well with a social security compensation system that aims to provide equitable compensation (as distinct from the right to sue for compensation) for all people regardless of their financial ability.</i></p>
<p>5(e) and 31</p>	<p>The facilitation by the administrator of health care through contracted service providers will lead to inferior "cheap" services to the detriment of the injured.</p>	<p>Section 217 of the Constitution mandates the procurement of services by all organs of state through a process that is fair, equitable, transparent, competitive and cost-effective. The Bill explicitly provides for this process in section 31. If this comment is to be accepted it implies that the Constitution mandates the delivery by the State of inferior services, which is clearly not the case.</p> <p>Consider the example of generic medicine and brand name medicine. The active ingredients in both medicines are the same but the latter costs significantly more. Per the argument put forward the scheme must incur the additional cost for no additional benefit, resulting in an unnecessary waste which will have to be carried by motorists who ultimately fund the scheme.</p>

27(1)	The exclusion related to terrorist activity is not rational since there is no SASRIA insurance for this.	The mischief sought to be addressed by the Bill is damage caused in relation to the driving (in the normal course) of motor vehicles, not damage caused by terrorist activity.
27	The Bill does not exclude benefits in respect of criminals and claimants who intentionally injure themselves.	<p>Currently the Bill does not exclude claims for benefits by these categories of claimant. If the Committee determines it necessary to provide for such exclusions the following revision to subsection 27(4) is proposed:</p> <p><u>(4) The liability of the Administrator is limited to payment for the provision of emergency health care services [I]if -</u></p> <p><u>(a) at the time of the road accident, an injured person [or deceased breadwinner] was not a citizen or permanent resident of the Republic or the holder of a valid permit or visa issued in terms of the Immigration Act, 2000 (Act No. 13 of 2002), or the Refugees Act, 1998 (Act No. 130 of 1998)[, the liability of the Administrator is limited to payment for the provision of emergency health care services provided to such injured person or deceased breadwinner, while he or she was alive.];</u></p> <p><u>(b) the claimant or beneficiary drove the vehicle, or was conveyed in or on the vehicle, during the course of the commission of, or in furtherance of, a crime listed in Schedule 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), for which crime the claimant or beneficiary was convicted;</u></p> <p><u>(c) the claimant or beneficiary sustained a bodily injury during the course of the commission of, or in furtherance of, a crime listed in Schedule 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), for which crime the claimant or beneficiary was convicted; or</u></p> <p><u>(d) the claimant or beneficiary sustained the bodily injury intentionally.</u></p>

		<p><u>(5) The liability of the Administrator to a dependent of a person who dies in circumstances contemplated in subsection (4) is limited to the provision of a funeral benefit.</u></p> <p>As regard paragraph (c) of subsection 27(4), a further input is made later in this response.</p>
28	<p>Contrary to Satchwell Commission the right to claim the balance of damages not recovered from the scheme has been removed. Failure to have the common law claim restored will render the scheme vulnerable to constitutional attack.</p>	<p>This has been discussed above.</p>
	<p>The negligent motorist is entitled to the same compensation as the victim which offends the mores of the public.</p>	<p>A road accident could arise from a moment's inattention, as referred to by the Constitutional Court in <i>Law Society of South Africa and Others v Minister for Transport and Another</i> 2011 (2) BCLR 150 (CC).</p> <p>In <i>S v Makwanyane and Another</i> 1995 (6) BCLR 665 (CC) the Constitutional Court confirmed that ubuntu is part of the fundamental values that underlie our Constitution.</p> <p><i>It envelopes the key values of group solidarity, compassion, respect, human dignity and collective unity. It embraces respect and value for life in the concept of humanity and gives meaning and texture to the principles of a society based on freedom and equality. Even the most evil offender remained a human being possessed of a common human dignity.</i></p> <p>The exclusion of claims of the negligent motorist has the potential of condemning the motorist and his whole family to a life of poverty and misery. Consider the scenario of a driver (sole breadwinner) that loses control over the motor vehicle and dies in the accident. If fault is retained as a prerequisite to succeed with a claim his spouse, children and other dependents would be without claims, not due to any</p>

