Position of THE DEMOCRATIC ALLIANCE on the ROAD ACCIDENT BENEFIT SCHEME, 2017 *Government Gazette* No.: 40788 on 18 April 2017, as replacement of the ROAD ACCIDENT FUND ACT 56 OF 1996

Minority Party Report Submission to the Portfolio Committee of Transport - 08 November 2018

CONTENT

1. INTRODUCTION

The DA is not in favour of the RABS Bill but in support of changing the current RAF Act. A variety of issues play into the challenging circumstances of the current RAF dispensation and based on a priority list of the most critical issues, amendments should be prioritised. Sadly, particular elements have been singled out in a near

campaign-like fashion to motivate RABS instead of addressing the real issues with RAF. 'Getting rid of lawyers' vs. 'Financial Sustainability' can serve as one appropriate example. This, while various other options are capable, yet never considered, of regulating the current exploitation of victims within RAF with minor amendments to the current act.

As such, the DA is convinced that the current financial constraints experienced in The Fund can/should be addressed by amendments to The RAF Act and by introducing management corrections and financial discipline rather than replacement by RABS. A position which is largely influenced by shared information, complaints and exposure to claim processing and victim experiences, combined with the fear of less check-and-balances in RABS than in RAF. Financial sustainability can be achieved in a similar fashion by amendments to RAF, rather than pushing for RABS just to get away from RAF. The DA is convinced that management decisions like appointment of over 500 staff during one financial year and review of the claims processing are core to fixing deficiencies. Staff appointments should coincide with training and capacity building support. Elements which come to question when one discovers that despite huge employment expansion, claim processing is being sub-contracted to service providers like Med-Scheme and Forbes.

The DA is of opinion that the litigation bill should be addresses in the same manner in order to address the huge bearing which this element has on financial sustainability. With no reason for panel lawyers being subcontracted to RAF to defend cases, let alone postpone and drag-out cases, only to settle on the stairs of courts shortly before final judgements, a large portion of the expense column can be diverted to available funds to benefit victims. This would not diminish professional stakeholders' role but open opportunity to address the backlog. Several mechanisms can be considered to protect both the state and victims yet maintain the professional participation of industry partakers.

Underlying concern to the DA in terms of administrative transparency is the fact that RABS represents a "closed" system opposed to RAF, with far less check-and-balances and less procedural insight into affairs. This combined with the fact that the same administration will be responsible for executing claims, yet under a "closed" regime, is a cause of huge concern.

The DA objects to RABS in its current form based on the narrowing down of benefits and objective to save money at the wrong place.

The following chapters deal with the content of RABS and specific concerns:

A. CONSTITUTIONALITY

In comparison to RAF, RABS is not an improved social security scheme for the victims of road accidents.

The **benefits** of RABS is not an improvement of current RAF advantages let alone fair, reasonable or appropriate.

The **financials** of RABS is not proven, let alone affordable, sustainable or workable.

The **dual-system** of RABS and RAF is not explained, let alone cheaper, reasonable or within the means of fiscal ability.

The readiness of **Health care**, something which RABS is solely dependant on, is not demonstrated, verified let alone recognised.

Rationality

The DA is of opinion that compared to RAF, RABS in its current form should be challenged with a rationality review to scrutinise the suggested legislation against the principle and desirability of public good. This view is based on a judgement [1] where the court made the following statement: *"[35] It remains to be said that the*

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

Furthermore, while one of the over-arching objects of the Bill in its current form is the creation of a "more" effective social security service to the victims of motor vehicle accidents, the DA is of the opinion that this is not the case. This, when considering that the Scheme introduces the "no fault" system ostensibly as being fairer than the previous one while it is clear that the no fault requirement "serves an obvious role of lowering the fund's liability to compensate victims[2]". 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. In addition, the DA holds a view that the following breaches of Chapter 2[3] rights should be highlighted:

- 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 calculation of the compensation and the time frames within which compensation is payable. (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);
- The insistence that benefits are to be paid in instalments[4] 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[5], once it is payable, it will be taxable again[6].
- 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[7].
- The provision[8] 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 Commission's underlying reasoning and findings.
- Calculating benefits by excluding all forms of "illegal" income and not separating (as the common law does) between incomes which are merely not licensed and incomes of those which are truly criminal.
- The bizarre arrangement (Sec 35(3)) 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[9].

