



Established in 1977

**OFFICE OF THE PRESIDENT  
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**THE BLACK LAWYERS ASSOCIATION SUBMISSIONS  
AND COMMENTS ON THE ROAD ACCIDENT BENEFITS  
SCHEME BILL**

**1. INTRODUCTION**

Black Lawyers Association (BLA) appreciates this opportunity to make its views and comments in respect to the Road Accident Benefits Scheme Bill (RABS). BLA is a voluntary association whose members are legal practitioners. Our members practice law in a spectrum of fields. The majority of our members practice in the field of Personal Injuries which is mainly made up of the Road Accident Fund Claims.

Majority of our members' clients are indigent and or live under the poverty line. They are not in a position to fund their RAF claims adequately or at all. As a result almost all the RAF claims are conducted on contingency basis. On this respect the legal practitioner funds the case on the understanding that at the successful finalisation of the case he or she will be reimbursed his / her disbursements. These disbursements cover a number of aspects like, payment to experts for medico-legal reports, travelling, accommodation, subsistence allowance and other related expenses. Seriously injured road accident victim's case may require financial assistance of more than R100 000.00. The practitioners financially assist their clients on the understanding

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that they will recover the expended disbursements. The fact that the current road accident system pays the award to client through the legal representative and that the RAF covers the claim's costs and disbursements, in a way, guarantees that the practitioner will get the costs and the disbursements associated with running of the claim.

Taking away of the guarantee that the practitioners will get their disbursements and costs from the scheme will adversely affect the road accident victims. This will result in fewer practitioners taking the road accident cases and as a result the victims will be forced to do their cases on their own without any or adequate investigation of quantum. A number of victims will not be able to pursue their claims because they will become prescribed. Those who may nonetheless institute such claims will end up under settling their claims. Under settlement of the claims and or non institution of claims contradicts the aim and purpose of the establishment of the compensation fund.

BLA finds it of paramount importance to record that RAF compensation is an important part of the social security programme in our country. The purpose of which, is amongst others, to place the road accident victims in the place they would have been but for the accident.

A number of measures which are to be introduced by the RABS will in a fundamental way make it impossible for victims of the road accidents to be placed in the position they would have been had it not been for the accident. What makes the matters even worse is that the victims of the road accident

will not have recourse against the wrongdoer as the common law right in this regard has been ousted.

BLA welcomes the positive changes which are to be ushered in by the enactment of the new legislation herein. We are, however, worried by those provisions which will bring hardships to our members, practitioners at large and the victims of the road accidents; and all those who will both be affected and feel the effects such accidents.

We believe that the scheme brings about major changes to the victims of road accident. One of the most important changes it brings is that contrary to the current Road Accident Fund Amendment Act where you have to establish fault on the part of the other driver (insured driver), RABS Bill will be a no fault base system. Victim need not prove negligence on the part of the insured driver. The no fault scheme also has problems of its own as we will demonstrate same in some paragraphs hereunder.

BLA's conviction is strongly rooted on the philosophy that the road accident scheme in South Africa should serve two purposes, being the social welfare in a form of social benefits and the public liability body for compensation of road accident victims as a result negligent or wrongful driving of a motor vehicle.

## 2. RIGHT TO SOCIAL SECURITY

The road accident scheme or system, as a social security agent, derives its mandate or authority from section 27 of the Constitution of the Republic of South Africa Act 108 of 1996 which provides as follow:-

**“Everyone has the right to have access to -**

**(a) ...**

**(b) ...**

**(c) social security, including, if they are unable to support themselves and their**

**dependants, appropriate social assistance.**

**(2) ...**

**(3) ...**

Under the circumstances the provisions of the RABS Bill, in as far as social security responsibilities are concerned, should comply with the direction of the Constitution. We shall deal with this aspect when we will be attending to the specific provisions of the Bill.

