



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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The Chairperson

Portfolio Committee on Transport
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Attention of Me Valerie Carelse

30 November 2017

FURHER COMMENT ON THE RABS BILL

1. Introduction

- a. The Association for the Protection of Road Accident Victims ("APRAV") was established in June 2014 by concerned parties responding to the Road Accident Benefit Scheme ("RABS") Bill, published by the Department of Transport on 9 May 2014 (See www.aprav.co.za).
- b. Our submission to the Department, dated 05 October 2014, and to NEDLAC, dated 27 November 2015, refer. Copies are attached for reference purposes.
- c. From the outset, we would like to refer to the RAF Commission's key mandate requirements of "...a **reasonable, equitable, affordable and sustainable system...**"

- i. A reasonable system of road accident compensation should acknowledge the symbiotic relationship between road accident compensation and the broader system of social security and its objectives. The system should be moderate, with no extremes of generosity or meanness. It should be sensible in its ambitions and reflective of both the needs and the resources of the South African society in which it is founded. It should be purposive, not a piecemeal mixture of legislative amendment.
- ii. An affordable system should be within the financial means of road users and South African society, as a whole. The system (in its funding demands, administration costs and social security benefits) must provide value to road users.
- iii. A sustainable system must be accessible and efficiently administered and facilitative of health care and rehabilitation as also the alleviation of financial hardship and anxiety. It should reinforce the broader system of social security, which, in turn, should support road accident compensation. It must be available in the long term and, accordingly must be financially and morally viable.
- iv. It must be equitable in that there must be a relationship between the funding of the system and the demands made thereon. The treatment of road accident victims and their families must be impartial, unbiased and fair. There should be some balance or congruence between the benefits available for road accident victims and those available for other South Africans in need.

(RAF Commission Report, Volume I, 2002, Executive Summary).

- d. We would like to go on the record, to indicate that a call for this input, under the auspices of gaining input from the “members of the public”, is highly inadequate for this stated purpose. Especially since the Department of Transport’s public consultation process’ was nothing but a farce and in no way consulted the public of South Africa meaningfully or adequately. Such a process should inform and educate first, and then consult; via meaningful dialogue and engagement.
- e. APRAV submits that the RABS Bill in its current form is not ready for Parliamentary debate and that there are various issues which need resolution before the Bill can earnestly be considered by the committee and ultimately by Parliament. These aspects are:
 - Procedural
 - Policy
 - Financial
 - Substantial
- f. **On the most basic level and our most important comment is “the RABS Bill is anti-poor!”.**

2. Procedural

Bill before committee not amended to provide for comments received

The Department of Transport published the revised *Road Accident Benefit Scheme* Bill, 2013 (“the RABS Bill”) for public comment for a period of 60 days in Government Gazette No. 37612 on 9 May 2014 – the latter period was extended to 30 October 2014. The Bill in its current form is the product of a previous call for comment published in GG 36138 of 8 February 2013. The comments received at the end of October 2014 have not been considered and the Bill which is now before the committee is the unamended Bill without any of the comments received after 30 October 2014 being considered and/or incorporated. To consider the Bill in its current form is to essentially disregard the crucial public consultation process which is central to the passing of new legislation, the disregard of which will be legally fatal to the extent that the resulting legislation may be void. In any event the Bill in its current form was referred to NEDLAC and was rejected. It follows that to debate a bill which has not considered and incorporated the views of the public and business, would be futile.

3. Policy

Responsible department

The RABS bill is essentially a social benefit scheme and as such it should be seriously considered whether it is prudent for this scheme to continue in isolation under the auspices of the Department of Transport and whether it is strictly not a matter that should be dealt with by the Department of Social Development and Department of Health. Also, the interrelationship between RABS and other social benefit schemes needs to be debated and coordinated.

Promotor and administration

- It is seriously questioned whether it is good policy for the Road Accident Fund to be the driving force behind this Bill as this entity has a vested interest by virtue of its imminent demise should RABS be passed and can therefore not objectively be the promoters of RABS.
- In addition, the proposal in the current Bill that RABS should be administered the Administrator without making any provision for the constitution of a new administrative body other than the RAF, is contrary to the whole thrust and intention of the recommendations of the Road Accident Fund commission as contained on p 1285 in their 2002 report: “It is questioned whether the proposed scheme should be administered by a government department, a parastatal or by the private sector and, absent concrete proposals from the private sector.

- The conclusion is reached that a new independent statutory authority should be established which should be called the Road Accident Benefits Scheme (RABS). Outstanding claims should be ringfenced and administered by the current RAF organisation that should operate based on an annual budget financed in part from fuel levy income and in part from an allocation from the Department of Finance.”
- The RAF is unsuited to fulfil this role as its current ethos, structure and cost is diametrically opposite to that what is required for the administration of a pure social benefit scheme. To take one aspect: Its Exco remuneration alone currently stands at R34 million p.a. of which the CEO receives approximately R5 million p.a. Its current wasted expenditure is a figure of R2 billion p.a., its legal fees approach R8 billion p.a. and its staff expenditure R1,434,772 million.
- In contrast the personnel budget of the comparable Compensation Fund (Workmen’s Compensation) is R636 375 million p.a., its executive remuneration approximately R3 million, Commissioner’s remuneration R838 000 and fruitless expenditure R436 114.

