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Portfolio Committee on Justice and Correctional Services
Parliament of South Africa

Attention: Mr V Ramaano

Per email: vramaano@parliament.gov.za

STATE LIABILITY AMENDMENT BILL [B16-2018]

The State Liability Amendment Bill [B16-2018] is referred to as the "Amendment Bill" and the State Liability Act, 1957, is referred to as "the principal Act".

General comments

The Western Cape Government (WCG) acknowledges that the common law "once and for all" rule places a huge burden on the budget of our provincial health department in respect of successful medico-legal claims that are substantial and high in value. The WCG further acknowledges that a need exists to introduce a system for the structured payment of compensation awards and for the payment of future medical expenses through an appropriate mechanism. In *MEC, Health and Social Development, Gauteng v DZ [2017] ZACC 37* the WCG was admitted as amicus curiae and submitted that in the Western Cape the model of a trust was successfully adopted in practice in the Province. In this model, damages awarded by a court is made conditional on the establishment of a ring-fenced trust administered by a case manager and a trustee is appointed whose role is to ensure that the award is used for its intended purpose. The trust deed would include provisions providing for the replenishment of the fund if the trust becomes depleted and for the return of any surplus funds to the Province if the beneficiary dies prematurely.

The WCG therefore in principle supports the legislative review of the common law rule but this support should not be construed as support for the Amendment Bill in its current form. The Amendment Bill is problematic in the following general respects:

a) The Amendment Bill does not provide clarity on how the system of a structured settlement will be implemented feasibly. Despite the lack of clarity, what is clear is that the practical implementation of the structured settlement system will have a direct impact on provincial treasuries and the budgets of provincial health departments. The administration of the envisaged structured settlement system will require an implementation mechanism. This mechanism, whatever it may be, may lead to additional costs being incurred by provincial departments of health. It is crucial that the mechanism has built-in checks and balances so as to ensure that the creditor is not simply paid a set amount of money on a specific date over a determined period of time. It is submitted that the state must ensure that the award of compensation is used for the purpose for which it is intended, otherwise public funds may be misused and the state (provinces) may have to assist the creditor again when that creditor accesses and reverts to public health facilities due to a lack of funds. As stated above, the WCG proposes that an appropriate mechanism through which to implement the payment of future medical expenses is that of an independent trust. This mechanism may involve additional costs for the department concerned and may have tax implications for the creditor but for the reasons set out above appears to be the most appropriate mechanism.

b) The Memorandum on the Objects of the Amendment Bill indicates that National Treasury was consulted. On 3 November 2017 the WCG submitted comments on a previous iteration of the Amendment Bill proposing that provincial health departments and provincial treasuries are consulted and meaningfully engaged to establish whether:

   i) a structured settlement award incorporating future payments over a long period is feasible;
   ii) multiple structured settlement awards would be manageable and sustainable from an administrative and budgeting perspective.

   It appears from the Memorandum on the Objects of the Amendment Bill that despite the proposal no such consultation occurred.

c) The Memorandum on the Objects of the Amendment Bill states in paragraph 5 thereof that the surge in medico-legal claims against the State places an increasing strain on the budgets of provincial hospitals and that the introduction of structured payments is intended to reduce the impact of lump sum payments. The root causes of the surge in medico-legal claims is health system failure and human error. The system of periodic payments for future medical costs envisaged in the Amendment Bill does not address the root causes. The system of periodic payments for future medical costs may well result in the budgets of the respective

provincial health departments looking healthy over the short term. This outlook may create a false sense of financial security when in fact the exponential effect of deferring payments will result in the same problem that is presently being experienced i.e. the drain on the national fiscus. The only difference is that that drain will be deferred. It is submitted that unless and until the root causes are addressed i.e. medico-legal claims are vigorously defended where there is merit to do so, the health system is appropriately strengthened, and human error is appropriately addressed, the surge of medico-legal claims against the state will not decrease. It is further submitted that the surge cannot also be reduced by a system of structured and periodic payments.

The WCG would like to engage with the committee on the concerns raised with the Amendment Bill and accordingly we propose that the WCG makes oral submissions to the committee on a mutually convenient date.

Our general comments are amplified by the specific comments attached hereto.

