5 June 2018

Attention: Honourable Chair and Honourable Members
of the Portfolio Committee on Transport

RE: LSNP SUBMISSIONS ON THE PROPOSED RABS BILL

A. INTRODUCTION

We the LSNP thank you for the opportunity to address the Committee and your indulgence to allow the presenter and his team adequate time to make our submissions (see annexure “A1” and “A2”).

The following is a brief summary of the most important concerns raised regarding the proposed RABS Bill issues raised and a few proposals to consider going forward.

B. THE OBJECT OF THE RABS BILL

The object of the RABS Bill is to provide an effective benefit scheme in respect of bodily injury or death caused by, or arising from road accidents, which benefit scheme is reasonable, equitable, affordable and sustainable, exclude from civil liability certain persons responsible for bodily injuries or death caused by, or arising from road accidents (common law right abandoned) and the establishment of the Administrator [our emphasis].

The aim of the presentation by the LSNP is to test whether the Bill, presented by the Department of Transport (DoT), succeeds in achieving these goals having regard to the following concerns:
B1. The absence of a medical tariff;

B2. Possible Constitutional Challenges (Adv. Carel van Jaarsveldt; see annexures “N1” and “N2”);

B3. Not as “pro poor” as the Bill is purported to be:
   a comparative study between benefits for the unemployed under the current RAF dispensation and
   what is proposed under RABS (Mr. Kobus Pretorius, see annexure “C”);

   a comparative study was made between general damages on offer under RAF in relation to no general
   damages and limited structured benefits under RABS (reference was made to a victim with a mutilated
   foot);

   Absence of recourse for victims / limited dispute resolution, under RABS (see paragraph F, page 17
   of annexure “N1”).

B4. Lack of rehabilitative facilities (Mrs. E Jacobs, see annexure “D”);

B5. Inaccessibility of the Scheme (Section 56).


C. General Remarks.

B1. THE IMPORTANCE OF THE MEDICAL TARIFF

The provision of quality healthcare is a primary function of RABS and as such a single medical tariff is such
an integral part of the RABS Bill, the RABSA cannot, reasonably function and/or deliver the benefits in Part
A, Health Care Services (Section 30, 31, 32 and 33) without the tariff having been secured.

The DoT submits (page 19 report dated 15 May 2018): “There is no dependency by RABS on NHI, RABS will
establish its own national contracted healthcare service provider network”.

It is said the Road Accident Fund Scheme Administrator (RABSA); “will cooperate with public and private
sector providers to enable the delivery of quality healthcare to road accident victims across South-Africa,
at affordable cost” [our emphasis].
The Constitutional Court, in respect of the challenge to the non-emergency tariff (public health tariff) under the RAF Act, in the matter of Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC), stated that:

"The public sector is not able to provide adequate services in a material respect" [our emphasis]

- Without a tariff it would be impossible for the Administrator to deliver "quality healthcare" nor would it be possible to cost RABS;

- Having regard to the high costs of medical care especially in the emergency, acute and rehabilitative phase and with the aim of keeping the RABSA as cheap as possible to administer, it is doubtful that RABSA would be able to engage private health care providers on an acceptable tariff.

- It will be placing the funding model of a combined RAF/RABS liability at enormous risk as RABSA would be unable to determine what their liability would be under a no-fault system;

- The RABSA will need to determine their liability in relation to so called balance-billing (excess between agreed tariff and the actual account payable for non-contracted service providers (Section 32));

- Road accident victims would be at risk of civil liability having to cover the excess payable to service providers not covered by the RABSA.

- Section 32 (1)(b) states that the RABSA will only be liable to pay non-contracted health care providers a "reasonable tariff" – road accident victims, especially the poor and indigent victims will be facing the biggest challenges having to cope with the burden of having to pay the balance of these medical bills;

- Until a single tariff has been procured, it will be unsure whether a monetary cap will have to be introduced upon healthcare services to determine whether it would be affordable;

- In a no-fault system certain parameters will have to be introduced to ensure that the RABSA remains adequately financed to ensure the sustainable delivery of healthcare services Chapter 6, Part A;

- If a cap is introduced, the immediate question would be whether private healthcare providers would be willing to engage the DoT, facing the real financial risk of engaging an entity that cannot guarantee any long term financial security;
In reality the RABSA, within its wide powers of discretion, may reduce any benefit subject to affordability, in order to ensure the financial viability of RABS (Section 40(2)(c));

Road accident victims will run the further risk of having their benefits reduced at any stage in order to assist the RABSA to maintain their contractual agreements with service providers.

