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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Open letter to all Stakeholders 1 November 2024

Comments on the discussions between SCOPA and the RAF on 16/10/2024

The impression was created that form was favoured over substance, concentrating on what the RAF is or should be, rather than what the RAF does and how the RAF is performing.

This led to not getting answers to relevant information required by Parliament and the Public.

Many questions were avoided by stating that the RAF is a Social Benefit Fund[1]. However, many of these avoided issues are relevant, even if the RAF is "declared" a Benefit Fund.

Answers to these unanswered questions will clearly reveal whether the performance of the RAF Board and Management has been acceptable or not.

Paragraph A; below considers important information that should be made available, irrespective of how the RAF may view themselves.

Although most factual information was avoided, the discussion did reveal some information which placed the RAF in a bad light, in which case the RAF Board and Management simply shifted the blame to other parties.

Paragraph B below considers whether it is justifiable to blame other parties for the current chaos at the RAF.

[1] The landing page of the RAF website states that *"The RAF provides compulsory cover .... against injuries sustained or death arising from accidents involving motor vehicles .... This cover is in the form of indemnity insurance to persons who cause the accident, as well as personal injury and death insurance to victims of motor vehicle accidents and their families."* This clearly is Social Insurance.

A: Required Information, irrespective of whether the RAF is a Benefit Fund or an Insurer?

It is important to concentrate on what the RAF's mandate is and how they have performed rather than debating its current or future form (Benefit Fund or Insurer). Any proposed legislative changes will affect the RAF's mandate in respect of claims resulting from future accidents and clearly need to be considered when judging their future performance after such changes but for now the performance of the RAF should be judged in relation to current legislation. The form and required legislative changes are important, but probably falls outside the mandate of RAF and are not discussed in this letter. The following information is extremely important, even to those who view the RAF as a Benefit Fund:

1) **The true cost of providing the benefits:**

   The true cost of RAF benefits in respect of MVA's that occurred during any particular year is the ultimate payments that will be made by the RAF in respect of these accidents and does not depend on whether the RAF is a Benefit Fund or an Insurer. It is of utmost importance that the Government (and the public) know the actual cost. For recent accident years, such costs will only be known in future, as many claims are still outstanding. Estimates of these outstanding claims, including IBNR (Incurred but not reported claims) will show what the expected actual costs are. The RAF has not disclosed these costs, stating that they received advice that a Social Benefit Fund does not have to show these numbers in their annual financial statements.

   Three aspects that seemed to be misunderstood are:

   a) It seemed that the CEO and RAF management considered it more important to debate the technical point of exactly where such costs should be shown in the annual financial statements, rather than to know and disclose the actual costs somewhere. The RAF and management keep on hammering on the technical issue of whether this Outstanding Claims Liability as well as the increase from the previous year, should be shown explicitly in the Statement of Financial Position and the Statement of Financial performance. The important aspect is not where it is shown, but that the actual costs are known and communicated to decisionmakers and known by the public, by showing and discussing the estimated cost, per accident year, somewhere in their Annual Report.

   b) During the meeting the RAF created the impression that they consider the actual cost of claims to be the sum of accepted offers plus judgements against them. This is simply not true. The RAF's liability to pay claims does not go away by postponing offers, delaying payments or not registering claims. They remain liable to pay these claims. Paying less now increases, rather than decreases the cost - as the delays lead to increased legal costs and shorter discounting periods. Not registering claims (Board Notice 271 of 2024) also increases, rather than decreases the cost - as without the information the RAF cannot defend the claim.

   c) Advice that they technically do not have to show the true cost of claims does not override judgement that they have to show it even if they have taken the matter on appeal.

