LAW SOCIETY
OF SOUTH AFRICA

SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE STATE LIABILITY AMENDMENT BILL B16 – 2018

The Law Society of South Africa (LSSA), as the umbrella organisation representing all practising attorneys and also acting in the public interest, has considered the STATE LIABILITY AMENDMENT BILL [B16 -2018] (the Bill) and comments as follows:

1. INTRODUCTION

1.1 On 2 June 2008 Section 3 of the State Liability Act 20 of 1957 (the Act), as it then stood, was declared unconstitutional and Government was granted 12 months by the Constitutional Court to pass appropriate legislation.

1.2 The new legislation was not finalised within the time prescribed and an extension was granted until 31 August 2009. However, as the new legislation was still not finalised a further two years' extension was granted to 31 August 2011.

1.3 On 30 August 2011 the State Liability Amendment Act 14 of 2011 came into effect, which substituted Sections 2 and 3 of the Act and inserted a new definition section as Section 4(a).

1.4 Section 3 of the amended Act now provides for an extended procedure to be followed to obtain satisfaction of a debt arising from a Court Order against a department, defined as a National or Provincial Department.

1.5 Although not strictly arising out of the provisions of the current Bill, it is noted that there is an uneasy correlation in Sections 1, 2 and 3 of the Act between the terms **"*State*"** and **"*department*"**. "*Department*" is defined in the new Section 4 (a) as a National or Provincial department, making it clear that local Government is not included. No such definition appears in respect of "*State*".

1.6 Thus, the use of the word "*State*" in Sections 1 and 3 creates uncertainty and it is suggested that it, too, be defined in Section 4 to make it clear that the entire Act relates only the Provincial and National spheres of government and not local authorities, being the third tier of government as envisaged in Section 40 of the Constitution.

1.7 The current Bill is promoted, in the interim, pending the outcome of a larger investigation into medico-legal claims by the South African Law Reform Commission.

2. GENERAL COMMENTS ON THE BILL

2.1 In seeking to introduce compensation by way of structured payments by the State when it becomes liable to compensate persons injured as a result of wrongful medical treatment where awards exceed R1 000 000.00, the Bill makes significant inroads into an injured party's common law rights to be compensated **"*once and for all*"** and to seek medical treatment at an institution or from a service provider of his or her own choice.

2.2 The Bill further seeks to impose its provisions retrospectively in respect of any proceedings not yet instituted or concluded prior to the commencement of Section 2A.

2.3 There are thus three basic principles of the rule of law which the Bill affects, namely:

- the right to be compensated once and for all;

- the right to seek treatment at an institution or from a medical practitioner of one's own choice; and

- the application of the provisions of the Bill retrospectively, which will detract from vested rights.

2.4 The imposition of periodic payments for future loss of earnings by way of periodic payments, which cease upon the death of the injured party, is a further significant erosion of the fundamental right of that injured party to be compensated for his or her lost earning capacity and in the case of a breadwinner will materially prejudice his or her dependants who will be left without a remedy. Even if those dependants might have a potential claim for loss of support, they would be forced to litigate again in order to establish a nexus between the death and the wrongful medical treatment. The fact that the claim may have been compromised or settled in full and final settlement of all claims could further compromise or curtail the rights of dependants to pursue a further claim for loss of support.

2.5 The Bill has been tagged 76 on the basis that the introduction of periodic payments with regard to future medical expenses will require that Provincial Hospitals have the necessary capacity for the administration of periodic payments. Presumably the Provinces will also be responsible for effecting periodic payments in respect of future loss of earnings. The memorandum on the Bill records that comments were requested from the offices of the Premiers but also records that only comments from the following Provinces were received, namely, from the Director General, Mpumalanga, the Office of the Director General, Western Cape, the Provincial Treasury of the Eastern Cape Province.

2.6 It is suspected that many, if not all, of the Provinces will not have the capacity to receive, verify, administer and execute claims for future care, medical treatment and loss of earnings.

