

# OPEN LETTER TO MINISTER OF TRANSPORT, THE HONOURABLE DIPUO PETERS.

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## APRAV

The Association for the Protection of the Rights of Road Accident Victims (APRAV) is a non-governmental association formed to protect the rights of road accident victims. APRAV has with concern noted the comments made by the Honourable Minister of Transport during her speech on the Transport Department's budget on 5 May 2015.

## Holistic approach: Government's Constitutional Duty

In our view the South African road accident victim's destiny requires a holistic approach which does not only concentrate on the consequences of road accidents in South Africa but also addresses the causes. The government has a Constitutional duty to ensure the safety of road users. Nothing relating to this duty appears in the Department of Transport budget for 2015/2016 despite the fact that internationally South Africa rates as one of the worst countries as far as road safety is concerned. The recent record Easter road deaths underscores the fact that comparatively speaking, South African road users are at considerable peril. Instead of properly funding the Road Traffic Management Corporation in compliance with its constitutional duty in an effort to improve road safety and consequently prevent citizens from becoming road accident victims, the Government in its 2015/2016 budget opted to rather spend R10 billion on the consequences of its failure to comply with its constitutional prevention duty by increasing the Road Accident Fund fuel levy by 50 cents a litre than comply with its constitutional duty to prevent harm to the motoring public thereby further burdening the already financially beleaguered citizen and strangling the embattled South African economy.

## Funding crisis

We are of the view that the Honourable Minister misidentifies the actual causes of the funding crisis in the road accident victim compensation system. In the first instance, the road accident victim compensation reform process is entirely driven by the perception that the system faces a R46 billion deficit. This deficit is an actuarial figure which is calculated on the basis that the compensation system is insurance based. This is not the case. The compensation system is and has always been a dedicated tax funded social benefit scheme. If this is accepted, the Government cannot use a lack of funds as a reason to change a system which has proven to be equitable and effective for more than 50 years. It cannot use the actuarial shortfall argument when dealing with other constitutional obligations to provide housing, care grants and medical care so how can it do so when dispensing social benefits to road accident victims?

## Unscrupulous stakeholders

The Honourable Minister makes the sweeping statement that the woes of the Road Accident Fund are entirely the consequence of the actions of "unscrupulous stake-holders including lawyers and doctors just to mention a few". This statement cannot go unchallenged. This completely ignores the role that the Road Accident Fund plays in the compensation system and assumes that no blame for the current financial crisis is in any way attributable to the way in which the Road Accident Fund is structured and functions in practice. Contrary to the Honourable Minister's implied assertion that the RAF has no part in the compensation crisis,

it is APRAV's conviction that the problem primarily lies with the RAF. In the first instance the governance of the RAF is structured as if it is a public company while it in essence dispenses social security. The CEO is remunerated more than our Honourable President Mr. Jacob Zuma and even more than American President while the RAF executive and board receive above average remuneration. In contrast the Compensation Commissioner who essentially has the same mandate as the CEO of the RAF receives one-fifth of the remuneration of the CEO of the RAF.

The RAF dismally fails in its constitutional duty to expeditiously and equitably deal with the claims of road accident victims - a fact which can be gleaned from judgments handed down by various courts over a number of years in which the RAF was severely criticised for its sub-standard administration. The RAF spends R4,6 billion p.a. on litigation when it has been held by a commission of enquiry that only 1% of RAF matters are actually heard by the courts and that 99% of all claims against the RAF are capable of early settlement prior to trial. In a judgment handed down by the High Court in Pretoria in March 2014 the following was said of the RAF: "As I stated above it was clear the no instructions were forthcoming from the defendant (RAF). *Because of the defendant's lackadaisical attitude to third party litigation it is those funds that are ostensibly being protected that are actually being wasted. However, that is not the issue. In my view the courts ought to adopt a stricter approach to the obstructive and ineffective role played by the defendant (RAF) in third party cases in allowing cases to go on trial when such cases can and should be settled. ...As at 3 March 2014 this case could and should have been settled. The plaintiff had supplied the defendant (RAF) with everything it required to consider the claim as a whole. Instead no decisions were made until the last minute, when counsel's first day fees had already been incurred, and then on the pretext that it is dealing with public funds, the Defendant (RAF) tries to justify its actions or inactions on the basis that public funds should be protected. This however has an impact on plaintiffs in third party cases who have to pay additional amounts, more often than not large amounts, being those not recoverable on the scale as between party and party.*" (we italicise). Two similar instances were reported in the press on 25 May 2015 and another instance in Natal in the same week where the judge called upon claims handlers to show cause whether they should not be held personally liable for the legal costs as a result of their neglect to attend to a seriously injured RAV's claim (see <http://www.iol.co.za/motoring/industry-news/accident-fund-gets-tongue-lashing-1.1862782#.VWapjkZrv2Q> and <http://legalbrief.co.za/story/raf-claims-handlers-to-pay-costs>) For the information of the Honourable Minister: This is the actual reason why court rolls are congested with RAF matters. The RAF furthermore spends approximately R20 million p.a. on preventable expenditure in the form of costs for writs of execution and interest on late payment of court judgments. Finally if unscrupulous stakeholders succeed in their alleged quest to impoverish the Road Accident Fund as suggested by the Honourable Minister it is only because the Road Accident Fund has allowed them to do so by not complying with the provisions of the act of parliament which it administers. The RAF Act contains a raft of provisions designed to curtail and prevent litigation but unfortunately the application of these provisions are by and large sorely neglected by the RAF.

### Discriminatory system

The current system is entirely common law driven and it is quite impossible for the current system to cause and perpetrate inequality or abuse as compensation awards are based on common law and subject to judicial scrutiny. The view that the system is unequal is fully based on perception. According to the RAF annual statements only 5% of claims exceed R500 000.

