A. Meeting Summary

The Law Society of the Northern Provinces (LSNP) and the BLA were against the no-fault system in RABS, as it excluded from liability the owners, drivers and employers of drivers involved in road accidents. A no-fault system incentivised people to be involved in accidents so as to get income and medical benefits. If the no-fault system was introduced, claims would increase by two-thirds of the current claims to the RAF, which meant that RABS would not be viable. The R10 000 funeral benefit in RABS was not enough because it did not cater for African burials, which were generally big events.

The LSNP called on the Minister of Transport to formulate a tariff which would guide private hospitals in providing medical services to road accident victims. A tariff was requested because RABS provided that victims of road accidents would be given quality medical care. The LSNP relied on a Constitutional Court matter to support the provision of quality medical care from private hospitals for road accident victims. The Minister had not formulated the tariff but had appointed Ernst and Young to formulate a tariff. The Ernst and Young report had not been made public, and not even given to the Portfolio Committee.

The LSNP was against absorbing the RAF into the RABS, as it went against the Satchwell Report which had recommended that if RABS was introduced, it should not be burdened by the baggage of the past, and should thus be financially and administratively independent of the RAF. The RABS Bill contradicted the Satchwell recommendations, as it was simply the RAF rebranded.

The LSNP and BLA did not support the RABS Bill because they felt it was not pro-poor. There was little information for the public to assess and ensure that proper benchmarking had been done to ensure that RABS was viable. The Department was asked to ensure that RABS was more equitable by balancing the flexibility in determining economic losses with the affordability and equity objectives of the scheme. They asked that the Portfolio Committee value the contributions of the legal profession and use them to ensure that the rights of all South African citizens and victims of road accidents were protected under the law.

Members asked why the RABS should cover legal costs, because there had been cases of lawyers defrauding claimants of their RAF benefits; why lawyers believed victims could not claim without their help; if RABS were to award legal fees, whether lawyers would accept fixed legal fees; why general damages should be awarded; and why private, and not public, medical services should be offered to victims of road accidents.

Meeting report

Law Society of Northern Provinces: Submission

Mr Gert Nel, Council Member: Law Society of the Northern Provinces (LSNP), said he worked with road accident victims, had worked for the RAF, and was also a member of the personal injuries committee at the Law Society of South Africa. He apologized for those lawyers who had brought the profession into disrepute by being fraudulent.
He said that the RABS Bill needed to find a balance between being pro-poor and the affordability of the scheme. The primary objective of the Bill was to provide medical care. In the matter of the Law Society of South Africa and Others v Minister of Transport and Another 2011, the court had found that road accident victims must be given quality medical care, which was generally found in private hospitals. The Minister of Transport had been directed to formulate a tariff which would guide hospitals in providing such services to members of the public. The Minister had not formulated a tariff at which RABS could be costed. The DoT had appointed Ernst and Young to formulate a tariff, but the findings of the report had never been made public. The Department had said that a tariff would be set after the Bill was passed. He disagreed with that approach because before the Bill was passed, its affordability needed to be assessed. If the Department argued that RABS was a viable scheme, the public must be given reasons and evidence of this assertion.

Mr Nel said that by having a no-fault system, the Bill incentivized people to be involved in accidents so as to get income and medical benefits. If the no-fault system was introduced, claims would increase by two-thirds of the current claims to the RAF, which meant that RABS would not be viable. Given the high accident rate in South Africa, the cost implications for government would be high if it had to provide road accident victims with private medical schemes. If the Bill was passed before the tariff was set, victims of a road accident would risk paying top-up insurance for the difference between the cost of private medical care and what the scheme would pay. The Department had argued that the scheme would operate at contracted private hospitals, so the victim's risk of liability for excess payment would be done away with. That was unlikely, because there were many medical practitioners who charged more than what the scheme would be willing to pay.

Mr Nel asked why the Department had been delaying since 2014 to set a single medical tariff so as to allow the public to make informed assessments of the viability of the RABS Bill. The answer to this was in a report prepared for National Treasury by Mr Alex van den Heever. The report had said that to negotiate a single tariff suitable to all parties was virtually impossible. Even if a tariff was negotiated, considering rising medical costs, there would always be irreconcilable differences, which would result in an agreement that was uncompetitive.

The DoT had not told the public whether hospitals would be willing to accept a single tariff set by the Department. It had previously consulted with Alexander Forbes regarding an appropriate tariff. Alexander Forbes had stopped the consultations because the RAF could not pay the company's consultation fees. Because of the no-fault system, RABS may not afford to pay private hospitals.

Mr Nel said that the LSNP had previously asked why the DoT considered the RABS Bill to be pro-poor if unemployment was high and the minimum wage was R3500 per month (R42 000 per annum). The Department's response had been that the RAF Act provided no compensation for the loss of income for the unemployed. Those who earned the minimum wage were compensated with that wage. Under RABS, the unemployed and those who earned below minimum wage would have more benefits, as they would be compensated on a deemed income of R52 527 per annum -- an amount higher than the minimum wage. The LSNP had made a written submission stating that the Department's response was misguided and an attempt to mislead the public into thinking that the RABS Bill was pro-poor.

The RAF offered better relief for road accident victims. It made provision for an increase in salary over and above the minimum wage, whereas the RABS offered a fixed deemed income. This meant an unemployed person would be better off claiming from the RAF than RABS. There was little security under RABS, because the administrator had wide discretionary powers and may reduce or stop the benefits if he realised that the benefits were unaffordable. In 2014, the Department had acknowledged that offering the average annual national income on a no-fault basis would be unaffordable, and would open RABS up to constitutional challenges.

Mr Nel said that the LSNP had previously asked the DoT why general damages had been removed and other benefits limited under the RABS Bill. The Department had responded in writing, saying that removing general damages under RABS was aligned to social security principles. Instead of compensating something that was not a loss, general damages had been removed so that RABS could compensate more people while remaining affordable and sustainable. Basically, RABS would substitute general damages with rehabilitation. Mr Nel found the rehabilitation benefit problematic, because only 15% of road accident victims qualified for rehabilitation.
Therefore, rehabilitation was not a just substitute for general damages. Any deviation from the RAF system would not be viable.

Mr Nel referenced the Satchwell Report, which had said that there should be a no-fault system, but the right of the victim to sue the wrongdoer should be retained and that RABS should provide life-enhancement benefits. This was a different description of general damages, but favored the retention of general damages for people who suffered life-changing injuries. He asked whether providing rehabilitation for severely injured victims was reasonable. The Satchwell Report indicated it had not been proved that removing general damages and introducing a no-fault system would result in more people being paid out. LSNP had consulted actuaries who had said that when RABS was introduced, the fuel levies funding the RAF would be redirected to fund the RABS, and any surplus would be used to pay RAF claimants. This was alarming, because victims with existing claims already had to wait for nine months to be paid out even where they had a court order instructing the RAf to pay. This showed that the RABS scheme would be unaffordable, because RAF victims may not be paid out because funds would be redirected to RABS.

The Department had previously said that the RAF would be absorbed into the RABS. This was against the Satchwell Report, which recommended that if RABS was introduced, it should not be burdened by the baggage of the past, and should be financially and administratively independent of the RAF. The RABS Bill contradicted the Satchwell recommendations as it was simply the RAF rebranded.

Mr Nel noted that clause 42(3) of the RABS Bill allowed RABS administrators to help claimants lodge claims, and clause 42(2) stated that the administrator would not be liable to pay out until a claim was submitted. A claimant needed to prove that he was in an accident and the extent of his injuries. RABS used the no-fault system, which meant that all persons injured in a road accident may claim, but they also needed to prove that they were in an accident. People involved in road accidents did not automatically qualify for RABS benefits. For example, this meant that each person injured in a taxi full of people needed to prove to the administrator that he was in an accident and the extent of his injuries in a medical report. Clause 42 applied to people who had already qualified for RABS benefits. The Bill was not accessible and pro-poor because not all people could get a medical report. Without a medical report, the poor could not lodge a claim for RABS. Clause 43(2) problematic, as it gave the administrator discretion when deciding whether to process claims. The Bill did not make RABS accessible to people, as they could not be lodging claims to the administrator unassisted. The Bill was drafted in a way that discouraged people from claiming.

Mr Nel compared the assistance of the administrator in RABS to RAF representatives. He said that the RAF had representatives who assisted claimants in hospitals and administrative offices. The RAF representatives advised claimants on how to claim and discouraged them from consulting lawyers, claiming that lawyers would steal their money. The RAF was poorly administered. Many claims lodged using a representative prescribed, or were under-settled. It was likely that the same would happen under RABS. The Department had previously said that the no-fault system would result in many claims. If the claims increased uncontrollably, the RABS benefits would be reduced. RABS had not set fixed benefits because its affordability was not guaranteed, and the Department did not know how much would be needed to fund the benefits. Therefore, inflation would not be applied to claims and claims may be reduced or stopped by the administrator when the scheme could not afford it.

Mr Nel said that the Satchwell Report had stated that the no-fault system would increase claims made to the RABS. If a no-fault system could not be done properly, then it should not be done at all because it would prove to be more expensive than the RAF. RABS did not give long-term security to unemployed claimants, as claims would be subject to review based on the affordability of the scheme. The Bill was not pro-poor, because it offered no financial rehabilitation, and lump sum payments were only made subject to clause 36(10).