Equality (Section 9)

- In terms of Sec 27(4)[10] of the Bill only illegal aliens qualify for emergency treatment and none of the other benefits; causing a clear distinction between victims who are injured whilst in the country legally as opposed to those who are injured whilst present illegally. Acknowledging the rights of all individuals

legally in the country is obviously required consequent to the judgment in Larbi-Odam v Member of the Executive Council for Education (Northwest Province) 1998 (1) SA 645 (CC)[11].

- 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".
- 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 (par [47] at 429D), 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.
- There is some suggestion in the judgment (par. [59] at 532D-G] that budgetary constraints might justify the refusal of health care services to individuals who are illegally in the country.
- 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.
- 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.
- 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[12]. South Africa has not been immune from 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 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[13]. 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.

Referencing (Other Schemes)

- Accepting the principle intent of RABS being one to facilitate the creation of a single social security scheme compensating citizens for all accidents (therefore not just road accidents), the DA questions differences between the compensation payable in terms of an Act such as COIDA and the Bill and whether these differences are justifiable.
- 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.
- 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 (par. [17] at 12C-H).
- 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.

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.

Human Dignity (Section 10)

Based on the Law Society case where 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 the DA is convinced of the relevance thereof, based on the following;

- This was done with reference to a decision of the German Constitutional Court "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."
- The Court a quo did not elaborate any further, save to state that this issue may arise in future.

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, aspects which the DA find unacceptable. This clear limitation of a claimant's ordinary right to, firstly, consent to or refuse medical treatment[14] and, secondly, to be treated by a medical practitioner of choice is seen to be transgressive and harmful.

- 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 not able to either:

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

- 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 (in this instance with no discretion given to the Administrator) these victims will further be deprived of the advantages of the Contingency Fees Act 66 of 1997.

Abolition of general damages

Whereas the New Act retained a limited entitlement to general damages for victims suffering a "serious injury" (Sec 17(1) & (1A), 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 and culminated with the Commission recommending (in par. 36.193 to 36.201) 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).
- 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 par. 36.187:

"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."*

- 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 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 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'."
- 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.

Bodily integrity (Section 12)

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; 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.
- As stated, the court ultimately held that this limitation was reasonable and therefore justifiable.
- 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.
- The Bill 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 will obviously have to be considered afresh in any future reasonableness review.

Deprivation of Property (Section 25)

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. 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.

- The Law Society judgment thus provides little guidance as to how this right will be dealt with in any future constitutional investigation.
- 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.
- In First National Bank of SA v Minister of Finance 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 would hold the Bill to be unconstitutional in terms of this right.
- 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.

Health Care and Social Security (Section 27)

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.
- 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, 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 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.
- 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.
- 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 should be avoided.
- 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.

Access to Courts (Section 34)

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 DA believes that this right may more correctly be referred to as the right of access to justice.

- 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 sense (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.
- Section 55(6) clearly provides for a classic judicial review thereby limiting the enquiry simply 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, recommended an extensive two-tiered process involving a Benefits Review Panel and a Benefits Appeal Tribunal.
- In contrast to the Bill, the Commission recommended 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.
- The author Nyenti 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:

"...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."

- 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.
- 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.
- 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.
- One can only guess as to the basis upon which the defenders of the Bill will attempt to justify this limitation. 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.

Tariffs

Noting that the Applicants in Law Society were successful in striking down the tariffs incorporated in terms of Regulation 5(1) of the New Act, the DA is of the opinion that it is a pre-requisite and condition in terms of agreement with both public and private sector service providers.

- 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.

Tagging

The DA is of the opinion that tagging of the RABS Bill as a section 75 is erroneous. It is evident in all the relevant sections of the Bill that it introduces a synergistic scheme in which the Administrator and healthcare service providers have indispensable roles;

- It is further evident that the healthcare service providers are not only an integral part of the new Scheme but that the object of the Scheme cannot be achieved without their direct participation as demanded by the provisions of the Bill;

