



**THE ASSOCIATION FOR THE PROTECTION OF ROAD ACCIDENT VICTIMS**  
(A VOLUNTARY ASSOCIATION NOT FOR GAIN INCORPORATED IN TERMS OF THE COMMON LAW)

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05 October 2014

The Director-General  
Department of Transport  
Private Bag X193  
PRETORIA  
0001

***Attention: Ms Kgothatso Kgantsi***

#### **RABS BILL COMMENT**

The Road Accident Benefit Scheme Bill: Extension: Comments invited (Gazette 37812, General Notice 530 of 2014) refers.

The Association for the Protection of Road Accident Victims (hereinafter referred to as APRAV) is a non-profit and voluntary association with its main aim to contribute to a sustainable, affordable, equitable and fair industry-wide solution for the victims and affected persons of road accidents.

#### **APRAV has the endorsement of the following national bodies:**

- SA Medico-Legal Society;
- SA National Taxi Council;
- Orthopaedic Association of SA;
- South African Occupational Therapist Association of SA;
- Industrial Psychologists in the medico-legal industry and the Clinical Neuropsychology Association of SA.

In terms of the RAF's Integrated Annual Report for 2013/2014, the benefits of the proposed RABS are listed as follows:

1. Providing for a fully funded scheme that is reasonable, equitable, affordable and sustainable;
2. Expanding access to benefits by removing the requirement to establish "fault" as a determinant to qualify for benefits and reducing disputes by removing the "fault" requirement and by providing pre-determined benefits;
3. Making available timely and appropriate healthcare benefits based on a reasonable tariff;
4. Simplify claim procedure;
5. Wider cover to persons in road accidents;
6. Fewer exclusions from benefits;
7. Defined benefits which promote affordability;
8. Alleviate the burden of our Courts through the establishment of an internal appeal procedure

## 1. Providing for a fully funded scheme that is reasonable, equitable, affordable and sustainable

On the 09<sup>th</sup> of September 2014, the RAF CEO (Dr. Eugene Watson) admitted in his submission of the RAF Strategic Plan & Annual Performance Plan to Parliament's Portfolio Committee on Transport that the Road Accident Fund's Actuaries have not yet costed RABS.

During a recent "so called public consultation" held in George on the 18<sup>th</sup> of September 2014, Mr. Chris Willemse of the RAF confirmed that RABS will not be dependent on National Health Insurance (NHI) as a pre-requisite for its implementation.

Mr. Willemse later admitted in Kroonstad on the 25<sup>th</sup> of September 2014, that no tariffs had been agreed upon between RAF and any private sector, as it would be premature in the light of the fact that the Act (BILL) is still in its early stages of development.

Mr. Willemse confirmed that RABS will be funded by the fuel levy and the current and remaining RAF claims from Parliamentary allocations.

It would be an impossible task to quantify RABS, at this point in time, as many of the larger expenditures like health care cannot be qualified before service level agreements and tariffs had been agreed upon by RABS (RAF) and the private sector.

How can the RAF say that the RABS would be a more affordable alternative to the current system of compensation if they do not know how much the system is going to cost the taxpayer?

What guarantees do the South African public have that RABS will not result in an increased fuel levy and/or other taxes to supplement the already cash strapped system?

## 2. Expanding access to benefits by removing the requirement to establish "fault" as a determinant to qualify for benefits and reducing disputes by removing the "fault" requirement and by providing pre-determined benefits

Expanding benefits based upon a "no fault" system would imply a more expensive system as more road accident victims will be able to apply for benefits.

"No fault" would add to the already "top heavy" demand on claims and compensation and had been proven to be a more costly than a fault based system.

The "no fault" does not automatically grant a victim access to all the benefits; except for emergency medical care.

Consecutive commissions of enquiry into the compensation system held that no fault is unaffordable as it would double the government's compensation bill.

Do we really want to compensate the hijacker and the habitual criminal?

Would this be appropriate for South African circumstances?

No service level agreements have been secured between RAF / RABS Administrator and private health care, victims under RABS will be no better off than under the current system.

To speak of pre-determined benefits is a fallacy, as each and every individual victim's circumstances and requirements differ and change as they progress through the trauma of an accident and the recovery period that follows.

RABS would be able to review, revise and terminate the claimants' benefits with a system of medical peer review that is supposed to facilitate objectivity and consistency of the medical and disability assessments.