		<p>fault on their part, as is currently the case under the RAF.</p> <p>The criminal justice system, which is distinct and separate from RABS, will deal with aspects of retribution, but RABS fulfils a social security and social assistance role which gives effect to the constitutional value of ubuntu. In a social security system, the exclusion of claims based on fault does not sit well with our constitutional values.</p>
	<p>The section must be amended to clearly provide for the exclusion of claims based on product liability, if that is the intention. The current exclusion only relates to the driver, owner and employer.</p>	<p>The mischief sought to be addressed by the Bill is damage caused in relation to the driving (in the normal course) of motor vehicles, not damage caused because of product liability. Consequently, the following amendment of subsection 27(1) is proposed:</p> <p>27. (1) The Administrator shall not be liable to provide a benefit, nor is the liability of any person excluded, in respect of –</p> <p><u>(a) bodily injury or death caused by or arising from the use of a vehicle to perpetrate any terrorist activity, as defined in the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004).]; or</u></p> <p><u>(b) bodily injury or death caused by or arising from the use of a vehicle in circumstances where the producer or importer, distributor or retailer is liable for the harm in terms of section 61 of the Consumer Protection Act, 2008 (Act No. 68 of 2008).</u></p>
<p>29</p>	<p>Contrary to Satchwell Commission no life enhancement benefits are provided.</p>	<p>This comment is accurate.</p> <p>The proposed scheme increases access (number of accident victims assisted by almost 40%) by reducing benefits which were recoverable under the RAF and, inter alia, excludes general damages (so-called lifestyle benefits), which the proposed scheme cannot afford.</p> <p>Satchwell Commission Report:</p>

		<p>“36.185 It is inappropriate for a road accident benefits scheme funded by the taxpayer and regulated by the State to award general damages, which is the heritage of the common law of delict and is a concept alien to the principles of comprehensive social protection and a scheme of limited social security benefits.</p> <p>36.187 It appears that the only real merit in awarding compensation for pain and suffering or loss of amenities and enjoyment of life is to provide victims who have sustained catastrophic injuries and/or life changing impairment with <u>finance which provides for lifestyle changes and leisure pursuits in ways which cannot be expected of a road accident benefits scheme.</u> For this reason, any such benefits should be known as “life enhancement benefits”.</p>
<p>S30,31,32,33 Medical Benefits</p>	<p>The costs of RABS cannot be determined without first finalising the medical tariff.</p>	<p>If, and until, the Bill is assented to, it would be irregular for the Minister of Transport to take any action to prescribe the tariff.</p> <p>If, and until, the Bill is assented to, it would be irregular for the Administrator to take any action to procure services from service providers contemplated in section 30.</p> <p>Regardless, the costs of RABS can, and has been, determined based on actuarial assumptions.</p> <p>Lastly, it is usual for a tariff to be prescribed by regulation, as it would be unusually cumbersome and time consuming to process an Amendment Bill every time changes are made to the tariff structure and, or, pricing.</p>
	<p>The Administrator may refuse purely palliative care.</p>	<p>WHO Definition of Palliative Care:</p> <p>Palliative care is an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of</p>

		<p>suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual.</p> <p>The Bill defines "bodily injury" as including physical and psychological injuries.</p> <p>The medical benefit comprises of reasonable health services for treatment, care and rehabilitation, and includes: rehabilitative care, long-term personal care, and provision for assistive devices, structural changes to homes, vehicles, and the workplace. Consequently, reasonable "palliative care" is available within the available medical benefit. Unreasonable requests, to be considered on the merits, must be refused, as is the case with any other type of unreasonable treatment request.</p>
	<p>The process to claim a medical benefit (forms and pre-authorisation) is cumbersome.</p>	<p>The use of forms and pre-authorisation are necessary controls to manage expenditure. These controls are, and have been for many years, firmly entrenched in the medical scheme industry. RABS will similarly use these same controls to manage access to benefits.</p> <p>An accident victim that uses the services of a contracted healthcare service provider will not incur any liability or co-payment, so no claim will arise. The contracted healthcare service provider will submit a claim in respect of the healthcare services provided to the accident victim to RABS which claim will be based on the contractual arrangement and processes agreed with RABS. The prescribed forms will likely not form part of these processes, as provides for in subsection 42(2) of the Bill.</p> <p>Where the medical service was provided by a non-contracted healthcare service provider the completion of forms will be required.</p> <p>Pre-authorisation will not be required if: (a) the health care service is urgently</p>