- The Scheme is further set out in terms wide enough to allow the Administrator to obtain the services of both provincial and private healthcare service providers;
- Whereas the Administrator may wish to deal with private healthcare service providers only the Bill is in its own terms not limited to the extent that provincial healthcare service providers are excluded;
- In many rural areas of the country the Administrator would have no choice but to be limited to provincial healthcare service providers as no private healthcare service providers exist;
- It is also a reality that unless the Administrator succeeds in negotiating tariffs at a particular level (which is seemingly higher than the tariffs presently envisaged) private healthcare service providers will not be amenable to entering into agreements with the Administrator. In such an event, only provincial healthcare service providers will be part of the scheme.
- The most likely scenario is that the Administrator may have agreements in place with private health care service providers for certain services and geographical areas but will have to rely on public healthcare service providers for those services and areas which cannot, or would not, be covered by private healthcare service providers.
- It is thus inevitable that provincial healthcare service providers will have an important role to play in the new Scheme.
- Provisions of the Bill placing (even potentially) the duties on provincial healthcare service providers which culminate in section 33(3)(a) thereof, clearly amount to "direct regulation" (or "actual regulation") of provincial health services and its impacts are not mere "knock-on" effects on the provinces. As such it satisfies the "substantial measures" test for tagging in terms of section 76.
- The above notwithstanding the Memorandum of Objects of the Road Accident Benefit Scheme Bill which was published with the Bill in 2017 advises that the Bill may be tagged in terms of section 75 and concludes that it has no implications for provinces. This view is set out in brief terms and the impact of the Bill on provincial healthcare providers is not dealt with at all. In fact, the authors of the memorandum (in paragraph 7.4 thereof) merely conclude:

"In Tongoane[15] the Constitutional Court held that 'the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence'.

The tagging test 'focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance'. In applying the tagging test of the Bill, the question that should be asked is whether the provisions in the Bill substantially affect a Schedule 4 functional area. The Road Accident Benefit Scheme is not an item listed in Schedule 4 or 5 of the Constitution."

- The last sentence can clearly not be taken literally as neither the Scheme nor its origins as found in the Satchwell report existed at the time when Schedule 4 was drafted. (In fact, the Scheme's predecessor only came into being in the same year as Schedule 4 by virtue of the Road Accident Fund Act 56 of 1996.) A mere reading of Schedule 4 further shows that functional areas are not identified with reference to a particular Act or Bill. The only conclusion is that the Bill's clear effect on the interests, concerns and capacities of the provincial health care service providers were either not considered at all or deliberately omitted.

B. PRINCIPLE

A Motion of Desirability was accepted during a PCoT meeting on 06 June 2018. This motion was objected to by the DA. Two principles in the Motion have to the opinion of the DA unfortunately determined and limited

the solution seeking options of any further process, restricting the scope to only include thinking framework to:

- Acceptance of a No-Fault principle/system
- Removal of access to common-law

This rigid departure sadly directed and predetermined input from specialists and public opinion but also served as mechanism to eliminate solutions form stakeholders. Positioning and mixing an undesired filtering mechanism which eliminated valuable input.

C. PROCESS

During the various stages, changes of substantial nature were done to previously published editions which was Gazetted, yet, conveniently ignored and processes continued without granting opportunity for public comment. Public input therefore was excluded from considering crucial elements added after the advertised editions.

Public Participation

During the public participation process in nine provinces undertaken during mid-2018, a total of 981 attended of which 242 submitted verbal input. The following table evaluates the proportion of participation of each province in relation to total population:

Representativity:

Population Census 2011		Particiaption		
		% of Pop	Rank	Nu
Gauteng	12 272 263	0,000098%	9	12
KZN	10 267 300	0,000146%	7	15
Mpumalanga	4 039 939	0,000644%	4	26
Western Cape	5 822 734	0,000412%	8	24
Limpopo	5 404 868	0,000278%	6	15
Eastern Cape	6 562 053	0,000503%	5	33
North West	3 509 953	0,001709%	2	60
Free State	2 745 590	0,000947%	3	26
Northern Cape	1 145 861	0,002705%	1	31

Of the 242 participants, 140 spoke directly to the content and desirability of the RABS Bill in relation to the following three categories:

In favour of RABS	Yes	33 = 24%
Not in favour of RABS	No	81 = 58%
Rather Amend RAF	Yes	26 = 19%

Noting a proportionally small sample, of the 242 participants, 88 (36%) participants reflected content directly coupled to RAF Claims and used the opportunity to raise issues about past and current experiences not related to RABS. It is however of importance that the concerns related to administrative management, aspects which to the DA's opinion represents a concern in the negative of the current administration which will continue with RABS. The last question-category represented 6 (or 2,5%) which represented a Question rather than present input to RABS. Eight (or 3,3%) people's input of the total participants (242) could be classified a "unrelated" or having no relevance to RABS or RAF.