The fact that the administrator may withdraw benefits at any given time (taking into account budget constraints and changes in personal circumstances)would imply that the road accident victim would have no long term financial security under the RABS administrator.

### **3. Making available timely and appropriate healthcare benefits based on a reasonable tariff**

Road accident victims currently enjoy access to immediate medical care and do not have to qualify under stringent rules to qualify for long term medical care.

Under RABS, a victim will receive emergency medical care and would have to apply for long term medical care.

As at the date hereof no tariffs; let alone reasonable tariffs had been agreed upon with any of the private healthcare services, according to Mr. Willemse of the RAF.

How can the RAF promise or promote a service which is far from being secured and may only amount to "lip service" should the RABS Administrator fail to secure service agreements with private health care services.

To our knowledge no tariff has been published for comment. If any reference is made to the 2005 Amendment Bill, the tariffs will be so low that the private sector will not participate.

The RAF claims, according to Mr. Willemse, that RABS will not be dependent on the implementation of a National Health Insurance nor will they wait for it to be implemented.

Road accident victims already receive appropriate healthcare where available at private, *alternatively* provincial health care service providers.

Under the current RAF Act a road accident victim is far less at risk of being held liable for medical expenses as it would be covered by his claim; in terms of RABS only a "reasonable tariff" would be paid to contracted health care providers.

This would imply that if a patient ends up receiving treatment from a non-contracted service provider, the victim would be responsible to pay the excess.

A victim would be expected to finance further medical treatment until such time that a claim has been approved.

A cumbersome system of claiming for payment and pre-authorization will most likely result in delays.

The nature and extent of treatment falls within the sole discretion of the administrator.

This will imply that the injured will be denied the freedom to choose the nature and extent of treatment.

As a result, it is our opinion that for RABS to be successful, NHI would have to be in place (even if agreements are reached with private health care providers) as it would be highly irresponsible to implement RABS before this has happened.

#### 4. Simplify claim procedure;

“No fault” is supposedly the “silver bullet” which the RABS Administrator will be depending on for the quick and effortless administration of claims.

In reality the victim would still have to prove that he/she was in an accident by submitting the statutory required documents, in exactly the same way as a current victim would have to do.

A victim would still be required to prove a nexus between the accident and injuries. To be able to do this, medical reports and the necessary police documentation would have to be obtained and submitted at the victim’s expense, as the administrator will not pay for any of these costs.

No costs would be paid towards legal fees and as such a road accident victim would be required to prepare, lodge and champion his or her own claim - RABS affords no financial assistance to formulate and file a claim.

In terms of **Section 44(1) of the RABS Act:**

- (a) *A victim may be required to attend an interview by the Administrator or its agents;*
- (b) *Furnish a written statement or affidavit regarding any aspect of a claim or benefit;*
- (c) *Furnish the administrator with the further particulars of the road accident or any other relevant information regarding any aspect of a claim or a benefit;*
- (d) *Furnish a document in his or her possession or under his or her control, relevant to a claim or a benefit;*
- (e) *Provide his or her consent to the administrator to access the records held by third parties relevant to his or her claim or benefit.*

In terms of **Section 44(2) of the RABS Act:**

*The Administrator shall not be obliged to process any claim until a claimant has complied with any requirements imposed on him or her in terms of this section.*

This would imply that if the victim cannot travel or afford to obtain any of the documents i.e. medical and supporting vouchers etc. his or her claim will be denied.

What will a victim do if he or she is not able to obtain medical records, or his or her name does not appear on the accident report as does often happen with taxi accidents?

These claims will be lodged unrepresented and the victim would be at the complete mercy of the RABS Administrator.

Having regard to these requirements the high rate of illiteracy and an unemployment level at 25, 5% it would be very difficult for the regular road accident victim to prepare a claim, let alone afford it.

RABS is complicated and does nothing to simplify the claim procedure; in fact it rather discourages than invites road accident victims from claiming from the administrator.

According to Mr. Willemsse, the RAF will conduct an internal audit to assess the need to appoint or obtain additional resources to deal with the additional claim demand – if no changes are made it would imply that the current staff complement would be left to assess claims.

As far as we know the current claims handlers are not medically trained and are in our opinion; unqualified to assess claims under RABS.

The current RAF Act makes provision for claims to be settled within 120 days from lodgment.

In terms of RABS a victim is prevented from claiming within 60 days of an accident.