2.7 Even though the Court retains the discretion in relation to ordering that future care be provided by a Provincial Hospital (which may be the very institution that caused the harm in the first place,) it has no discretion as to the quantum to be

awarded in respect of such care. Section 2A(2)(d) makes this clear. The wording "***In circumstances where future medical treatment <u>has</u> to be delivered in a private health establishment...***" suggest a further curtailment of a Court's discretion with regard to future expenses.

The practical effect of limiting the liability of the State to public health care tariffs is that many severely injured persons (and particularly those without independent means), despite having succeeded with their claims, will be obliged to seek treatment from the public health sector which caused the injury in the first place. The fact that the institution must be compliant with the norms and standards as determined by the office of Health Standard Compliance established in terms of Section 77 of the National Health Act 2003 (Act No 61 of 2003) provides cold comfort. The current status of the public health system is common knowledge. Over and above this, the reality is that many of the modalities of treatment required by severely compromised patients are simply not available within the public health sector. The question then arises as to what compensation can be claimed and how, having regard to the provisions of Section 2A(ii)(d) that the liability of the State shall be limited to the potential costs that would have been incurred if such care were provided in a public health establishment.

The provisions contained in Section 2A(iii) providing for an increase annually with the consumer price index of periodic payments gives rise to the assumption that the intention is to capitalise the future expenses in respect of anticipated treatment and loss of earnings and thereafter to calculate an annualised (or more frequent) payment. Whilst this may be achievable in respect of future loss of earnings / earning capacity, it is submitted that it is not feasible in respect of much future medical treatment, some of which may arise unexpectedly or sooner than anticipated. Will payment be made in advance in respect of anticipated treatment not administered at a public health facility or in arrear?

2.7 In two short pages, the Bill seeks to rewrite fundamental principles of the common law and in doing so, in our view, runs the risk of being struck down, in all or in part, as offending the Bill of Rights, for which there can be no justification in terms of Section 36 of the Constitution. What the Bill seeks to do is to punish the victim,

yet again, leaving the negligent State facility with little accountability for its wrongdoing.

2.8 It is submitted that before any drastic amendments to the common law are enacted, the reasons for the deteriorating standards of service delivery of state institutions, and in particularly the public health sector, should be fully investigated and remedial action taken. This is even more apposite in the light of the fact that the Bill seeks to send the victim back into the public health system as a means to curtail costs. If such a person is once again injured, state liability will in fact increase and the purpose will have been defeated.

2.9 It is also submitted that a thorough investigation into how the law of procedure can be amended to improve and make more efficient the procedures for all damages claims should be undertaken so that there can be a uniform system in respect of all delictual claims which reduces the time spent and cost incurred in current practice.

2.10 In a judgement of the Cape High Court in the matter of *ASLAM DU TOIT AND ANOTHER V MEC FOR HEALTH AND SOCIAL DEVELOPMENT, WESTERN CAPE PROVINCIAL GOVERNMENT* Rogers J in declining to develop the common law (which he said was the province of the legislature in this instance) had the following to say paragraph [64]:

"….***While the lump-sum rule may sometimes result in over compensation or under compensation, it has the advantage of finality. An order for periodic payments inevitably involves risk of ongoing disputes as to whether particular medical expenditure is reasonable and whether it arises from the injury for which the defendant is liable. An order against an organ of state to make indeterminate payments over an indeterminate period may present significant budgetary and fiscal challenges. In order to properly assess its annual requirements under such an order, an organ of state will have to obtain annual updates on the claimant's condition and likely medical requirements. Even if this information were readily obtainable, its assessment could be time-consuming and expensive...."***

He also warned against having one system of laws applicable to particular cases and different systems to others and in this regard, he stated at paragraph [66] as follows:

"***The rule of law is a foundational principle of our democracy and equality before the law is a guaranteed right. Law needs to have a measure of predictability (….) and to operate similarly in relation to similarly placed litigants.***"

2.11 The above remarks underscore the dangers inherent in attempting to find a piecemeal solution to a complex problem. They also foreshadow the vulnerability of the Bill to constitutional attack.