Categories	Total		Directly Related		Support' Yet, bad RAF experience		NW	G	M	L	EC	KZN	WC	FS	NC
							Brits	Mamelodi	Witbank	Jane Furse	Cambridge	Port Shepstone	Worcester	Welkom	Kimberley
Attend	981						147	45	73	154	67	163	63	186	83
RAF Claim	88	36,4%			121	86%	9	1	6	0	19	4	21	7	21
Yes	33	13,6%	33	24%			7	0	3	2	11	6	0	2	2
No	81	33,5%	81	58%			24	9	11	8	2	4	3	13	7
Amend RAF	26	10,7%	26	19%			13	2	3	3	0	1	0	4	0
Question	6	2,5%					2	0	2	1	1	0	0	0	0
Unrelated	8	3,3%					5	0	1	1	0	0	0	0	1
Totals	242		140				60	12	26	15	33	15	24	26	31
	25%		14%				41%	27%	36%	10%	49%	9%	38%	14%	37%
	121,00						180	36	78	45	99	45	72	78	93
							0	144	102	135	81	135	108	102	87
							100%	20%	43%	25%	55%	25%	40%	43%	52%

In summary only two provinces were in favour of RABS while seven provinces were not in favour of RABS. Of the seven provinces not being in favour of RABS, four suggested amendments to the RAF Act over a new (RABS) Act.

Substantial inconsistency in terms of provided documentation to general public at the hearings was experienced, this, to such an extend that one session had to be repeated because attendees received no and different documents to other sessions. More than five variations of documentations supplied occurred during the nine sessions. In terms of the stringent time management of three minutes which was employed per submission-input over the nine sessions or 27 hours, an efficiency rate of 45% was achieved; mainly as a result of view sessions starting late, delays and up to 17 interruptions during particular occasions.

In seeking direction from the public participation results it should be noted that 33,5% (81/242) of all participants said “NO” to RABS. This read together with 10,7% (26/242) who were in support of “Amend RAF” compromises the majority of view: 44,2% opposed to “Yes” for RABS = 13,6% (107 vs 33). The DA holds the same view. The majority of public participation input was not in favour of RABS but against it and those in favour constituted less than half, while many of those in ‘favour’ expressed conditions or alluded to a notion of favour for the idea of having a social security scheme taking care of road accident victims.

2. NO FAULT

The DA is not convinced of a dispensation where the wrongdoer is indemnified which will benefit and be advantages to positive road behaviour improvement, given the current state of road safety.

No fault is a two-edged sword. Its introduction according to research conducted in America can bring about an approximately 22% saving. On the other hand, it significantly increases exposure to liability for compensation by persons who do not qualify for benefits under a fault system. It has the potential to double the current amount required for compensation calculated at current levels of compensation. Consecutive commissions of inquiry into the compensation system have held that no fault is unaffordable. The RAF Commission of Inquiry which submitted its report in 2002 commissioned actuarial estimates. These estimates show that the introduction of no-fault compensation will just about double the government’s compensation bill. It is significant that in some other jurisdictions in the USA no fault was tried and after some time jettisoned.

The protagonists of RABS do not tell us what the financial consequences of the introduction of no-fault liability could be and this is worrying. Based on the assumption that the funding requirement brought about by the introduction of no fault the levels of fuel levy funding required in future will unavoidably have to be increased.

This raises a real question of sustainability because of the political and economic limitations attached to the fuel levy. In addition, the introduction of RABS will mean that a fault and no-fault system will exist side by side until all claims under the previous dispensation are finalised. No mention is made of this consequence and neither is the funding issue which this raises disclosed, discussed or solved.

The acceptance of Government of a no-fault system in the South African context seems to be a serious lapse in policy and direction and is an entirely wrong policy given the South African road safety record, the composition of the South African road accident victim population and the limited funds available to fund such a system. Although the DA supports the notion of no-fault as beneficial to the interests of the road accident victim it has serious reservations in respect of its unqualified implementation in South Africa.