The LSNP had previously asked the Department whether the no-fault system had been compared to other jurisdictions. Its response had been that the no-fault system had been tested against other countries by the Satchwell Commission, which had recommended a no-fault system. The no-fault system had been approved by Cabinet because its benefits were designed for South African conditions. However, the countries used in the comparison were other third world countries, which had lower accident rates than South Africa.
The comparison in the report was not on accident rates, but rather the quality of service delivery. The Department had not addressed how it intended to deliver services in relation to the administration of RABS. He advised the Department to use the recommendations in volume two of the report relating to the administration of the scheme.

Mr Nel found clause 35(5)(c)(i) problematic because it stated that claimants would not get benefits for the first 60 days after an accident so that assessments may be done. Claimants would get medical treatment during that time, but the extent of the medical benefit was not clear, because a tariff had not been set. The Bill was unconstitutional because it did not allow for private medical care, but referred to a tariff which was unknown. If the Bill was passed without a set tariff, it would be found to be unconstitutional on the basis of the Law Society of South Africa and Others v Minister of Transport and Another 2011 matter. Clause 35(7) and 38(14) state that claims would not be adjusted with insurance. This proved the unaffordability of the Bill.

He had an issue with clause 47(1), as it gave administrators 180 days to process claims. Victims would be prejudiced by the unreasonable delay, and claims should be processed in 120 days. He asked that the Department address how it would pay medical service providers. Medical service providers could claim payment for their services from RABS if they submitted the requisite documents. He asked what measures medical service providers could take to claim from the fund if they could not get all the information relating to victim accidents.

The Department had previously said that the RABS Bill was not dependent on the introduction of the national health insurance (NHI) scheme. The Bill in its current form could not provide for private medical care and victims would have to go to state hospitals if the Department did not negotiate a medical tariff with private hospitals. The DoT should include the Minister of Health in RABS discussions.

Mr Nel said that the LSNP would like a Regulatory Impact Assessment (RIA) of RABS to be done. An RIA was a method to assess the impact of a regulatory measure. It showed the costs and benefits of the measure, the implications for compliance and the state’s cost of enforcement. He said that the RABS Bill could not be passed without going through an RIA, and he asked the Portfolio Committee to propose the RIA to promote transparency and a proper costing analysis.

Mr Nel did not support the RABS Bill because he thought that it was not pro-poor. There was little information to assess and ensure that proper benchmarking had been done to ensure that the RABS was viable. A lot still needed to be done by the Department to ensure that RABS was more equitable by balancing the flexibility in determining economic losses with the affordability and equity objectives of the scheme. He asked that the Portfolio Committee value the contributions of the legal profession and use them to ensure that the rights of all South African citizens and victims of road accidents were protected under the law.

Discussion

The Chairperson said that the Ernst and Young report would not be circulated, because Ernst and Young had put a disclaimer in the report that it should be seen only by the RAF unit, the board and executive. Even the Portfolio Committee could not see the report. She asked whether Mr Nel had received permission from his client to distribute images to the Committee. The image was of a woman’s body from the stomach down. The lady was wearing underwear and her leg was injured.

Ms Xego said that the Portfolio Committee could not answer many of the questions, as they had been directed to the Department and not the Committee. She asked Mr Nel to expand on his statement that the no-fault system would be more expensive than the system under the RAF. The Committee would continue gathering information through public participation. It would interview victims who had used lawyers to help them claim from the RAF to determine the feasibility of removing legal costs in RABS. She asked what would prevent victims from claiming without help from lawyers.

Mr Nel responded to the Chairperson’s statement by saying that the Ernst and Young report should be circulated so that the public knew whether RABS was a more viable option.
He had asked his client for permission to use the images of her injury. He had shared the image to show the severity of the injury and how the client would be able to claim under the RAF, but not under the RABS.

In response to Ms Xego's question, he said that an actuary would be presenting the following day to comment on how the no-fault system was more expensive. The written submissions of the actuary would show that although RABS would not be paying out lump sums like the RAF, rehabilitation was the most uncertain and expensive benefit in RABS. Victims claiming from the RAF would be negatively affected if the RABS Bill was passed, because their claims would be considered only after funds had been allocated for RABS. More details would be provided in the actuary's presentation.

Mr Nel introduced one of his RAF clients, Mr Lebereko, and asked if Mr Lebereko could give his account of being a road accident victim and how Mr Nel had helped him lodge his claim to the RAF.

The Chairperson and Committee Members were against allowing Mr Lebereko to make a submission. The Chairperson said that the Committee did not want to create a precedent of allowing organisations to bring people to give testimony. Members of the public would be given an opportunity to make submissions at the public participation stage, when the Committee visited the provinces. The Chairperson pointed out the time constraints of the meeting, which would not allow Mr Lebereko to make a full submission, and once he presented, the Committee would ask him questions. To protect him from questions he would not be unable to answer, the Chairperson asked him not to make a submission.

Mr Ramatlakane referred to Mr Nel's statement that there must be a set tariff which was known by health care service providers. If that was not done, then the Bill would be unconstitutional. He said that passing the RABs Bill did not rest on whether a tariff was set. Road accident victims could go to public hospitals. Setting the tariff was determined by the DoT and not the Committee. He asked why the LSNP was against the removal of legal fees from RABS. Victims should have a choice as to whether they wanted to be assisted when claiming. Not being helped by a lawyer was a cheaper option, and that was why RABS did not cover legal costs. He asked Mr Nel what reform the LSNP suggested. Did it believe there must be a change? Did it agree with the changes that the Committee had proposed? Must the RAF be left intact?

Mr Nel said that the point of RABS was to provide quality health care. Some state hospitals were good, but some were not. There had been a rise in medical negligence cases, and that was why victims of road accidents must be treated at private hospitals to get quality medical care. If RABS did not pay for private medical care, the Department should consult the Department of Health about improving its health care services.

The Chairperson asked Mr Nel to understand that the Department of Transport, the RAF and the Department of Health, through the NHl, would work together to ensure that public hospitals complied with offering proper medical services. Public hospitals must not be looked down on, because when medical aid members exhausted their benefits, they moved to public hospitals.

Mr Nel responded to Mr Ramatlakane by quoting the Law Society of South Africa and Others v Minister of Transport and Another 2011 matter, which stated that the public sector could not provide adequate services. The objective of compensating road accident victims was to give them reasonable healthcare (paragraph 99). Mr Nel said that giving victims quality health care was not unreasonable, because that was the suggestion of the Constitutional Court. The RABS Bill would be a quality Act and would not be challenged in the Constitution if it included the recommendations from the Satchwell Report. The Department had picked only a few recommendations from the report to suit its own requirements. If a constitutional right was removed, it must be replaced with an equal or better right. Therefore, if general damages were removed, they must be replaced with something similar or better.

Since the Committee had not allowed Mr Lebereko to speak, Mr Nel gave an account of Mr Lebereko's story. He had been involved in a road accident and his face had been disfigured. While in hospital, a representative of the RAF had approached him and asked him how much he wanted. He had asked for R120,000.
The representative had said that that was little, and had offered him R200 000. Mr Leberekho had seen an advert for a lawyer and had contacted him. When Mr Nel had helped Mr Leberekho with his claim, he had been paid out R2.3 million.

Mr Nel said that claimants became victims doubly because they were injured in road accidents and then mistreated by RAF representatives. The RAF and RABS could not play the role of judge and jury by helping victims claim and processing the claim. Victims should have the option to get help from lawyers. The Satchwell report even recommended the representation of clients. Attorneys’ fees may even be capped, but they should not be completely removed. He disagreed with the point that legal fees were removed from the Bill to make it more cost effective. Claimants who would not be satisfied with the outcome of their claim would appeal and review the decision. A review cost R50 000. This would result in higher legal costs, because there would be more claims in RABS because of the no-fault system. To avoid many appeals and reviews, representation should be allowed in RABS. There had to be a balance between benefits and affordability.

Mr Ramatlakane said Mr Nel could not rely on the Constitutional Court matter to say that public hospitals did not provide quality health care and that road accident victims should be treated at private hospitals. Public health care services had to be improved and should not be completely disregarded. He asked Mr Nel how the tariff should be introduced. It could not be put in the Act because tariffs were not determined by the Portfolio Committee. He asked the LSNP to work with the Committee in finding solutions to the problems identified. The Satchwell Report had recommendations which were not binding in law, so the Committee was not obliged to include them in the RABS Bill.

Mr Sibande asked that questions for the Department should be directed to the DoT and not the Committee. The Committee still needed to decide whether victims should be represented by big law firms or lawyers appointed by the government. He commented that tariffs were not set by the Committee, as that was done by the Competition Commission. He asked Mr Nel who the tariff should be set by. Lawyers should not be the ones to determine the tariff. Compensation for injuries should not be determined by lawyers, but by doctors. There were lawyers who had lodged claims and kept the compensation for themselves without giving the client any money. RABS would protect victims from such covert operations by lawyers.

Mr Nel responded to Mr Ramatlakana’s statement about provision of quality health care by saying that the DoT had previously affirmed that RABS was not dependent on the establishment of the NHl, but would have its own medical network. Such a network had not been established.

He responded to Mr Sibande by noting that at the beginning of his presentation, he had apologised on behalf of the legal profession for the behavior of fraudulent lawyers. Lawyers should be allowed to represent clients, as they used precedents to determine compensation. Previously, the RAF had used the “vleis lys” (meat list) to determine compensation when different body parts were injured, but that was no longer done.

