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TO: GERT NEL INCORPORATED

**CONSULTANT: ASSOCIATION FOR THE PROTECTION OF ROAD
ACCIDENT VICTIMS ("APRAV")**

REF.: G NEL/lvdb

OPINION

1.

The Consultant has requested an opinion regarding the potential unconstitutionality of the latest Bill ("*the Bill*") introducing the Road Accident Benefit Scheme ("*the Scheme*") as a substitute to the current system of compensation put in place by the Road Accident Fund Act 56 of 1996.

2.

The latest version of the Bill was introduced in the National Assembly and published with an explanatory summary in the *Government Gazette* No.: 40788 on 18 April 2017.

3.

This advice is given on the assumption that this Bill will come into force with the wording as set out in the above Gazette and that this wording would thus be the object of constitutional scrutiny.

4.

The Bill follows upon the far-reaching amendments brought about to the Act in 2008. These amendments significantly altered the basis of compensation provided by the Act and its import lead to a constitutional attack of its own which culminated in the judgment of the Constitutional Court in ***Law Society of SA v Minister for Transport*** 2011 (1) SA 400 (CC) ("***Law Society***"¹). The Bill is, at least in part, a manifestation of the recommendations made by the Road Accident Fund Commission ("*the Commission*") overseen by Her Ladyship Ms Justice Kathleen Satchwell. Its report ("*the Satchwell Report*") was published in 2002. (I will also refer to the Road Accident Fund Act as amended in 2008 as "*the*

1 References to the *a quo* judgment will be "***Law Society a quo***".

New Act".²⁾

5.

In **Law Society** the New Act was subjected to both a rationality and a reasonableness review. No doubt any future investigation into the constitutionality of the Bill will follow the same route. There are however significant differences between these two tests. These were set out succinctly in **Ronald Bobroff and Partners v De La Guerre** 2014 (3) SA 134 (CC) paras [6]-[8] at 137E-139A:

"The distinction between rationality and reasonableness review

[6] *The Constitution allows judicial review of legislation, but in a circumscribed manner. Underlying the caution is the recognition that courts should not unduly interfere with the formulation and implementation of policy. Courts do not prescribe to the legislative arm of government the subject-matter on which it may make laws. But the principle of legality that underlies the Constitution requires that, in general, the laws made by the legislature must pass a legally defined test of 'rationality':*

'The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a Court may take over the function of government to formulate and implement

2 This is in consonance with the Road Accident Fund (Transitional Provisions Act) 15 of 2012 in which the Act, as amended in 2008, was defined as "the New Act".

*policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature.*³

[7] *A rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is a less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation.*

[8] *In those cases the courts have a more active role in safeguarding rights. Once a litigant has shown that legislation limits her fundamental rights, the limitation may only be justified under section 36 of the Constitution. Section 36 expressly allows only limitations that are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.*⁴

3 With reference (in footnote 12) of the judgment to ***Merafong Dimarcation Forum and Others v President of the Republic of South Africa and Others*** 2008 (5) SA 171 (CC) para 63

4 In footnote 13 in the ***Ronald Bobroff*** matter, with further reference to the basis of the rationality review, the CC states :

*“In ***Albutt v Centre for the Study of Violence and Reconciliation and Others*** 2010 (3) SA 293 (CC) (2010) (5) BCLR 391; [2010] ZACC 4 in para 51, this Court held:*

‘The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally

6.

These principles have their origin in the separation of powers between the legislature and the judiciary and are aimed at preventing the judiciary prescribing to the legislature on issues of policy. However, in the present context the Courts have already pronounced positively on the government policies underlying any future laws.

7.

A major feature of **Law Society** was the abolition, by the New Act, of the long standing residual common law claim a claimant had against the negligent driver for those damages not covered by the RAF Act and its predecessors. This was the focus of a comprehensive rationality review which is to be found in paragraphs [29]-[56] of the judgment. In the course of this the Court made various findings regarding the past and the future of road accident legislation.

8.

related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.'

*This was reiterated in **Democratic Alliance v President of the Republic of South Africa and Others** 2013 (1) SA 2488 (CC) (2012) (12 BCLR 1297; [2012] ZACC 24) in para 32 where this Court held that—*

'rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.'

Accordingly, any scrutiny of the Bill cannot be done without regard to the judgment in **Law Society**. The discussion herein will thus commence firstly by dealing with a possible basis for a rationality review of the Bill with reference to what was decided in **Law Society**.

RATIONALITY REVIEW

9.

In **Law Society** the respondents (the Minister for Transport and the RAF) justified the changes brought about by the New Act by way of evidence dealing with the ever growing funding deficit⁵ of the RAF, as well as the broader goal of bringing the road accident compensation regime in line with a proposed comprehensive social security system. The Court, on the face of the judgment, accepted this evidence.

10.

In the course of the judgment, the Court proceeded to identify the government purpose for which the New Act was intended. This was obviously done in order to identify the result or end which was to be reached with the legislation.

11.

