



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 Director General: National Treasury

Dear Dr Duncan Pieterse (Ms Lindiwe Mnisi - Personal Assistant: Director General)

URGENT NOTICE ON THE ROAD ACCIDENT FUND AMENDMENT DRAFT BILL 2023: SIGNIFICANT IMPLICATIONS

This main purpose and intention of this letter is to ensure that all the Government Departments (especially National Treasury) are fully aware of the significant underlying and consequential short- and long-term financial/other implications of this proposed Bill and other constitutional (Bill of Rights), legislative and national interest issues, affected.

1. We, the Association for the Protection of Road Accident Victims ("APRAV") was established in June 2014 and is a human rights organisation with a strategic focus to protect the Constitutional rights of all road crash victims, to support and offer sensible and sustainable support and advice on matters of public interest and in this instance, we are morally called upon to address the issue of the Road Accident Fund (RAF).
2. To our knowledge we are the only association of our kind that has been invited to Parliament to address the Portfolio Committee on Transport, in recent years, to discuss possible solutions on the dire situation at the RAF, the presentation having taken place on the 25th of October 2022; see from minute 33 to 1:41 of the sitting:
<https://www.youtube.com/watch?v=Vl13XAvQ2IM>

3. Our presentation was submitted to the acting Chair of the PCOT (now the Deputy Minister of Transport) and SCOPA on the 19th of July 2023.
4. Since our presentation the RAF had been in the news for a myriad of reasons, from the RAF board and its CEO being ordered to personally pay the legal cost in two Mpumalanga claims, to introducing measures, challenging and litigating recognized legal principles and further assuming powers and responsibilities that ought to be linked to the Minister of Transport and Parliament.

Most notably was a recent visit by members of SCOPA to the RAF's offices which resulted in the following being published on the Parliament Website (Abel Mputing 27 June 2023) about their findings:

- a) **"To say RAF's offices are not conducive for a working environment is an understatement.** We had not imagined the situation we are confronted with. **What we have seen here is a mess,**" commented the Chairperson of the committee, Mr Mkhuleko Hlengwa. He continued: **"Why RAF is in the public domain for the wrong reasons, we have experienced it today. Now we have recognised the magnitude of its problem."** He further stated that he now knew why the Auditor- General (AG) shied away from conducting its work at RAF. **"The AG doesn't even want to touch RAF because there's no integrity in doing so."**[our emphasis]
- b) **The chaos that besieges RAF is a clear indication that RAF is an institution in crisis,** he stated. Hence, there is a standoff between it and the AG. In his view, **this is a result of a dysfunctional board,** which does not quorate, but is in office illegally. He urged the Deputy Minister of Transport, Mr. Lisa Mangu, to look into this because it is one of the root causes of the crisis at RAF. **"Minister, RAF is a car wreck and something's got to give.** We have asked for a report on why a board that does not quorate is still in office, but we never got a reply from RAF's accounting officers."**[our emphasis]**
- c) "We have a discontent board and the executive which contribute to employees' trust deficit. **A situation indicative of RAF that is in intensive care unit, leaderless and directionless and that cry for help.** Deputy minister, please help," he urged him. RAF's **refusal to let Members of Parliament conduct oversight over it constitutes a violation of the Constitution and is indicative that something untoward is going on at RAF,** he claimed. **[our emphasis]**
- d) Mr Hlengwa went on to suggest: "Maybe, there's a need for a forensic investigation on the financial management of RAF; unveil what lies beneath its messy affairs. Because the greatest risk to RAF is RAF itself. Deputy minister, we would like to get a report on RAF efficacy in 30 days because **what is going on at RAF is a national disaster.**"**[our emphasis]**

5. The Department of Transport then published a draft Road Accident Fund Amendment Bill 2023, on the 8th of September 2023 in Government Gazette 49283.
6. On the 30th of August 2023 the Standing Committee on Public Accounts (SCOPA) convened a meeting with the RAF in order to address significant issues encountered with the administration, management and finances of the RAF.
7. **Neither the RAF nor the Department of Transport made any mention that they were indeed busy settling a draft Bill that intendeds to address the RAF's dismal performance (SCOPA's concerns).**
8. It is our respectful submission that the Bill was kept from SCOPA as it would have most certainly been met with the same contempt expressed by the public, since it was published, as it offends the Constitution in almost every amended Section thereof and is a clear an attempt to limit oversight (SCOPA amongst others) and legitimize the RAF's recent failures in Court and assuming itself powers to create subordinate legislation.
9. The public is required to submit comments on the proposed amendment Bill by the 8th of October 2023, yet neither the effecting Regulations (touted as having been prepared since 2021) actuarial calculations nor any legal opinions are forthcoming despite being requested (see our letter dated the 27th of September 2023).
10. Experience has taught that a lot of taxpayer's money and Parliamentary time could be saved by timeously providing the relevant information allowing for clear and concise input, commentary and participation: Especially on the funding model to be applied, the source of the funding for this Bill, how the dual funding will be managed (RAF Act vs this Bill) since the claims in terms of the RAF Act will take about 05 years to be processed and the Fuel Levy is the source of funding...by law) and the long-terms implications on the Fiscus and the most importantly, the impact on the public.
11. APRAV acknowledge that many interested parties and individuals will submit invaluable commentary and as such we will limit the scope of this letter to only certain issues emanating from the Bill, being:
 - i. **The Bill will change the composition and powers of the Board and CEO (& negate any good governance);**
 - The Bill provides that the DG, CEO and the CFO will function as the only executive members of the of the Board with a vote. This will have an adverse effect on accountability and contra the principle of good corporate governance.
 - Section 26 of the current RAF Act 56 of 2008, delegates the subordinate legislation making powers to the Minister of Transport;