B2. CONSTITUTIONAL CHALLENGES:

THE RETENTION OF GENERAL DAMAGES & THE RIGHT TO SUE WRONGDOER

General damages are a form of compensation paid under the common-law delictual claim for pain and suffering, loss of amenities of life, or disfigurement.

Under the RABS dispensation general damages will not be available to any crash victim (irrespective of income status).

A comparison was drawn between a person with a severe “life changing injuries” under the current RAF system in relation to the RABS dispensation.

In the example it was shown that a person under RAF will qualify for general damages and under RABS the same person will not receive any benefits (no general damages, earns above the “cap” thus is offered no income benefit and has her own medical aid).

The Satchwell Commission proposed a no-fault system whilst the victim retains:

1. the right to sue the wrongdoer (see “G1”, par. 18.204 (a) “The majority (Commissioners Satchwell and Sithole) recommended that road accident victims and their families should retain all rights under the common law…”

   (b) “the driver should not be indemnified in terms of the common law”;

2. the right to claim life enhancement benefits in cases of catastrophic and/or life changing injuries (par. 36.187, page 1150, and par. 36.193 Volume 2 and paragraph 21.143, and 21.148 page 614/615 of Volume 1, of the report).

The RABS Bill caters for neither of the two and offers the injured victim no long term financial security nor any chance of financially rehabilitation in the absence of lump sum payments.
It seems that the DoT religiously relies on the judgement in *Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC)* without having regard to the fact that under RABS, the limitation of rights are significantly more restrictive and prejudicial to victims as opposed under the RAF system, which has as its objective to offer the widest possible cover.

Adv. Carel van Jaarsveldt’s comments are attached hereto as annexure “N1” and “N2” and addresses some of the more apparent Constitutional challenges in more detail.

**B3. BENEFITS FOR THE UNEMPLOYED: RAF v RABS**

Contrary to this submissions by the DoT, the current RAF Act, does cater for the unemployed and in fact offers better financial benefits to the unemployed road accident victim as a result of a serious accident. In order to illustrate this point, Mr. Kobus Pretorius illustrated a comparative study based upon the available assumptions made by the DoT and by applying the rule of law, as catered for in the Road Accident Fund Act 56 of 1996 (as amended) – see Mr. Pretorius’ full report attached as annexure “C”.

**B4. LACK OF REHABILITATION FACILITIES**

In the absence of a tariff, victims will remain at the mercy of the public healthcare which having regard to the judgement in the Constitutional Court, in the matter of *Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC)*, renders the Bill Unconstitutional.

The lack of trained personnel and facilities in the public healthcare sector was addressed by Mrs. Elizeth Jacobs (see presentation attached as annexure “D”);

It is clear that the RABS Administrator cannot, without having secured an acceptable medical tariff, provide the rehabilitative benefits it says it will and as such will fail to deliver on one of its principal objectives, under Section 33.

The second last bullet point on page 21 of Messrs. True South’s report states: “Rehabilitation is both the most uncertain benefit (due to the absence of protocols, etc.) and also potentially one of the most expensive.”
B5. **ACCESSIBILITY OF THE RABS ADMINISTRATOR**

Section 56 of the RABS Bill states: "the Administrator shall not be liable to contribute to the costs of an injured person...to prepare and submit a claim or an appeal or to meet any requirements of the Act".

Contrary to the explanation by the DoT, Section 30 does not provide just relief or assistance as the Benefits under Section 30 only applies once the victim has already qualified for the benefit.

The RABS Bill lacks the support the DoT is claiming it affords, as most victims, especially the poor, will be excluded from engaging the Administrator purely from a financial accessibility point of view.

The fact that RABS will be no-fault based, does not mean automatic access to Benefits, as the victim will still be required to submit costly medical and other related reports to substantially comply and lodge a claim with the Administrator.