At 422H, and when concluding that the New Act survived the rationality review, the Court finds that:

"... the abolition of the common-law claim is rationally related to the legitimate government purpose to make the fund financially viable and its compensation scheme equitable"

and at 422F:

"The primary and ultimate mission of the Fund is to render a fair, self-funding, viable and more effective social security service to victims of motor accidents."

12.

Then, quoting⁶ the evidence of the deponent of the respondents' affidavit, the Court repeats the following (seemingly accepting the evidence as given):

"...the ultimate vision is that the new system of compensation for road accident victims must be integrated into a comprehensive social security system that offers life, disability and health insurance for all accidents and

5 At 418C.

6 At 419G-420A

diseases. He⁷ acknowledges that a fault-based common-law system of compensation for road accident victims would be at odds with the comprehensive social security model. The intention is therefore to replace the common law system of compensation with a set of limited no-fault benefits which would form part of a broader social security net as public financial support for people who are poor, have a disability or are vulnerable. He goes on to state that the design of a comprehensive social security system is complex and will take time. However, cabinet has approved the principle (on 18 November 2009) and published a draft no-fault public policy for public comment and consultation.”

13.

Elsewhere in the judgment the Court then also accepts that it is part of the duty of the government and the Road Accident Fund to “*facilitate access to social security and health care*”.⁸

7 The deponent to the affidavit.

8 421J-422A – The duty in question emanates from section 27 of the Constitution which reads as follows:

“Health care, food, water and social security

27. (1) *Everyone has the right to have access to—*
- (a) *health care services, including reproductive health care;*
 - (b) *sufficient food and water; and*
 - (c) *social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*
- (3) *No one may be refused emergency medical treatment.”*

14.

From the above, it would appear that when conducting a rationality review of the Bill the courts will have to bear in mind that:

14.1 The purpose or end of the Bill has already been found to be to introduce a scheme which:

14.1.1 is financially viable;

14.1.2 is equitable;

14.1.3 renders a fair, self-funding, viable and more effective social security service to victims of motor vehicle accidents; and

14.1.4 is intended to be part of a broader overall national scheme providing compensation for victims of all⁹ accidents.

14.2 the aim of the rationality review is not to determine whether the Bill is the best or most ideal means with which to reach this end; and

9 Therefore not just road accidents.

14.3 the enquiry is only whether the Bill and its contents can be rationally linked to the above purpose or end.

15.

In conducting the rationality review in **Law Society** the Court however made the following statement in paragraph [35] (at 416E-F):

"[35] It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad."

16.

One is thus left with the question as to how, if the "public good" which the Bill seeks to realize is a fair and equitable (or even only a fairer and more equitable) system, the rationality review can be conducted without the Court being allowed to enquire into the fairness of the new system.

17.

Furthermore, the requirement that the tested legislation need not be the

best measure for it to be rational seems to do away with any scope for a comparison with the existing legislation.

18.

This creates a further problem. As stated above, one of the overarching objects of the Bill is the creation of a “*more*” effective social security service to the victims of motor vehicle accidents. Thus obviously more effective than what has existed hitherto.

19.

This issue comes even further to the fore when one starts to consider some of the realities brought about by the Bill. The Scheme introduces the “no fault” system ostensibly as being fairer than the previous one. One of the stated intentions of the Scheme is that it must be financially viable (or more viable). However in ***Law Society*** itself¹⁰, albeit in a different context, the CC acknowledges that the fault requirement “*serves an obvious role of lowering the fund’s liability to compensate victims*”. Conducting the rationality review without being allowed to ask why a potentially more expensive basis of liability is being introduced to a scheme which is to be financially more viable than its predecessor seems to be irrational in itself.

10 421G-H.

20.

It is accordingly submitted that in the context of this particular Bill, the Court should be urged not to avoid the question of the Bill's fairness or its comparability to the previous scheme when conducting the rationality review¹¹. This will allow the argument on behalf of any applicants attacking the constitutionality of the Bill to be developed without having to prove breaches of any of the sections of the Bill of Rights (or "Chapter 2 rights"). (As set out herein later however there are various arguments that such breaches will in any event occur in terms of the Bill).

21.

In considering the fairness of the Bill a number of issues may be highlighted as strikingly unfair or irrational (whether in breach of a Chapter 2 right or not) being:

21.1 The authority provided to the Administrator in section 33(1)(c), that in the event of a dispute with the road accident victim, the Administrator may insist that the victim receive medical treatment from health care practitioners acceptable only to the administrator;

11 The rule is not immutable, as expressed by Moseneke DCJ in his dissent in *Merafong* (supra) para [171]-[172] at 225F-226C

21.2 The differential treatment to claimants in terms of, for instance, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"), both in relation to the calculation of the compensation and the time frames within which compensation is payable;¹²

21.3 The insistence that benefits are to be paid in instalments¹³ thus qualifying as an "annuity" for purposes of the Income Tax Act. This means that, whereas the compensation is to be calculated with reference to a claimants income after tax¹⁴, once it is payable, it will be taxable again.¹⁵

21.4 The various provisions in the Bill making every decision subject to the discretion of the administrator and the meagre appeals procedures which make no allowance for wide appeals or full oversight by the courts or a truly independent tribunal.¹⁶

21.5 The provision¹⁷ that no legal costs may be part of the

12 Particularly in the expressed context that the statutes are meant to be in line with an overall scheme of social security benefit applicable to all accidents, thus both on duty and on the road.