- The CEO of the RAF has of late been publishing regulations, labelling same as, Management Directives or RAF Board Notices in an effort to sidestep the function of Parliament and the Minister.
- In an effort to justify the approach, the amendment Bill would provide that the Board (effectively the CEO and the Minister) would have the right to publish Regulations.

The Board is in effect given powers to make subordinate legislation.

ii. The Bill negates / severely limits Parliamentary oversight;

Section 13(2) of the Act (which compels the Minister to submit an annual report to Parliament) is deleted in the Bill, effectively removing the oversight function of Parliament.

iii. The Bill changes the Nature of the RAF

- In 2021 the RAF, unilaterally, changed its accounting policy; from International Financial Reporting Standards (IFRS) to the International Public Sector Accounting Standards (IPSAS). The Auditor General found that this resulted in the RAF understating its liabilities by approximately R300 billion.
- The then Minister of Transport (Fikile Mbalula) was reported to say:” we **took a decision as people that understand finance and accounting**..... that is the only gripe we have with the AG”.**[our emphasis]**
- On the 2nd of June 2023, the Auditor-General of South Africa (AGSA) awarded the RAF a disclaimer audit opinion for the 2020/21 financial year, with findings on non-compliance with legislation, including the Public Finance Management Act (PFMA).
- To remedy this the Bill intends to move the RAF away from being subject to the provisions of the Insurance Act 18 of 2017, effectively changing the accounting policy.
- Clearly the public cannot be expected to piecemeal accept that the intended amendment meets the financial object of the Bill and more information is required.

iv. The Bill replaces Compensation with a Structured Reviewable Benefit;

- The RAF Act is social legislation which were created for the sole purpose “**to provide the widest possible cover to road crash victims**”.
- The Bill intends to replace the current system with structured revvable benefits with “prescribed limits”.
- What the value of these “prescribed limits” would be is not disclosed but having regard to the motive behind the amendment we can accept that it would result in something far less compared to the current system which intends to indemnify the victim.

v. **The Bill mute on the “vexed issue” of Funding**

Nowhere in the Bill is any reference made to the financial impact of the proposed changes nor the value of the benefits on offer – this would have allowed for a proper assessment of the financial impact thereof.

Having regard to the object of the Bill: **“to Limit the liability of the Fund to improve the solvency and sustainability of the scheme”** one would expect more financial input and an actuarial basis for the proposed amendments. The Department of Transport exercised the same carelessness when proposing the erstwhile RABS Bill resulting in serious confrontation between the Department of Transport and National Treasury.

National Treasury rejected the Department of Transport’s costing model for RABS saying that: “RABS represented a significant reform of social legislation and there simply is too much uncertainty in the costing model proposed by the DoT”.

National Treasury raised the following key concerns:

- *“In some respects, the policy approved by Cabinet deviates from recommendations of the RAF Commission. In particular, whereas the Commission recommended that the common law claim for the balance of loss should remain, the RABS Bill removes this right.”*
- “Of particular concern is the absence in Section 26(2) of any separation of the funding of the RABS benefits from the funding of the administration of the scheme”.
- “In order to provide satisfactory governance and financial management arrangements that are consistent with the Public Finance Management Act, the Bill needs to provide for separate funding...”*and most importantly”.*
- “In its current draft, should the liabilities of the Scheme exceed accumulated surpluses at the end of each year, the Bill will require immediate appropriation or adjustments to the fuel levy”.
- “The requirement for an affordable and sustainable Scheme is that the system should be affordable to road users and the fiscus over the long term”.

In essence, National Treasury focussed on the key principles of reasonability, affordability, sustainability and equitability and instructed the DoT to ensure that these key objectives are met. In case?

vi. **Medical expenses will be paid according to a tariff, likely far less than private medical care tariffs exposing the victim to personally funding medical treatment which might exceed the RAF tariff.**

- The Bill deletes Section 17(4B) which links the tariffs to the National Health Act and introduces Section 17(2A) (i) which subject the medical costs to the ‘prescribed medical tariff’ which is yet to be determined.