After 60 days had lapsed he/she may submit a claim but will have to wait an additional 180 days for RABS to decide whether or not he/she would qualify for benefits.

In terms of Section 48(1) the administrator is not obliged to even reply to a claim and the victim must accept that if he has not heard from the administrator within 180 days, his claim had been denied.

It is our opinion that RABS would be an administrative nightmare and almost impossible to objectively assess without appointing qualified medical experts to assess each and every claim which will add to RABS cost expenditure.

It is well documented in relevant case law that the RAF's administration is poor and often the result of unnecessary litigation and costs being occurred.

In March 2014, the following was said by a presiding judge in the North Gauteng High Court in a matter against the RAF: "In my view the courts ought to adopt a stricter approach to the obstructive and ineffective role played by the defendant (the RAF) in third party cases in allowing cases to go on trial when such cases could and should be settled".

No mention is made of how RABS plans to administer the whole country's claim demand under a "no fault" system without drastically expanding its personnel and resources – according to the RABS the current RAF structures will be absorbed into RABS.

The fact that RABS has no accountability leaves the victim totally vulnerable and at the mercy of the RABS Administrator.

Only road accident victims that can afford to go to court will have access to the judiciary, adding insult to injury by making him or her, a victim twice, first being involved in an accident and secondly being denied benefits by RABS.

Lastly, RABS will significantly disadvantage any person with a brain injury, even if the injury is only subtle.

#### **5. Wider cover to persons in road accidents;**

The fact that "no fault" applies under RABS does not mean wider cover, as the victim would still have to prove a nexus and compliance with the Act, before qualifying for any benefits.

A "no fault" system is not the answer that would magically dispel all the RAF's current problems in fact it will only result in a larger financial burden.

It is certainly not a fit and proper substitute for general damages as it affords no compensatory advantage for the road accident victim under RABS.

#### **6. Fewer exclusions from benefits;**

RABS was said to be a "safety net" not designed to compensate for full loss.

Consequently, RABS introduces far more exclusions and less benefits than the current road accident victim enjoys:

- The claims of children are limited to emergency medical care;
- General Damages are abolished;
- Funeral expenses are limited to R 10 000.00;
- Loss of earning capacity “career-pathing” is abolished;
- Benefits terminate on death of the beneficiary (leaving the dependants destitute);
- Claims for loss of income support are capped;
- The claims of foreigners are limited to emergency medical care;
- Save for emergency medical care, road accident victims older than 60 years have no claim.
- Save for emergency medical care, victims who earn more than R 219820.00 per annum, will have no cover in terms of RABS;
- Loss of support benefits are forfeited after 15 years or the dependent reaching the age of 60, whichever comes first;
- Loss of support benefits are terminated when a dependent child turns 18;
- No contribution towards legal or administrative costs;
- Foster children are excluded from benefits.

RABS will provide a benefit which would not cover the full extent of the loss as the purpose is to encourage an injured victim to return to their workplace as to curb the culture of dependency.

This is a wonderful concept but what about the people who were not employed, lost their jobs subsequent to the accident or simply cannot secure employment?

It is unclear how the administrator will deal with people who are economically inactive at the time of the accident.

As the RABS currently stands it will have devastating consequences for children, students and young adults. If the victim is a final year student and left incapacitated after a motor vehicle accident, he would be regarded as an unemployed person and his income benefits would be based upon the annual national income without the prospect of having his academic history and/or prospective income taken into account.

By excluding “career-pathing” which is manifestly unjust victims in this category will not be able to afford additional top-up insurance and will result in a higher rate of dependency on the state as an alternative income resource.

Family support benefits ceases when a child reaches 18. This means that it may end before a child completes school and will almost certainly end before any further education is obtained. Children in poorer communities might be finish their schooling as child support grants cease at the same age.

We suggest that the duration of the benefit should be extended to the age of 21.

Disabled children may be dependent on support for life and stopping the benefit at 18 may be extremely penal to this vulnerable group.

## **7. Defined benefits which promote affordability**

What this actually means is that government offers the victim less benefits whilst having to pay the same, if not more, to allow RAF/RABS to balance the books.

It is generally accepted that the enactment by parliament of laws governing personal injuries caused by or arising from motor vehicle accidents was in order to provide the road accident victim with the “widest possible protection”.

The RABS offers exactly the opposite; it offers a sugar coated protection with the promise of wider accessibility under a no fault system.