13 Sections 35(5)(e) and 38(12)

14 Sections 35(2)(c) and 36(7)(a)

15 *Hogan v Kommissaris van Binnelandse Inkomste [1993] 2 All SA 469 (A)*. The Satchwell Commission also dealt with this issue recommending a concomitant amendment to the Income Tax Act 58 of 1962 (see par 22.257 page 664). From sections 64 and 65 at the conclusion of the Bill it is clear that no such amendment is introduced by the Bill itself.

16 As is allowed in many similar statutes such as COIDA, the Pension Fund Act 24 of 1956, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008.

17 Section 56

compensation thus clearly discouraging claimants from seeking legal advice as to the full extent of their rights.

21.6 The fact that many of the recommendations in the Satchwell Report are incorporated only partially and without regard to the Commission’s underlying reasoning and findings.

21.7 Calculating benefits by excluding all forms of “illegal” income and not discerning (as the common law does) between incomes which are merely not licensed and incomes those which are truly criminal¹⁸.

21.8 The bizarre arrangement¹⁹ that claimants who cannot prove their income are given benefits calculated based on the “Annual Average Income” thus allowing persons with no income or criminal incomes to share in a scheme supposed to be equitable and financially viable.

21.9 The blanket payment of benefits to all persons injured in a road accident thus inclusive of people injured whilst under the influence of alcohol or drugs, people injured whilst committing a

18 See par 26.2 below.

19 Section 35(3)

crime and people deliberately injuring themselves²⁰.

22.

It will be seen below that many of the above issues may be linked to a particular Chapter 2 right as well. From the discussion it will however also appear that the conclusions as to whether these amount to limitations of these rights, range from the obvious to the merely arguable. (This highlights the necessity to include these in the arguments above relating to the rationality review.)

23.

It would appear as though certain Chapter 2 rights may be under threat thus justifying a reasonableness review.

REASONABLENESS REVIEW

24.

In this regard the Court will first enquire as to whether there are any Chapter 2 rights which are affected by the Bill and then determine whether this amounts to a limitation of these rights. Once such

20 The last instance will no doubt be typified as a fraudulent claim. Section 62(2) also criminalizes the providing of false and misleading information to the Administrator. Given the no fault basis one can nevertheless speculate about the claimant who openly states that he did intentionally injure himself and whether his claim can be avoided as being the type of absurd result the legislator would not have contemplated.

limitation is found, the Court enquires into whether such limitation is reasonable and justifiable as envisaged by s 36 of the Constitution. In **Law Society** the abolition of the common law claim was held to be a reasonable limitation of a claimant's rights in terms of s 12 of the Constitution in light of the legitimate government purpose which the Court had already approved when conducting the rationality review. This will no doubt be the State's broad contention in any future reasonableness review as well.

25.

It is therefore required to identify those provisions of Chapter 2 which may be affected by the Bill. (These are dealt with in the order in which they appear in Chapter 2 and thus not in order of the most likely to succeed.)

26.

Section 9 - Equality

26.1 **Illegal aliens**

26.1.1 In terms of section 27(4)²¹ of the Bill illegal aliens only qualify for emergency treatment and none of the other benefits;

26.1.2 There is thus a clear distinction between victims who are injured whilst in the country legally as opposed to those who are injured whilst present illegally. Acknowledging the rights of all individuals legally in the country is obviously required consequent to the judgment in ***Larbi-Odam v Member of the Executive Council for Education (Northwest Province) 1998 (1) SA 645 (CC)***²².

21 **“Limitation of Administrator’s Liability**

27(1) ...

(4) *If, at the time of the road accident, an injured person or deceased breadwinner was not a citizen or permanent resident of the Republic or the holder of a valid permit or visa in terms of the Immigration Act, 2000 (Act No.: 13 of 2002), or the Refugees Act, 1998 (Act No. 130 of 1998), the liability of the Administrator is limited to payment of the provision of emergency health care services provided to such injured or deceased breadwinner, while he or she was alive.”*

22 See Also: ***Klaaren “Non-Citizens and Constitutional Equality” – Larbi-Odam v Member of the Executive Council for Education (Northwest Province) 1998 (1) SA 645 (CC) 1998 (1) SA 645 (CC) (1998) 14 SAJHR 286.***

26.1.3 The provision to extend emergency health care to all victims is further in line with section 27(3) of the Constitution which arranges that “*No one may be refused emergency medical treatment*”.

26.1.4 The difficulty arises however from the initial wording of section 27(1)(a) of the Constitution which arranges: “*Everyone has the right to have access to health care services*”. In ***Khoza v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC) (“Khoza”*** it was held²³, specifically within the context of section 27 (being the provision dealing with social security benefits) that the first word of section 27(1) (“*Everyone*”) did not limit the provisions of this section to citizens of South Africa only.