The Bill actually discourages rather than encourage victims to claim and excludes the very people it purports to protect.

See page 11 of "N1" where it is stated: "Accordingly a victim who is unable to either afford the costs of these reports (which are well-known to be expensive), or to 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".

If this was an unintentional consequence of the Bill, it should be amended to allow victims unrestricted access to the Administrator and Benefits.

B6. **BENCHMARKING / ACCOUNTABILITY**

The Satchwell Commission recommended in par. 41.177, Volume 2, page 1338, that appropriate benchmarking practices and standard should be incorporated within the management practice of the administrative authority of the RABS.

The standards should be subject to scrutiny by both the Board and the relevant Parliamentary Portfolio Committee, which would ensure that service delivery attains and maintains the highest possible level [our emphasis].
The DoT, has to date, not offered any reasonable explanation nor given a convincing argument on how they intend to ensure that these exceptional levels of service delivery are to be achieved and maintained without backsliding into the same administrative slump road accident victims currently experiencing under RAF and COID.

We have not seen the results of the “skills gap analysis” that were supposed to be done in 2014 to determine whether the transitional system between RAF and RABS will succeed.

We do, however, know the DoT maintains the RABSA will be a better system than the current RAF - but without a proper strategy plan, costing analyses and the benchmarking of performance, this promise will amount to nothing more than “lip service” in the face of the huge administrative task RABSA would have to be able to maintain.

To administrate a no-fault based “medical scheme” as envisaged by RABS having regard to the enormous number of procedures, equipment and consumables, will require an exceptional level of service delivery from the RABSA, as it would be taking on a “near impossible administrative task”.

The Satchwell Commission said that if no-fault cannot be done right it should not be done at all [our emphasis].

A major concern is that, according to the report by Messrs. True South (Actuaries obo DoT), the financial requirements of RABS will be the primary objective and only then will funding be channelled to victims under the current RAF - page 30 of their report: “Revenue available for RAF (excess fuel levies after RABS costs have been met)...........”.

This approach places victims under RAF at enormous risk, should RABS prove to be too costly, not only will victims suffer under RABS but, historic RAF victims will only be further prejudiced (currently they are required to wait up to 9(nine) months for payment after settlement).

Further the PCOT should also have regard to the following sections of the proposed RABS Bill [B17-2017] Page 11, Section 22, which states that “The Chief Executive Officer is accountable to the Board”.

Page 26, Section 57, Liability for administrative decision-making, which states, “The Administrator or any official employed by the Administrator shall not be liable in respect of anything done or omitted to be done in the exercise of any power or performance of any duty conferred or imposed by or under this Act, unless intentional wrongdoing is proved”.

[Signature]
Considering the freedom which the authors of the Amendment Act [B17-2017] have allowed in Section 22, which states that the Chief Executive is not accountable to the Board and Section 57, which states that the Administrator or any official employed by the Administrator shall not be liable in respect of anything done or omitted to be done in the exercise of any power or performance of any duty conferred or imposed by or under this Act, unless intentional wrongdoing is proved.

Considering the poor administrative performance by the RAF, Section 22 and 57 absolve employees of the RABS of all accountability in respect of their work tasks performed on behalf of the Administrator.

It is for this reason the Commission stated in par. 40.175 on page 1317 that: "It would be advisable that the new scheme not be burdened by either the legacy or baggage of the past and that it should be both financially and administratively independent of the old RAF".

C. GENERAL COMMENTS

C.1 REGULATORY IMPACT ASSESSMENT (RIA)

This issue was also raised by numerous stakeholders in the 2014 commenting stage.

A Regulatory Impact Assessment (RIA) is a method to assess the significant impacts – both positive and negative – of a regulatory measure. 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 Co-operation and Development (OECD) has published guidelines on undertaking RIAs.

Having regard to the significant impact of the RABS Bill, we respectfully submit that the RABS Bill cannot be reasonably signed into as a Law, without having been subjected to a Regulatory Impact Assessment and respectfully submit that the PCOT will be well advised to propose such an intervention in the spirit of transparency and proper costing analysis.
H. CONCLUSION AND SUGGESTED COURSE OF ACTION

Having regard to the above, it is evident that the RABS Administrator will struggle to meet its strategic objectives.