		required, in an emergency situation, in order to preserve the injured person's life or bodily functions, or where treatment cannot be delayed; (b) if in the opinion of a medical practitioner, who has personally examined the injured person, the injured person's medical condition, would subject the injured person to severe pain that cannot be adequately managed without immediate medical intervention; or, (c) if the health care service is already authorised in accordance with an individual treatment and rehabilitation plan, or vocational training program.
	RABS may require a beneficiary to be assessed for purposes of preparing the treatment and rehabilitation plan at the beneficiaries cost.	This comment is inaccurate. The Bill is clear in this respect and reads as follows: <i>"33(2) For the purpose of preparing an individual treatment or rehabilitation plan, the Administrator may require a beneficiary to be assessed by a health care service provider, at the cost of the Administrator."</i>
	Once the treatment and rehabilitation plan has been agreed the beneficiary is no longer free to choose a medical practitioner or institution of his choosing.	This comment is accurate, noting that the beneficiary, his curator, employer / future employer, and existing / future medical service providers would have participated in the development of the plan. It is likely that agreed plans will contain provisions to allow for the review of the plan if the beneficiary's circumstances change.
34,35,36,38 Income and family support benefits	LSSA interprets the deeming provision relating to ordinary resident to apply to citizens and permanent residents also.	The LSSA's interpretation is incorrect. All citizens and permanent residents qualify for temporary income support and long-term income support regardless of the deeming provision relating to residence. Conversely, only non-citizens and non-permanent residents are impacted by the deeming provision relating to residence. The position is the same with regards to dependents who are citizens or permanent residents – they will qualify for family support benefits regardless of the deeming provision relating to ordinary residence.