In principle and constitutionally, government cannot plead poverty when it has a constitutional duty to look after the social security benefits of its citizens.

The right to bodily integrity was identified as a constitutionally protected right by the constitutional court.

It is the common law and constitutional right to bodily integrity and the right to maintenance which is compromised in a motor vehicle collision.

These rights cannot be compromised for the sake of expediency and in order to balance the RAF books – especially where it is doubtful that the need to do so is entirely systemic.

It would be complicated to define benefits as there are so many variables to consider when administering a claim on behalf of a road accident victim.

The RABS Administrator is able to review, revise or terminate a claimant's entitlement to benefits.

A victim will never truly be financially independent as he will be continually scrutinized by the Administrator on an ongoing basis.

Victims over the age of 60 are excluded from income benefits, it is a well-known fact that many people over the age of 60 are still economically active.

Even though a child under the age of 18 would ordinarily not qualify for an income benefit it is worthwhile mentioning that, RABS will not take the child's particular circumstances (careers of parents etc.) into account when evaluating his/her loss of income, a basic principle of the Law of Damages, with the ideal of placing the victim in the position he/she would have been in had the accident not taken place.

Having the maximum time period of 15 years on support benefits may have a detrimental effect on young widows and their children.

Benefits are forfeited the moment a beneficiary dies (the result would be that the family of a beneficiary would be left destitute).

We are of the opinion that any benefits received should fall into the estate of the deceased in order to support the families of beneficiaries should they fall away.

Annual inflationary adjustments cannot be guaranteed and will be subject to affordability. This may result in the real value of these benefits declining over time. We are of the opinion that benefits should be adjusted annually in line with inflation.

Funeral benefits are limited to R 10 000.00 under the RABS Administrator. However, funeral expenses are costly and in many cases the cost of a casket alone can be in excess of R 10 000.00. Under the current system the RAF pays for necessary funeral expenses, which if proven, may be in excess of R 10 000.00 (this includes the plot, the service and transport costs of the deceased). According to the 2013/2014 RAF Annual Report, the average funeral claim is R 11 245.00. The report confirms that funeral expenses increased by 11% per year since 2010. We are of the opinion that either the amount should be increased to a more realistic lump sum or funeral expenses should be paid upon proof of payment as per the invoice provided.

Income benefits will be capped and general damages be abolished under RABS to ensure affordability.

The perception exists that the current compensation system favors the rich at the expense of the poor. Ostensibly based on this perception, the compensation of higher than average income earners have since 2008 been restricted to the national average income (currently R219 965.00 p.a.).

- According to the 2013/2014 RAF Annual Report the average value of a personal claim is R 194 6786.00 per claim.
- Only 3.8% of all claims finalized exceeded R500 000,00 and in value is less than 50% of compensation paid (page 71 of the RAF's 2013/2014 Annual Report).
- There is nothing sinister in this phenomenon. It is simply a reflection of the fact that high income earners are more likely to own a motor vehicle, travel more and be exposed to motor vehicle accidents.
- Why should the seriously injured (only they qualify for this level of compensation) including the quadriplegic and paraplegic road accident victims (also referred to by protagonists of RABS as instant millionaires) be made a victim twice?

First, through negligent driving and then by being discriminated against and denied the social security they are entitled to as citizens?

- The RAF Commission found that a typical South African road accident victim is likely to be a black male approximately 29 years of age who is lightly injured and if employed, earns less than R8 000,00 per month.
- Currently a 25, 5% unemployment rate is experienced.
- A sizeable section of road accident victims have no income whatsoever.
- Only 3% of road accident victims earned more than R27 000, 00 pa.
- The AANI is according to the RABS Bill is R 43 965.00 pa.
- Pedestrians constitute 28% (second largest group after passengers) of all road accident victims.
- Pedestrians are indicated as the highest socio economic risk group because of high rates of unemployment (60% unemployed) with an average income of less than R4 000,00 per month.
- RABS uses an Average National Income (ANI) and the Annual Income Cap to qualify loss of earning benefits.
- The AANI is a large relative to the current projected incomes of many RAF claimants.
- The application of the ANI Cap limits claims of higher income earners much more severely and may result in no claim despite significant loss of earning capacity.
- Paying an amount of R 43965.00 as AANI, is not only more expensive but may also encourage more claims and in particular fraudulent claims from very low earners to the unemployed.
- According to the RAF's 2013/2014 financial report the total pay-outs on general damages has decreased over the past three financial years.
- On average the amount of claims in respect of general damages has decreased by 26% per annum from 2010.
- It is expected that the RAF Amendment Act will result in further decreases in general damages payouts which begs the question why does road accident victims have to forfeit this right under RABS.
- If this is a financial decision clearly the RAF Amendment Act is reaching its objective by only paying general damages to the seriously injured.
- The practical effect of RABS is to deny the poor compensation and punish the affluent with lessened benefits.
- Why benefits under RABS need to be limited in any way seems to be driven by another principle other than equity.