The meeting was adjourned.
Road Accident Benefit Scheme (RABS) Bill: public hearings day 3

Transport

23 May 2018

Chairperson: Ms D Magadzi (ANC)

Meeting Summary

The Law Society of the Northern Provinces (LSNP) said that the Road Accident Benefit Scheme (RABS) Bill should be a balancing act between fair compensation and the affordability of the scheme in terms of available resources. Participating in the Portfolio Committee on Transport's public hearings on the Bill, the LSNP suggested that general damages should be included in the Bill as recommended in the Satchwell Report. Removing general damages would infringe on the victims' constitutional rights to dignity and bodily integrity. The Bill had very limited dispute resolution mechanisms, in that it provided for an internal appeal against the decision of the administrator, and then allowed the claimant to take the decision on review to the high court. There were uncertainties about the consequences of the no-fault system. For example, how many claims would be brought, and what would the average cost of each claim be? To address the uncertainties, there had to be an analysis of the trends of road accidents and claims over time, and a costing exercise of RABS by experienced actuaries. If the no-fault system was introduced, it should apply only to healthcare and rehabilitation costs. The Committee was advised to consider the financial viability of offering rehabilitation, given the lack of rehabilitation centres in South Africa.

Meeting report:

Law Society of the Northern Provinces

Mr Gert Nel appeared on behalf of the Law Society of the Northern Provinces (LSNP). He had presented the previous day, and today he was joined by three professionals to make submissions to the Committee regarding the RABS Bill. Advocate Carel van Jaarsveld would deal with the constitutionality of the RABS Bill; Mr Kobus Pretorius, an actuary, would deal with calculations and comparisons to determine whether the Bill was pro-poor; and Ms Elzeth Jacobs, an occupational therapist, would discuss rehabilitation benefits in the Bill.

Adv Van Jaarsveld said he had practiced law for 20 years and had dealt with road accident matters for most of that time, and had represented the Road Accident Fund (RAF) in court. He said there were three basic documents that needed to be discussed — the Constitution, the Law Society of South Africa and Others v Minister of Transport and Another 2011 case (Law Society case), and the Satchwell Commission Report which was published in 2002 after the investigations which had begun in 1999.

The Law Society case required that the RABS Bill to do a balancing act — a duty which the state accepted in that matter. In that case, it had been said that fair compensation should be given in relation to the resources that were available in the scheme. He felt that the Satchwell Commission had succeeded in making recommendations that struck that balance. However, many of the recommendations were not included in the Bill. He was concerned that the recommendations which favoured the administrator were included, but not the ones that protected the victims of road accidents.

Adv Van Jaarsveld focused on three issues with the Bill.

Firstly, the Bill did not allow for victims to claim general damages. The Satchwell Report had recommended that general damages should be kept and it referred to these as life enhancement benefits. The Commission had been indecisive about keeping general damages, because the scheme could save between 35% and 39% of funds by removing general damages. However, it had acknowledged that people with serious injuries needed
further compensation. By not providing such benefits, the Bill infringed section 12 of the Constitution, which dealt with the right to bodily integrity, and section 10, which was the right to dignity. The Law Society case supported the fact that people who were seriously injured in road accidents and had their quality of life reduced, should be compensated. The right to dignity included the right of persons to choose a life that was meaningful to them. The former judge of the Constitutional Court, Justice Laurie Ackermann, had even written a book on human dignity which talked about the retention of inherent human worth, as it was the cornerstone of the Constitution. The purpose of the Bill was to give the widest possible protection to victims. However, RABs limited the benefits available.

Secondly, Adv Van Jaarsveld dealt with section 27 of the Constitution – the right to healthcare and social security. The Constitutional Court had said that schemes such as RABS needed to be viable, financially and with regard to administration. He was uncertain about whether RABS could handle the administration of claims, since it would be dealing with all stages of the claiming process.

Thirdly, the Bill had very limited dispute resolution mechanisms. It provided for an internal appeal against the decision of the administrator, and then allowed the claimant to take the decision on review to the high court. That was not much of a remedy, because a review would deal only with whether the administrator had followed the correct procedure, but not consider the merits of the case. He referred to research by an academic in the North West Province on the comparison between dispute resolution mechanisms in social security and consumers, which had found that consumers had better protection than people receiving social services. The Satchwell Commission had recommended a two-tier internal appeal process, followed by an appeal and review to the high court on issues of law and fact, but this recommendation had not been included in the Bill. The courts encouraged internal remedies to resolve non-contentious matters so that the matters that went to court were proper disputes. Victims should be able to take matters to court so that they were not limited to internal remedies which would be heard by the internal body that had made the original decision. The limitation of dispute resolution mechanisms was against the interest of victims.

Mr Pretorius, the actuary, said that he would discuss loss of earnings and would base his presentation on the case study of Mr Lebereko, a victim of a road accident who had been assisted by Mr Nel in claiming from the RAF. Mr Lebereko’s earnings, excluding general damages under the RAF, had been estimated at R1.4 million, and under RABS he would receive R420 000 – 30% less than what he would have received from the RAF. RABS was not clear on whether victims could claim temporary loss of income benefits between months three and 24 after the accident. Claiming this benefit depended on a medical opinion as to whether the victim was able to continue working after the accident. Mr Lebereko had returned to work after two months, so he was not able to claim under the RAF.

However, Mr Pretorius was uncertain about the medical standards applied in determining whether a victim could claim temporary loss of income benefits. He was also uncertain about the long-term loss of income benefits which would be calculated from month 25 post-accident until retirement. The formula was 75% of the pre-morbid income, less the post-accident income. He was uncertain about whether the income at the time of the accident should be adjusted for inflation. Passive income, like a return on savings, should be included in the post-accident income.

Mr Pretorius said that the fact that the benefits under RABS were less did not mean that RABS was a more affordable scheme. The True South Actuaries and Consultants report from January 2017 showed that the medical and rehabilitation costs would be more than three times higher than the costs under the RAF. This would result in the overall cost of RABS being higher than the RAF. He was uncertain about the consequences of a no-fault system. For example, the number of claims RABS would receive was unknown, as was the average cost of the claim. The True South report had said that savings under RABs would come mainly from the removal of general damages, and amount to about 27.29%. He was uncertain about the administration expenses.
The report estimated that those would stay the same. He disagreed with the report on that point, and felt that more benchmarking needed to be done to determine the administration expenses, given that administrators would be more involved in the claiming process under RABS. Given that RABS intended having a medical scheme for victims, the administration on that would also be intensive and require more funds than the RAF.

To address the uncertainties, he suggested that more trends be considered, to analyse the trends of road accidents and claims over time, and a costing exercise of RABS by experienced actuaries, using the data used by True South Actuaries.

Mr Pretorius recommended that more research be done on medical tariffs, as it was difficult to cost something if the price was unknown. A tariff needed to be set to determine the cost of RABS. His concerns were that if the tariff was too low, the private sector may not want to participate and if the tariff was high, it raised the question of affordability for RABS. If the medical scheme under RABS was run like conventional medical schemes, healthcare service providers may charge victims of road accidents excess fees.

To make RABS affordable, he proposed that the Committee further investigate the RABS cost drivers. If it was legal, general damages could be reduced, not completely removed. If legal fees were too high, one lawyer could be appointed to assist the claimant and defendant. If there was disagreement, they could appoint a second lawyer. The Department of Health could address the concerns about private healthcare costs. If the no-fault system was introduced, it should apply only to healthcare and rehabilitation costs. The claims under that system must be monitored over time to determine whether more benefits could be introduced under the no-fault system.

Ms Jacobs, occupational therapist, presented on the accessibility of rehabilitation under the RAF and RABS, having done extensive research on the matter. She said that RABS prioritised rehabilitation and emphasised the return to work of victims. Prioritising rehabilitation would result in decreased benefit payment periods, as benefits would end when a claimant returned to work.

She presented her findings using a scenario of four people involved in an accident. If two of them were unemployed, RABS would have to pay for medical expenses and rehabilitation to prepare them for employment after recovery. They would have to be given jobs after recovering. This would be difficult task, as jobs were not easy to find in South Africa, especially for disabled people. If the other two people were employed in high risk occupations, they would need physical and vocational rehabilitation.

Ms Jacobs said there were only 35 rehabilitation facilities in South Africa. Eleven were run by government and 24 by the private sector. Only four provinces had state rehabilitation centres -- Gauteng, Western Cape, North West and KwaZulu-Natal. The private rehabilitation centres were only in Gauteng, Western Cape, KwaZulu-Natal, Eastern Cape, Free State and Mpumalanga. Limpopo and the Northern Cape had no rehabilitation centres. Only 18 centres offered vocational rehabilitation.

Physical rehabilitation helped people regain their normal functions, whereas vocational rehabilitation allowed someone to return to work. Five state facilities offered vocational rehabilitation, but the services were very limited and could not count as services. Services were mainly limited in Limpopo, Mpumalanga, Northern Cape and the North West. Patients from those provinces were treated mainly in Gauteng. Most centres were located within the cities so people in the rural areas struggled to get to the centres. She observed that the challenges faced by victims of road accidents were that if there was no rehabilitation centre in their region, they had to travel to other regions. Some people could not afford the cost of travelling to another region. South Africa did not have return-to-work programmes. Rehabilitation did not always restore full functionality, which meant that many people were not able to return to work.
Ms Jacobs recommended that rehabilitation be offered to all victims of serious injury, whether employed or unemployed, as it was a basic human right. The financial viability of offering rehabilitation to victims of road accidents was not possible because there was a lack of rehabilitation centres in South Africa; rehabilitation was not always effective; South Africa had a high unemployment rate, especially regarding disabled persons; and there was a lack of return-to-work programmes. Rehabilitation was very important for those who qualified, but it would not be financially viable under RABS.