3. THE CONSTITUTION

3.1 The Constitutional Court *in LAW SOCIETY OF SOUTH AFRICA VS THE MINISTER OF TRANSPORT AND ANOTHER 2011 (1) SA 400 (CC)* **(**the LSSA case**)** described the rationality test as applied to legislation as follows:

[32] A convenient starting point in evaluating these submissions is to restate, albeit tersely, the rationality standard that may be culled from the decisions of this Court. The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution. The rule of law requires that all public power must be sourced in law. This means that state actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant "to promote the need for governmental action to relate to a defensible vision of the public good*ll *and —to enhance the coherence and integrity of legislative measures.

[33] A decision whether a legislative provision or scheme is rationally related to a given governmental object entails an objective enquiry. The test is objective because:
'Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle'.

[34] It is by now well settled that where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.

[35] It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad.

[36] Unlike many other written constitutions, our supreme law provides for rigorous judicial scrutiny of statutes which are challenged for the reason that they infringe fundamental rights. That scrutiny is accomplished, not by resorting to the rationality standard, but by means of a proportionality analysis. Our Constitution instructs that no law may limit a fundamental right except if it is of general application and the limitation is reasonable and justifiable in an open and democratic society.

3.2 It is submitted that the fundamental changes sought to be brought about by the Bill offend certain sections of the Bill of Rights as set out below.

3.3 **Section 9.1** of the Constitution provides:

"Everyone is equal before the law and has the right to equal protection and benefit of the law".

Singling out victims of wrongful medical treatment at the hands of the State for "structured payments" and denying lump sums for future losses and expenses is clearly discriminatory. It is submitted that the Bill as currently enacted impermissibly differentiates between victims of medical wrongdoing and other victims injured by the State and in so doing it limits the right to equal protection and benefit of the law guaranteed by Section 9(1) of the Constitution. The Bill further has the effect of differentiating between persons having delictual claims against the State and those claiming from any other wrongdoer. This is in stark contradiction to Section 1 of the Act which recognises that the basis of a claim against the State remains rooted in the common law.

Whilst it might be a legitimate Government purpose to address the "***increasing strain on the budgets of Provincial Hospitals***" it is disputed that "***the measure the lawgiver has chosen is properly related to the public good it seeks to realise".***

The most obvious measure to choose would be to reduce the incidents of negligence in Public Hospitals by implementing proper procedures and effective checks and balances and in ensuring a culture of patient safety and medical accountability.

Without wrongdoing there will be no liability.

The memorandum on the objects of the Bill also claims that there is a "***surge in medico-legal claims***". It is submitted that this perceived increase requires closer examination. Recent press statements by the Minister of Health appear to be based on estimates of potential liability rather than statistics of actual claims settled or realistic reserves raised in respect of contingent liability for pending claims made. A chart published in the Financial Mail on 19 July 2018, for example, illustrates the difference between contingent liabilities and actual

payments for 2016 / 2017 where R56.1 billion was raised as a contingent liability whereas R1.1 billion was actually paid out in settlements.

It is further submitted that there are other and less restrictive methods of achieving significant savings which will not discriminate against victims of medical wrongdoing and that, as currently framed, the Bill cannot be justified as a law of general application, reasonable and justifiable in an open and democratic society.

3.4 **Section 10** of the Constitution provides:

"Everyone has inherent dignity and the right to have their dignity respected and protected".

It is submitted that the fact that the Bill curtails a claimant's choice to receive treatment at an institution or at the hands of a medical practitioner of his or her own choice, given the personal nature of medical treatment, would clearly amount to an impairment of dignity. This would be exacerbated should a claimant be directed to seek treatment at a public health establishment.

Section 2A(2)(c) stipulates that the public health establishment concerned must be compliant with the norms and standards as determined by the Office of Health Standards Compliance (OHSC) established in terms of Section 77 of the National Health Act 2003. This may necessitate a claimant, obliged to seek treatment, having to travel to the nearest compliant establishment, probably at his or her own expense. This is likely to impact the worst on the poorest of the poor and, in particular, the elderly and children who may not have qualified for any compensation for loss of earnings or earning capacity.