- Rehabilitation, which includes vocational rehabilitation, is apparently a primary objective of RABS.
- Our question is; how do they plan to achieve this goal when there are no or little supportive structures in place?

**Secondly**, is the intention of RABS to attempt to restore the claimant to his/her pre-accident condition by means of rehabilitation and/or vocational rehabilitation in order to prevent paying benefits in the end?

- With this last question, it should be kept in mind that only 16% of claims constitute serious injuries, requiring some kind of rehabilitation.
- From this percentage, only a small part would be suitable candidates for vocational rehabilitation. Seeing that such great emphasis is put on rehabilitation in the Bill, it appears that there might be a perception that rehabilitation will restore function, when in fact it facilitates the process of recovery from injury, yet will in only a few cases restore full functionality. Although rehabilitation is necessary for all serious injuries to some extent, it is not a miracle maker that will erase the injury and automatically reinstate full functionality. Supposing an injured person does receive successful vocational rehabilitation, it should be kept in mind that the employment rate for working-age people with disabilities remains low in this country. Road accident victims, with residual difficulties, wishing to return to work are no exception. What about the majority of claimants that had been unemployed pre-accident and where vocational rehabilitation is not the answer to restoring function? They will need training from private facilities or colleges – does RABS, in such a scenario, intend to pay for training where before the accident they were unqualified (thus not restoring function, but dramatically enhancing opportunities for some individuals which might be considered “lucky” by some)?
- It is thus clear that our current health care system is lacking from the very foundation. It would be an enormous task to develop a holistic health care system which is according to RABS already in place and such a project needs to be rolled out at a national level. What is already in place and working very well, is an assessment system whereby appropriate candidates who would benefit from rehabilitation and vocational rehabilitation can be identified. This part of the machine is working effectively and should be kept in working order, while the rest of the vehicle to take the person with disabilities forward is developed to the same high standards. It is our belief that people with disabilities in general and road accident in particular, should be provided the full benefit of specialized medical care, rehabilitation and when appropriate vocational rehabilitation and we offer our full support in developing such a system; but are mindful of the fact that it will take years to develop (recognizing the cost and complexity of the framework of establishing National Health Insurance, governments green paper proposes a 14 year transition period).
- Dr. Eugene Watson, CEO of the RAF, told the Business Day Live on 2 July 2014 that general damages will not be awarded under RABS to ensure that sufficient resources are available to prioritize rehabilitation.
- With only 16% of all road accident victims that could benefit from rehabilitation it is doubtful that rehabilitation is an adequate substitute for abolishing general damages – what about the other 84%?

## **8. Alleviate the burden of our Courts through the establishment of an internal appeal procedure**

The RABS Act offers the disgruntled road accident victim little or no access to courts.

The appeal process will be internal in nature handled by officers appointed by the RABS Administrator.

A victim will be required to lodge a written appeal within 30 days after being informed by the administrator.

With the high level of illiteracy and lack of financial means the victims may not be in a position to lodge their appeal in time.

Some victims are completely unable to act on their own behalf, especially those who are comatose or mentally incompetent.

Even if a RABS representative is posted in every local government clinic the chances are high that numerous victims would remain unaware of their right to appeal the decision of RABS.

This process by its very nature could be regarded as non-objective and unfair and opens the RABS Administrator to the charge of violating the beneficiaries' rights to administrative justice.

The appeals process cannot be supported by a legal representative which would result in a further disadvantage to less resourced, less educated and more historically disadvantaged members of the South African population.

The fact that a victim will have to "self-fund" expert evaluations in support of an appeal will make the process of appealing economically unaffordable to the average road accident victim.

**RABS is open to attack on Constitution grounds which include but are not be limited to:**

- The issue regarding the discrimination between different classes of road accident victims – Section 9(1) of the Constitution. This approach is in direct conflict with section 9(1) of the Constitution.