Mr Nel said that the RABS Bill was not pro-poor because a claimant needed a medical report to lodge a claim with the RABS administrator. Clause 43 sets out the obligations of the claimant and beneficiary. The fact that RABS would be a no-fault system did not mean that claimants would automatically be compensated. Claimants first needed to qualify to be awarded benefits.

Discussion

Mr M de Freitas (DA) noted Mr Pretorius’s point that RABS would require intensive administration, and asked how that problem could be addressed. He asked what the Law Society of the Northern provinces thought of the fact that every person injured in a road accident could claim from RABS -- even a drunk driver -- and on the point that RABS would not pay a claimant until 180 days had passed since the accident. He asked for clarity on the point that RABS favoured employed people over the unemployed.

Mr Nel responded that the Department had to do proper benchmarking to determine whether proper administration would be done under RABS. Administration under the RAF had been very poor over the years, and the fact that the RAF would be merged into RABS was concerning.

Adv Van Jaarsveld agreed that a drunk driver would be able to claim under RABS. The fault system was the fairest when considering victims of road accidents, as perpetrators of accidents were not compensated.

Ms Jacobs said that RABS intended saving money by rehabilitating people and having them return to work so that benefits could cease.

Mr M Sibande (ANC) said that the Satchwell Commission had not been the only commission appointed to make recommendations, and the Portfolio Committee could not be told to include all the recommendations in the Bill, because the Satchwell Report was not binding in law.

Adv Van Jaarsveld said that the Satchwell Commission was different from other commissions, because it was the only one that had started after the Constitution had been passed. It was the only commission that accepted that the RABS Bill fell under the social security cluster, and all its recommendations had been made with that in mind. It had been given an implied approval by the Constitutional Court in the Law Society case. Its recommendations were very balanced.

The Chairperson asked for clarity on the dispute resolution mechanisms between the claimant and the administrator.

Adv Van Jaarsveld said that the RABS Bill allowed the claimant to appeal a decision only internally and then take the matter on review to the High Court. He suggested that administrators were given wide discretion to make decisions, but claimants had very few dispute resolution mechanisms available. A good example of dispute resolution mechanisms was that of the pension fund adjudicator, who had a wide discretion on how to investigate matters and could make any order that a court could make. If a claimant from a pension fund was unhappy with the internal process, they may take the matter to court and raise the dispute afresh. Consumers were also protected, in that there was the Consumer Tribunal, but if a consumer was unhappy with the decision of the tribunal, they may raise the matter in court. RABS needed a stronger dispute resolution mechanism to protect victims’ rights.
The Chairperson asked Adv Van Jaarsveld to make a written submission to the Committee on appropriate dispute resolution mechanisms.

Ms S Xego (ANC) raised a concern about using victims’ pictures in presentations to the Committee. For example, she did not appreciate the fact the LSNP had shared a picture of a woman whose leg had been injured, but the image had been taken of her stomach and below, wearing underwear. [point of clarity the presenter did not use pictures showing “underwear” it was in fact one of the previous week's presenters]. She also observed that the case studies were only of black people, which gave the impression that only black people were vulnerable. She asked whether the LSNP represented people of other races. She noted that Adv Van Jaarsveld had spoken about that the unconstitutionality of the Bill, and asked him to point about the unconstitutional clauses. She asked whether the LSNP had considered that the Department of Health was planning to introduce the National Health Insurance (NHI), which meant that RABS did not have to rely on private medical expenses. Would the LSNP accept the Bill if a medical tariff was set and presented to the public?

Mr Nel apologised for sharing the image of his client. He had wanted to illustrate the fact that RABS would not compensate serious injuries, like the one in the image. He said that he did not choose his clients according to their race. In the matter of Law Society of South Africa and Others v Minister of Transport and Another 2011, the court had said that victims of road accidents should be given medical treatment and if the government could not provide such treatment, the victims must be taken to private hospitals. Knowing the tariff would allow the public to assess the affordability of RABS.

Ms Xego asked Mr Pretorius why Mr Lebereko’s earning had been valued at R1.4 million, and why the R420 000 under RABS would be insufficient.

Mr Pretorius had used expert input from various medical practitioners. He had looked at Mr Lebereko’s earning before the accident. He could not work for two months after the accident. When he returned to work, he could not earn what he had earned before the accident. The present value loss of earnings amounted to R1.4 million. RABS limited the compensation that may be paid to the victim, in that Mr Lebereko would qualify only for the long-term benefits which were paid out two years after the accident.

Mr Nel said that inflation and career-pathing were not considered under RABS. The purpose of the RAF was to put the victim in the financial position they would have been in, had the accident not happened, whereas the purpose of RABS was not to compensate. The RABS Bill sought to balance the affordability of the scheme and paying out the claims made.

Mr T Mpanza (ANC) said her had also found the images presented offensive, and asked presenters to be sensitive to the diversity of South Africa. He asked that presentations reflect the true political nature of the country. He asked the LSNP to focus on matters involving the Committee and direct its issues with the Department of Transport through other channels, so that their concerns were addressed. He asked the LSNP for its view on a comment made by the Black Lawyers’ Association the previous day that the Bill favoured the rich and not the poor. He asked Adv Van Jaarsveld to indicate which clauses of the Bill were unconstitutional. He noted that the Portfolio Committee had been accused of implementing only parts of the Satchwell Report that favoured the administrator, and not the victim. He said that the Committee was not compelled to implement the recommendations, as they were not binding law.

Mr Nel apologised again for the unintended racial undertone of the case studies presented. He did not believe that the Bill favoured the rich over the poor, as people earning above a certain amount and had medical aid would be excluded from benefiting under RABS. He advised that there should be a peer-review process for determining the medical tariff.
Adv Van Jaarsveld said that the Bill could not be passed if it was unconstitutional. The court in *Law Society of South Africa and Others v Minister of Transport and Another* 2011 used the reasonableness test to determine whether removing certain benefits in the Road Accident Fund Act was constitutional or not. The court had found that removing general damages infringed section 12 of the Constitution, and limiting loss of earnings benefits infringed section 25 of the Constitution. Rights were being limited in the Bill, and the justification for the limitation was the funding crisis of the RAF. Victims' constitutional rights must be balanced against the available resources. The Satchwell Commission had a good balancing act, and that should be used as the starting point. It was the only commission that had been started after the 1996 Constitution. The report was not binding, but had valuable recommendations.

The meeting was adjourned.
EXECUTIVE SUMMARY FOR PORTFOLIO COMMITTEE

This is a summary of a fuller opinion provided earlier APRAV in May 2018 (see attached as annexure “N2”) 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.

The Bill follows upon the far-reaching amendments brought about to the Road Accident Fund 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. (The Road Accident Fund Act as amended in 2008 is referred to as “the New Act”.2)

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. Accordingly, any scrutiny of the Bill cannot be done without regard to the judgment in Law Society.

RATIONALITY REVIEW

From a reading of Law Society, it would appear that when conducting a future rationality review of the Bill the courts will have to bear in mind that the purpose or end of the Bill has already been found in Law Society3 to be to introduce a scheme which

- is financially viable,
- is equitable,
- renders a fair, self-funding, viable and more effective social security service to victims of motor vehicle accidents, and
- is intended to be part of a broader overall national scheme providing compensation for victims of all4 accidents.

The broad aim of a rationality review is not to determine whether the Bill is the best or most ideal

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1 References to the a quo judgment will be “Law Society a quo”.
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”.
3 At 422F-H.
4 Therefore not just road accidents.
means with which to reach this end and the enquiry is only whether the Bill and its contents can be rationally linked to the above purpose or end.

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 fails to be struck down as constitutionally bad."

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.

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.

This creates a further problem. As stated above, one of the over-arching 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 exited hitherto.

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 itself, albeit in a different context, the Constitutional Court 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 seemingly 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.

It is accordingly submitted that in the context of this particular Bill, the Court would not to be able avoid the question of the Bill’s fairness or its comparability to the previous scheme when conducting the rationality review. This will allow the arguments 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 hereinafter however there are various arguments that such breaches will in any event occur in terms of the Bill).

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:

- 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;

- 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

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5 421G-H.
6 The rule is not immutable, as expressed by Mosenke DCJ in his dissent in Merafong (supra) para [171]-[172] at 225F-226C
calculation of the compensation as well as the time frames within which compensation is payable;\(^7\)

- The insistence that benefits are to be paid in instalments\(^8\) 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 tax\(^9\), once it is payable, it will be taxable again.\(^10\)

- 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.\(^11\)

- The provision\(^12\) that no legal costs may be part of the compensation thus clearly discouraging claimants from seeking legal advice as to the full extent of their rights.

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

- 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

\(^7\) 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.

\(^8\) Sections 35(5)(a) and 38(12)

\(^9\) Sections 35(2)(c) and 36(7)(a)

\(^10\) *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.

\(^11\) 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.

\(^12\) Section 56
which are truly criminal.  