## 3. ACCESS TO COURTS

Section 34 of the Constitution provides that **“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”**. We are of the view that road accident victims’ right to have their dispute resolved in a fair public hearing is covered by this section of the Constitution. Such disputes include delictual disputes and/or non-pecuniary damages disputes. Under the circumstances it will be unconstitutional for the RABS Bill to deny the road accident funds victims a legal recourse to be compensated for non-pecuniary loss from both the scheme itself and the wrongdoer.

We now turn to deal with the specific provisions of the Bill

#### 4. THE BILL

For easy of reference the Bill's "articles" will hereunder be referred to as the "sections".

##### 4.1 Section 28

Section 28 of the Bill outlines the scenario under which the wrongdoer is not protected by the scheme and the administrator is not liable to provide the benefit to the injured. This will, in terms of subsection (1) occur in the event that the bodily injury or death was caused by or arose from the **use** of a vehicle to **perpetrate** a terrorist activity. The Bill does not define what constitute a "terrorist activity" but same is defined under section 1 of Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004. The administrator shall not liable to a person or dependants of a person who got injured or killed when he or she was not legally in the country, save for emergency health care services.

We find this section to be problematic in the following respects:-

- 4.1.1 The person who wilfully knocks another person by a motor vehicle will not be liable to pay this/her victim compensation for the inflicted injury, including pain and suffering;
- 4.1.2 A culprit in the above given scenario, if in the process, gets hurt he /she will get cover from the scheme;

- 4.1.3 Participant in organised motor racing (lawful or unlawful) will benefit from the protection of the scheme like any other ordinary victim of a motor vehicle accident;
- 4.1.4 A criminal driving away from the police if he/she is involved in the accident shall benefit from the protection of the scheme (He/she will be paid for the loss he will suffer and at the same time he will not compensate his/her victim for the pain and suffering);
- 4.1.5 The injured person who is illegally within the country will not be protected by the scheme save with respect to the emergency health care services. This is absurd because serious criminals, as indicated above, will be protected by the scheme; save in the event of terrorism, which in any event will not be easy to prove. The illegal foreigners deserve full health care services. The benefit of a person who is illegally within the country may be limited by excluding Income support benefits and the family support benefits, these benefits or any other social benefits applicable can be afforded him/her from his/her country of origin;
- 4.1.6 The person who is illegally within the country should be entitled to non-pecuniary damages. He/she should also be liable to compensate his/her victim for non-pecuniary damages;
- 4.1.7 Section 28(1) is not clear on the extent to which protection of the wrongdoer is lifted. It is not clear if the wrongdoer will only be personally liable to the victim in respect to the categories of benefits as they appear in Section 30 of the Bill and subject to their limitations

or is open to compensate the victim for the pain and suffering as well; and

4.1.8 Section 28 should widen the list of the insured drivers who may not receive benefits from the scheme. Amongst others, it must exclude drivers, cyclists, motor bikers or pedestrians who deliberately expose themselves to the Road Accident.

## 4.2 Section 29

In terms of Section 29 of the Bill the owner or driver of a vehicle involved in the road accident, or the employer of the driver will not be liable in respect of bodily injuries or death of any person caused by or arising from a road accident. We are of the view that this Section should read as follows, “Subject to the provisions of section 28 no civil action for damages shall...”

## 4.3 Section 30

This Section makes provision for benefits in respect of the following categories of benefits, namely:-

- 4.3.1 Health care services;
- 4.3.2 Income support benefits;
- 4.3.3 The family support benefits; and
- 4.3.4 The funeral benefits.

The bill excludes compensation for the non-pecuniary damages (commonly known as the general damages). We find the blanket exclusion of general

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damages to be contrary to what the Bill, in its objectives, professes to stand for, namely, to provide an effective benefit scheme in respect of injury or death caused by or arising from road accidents, which benefit scheme, is **reasonable, equitable, affordable and sustainable.**

#### 4.4 Reasonable And Equitable

We find the scheme to be unreasonable and inequitable on the following grounds:-

#### 4.5 Reasonableness

The scheme places the victim of a wrongful and unlawful driving of motor vehicle at the same position with the culprit thereof. At times, the perpetrator may be placed at a better place than the victim.