The RAF should be obliged to at least disclose the estimated cost per accident year, for example populating the following table:

	Total payments made during financial year				Estimated Outstanding	Estimated Total Cost
Accident Year	2010	…..	2023	2024		
2010	R	R	R	R	R	R
…….		…	…	…	…	…
2023			R	R	R	R
2024				R	R	R

2) **The number of claims:**

Irrespective of whether the RAF is a Benefit Fund or an Insurer, the number of claims should be disclosed – at least providing the information in the table below. These numbers should be readily available, as the Board and Management must clearly know these numbers (with a lot more detail) to be able run the RAF efficiently)):

	Total number of Non-Supplier Claims					
Accident Year	Finalised	Partly Paid	Registered not paid	Received not registered	Estimated IBNR	Total
2010	#	#	#	#	#	#
…….	…	…	…	…	…	…
2023	#	#	#	#	#	#
2024	#	#	#	#	#	#

Preferably two sets of the above numbers should be given - one showing claims by Injured Persons and the second, separately showing claims by dependants of deceased breadwinners.

3) **Sustainability:**

Many attendees commented on the unsustainability of the RAF. It is clear that the RAF is unsustainable if it continues to be managed as at present. Mr. Letsoalo (CEO) mentioned that the outstanding claims liability exceeds R500bn (unfortunately no further detail was provided).

It seems as if nobody (not even the RAF) knows what the actual costs are to provide the current benefits. All indications are that the costs are much higher than it has ever been before (even after allowing for inflation).

The factors indicating that costs are higher are:

a) The RAF is allowing the majority of claims to be settled by way of default judgement.

b) Quantum depends primarily on the evidence provided by the claimant attorney, with the RAF seldom questioning any of this evidence. Fortunately, the majority of attorneys are reasonable in trying to get fair and equitable settlements for their clients.

   The courts rely on the evidence provided by experts appointed by the claimant attorney. The RAF boasts that they save a lot by not appointing experts and attorneys.
   However, relying on default judgements increases plaintiff's legal costs (payable by RAF) significantly when compared to what the legal costs would have been if they made fair offers and settled claims.

c) Not appointing experienced attorneys and advocates to defend matters may save some legal costs but the increased cost of over-settlement far outweighs the saved legal costs. The same argument applies to not appointing own experts.

d) Not registering claims (due to alleged incompleteness subject to illegal Board Notice 271 of 2022) and then to wait until default judgement without knowing anything about the claim (except that a "phantom" claim is somewhere in a box or sent back to an attorney) is highly irresponsible.
   Not paying such claims in accordance with the default judgement only leads to further delays and higher costs.

If claims were to be handled properly, the RAF will definitely be sustainable under the current legal framework.

There may be other reasons (beyond the scope of this letter) to call for a change in the legal framework or partial / wholesale bailout by Treasury.

4) **The average amount paid in respect of non-supplier claims:**

As mentioned above, there are reasons to expect that the RAF are over-settling some claims especially those of the not so seriously injured claimants and where the RAF relies on a default judgement to determine quantum. Irrespective of whether management views the RAF as a Benefit Fund or an Insurer, the quantum should be determined under current legislation. It is extremely important to identify any trend in average claim amounts timeously such that necessary steps can be taken to rectify adverse trends as soon as possible. It is inconceivable that the Board can make decisions without having such information. The RAF should at least disclose the following:

	Average total amount (including all costs) in respect of claims where no further payments are expected, per year finalised				Average for the accident year	Number of claims Finalised
Accident Year	2010	…..	2023	2024		
2010	R	R	R	R	R	#
…….		R	R	R	R	#
2023			R	R	R	#
2024				R	R	#

Preferably the above table should be given separately for tree different types of claims: One such table for “Injured Adult” claims (say, over age 20); a second table for “Injured Child” claims (say below age 20); and a third table for claims by dependants of deceased breadwinners.

5) **Personnel:**

When commenting on staff, it seemed as if the RAF Board and Management did not concentrate on claims-handling staff, but more on staff who is working on changing the Operating Model or proposing changes in the legal

environment. Irrespective of whether management views the RAF as a Benefit Fund or an Insurer, their main task remains to administer and settle claims under the current legal framework.

The RAF must create an environment in which experienced legally qualified staff can handle these claims.