We do acknowledge that change is needed and as such the LSNP respectfully submits that the PCOT and the DoT considers the following suggested proposals:

a. Apply “no fault” to the following scenarios which will immediately result in a substantial reduction in litigation and cost saving:
   - Claims of minor children;
   - Passenger claims;
   - Loss of support claims;
   - Funeral expenses;
   - Medical Expenses.

b. Retain common-law right to sue the wrongdoer.

c. Allow for “capped” life enhancement benefits.

d. As far as the lodgement and dispute resolution process is concerned, the proposed assistance and remedies on offer in terms of the current draft RABS Bill, will amount to nothing more than “lip service” in the absence of financial assistance (See Section 56).

   We are mindful of the fact that the DoT is busy with a very sensitive balancing act to ensure the financial viability of RABS.

e. In the interim the Honourable members must have regard to the fact that we will be dealing with the current dispensation for some time to come and need to work together to make the system achieve it’s intended goal which is to compensate.

f. We are concerned that the DoT is so focussed on RABS and the balancing act between offering benefits on a no-fault basis and the rights of the victims that they are alienating the rights of victims under the current dispensation.
g. Funding for RAF claimants should still be ring-fenced after the introduction of RABS, or any other system having regard to the recommendations of the Satchwell Commission, as discussed earlier.

h. The members of the LSNP would be more than willing to assist the RAF in an effort to advice on steps to be taken to reduce litigation costs and to make the claim assessment process more effective in an effort to prevent unnecessary litigation.

i. There are a number of other cost saving features that can be implemented to the current RAF that will result in substantial cost savings, for instance, the introduction of a single panel of experts.

j. The Western Cape Department of Traffic and Public Works highlighted the fact that one of the main concerns of the current dispensation is the lack of administrative control, not necessarily the Act.

k. Proper implementation of corrective measures might reduce the need for a complete overhaul.
   - The current Act still has as its primary objective to compensate and provide the widest possible cover;
   - RABS is not aimed at full compensation and the Benefits on offer are all subject to affordability (even funeral expenses) and in some instances not guaranteed as the structures to ensure primary medical care and rehabilitation are not yet in place;

l. The actuary Johan Sauer indicated that RAF’s financial situation is stabilising and we are starting to see the effect of the 2008 statutory limitations (capping of income, restricting claims for general damages and foreigners being prevented from claiming in their own currency).

m. We agree with the Actuarial Society that:
   - Any calculations in terms of costing of RABS should be subject to peer review by Actuaries experiences in this particular field;
   - If changes are considered, it should be introduced in phases and that the simultaneous implementation would place the current and new RABS system under enormous financial and administrative pressure.

We accept that a fault based system excludes some victims but, by the same token, no-fault includes victims that should ordinarily not be justified to claim: “inclusive of people injured whilst under the influence of alcohol or drugs, people injured whilst committing a crime and people deliberately injuring themselves.” see bullet point two, page 6 of annexure “N1”.
Honourable Sibande commented that criminals should not be allowed to claim under a no-fault system, however, this is exactly what will happen under RABS.

In fact with RABS effectively incentivising accidents and having regard to the already high accident rate in South-Africa, highlighted in the presentation by Prof. Hennie Klopper, this would be the last thing the South African public would have to be subjected to, or would even be able to afford.

The DoT argues that no-fault will allow the RABSA to offer more resources to a wider road accident victim base, however, with reference to the Satchwell report (par.20.63, page 577), there is no existing no-fault system that ensures that more compensation/benefits are devoted to victims).

Having listened to all the presentations made by the various stakeholders it is apparent that the DoT will have to address quite a lot of unresolved issues in order to achieve the primary objectives of RABS whilst at the same time balancing the rights of victims and the affordability thereof.

We invite the DoT and/or the RAF to allow the LSNP to assist and advise on any of the issues and concerns raised by the LSNP, or any other stakeholders, and sincerely hope that the Honourable members and the DoT will consider our proposals in their quest to secure a “Good Law” for all South-African citizens and victims.

Yours faithfully,

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