The fact that a road accident victim is denied non-pecuniary loss as opposed to a victim of medical malpractice, rail accident or assault who will still qualify for non-pecuniary loss.

- The fact that General Damages is abolished under RABS.

RABS abolishes this right to achieve a financial saving. Financial constraints provides no ground for the curtailment of common law rights.

The 2013/2014 annual report shows a yearly decrease in payouts for general damages which according to the report will increase as the 2005 RAF amendment act takes effect.

The legislature must provide an adequate and compensatory advantage should they wish to abolish common law rights. RABS affords no compensatory advantage whatsoever and to the contrary severely restricts the road accident victim's rights.

- The fact that a road accident victim's right to claim the excess of his claim from the wrongful party. The RABS abolishes the road accident victim's right to claim compensation not paid by RABS while for example Section 39(1)(a) of COIDA, retains such rights.
- There is a constitutional duty on RABS to ensure that claims are processed timeously and effectively and to ensure that benefits are allocated as soon as possible;

*The RAF is mandated to provide "compulsory cover to all users of South African roads, citizens and foreigners, against injuries sustained or death arising from accidents involving motor vehicles within the borders of South Africa; this cover is in the form of indemnity insurance to persons who cause the accident as well as personal injury or death insurance to victims of motor vehicle accidents and their families."*

*The fact that the number of unpaid or unresolved claims has been allowed to grow to such an extent is a travesty. With the RAF bleeding funds due to a backlog of claims estimated at well over R42 billion, it is clear that not enough is being done to manage the situation.*

*Recent news reports have also indicated the RAF has been accused of continuously losing files and letting down road accident victims. Case in point are the Zithwane orphans from the Eastern Cape, who, according to reports, have been waiting for the past three years to get compensation from the RAF after their mother had been killed in a road accident during July of 2008. This is but one example and my Shadow Deputy Minister, Greg Krumbock and I receive countless requests and complaints about claims being ignored.*

*Transport Minister Ben Martins must step in to rectify the situation. I will be raising the DA's concerns and will call on Minister Martins to put forward solid and urgent proposals as to how the situation will be addressed during a meeting of the Transport Portfolio Committee, scheduled for Wednesday 25 July 2012, where committee members are set to be briefed by the Department of Transport on the RAF transitional provisions bill. The situation cannot be allowed to continue. The Department must act urgently to ensure that the victims of accidents on our road are properly taken care of.*

*Statement issued by Ian Ollis MP, DA Shadow Minister of Transport, July 22 2012*

- **The fact that a road accident victim is prevented and/or limited in his right to access the Courts – Section 34 of the Constitution.**

Under RABS the road accident victim has no legal recourse or sanction to compel the Administrator (RABS) to attend to his or her claim.

In terms of RABS no claim may be submitted within 60 (sixty) days of the cause of action. The administrator then has 180 days (six months) to decide whether or not benefits may be allocated – in terms of the Act the administrator need not even reply to the claim the road accident victim must accept that his claim was denied if not replied to within the prescribed period.

- **The right to bodily integrity, fact that a victim will not be able to choose where and how he would like to receive medical treatment – Section 12(2) of the Constitution.**
- **The fact that a child's right to support is affected as no support is payable to a child living abroad regardless of the fact that the deceased had a legal obligation to pay support – Section 28 of the Constitution.**

***In an article in NEWS 24 on the 26<sup>th</sup> of July 2014, it was said: ANC Lekgotla agreed to avoid rushed legislation:***

Johannesburg - The ANC wants to re-assess the passing of rushed legislation which may lead to it being deemed unconstitutional or excluding certain sectors of society, the SABC reported on Saturday. "We are walking away from rushing legislation because we want to finish, we have to look at laws thoroughly because we do not want any piece of legislation to produce unintended consequences," African National Congress chief whip Stone Sizani was quoted as saying. "This is one serious issue we have agreed we should re-look."

Sizani was speaking at a two-day ANC Lekgotla in Parliament, chaired by the party's deputy president [Cyril Ramaphosa](#). He was standing in for President [Jacob Zuma](#). The ruling party wanted to make sure all laws that were tabled, debated and passed by both Houses of Parliament were in line with the Constitution, Sizani reportedly said. The traditional courts bill was criticised for excluding women.