Firstly, the introduction of a no-fault system was not unreservedly recommended by the Road Accident Commission (2002) and was found to be unaffordable by all the previous South African commissions of enquiry who investigated the no fault option. The report of the RAF Commission indicates that further research, especially regarding cost, is required before such a system can be introduced. Secondly, the protagonists of RABS state that South Africa, by adhering to a fault-based system, is out of step with leading other global legal jurisdictions such as Australia, Canada and the USA. In order to assess whether these arrangements and/or systems in these jurisdictions can be successfully implemented in South Africa, factors such as accident-rate, unemployment and GDP need consideration. A comparison shows that the RSA accident rate overwhelmingly exceeds all of the countries in question.

Indicator:	Australia	Canada	USA	**RSA**
Accident rate (per 100 000 vehicles)	7,0	9,3	13,6	**156,4**
Unemployment	5,8%	6,5%	13,6%	**26%**
GDP	$1 560 597	$1 826 769	$16 800 000	**$350 630**

The Australian accident rate is 7 casualties per 100 000 vehicles, Canada 9,3 and the USA 13,6. The casualty rate for South Africa is 156.4. The unemployment rate in Australia is 5,8%, Canada 6,5%, the USA 13,6% and South Africa 26%. The GDP in Australia is $1 560 597, Canada $1 826 769 the USA $16 800 000 and South Africa $350 630. The accident rate and GDP alone suggest that a very careful consideration of the financial implications and affordability of no fault in South Africa is deserving of very incisive and meticulous scrutiny. More so, if the fact that some jurisdictions who have opted for no fault reverted to fault and that in other voices for the change in the no fault approach have arisen. This truly a situation of “act in haste and repent at leisure”. In addition, the important policy question as far as South Africa is concerned, is whether no fault sits well with the enforcement of road traffic legislation compliance by South African drivers and the improvement of road safety and whether no fault will result in indirectly rewarding careless and negligent drivers for the lack of compliance with the rules of the road with tax money.

3. COMMON LAW

The DA objected to the decision taken on the 06 June 2018 when, during a PCoT meeting a Motion of Desirability was accepted in which the abolishment of Common Law was approved as core element to the RABS Bill. Mind full of the importance to maintain common law within the current road user condition where

an estimated (only) 50% of vehicle owners have private insurance the following track record serves as orientation to our position.
During the 1930's the South African Parliament expressed concerns about the effect that the introduction of the motor vehicle and consequent road accidents could have on the socio-economic well-being of society. The outcome of this was the introduction of legislation to ensure that the detrimental consequences of road accidents do not unduly burden society. Initially the mechanism used was the introduction of a system which compelled each owner or driver of a motor vehicle who uses a motor vehicle on a public road to take out insurance to secure the compensation which at common law accrues to a road accident victim by ensuring payment where generally wrongdoing drivers may not have the means to pay compensation.

The insurance and the premium paid can be called an indirect magic tax levied by government in that motorists had no choice but to pay under sanction of criminal penalty. Magic because it contains the ability of an owner/driver to proportionally pass on the cost of the insurance premium to consumers in the cases where vehicles are used for goods or people so that ultimately all persons in society indirectly contribute in that the cost of transportation (of which fuel and the fuel levy is a component) is incorporated into the price of services and goods.

It should be clearly understood what insurance was, but the vehicle used to deliver what was essentially a social security measure aimed at countering the social-economic consequences of road accidents. The actual insurance contract concluded between the owner/driver did not circumscribe the compensation that a road accident victim was entitled to but only ensured compensation and payment of a road accident victim's common law claim. This was done by conditionally absolving the wrongdoing driver from liability and substituting him/her with a deep pocket defendant (insurance company). It is clear that all persons were in principle entitled to compensation because of the common law nature of the claim.

In 1986 the method of funding was changed from a compulsory insurance premium to a fuel levy. The object and the compensation remained unchanged. Because compensation is wholly based on common law it is disingenuous to say that Road Accident Fund (current compensation system) is the product of an undemocratic, oppressive and unrepresentative state.

Since the introduction insurance premium funded social security system in 1946, the object of the system as repeatedly reiterated by our courts is that the relevant acts had as their objects to give," the widest possible protection" to the road accident victim. The wrongdoing driver has never been a beneficiary of the system and this principle was confirmed in 2006 by the Supreme Court of Appeal but ignored by the Constitutional Court in 2011 when the RAF Amendment Act was subjected to constitutional challenge.