It is therefore simply untrue that a small percentage of claimants are compensated by being paid the lion's share of available funds while other road accident victims go without compensation. On the other hand, if the allegation is proven to be true, then the counter argument is that this is the case because of bad RAF administration allows this to happen. The oblique reference to the RAF Amendment Act (RAFAA) as the Act which brought about equality is unfortunate. It must be remembered that the RAFAA passed constitutional scrutiny largely on the basis that it was an interim measure. Furthermore, the RAFAA all but constructively abolished the majority of road accident victims' right to receive compensation while curtailing the seriously injury road accident victim's right to full compensation without any compensatory advantage - all in order to balance the government's books.

### Disheartening stories

The vague reference to anecdotal information regarding the RAF's "successes" without hard facts is disingenuous - especially when recent reported instances in the media regarding some of the outcomes of the "RAF on the Road" campaign is considered. The RAF persuaded Frans Mabitsi to settle his claim for R38 000,00. After consulting an attorney he recovered R1.5 million (<http://www.news24.com/Archives/City-Press/Road-accident-fund-leaves-middleman-high-and-dry-20150429>). In another instance a legal practitioner reported that her client was persuaded by the RAF to accept R21 500,00 and was later awarded R975 000,00. Samkelo Vapi was paid R905 000,00 by the RAF directly as guardian for his brain injured child when the claim was later admitted for R1,2 million (see <http://legalbrief.co.za/story/judge-orders-review-of-raf-claim/>). Other instances of under settlement can be supplied on request. A document sourced from within the RAF seems to suggest that "RAF on the Road" is being run at the expense of RAV's. Not only are the amounts which claimant's receive far less than claims where RAV's are represented but it seems that unrepresented claimant's claims are favoured at the expense of represented claimants. From the preceding examples indicating the way that the RAF deals with some direct claimants, it is quite apparent that the removal of attorneys from the compensation system poses a real threat to the rights of road accident victims. More so if it is remembered that the administration of RABS will simply be the RAF in a different guise. As far as the case of the claimant present in Parliament referred to by the Honourable Minister is concerned, the benefits received by Ms Gunuza were benefits which accrued to her in terms of the current compensation system and not RABS.

### RABS as THE SOLUTION

The acceptance of Government of a no fault system in the South African context seems to be a serious lapse in policy and direction and an is an entirely wrong policy given the South African road safety record, the composition of the South African road accident victim population and the limited funds available to fund such a system. Although APRAV supports the notion of no-fault as beneficial to the interests of the road accident victim it has serious reservations in respect of its unqualified implementation in South Africa. Firstly, the introduction of a no fault system was not unreservedly recommended by the Road Accident Commission (2002) and was found to be unaffordable by all the previous South African commissions of enquiry who investigated the no fault option. The report of the RAF Commission indicates that further research, especially regarding cost, is required before such a system can be introduced. Secondly, the protagonists of RABS state that South Africa, by adhering to a fault based system, is out of step with leading other global legal jurisdictions such as Australia, Canada and the USA. In order to assess whether these arrangements and/or systems in these jurisdictions can be successfully implemented in South Africa, factors such as accident rate,

unemployment and GDP need consideration. A comparison shows that the RSA accident rate overwhelmingly exceeds all of the countries in question. The Australian accident rate is 7 casualties per 100 000 vehicles, Canada 9,3 and the USA 13,6. The casualty rate for South Africa is 156.4. The unemployment rate in Australia is 5,8%, Canada 6,5%, the USA 13,6% and South Africa 26%. The GDP in Australia is \$1 560 597, Canada \$1 826 769 the USA \$16 800 000 and South Africa \$350 630. The accident rate and GDP alone suggest that a very careful consideration of the financial implications and affordability of no fault in South Africa is deserving of very incisive and meticulous scrutiny. More so, if the fact that some jurisdictions who have opted for no fault reverted to fault and that in other voices for the change in the no fault approach have arisen. This truly a situation of "act in haste and repent at leisure". In addition, the important policy question as far as South Africa is concerned, is whether no fault sits well with the enforcement of road traffic legislation compliance by South African drivers and the improvement of road safety and whether no fault will result in indirectly rewarding careless and negligent drivers for the lack of compliance with the rules of the road with tax money.

### **Affordability**

We have roughly estimated the cost of the introduction RABS. Because of the high unemployment rate we estimate the non-employment benefit in terms of RABS alone to be in the order of R20 billion p.a. If medical costs, loss of support, loss of employment income, funeral expenses and legal costs are added, RABS benefits exceed the available budget of R30 billion p.a. by a very large margin. Our concern is that due to the limited budget, the only way that RABS will be able to function will be through the limitation of rights and benefits. In this regard we observe a trend in past government actions (see the introduction of limitations with the Road Accident Fund Amendment Act of 2005) that budgetary aims are achieved at the expense of the rights of road accident victims and we are deeply concerned that the introduction of RABS means a further erosion and worsening of the position of the road accident victim in South Africa - especially for the more productive tax-paying section of this constituency. Apart from the affordability if RABS we are concerned that RABS is not aligned to the needs of the average South African road accident victim and in essence seeks to compensate ignoring the profile of the average South African road accident victim. It also abolishes the constitutionally enshrined common law rights of the road accident victim and his/her constitutional right to access to the courts. We contend that the government's failure to protect the road user's constitutional right against harm and the introduction of RABS present a double jeopardy to road accident victims and is not at all a reflection of a government that cares for its citizens. We call on you and Government to enter into a dialogue with us and all other interested parties to explore a suitable solution to compensation of the South African road accident victim so that the best interests of the road accident victim and our country may be served and assured.

APRAV  
12 MAY 2015