The RAF’s ethos, structure and culture are totally unsuited to the objects and ethos of RABS. This was one of the key findings of the RAFCOM. What is stated by the RAFCOM in 2002 has not changed. As recently as October 2017 a Free State judge in *Hlalele v Road Accident Fund* 5668/16 ZAFS 18 October 2017 at par 32 said the following regarding the RAF: “[32] The system at the RAF should be investigated and much better management practices shall be implemented.

- It is incomprehensible that a litigation officer, without being placed in possession of a file containing the claim documents, is instructed to handle a claim in order to instruct attorneys, communicate with them, and eventually oversee that all pre-trial processes are conducted to get the matter trial-ready to ensure that the trial runs its normal course or to give instructions to settle.
- The two litigation officers were not prepared to accept responsibility. They are quick to put blame on the attorney, but what transpired in the RAF's offices, prior to and when the matter should have been under their control, remains a mystery.
- We have not been told why it was necessary that an apparently straightforward claim had to be referred to the Forensic Investigation Department, and more importantly, what this department did to carry out the RAF's mandate.
- Fraud is indeed a worrisome matter and no doubt; the RAF must ensure that fraudulent claims be traced and dealt with.
- It is laudable that the RAF tries to do whatever is needed to eradicate false claims, but in casu no need was shown for such action. The outcome of any delayed action that might have been taken is a secret.

The information available to me does not indicate that whoever was tasked to do whatever, did in fact contribute positively to the challenges faced by the RAF. [33] From my experience on a weekly basis when allocated civil trials, the RAF seldom challenges the evidence of plaintiffs on the merits. A small percentage of the twelve to fifteen RAF cases set down for hearing on a weekly basis in this Division proceeds to trial. Obviously, in passenger claims it is difficult to successfully defend a claim for the reason mentioned supra, but then, such matters should proceed to trial on rare occasions only; by far the majority must be settled even before action is instituted. Unnecessary legal costs can be avoided. On the other hand, the RAF seldom investigates claims properly and its legal teams are often not able to proceed to trial in matters not involving the so-called 1% cases. Mostly, the RAF's legal teams come to court, not to settle, but to throw in the proverbial towel. In most of cases the outcome can be predicted: the merits are settled 100% in favour of the plaintiff. Witnesses are not subpoenaed and counsel (if one is appointed) is not instructed to conduct a defended trial, but receives instructions in respect of settlement only. To make matters worse, the court is often asked to stand matters down as the litigation officer cannot be contacted in order to give instructions to settle. Judges are even requested to stand matters down to the next day or even a third day. In the meantime, legal costs soar. [34] My personal experience is that, notwithstanding possible good intentions of RAF's senior management the overall system is such that it cannot be tolerated much longer.

We accept that the RAF is flooded with claims, but this country cannot afford the wasting of resources. It is not for the courts to prescribe to a litigant how it should run its business, but serious reconsideration must take place.

4. Financial

Nowhere in any of the representations made in support of RABS were there any real-world projections made. RABS is presented as the silver bullet that entirely solves the country's road accident benefit financing woes and abundant reference is made to the fact that RABS is no fault.

- In a country where 38 people die every day and as much as an estimated 1 500 per day are injured, the RABS no-fault which is touted as *the* solution and which affords every dependent and injured a claim is simultaneously financially its biggest problem.
- Added to this, is the recommendation of the RAFCOM that the liability of the current RAF should be ringfenced and separately financed, the very crucial question of affordability arises – both in respect of transition from RAF to RABS and the future.

- It would be disastrous indeed if the RABS bill becomes law only to realise after a few years that the country cannot afford it. In this regard the RAFCOM at p 1286 recommends: “A costing exercise has been attempted with the assistance of a firm of actuarial consultants who have prepared a valuation report. The limitations of such exercise are discussed in some detail although it is believed that this exercise provides an impetus for future data capturing, compilation of statistics, analysis and research, forecasting of expenditure, product design and cost containment.
- The costing exercise that has been undertaken by the Commission should be considered a preliminary step in development of an actuarial model and valuation of the proposed road accident benefits scheme. It is suggested by the Commission that, while the report is subject to consideration by the Legislature instructions could be given to another firm of actuaries to cost the scenarios directed by the Legislature.
- Such actuarial model could be completed, and the valuation presented subsequent to and additional to the Report of this Commission.” None of the “data capturing, compilation of statistics, analysis and research, forecasting of expenditure, product design and cost containment” is evident from any of the submissions made on RABS to the Portfolio Committee.