26.1.5 There is some suggestion in the judgment²⁴ that budgetary constraints might justify the refusal of health care services to individuals who are illegally in the

23 Par [47] at 429D

24 Para. [59] at 532D-G

country.

26.1.6 What is apparent from the above though, is that there is a clear differentiation in the Bill based on residency status. This may in particular come to the fore in a case of an asylum seeker becoming a road accident victim before he or she has obtained any formal authorization to be within the Republic. It can hardly be said that such a person is an "illegal" immigrant in the ordinary sense.

26.1.7 Even with regards to truly illegal immigrants it would appear from ***Khoza*** that the justification for withholding from them the health benefits contained in part B and C of the Bill, needs to be linked to budgetary constraints

26.1.8 One of the aspects which renders discrimination unfair as required by s 9 of the Constitution is the likelihood of stigmatization of the group affected by the differential treatment²⁵. South Africa has not been immune from the issues stemming from xenophobia

25 See ***Khoza***(supra) paras [73]-[74] at 537F-538B

and the Bill is clearly open to criticism on this basis.

26.2 **Illegal Earnings**

26.2.1 Both section 34(3) of the Bill dealing with Income Support Benefits as well as section 38(3) dealing with Family Support Benefits prescribes that the Administrator “*shall not take into account income that was illegally earned by either the injured party or the deceased breadwinner*”.

26.2.2 These provisions do not take cognisance of the present common law position dealing with “*illegal*” earnings for purposes of calculating compensation. In terms of the common law, a distinction is made between earnings which are illegal for immoral reasons and those which are “*illegal*” as not compliant with taxation and/or licencing statutes. In terms of the latter form of illegality, a claimant is not deprived of his loss of earnings.²⁶ This differentiation therefore clearly discriminates against individuals whose source of

26 See: *Dhlamini v Protea Assurance* 1974 (4) SA 906 (A); See also the twin articles by Prof M Dendy – Illegal Income and Remunerative Loss – I: Claims by Income Earners in Southern African Law, 1998 THRHR, p.574 and Illegal Income and Remunerative Loss – II: Claims by Dependents in Southern African Law, 1999, THRHR, p.34.

income is illegal purely because of a technical cause.

26.2.3 Regarding Family Support Benefits, one may also very well also ask why children and/or other dependents who have no influence over the source of the income of their breadwinner, ought to be punished in this regard.

26.2.4 These provisions will affect legal citizens and/or permanent residents with incomes deemed illegal merely because they do not have proper business licences or similar authorizations. This will most likely be poor people who are doing all they can to make ends meet. A danger of stigmatization thus exists in this regard as well.

26.3 **COIDA and Other Schemes**

26.3.1 As already stated it is one of the over-arching purposes of the Bill to facilitate the creation of a single social security scheme compensating citizens for all accidents (therefore not just road accidents). The question thus arises whether the patent differences between the compensation payable in terms of an Act such as

COIDA and the Bill are justifiable. (There seem to be no suggestions of any amendments to COIDA.)

26.3.2 COIDA is likely to be put up as an example justifying the existence of the Bill due to the judgment in ***Jooste v Score Supermarket Trading (Pty) Ltd 1999 (2) SA 1 (CC) ("Jooste")***. The question may well be asked why a similar compensation scheme as set out in COIDA is not introduced by the Bill. (No doubt the fact that COIDA does not do away with the claimant's common law claim against a negligent wrongdoer other than the employer is one of the reasons why a similar scheme such as COIDA will probably never be adopted.)

26.3.3 It also needs to be borne in mind with regards to the applicability of ***Jooste*** that the applicants in that matter ultimately abandoned any reliance on the limitation of a Chapter 2 right. ***Jooste*** thus proceeded purely as a rationality review with the Court having little difficulty in finding that COIDA was rationally connected to a legitimate government purpose.²⁷

27 See: ***Jooste*** para. [17] at 12C-H.

26.3.4 **Jooste** was also decided prior to the principle being accepted in **Law Society** that it is one of the legitimate governmental aims that all social security benefits (thus both COIDA and Road Accident Fund benefits) should be similar. It would thus appear that the underlying reasoning of **Jooste** might have to be reconsidered in any event.

26.4 **Dispute Resolution Remedies**

It is further evident that the dispute resolution remedies provided for in the Bill (and in fact in many other social security statutes), are considerably more limited than those found in consumer protection legislation. This aspect is dealt with more fully below when dealing with section 34 (Access to Courts), but may also justify an equality argument.

27.

