COMMENT BY THE LAW SOCIETY OF SOUTH AFRICA ON THE ROAD ACCIDENT FUND AMENDMENT BILL 2014

BACKGROUND

The reason for the need for the current Bill, as stated in the accompanying memorandum to the Road Accident Fund Amendment Bill 2014 is, *inter alia*, to address the issue of a medical tariff in response to the judgment of the Constitutional Court on 25 November 2010 in the case of *The Law Society of South Africa and Others v The Minister for Transport and Another (2010 JOL 26483 CC)*, which struck down the public health care tariff then prescribed as the limit of the liability of the Fund to compensate a claimant for "non-emergency" medical and hospital costs in the 2005 Amendment Act.

The memorandum also notes that the administration of a two tariff system adds **"administrative complexity"**.

In terms of the Constitutional Court ruling, currently all medical and hospital treatment which cannot be classified as **"emergency"** is compensated as if the claim came into existence prior to the commencement of the Road Accident Fund Amendment Act 19 of 2005 on 1 August 2008.

The Law Society of South Africa (LSSA) is in agreement that administering a two tariff system of compensation is unnecessarily complicated and costly and the move back to a single method of calculating the compensation payable for all medical, hospital and related expenses arising from a motor vehicle injury is welcomed.

However, any tariff that may now be prescribed by the Minister of Transport in order to meet the criteria laid down in the Constitutional Court judgment four years ago still needs to be published for comment. No doubt, the objective of the introduction of a **"tariff"** is still to limit the exposure of the Road Accident Fund

with regard to expenses incurred which are covered by that tariff. The Act requires that any such tariff be prescribed after consultation with the Minister of Health. It is not known whether those consultations have taken place and whether there has been any engagement with the private health care sector and/or medical aids on what would be an acceptable tariff for the private sector to be able to continue to provide much needed treatment and health care to road accident victims to supplement the often inadequate, overstretched, poorly administered and, in some cases, unavailable, services at public hospitals.

Of course, if the tariff eventually prescribed is such, so as to exclude access to private health care, it will meet with the very same challenges as were raised by the LSSA in its successful application to strike down the previous tariff, particularly as the common law right to recover the balance of costs not covered by the Act remains abolished.

In this regard it is noted that the Bill proposes that the costs of the first 30 days of treatment be paid on a no fault basis. It is in those 30 days that the vast majority of high cost expenditure is incurred, both in relation to hospitalization and medical treatment. The object of the Bill is stated to be to create a scheme that facilitates responsible financial management and that enables the efficient and cost effective delivery of compensation. Without knowing what tariff is proposed, it is obviously not possible to estimate the costs that might be incurred as a result of this proposal. Common sense dictates that, if those costs are to be met on a no fault basis, the exposure of the Fund for past medical and hospital costs will increase materially.

The Bill also proposes no fault liability for funeral claims, but caps liability at R10 000, 00 per claim. Hopefully the medical tariff will not also be aimed at containing those costs also at a significantly lower level than the actual costs reasonably incurred by a claimant.

The other major amendment proposed is the removal of the two year prescriptive period for hit and run claims and the Bill now proposes a unitary prescription period for all claims. This proposal is welcomed.

The actual provisions of the Bill are now considered in turn and the following submissions are made relative thereto.

COMMENT ON THE BILL

SECTION 1

Section 1 amends the definition section of the principle Act by introducing a definition of **"medical practitioner"**. The impact of this is that now only a medical doctor registered under the Health Professions Act may complete a RAF 1 medical report. This is no doubt to counter the effects of the recent judgment in the Cape High Court where the Court ruled that, as there was a clear distinction drawn between the wording of the requirement for completing the serious injury assessment report (RAF 4) as per Section 17 (1A) (b) of the Act and the wording of Section 24 of the Act, the Form 1 could be completed by medical practitioners other than doctors and in that particular case a chiropractor.

The LSSA supports this amendment.