	<p>Income illegally earned will be excluded. What is considered "illegal" will give rise to debate. Two examples postulated in the verbal submission was unlicensed panel beater and hawker.</p>	<p>What constitutes "illegal income" is already well recognized in our case-law, e.g.: Santam Insurance Ltd v Ferguson [1985] 2 All Sa 591 (A) – unlicensed panel beating business; Dhlamini and Another v Protea Assurance Co Ltd [1974] 4 All Sa 678 (A) – unlicensed hawker.</p> <p>A person who earned illegal income is not without a claim. The claim will however be based on the average annual national income.</p>															
	<p>The Average Annual National Income benefit does not allow for residual income which is higher – example of two medical students who complete studies but meet with road accidents before starting employment used to illustrate the impact under RAF v RABS.</p>	<p>The RAF Act caps income claims at R 270 285 (as at April 2018) per annum. It is likely that the upper income cap under RABS will track the above RAF Act cap.</p> <p>In the LSSA example student A injured prior to the implementation of RABS would be covered by RAF and would be able to claim loss of income based on his earning potential (as opposed to actual earnings) – limited to R 270 285 per year.</p> <p>Student B injured after the implementation of RABS would not be covered by RAF and would be limited to a temporary income support benefit, and, or long-term income support benefit calculated on the Annual National Average Income – R 52 527 (as at 31 December 2016).</p> <p>If only the benefits (not fault) are compared student A is better off than student B. But what about the fundamental difference between RAF and RABS, fault? A fair comparison must also consider the impact that fault may have on the respective benefits. If one assumes a range of percentages of contributory negligence (fault) on the part of both student A and B the comparison between the RAF and RABS changes:</p> <table border="1" data-bbox="949 1803 1324 2027"> <thead> <tr> <th>Fault</th> <th>Student A</th> <th>Student B</th> </tr> </thead> <tbody> <tr> <td>0%</td> <td>270 285</td> <td>52 527</td> </tr> <tr> <td>25%</td> <td>155 464</td> <td>52 527</td> </tr> <tr> <td>50%</td> <td>135 143</td> <td>52 527</td> </tr> <tr> <td>75%</td> <td>67 571</td> <td>52 527</td> </tr> </tbody> </table>	Fault	Student A	Student B	0%	270 285	52 527	25%	155 464	52 527	50%	135 143	52 527	75%	67 571	52 527
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	<p data-bbox="399 884 742 907">Age limits are unreasonable:</p> <p data-bbox="399 952 885 1019">60 day waiting period (temporary income support)</p> <p data-bbox="399 1064 782 1086">Age limit of 18 (income support)</p> <p data-bbox="399 1131 766 1153">Age limit of 18 (family support)</p> <p data-bbox="399 1198 885 1265">Age limit of 60 (income and family support)</p> <p data-bbox="399 1310 885 1377">15 years or age 60 spousal family support</p>	<p data-bbox="901 884 1125 907">The RAF System:</p> <p data-bbox="901 952 1412 1198">Under the RAF system no provision is made for statutory waiting periods or statutory age limits and each claimant is free to prove the period of actual loss, in accordance with applicable delictual principles. The claimant's proven actual loss is then reduced in respect of:</p> <ul data-bbox="909 1243 1412 1736" style="list-style-type: none"> ▪ collateral benefits - e.g. COID payments (but excluding benefits that are <i>res inter alios acta</i>, e.g. benevolent payments) ▪ contingencies - pre- and post-morbid contingencies are deducted (e.g. uncertainties relating to employment) ▪ apportionment for fault – Apportionment of Damages Act ▪ statutory caps are applied – R 270 285 (as at April 2018) per annum ▪ lump sum payments are then capitalised to reflect the present-day value of loss <p data-bbox="901 1780 1412 2027">In the RAF system it is possible to receive NO compensation, i.e. nothing for medical treatment, nothing for loss of income, nothing for loss of support, and nothing for general damages. The RAF system therefore provides false security for those contributing to the Fuel Levy.</p>																					

		<p>The RABS System:</p> <p>The Bill is not based on delictual principles. It does not seek to compensate each individual to the full extent of his or her proven loss. Instead the Bill prioritises need over loss and seeks to provide for a minimum social security safety net, also taking into account other social security benefits available to road crash victims.</p> <p>The age limits are necessary for the scheme to be:</p> <ul style="list-style-type: none"> a) Reasonable – it must <i>“...acknowledge the symbiotic relationship of road accident compensation with the broader system of social security and its objectives”</i> b) Affordable – it must <i>“...be within the financial means of road users and South African society as a whole”</i> c) Sustainable – there must <i>“...be reinforcement of the broader system of social security which in turn should be supportive of road accident compensation”</i> d) Equitable – it must <i>“...be equitable in that there must be proportionality between the funding of the system and the demands made thereon... there should be some balance or congruence between the benefits made available to road accident victims and the benefits made available to other South Africans in need”</i> <p>Unlike the RAF, the proven actual loss is not compensated. Instead, defined benefits are provided.</p> <p>Unlike the RAF, the defined benefits are not reduced for: collateral benefits; contingencies; or fault.</p>
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		Unlike the RAF, full medical and rehabilitation benefits are available for as long as required, regardless of fault.
	The 75% multiplier used in the formula possibly amounts to double taxation.	<p>The multiplier has nothing to do with taxation as the benefit is already calculated on after tax income.</p> <p>The Satchwell Commission recommended the use of a multiplier which recommendation has been taken up in the Bill. Some of the reasons for the use of a multiplier are: (a) it is not appropriate that the "safety net" provided by the scheme must provide full reimbursement; (b) someone in employment incurs greater expenses than someone who remains out of the workforce; and, (c) the multiplier may create a financial incentive to return to work.</p>
	Not allowing for inflationary adjustments will diminish benefits in real terms further significantly disadvantaging beneficiaries in relation to other claimants who claim in relation to other types of delicts.	For the system to remain affordable levers are necessary to manage liability. Where the income of the scheme does not track inflation, it will not be affordable for the benefits to do so.
	<p>The income support benefit ceases upon the death of the beneficiary which if the death is unrelated to the road crash will mean that no provision is made for the future support of the dependents.</p> <p>Under the current system a lump-sum is paid which could be used to make provision for the financial security of the family.</p>	<p>The benefits provided by RABS are provided in relation to injuries or death arising from motor vehicle accidents, not other causes. If the death is related to the road crash the dependents have access to their individual family support benefits.</p> <p>If the death is unrelated to the road crash and as a result of a delict the dependents have access to their common-law damages claims.</p> <p>If the death is unrelated to the road crash, and not as a result of a delict, the dependents may have access to other social security benefits.</p> <p>Periodic payments could be used to buy life insurance.</p>
	The RAF 3 Form calls for the injured person to obtain the SAPS accident report.	The draft RAF 3 form was published with the 2014 revised draft of the Bill. As with the other forms it is not part of the Bill before PCoT and these forms will be reviewed and revised and again put out for comment in due course, as required in