Section 10 – Dignity

27.1 **Law Society a quo**

- 27.1.1 In **Law Society** the court *a quo mero motu* raised the question whether the New Act could be seen as having an effect on a claimant's rights to dignity in terms of section 10.
- 27.1.2 This was done with reference to a decision of the German Constitutional Court²⁸ "*which dealt with the payment of social security amounts for children (amongst others) and in the context of the right to dignity held, that the Government was obliged to pay subsistence minimum that was in line with human dignity, and it therefore had to assess all the expenditure that was necessary for one's existence, consistently in a transparent and appropriate procedure according to the actual needs of the persons i.e. in line with reality.*"
- 27.1.3 The Court *a quo* did not elaborate any further save to state that this issue may arise in future. (Clearly some research into the German approach will be required. For present purposes however this is beyond the scope of this opinion.)

28 *BVerf G, 1BvL 1/09* quoted in para[30] of *Law Society a quo*.

27.2 **Choice of medical practitioner**

27.2.1 The Bill encourages, if not ensures, that the choice of medical practitioners for emergency, and most definitely non-emergency, treatment lie with the Administrator and not with the victim. This is a clear limitation of a claimant's ordinary right to, firstly, consent to or refuse medical treatment²⁹ and, secondly, to be treated by a medical practitioner of choice.

27.2.2 Given the personal nature of medical treatment, having an unwanted, or even unchosen, practitioner, forced upon a victim, would clearly amount to an impairment of their dignity.

27.3 **No medical costs**

27.3.1 Allied to the previous concern is the provision in section 56, read with section 33(2), of the Bill that the Administrator is not liable for any of a claimant's medical costs incurred in preparing a claim unless the

29 See Castell v De Greeff 1994 (4) SA 408 (C) 420G-421D

Administrator in its discretion agrees to it. Accordingly a victim who is not able to either:

27.3.1.1 afford the costs of these reports (which are well-known to be expensive), or

27.3.1.2 convince the Administrator to carry these costs

would be incapable of claiming compensation at all and therefore be left with no compensation, let alone any compensation which is in line with reality.

27.3.2 This provision is likely to hurt the poorest of the poor, i.e those who are already struggling for their dignity as it is. As the same section also outlaws legal costs as part of the compensation³⁰ these victims will further be deprived of the advantages of the Contingency Fees Act 66 of 1997.

30 In this instance with no discretion given to the Administrator.

27.4 **Abolition of general damages**

27.4.1 Whereas the New Act retained a limited entitlement to general damages for victims suffering a “*serious injury*”³¹, this entitlement is abolished *in toto* by section 28 of the Bill;

27.4.2 The claim for general damages was dealt with at length in the Satchwell report³² and culminated with the Commission recommending in paragraphs 36.193 to 36.201³³ that it be replaced by a statutory claim for what it termed “*Life Enhancement Benefits*” (which would only be payable to persons who could prove a serious injury according to the AMA Guides.³⁴)

27.4.3 Whereas the Commission saw a blanket claim for general damages as a major source of wasting resources (particularly due to the fact that all victims, no matter how small their injury, would get an award of general damages) it still justified its retention for serious injuries stating the following in paragraph

31 Section 17(1) & (1A) of New Act read with Regulation 3.

32 See: Chapters 35, 35A and 36.

33 Pages 1151-1153.

34 From there the system set out in the New Act.

36.187 (page 1150):

“It appears that the only real merit in awarding compensation for pain and suffering or loss of amenities and enjoyment of life is to provide victims who sustained catastrophic injuries and/or life changing impairment with finance which provides for lifestyle changes and leisure pursuits in ways which cannot be expected of a road accident benefit scheme. For this reason, any such benefit should be known as ‘life enhancement benefits’.”

27.4.4 Denying victims of “*catastrophic*” injuries some form of compensation (whether it is called “general damages” or “life enhancement benefits”), is tantamount to denying them an opportunity to restore their lives to some semblance of normality albeit within an imperfect scheme. In this regard cognisance should be taken of the right to dignity and its ambit. In ***MEC for Education: Kwa-Zulu Natal v Pillay***³⁵ O’Regan J (in a separate, and partially dissenting, judgment) pointed out that an aspect of dignity was “*the right of each and every person to choose the life that is meaningful to*

them”.

27.4.5 Where a road accident victim’s life has been effectively rendered “*meaningless*” by a catastrophic injury, there can be no doubt that the remainder of their existence would be undignified, both in the general sense of the word and in its constitutional sense. The constitutional concept of dignity is far-ranging as appears from the work of (former Constitutional Court Judge) Ackermann ***Human Dignity: Lodestar for Equality in South Africa*** (2012) pages 86 to 109 and in particular at 97-98 where the author expresses the view that “*in the context of the Constitution ‘dignity’ means ‘human worth’ or ‘inherent human worth’.*”

27.4.6 From the authorities referred to in this section it is clear that the right to dignity is one of the cornerstones of our Constitution. Its impact on the road accident victim legislation was not definitively considered in ***Law Society***. It is therefore premature to say that the reasoning in ***Law Society*** is the last word to be spoken on the reasonableness of the Scheme proposed in the Bill.

28.

Section 12 – Bodily integrity

28.1.1 In ***Law Society*** the Constitutional Court held that the abolition of the common law claim against the wrongdoer amounted to a limitation of this right.