Mr. Letsoalo claims that Board Notice 271 of 2022 "RAF1" is an important element of their new operating model stating that it will reduce the backlog of claims on the court rolls as matters will settle sooner not requiring litigation. He however fails to explain that (if for one moment we regard Board Notice 271 of 2022, legal, which it is not) it will only possibly have an effect on future matters, if at all (the RAF seems to battle with settling matters even if they do comply with Board Notice 271 of 2022).

Mr. Letsoalo however failed to address the current backlog of claims that are on the civil trial roll (and ready for settlement as these matters have already been certified trial ready).

By introducing a "Settlement Hub" managed by experienced claims handlers, the RAF could easily start attending to the oldest matters on the roll and start decluttering the Court Rolls (countrywide).

Hence, creating a "Settlement Hub" as opposed to a "Call Centre" should have been a priority if the RAF was in any manner sincere about their intentions to achieve their statutory duty.

Support staff and management should be there to assist these core personnel. Staff working on changes in legislation should probably rather fall under the Department of Transport.

The RAF should provide information on the following:

a) The number staff, on each level of seniority, categorised by the following functions: (i) Those working directly with handling claims; (ii) Those providing direct services to these claims-handlers (for example experts); (iii) Those providing general services (e.g. finance, human resources); and (iv) those working on changing operating models and proposals for legislative changes.

b) The movement (new appointments, resignations, etc) of the claims handling management and staff.

B. Parties responsible for the current situation[2] at the RAF

[2] The "current situation" will only be known once the figures in A has been provided. Before seeing the actual figures, it is assumed (for reasons discussed earlier) that the RAF finalises very few claim – and many of those that are finalised, are settled too high.

The Board of the RAF is responsible for administering and paying claims. However, it is possible that there are factors outside their control causing the current chaos at the RAF. During the hearing, the Board and CEO often blamed the following factors or persons for the current situation:

1. Legal framework:

The RAF frequently mentioned that the legal framework needs to be changed. Discussing the need to change legislation is beyond the scope of this letter. The RAF must settle claims under the current legislation irrespective of whether it needs to be changed or not. Individuals should not accept positions on the Board or management if they are opposed to the main purpose of the RAF i.e, settling claims under the current legal framework. The RAF is a creature of statute and if you do not disagree with the legislation at your disposal you have to follow the appropriate steps to ensure legislative changes through Parliament not the Courts.

Surely the Board and Management can give information and opinions to those responsible for changing the legal framework, but this cannot distract focus from their main task.

It is unjustified to blame the legal framework for the current situation.

2. The Courts:

As far as the criticising the courts go, the RAF applies double standards: On the one hand they rely fully on the courts to do their job (they leave it to the courts determine quantum by default judgement instead of investigating the claim). On the other hand, they refuse to accept such default judgements - or any other judgements.

If I understood correctly, it seemed as if the RAF Board and Management believed they do not have to adhere to judgements (even of the Supreme Court of Appeal and Constitutional Court (as with the Discovery matter) if they disagree with the judgement. Fortunately, it seemed as if most of the attendees at the meeting (including the hon. Deputy Minister of Transport) understood that all citizens must adhere to judgements and explained this to the RAF Board and management.

The inappropriate tendency to blame the courts are not further discussed in this document. It is clearly unjustified to blame the courts for the current situation.

3. Liquidity, Funding model, Solvency:

Mr Letsoalo mentioned that the RAF has a liquidity problem.

This is clearly not true; considering the liquid assets held by the Fund.

Reference was often made to the current inadequate funding model and the fact that the RAF has always been insolvent. It is true that, if the RAF was an Insurance Company registered with the Prudential Authority, then they would have had to hold assets exceeding their liability (which was stated to exceed R500bn). For the RAF to be considered solvent, they would have to hold assets exceeding this ("at least") R500bn. Considering the track record of the RAF, we are sure that the general opinion is that the RAF Board and Management should not be entrusted with an amount of R500bn – R1 000bn, but rather be considered technically solvent and receive the required funds when they need to make payments; with a small cash buffer.

The technical insolvency can be addressed in the RAF Annual reports by explaining the extent to which Government commits to honouring claims emanating under current legislation.