- The strange arrangement 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.

- 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 crime and people deliberately injuring themselves.

**REASONABLENESS REVIEW**

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 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 and 25 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. What follows is a brief discussion of those Chapter 2 rights which are affected by the Bill in its present form.

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13 See par 26.2 below.
14 Section 35(3)
15 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.
A. Section 9 - Equality

Illegal aliens

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

There is thus a clear differentiation in the Bill based on residency status. This may 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.

Even with regards to truly illegal immigrants it would appear from the case law 16 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.

One of the aspects which render discrimination unfair as required by s 9 of the Constitution is the likelihood of stigmatization of the group affected by the differential treatment17. South Africa has not been immune to the issues stemming from xenophobia and the Bill is clearly open to criticism on this basis.

Illegal Earnings

Both section 34(3) of the Bill dealing with Income Support Benefits as well as section 38(3) dealing

16 Khoza v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC) para. [59] at 532D-G
17 See Khoza(supra) paras [73]-[74] at 537F-538B
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".

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.\(^\text{18}\) This differentiation therefore clearly discriminates against individuals whose source of income is illegal purely because of a technical cause.

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.

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.

**COIDA and Other Schemes**

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

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\(^{18}\) 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
Act such as COIDA and the Bill are justifiable. (There seem to be no suggestions of any amendments to COIDA.)

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 thus 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.)

**B. Section 10 – Dignity**

**Abolition of general damages**

Whereas the New Act retained a limited entitlement to general damages for victims suffering a "serious injury"\(^{19}\), this entitlement is abolished *in toto* by section 28 of the Bill;

The claim for general damages was dealt with at length in the Satchwell report\(^{20}\) and culminated with the Commission recommending in paragraphs 36.193 to 36.201\(^{21}\) 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.\(^{22}\))

The Commission justified the retention of benefits for serious injuries by stating the following in

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\(^{19}\) Southern African Law, 1999, THRHR, p.34.

\(^{20}\) Section 17(1) & (1A) of New Act read with Regulation 3.

\(^{21}\) See: Chapters 35, 35A and 26.

\(^{22}\) Pages 1151-1153.

\(^{22}\) From there the current system set out in the New Act.
paragraph 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 have 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’.”

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 Pillay23 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”.

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 rearranging as appears from the work of (former Constitutional Court Judge) Ackermann Human Dignity: Lodesar 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’.”

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23 2008 (1) SA 474 (CC) para [150]
Choice of medical practitioner

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 treatment\(^{24}\) and, secondly, to be treated by a medical practitioner of choice.

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.

No medical costs

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 Administrator in its discretion agrees to it. 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 \textit{at all} and therefore be left with no compensation, let alone any compensation which is in line with reality.

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 compensation\(^ {25} \) these victims will further be deprived of the advantages of the Contingency Fees Act 66 of 1997.

\(^{24}\) See Castell v De Greeff 1994 (4) SA 408 (C) 420G-421D
C. Section 12 – Bodily Integrity

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. In particular the reasoning went as follows:

- 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;\(^\text{26}\) and
  
- 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.\(^\text{27}\)

The Court went on to hold this limitation justifiable. The Bill however introduces further limitations and in particular the claim for general damages is abolished in full. The impact on this right brought about by the new provisions in the Bill and the question as to whether its limitation is still justifiable in light of the further impairments introduced will obviously have to be considered afresh in any future reasonableness review.

D. Section 25 – Deprivation of Property

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.\(^\text{28}\) Similarly, the further impairments brought about by the Bill will necessitate a reconsideration with regards to this section.

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25 In this instance with no discretion given to the Administrator.
26 Par [63] at 427C
27 Paras [66]-[67] at 427H-428D
28 See paras. [81] – [86] at 431E-433C
E. Section 27 – Health Care and Social Security

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” 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.”

In paragraph [100] 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.”

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).

The only specific limitation mentioned in the subsection is the inadequacy of resources. The section further implies that the State should devise a comprehensive and workable plan which can be effectively implemented.

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29 At 436F.
30 At 436G.
31 At 436H.
33 See: Government of RSA v Groothboom 2001 (1) SA 46 (CC) at para. [38] at 67H-I, with reference to the similar provision in section 26 of the Constitution.
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.

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.

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, Volume 2 of the report, 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 filed 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.”

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

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 discourage a claimant from approaching the Administrator.
At this juncture one may have regard to the Administrative Principles34 to be applicable to the Scheme as identified by the Satchwell Commission being:

a) Entitlement;
b) Independence;
c) Flexibility;
d) High quality decision making; and
e) Speed in making decisions and in providing benefits.

To this may be added the further concepts of:

f) Promotion of the Scheme; and
g) Clear formulation of policy.

At present there exists very little confidence that principles c) to g) are achievable based on the RAF’s track record.

The Bill further falls short in complying with the first principle, being that of Entitlement. In paragraph 41.14 (p.1323) the Commission states:

"The principle of entitlement suggests that the administrative authority should refrain from adopting an adversarial approach to claimants. It is not appropriate, for example, to require a claimant, at his or her peril and without assistance, to prove every element of a claim."

34 In paragraph 41.10, p.13222, Volume 2
Paragraph 41.15 then concludes:

“Disputes in matters of both fact and of law will arise and will have to be resolved, ultimately (if necessary) by an Appeal Tribunal.”

A reading of the Bill in its present form however leaves the clear impression that the victim will basically be in the hands of the Administrator, will have very little input in the decision making process, will receive limited financial assistance from the Administrator in proving his/her claim, and ultimately (as dealt with further below) will have a virtually inconsequential, but definitely very limited, method of dispute resolution available.

The second principle of Independence is defined as follows in paragraph 41.17, p. 1323 of the Satchwell report:

“The administrative authority of the Scheme should attempt to be independent of the Government of the day to the maximum extent possible.”

In paragraph 41.18, the importance thereof that the day-to-day administration of the Scheme should be independent of the control or interference of the Government is stressed. In particular the commission suggests that “significant policy changes should be implemented through public and Parliamentary debate and legislation rather than by means of Government directives.”

Nonetheless the Bill retains a feature found in previous third party statutes whereby wide regulatory powers are given to the Minister. This seems to be at odds with what is envisaged by the principle of Independence as defined, particularly as the use of these regulatory powers has a chequered history in third party law with many minister-made Regulations having been struck down over the years as
being ultra vires or unconstitutional35.

The Bill is now accepted as being part of the State’s social security legislation. Accordingly, the requirements of section 27 and the impact of the abovementioned administrative principles will not be avoidable in any future constitutional review. In fact it is anticipated that this will be the main feature of any such exercise.

F. Section 34 – Access to Courts

The reference in this section 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 justice36.

The only dispute resolution mechanism which is found in the Bill is that contained in section 55. 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 sense37 (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 appeal38.

Section 55(6) clearly provides for a classic judicial review only thereby limiting the enquiry simply

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35 E.g. Bezuidenhout v RAF 2003 (6) SA 61 (SCA), Engelbrecht v Road Accident Fund 2007 (6) SA 96 (CC) and Combrink v Road Accident Fund and Another [2015] ZAGPHC 760
36 Nyenti Access to justice in a South African social security system: Towards a conceptual approach 2013 De Jure 910
37 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]
38 See Tikly v Johannes NO 1963 (2) SA 588 (T) at 590F-591A and Hoexter Administrative Law in South Africa (2012) at 68-70
to whether “the functionary has performed the function with which he was entrusted.”

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

- Whether the injury was sustained in a “road accident” as defined in section (1) of the Bill;

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

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

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.

The Satchwell Commission, when dealing with dispute resolution procedures\(^\text{40}\), recommended an extensive two tiered process involving a Benefits Review Panel and a Benefits Appeal Tribunal.\(^\text{41}\)

In contrast to the Bill, the Commission recommended\(^\text{42}\) 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

\(^{39}\) MEC for Env Affairs & Dev Planning V Clairison’s CC 2013 (6) SA 235 (SCA) par [18]

\(^{40}\) Chapter 25 of Satchwell Report, pages 755-788.

\(^{41}\) 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.

\(^{42}\) At para. 25.195, page 786.
of these provisions, which clearly envisage a wide process of dispute resolution, have been retained in the Bill.

The author Nyenti\(^{43}\) 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 contrast to the narrow internal appeal and equally narrow 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.

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 its own, but also allows a wide appeal to the High Court which essentially entitles the Applicant to bring his/her entire application afresh and to lead evidence anew.\(^{44}\)

It thus appears that, when compared with both 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.


\(^{44}\) Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at 7251-726E.
G. Tariffs

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.

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.

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.

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.

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.

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.

**Conclusions**

In paragraph 40.43 (p1296), the Satchwell Commission identified ten essential features of any
extended scheme or schemes being the following:

a) Positive measures to promote safety and accident prevention;

b) Elimination of “fault” as a criterion of entitlement to benefits;

c) Periodic benefits for loss of income and loss of earning capacity and, in some cases, the correlation of benefits to losses sustained by accident victims;

d) Maximum incentives and aids to rehabilitation;

e) Adequate benefits to non-earners sustaining long-term loss of earning capacity;

f) Priority to secure adequate benefits for those victims who sustained serious and long-term disability and incapacity;

g) Priority given to the provision of quality medical care, rehabilitation and life care to accident victims;

h) Embodiment of the fundamental principles of “reasonable, affordable, equitable and sustainable” in benefit schemes and general health care systems;

i) Administration of the scheme in accordance with the principle of entitlement, with the emphasis on high quality decision making; and

j) An independent review and appeal system retaining access to the Courts.