Yours sincerely

Adv. B Gerber
Director-General
Date: 19/1/2018

COMMENTS

Proposed new section 2A(1):	The WCG in its 2017 comments on the Amendment Bill proposed that a structured settlement as envisaged in the Amendment Bill should be optional in lower value settlement awards. This is so because the cost of administering a structured settlement, particularly the periodic payment portion of the settlement for low-value claims would outweigh the cost of the claim and would not be prudent. The amount of R1 million was an arbitrary amount that was proposed to induce the national department to consider the notion of a baseline. After consideration of the amount, it has become clear that whatever baseline amount is provided for in the Amendment Bill, such amount must be carefully considered and rationally based. It is therefore submitted that the baseline amount must be considered and informed by research to ensure that it is rational. It is submitted that the provision should also provide that the amount may be adjusted from time to time and that the adjustment be linked to the rate of inflation.	It is proposed that the baseline amount of R1 million is reconsidered and informed by research to ensure that it is rational.
Proposed new section 2A(1):	This proposed provision introduces a system of structured settlements for the payment of successful medico-legal claims against the state. The WCG supports the notion that the common law "once and for all" rule must be replaced with a system of structured payments, where appropriate. However, the WCG does not support the notion that the rule must be replaced with a system of structured payments as envisaged in the Amendment Bill. It is submitted that the model of an independent trust referred to in our general comments is an appropriate model to replace the common law rule.	It is proposed that the model of an independent trust referred to in our general comments is considered as an alternative to the system of structured payments envisaged in the Amendment Bill.

Proposed new section 2A(1):	The wording of this proposed provision is peremptory i.e. it provides that the court "must' order that compensation be paid to a successful creditor in terms of a structured settlement. Effectively, neither the judge nor the defendant has a discretion. It is submitted that a defendant should be given the election to opt out of the structured settlement system and the portion of that system that relates to periodic payments for future medical costs with the consent of the creditor in circumstances where the defendant can afford to comply with the "once and for all" principle. Such a right of election will enable a defendant to mitigate against deferring debt and manage its contingent liability which would undoubtedly increase over time as courts order structured payments.	
Proposed new section 2A(1):	It is not clear whether the new proposed section 2A(1) is also intended to apply to settlements that are reached by agreement between the parties and that are in turn made an order of court. On the current wording of the proposed section it is not clear whether such a settlement would be considered as "a successful claim against the State". If these kinds of settlements are indeed included in the ambit of the new proposed provision, it is submitted that neither the parties conducting such a settlement, nor the court would have discretion to negotiate and order, respectively, the terms of the compensation. There may be instances where future medical treatment in a public health establishment that is not compliant with the norms and standards as enforced by the Office of Health Standards Compliance (e.g. occupational therapy or physiotherapy services) but that is able to provide a standard of service for the care equal to or better than the standard of service offered by a private health establishment is	It is proposed that if the proposed new section 2A(1) extends to settlements reached by agreement between the parties, the proposed new section should provide that future medical treatment may be provided by any public health establishment that is able to provide a standard of service for the care equal to or better than the standard of service offered by a private health establishment. Please see our proposal under our comment on the proposed new section 2A(2)(c).

	acceptable to a plaintiff as part of the settlement agreement. Settlement terms like these would reduce costs for provincial departments of health. It appears that the proposed new section 2A(1) does not provide for this form of compensation and would not allow it to be part of a structured settlement.	
Proposed new section 2A(1) and (2):	Clarity is required on whether the impact of the Contingency Fee Act, 1977, on the envisaged structured settlement system has been considered. Creditors with high-value settlement awards incorporating periodic payments for future costs over a lengthy period are at risk of being seriously financially prejudiced. If the damages are substantial or of high value, for example in the case of birth injury awards, the future medical and care costs will likely be paid by way of periodic payments over a lengthy future period. The contingency fee payment, in terms of section 2 of the Contingency Fee Act, 1977, will not be staggered proportional to the frequency of the periodic payments and may therefore deplete wholly or in substantial part the immediate award comprising the expenses and costs listed in the proposed new section 2A(1)(a), (b), (c) and (d). The creditor may thus be left with little or no compensation for up to a year.	It is submitted that this issue will require a review of the Contingency Fee Act, 1977, together with wide consultation with the broader legal profession and the professional associations for attorneys and advocates. A review of that Act is needed to provide for a reduced maximum amount that may be charged as a contingency fee and to determine when and how contingency fees are to be paid in successful medico-legal claims against the State where future periodic payments make up the bulk of a substantial or high-value claim.
Proposed new section 2A(2):	1. This proposed new section provides that the court must, subject to the variation which may be ordered by it in terms of subsection (4), order that compensation for future care, future medical treatment and future loss of earnings be paid by way of periodic payments at "such intervals which may not be less than once a year, and on such terms as the court considers necessary.". 2. The proposed provision does not provide clarity on how the scheme is envisaged	It is proposed that the model of an independent trust is an appropriate alternative model to the envisaged periodic payment system for future medical expenses in matters involving substantial or high-value awards or where a child is the creditor. It is proposed that in these types of matters, the court should be empowered to order that an