Furthermore, while the majority of vehicles remain fuelled by Petrol and Diesel, it seems efficient and fair to fund the RAF primarily by way of a fuel levy.

The actual funding model can work as long as the actual cost is fully disclosed (see point A1). To know the actual cost and knowing the actual cents / litre fuel levy that the current benefits (as defined in the Act) cost, does not imply that the RAF should hold the actual cash. No one has ever blamed the RAF for not being solvent.

How government should account for these future payments are beyond the scope of this letter.

The Liquidity, Solvency or Funding Model cannot be blamed for the current chaos the RAF clearly has enough liquid assets.

4.1 **Non-residents (foreigners):**

The RAF expressed the opinion that claims of foreigners are often large amounts claimed in foreign currencies.

This was exaggerated by ignoring the following facts:

a) Loss of Earnings of all claimants (foreign as well as local claimants) in respect of accident that occurred since 2008 were capped at R160 000 per year. This R160 000 increased with inflation and is currently just over R350 000 per year. This implies that any single Loss of Earnings claim will be less than R7.2 million (if accident were end 2008 and the loss is >R160 000 each year for a 45-year working life) or less than R16 million (45 x R357 565) for current accidents.

b) **The accident that led to the large Swiss claim that was mentioned was before 2008 and hence before this R160 000 annual limit. The "in excess of R500 billion" that was mentioned is the gross amount paid, of which the majority (>R400 billion) was paid by the European Reinsurers.**

c) An unsettled claim for European medical students were mentioned. If the accident occurred after August 2008, the maximum should be R7.2 million[3] per claimant. If the accident occurred before August 2008, then the amount payable by the RAF for their combined claims, will be equal to the retention specified in the reinsurance treaty. The combined amount (arising from one accident) in excess of this retention will be payable under the reinsurance contract - provided the RAF has kept the reinsurers informed of any changes in these claims.

d) Interest is not added to past losses, implying that if a person suffered a loss of R100 000 twenty years ago, he will receive compensation of R100 000 now, without any added interest.

e) The RAF provides liability insurance to the wrongdoer and pays the injured party. This firstly provides cover for the driver as he does not have to compensate the injured, as he would have had to if the injury was not caused by an MVA, but by some other negligence on his part. So, primarily, people who receive the most benefits are those whose negligent driving caused the big losses. The injured person benefits from the RAF to the extent that his compensation is not limited to the wealth of the wrongdoer. The comments that high earners benefit more is thus only partly true. The person who causes injuries to high earners, primarily benefits most. On a secondary level, injured high earners benefit more relative to injured lower earners.

Clearly foreigners make up a small percentage of claims and cannot be blamed.

5. Medical Aid Payments:

Medical aids were blamed for claiming from the RAF. The law is clear on the aspect and many rulings (including the Constitutional Court) had already been made in favour of medical aid companies. If the legal framework specifies that

[3] The R7.2m is in 2008 terms and inflation adjustments are required from 2008 until the accident date.

the RAF is responsible for medical costs resulting from negligent driving of motor vehicles, then it will be inappropriate of Medical Aids to include such benefits and charge the higher premiums associated with such higher benefits.

Considering the current long settlement delays of the RAF, it assists claimants significantly if their Medical Aids pay for their medical costs and then reclaim these payments at a later stage; as opposed to not paying and leaving it to the injured party to claim from the RAF.

As mentioned earlier, the law is clear on the issue and if the CEO does not like the fact that they remain liable he should know that changes will have to be made to the legal framework, similar to the issue concerning foreigner claims.

The RAF cannot be seen to attempt creating legislation through litigation. In the matter of McDonnel v RAF (13183/2015)[2022]ZAWCHC116)) the honorable judge ruled: [25] "Courts cannot tolerate even the slightest impression, especially from those seized with the administration of public funds, that there is a constitutionally guaranteed right to plain stupidity".

6. Operating model

Every time a new Board or a new CEO is appointed, the previous Board and management is blamed for not handling claims correctly and the new management wants to change the "Operating model".