## POINTS TO PONDER

### 1. Litigation costs

In advancing the unsustainability argument the assumption is made that no inherent costs savings can be made in an attempt to reduce the perceived deficit and the manner in which the current system is being administered is at its optimal level. This assumption in our view is false.

A statement that 50% of cases on the court rolls have the Road Accident Fund as the defendant is possibly an understatement of the actual situation. A cursory page through the court rolls for 2014 in the Gauteng North High Court suggests an estimate of 80% to be closer to the mark.

This phenomenon will probably also be reflected by Magistrate's Court rolls where the majority of claims are heard. This partially explains the R4, 6 billion per annum legal bill of the RAF reported by the CEO of the RAF during the meeting in Centurion in July 2014.

It was said that this is the result of there being no incentive in the current system for early settlement of claims. This statement is simply untrue. The current RAF Act of 1996 contains provisions designed to encourage and enforce early settlement. One of these provisions places a claimant at risk for all the costs of litigation should such claimant decline an offer made by the RAF at any stage (even before litigation is commenced) and it later appears that the claimant is unable to prove his/her entitlement to more than the offer made. In addition, a claimant is under pain of loss of his/her claim compelled by the Act to disclose within a reasonable time after submitting a claim the circumstances under which the claim arose and also provide all information regarding the collision as well as his/her medical records. He/she is also compelled to at any stage after submission of a claim undergo medical examinations at the request of the RAF. The RAF has 120 days to investigate and finalise claims.

Viewed from this perspective it is suggested that the major portion of legal bill of R4, 6 billion is in part a consequence of claims not being promptly investigated, offers not being made within 120 days and the relevant provisions of the act not being applied.

The Grosskopf Commission of Inquiry found that only 1% of RAF matters actually proceed to trial and 99% are settled. One can rightfully ask: If this is the case why does the RAF litigate to the extent it does?

The RAF was in the past criticized by the courts for not complying with its constitutional duty to deal with the claims of claimants effectively and expeditiously. Law reports show that the RAF sometimes defends claims it should have conceded liability. In one reported instance a senior claims handler of the RAF was convicted of contempt of court for not conceding a claim of a claimant where the RAF accepted liability for other claimants involved in the same collision.

Clearly the legal bill could be drastically reduced if the RAF followed the principles of the current RAF Act and makes tenders within the prescribed time frame.

According to the 2013/2014 annual report the RAF's legal costs payments increased by 29% by the end of the financial year – the average increase in costs being 16% per year since 2010.

It should be noted that the amount of claims have more than halved in total since the inception of the current RAF amendment act on the 1<sup>st</sup> of August 2008.

## 2. Legal / Expert Medical Representation

Equity is defined as the quality of being fair or impartial. It is our opinion that there can never be any question of equity in the RABS system if the road accident victim is not allowed the opportunity to effectively qualify his claim / appeal.

The assumption of the RAF in their 2013/2014 annual financial report (page 66) that “plaintiff attorneys have long exceeded the 25% maximum cap as stipulated in the Contingency Fees Act” is false and without any scientific basis. What is an even greater fallacy is to assume that attorney’s contingency fees amounted to 50% of compensation during the year under review.

It is said that “The current system benefits attorneys who, despite being paid their legal costs in full by the RAF, continue to charge a contingency fee from the claimants” (see paragraph 2 on page 75 of the 2013/2014 annual report).

Clearly the person responsible for this paragraph has no idea what the concept of party and party costs and attorney and client costs entail. The cost contribution by the RAF is exactly that, the difference of the attorney and client costs, like any other litigation (civil, criminal or divorce matter etc.) is payable by the client, this is not an enigma limited to RAF matters only.

We do however agree that there are certain individual plaintiff attorneys who might be guilty of overcharging, but it can never be assumed that the whole legal fraternity is involved in irregular fee charging.

By the same token can the fact that one doctor overcharges his client does not mean that all doctors should be “burned at the stake”.

It has become standard practice that judges require plaintiff attorneys to hand up copies of their fee agreements and those who had been found in contravention of the Contingency fee Act, have been dealt with by the relevant Law Societies.

Having regard to concerns about misconduct by legal representatives it should be noted that the Legal Practice Bill has been signed into law by South African president Jacob Zuma on Friday the 26<sup>th</sup> of September 2014.

The Act will see all lawyers – both advocates and attorneys – fall under a single regulatory body for the first time. The South African Legal Practice Council (SALPC) will be assisted by provincial councils in its daily operations.