		<p>terms of the Promotion of Administrative Justice Act. The proposed revised draft forms provide for the following means to prove nexus:</p> <p><i>Note: if not previously submitted, submit a copy of one, or more, of the following documents, which demonstrate that this claim for a benefit relates to bodily injury, or death, caused by or arising from the road accident:</i></p> <ul style="list-style-type: none"> ▪ Accident report; ▪ Ambulance record; ▪ Hospital admission record; ▪ Hospital records; ▪ Witness statement; ▪ Inquest report; ▪ Charge sheet; or ▪ If the documents listed above are not available, or if such documents are available but do not demonstrate that the claim relates to bodily injury, or death, caused by or arising from the road accident, then attach an affidavit by any person with knowledge of the relevant facts confirming the facts that relate to the road accident, and that the bodily injury, or death, arose from the road accident. <p>The administrator is obliged in terms of section 5(a) to assist claimants and to this end is empowered in terms of section 45 to access information from numerous sources to identify potential claimants and to render such assistance.</p>
	<p>The administrator selects the vocational training service provider and the program to be attended. Failure to co-operate could result in termination of the benefit.</p>	<p>The focus of RABS is rehabilitation and return to work. The beneficiary is a participant in developing the programme. Consequently, where it is possible to medically and vocationally rehabilitate a beneficiary through reskilling or upskilling to perform the same, similar or other work, within the beneficiaries' post-accident abilities, the scheme should do so to reduce, or eliminate, continued reliance on the scheme.</p>

39	A R 10 000 funeral benefit is not enough.	The Bill does not specify the level of the benefit but authorises the Minister in consultation with the Minister of Finance to determine the benefit by regulation.
42(2), 43(2) and 56	<p>The Bill excludes the claimant's or beneficiary's medical and legal cost to submit a claim.</p> <p>Without financial assistance poor victims will be disqualified from claiming as it is necessary to first qualify for a claim before the benefit can be accessed.</p>	<p>This comment is inaccurate, in as far as the Bill does not exclude the claimant's or beneficiary's medical cost to submit a claim.</p> <p>These costs are paid for by the administrator as part of the medical benefit, in accordance with subsection 30(1)(h). This benefit can be claimed by the claimant or the medical service provider. The latter will submit the claim where the claimant does not pay the service provider for the assessment, i.e. where the claimant cannot afford to pay the service provider for the report the service provider will claim the costs from the administrator.</p> <p>The Bill does exclude the claimant's or beneficiary's other legal costs to submit a claim, noting that the administrator is obliged in terms of section 5(a) to assist claimants and to this end is empowered in terms of section 45 to access information from numerous sources to identify potential claimants and to render assistance to claim. Consequently, where the claimant elects not to utilise a service that already exists the claimant must do so at his own cost.</p> <p>If a court awards costs to a claimant or beneficiary subsequent to a successful review of a decision by the appeal committee, the administrator will pay such costs as provided for in the order.</p> <p>Currently there are thousands of claimants who claim directly with the RAF where assistance is provided and where funding is not a hindrance.</p>
46	RAF Act allows 5 years to claim before a claim prescribes, not 3 years as in RABS.	<p>This comment is inaccurate.</p> <p>The RAF Act requires the lodgement of the claim within 3 years if the insured driver is known, or within 2 years if it is a hit-and-run claim. If the claim is not lodged in</p>