As this submission has attempted to show, the Bill in its present form suffers from a number of constitutional shortcomings and the Bill requires a considerable amount of further thought before it meets the above essential features. In particular the Bill does not adequately reflect features c) to j) from a constitutional point of view or in light of the Satchwell Report. Many of the other presentations submitted to the Portfolio Committee further show the Bill’s shortcomings with regards to the effective inclusion and attainability of these features as well.

It is evident that any new scheme of compensation will have to strike a balance between the
rights and needs of the road accident victim on the one hand and the State’s resources and ability to meet same on the other. The Satchwell Report provided an erudite and considered set of recommendations which went a long way towards striking the balance required and towards identifying the specific areas which demand careful attention.

It is thus disconcerting to note, when comparing the Commission’s report with the contents of Bill, that many of the Commission’s recommendations which favour the Administrator have been retained in the Bill, whilst many, if not most, which favour the victim have either been watered down or left out altogether.

I advise accordingly.

ADV C VAN JAARSVELD
GROENKLOOF CHAMBERS
5 June 2018
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”.

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..."

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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

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.

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 31, 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.

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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 deficit\(^5\) 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.

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\(5\) At 418C.
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, quoting\(^6\) 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

\(^6\) At 419G-420A
diseases. He 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”.

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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 all\(^9\) 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.
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 fails 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 exited 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 itself\textsuperscript{10}, 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.

\textsuperscript{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 review\(^\text{11}\). 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 instalments\(^{13}\) 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 claimant's income after tax\(^{14}\), 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 provision\(^{17}\) 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 criminal\textsuperscript{18}.

21.8 The bizarre arrangement\textsuperscript{19} 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

\textsuperscript{18} See par 26.2 below.
\textsuperscript{19} Section 35(3)
crime and people deliberately injuring themselves\textsuperscript{20}.

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

\textsuperscript{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.)
Section 9 - Equality

26.1 Illegal aliens

26.1.1 In terms of section 27(4)\textsuperscript{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 \textit{Larbi-Odam v Member of the Executive Council for Education (Northwest Province) 1998 (1) SA 645 (CC)}\textsuperscript{22}.

\textsuperscript{21} \textit{Limitation of Administrator’s Liability}

\begin{align*}
27(1) & \quad \ldots \\
(4) & \quad 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.
\end{align*}

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 held$^{23}$, 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 judgment$^{24}$ that budgetary constraints might justify the refusal of health care services to individuals who are illegally in the

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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 treatment\(^{25}\). 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. This differentiation therefore clearly discriminates against individuals whose source of

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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

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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 Court\(^2\) *“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.)

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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 treatment\(^{29}\) 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 compensation\(^{30}\) these victims will further be deprived of the advantages of the Contingency Fees Act 66 of 1997.

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\(^{30}\) 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 report\(^ {32}\) and culminated with the Commission recommending in paragraphs 36.193 to 36.201\(^ {33}\) 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

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\(^{31}\) 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

\(^ {35} \) 2008 (1) SA 474 (CC) para [150]
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]

"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.

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

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.
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 filed 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.

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To the similar provision in section 26 of the Constitution.
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 attack\(^46\) should be avoided.

\(^46\) As happened in the matter of *Jooste*. 
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 section\(^{47}\) 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 justice\(^{48}\).

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\(^{47}\) "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."

\(^{48}\) *Nyenil 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) Reconsider 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."\textsuperscript{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.

\textsuperscript{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 procedures\textsuperscript{53}, recommended an extensive two tiered process involving a Benefits Review Panel and a Benefits Appeal Tribunal.\textsuperscript{54}

31.8 In contrast to the Bill, the Commission recommended\textsuperscript{55} 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 Nyenti\textsuperscript{56} 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:

\textsuperscript{53} Chapter 25 of Satchwell Report, pages 755-788.
\textsuperscript{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.
\textsuperscript{55} At para. 25.195, page 786.
"...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.\textsuperscript{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 limitation\textsuperscript{58}. 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.

\textsuperscript{57} Meyer \textit{v} Iscor Pension Fund 2003 (2) SA 715 (SCA) at 725I-726E.

\textsuperscript{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 \textit{v} Van der Linde 1997 (3) SA 1012 (CC) at para. [25] at 1024F-1025A.
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 made out against the constitutional validity of the Bill in its present form.

I advise accordingly.

ADV C VAN JAARSVELD
GROENKLOOF CHAMBERS
5 April 2018
Portfolio Committee on Transport

Road Accident Benefit Scheme (RABS) Bill [B 17 – 2017]

Public Hearings
23 May 2018
9:30 – 10:00 (RABS 2017-9)

Kobus Pretorius
Fellow of the Actuarial Society of South Africa
Chartered Enterprise Risk Actuary

Presentation by Actuary Kobus Pretorius (BSc (Hons), FASSA, CERA)
Second presentation included in the presentation slot of the Law Society of the Northern Provinces (RABS 2017-9)
Mr Lebereko – RAF vs RABS

- RAF Loss of earnings ~R1.4m (for loss of income only)
- RABS Monthly payments valued at ~R420 000 once off
- RABS therefore ~30% of RAF (for this example – for loss of income only)

- Temporary LOI (loss of income) benefit (months 3 – 24) → Uncertain whether Mr Lebereko would have qualified or not
- Long term LOI benefit (months 25+; retirement age 60 years) → 75% of pre-morbid income less post-morbid income (uncertainties: monetary terms, deemed income?)
- Section 36 5(a): “other income-generating opportunities, and passive income available to an injured person”

Although it seems that RABS should be significantly cheaper based on this example, this will not necessarily be the case. The main purpose of this example is to demonstrate the significantly lower benefit certain claimants will receive under the RABS compared to the current benefit (or compensation) received under the RAF. This is also not a “high-income” case, but rather an example of a relatively low income earner (R48 000 per annum at the time of the accident (2008)).

Even if the attorney retained 25% as a contingency fee, Mr Lebereko would still only receive ~39% under the RABS compared to the RAF.

We only considered the loss of income benefit in this example (we therefore ignored general damages and medical/healthcare expenses). It is also important to note that the RABS Bill is not clear on a number of points... These include:
- Which medical criteria will apply to determine whether a claimant qualify for a temporary LOI benefit? Mr Lebereko was unable to work for a 2-month period following the accident. We therefore assume he would not have qualified for the temporary LOI benefit on medical grounds (even though his earnings dropped post-accident).
- Is the actual post-accident earnings an important determination when determining
the temporary LOI?

• Not clear whether time value of money (monetary terms) will be taken into account when determining the various benefits (especially the long term LOI benefit).

• How to interpret deemed income? Given the South African unemployment situation, it seems quite penal should someone lose a job as a result of the accident and after recovery struggles to find employment again and then they are deemed to be able to earn as was the case pre-accident?

• It seems also unfair to penalise a claimant who invested pre-accident earnings only for post-accident earnings to be reduced based on returns on investments (passive income)?
Mr Lebereko – RAF vs RABS

- RABS not necessarily more affordable...

- Medical expenses expected to be much more expensive (True South report dated 20 January 2017: ~3 times the cost of medical costs under RAF)

- Introduction of no-fault:
  - Number of claims
  - Cost per claim (merit apportionment removed)

Following from the previous slide, it was mentioned that although RABS may pay a lower LOI benefit compared to RAF, it is still possible for RABS to be more expensive compared to RAF. The "cost drivers" which is of concern and will be the focus of the rest of the presentation is medical/healthcare/rehabilitation expenses and the introduction of no-fault.

True South report: Medical costs (including rehabilitation) under RABS ~3 times that of RAF
No-fault uncertainties: Number of claims as well as average cost per claim effects (merit apportionment removed – as well as reduction for pre-existing conditions).
Costing – RABS vs RAF

- Costing of RABS sensitive to healthcare tariffs, impact of no-fault, etc.
- RABS Costing (True South 20 January 2017)
  - p7: “subject to large number of uncertainties and even unknowns at this time”
  - p9: “27.29% saving by removal of general damages
  - p9: Administration expense assumed to remain the same
  - p10: “subject to some material uncertainties”
  - p10: RABS will be more expensive if the 30% more accidents than expected scenario turns out to be reality – even ignoring the other uncertainties (e.g. 75% threshold, rehab costs, fees & admin)
- Consider trends and second independent costing (date of accident and date of settlement)
- More detail on uncertainties - sensitivities

As mentioned, the costing of RABS is sensitive to the healthcare tariffs and impact of no-fault. It is also important to consider the True South report as a whole. Even though it shows a potential saving compared to RAF, it also include important warnings. E.g. p7...

A large portion of the savings is driven by the removal of general damages (also refer to proposals at the end of the presentation). (p9)

p9: It feels intuitively wrong for administration expenses to remain the same under RABS. I would have expected this to be based on an in-depth benchmarking analysis, especially given the “medical scheme” nature of administration expected.

p10: Another warning that the results in the report are subject to material uncertainties. As actuaries we tend to include sensitivities that reflect the level of movements / uncertainty around the best estimate. Including sensitivities of this magnitude (30%) is in my opinion another indication that the authors believe the results are based on “material uncertainties” and “even unknowns at this time”. One then need to take into account that only allowing for the 30% increase in accidents will result in RABS being more expensive than RAF (based on the sensitivities included.
in the report) – not to even mention the other sensitivities considered in the report.