	to work practically i.e. will the creditor's attorney be paid the periodic payments for payment to the creditor? The proposed provision does not provide clarity on who the periodic payments are to be paid to, who controls the amount being paid to the creditor, who decides whether those amounts are reasonable and what checks and balances should be in place to ensure that the funds are appropriately spent. In the experience of the Western Cape past damages that are awarded are usually depleted when it is not properly managed or, in the case of a child creditor, not protected or managed in the child's best interests. This has in our experience resulted in the creditor (child or adult) reverting to the public health care sector for treatment and equipment after the provincial health department had paid out substantial awards in damages. This return to the public health care sector in turn prejudices other persons who are also entitled to access public health care services. The proposed provision fails to expressly safeguard the best interests of a child creditor and to ensure that, in the case of an adult creditor, the damages awarded are properly managed so that it is used for its intended purpose. It is submitted that the proposed section 2A(2) must provide safeguards that will ensure the proper management of awards in a manner that is consistent and that promotes the best interests of a child creditor.	independent trust with an accountable trustee is established to manage the payment of an award to the creditor. In the proposed model of a trust the trust will have a ring-fenced fund to provide for future medical and care expenses and will operate in concert with a case manager. The trust deed must provide for the appointment and remuneration of the case manager from the ring-fenced fund. The role of the case manager will be to realistically assess and monitor invoices to ensure that the necessary and appropriate medical care and equipment is provided as and when the need arises. This proposed model safeguards the award and ensures that the funds are used appropriately for its intended purpose whilst in matters involving child beneficiaries it will ensure that the award is used for the benefit of and in the best interests of the child creditor.
Proposed new section 2A(2):	The implications of the proposed structured settlement system on provincial budgetary	

	control and management would be far reaching. It must be borne in mind that budgetary control and management is imperative to ensure clean fiscal governance. To this end, clarity is required on how it is envisaged that budgetary control and management will be ensured. Practically, there will be no certainty for provincial departments of health as to when court orders for periodic payments will land and for how many years or decades such payments will be required to be made. This will impact prudent, fiscal management. Is it envisaged that National Treasury will provide guidelines to ensure budgetary control and management in this regard?	
Proposed new section 2A(2)(c):	This clause provides that where the State is ordered to provide future medical treatment at a public health establishment in terms of clause 2A(2)(b), the public health establishment concerned must be compliant with the norms and standards as enforced by the Office of Health Standards Compliance established in terms of the National Health Act, 2003. The provision is problematic because only 0,7% of public health establishments according to the 2016/2017 annual inspection report of the Office of Health Standards Compliance are compliant. This equates to 5 out of 696 hospitals and clinics inspected countrywide. It is submitted that for such a provision to realistically be implementable, it is imperative that health system strengthening must first happen.	It is proposed that clause 2A(2)(c) is reconsidered and redrafted to align with the decision of the court in the case of *MEC for Health and Social Development of the Gauteng Provincial Government v Zulu (1020/2015) [2016] ZASCA 185* i.e. that where possible, the State can offer future medical treatment to the creditor at any public health institution which is able to provide a standard of service for the care equal to or better than the standard of service offered by a private health establishment. If clause 2A(2)(c) is retained in its current form, the injured party will be further prejudiced by the inability of the State to provide future health treatment.