The changes were aimed at ensuring a legal profession that was not only transformed, but also independent, as well as one that promoted the values underpinning the Constitution and upholding the rule of law. The Act states that disciplinary bodies that adjudicate on cases of alleged misconduct will be open and transparent and will consist not only of lawyers, but also of lay persons.

It also states that a Legal Services Ombudsman should be appointed, whose mandate it is to protect and promote the public interest in relation to the rendering of legal services and to ensure the fair, efficient and effective investigation of complaints against allegations of misconduct by legal practitioners. With the implementation by the legal practice bill the concerns regarding fees and conduct of legal representatives will be properly addressed.

Further, the Constitutional Court recently confirmed the application of contingency fees as stipulated under the Contingency fees Act and the Legal Services Ombudsman will ensure compliance in this regard.

### 3. Suppliers Claims

Apart from high levels of preventable litigation the RAF pays compensation to medical suppliers which in our view is not authorized by the RAF Act.

In the 2013/2014RAF annual report the average medical suppliers claim is R 5215.00.

The average payment of supplier claims has increased by 16% from 2010 to the end of 2014.

By correctly applying the RAF Act we submit that 16 620million less claims need to be dealt with and a possible potential saving of R 83,1 million can be gained.

### 4. Fruitless Expenditure

In its 2013 financial statement it shows fruitless expenditure ascribed to Law Administration of R20 million and R 22 million in 2012.

The CEO of the Fund's remuneration package was R 9,628 million per year.

The remuneration package of the Director General is approximately R 1,5 million per year.

A clear cost saving can be made by innovative thinking in structuring governance structure.

### 5. No Fault

Consecutive commissions of inquiry into the compensation system have held that no fault is unaffordable. The RAF Commission of Inquiry which submitted its report in 2002 commissioned actuarial estimates.

These estimates show that the introduction of no fault compensation will just about double the government's compensation bill.

It is significant that in some other jurisdictions in the USA no fault was tried and after some time jettisoned.

The protagonists of RABS do not tell us what the financial consequences of the introduction of no fault liability could be and this is worrying.

Based on the assumption that the funding requirement brought about by the introduction of no fault the levels of fuel levy funding required in future will unavoidably have to be increased. This raises a real question of sustainability because of the political and economic limitations attached to the fuel levy.

In addition, the introduction of RABS will mean that a fault and no fault system will exist side by side until all claims under the previous dispensation are finalised.

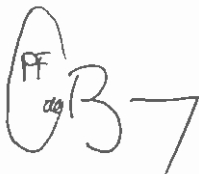
No mention is made of this consequence and neither is the funding issue which this raises disclosed, discussed or solved.

If no fault is introduced at the current level of funding it will result in an even larger deficit or even a drastic reduction of benefits, the latter of which will defeat the purpose of social security.

**In conclusion:**

- *The benefits and requirements of RABS are totally inconsistent with the nature and character of the South-African road accident victim and falls way short of the ideal of providing the “widest possible cover”.*
- *RABS will be a complicated and costly system fraught with disparities that would leave the South African road accident victim totally destitute and dependent on the State and will lead to countless court cases chipping away at the unconstitutional cornerstones of RABS.*
- *The fact that the functionality of RABS is greatly dependent on NHI makes any prospects of implementing such a system before NHI is fully operational, premature and highly irresponsible and will prove very costly.*
- *The constitutional issues raised in RABS will be in direct contrast to the ANC Lekgotla “the ruling party wanted to make sure that all laws that were tabled, debated and passed by both houses of Parliament were in line with the Constitution”.*
- *The fact that the administrator is only accountable to the Minister and himself will leave the victim vulnerable to being denied compensation without any sanction or recourse as is currently experienced with the RAF on the road campaigns.*
- *It is clear that a large portion of the current system of compensation’s financial woes are purely systemic in nature and can be addressed by streamlining the process in accordance with the requirements of the Act.*
- *There is a better more effective and cost saving alternative that can be found in innovative thinking, involving all the relevant stake holders which would ultimately lead to better benefits being awarded to the road accident victim.*

Yours sincerely

A handwritten signature in black ink, consisting of the letters 'PF' inside a circle, followed by 'de Bruyn' written in a stylized, cursive script.

Pieter FC de Bruyn  
Chairman  
APRAV