5. Substantial problems

Claims procedure

Against the backdrop of a 60% functional illiteracy in our country and the fact that 40% of road accident victims are pedestrians and poor, RABS proceeds from the premise that the onus of initiating and driving the claim for RABS benefits lies with the RAV. A RAV is moreover called upon to finance the whole claims process. This is indeed a cynical and callous approach – more so, if one considers that a claim may lapse automatically through inaction of the Administrator or the claimant and that representation of RAV’s is frowned upon. This is completely contrary to the recommendations of the RAFCOM.

Constitutional issues

The provisions of RABS are open to constitutional challenge: Without being exhaustive, the following provisions are mentioned:

- i. To be considered all claims need to be submitted by the claimant personally and no representation (curtailment of the right to representation);

- ii. If the Administrator does not respond to a claim for 180 days after submission, the claim has been denied (curtailment of the right to fair administrative process);
- iii. Loss of long-term 'career path' earnings are no longer considered – i.e.: loss of income (LOI) that would have earned had there been no accident, are disregarded (curtailment of a RAV's economic rights);
- iv. benefits will be based on 75% of the claimant's earnings prior to the accident without the ability to recover the balance from the wrongdoer as is the case with COIDA claims (curtailment - COIDA has a minimum and maximum and allows claims against the wrongdoer therefore discrimination);
- v. Benefits are not inflation-linked nor guaranteed as benefits can be reviewed, revised or suspended at any time (curtailment without right of recourse);
- vi. Claimants access to attorneys is limited, therefore the constitutional right to access the courts is denied;
- vii. The nature and extent of a victim's medical treatment will be decided by the RABS Administrator (curtailment – no right of recourse);
- viii. There will be no claims for non-patrimonial loss such as pain and suffering (curtailment - COIDA retains such claims except for a claim against the employer also in breach of s 12(2) of Constitution);
- ix. There will be no financial assistance for any legal or administrative costs the victim may incur while preparing and processing their claim (curtailment and disregard of right to fair administrative process);
- x. Costs of obtaining medical and police reports will lie with the claimant – RABS will not refund these costs (curtailment and an infringement of the right of the poor creating constructive exclusion of claims of poor RAV's);
- xi. The claims of children, persons over 60 years of age, and persons earning over R220,000 pa, will be limited to emergency medical care only (curtailment, discriminatory and contrary to the 2010 judgment of the Constitutional Court);
- xii. Funeral expenses will be limited to R10,000 (curtailment - the current average is R15 000 discriminatory);
- xiii. Benefits terminate on the death of the claimant, leaving any dependents without support (curtailment in breach of s 28 of the Constitution);
- xiv. Benefits terminate after 15 years or when the claimant reaches 60, whichever occurs first (curtailment right to economic activity);

- xv. Stringent rules will apply to qualify for long-term medical care – and will only be allowed from healthcare contractors specified by the RABS administration (curtailment and contrary to current law and the 2010 Constitutional Court judgment).

6. Conclusion

It is submitted that the adage “act in haste, repent at leisure” is appropriate. The committee is duty bound to the citizens of this country to guard against the over-hasty introduction of an unproven, uncosted system to replace a tried and tested system of RAV compensation which has served the RAV admirably well for more seven and a half decades. As much as it is in need for improvement and alignment with South Africa, today.

The need for the current RAF system and a system for the future, to be ‘pro-poor’ is fully supported. However, this fundamental need can not only be flaunted in words but should be supported by –

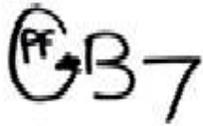
- adhering to all constitutional rights;
- protecting (and not diluting) road user rights;
- optimum efficiency and effectiveness of the ‘system’ and especially those ‘managing’ its operations;
- properly completing the research recommended by the RAFCOM (2002) to ensure that the South African realities, in 2017/2018, is fully considered;
- being ‘pro-poor’ in its practical application and not just as a tag line;
- drawing from an industry’s 07-decade long experience;
- properly consulting the public of South Africa, in an open and transparent manner; and
- accepting that all stakeholder needs to be involved to ensure buy-in into the future.

We suggest that the above matters be fully and thoroughly canvassed and pursued before the possibility of another compensation system for our country may be considered. In this regard APRAV as an association representing the interests of RAV is more than willing to assist the committee in any way possible in arriving at a solution which will be to the benefit of both all RAV’s and our Republic.

We are creating Provincial Task Teams (in some provinces these are already functioning) solely focused on immediate solutions (to ‘stop the bleeding’) and longer-term solutions (to fundamentally improve this industry). We will involve all stakeholders who is interested to constructively contribute to this process and will share all our research, findings, recommendations, etc. with the Portfolio Committee on Transport (i.e. we only this week completed a detailed actuarial analysis of a realistic and likely RABS Bill annual costing; and our findings are a sobering reality check versus the Departments of Transport’s “RABS will be cheaper”!

APRAV is here to assist you in any sensible way possible, to ensure meaningful and sustainable change to the current RAF system.

Yours sincerely

A handwritten signature in black ink, appearing to read 'PB7'. The 'P' is a large, stylized letter with 'PB' written inside its upper loop. The '7' is a simple, straight vertical stroke with a horizontal top bar.

Pieter de Bruyn

Chairperson