The fact that a claimant is obliged to apply to Court for a variation of the frequency or amount of periodic payments following any substantial change in the condition or circumstances of the injured party is a further affront to human dignity.

3.5 **Section 12** of the Constitution provides:

"(1). Everyone has the right to freedom and security of the person which includes the right –

(c) to be free from all forms of violence from either public or private sources".

The Constitutional Court in the LSSA case found that the abolition of the common law claim against the wrongdoer amounted to a limitation of this right. In arriving at this conclusion, the Court reasoned that injuries sustained by an individual in a motor vehicle accident is the sort of impairment to bodily integrity for which the State ought to ensure that compensation is available.

We would submit that this would be even more applicable in respect of injuries suffered as a result of wrongful conduct on the part of the State. The State accordingly has a constitutional obligation to ensure that compensation is available to victims of wrongful medical treatment at the hands of the State.

3.6 **Section 25 (1)** of the Constitution provides:

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

It is trite law that a person's earning capacity is an asset in their estate. In *LAW SOCIETY OF SOUTH AFRICA VS THE MINISTER OF TRANSPORT AND ANOTHER 2011 (1) SA 400 (CC)* the Constitutional Court, in assuming, without finding, that a person's earning capacity constitutes "property" for the purposes of Section 25(1) had the following to say:

Section 25(4)(b) makes it clear that property is not limited to land. It must follow that both corporeal and incorporeal property enjoy protection. For present purposes let it suffice to state that the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth. In many disputes, courts will readily find that a particular asset of value or resource is recognised and protected

by law as property. In other instances, determinations will be contested or prove elusive.

The additional costs for medical and hospital treatment incurred at private rates but only refunded at public health sector rates will be a further erosion of the patrimony of an injured claimant's estate.

The imposition of the provisions of the Bill retrospectively could also be a violation of this provision of the Constitution as detracting from vested rights which are an asset in the estate of the injured party.

It is submitted that in the context of the Bill a Court will have no difficulty in defining a claim for compensation arising from wrongful medical treatment at the hands of the State as "property" as contemplated in Section 25.

3.7 **Section 27** of the Constitution provides:

(1) Everyone has the right to have access to –
(a) healthcare services...

The point has already been made that the limiting of the liability of the State for future medical treatment to the costs that would have been incurred if such care was provided in a Public Health Establishment will, in effect, deny many injured parties adequate health care services.

It is submitted that such a denial will not be justified in terms of Section 36 of the Constitution.

3.8 **Section 34** of the Constitution provides:

"***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."***

Not only is it contended by the LSSA that a structured settlement with deferred payments for future losses may not, in all circumstances, provide meaningful compensation, but a further and perhaps unintended consequence of legislating out lump sum payments will be that many claimants will now not be able to have access to the Courts as their claims will not be taken on by legal practitioners on a contingency fee basis.

Medical malpractice claims require specific and specialised expertise and are often expensive and lengthy proceedings. Party and party costs, if awarded, or forming part of a settlement agreement do not cover the actual costs incurred. On average there is a shortfall of at least 40 to 50% in actual costs incurred which needs to be recovered from the capital awarded. Even if there is a lump sum initial payment, much of this payment will have to go towards settling the past medical and other expenses incurred by or on behalf of the injured party and to cover the immediate medical and other needs going forward. In the case of children and the elderly, in particular, it is anticipated that no amount will accrue or in the case of children, be paid, initially, in respect of loss of earnings/earning capacity until such time as the loss would have occurred.

Thus, the proposed legislation may well result in a denial to claimants of effective remedies. The Constitutional Court in *ENGELBRECHT VS ROAD ACCIDENT FUND & ANOTHER 2007 (6 SA 96) (CC) [AD PARAGRAPH 21]* stated that "***the remedies are part and parcel of the right***". If there is no remedy, then there is no right.

3.9 **Section 36** of the Constitution provides:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- ***(a) the nature of the right;***
- ***(b) the importance of the purpose of the limitation;***
- ***(c) the nature and extent of the limitation;***

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any rights entrenched in the Bill of Rights.