28.1.2 In particular the reasoning went as follows:

28.1.2.1 That the injuries sustained by an individual in a motor vehicle accident is the sort of impairment to bodily integrity for which the State ought to ensure that compensation is available;³⁶ and

28.1.2.2 By not retaining the residual common law claim such a claimant is not in a position to be fully compensated for his or her losses.³⁷

36 Par [63] at 427C

37 Paras [66]-[67] at 427H-428D

- 28.1.3 As stated the court ultimately held that this limitation was reasonable and therefore justifiable.
- 28.1.4 It needs to be borne in mind however, that the only subject of scrutiny for purposes of section 12 in the ***Law Society*** judgment was the abolition of the common law claim.
- 28.1.5 The Bill introduces further limitations and in particular the claim for general damages is abolished in full.
- 28.1.6 The impact on this right brought about by the new provisions in the Bill will obviously have to be considered afresh in any future reasonableness review.

29.

Section 25 – Deprivation of Property

- 29.1 In ***Law Society*** the Court assumed (without finding) that the cap on compensation for loss of income and loss of support infringed on a victim's right to property in terms of section 25(1) of the Constitution.³⁸

38 See paras. [81] – [86] at 431E-433C

- 29.2 The Court declined to come to any finding as to whether the common law claims for loss of earning capacity or loss of support constitutes “*property*”. It held that, since the New Act was only being attacked on the basis that it was substantially irrational, the Court’s finding in the rationality review would also justify a finding that any deprivation of property could not be “arbitrary” as required by section 25(1) of the Constitution.
- 29.3 The ***Law Society*** judgment thus provides little guidance as to how this right will be dealt with in any future constitutional investigation.
- 29.4 Given however the patrimonial basis of both these causes of action, it seems plausible that the Court will ultimately find that they do constitute property for purposes of section 25(1) of the Constitution.
- 29.5 In ***First National Bank of SA v Minister of Finance***³⁹ the Court set out the circumstances in which a deprivation of property will be found to be “*arbitrary*”. In comparison with the finding in ***Law Society***, it would appear unlikely that the Court

39 2002 (4) SA 768 (CC) para. [100] at 810G-811F

would hold the Bill to be unconstitutional in terms of this right.

29.6 Even though certain provisions of the Bill, particularly the fifteen (15) year period applicable to a spouse's Family Support Benefits in terms of section 38(9), appear to be "arbitrary" in the ordinary sense of the word, the Court will probably hold that, as the Bill does not completely deprive the victim of compensation, this right remains intact.⁴⁰

30.

Section 27 – Health Care and Social Security

30.1 In **Law Society** the challenge against the severely limited public sector tariffs prescribed in terms of Regulation 5(1) of the New Act was successful, the Court holding that these tariffs were inadequate to "enable innocent victims of road accidents to obtain the treatment they require"⁴¹ and that "the means selected are not rationally related to the objective sought to be achieved. The objective is to provide reasonable health care to seriously injured victims of motor vehicle accidents."⁴²

40 See *First National Bank of SA v Commissioner: SARS (supra)*, particularly at 811C-D.

41 At 436F.

42 At 436G.

30.2 In paragraph [100]⁴³ the Court further states:

“I may briefly add that, even if Regulation 5(1) were found to be rational, the tariff is in any event under-inclusive in relation to the health care needs of quadriplegic and paraplegic road accident victims and, for that reason, would be unreasonable and thus in breach of sections 27(1)(a) read together with section 27(2) of the Constitution.”

30.3 This illustrates the power of section 27(2). The Court may invalidate a legislative provision in terms of this section alone (i.e. without rationality or reasonableness reviews).

30.5 The only specific limitation mentioned in the subsection is the inadequacy of resources.⁴⁴

30.6 The section further implies that the State should devise a comprehensive and workable plan which can be effectively implemented.⁴⁵

30.7 In this context the financial viability of the Scheme introduced by the Bill as well as the competence of the entity that will be tasked to implement it becomes relevant.

43 At 436H.

44 See *Soobramoney v Minister of Health Kwa-Zulu Natal* 1998 (1) SA 765 (CC) para. [11] 771G-I.

45 See: *Government of RSA v Grootboom* 2001 (1) SA 46 (CC) at para. [38] at 67H-I, with reference

30.8 It is evident from section 63 of the Bill that the Scheme is to be taken over by the entity and personnel currently managing the Road Accident Fund.

30.9 In 2002 the Satchwell Commission was scathing in its conclusions with regards to management of the Road Accident Fund. In paragraph 37.162 on page 1216, the following was stated:

“Since the establishment of the Road Accident Fund (and its predecessors, the Motor Vehicle Insurance Fund and the Motor Vehicle Accident Fund) the stewardship of the scheme of road accident compensation has left much to be desired: there has been a passive Board uncritical of the management and administration of the scheme; an arrogant Management unresponsive to concerns and criticisms of the road using public; an ignorant and apathetic consumer base which was failed to hold Government, the Board and RAF Management accountable. The RAF has ‘functioned’ for many years without attempting to identify and acknowledge the people it is supposed to serve, with the result that there has been no appreciation of the need for the concept of service to be at the core of the Fund’s operations.”