I would expect a second independent costing exercise be performed by actuaries with experience of the RAF, based on the same data made available to True South (albeit updated to the latest date). I would then expect True South to update their report and then both parties compiling new reports that also include trend analyses (date of accident as well as settlement of claims are important). I would also like to see these reports to include more detail on the uncertainties – with sensitivities being justified where possible.

It is in all South Africans best interest to be triple sure that RABS will not be more expensive than RAF before it is being implemented and impossible to reverse (however, again note my proposals at the end whereby I consider a step-wise approach to a hybrid solution).
Healthcare

- Difficult to assess costs of RABS:
  > Medical tariffs not yet determined
    - Too low a tariff will result in unwillingness of private sector to participate
    - A higher tariff will result in higher expenses (affordability? -- especially coupled with no-fault basis)
    - It is quite common for private health care providers to charge different tariffs compared to the various "medical scheme tariffs" -- and thus the big market for gap insurance cover
    - A number of medical schemes offer more expensive options that will pay a higher tariff (e.g. 2x or 3x the inhouse tariff) -- under RABS the road accident victim will retain the risk of paying for excess costs (co-payments)

It is also important to note that should medical tariffs be too low, the private sector will likely remain unwilling to "participate". On the other side, the higher the tariffs the more expensive it will be (especially linked to no-fault). It is therefore a bit of a catch-22.

A single set of tariffs is not ideal if one consider the current "medical scheme tariffs" used in the market. It is quite common for providers to charge in excess of these tariffs with the patient being responsible for co-payments / additional payments not covered by the medical scheme (this is the reason for the big market for gap insurance cover).

This is even the case for medical scheme options which pay up to 2x or 3x the "medical scheme tariff". Under RABS the RAV will retain the risk of paying for excess costs.

Not mentioned (lack of time):
Private vs Public sector –SLAs?
i.e. the administrator becomes a medical scheme for road accident victims.
Proposal

- Affordability of RAF
  - Firstly investigate the current cost drivers in detail
  - Reconsider general damages under RAF (e.g. only pay x% based on affordability – set by Minister once per annum applicable to trial date)
  - If expert/legal fees are seen as excessive, investigate it and consider specific solutions (e.g. pre-scribed hourly fees, only one expert when agreed by both parties)
  - Address administration and legal defence inefficiencies
  - Consider structural problems in relation to private healthcare costs (i.e. competition law, costs managed (or not managed) by medical schemes, hospital groups, etc. – Department of Health)

I therefore recommend:

1. First understand the cost drivers of RAF.
2. Reconsider general damages under RAF (this is the key saving under RABS – no reason that it cannot be done under RAF) – however, I’m not a legal expert. This will depend on whether it is legally possible to remove general damages (but maybe paying only x% is some sort of hybrid solution which will be allowed legally?)
3. Expert/legal fees are often touted as being excessive. I propose these are investigated and considered specifically (e.g. pre-scribed hourly fees, using only one expert per case (e.g. one actuary vs two – if the defendant (RAF) is unhappy with the report provided by the claimant, only then should they request a second report).
4. Admin and defence inefficiencies...
5. Structural problems in the healthcare environment... I read an article last week that the Minister of Health is working on new regulations which might be the solution to this problem.
Proposal

- If savings are generated based on proposals...
  ➢ Introduce no-fault only for medical and rehabilitation costs
    ▶ Will be able to generate statistics on no-fault and medical / rehabilitation costs in practice
    ▶ Will reduce the uncertainties in relation to costing other changes to benefit design and thus reduce the risk of changing to RABS only to realise too late that it is also not affordable
  ➢ If there’s more room to enhance benefits (e.g. after 5 years of observing initial changes)
    ▶ Introduce minimum monthly benefit on no-fault basis paid as a lump sum (i.e. similar to current average annual national income and income support benefit)

If, following the proposals on the previous slide, savings are generated, I will introduce no-fault only for medical and rehabilitation. Over time more data / statistics will be generated on the impact of no-fault as well as the medical / rehabilitation costs in practice.

This will reduce the uncertainties (sensitivities) in costing the other changes to benefit design and thus reduce the risk changing to RABS only to realise too late that it is also not affordable.

If, after a period of say 5 years of observing the initial changes, there’s more room (i.e. money / budget) to enhance benefits, I will introduce a minimum monthly benefit on a no-fault basis paid as a lump sum. Reason for lump sum: once-off payment with no future admin hassles – nor future cost uncertainties.

To summarise: I believe too many uncertainties remain in relation to the costing of RABS – especially in relation to medical/healthcare/rehabilitation costs and the impact of no-fault. I however believe there’s a stepped approach that can be followed to develop a hybrid solution which include some elements of no-fault.
Kobus Pretorius (Fellow of the Actuarial Society of South Africa, Chartered Enterprise Risk Actuary) – Presentation to the portfolio committee on transport – Parliament – 23 May 2018)

My comments / opinion on some questions received:
1. Examples provided of fraudulent / corrupt RAF claims reflecting badly on legal profession.
   • It is important to note that the legal profession / attorneys are coordinating a RAF claim from A-Z. As a result they tend to be the “face” of RAF claims – and probably in the best position to commit fraud. I however doubt that an attorney can commit such fraud all on its own. I therefore expect that fraudulent networks consist involving many players from different backgrounds (e.g. the road accident “victim”, medical experts, attorneys, etc.). However, there are also parties involved in cases which are too far removed to play a vital role in fraud (e.g. actuaries receiving a report by an Industrial Psychologist only to base calculations on – therefore in no position to “unravel” fraud).
   • Secondly, it is important to note that fraud / corruption is also prevalent in other systems. I have experience in the medical scheme as well as reinsurance industry. The “face” / “background” of the wrongdoer might only differ – but fraud is still prevalent and sometimes extremely difficult to identify and deal with.
   • It is therefore of utmost importance for law enforcement to take place – which is seemingly what happened in each of the examples provided by the Honourable Member.

2. On the opinion that victims receive nothing as all money is taken by the legal parties.
   • Where a valid claim was lodged and compensation paid for distribution to the road accident victim, there is no situation as far as I know which can result in an attorney (or other party) retaining the full value of the compensation paid. The Contingency Fees Act limit the value of the claim an attorney can retain given that the claim was lodged on a contingency basis. As far as I know the maximum is 25%. If the Honourable Member is of the view that this is excessive, I recommend this assumption is investigated (specifically for claims against the RAF) to determine a more equitable maximum contingency fee for claims against the RAF (without an investigation to this extent, I’m unable to comment on whether 25% is justified or not).

3. Tariffs being published tomorrow – will RABS be able to continue...?
   • No. It may enable a better / more accurate costing exercise. But, as mentioned there are a number of softer issues surrounding the medical tariffs that need to be addressed first. My understanding is that new
medical scheme regulations are in the pipeline that may assist in solving some structural issues within the healthcare sector.

4. Bill being a balancing act between...
   • Cost on the one side
   • Benefits being provided on the other side

5. More research / work on...
   • Impact of no-fault (number of accidents as well as average cost per claim)
   • Administration costs (intuitively I expect RABS to be more admin intensive – but I recommend a benchmarking exercise with e.g. an existing medical scheme administrator (GEMS, Discovery?))
   • Medical costs (whether a uniform set of tariffs will actually work in practice – if it does, the more accurate costing may be possible; if not, structural problems within the healthcare sector must first be addressed)
   • Trends (not only snapshots – even though the RAF seems to cost more over time, why is it? – can we identify the worsening and improving trends. Is care safety not improving to such an extent that road accidents will start decreasing in the near future?)
   • Other solutions (including non-Western countries)

   • Stakeholders will include the RAF, the department of transport (road safety, # of car accidents, etc), the department of healthcare, the department of treasury (budget?) and all related stakeholders (actuarial, legal, medical, ...)
   • My view is that it will take at least 1-2 years, with the hope to introduce a few changes to the RAF, with more changes to follow in 5-10 years time (refer to my proposals). This will enable re-evaluation of the system at regular intervals to ensure the best possible route is taken given the best possible information at hand.
Rehabilitation as cost saving measurement, 23/05/2018

Elzeth Jacobs
Occupational therapist
B. Occupational therapy (UP)
Diploma in Vocational rehabilitation (UP)
Certified Blankenship Functional Evaluation Evaluator (BKS inc)
Qualified mediator (UCT/MiM)

At my practice we have recently completed our research regarding rehabilitation facilities in South Africa and the relevance thereof on the objective regarding rehabilitation as described in the proposed RABS bill. I would like to share my research and views with you.

RABS prioritises rehabilitation and emphasises the return to work of injured beneficiaries. This, is stated, may result in decreased benefit payment periods as benefits cease when a beneficiary returns to work. The intend seems to be to save by returning the injured person to work.

Four friends were travelling in a taxi. There was a horrific accident. They all sustained serious injuries. Let us examine this presumption using our injured friends as case studies.

Two of the seriously injured friends were unemployed and have no job to return to. On the premise that they are to be “returned” to work in order to support the financial viability of the RABS in that the monthly payments will cease when the beneficiary is successfully rehabilitated and returned to work, RABS will (after successful rehabilitation) then have to pay for job specific training at an appropriate training institute to provide these claimants with a chance of future employment and then find them a job. A quite challenging exercise considering our high unemployment rate (26.7% actual and 36.4% extended), especially where there are still some residual disabilities.