SECTION 2

Section 4 of the principal Act is to be amended so as to legislate for the Fund to have the power to "**determine**" and amend the forms used in terms of the Act and Regulations, which forms previously had to be **"prescribed"** by the Minister of Transport.

The content of such forms will nevertheless continue to be measured against the enabling provisions of the Act and Regulations in determining their validity.

Subject to the above, the LSSA has no objection to the proposed amendment.

SECTION 3

Section 3 of the Bill seeks to amend Section 15 of the principal Act, which deals with the legal status of and proceedings by the Fund, as well as an indemnity in respect of Fund employees acting in good faith.

The proposed amendment is to limit the right of a claimant with an adverse judgment against the Fund to execute for payment thereof.

The stated intention is to bring the Road Accident Fund Act in line with the provisions of the State Liability Act 1957, which was amended pursuant to a constitutional challenge against the indemnity of state assets from execution.

Currently the Fund, when settling claims, is stipulating for a 60 day period within which to affect payment of capital and also an extended time period for payment of a taxed bill. Interest will continue to run on overdue payments at the prescribed rate and it can hardly be cost effective for the Fund to unnecessarily delay payment of amounts due in terms of settlements, court orders and taxed or settled bills of costs.

It is submitted that a more efficient and cost effective way of dealing with the issue of writs of execution, would be to have a proper system in place in terms whereof all settlements, judgments and taxed or settled bills are properly recorded and processed for payment, rather than create yet another technical and costly barrier to enforcing a debt which is due and payable by an organ of state.

In terms of Section 17 (3A) of the Act, no interest is payable if the capital is paid within 14 days of due date. It would obviously be desirable and more economical for the Fund to effect payment within that period, thus avoiding any liability for interest and/or execution costs.

In terms of the proposed procedure, payment of a due amount in respect of capital and costs could be delayed for more than 90 days before any goods attached can be removed and sold in execution. The cost

of this will be for the Fund's account, as well as the interest accruing on late payment. It is anticipated that this "breathing space" will only result in further delays and not result in any savings.

The proposed procedure requires a certificate to be issued by the Registrar or Clerk of the relevant Court certifying that no appeal, review or rescission proceedings are pending in respect of the court order or taxed bill. This is likely to create more administrative pressure on already overburdened courts and will inevitably result in even further delay in extracting payment as a result.

Surely the appropriate way to deal with the unnecessary costs and inconvenience created by the issue of writs is to ensure that payment is made or acceptable arrangements made for payment in respect of capital and costs timeously.

The LSSA does not support this amendment.

SECTION 4

Section 4 seeks to amend Section 17 (1) of the principal Act by introducing two new sub-sections providing for the payment of initial medical and hospital costs as well as payment of funeral expenses as per Section 18 (4) on a no fault basis.

The wording proposed in Section 17 (1) (b) (ii) needs to be revised, as there is clearly a typing error. To achieve the purpose set out in the Bill, Section 17 (1) (b) (ii) should probably read as follows:-

> **"Provided that the obligation of the Fund to compensate a third party for; …**
> **(ii) the cost of accommodation of any person in a hospital or nursing home or the treatment or rendering of a service or supplying of goods or services incurred within 30 days following immediately after the cause of action arose shall be irrespective of the negligence or other wrongful act of any person;"**

Section 17 (1)(b) (iii) provides for payment of funeral costs contemplated in Section 18(4), also irrespective of fault.

It is noted that the object of the Bill is to create a single medical tariff. However, the fact that the 30 day period post injury is proposed to be compensated on a no fault basis cannot absolve the Fund from providing private healthcare for injured road accident victims on the grounds and for the reasons set out in the Constitutional Court judgment referred to above.

The Bill also proposes that Section 17 (1A) be substituted in order to make provision for the following:

1. The consequential amendment resulting from the introduction of the definition of a medical practitioner;
2. The introduction of a list of injuries that are **"deemed serious"**;
3. The introduction of a cost contribution;
4. The removal of the provisions struck down by the Constitutional Court pertaining to the tariff prescribed for establishments contemplated in the National Health Act 2003;
   and
5. The removal of the emergency tariff provision.