Proposed new section 2A(2)(d):	This clause provides that in the circumstances where future medical treatment must be delivered in a private health establishment, the liability of the State shall be limited to the potential costs that would be incurred if such care was provided in a public health establishment. Clarity is required on who will have to pay the difference in costs. If it is intended that the creditor must pay the difference, it is submitted that such an arrangement is manifestly unfair as the creditor finds himself or herself in that position through no fault of their own i.e. the reason for having to receive treatment is due to the proven negligence of the State and the fact that only 0.7% of public health establishments will qualify to render treatment to the creditor.	It is proposed that the ratio of the Zulu judgment as referred to under our comment on clause 2A(2)(c) is followed and accordingly provided for.
Proposed new section 2A(2)(d):	Clarity is required on how it is envisaged that private health establishments will be paid for their services in terms of the National Health Insurance Bill, 2018, when a creditor receives services from these private health establishments under the circumstances of the proposed new section 2A(2)(d). In the current form of the proposed provision the State (i.e. the provincial department of health) is the defendant and is liable to pay. In terms of the National Health Insurance Bill, 2018, the private health establishment must claim payment from the National Health Insurance fund. Two different functionaries are identified in two different pieces of draft legislation as being liable to pay. This will lead to confusion and inconsistent compliance.	It is proposed that the proposed new section 2A(2)(d) is reconsidered after consideration of the provisions of the National Health Insurance Bill, 2018.
Memorandum on the Objects of the Bill: Paragraph 4	This paragraph envisages that provincial hospitals will be paying the amounts ordered for periodic payments in terms of a structured settlement. Practically, the party paying the amounts will be the provincial department responsible for health. The statement in paragraph 4 should therefore relate to	

	provincial departments of health and not provincial hospitals. The implication for provinces as identified in paragraph 4 is therefore that provincial departments of health would require the requisite administrative capacity to deal with court orders ordering future periodic payments.	

Adv. B Gerber
Director-General
Western Cape Province
Date: 19/10/2018

REPUBLIC OF SOUTH AFRICA

STATE LIABILITY AMENDMENT BILL

(As introduced in the National Assembly (proposed section 76); explanatory summary of Bill published in Government Gazette No. 41658 of 25 May 2018)
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 16—2018]

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GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the State Liability Act, 1957, so as 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.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Insertion of section 2A in Act 20 of 1957

1. The following section is hereby inserted after section 2 of the State Liability Act, 1957 ("the principal Act"):

"Structured settlements for claims against the State resulting from wrongful medical treatment

2A. (1) 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 to the creditor 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 or other aids and appliances;

(d) general damages for pain and suffering and loss of amenities of life; and

(e) periodic payments for future costs referred to in subsection (2).

(2) *(a)* Where the State is liable to pay for the cost of future care, future medical treatment and future loss of earnings of an injured party, the court must, subject to subsection (4), order that compensation for the said costs be paid—

(i) by way of periodic payments at such intervals, which may not be less often than once a year;

(ii) only during the lifetime of the injured party concerned; and

(iii) on such terms as the court considers necessary.

(b) The court may—

(i) in lieu of the amount; or

(ii) at a reduced amount,

of compensation that would have been paid for the future medical treatment of the injured party, order the State to provide such treatment to the injured party at a public health establishment.

(c) Where the State is ordered to provide future medical treatment at a public health establishment, the public health establishment concerned must be compliant with the norms and standards as determined by the Office of Health Standards Compliance established in terms of section 77 of the National Health Act, 2003 (Act No. 61 of 2003).

(d) In circumstances where future medical treatment has to be delivered in a private health establishment, the liability of the State shall be limited to the potential costs that would be incurred if such care was provided in a public health establishment.

(3) The amount payable by way of periodic payments must increase annually in accordance with the average of the consumer price index, as published from time to time by Statistics South Africa established in terms of section 4 of the Statistics Act, 1999 (Act No. 6 of 1999), for the immediately preceding period of 12 months.

(4) The State or creditor referred to in subsection (1) may apply to the court for a variation of the frequency, or amount, of periodic payments, or for a variation of both the frequency and amount of periodic payments, should a substantial change in the condition or the circumstances of the injured party necessitate such a variation.

Substitution of section 4 of Act 20 of 1957, as substituted by section 3 of Act 201 of 1993

2. The following section is hereby substituted for section 4 of the principal Act:

"**Savings**

4. (1) Nothing in this Act contained shall affect any provision of any law which—

(a) limits the liability of the State or the national government or a provincial government or any department thereof in respect of any act or omission of its servants; or

(b) prescribes specified periods within which a claim is to be made in respect of any such liability; or

(c) imposes conditions on the institution of any action.

(2) Proceedings for purposes of claiming compensation from the State for damages resulting from the wrongful medical treatment of a person by a servant of the State and which have not been instituted or concluded prior to the commencement of section 2A, must be instituted, continued and concluded in accordance with the provisions of section 2A.".