30.10 Sixteen years hence there is little reason to see the present RAF in any different light. If anything matters have become worse.

30.11 The Bill nevertheless entrusts virtually every conceivable discretion and decision to the Administrator and provides the claimant with very few rights. The Bill is also drafted in a manner which appears to almost discourage a claimant from approaching the Administrator. One can only imagine how the current management of the RAF is going to deal with these new responsibilities.

30.12 The defenders of the Bill will therefore have to go further than they did in ***Law Society*** when presenting evidence as to the workability and viability of the Scheme. Merely suggesting that it is part of a progressive long term plan forced on the public due to limited funding should not be permitted.

30.13 The parties attacking the Bill should present their own evidence, particularly in the form of expert evidence relating to financial viability and proper financial administration. The RAF's role in the squandering of its own resources since its inception should also be made an issue as it is relevant to the viability of the Scheme.

A mere theoretical attack⁴⁶ should be avoided.

30.14 As the Bill is now accepted as part of the State’s social security legislation the provisions of section 27 will not be avoidable in any future constitutional review. It is anticipated that this will in fact be the main feature of any such exercise.

31.

Section 34 – Access to Courts

31.1 The reference in this section⁴⁷ to extra-curial tribunals and the like clearly imply that the ambit of this right includes more than just effective dispute resolution systems within the Courts. The right may more correctly be referred to as the right of access to justice⁴⁸.

46 As happened in the matter of *Jooste*.

47 “*Access to Courts*

[34] *Everyone has the rights to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal of forum.*”

48 *Nyenti Access to justice in a South African social security system: Towards a conceptual approach 2013 De Jure 910*

31.2 The only dispute resolution mechanism which is found in the Bill is that contained in section 55.⁴⁹

32.3 An internal appeal to an Appeal’s Committee is envisaged. As the procedure is still to be prescribed by regulation, it is not entirely clear whether the appeal to the Appeal’s Committee is to be seen as an appeal in the wide sense⁵⁰ (which would allow the appellant to present further evidence to the Appeal’s Committee) or whether it is a narrow appeal. The wording of the section itself would seem to indicate a narrow appeal.⁵¹

31.4 Section 55(6) clearly provides for a classic judicial review thereby

49 *Appeals*

55(1) *A claimant or a beneficiary may, after being notified of a decision of the administrator or after the expiry of the period specified in section 47(1), in accordance with the prescribed form and procedure, lodge an appeal against the decision of lack of a decision contemplated in section 47(1).*

(2) *An appeal in terms of subsection (1) must be submitted to the Appeal’s Committee within thirty (30) days after a claimant or beneficiary has been notified of a decision of the Administrator or after the expiry of the period specified in section 47(1).*

(3) *The Appeal’s Committee must hear and determine appeals in accordance with the prescribed procedure and the Act.*

(4) *Appeal’s Committee may, after hearing an appeal –*
(a) Confirmed a decision of the administrator;
(b) Vary the decision of the administrator; or
(c) Rescind the decision and replace the decision of the Administrator with such other decision as it considers just.

(5) *The Appeal’s Committee must hear and determine the appeal within 180 days after the lodgement of the appeal, and in writing, inform the applicant of the outcome within fourteen (14) days.*

(6) *A decision by the Appeal’s Committee is final, subject to judicial review.”*

50 As is the case with the present appeal to the RAF Appeal’s Tribunal – *Road Accident Fund v Duma 2013 (6) SA 9 (SCA) para [26]*

51 See *Tikly v Johannes NO 1963 (2) SA 588 (T) at 590F-591A* and *Hoexter Administrative Law in South Africa (2012) at 68-70*

limiting the enquiry simply to whether "*the functionary has performed the function with which he was entrusted.*"⁵²

31.5 The following are only a few examples of the types of disputes which would ultimately thus be testable by way of review only:

31.5.1 Whether the injury was sustained in a "road accident" as defined in section (1) of the Bill;

31.5.2 Whether the Administrator has correctly determined that a beneficiary has "*unreasonably*" withheld his/her consent to a rehabilitation plan - section 33(1)(c);

31.5.3 Whether earnings are illegal - sections 38(3) and 34(3).

31.6 A particular concern is that the internal appeal is only against the Administrator's decision in terms of section 47(1), i.e. the decision to accept or reject a claim. No internal appeal is seemingly provided against the Administrator's decisions in terms of Part E relating to a Benefit Review. The claimant thus only has a single remedy here being a judicial review.