What then was the effect of the Road Accident Fund Amendment Act of 2005?
The Amendment Act had two important consequences:
First, it made the recovery of non-patrimonial damages (which constitutes approximately 22% of the damages that a person may be entitled to) subject to a threshold which incorporates a very sophisticated, involved and expensive test. Practically the effect of the threshold is to constructively abolish the common law right to compensation for pain and suffering, loss of amenities of life etc. of the majority of road accident victims. It saddles them with the added burden to prove (at their own financial risk) their entitlement to this form of compensation.
Secondly, it penalised high income earners by introducing a cap on income based on an arbitrary figure of R160 000 p.a. quarterly adjusted for inflation. It can be said that these interim measures are far from neither

being claimant friendly nor social security driven and in fact seek to balance government's books at the sole expense of the rights of the road accident victim.
The RAF is technically not an insurer but in effect dispenses social security benefits based on a road accident victim's common law right to damages resulting from the unlawful and negligent driving of a motor vehicle.

The deficit frequently used as a driver of reform is an actuarial deficit and is established using actuarial calculations. If it is accepted that the compensation system is social security instituted by the government and funded by an indirect tax (fuel levy) as was accepted by the Constitutional Court, the question can rightfully be asked if the calculation and use of the deficit in this way is valid. At the most it shows that government is under funding a social security system which it introduced of its own accord.

The DA believes that government can in principle and constitutionally speaking not plead poverty when it has a constitutional duty and has of its own accord undertaken the affording of citizens' social security benefits.

The right to bodily integrity was identified as a constitutionally protected right by the constitutional court. It is the common law and constitutional right to bodily integrity and the right to maintenance which is compromised in a motor vehicle collision. These rights cannot be compromised for the sake of expediency and in order to balance the books – especially where it is doubtful that the need to do so is entirely systemic.

4. FINANCIAL

RAF R200Bn "deficit" is often used, equal to the term, "technical insolvency" both created to motivate a case for RABS and largely un supported by evidence, let alone audited.
The DA notes with disappointment that despite numerous calls for proper financial assessment of Financial implications of RABS throughout the process, only one report was tabled; the True South Report. While the report presents fundamental discrepancies no further attention was entertained by DoT nor PCoT. The DA requested further workshops and additional scrutiny upon changes following the True South Report, all of which was not considered nor responded to. Changes to the latest version of the Bill which would have significant impact on calculations of benefits and former assumed saving was never re-calculated at latter stages. The Average Annual National Income (ANNI), discussed below, serve as example.

<u>Uncertainty in modelling the costs of RABS</u>

- Before implementing a system such as RABS, it is critical to obtain a proper estimate of administrative costs.
- The Compensation Fund is administratively expensive.
- The DA is in full agreement with National Treasury's observation that: *"There is considerable uncertainty in modelling the costs of RABS."*
- Furthermore, the calculations are narrow and does not take into account any costs which RABS rely on in relation to Health Care, SASSA and supporting stakeholders.
- While the increased administrative burden with RABS compared to RAF is apparent, the True South Report suggested exactly the same expense costing for both the Scheme and Fund. Not only will both have to be administered and managed together for an extended period due to the vested right of claims continuing for a period after RABS, but RABS is a more expensive administration due to handling 100% of claims internally from recruitment, management to extended involvement due to the monthly payment vs current lump sum settlements.

- The impact of the fuel levy at 193 cents per litre of petrol since April 2018 and subsequent increases must be factored into a new actuarial valuation. Decisions are being made based on outdated projections.
- True South did not qualify the Average Annual National Income definition in their report and as such it leaves room for interpretation and argument for an affordable or totally unaffordable RABS dispensation. The definition in the Bill was formulated to its current form subsequent to submission of the True South Actuarial Report.

Dual System

If RABS is implemented South Africa will be faced with a dual system for a number of years. On the basis of True South's report this will consist of:

- RABS that will cost 154 cents per litre of petrol increasing with inflation each year.
- The RAF that will have R 163 billion in unpaid claims in 31 December 2016 money terms requiring further funding.