		<p>these timeframes the claim prescribes. After lodgement the claimant has 2 years or 3 years respectively within which to interrupt prescription permanently by serving summons on the RAF. Extended time periods apply where a legal impediment is present.</p> <p>RABS only requires lodgement within 3 years, regardless of whether it is a hit-and-run claim or not. Prescription in the Bill is aligned to the Prescription Act, 1969.</p>
46(3)	<p>Persons subject to a legal impediment have 1 year after the legal impediment has ceased to claim, as opposed to other persons who have 3 years. The prescription periods must be aligned.</p>	<p>Prescription in the Bill is aligned to the Prescription Act, 1969. However, alignment of the prescription regime provided for in the Bill will provide for better equity. The following amendment is proposed:</p> <p>(3) If a qualifying person— (a) is a minor or is suffering from mental illness or is a person under curatorship or is prevented by superior force including any law or any order of court from submitting a claim; or (b) is deceased and an executor of the estate in question has not yet been appointed,</p> <p>the period of prescription shall not be completed before [one] <u>three</u> years [has] <u>have</u> elapsed after the relevant impediment referred to in paragraph (a) or (b) has ceased to exist.</p>
47(1)	<p>The 180-day period to process a claim is unreasonable and must be reduced to 120 days</p>	<p>The Administrator will strive to finalise claims earlier. It may not be practical to finalise all claims in the specified period, especially where expert reports are required, consequently a longer period is provided for.</p> <p>Subsection (2) provides for interest to be paid where the claim is not finalised in the specified period. Where this period is too short to allow for necessary assessments the administrator will incur an additional liability which could materially impact the affordability and sustainability of the scheme.</p>

48(2)	<p>The Legal Practice Act, which is expected to come into force soon will result in the demise of the law societies, which necessitates an amendment to the current clause.</p> <p>(2) The Appeals Committee must be composed of the following members and alternates appointed in writing by the Minister:</p> <p>(a) One person, and one alternate, each with a legal qualification and registered as a member of a law society, with not less than 10 years of practice experience in the field of law and with proven experience in the field of alternative dispute resolution;</p>	<p>Agreed. The following amendment is proposed:</p> <p>(2) The Appeals Committee must be composed of the following members and alternates appointed in writing by the Minister:</p> <p>(a) One person, and one alternate, each with a legal qualification and registered [as a member of a law society] and enrolled <u>as an advocate or an attorney under the Legal Practice Act, 2017(Act No. 28 of 2014)</u>, with not less than 10 years of practice experience in the field of law and with proven experience in the field of alternative dispute resolution;</p>
55	<p>The jurisdiction of the courts to adjudicate a dispute has been ousted.</p>	<p>The Constitution of the Republic of South Africa, 1996 provides in section 34 that:</p> <p><i>“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”</i></p> <p>Regulation 3 made under section 26 of the Road Accident Fund Act, 1996 already contains an example of such an alternative to the courts and has been in place for almost 10 years. The HPCSA adjudicated serious injury disputes and reviews are taken to the High Court.</p>
	<p>The grounds for a review are extremely narrow.</p>	<p>This comment is inaccurate.</p> <p>A decision of the appeals committee would constitute administrative action which is to be reviewed in terms of the Promotion of Administrative Justice Act, 2000, which provides extensive grounds for review in subsection 6(2), as follows:</p> <p><i>(2) A court or tribunal has the power to judicially review an administrative action if— (a) the administrator who took it— (i) was not authorised to do so by the empowering provision; (ii) acted under a delegation of power which was not</i></p>