52 MEC for Env Affairs & Dev Planning v Clairison's CC 2013 (6) SA 235 (SCA) par [18]

- 31.7 The Satchwell Commission, when dealing with dispute resolution procedures⁵³, recommended an extensive two tiered process involving a Benefits Review Panel and a Benefits Appeal Tribunal.⁵⁴
- 31.8 In contrast to the Bill, the Commission recommended⁵⁵ that an appeal should be available on issues of law and of fact from the Benefits Review Tribunal to the Magistrate’s Court or to the High Court and that the Tribunal itself should have the power to refer a question of law to the High Court. None of these provisions, which clearly envisage a wide process of dispute resolution, have been retained in the Bill.
- 31.9 The author Nyenti⁵⁶ points to the considerable shortcomings in the alternative dispute resolution mechanisms created by social security legislation when compared to labour relations, business competition regulations and the consumer protection jurisdictions in South Africa. In particular he points out with regards to these other jurisdictions at 15-16:

53 Chapter 25 of Satchwell Report, pages 755-788.

54 Interestingly, in paragraph 25.187, page 786, the Commission recommended that the Tribunal should have the power to award a claimant costs even if unsuccessful.

55 At para. 25.195, page 786.

56 *Reforming the South African Social Security Adjudication System: Innovative Experiences from South African Non-Social Security Jurisdiction PER/PELJ 2016 (19)*.

"...integrated and streamlined systems have been created, consisting of specialist multi-tiered institutions that are accessible and guarantee complementary and seamless procedurally-fair dispute resolution processes. The multi-tiered and complementary nature of these dispute resolution institutions, their status and procedures guarantee the effectiveness in resolving disputes. In the first instance, their nature enables them to undertake sequential and complementary reviews and appeals procedures, which are a primary consideration in the development of an adjudication system, as there is a need to ensure an institutional separation between administrative accountability, review and revision (on the one hand) and a wholly-independent, substantive system of appeals (on the other). It also allows for the resolution of disputes at an appropriate level. It further ensures the independence of the appeal institution from the administration that reviewed the initial complaint, which is a necessary aspect of the concept of appeal. Other factors promoting their effectiveness include their accessibility, the fairness of their procedures, the scope of their jurisdiction and powers, their expertise and their independence and impartiality."

31.10 In contrast with the narrow appeal and equally narrow classical judicial review allowed for by the Bill, the dispute resolution mechanisms in the other more consumer-friendly jurisdictions referred to include the different tiers leading from the CCMA to the Labour Appeal Court, the Competition Commissioner and Tribunal and the National Consumer Tribunal.

31.11 The apex example is found in section 30P of the Pension Fund Act 24 of 1956. The latter Act not only allows the Pension Fund Adjudicator wide powers of his own, but also allows a wide appeal to the High Court which essentially entitles the Applicant to bring his entire application afresh and to lead evidence anew.⁵⁷

31.11 It thus appears that, when compared with the recommendations of the Commission, as well as the mechanisms available to most consumers in other branches of the law, the dispute resolution mechanism in the Bill is considerably more limited than those to which an ordinary citizen would generally be entitled.

31.12 One can only guess as to the basis upon which the defenders of the Bill will attempt to justify this limitation⁵⁸. No doubt the recent experiences of a court system over-clogged with RAF matters will be held up as the major argument. This was however already considered by the Satchwell Commission (see Chapter 24), hence the recommendation that an extra-curial scheme should be brought into being.

57 *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at 725I-726E.

58 This patent difference in the ambit of the remedies available against the state in social security law as against private entities in consumer protection law seems to indicate a new form of “*naked preference*” which is not in line with the concept that the new South African Constitutional order should constitute a bridge to a culture of justification as expressed in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para. [25] at 1024F-1025A.

32.

Tariffs

- 32.1 As indicated herein above, the Applicants in **Law Society** were successful in striking down the tariffs incorporated in terms of Regulation 5(1) of the New Act.
- 32.2 The tariffs are at present a controversial issue as these have apparently not been negotiated by the Minister of Transport and there is therefore no indication of which tariffs will be included in the Bill.
- 32.3 As section 60(1)(a) of the Bill empowers the Minister in consultation with the Minister of Health to prescribe the tariffs, the Minister may argue that this is something to be done once the Bill is passed into law.
- 32.4 There is however the opposite view that whilst the statute is still in Bill form, the Minister is in a stronger position to negotiate these tariffs with the service providers.
- 32.5 Whatever the case, up until such time as an indication is given as to which tariffs have been negotiated, it will be impossible to

predict whether a similar attack such as undertaken in **Law Society** would be successful.

32.6 At its heart though the decision in **Law Society** indicates that any set of tariffs which will be insufficient to meet the requirements of at least the worst injured victims such as quadriplegics and paraplegics will not be constitutionally viable.

33.

Conclusion

33.1 In the context of an opinion of this nature the above can only ever constitute a considered, yet broad, personal overview of the arguments available to the Consultant.

33.2 From the various documents provided to me and also sourced by myself, it is clear that there are many further and wider views, but also counter-arguments.

33.3 What this opinion should highlight is that the inevitable further debate as to the basis of a future constitutional attack must be done mindful of the import and ambit of the rationality review, the reasonableness review and the specific requirements of

section 27(2) of the Constitution.

33.4 What is apparent though is that a case can certainly be made out against the constitutional validity of the Bill in its present form.

I advise accordingly.

**ADV C VAN JAARVELD
GROENKLOOF CHAMBERS
5 April 2018**