Amendment of section 4A of Act 20 of 1957, as inserted by section 3 of Act 14 of 2011

3. Section 4A of the principal Act is hereby amended by the insertion after the definition of "appropriate budget" of the following definition:

" '**creditor**', for purposes of section 2A, means—

(a) an injured party who has suffered damages resulting from the wrongful medical treatment of him or her by a servant of the State; or

(b) anyone acting on behalf of an injured party who is not able to act in his or her own name.".

Short title and commencement

4. This Act is called the State Liability Amendment Act, 2018, and commences on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE STATE LIABILITY AMENDMENT BILL, 2018

1. PURPOSE OF BILL

1.1 A person who suffers damages as a result of negligent medical treatment has to claim compensation or satisfaction for damages in terms of the common law "once and for all" rule. A plaintiff must therefore claim damages once for all damages already sustained or expected in future. The surge in medico-legal claims places an increasing strain on the budgets of provincial hospitals.

1.2 The State Liability Amendment Bill, 2018 ("the Bill"), therefore aims to amend the principal Act so as 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. The Bill is promoted in the interim pending the outcome of the larger investigation into medico-legal claims by the South African Law Reform Commission.

2. OBJECTS OF BILL

2.1 Clause 1 of the Bill aims to introduce a new provision dealing with the structured settlement of claims. The proposed new section 2A(1) provides that a court must, in a successful claim against the State that exceeds R1 million, order that compensation be paid to the creditor in terms of a structured settlement which may provide for, among others, past expenses and damages, necessary immediate expenses and periodic payments for future costs referred to in the proposed new section 2A(2). The proposed new subsection (2)*(a)* requires that, insofar as the cost of future care, future medical treatment and future loss of earnings are concerned, the court must order that compensation for those costs be paid by way of periodic payments. The proposed new subsection (2)*(b)*, *(c)* and *(d)* make provision for those instances where the State can provide treatment to injured parties.

2.2 Provision will also be made that the amount payable by way of periodic payments will increase annually in accordance with the consumer price index. The proposed new section 2A finally makes provision for any party to apply to the court for a variation of the periodic payment order if a substantial change in the condition or the circumstances of the injured party necessitate such a variation.

2.3 Since the proposed new section 2A will exclude medico-legal claims insofar as future medical expenses are concerned from the "once and for all" rule, it is necessary to amend section 4, the savings provision, of the principal Act. Clause 2 aims to insert a provision in section 4 in order to clarify that proceedings resulting from the negligent medical treatment which have not been instituted or concluded prior to the commencement of section 2A must be instituted, continued and concluded in accordance with the new section 2A.

2.4 The term "creditor" is used in the proposed new section 2A. The term implies the injured party or anyone acting on behalf of an injured party who is not able to act in his or her own name. Clause 3 of the Bill, therefore, aims to amend section 4A of the principal Act, which section is the definitions section, by inserting a definition of creditor for purposes of the proposed new section 2A.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

3.1 The Department of Justice and Constitutional Development (Department) requested comments from the National Treasury, the National Department of Health and the Directors-General in the offices of the Premiers.

3.2 The Department received comments from the National Treasury, the National Department of Health, the Office of the Director-General: Mpumulanga, the

Office of the Director-General: Western Cape, the Provincial Treasury of the Eastern Cape province and Legal Aid South Africa.

4. IMPLICATIONS FOR PROVINCES

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.

5. FINANCIAL IMPLICATIONS FOR STATE

The surge in medico-legal claims places an increasing strain on the budgets of provincial hospitals. The introduction of structured payments is intended to reduce the impact of lump sum payments.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution, since it contains a provision to which the procedure set out in section 76 of the Constitution applies.

6.2 The principles in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (the "*Tongoane case*") is important when determining if a Bill ought to be tagged as either a section 75 or 76 Bill. The test for determining the procedure to be followed in enacting a Bill is whether the provisions of the Bill fall within a functional area listed in Schedule 4 or, in substantial measure, affect the interests of the provinces.

6.3 The tagging of the Bill requires firstly, considering all the provisions of the Bill and determining whether they substantially impact the interests of the provinces. Thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial must be carried out.

6.4 The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them.

6.5 If we have to take into consideration the legal principles expounded by the Tongoane case, the following may be deduced from a reading of this Bill:

- 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.

- It would seem that the Bill, in its current form, would substantially affect the provinces. The Bill, therefore, should be dealt with in terms of section 76 of the Constitution.

6.6 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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