Unfortunately, it seems as if they never succeed before their term expires and then new management start over. This seems to have been the case for the last 20 years. For an outsider, some reasons for the continuing failure of "new operating models" over the past 20 years are:

a) The design of the new models is often led by individuals with limited experience in handling RAF claims and limited legal experience.
b) The proposed models often specify solutions that require changes in processes, changes in technology as well as changes in the legal framework. If one of these required changes fail, then the whole model fails. Solutions should focus on how claims should be handled under the current legal framework and take the actual claims-handling experience of the RAF into account.
c) Management comprises individuals with experience in many fields but very limited experience in RAF claims. The CEO professes to be "a self-taught student of Third-Party Compensation" which does not translate to any kind of authority or legal standing. It does however explain the unnecessary litigation, default judgements and ever-increasing number of punitive costs orders awarded against the RAF. New models will often concentrate on solution in which management has experience rather than solutions for the actual problems, where experience is limited.

d) While new alternative models are being developed, existing processes are neglected. The main focus should be on streamlining and optimising existing processes. New models should be developed and only implemented on smaller scale until tested and proven to work for example opting not to extend the RAF panel's contracts in the absence of a viable contingency plan to defend themselves in Court.

So, there is some justification in blaming previous Boards and management for not concentrating on the job at hand but consciously trying to implement new models doomed to fail, is setting up the RAF for disaster.

7. Attorneys

Various attendees blamed attorneys and proposed that solution should be found to exclude attorneys from the claims process. The RAF in previous years has tried to encourage claimants to claim directly but this failed completely. During the hearing the CEO could not give any figures on how many such claims have settled.

The RAF introduced a new requirement (Board Notice 271 of 2022) that expert reports quantifying the claim should be submitted when the claim is lodged thereby making it practically and financially impossible for a claimant to lodge a claim without an attorney.

Attorneys render services on a contingency basis that allows indigent victims (average road crash victim) to access the compensation available subject to the RAF Act.

Contingency fees are highly regulated and all agreements are subject to judicial oversight and the Rules published by the LPC, concerning contingency fee agreements.

Experience has shown that on average direct claims are settled for far less than the actual value *alternatively* left to prescribe in the hands of the RAF. The RAF should be asked to disclose the statistics on the value and number of claims settled directly (or were left to prescribe) as opposed to represented claims.

Having regard to the stringent requirements of Board Notice 271 of 2022 it seems that the RAF is attempting to discouraging road crash victims from claiming from the RAF as opposed to providing the "widest possible cover as envisaged by the lawmakers.

Fact is under the current legal framework, victims are without any doubt, better off claiming through an attorney as opposed to claiming directly from the Fund.

During the meeting the RAF CEO stated that *"Attorneys are taking advantage of the lack of knowledge of our people."* It was not clear whether, by *"our people"* he meant victims of road accidents, RAF management, or both. The RAF is

clearly justified in blaming some attorneys of taking advantage of the poor way in which the RAF are handling claims. However, it seemed as if they extended this blame to Attorneys in general.
Two goals: (i) An efficient and cost-effective claims process; as well as (ii) achieving fair and reasonable compensation, will both be achieved much easier if the RAF work with the majority of competent attorneys who represent claimants rather than blaming them.

In the past the RAF appointed competent attorneys and advocates to defend claims on their behalf. These legal teams ensured, subject to their legal guidance, that most if not all matters on the Court rolls were literally settled on "the stairs of the Court".

Letsoalo now blames lawyers for delaying settlements and complains that the RAF is always the defendant or respondent which is to be expected if you fail to address claims subject to the Act. He is also often heard quoting Prof. Klopper stating that 99% of these defended matters are settled, which begs the question:

"Why wait for the court date when you can settle today?"

If the RAF is not going to appoint experienced claims handlers, attorneys or advocates to attend to these claims they should stop with the "lawyer bashing" and start engaging claimant attorneys to work together to settle matters earlier.

APRAV remains committed to share years of experience, research and a wealth of knowledge to allow the RAF to execute their mandate (in the short and long term) in the interest of all road crash victims and the South African public in general.

Yours Truly,

APRAV