

18 October 2018

Dr M. Motshekga  
Chairperson  
The Portfolio Committee on Justice and Correctional Services

c/o Mr Vhonani Ramaano  
By email: [vramaano@parliament.gov.za](mailto:vramaano@parliament.gov.za)

Dear Dr Motshekga

## COMMENTARY ON THE STATE LIABILITY AMENDMENT BILL

### 1. Introduction

The State Liability Amendment Bill [B16-2018] (“the Bill”) was introduced in the National Assembly with an aim of amending the State Liability Act, 1957 (“the Act”), with its intention being to “*provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State; and to provide for matters connected therewith.*” The Bill was made open for commentary to the public. To this effect, the Actuarial Society of South Africa submits this document as commentary from actuarial professionals with experience in the Damages and Compensation field of practice.

#### 1.1. Contributors

A call for comments was made to actuaries working with claims that would be affected by this Bill. This document is a collation of the comments received from members as compiled by Alpha Kunaka in his capacity as the Secretary of the Damages and Compensation Committee of the Actuarial Society of South Africa (ASSA). The following members contributed comments included in this commentary:

- Mr Frans Koning (FASSA<sup>1</sup>) (University of the Free State)
- Mr Charl du Plessis (FASSA) (Munro Consulting Actuaries)
- Mr Greg Whittaker (FASSA) (Algorithm Consultants & Actuaries)
- Mr Amith Haribhai (FASSA) (RiskHouse Actuaries & Consulting)

#### 1.2. Scope

The comments cover the Bill as it stands at the time of writing. The report does not cover parts of the Act not impacted by the Bill. Commentary had previously been submitted by Mr Whittaker on behalf of *Algorithm Consultants & Actuaries*. This commentary is provided in the Appendix without edits.

The submitted comments can be grouped into two sections as outlined here:

- Points of Concern (Section 2)
- Possible Solutions to Raised Concerns (Section 3)

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<sup>1</sup> FASSA – Fellow of the Actuarial Society of South Africa

## **2. Points of Concern**

Contributors expressed concern over issues relating to inflation risk and the level of liability borne by the State.

### **2.1. Inflation Risk**

The State Liability Amendment Bill proposes a structured settlement should the claim exceed R1 million. The periodic payments under the structured settlement would increase in line with the average Consumer Price Index for the immediately preceding period of 12 months.

The arising concern is that medical related costs may tend to increase at a rate above CPI inflation, resulting in the escalation of costs exceeding or being insufficient to cover the basis of the award. The use of a moving average would also affect and increase this mismatch. Mr Du Plessis expresses the following concerns:

*"This might be below increases in salary or medical related items, and also below (or above) the actual cost of any item which would be known by the time payment must be made. The situation of making the wrong payment for a known underlying cost will then arise with each payment made, and many medicines or other technological items could actually get cheaper in real terms."*

These comments are echoed by Mr Whittaker as he states, *"this does not eliminate the risk for the State since actual costs, such as care in a State Institution may inflate at a higher rate."*

### **2.2. Liability Borne by the State**

Contributors feel that the Bill does not adequately reduce the liability borne by the State and the risks inherent in that. Mr Whittaker provides the following comments:

*"The intention is to ease cash flow concerns, but the liability still remains. The State's liability is significantly more variable. This would increase the uncertainty affecting the State's financial position and has implications for its credit rating. It is unclear how the unfunded liability will be accounted for by Treasury. SLAB does nothing to limit the State's liability which should be the core focus in the medical negligence arena."*

Liability concerns were also raised by Mr Koning, who considers the impact on the injured party and the medical facilities. He proposes the use of a cap be applied to limit the liability. Below are his comments.

*"The bill should put a cap to the amount paid, not only per annum, but also in total. The current situation eats into medical budgets allocated by government, reduces quality of treatment, increasing likelihood of claims and concludes into a downward spiral of more and larger claims leading to the absolute collapse of state medical facilities. It also promotes unfairness, enriching the few and to the expense of many others, of these "few" the lawyers make up a large component. The amounts are so large that it actually creates an incentive for purposeful negligence."*

Mr Haribhai (on behalf of *RiskHouse Actuaries & Consulting*) highlighted concerns over the size of the pay-outs as well, stating that they are *"conflicted as to whether the current system of large pay-outs (and the resultant financial strain on public finances, as well as private hospitals), is indeed in the best interests of society/the public's best interest."*

## **3. Possible solutions to Raised Concerns**

Contributors suggested possible solutions to the concerns raised feel it wise to look into the viability of such initiatives and procedure. These remain an area of concern and will be the subject of discussions among actuarial professionals as time progresses.

### **3.1. Solutions to Concerns Regarding Inflation Risk**

While no explicit solution was suggested regarding inflation risk, the writer would like to bring to the reader's attention that the concern is that of a mismatch regarding the medical needs of the Injured and the amount calculated using a rolling 12-month average of CPI inflation. As such, any method that better reduces the risk of such a mismatch would prove appropriate.

### **3.2. Solutions to Concerns Regarding the Liability Borne by the State**

In their comments, the contributors highlighted the following possible solutions:

- The application of a relevant cap on annual and total amount paid. This limits the risks outlined by Mr Koning.
- Creating specific care centres for specialised medical treatments (e.g. cerebral palsy care centres). (Mr Haribhai)
- Improving the reporting, record keeping and data management of public healthcare. (Mr Haribhai)

## **4. Conclusions and Recommendations**

Contributors expressed concerns regarding inflation risk and the liability borne by the State. Further explanation is available in the in-depth commentary submitted by *Algorithm Consultants & Actuaries* (Appendix). Possible solutions were suggested as outlined in Section 3 of this document. Members of the actuarial profession remain eager to assist in creating better financial frameworks for stakeholders of our economy and beyond. To this effect, the Society and in particular the Damages and Compensation Committee is available to assist should it be so requested.

**We would welcome an opportunity to engage further with policymakers on specific aspects of the general observations and commentary in this document. The Actuarial Society of South Africa will also be interested in making a verbal presentation to The Portfolio Committee on Justice and Correctional Services.**

For any such requests, please contact the Chairperson of the Damages and Compensation Committee of the ASSA, Mr Wim Loots (FASSA) ([wim@wlac.co.za](mailto:wim@wlac.co.za)).

Yours sincerely

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*This letter was dispatched electronically without e-signature*