In the LSSA case the Constitutional Court said:

(1) ***A rights limitation analysis is wide ranging. Courts take into account all relevant factors that go to justification of the limitation. The enquiry is not restricted to the factors listed under section 36(1) of the Constitution. All factors relevant to that particular limitation analysis may be taken into account in reaching a decision whether the limitation on a fundamental right is constitutionally tolerable or not.***

It is significant that one of the relevant factors listed in section 36 is the relation between the limitation and its purpose. This is so because the requirement of rationality is indeed a logical part of the proportionality test. It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right. Equally so, a law may be rationally related to the end it is meant to pursue and yet fail to pass muster under the rights limitation analysis.

4. THE BILL

4.1 Section 1 of the Bill proposes the introduction of a new section 2A into the Act providing for structured settlements for claims against the State resulting from wrongful medical treatment. This is the essence of the Bill.

4.2 Section 2A(1) provides that a Court **must** in a successful claim against the State resulting from wrongful medical treatment that exceeds the amount of R1 million order that compensation be paid in terms of a structured settlement which **may** provide for:

(a) past expenses and damages;

(b) necessary immediate expenses;
(c) the cost of assistive technology and other aids and appliances;
(d) general damages for pain and suffering and loss of amenities of life;
(e) periodic payments for future costs referred to in sub-section 2.

Subsection (2) compels a Court to order that future costs and loss of income be paid by way of periodic payments.

A Court therefore has no discretion, regardless of the circumstances of the injured party or the facts of the case.

It is assumed that the intention is that the heads of damages (a) to (d) in 2A(1) are to be paid as a lump sum regardless of the quantum thereof. The wording is not clear and should be amplified to provide that the total amount due in respect of damages arising from 2A(1) (a) – (d) shall be due and payable as a lump sum upon the conclusion of the matter by court order or settlement agreement.

It is assumed that the intention is that structured settlements apply in respect of a j**udgment** exceeding R1 000 000.00 as opposed to a **claim** exceeding R1 million.

Section 2 A(1) should be amended to read:

"A Court must in a successful claim against the State arising from wrongful medical treatment which results in an award that exceeds the amount of R1 000 000.00 order that compensation be paid to the creditor ..."

4.3 Section 2A(2)(a) relates to payment by way of periodic payments of the State's liability to pay for the cost of future care, future medical treatment and future loss of earnings of an injured party at such intervals which may not be less often than once a year. This section curtails a Court's discretion in that it provides that the Court "**must**" order periodic payments to be made at least once a year and which are **only** paid during the lifetime of the injured party.

The stipulation in 2A(2)(a)(iii) that the said cost be paid "***on such terms as the Court considers necessary***" must be read subject to the peremptory provisions contained in 2A(2)(a)(i) and (ii).

4.4 Although Section 2A(2)(b) provides that a Court **may** order the State to provide future medical treatment of an injured party at a public health establishment *in lieu of* or at a reduced amount of compensation that would have been paid for the medical treatment of the injured party, 2(A)(2)(d) curtails this discretion in the sense that where future medical treatment is to be delivered in a Private Health Establishment the **liability** of the State is limited to the potential cost that would have been incurred if such care was provided in a Public Health Establishment.

4.5 Section 2 of the Bill substitutes Section 4 of the Act and introduces a subsection (2) which provides that the provisions of Section 2A will apply in respect of all claims for compensation which have not yet been finalised, regardless of the fact that the cause of action arose before the commencement of the amendments introduced by the Bill. Not only will this prejudice claimants, who may have arranged their affairs in anticipation of a lump sum settlement, but it will also materially prejudice their legal advisors who may have incurred considerable debt or outlaid significant amounts in anticipation of a lump sum settlement. As previously stated, the party and party cost recovery will not cover all these costs.

These comments have been prepared in haste having regard to the very short time period allowed for comment and the LSSA reserves the right to supplement these submissions.

The LSSA also requests an opportunity to make a verbal presentation at the public hearings to be held in Parliament.