	<p>authorised by the empowering provision; or (iii) was biased or reasonably suspected of bias; (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c) the action was procedurally unfair; (d) the action was materially influenced by an error of law; (e) the action was taken—</p> <p>(i) for a reason not authorised by the empowering provision; (ii) for an ulterior purpose or motive; (iii) because irrelevant considerations were taken into account or relevant considerations were not considered; (iv) because of the unauthorised or unwarranted dictates of another person or body; (v) in bad faith; or (vi) arbitrarily or capriciously; (f) the action itself— (i) contravenes a law or is not authorised by the empowering provision; or (ii) is not rationally connected to— (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator; (g) the action concerned consists of a failure to take a decision; (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or (i) the action is otherwise unconstitutional or unlawful.</p> <p>(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where—</p> <p>(a) (i) an administrator has a duty to take a decision;</p> <p>(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and (iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the</p>
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		<p>decision; or (b) (i) an administrator has a duty to take a decision; (ii) a law prescribes a period within which the administrator is required to take that decision; and (iii) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.</p>
	<p>Instead of an internal appeal the Bill must provide for mediation – presumably by an external mediator.</p>	<p>It is submitted that the appeal process and subsequent right of review is adequate, as is the case currently in Regulation 3 serious injury disputes under the RAF Act.</p> <p>If mediation, arbitration, then litigation and appeals / review are allowed the time and cost will be significantly increased.</p>
55(2)	<p>The 30-day period to lodge an appeal is unreasonably short and will be struck down.</p>	<p>In this regard it is informative to note that the Promotion of Administrative Justice Act, No. 3 of 2000 in section 7(1) provides that:</p> <p><i>Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after ...</i></p> <p>The Promotion of Access to Information Act, No. 2 of 2000 (PAIA) in section 78(2) provides that: <i>A requester— ... may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.</i></p> <p>In the case of PAIA the above section used to provide for a 30-day period, which period the Constitutional Court, in the matter of <i>Brümmer v Minister for Social Development and Others</i> 2009 (11) BCLR 1075 (CC), declared unconstitutional. The CC suspended its order and provided for a 180-day period which period was later adopted by the legislature.</p>

		<p>The Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993 in section 91 provides that:</p> <p><i>Any person affected by a decision of the Director-General or a trade union or employers' organization of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner.</i></p> <p>A 180-day period may be more appropriate. The following amendment is proposed:</p> <p>(2) An appeal in terms of subsection (1) must be submitted to the Appeals Committee within [30] 180 days after a claimant or beneficiary has been notified of a decision of the Administrator or after the expiry of the period specified in section 47(1).</p>
57	The Administrator and staff are only personally liable for intentional wrongdoing.	The Department sourced a legal opinion on the constitutionality of this clause. Per the opinion the clause is a codification of the existing common law in respect of liability for wrongful administrative action and the clause will survive constitutional scrutiny.
60(2)	<p>The following deletion is proposed:</p> <p><i>(2) The Minister may prescribe any ancillary or incidental matter that [it] is necessary to prescribe for the proper implementation or administration of this Act.</i></p>	Agreed.

- H. THE LEGAL RESOURCE CENTRE
- I. THE SCALABRINI CENTRE
- J. LAWYERS FOR HUMAN RIGHTS
- K. THE CONSORTIUM FOR REFUGEES AND HUMAN RIGHTS
- L. THE SOUTH AFRICAN LITIGATION CENTER

Section	Comment	Response
27(4)	Everyone in the country is guaranteed the rights in the Bill of Rights, therefore the exclusion is unconstitutional.	In <i>Khosa & others v Minister, Social Development & others</i> ; <i>Mahlaule & another v Minister, Social Development &</i>