See the following scenario:-

*“An unemployed 25 year old University graduate (Law or Medicine degree) victim of a motor vehicle accident who suffered catastrophic permanent impairment will get about R1 538 775.00. Whereas the culprit who suffered the same injuries with the former in the same accident, an 18 year old drunk unlicensed driver who earns R220 000.00 per annum driving (running) away from law enforcement officers, may end up getting a compensation of about R9 232 440.00.”*

This is possible taking into account the following factors:-

- The Economic Inactive Person is only entitled to compensation for the Average Annual National Income which is currently fixed at R43 965.00 (regulation 1);

- The benefit is not subject to the inflation adjustment (section 37(9); and
- The Pre-Accident Income Cap per year is R219 820.00 (regulation 2).

If the Bill is passed into law in its current form, road accident compensation will be profitable to criminal drivers who wilfully disregard road safety. It is unreasonable and against public policy that the victim of a crime gets the same or less protection from the law compared to the perpetrator.

#### 4.6 Equitable

The principle of equity demands that people should be afforded the quality of fairness and impartiality. Therefore the principle requires that everyone should be treated fairly and equally. Section 9(1) of the Constitution provides that **“everyone is equal before the law and has the right to equal protection and benefits of the law.”**

Victims of Road Accident should also be treated as equals before the law and are entitled to equal protection and benefits of the law. One of the protections which the victims of the road accidents are entitled to is a delictual compensation for pain and suffering caused by the wrongdoer and/or its substitute, the scheme in this regard. This right can only be limited by a law of general application which is reasonable and justifiable in an open democratic society based on dignity, equality and freedom.

The RABS Bill does not meet this standard because the Bill is not the law of general application. It will only apply to victims of road accidents. All other victims who are subjected to personal injuries will continue to be compensated for the non-pecuniary damages by the culprits. For in stance

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victims of medical negligence, rail transport, and assault will continue to exercise and enjoy their common law right in this regard.

#### 4.7 Human dignity

Section 10 of the Constitution declares that everyone has inherent dignity and the right to have their dignity respected and protected. Inherent dignity encompasses that no harm should be inflicted on the person of the other. If harm is inflicted same must be met with a remedy. One of the common law remedy to pain and suffering is compensation for non-pecuniary damages. We hold the view that a common law remedy may be limited but not excluded or take away as the Bill intends doing. Road accident victims must be treated like all other victims of personal injuries and be allowed to be compensated for non-pecuniary damages they have suffered. It is irrational to abolish non-pecuniary damages resulting from the road accident because it is ‘difficult to compute same’.

#### 4.8 Affordable and Sustainable

We find the argument of affordability and sustainability of the scheme as reason of doing away with the non-pecuniary damages to be not convincing. It cannot be correct that affordability and sustainability of the scheme may be sought at all costs. Section 36(1)(e) of the Constitution provides that “...less restrictive means to achieve the purpose” must be considered when limiting a right entrenched in the Bill of Rights. The scheme can remain affordable and sustainable if some of the non-pecuniary damages are limited or capped but at the same time there must at least be unlimited non-

pecuniary damages specifically for people who suffered catastrophic injuries and or impairments.

The Overemphasis of affordability and sustainability of the scheme violate the rational basis test in that it imposes the cost of the intended benefit to the public solely upon those most severely injured. We believe that in order for a public scheme of this nature to pass the affordability and sustainability same must not overly be focused on national issues and at the same time being biased against those whom it must be intended to protect, the road accidents victims.

We therefore submit that it is beyond reasonable doubt that the Bill and the constitutional provisions are clearly incompatible and as such same must be redrafted in order to comply with the constitutional requirements.

#### **4.9 Section 31(2)(c)**

This Section limits the number of times an individual may receive medical treatment at the expense of the scheme. It disregards the personal circumstance of an individual injured person.