The other two were employed in high-risk occupations, meaning they can easily be replaced. Both were lucky enough to have received adequate and timeous medical treatment and both qualify for physical rehabilitation and vocational rehabilitation.

Sam from Limpopo was a builder, he sustained multiple fractures of both lower legs. After initial treatment, he had to learn to walk again. Since there is no rehabilitation facility in his province, he was sent to Tshwane Rehab in Pretoria. He was unable to undergo the vital follow-up sessions as he did not have the money and assistance to travel to Pretoria once a week. They also have no vocational rehabilitation facility at Tshwane Rehab and he received no work rehabilitation. His closest clinic, 100km away, had no occupational- or physiotherapist. There is also no return-to-work system consisting of, for example, a return to work plan and monitoring of the process in place in South Africa. Sam lost his job. He still struggles to walk and could not find another job. As the only breadwinner, his family is now destitute.

Because RABS is largely based on rehabilitation, it is important to look at the availability of rehabilitation and vocational rehabilitation facilities in SA (Appendix A):
Countrywide there are only 35 available facilities that offer rehabilitation services. Of these, 11 are government/state institutions and the remaining 24 exist in the private sector.

Furthermore, there are only 18 private institutions in the whole of SA that offer vocational/work rehabilitation and 5 government/state facilities that offer limited vocational/work rehabilitation.

Let’s take a closer look:

- Only 4 provinces (Gauteng, Western Cape, North West and Kwa-Zulu Natal) have government/state rehabilitation centers. There are none in the other 5 (Eastern Cape, Free State, Limpopo, Northern Cape and Mpumalanga). The private sector also only covers Gauteng, Western Cape, Kwa-Zulu Natal, Eastern Cape, Free State and Mpumalanga. There are thus neither state nor private rehabilitation facilities in two of our provinces, namely: Limpopo, Northern Cape).

- There are only 18 private facilities countrywide offering vocational rehabilitation (none in the Northern Cape and KwaZulu-Natal). There are 5 governmental/state institutions (Free State, Gauteng, Western Cape, KwaZulu-Natal and Mpumalanga) that offer limited forms of vocational rehabilitation. The cost that will have to be paid for suitable vocational rehabilitation will thus be private tariffs.

- Overall, services seem to be most limited in Limpopo, Northern Cape, Mpumalanga and the North West province. Patients from these provinces are apparently referred to Gauteng.

- The location of the facilities is impractical for many. An injured worker will after his discharge from hospital have to attend as an out-patient, implying that such a facility should be accessible from his/her home. Most facilities are situated near cities and injured workers from rural areas will consequently be seriously disadvantaged.

Sandako from the Western Cape was a factory worker and he sustained a serious head injury. After recuperation and discharge from hospital, he was placed in a rehabilitation facility that also offered vocational rehabilitation. Although his therapist worked closely with his employer from the start to re-integrate him back to work, he nonetheless lost his job. Why, you may ask? Sandako’s brain injury left him with serious memory and concentration problems. No amount of rehabilitation could restore him to the man he was. One should be careful not to make the common mistake of assuming that rehabilitation will always restore function. Rehabilitation, in fact facilitates the process of recovery from injury, but in only a few cases restores full function. Most claimants with serious injuries will remain with residual difficulties. Residual difficulties may still impact negatively on their functionality to engage in everyday life and work life. Although rehabilitation is necessary for almost all serious injuries, it is not a miracle maker that will erase the injury and automatically reinstate full function.

I fully agree that people involved in road accidents employed at the time of the crash, should be providing the opportunity of rehabilitation and vocational rehabilitation to enhance their function and possibly return them to work. However, the plan to support the financial
viability of RABS by means of rehabilitation in order to place beneficiaries at a workplace is clearly not realistic. The vast lack of rehabilitation facilities, the ambiguous success of rehabilitation, the high unemployment rate especially regarding the disabled, the lack of procedures to support the return of the injured worker to the workplace and the high percentage unemployed individuals involved in road accidents makes this objective unattainable. Even more compelling is the low percentage (approximately 5%) of claimants with injuries seriously enough to qualify for rehabilitation.

Rehabilitation is vital for those who qualify, but I fail to see how it would, especially in the current circumstances, support the financial viability of RABS.

The focus of RABS on the process of rehabilitation in order to place the injured back to work to save money additionally raises the question if rehabilitation will also be offered to seriously injured individuals who would not return to work and where saving money could then not be the objective. For these individuals, rehabilitation would be vital to enhance independence and quality of life, which are basic human rights. To deny them this indispensable service on their road to recovery would be immoral.
## Appendix A

<table>
<thead>
<tr>
<th>Province</th>
<th>Government in-patient rehabilitation centers:</th>
<th>Private rehab center:</th>
<th>Work rehab offered in government:</th>
<th>Work rehabilitation offered in private:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Free State</td>
<td>0</td>
<td>4</td>
<td>1 (limited)</td>
<td>1</td>
</tr>
<tr>
<td>Gauteng</td>
<td>2</td>
<td>9</td>
<td>1 (limited)</td>
<td>3</td>
</tr>
<tr>
<td>Western Cape</td>
<td>6</td>
<td>3</td>
<td>2 (limited)</td>
<td>7</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>North West</td>
<td>1 (+ 2 mines)</td>
<td>0</td>
<td>(2 mines)</td>
<td>1</td>
</tr>
<tr>
<td>Kwazulu-Natal</td>
<td>2</td>
<td>5</td>
<td>1 (limited)</td>
<td>0</td>
</tr>
<tr>
<td>Limpopo</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Eastern Cape</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>11</strong></td>
<td><strong>24</strong></td>
<td><strong>5</strong></td>
<td><strong>18</strong></td>
</tr>
</tbody>
</table>
References:

3. Care@Midstream. 2018. Care@Midstream. [ONLINE] Available at: http://careatmidstream.co.za/ [Accessed 9 May 2018].

Resources:

<table>
<thead>
<tr>
<th>Name</th>
<th>Capacity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Dominique le Riche</td>
<td>OT at Life Pasteur rehabilitation hospital in Bloemfontein. Confirmed that they do not do work rehabilitation at their hospital. Only knows of Ms Gerbri van Heerden (private practice) who does work rehabilitation in the Free State.</td>
</tr>
<tr>
<td>2 Hanlie Duvenhage</td>
<td>Secretary at Nurture Victoria Gardens in Bloemfontein.</td>
</tr>
<tr>
<td>3 Gerbri van Heerden</td>
<td>Owner of a private practice in BFN who does work rehabilitation. Says that funds for work rehab are very limited and it is rather seen as a “luxury”.</td>
</tr>
<tr>
<td>4 Herculene van Staden</td>
<td>She has information on OTs in the Western Cape that do work rehabilitation (INSTOPP board member for the Western Cape). Reports that the therapist’s understanding of work rehab is very broad which then has an impact on the therapy as well as the outcomes of vocational rehabilitation.</td>
</tr>
<tr>
<td>5 Elaine Moolman</td>
<td>OT working at Kimberley hospital. Reports that there is no work rehabilitation program at her hospital. Physical rehab only takes place while admitted to the acute wards in the hospital. Patients</td>
</tr>
<tr>
<td></td>
<td>Name</td>
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<tr>
<td>6</td>
<td>Lise-mari van der Watt</td>
</tr>
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</table>
| 7 | Lindie Pieterse       | Owner of a private practice in Rustenburg  
  - Confirmed no physical rehabilitation center in Rustenburg/North West, except Witrand (government) in Potchefstroom.  
  - Takes note of Carltonville and Orkney’s work rehab at the mines (only accessible for mine workers). Furthermore, notes that there are on the verge of closing down. |
<p>| 8 | Marne Venter          | OT in Klerksdorp. Confirms no physical rehab hospital in Klerksdorp or the North West except for Witrand.                                                                                                                                                                      |
| 9 | Kate Rowland          | Provided information regarding private rehabilitation centers in the Durban area as well as work rehabilitation practices. Works at a private practice in Durban.                                                                                                               |
| 10| Lize Kubannek         | Owner of a general OT practice in Limpopo (INSTOPP board member for Limpopo). Confirmed that there is no physical rehabilitation center in Limpopo and only one private OT that does work rehabilitation.                                                                                               |
| 11| Chanette van der Merwe| Owner of a private OT practice in Port Elizabeth that does work rehabilitation and return to work programs.                                                                                                                                                                   |
| 12| Roxanne van Geelen    | OT at Chris Hani Baragwaneth hospital.                                                                                                                                                                                                                                       |
| 13| Rianrie Arendse       | OT working for Karen Weskamp. Provided information on work rehabilitation at their group of practices in the Western Cape as well as confirmed a work rehabilitation program at both Groote Schuur and Tygerberg hospital.                                             |</p>
<table>
<thead>
<tr>
<th></th>
<th>Mariaan Teubes</th>
<th>Owner of a private practice in Nelspruit which offers in-patient rehabilitation services at M-Med rehabilitation hospital and also follows up with patients on an out-patient basis.</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Daleen Campher</td>
<td>OT working at Sabie hospital. She says that they offer work evaluations and vocational rehabilitation, but they currently have a waiting list of two months.</td>
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<tr>
<td></td>
<td>072 191 1804</td>
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<td></td>
<td>079 506 6030</td>
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