**DEPARTMENT OF TRANSPORT**

**COMMENT ON THEMES THAT AROSE DURING THE PORTFOLIO COMMITTEE ON TRANSPORT PROVINCIAL CONSULTATION ON THE ROAD ACCIDENT BENEFIT SCHEME AMENDMENT BILL, NO. 17 OF 2017**

|  |  |
| --- | --- |
| **THEMES BASED ON NOTES BY ADV. ALMA NEL** | **COMMENT** |
| 1. The current claim process is too cumbersome and takes too long to conclude
 | Agreed, this theme is alsohighlighted in the Road Accident Fund Commission Report (RAFCR): Per para 13: “The Act does not fundamentally alter the basic delictual requirements forliability as found in common law. It still requires a claimant to prove all the elementsof a delict, which are contained in and partially codified by the provisions of the Act.”Per para 33 – 34 “The focus of the current system of road accident compensation is the presenceor absence or degree of “fault”, rather than the prevention or amelioration of theconsequences of road accidents:a) Skills, time, money and energy are expended on attributing or denyingblame instead of being dedicated to road safety, emergency medicalservices, trauma care and early and effective medical and rehabilitativeintervention.b) During the considerable period that “fault” is in dispute the road accidentvictim has no entitlement to any compensation.c) Transaction costs financially advantage “experts” in issues of “fault”(specialists in accident investigation and reconstruction and the legalprofession).The result is that the cause of the accident takes priority over the need forhealthcare and rehabilitation, trauma care and rehabilitative intervention are notavailable during the “golden” period (the window of opportunity for treatment -whether an hour, a day, a month or even a year) and appropriate healthcare may not beaccessible until the patient’s entitlement to rehabilitative assistance is established,which may take a considerable amount of time”The current claim process is based on the common law which requires that fault must first be proven; then, apportionment of fault must be determined, where relevant. Thereafter, damages must be proven and quantified. In respect of general damages the injury must reach “maximum medical improvement” for purposes of assessment of whether the injury qualifies for general damages. Multiple experts, from various disciplines, assess the claimant to for a view of any future losses. The proven and quantified damages, less any apportionment, is then offered as a damages award to the claimant. In the majority of cases the claim is not settled until after a protracted and expensive litigation process. **The claim process in terms of the Bill will be less cumbersome and quicker. Fault need not be proven and the apportionment of fault does not apply. Benefits are defined and paid incrementally. Litigation will be less.** |
| 1. Claimants struggle to access RAF offices
 | Agreed, notwithstanding the RAF having extended its footprint substantially in recent years access is still a challenge for many. The RAF currently has offices in Centurion, Johannesburg, Pretoria, Durban, East London, Nelspruit, Kimberley, Polokwane, Bloemfontein, Port Elizabeth and Mmabatho.Access to RAF services is also available at any of the over 100 hospital service centers. The RAF Mobi-bus is deployed to RAF-on-the-Road events. Call center agents assist with queries on a daily basis.**The national network of contracted healthcare service providers provided for in the Bill will add to the existing RAF footprint.** |
| 1. The amounts claimable should be specified in the Bill
 | The formulas that determine how a benefit is calculated is specified in the schedule to the Bill. The benefit design results in different levels of benefits depending on a number of variables, consequently no fixed amount applies to all claims.Lastly, it is not practical to “hardcode” amounts in an Act.  |
| 1. The Bill must cap the percentage of fees that may be charged by an attorney
 | The Contingency Fees Act, No. 66 of 1997 already contains the cap. A 25% cap applies, calculated on the capital damages award. Apart from the fee, disbursements are also recovered from the capital award and the party-and-party costs. The Constitutional Court in Ronald Bobroff and Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers vMinister of Justice and Constitutional Development and another2014 (4) BCLR 430 (CC) confirmed that the maximum fee allowed by the Act in the 25%. Notwithstanding this and numerous subsequent judgments further clarifying the provisions of the Act certain members of the legal profession continue to overcharge their clients.In the June 2018 edition of De Rebus (a legal periodical) an article was published by MrGert Nel (attorney), in which he expresses the view that the 25% statutory cap does not apply to the attorney’s usual fee, but only to the “success fee”, consequently a fee larger than 25% of the capital award is recoverable.Neither the RAF nor the future Administrator has jurisdiction to deal with overreaching. In future the Legal Ombud will assist claimants. |
| 1. The law society must assist in tracing and dealing with attorneys that absconded with the claimant’s funds
 | This is a matter for the police. The law societies only deal with the disciplinary aspects. |
| 1. Fraud and corruption in the RAF administration must be addressed then there would not be need for the new Bill
 | Fraud and corruption is a reality in the RAF’s operations. It is recognized as one of the major risks of the organization and this recognition is echoed in the RAF’s APP. It is however not the only challenge.As confirmed in the Road Accident Fund Commission Report, there are a multitude of reasons why the existing system is floundering, one of the most important being that income and liabilities are not matched: Per para 38: “It is not reasonable to expect a developing country such as South Africa toprovide unlimited benefits or compensation to road users. The lack of moderation in thesystem that allows for and perpetuates disparities of wealth between road users cannotmeet the standard of reasonableness. The absence of any relationship between the fuellevy and the compensation to which a victim may be entitled is not economical and istherefore unaffordable. A system of compensation without limits or boundaries isunreasonable. The absence of any congruence between the fuel levy, risk and cover isinequitable, unaffordable, unreasonable and unsustainable” |
| 1. How would government afford RABS considering that the fuel levy is already high
 | Apart from the fuel levy the scheme will be funded from the general fiscus. If the RAF dispensation is not replaced continued fuel levy increases will be required. |
| 1. Claims as a result of poor road conditions must be clarified
 | Currently claims relating to poor road conditions can be pursued against the organ of state responsible for maintaining the particular road, and, or the RAF, depending on the actions of the driver. The same position will persists under RABS.  |
| 1. Would the new administrator be able to handle the influx of new claims
 | It is submitted that the new Administrator will be able to handle the influx of new claims. It is correct to assume that more claims will be received (as a result of the removal of fault) but at the same time claim complexity and disputes, leading to expensive and protracted litigation, will be much reduced. |
| 1. With regards to severe injuries, the 18 year and 60 year limitation on benefits must be clarified
 | An injured (regardless of whether it is a minor, moderate or severe injury) person will be entitled to the medical benefit immediately after the injury, for as longs as is necessary, until death. The 18 year and 60 year age limits only apply to income- and family support benefits and are unrelated to the medical benefit. |
| 1. There is a need for an education campaign on the RAF and on RABS
 | The RAF is continuously communicating with the public on social media, conventional media, and RoTR events throughout the country.This communication will be strengthened under the Bill, with a specific power providing for same in section 6(i).  |