#### **4.10 Section 31(2)(f)**

Section 31(2)(f) closes doors for new medical practitioners because it requires "... service provider who ... normally provides the health care service". It will be difficult to establish if a medical practitioner normally provides the particular health care service.

#### **4.11 Section 32(1)(f)**

Pre-authorisation in respect of non emergency health care, will undoubtedly result in unnecessary delays and undue hardships for the injured to get the necessary treatment.

#### **4.12 Section 33(1)(b) and 1(c)**

Limitation of costs of the health care will result in a big liability to the members of the public. The health care services may require the member of public to foot the bill beyond and above what the health care services would have received from the administrator.

#### **4.13 Section 33(1)(d)**

This Section is unfair in the following respects:-

4.13.1 It denies the injured to get medical treatment of high quality; and

4.13.2 It ignores the reality that an ordinary residence who was involved within the republic may after leaving the country fall ill resulted from the injuries of the accident which occurred within the republic.

We propose that the Administrator must, in the event of a health care provided outside the Republic, limit its costs to the reasonable amount payable within the Republic for similar treatment received outside the Republic.

#### 4.14 Section 33(2)

This Section will cause a huge hardship to members of the public whose pre-authorization may not be pre-approved when, in reality, they need medical attention.

#### 4.15 Section 35

Section 27 of the Constitution guarantees to “everyone...” the right to access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance, not to the ordinary South Africans only. This Section will not pass the constitutional muster.

#### 4.16 Section 35(1) and (2)(a) R/W 39(1) and (2)

This Section takes away the benefits from the following class of South Africans:-

- 4.16.1 Youth who are studying on scholarship abroad ( for instance medical students receiving training countries like Cuba); and
- 4.16.2 People who have employment contracts which require them to be 6 months abroad and six months at home.

#### 4.17 Sections 36(1)(a) and (3) Read With Section 37(1)(b)(i)

This Section does not take into account the potential of the injured, his/her career path, possible promotional increases and the economic circumstances.

For instance a medical student who suffered catastrophic permanent impairment injury when doing final year will be regarded as an economic

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inactive person and thereby only be entitled to compensation for the Average Annual National Income (AANI).

#### **4.18 Sections 37(1), 39(3), 43 and 44**

Compliance with the provisions of these sections will require technical ability on the part of the claimant. It places the burden on the claimant to comply with specific requirements and time frames. As such this section makes it very important that the claimants be assisted by legal practitioners but their service is discouraged by direct payment to the claimants and non contribution towards the legal and medical costs.

The number of forms required to be completed by the claimants in terms of the Bill are onerous and will in the process, instead of simplifying the process, it ends up complicating and confusing the poor claimants.

#### **4.19 Section 37(2)**

This section makes it compulsory for everyone who wants to claim a long term income support benefit to subject himself or herself to an assessment by Occupational Therapist or other suitable expert. This section burdens the claimant unfairly in that:-

4.19.1 The administrator does not bear the costs of this assessment. Section 51 excludes medical and legal costs by the Administrator; and

4.19.2 This Section is some sort of red tape aimed at making it impossible for the indigent injured members of public to submit their claims for long-term income support.

#### **4.20 Section 37(3)&(4)**

We are not in support of accreditation of the assessors as it is proposed in this section, in that:-

- 4.20.1 In the event of fewer assessors being accredited same will result in unnecessary delay to the whole claim process;
- 4.20.2 It will limit the choice of assessors;
- 4.20.3 The assessors will be subjected to the administrator's requirements and standards and thereby compromises the expert's objectivity; and
- 4.20.4 Some of the accredited assessors, it is considered, may regard the scheme to be their employer and render reports which are mainly favourable to the Administrator.

#### **4.21 Section 38**

We agree with this section provided same is not intended to arbitrarily stop the provision of the benefit to the claimants. The training should be at the expense of the administrator.