Rehabilitation Benefit

- National Treasury notes that no data is available for the costs of the rehabilitation benefit envisaged in the scheme. The True South Financial Report merely valued that benefit as being equal to 33% higher than medical costs without any verification or reference.
- The DA has requested for a more detailed analysis to be made with respect to the valuation of rehabilitation benefits in the absence thereof since a August 2002 actuarial valuation conducted by NMG-Levy which noted the following:

> **A.1.2.4 MEDICAL RESEARCH COUNCIL**
> Dr AJ Herbst compiled a report titled "The Cost of Medical and Rehabilitation Care for Road Accident Victims at Public Hospitals".
> We have made use of this report in the estimation of the medical and rehabilitation costs which are incurred in the first year after a road accident.

> **A.1.2.6 RAND MUTUAL ASSURANCE ('RMA')**
> A distribution used in the derivation of long-term medical expense costs in respect of the Compensation for Occupational Injuries and Diseases Act has been used in the costing model. This model has been used to derive only an expected 'run-off' pattern (or timing) of future rehabilitation and life care cost claims and the quantum of medical expenses has been adjusted to be consistent with the Medical Research Council's report discussed in A.1.2.4.

- Insufficient attention has been paid to the valuation of rehabilitation costs. More detailed modelling and input from medical schemes like the Compensation Fund and Rand Mutual Assurance should have been obtained as the DA recommended.

Average Annual National Income

The DA submits that the current definition is vague and not specific enough without clarity about wether Narrow or Expanded Unemployment definitions should apply. It is not clear what True South used. "Unemployed": does this include or exclude "not economically active but can work".

- In SA there are approximately 18 Mn persons who earn zero income. To include them significantly reduces average income i.e. averaging over 36% of the population who earns zero, illustrating how the in/exclusion will influence benefits in the calculation.

8. CONCLUSION

1. A myriad of issues contained in the RABS Bill can be made out against the constitutional validity of the Bill in its present form.
2. Core financial questions on affordability and sustainability remain unanswered.
3. Essential needs in health care services which this RABS Bill is highly dependant upon has not been addressed.
4. Operational service delivery execution (and related costs), especially with regards to needs in rural areas are outstanding.
5. Pre-requisites to conclude a full understanding of the implications to RABS have yet to be finalised (Tariffs, MOU's, Regulations etc).

Recently, service providers in Physio therapy was required by RAF and suggesting tariffs & terms of service provision were predetermined, yet payment was stopped after 3 months. What will guarantee similar practise under RABS under a dispensation of less transparency.

- Critical financial decisions cannot be made when two key cost drivers – namely, administration costs and rehabilitation costs have not been properly examined.
- Benefits will be substantially reduced thereby prejudicing the poor, defeating the purpose of the intended legislation being more equitable.

The DA is doubtful that a cost saving as envisaged in Table 1 of the True South Report will materialize for reasons as set out in this document. If a cost saving is projected in updated actuarial valuations, it will nevertheless take many years for real savings to accrue to the South African public, - since the South African public will face increased taxes whilst funding a dual system. RABS, together with RAF is unaffordable and not fair to the consumer financing both via a fuel levy or indirectly via taxes to the fiscus. RAF will have to continue for at least 20 years due to the principle of vested rights.

Mindful of the need to address the increasing shortfall in fiscal resources and increasing backlog of payments to victims of car crashes the DA has always expressed its sentiment towards RABS as "a" solution, but not the "only" solution. In its current form, and in comparison, to RAF, RABS is nothing short of an effort to legitimise under-settlement towards victims and paradox-fairness to the wrongdoer sharing our roads.

9. REFERENCES

1. Rationality review in The Constitutional Court in Law Society of SA v Minister for Transport 2011 (1) SA 400 (CC), paragraph [35] (at 416E-F)

2. Law Society of SA v Minister for Transport, 421G-H.

3. Constitution of South Africa, Chapter 2, The Bill of Rights

4. Sections 35(5)(e) and 38(12)

5. Sections 35(2)(c) and 36(7)(a)

6. 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.

7. 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.

8. Section 56

9. 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.

10. "Limitation of Administrator's Liability

27(1) …

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

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

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

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

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

15. Tongoane and others v Minister of Agriculture and Land Affairs and others 2010 (6) SA 214 (CC) ("Tongoane"), Constitutional Court

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