		<p>others [2005] JOL 12540 (CC) the Constitutional Court stated that:</p> <p><i>"I accept that the concern that non-citizens may become a financial burden on the country is a legitimate one and I accept that there are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status."</i></p> <p>Botswana – Section 23 of the Motor Vehicle Accident Fund Act, 2007 provides as follows:</p> <p><i>(2) a visitor to Botswana who, whilst in Botswana, suffers loss as a result of personal injury caused by a motor vehicle accident, shall subject to the limitations and exclusions, be entitled to only medical and rehabilitation benefits sets out in this Act only whilst he is in Botswana.</i></p> <p><i>(3) such visitor shall not be entitled to the benefits for loss of earning and neither shall the dependants of that visitor be entitled to any loss of support benefits under this Act nor shall any claimant be paid any funeral costs for the burial of such visitor.</i></p> <p><i>(4) for the purposes of this section a "visitor" has the meaning assigned to it in the Immigration Act.</i></p> <p>Swaziland – Section 12 of the Motor Vehicle Accident Act, 1991 provides as follows:</p> <p><i>(2) A claim by a claimant who is a visitor to Swaziland on account of any injury or a claim by a claimant on account of the death of a visitor to Swaziland caused by a motor vehicle accident shall be excluded save for, and subject to other applicable limitations or conditions under this Act, medical and rehabilitation expenses incurred whilst that person is in Swaziland or to funeral expenses incurred as the case may be.</i></p>
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(3) For the purposes of this section, "visitor" means a person who is in Swaziland for a temporary period not exceeding six months but does not include a person who is a citizen of the Republic of South Africa, Namibia, Lesotho and any other country as the Minister may from time to time prescribe.

Namibia – Section 26 of the Motor Vehicle Accident Fund Act, 2007 provides as follows:

26. The Fund may not award benefits to a person injured in a motor vehicle accident or claiming under section 25 - ...

(h) if the person is in Namibia in contravention of the Immigration Control Act, unless the person - (i) wishes to remain in Namibia as a refugee in compliance with section 13 of the Namibia Refugees (Recognition and Control) Act, 1999 (Act No. 2 of 1999); or (ii) is the person contemplated in section 14 of the Namibia Refugees (Recognition and Control) Act, 1999 (Act No. 2 of 1999).

Section 14 of the Namibia Refugees (Recognition and Control) Act, 1999 provides as follows:

(1) Notwithstanding anything to the contrary in any other law contained, any person who has applied in terms of section 13(1) for refugee status, and every member of the family of such person, shall have the right to remain in Namibia -
(a) until such person has been granted refugee status in terms of this Act; or
(b) where such person's application for refugee status has been unsuccessful, until he or she has had an opportunity to appeal in terms of section 27 against the decision of the Commissioner; or
(c) where such person has noted an appeal in terms of section 27 and the appeal so noted has been dismissed, until he or she has been allowed a reasonable time, but not exceeding 90 days, and, if he

		<p>or she is in detention, has in addition been afforded reasonable facilities, to seek admission to a country of his or her choice.</p> <p>(2) The Minister may at any time, whether before or after the expiry of the days referred to in subsection (1)(c), upon a written application being made by the person concerned, extend that period of 90 days, if the Minister is at there is a reasonable likelihood of such person being admitted to a country her choice within the extended period.</p>
	<p>Asylum seekers, refugees and migrant workers have difficulties to obtain and extend permits due to logistical and other reasons not of their making which may result in their exclusion under the scheme – the subsection must be deleted or amended.</p>	<p>This concern is for the Department of Home Affairs to address. It would be inappropriate to legislate for these concerns in the Bill based on alleged inefficiencies which, if later resolved, results in an unintended additional liability for the scheme.</p> <p>However, if the Committee agrees to make allowance in the Bill, the following revision is proposed:</p> <p><i>(4) If [, at the time of the road accident,] an injured person or deceased breadwinner [was] is not a citizen or permanent resident of the Republic or the holder of a valid permit or visa issued in terms of the Immigration Act, 2000 (Act No. 13 of 2002), or the Refugees Act, 1998 (Act No.130 of 1998), the liability of the Administrator is limited to payment for the provision of emergency health care services provided to such injured person or deceased breadwinner, while he or she was alive.</i></p>