#### **4.22 Section 40**

The amount of R10 000.00 for funeral costs is unreasonable too low. This Section disregards the cultural practices and customs of the majority citizens of the country. To the majority of our people funerals must be ‘dignified’. They bury their loved ones with love and dignity. Further, funeral is for the whole family and community, it is not a private ritual. In the majority of the Africans funerals the mourners/guests must eat, there must be a coffin and a tombstone. Under the circumstances we find that the appropriate funeral expenses should not be less than an amount of R25 000.00 per funeral.

#### **4.23 Section 41(2)**

The Administrator must only be in a position to terminate the benefits after been authorized by a court of law to do so.

#### **4.24 Section 47**

The Bill’s spirit is to do away with the legal practitioners in the process. Section 51 excludes Legal Costs Contribution by the Administrator. It will be unfair for the administrator to put the rigid prescription periods because that will compromise the rational for the Bill. Prescription of claims under the scheme must, depending on the circumstances of an individual claim, be capable of been lifted on reasonable explanation of the delay, through application for condonation of late processing of the claim.

#### **4.25 Section 47(3)**

This section has adverse effects on the minor children, insane people and people under curatorship. It only gives them a period of one year, after

attainment of age of majority or after the impediment has been removed, to institute the claim against the fund whereas major people who are without mental capacity impediments have 3 years to do the same thing.

The minors, insane and people under curatorship must, after their impediments have been removed, have three years to institute their claims as well.

#### **4.26 Section 49**

The Period of 30 days to lodge an appeal by unrepresented claimants is unreasonably too short. This period will only assist to exclude the claims. We hold the view that same should be extended to at least 120 days.

#### **4.27 Section 51**

This Section denies the claimants the opportunity to properly investigate and submit their claims to the administrator. The South African legal system has rich body of jurisprudence in respect personal injuries claims and the legal practitioners who can provide this service efficiently. This Section is unreasonable because it expects lay people to comply with the technical Act of parliament. We do not support this section.

We find this section to contradict the spirit and the letter of the Constitution which encourages that people should be given access to justice. Section 51 closes this door.

#### **4.28 Section 52**

This Section is not acceptable at all. In terms of this Section the scheme is exonerated from liability of the wrong doing by its employees. Such negligence may result in the claimant losing his/her benefit.

The scheme must take responsibility of its wrong doing. Examples of such wrongdoings could be a prescription at the hands of the scheme when the claimant had complied with the necessary requirements.

#### **4.29 Section 53.**

We are of the view that cession or transfer of the benefits should be done with the consent of the administrator not the Minister.

#### **4.30 Section 57(1) and (2).**

The maximum fine of R50 000.00 is too high taking into account that the Regulations places an Average Annual National Income at R43 965.00.

#### **4.31 Section 57(3)**

Amount of R1 000 000.00 is unreasonable taking into account that the average driver is under paid, if not unemployed. The fine will only assist to over crowd the already overcrowded prisons.

## 5 Recommendations

We recommend that the Bill should also cater for the following circumstances:-

- 5.1 The innocent victim of a motor vehicle accident should be illegible for non-pecuniary compensation;
- 5.2 Non-pecuniary compensation for catastrophic injuries or impairment should not be limited or capped (catastrophic permanent impairment should be assessed as follows, 50% WPI or any of the following, loss of foetus, Amputation of a limb or major part or organ of the body or long term permanent loss of a body function, long term mental impairment and permanent bodily disfigurement; and
- 5.3 There should be cap for the non-catastrophic injuries;
- 5.4 The wrongdoer should only be entitled to the category of benefits enlisted under section 30 of the Bill;
- 5.5 The following categories of persons should be excluded from benefiting from the scheme, namely:-
  - 5.5.1 Participants in organized motor racing;
  - 5.5.2 Criminals driving away from the police or any other law enforcement agencies and happen to be involved in an accident;

5.5.3 A person who willfully places himself in danger of being injured by a motor vehicle with the intention of benefiting from the scheme.

We thank you.



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**For: Pritzman Busani Mabunda**  
**BLA: President**  
**04 JULY 2014**