There has been some public consultation on the proposed serious injury list. The LSSA understands that the proposed list does not include many injuries which should qualify *per se* as **"serious"** and will not really alleviate the back log in the Health Professions Council South Africa Appeal Tribunal hearings. It is understood that in excess of 6 000 matters await adjudication and that the delays occasioned as a result of this far exceed the time periods that have been stipulated in the Regulations. In fact, there are matters that have been awaiting adjudication for lengthy periods of a year or more.

It is to be pointed out that the validity of certain of the injuries stipulated on the **"not serious"** injury list still remain to be tested as claims from accidents arising after the amendment to the Regulations took place in May 2013 are not yet ripe for adjudication. The publication of a list of injuries that are deemed **"serious"** is far less invasive. If an injury is not on that list, it is always open to the claimant to prove that his or her injury is covered either by the AMA Guides Impairment rating or the narrative test.

The introduction of a serious injury list is repeated in a proposed amendment to Section 26, which empowers the Minister to make regulations.

It was pointed in the submission made by the LSSA that the revoking of Section 17 (2) would result in increased costs being incurred. The reintroduction of a cost contribution is welcomed. However, it is noted that, whilst Section 17 (2) was peremptory, the proposed amendment gives the Fund discretion as to whether to offer a contribution or not. It is submitted that this amendment is not strictly necessary, as the Fund already has this discretion, despite the revocation of Section 17(2).

Comment has already been offered in the introduction regarding the nature of the proposed tariff to be prescribed by the Minister of Transport in consultation with the Minister of Health.

It is pointed out that reference in relation to tariffs, both in the existing Act and in the proposed amendment to sub-sections (4)(a), (5) and (6) are to future expenses (4)(a), direct payments to suppliers (5) and interim payments (6). Strictly speaking there is no reference, at all, to past hospital medical and related expenses, being those expenses incurred not covered by way of an interim payment or the subject of a direct suppliers claim at the time of settlement or trial. This situation will be further complicated by the introduction of the 30 day no fault period.

The LSSA supports the proposals in part, subject to the above comment.

SECTION 5

Section 5 seeks to amend Sections 18 of the principal Act and, specifically, Section 18 (4) which is liability to compensate for funeral costs limited in terms of the existing Act to the **"necessary actual cost to cremate the deceased or to inter him or her in a grave"**.

The current proposal does include provision for transporting the body, which in many cases is a significant cost, but limits the liability of the Fund to an amount not exceeding **R10 000,00** payable on a no fault basis.

It is submitted that a claimant should be given the choice whether to opt for the no fault limited claim, or to persevere with a claim for the actual costs incurred, even if that necessitates proving fault. The R10 000.00 cap is low, particularly if one considers the costs of transporting a body for burial at a place other than the place of death.

The LSSA supports the proposal, subject to the reservation of rights referred to above.

SECTION 6

Section 6 provides for consequential amendment to Section 22 following on the empowering of the Fund the "**determine**" forms. The section deals with the submitting of a form by the owner and driver reporting the accident, together with the prescribed statements to provide for forms as **"determined**" by the Fund.

SECTION 7

Section 7 proposes the amendment to Section 23 in order to eliminate the different prescription period for unidentified vehicles.

The LSSA supports this amendment.

SECTION 8

Section 8 proposes a further consequential amendment to Section 24 dealing with the forms now proposed to be **"determined"** by the Fund instead of prescribed by the Minister.

Subject to what has been said above regarding the content of the forms, the LSSA has no objection to this proposed amendment.

SECTION 9

Section 9 proposes consequential amendments to Section 26, being the power to prescribe by regulation injuries which are deemed to be serious and the tariff for medical treatment.

Subject to the above comment, the LSSA has no objection to this proposal.