- Alex van Heerden prepared a report for National Treasury to support its assessment of administered prices in South Africa. The objective of the study was to assess the processes involved in setting prices in regulated industries.
- The existing process for centrally bargained medical scheme tariffs is flawed, inflationary, and open to special interest manipulation. It exists within a regulatory vacuum, resulting in both medical scheme and service providers engaging in a confusing set of interactions which rarely benefit the public. The almost continuous and seemingly irresolvable conflict in price determination between service suppliers and medical schemes stems largely from the unavoidable requirement placed on the market to set fees centrally. Given the vast number of procedures, equipment and consumables, a degree of uniformity in pricing is required to ensure that medical schemes and service providers can cope with huge volumes of invoices. If a different price schedule existed for every medical scheme, service suppliers would be given a near impossible administrative task.
- **However, to negotiate a single schedule in a manner acceptable to all parties is virtually impossible [our emphasis]. Having regard to the above and in the absence of the details of the “prescribed medical tariff” we can accept that neither the RAF nor the Department of Transport can state with any margin of certainty what the cost implication of this amendment would entail and hence would be unable to prove that the object of the Bill is achieved.**

vii. **No compensation for crashes that did not occur on a public road.**

In conflict with Section 9 of the Constitution - everyone is equal before the law and has a right to equal protection and benefit of the law.

viii. **Medical costs paid by a claimant’s medical aid are excluded.**

The position in law is that the payment of medical costs should be covered – however this issue is currently before the Constitutional Court and a decision pending.

ix. **No claim for a pedestrian crossing a highway.**

In conflict with Section 9 of the Constitution - everyone is equal before the law and has a right to equal protection and benefit of the law.

We find this provision ill-conceived as 40% of road crash victims are pedestrians and many live in informal settlements adjacent to freeways where sometimes there are no pedestrian bridges.

x. **No claims for non-South African citizens**

Foreigners' claims had already been addressed and capped in the previous amendment and will no doubt result in a very contentious debate.

xi. **No claim for hit-and-run crashes**

In conflict with Section 9 of the Constitution - everyone is equal before the law and has a right to equal protection and benefit of the law.

xii. **No claim for general damages**

In *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC). Removing the right to claim general damages is unconstitutional.

The Bill offers the injured victim no long-term financial security nor any chance of financially rehabilitation especially in the light of the long waiting periods.

xiii. **The Bill limits a claimant's access to Court.**

- The Bill provides that an injured victim who may approach the court to enforce a claim, after approaching the RAF Adjudicator.
- In the absence of the regulation, it is unclear exactly how this system will work. Considering that the Board (CEO) will be in a position to influence the process through the regulation the road crash victims will most certainly be at a disadvantage, being subjected to the RAF acting as judge and jury.

12. **The Bill requires correct "Tagging"**

Considering the uncertainties, constitutional and financial implications amongst others we respectfully submit that Parliament would be well advised to call for a Regulatory Impact Assessment (RIA) as a method to assess the significant impacts both positive and negative of a regulatory measure, at the appropriate time.

RIA systematically examines the effects likely to arise from regulatory interventions such as new laws, amendments to existing laws, regulations and even policies and frameworks and communicates this information to decision makers and the public. Thus, RIA makes transparent the benefits of different regulatory options for various stakeholders, the implications for compliance and the state's cost of enforcement. RIA also encourages public consultation to identify and measure benefits and costs. The Organisation for Economic Cooperation and Development (OECD) has published guidelines on undertaking RIAs.

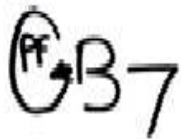
As mentioned earlier, National Treasury rejected the Department of Transport's costing model for the RABS Bill as it **“represented a significant reform of social legislation and there simply is too much uncertainty in the costing model** proposed by the DoT” - we submit the RAF Amendment Bill of 2023 will go the same route.

APRAV is concerned that the RAF, supported by the Department of Transport, are simply subjecting the public and Parliament to a reworked' version of the Road Accident Benefit Scheme, draft Bill (which was rejected by the General Assembly of Parliament in December 2019 and finally by the Portfolio Committee of Transport in 2020).

If we take into account the criticism raised by the Courts and SCOPA concerning the CEO, the Board and the RAF in general it would be careless to allow the Department of Transport and the RAF to introduce an amendment that will effectively give the CEO carte blanche, to deal with the RAF as he deems fit, **effectively capturing the RAF.**

We will be submitting formal comments on the intended Bill but are mindful of the importance of ensuring that all role players are suitably informed about the realities of the intended legislation as it will no doubt have catastrophic consequences to the victims of car crashes, the public in general and Government having to carry the burden of the social consequences and injustice caused as a result thereof.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'PFB7'.

Pieter FC de Bruyn
Chairperson



cc: Directort General: Department of Health
Directort General: Department of Justice & Correctional Services
Directort General: Department of Social Development
Director General: Department of Transport

Portfolio Committee on Health
Portfolio Committee on Department of Justice & Correctional Services
Portfolio Committee on Social Development
Portfolio Committee on Transport
Standing Committee on Public Accounts (SCOPA)