COMMENT BY THE LAW SOCIETY OF SOUTH AFRICA

ON THE DRAFT ROAD ACCIDENT FUND AMENDMENT BILL 2023

INTRODUCTION

1. The Law Society of South Africa (LSSA) constitutes the collective voice of the approximately 31 000 practising attorneys and almost 7 000 candidate attorneys within the Republic. It brings together the Black Lawyers Association, the National Association of Democratic Lawyers and the Independent attorneys, in representing the attorneys' profession. The LSSA speaks on behalf of its members and their clients as well as in the public interest, not only on behalf of potential road accident victims who are not able to speak for themselves, but also to ensure a just and equitable legal system.

2. In common with many other jurisdictions elsewhere in the world, statutory intervention to regulate compensation for personal injury arising from motor vehicle accidents arose out of the social responsibility of the state, as long ago as 1942. As such, a regulated scheme should be part of the social security net for all road users and their dependants. In its current form, the Road Accident Fund Act 56 of 1996, as amended ("the Act") by and large fulfils this purpose, in theory at least.

3. The Road Accident Fund ("the Fund" or "RAF") - together with the Unemployment Insurance Fund ("UIF") and the Compensation for Occupational Injuries and Diseases Act ("COIDA") - constitute a cluster of government backed statutory insurers. UIF and COIDA are funded by contributions from employers and employees, whilst the Fund is funded by a levy on fuel and revenue accrues to it from every litre of petrol and diesel sold (with some minor exceptions). The RAF is thus funded by every commuter and any person who consumes goods or services transported by road.

4. The draft Bill proposes sweeping changes aimed at the very heart and nature of the current legislation.

THE NATURE OF THE SCHEME IN THE BILL

5. The object of the Act is changed in the Bill, by amending Section 3 of the Act. If the draft Bill becomes law, persons injured in a motor vehicle accident or their dependants lose the right to claim compensation for injuries or death. In its place, the Bill provides *"social benefits to the victims of motor vehicle accidents which occurred on a public road"*.

6. Currently the revenue derived from the Road Accident Fund fuel levy is contained in a dedicated fund which can only be used to fulfil the objects of the current Act. As a statutory insurer, it is required to comply with the provisions of the Insurance Act, 2017, and to provide in its financial statements for future losses, which are actuarially calculated in accordance with recognised principles.

7. In changing the object of the Fund from the payment of compensation to the provision of social benefits, the Bill not only seeks to free the Fund from adhering to the Generally Recognised Accounting Practices (GRAP) - currently the applicable standard for preparing the accounts of the Fund - but also to open the way to remove the restrictions imposed by a dedicated fund and thus unlock its revenue for other government purposes.

8. The characterisation of the nature of the scheme provided for in the current Act was at the heart of the dispute between the Road Accident Fund and the Auditor General, which resulted in the Minister of Transport (the Minister) refusing to table the RAF annual report, financial statements

and audit report for 2020 / 2021 before Parliament. The 2020/2021 accounts were prepared - for the first time by the Fund - not in accordance with GRAP but in accordance with the International Public Sector Accounting Standard 42 (IPSAS 42) for social benefits.

9. Despite the Minister's refusal to table the accounts before Parliament, the Auditor General, after first obtaining confirmation from National Treasury that it agreed with her view, nevertheless submitted to Parliament her Road Accident Fund audit opinion and audit outcomes, as per the law, in which a finding was made that the use by the Fund of the International Public Sector Accounting Standard 42 (IPSAS 42) for social benefits, was an inappropriate accounting method to have used and that it is in conflict with the conceptual framework of Generally Recognised Accounting Practices (GRAP), which is the applicable standard for the RAF to use.

10. The Auditor General further found that the use of IPSAS 42 resulted in material misstatements in claim expenditures, current and non-current liabilities and disclosure notes.

11. The financial statements for this year reflected a surplus of R428 million.

12. The Bill also seeks to amend section 13 of the Act. Currently section 13 obliges the Fund to publish an annual report containing the audited balance sheet of the Fund, together with a report of the auditor as contemplated in section 14, as well as a report of the activities of the Fund for the year in question, and to lay upon the Table in Parliament a copy of this report within 30 days of receipt.

13. The revised version of section 13 merely obliges the Board to publish an annual report in accordance with Chapter Six of the Public Finance Management Act 1999 (PFMA). The Board is no longer obliged to lay a copy of the annual report on the Table in Parliament. Whether this is aimed at and/or will achieve the curtailment or removal of Parliament's oversight function in relation to the finances and activities of the Fund, is not clear to us. The Fund is already a Schedule 3 listed entity and subject to PFMA. In terms of section 14(2) - which has not been amended - the accounts of the Fund are still to be audited by the Auditor General.

14. The scheme remains fault based, and what is very clear is that the provisions of the Bill are aimed at significantly curtailing the expenditure of the Fund by stripping out most of the benefits currently covered, and by excluding certain claimants and claims. What is left once the Bill is enacted can hardly be described as contributing to the social security net or as discharging the State's social

responsibility in respect of the carnage on our roads, which continues unabated. South Africa has a road accident death rate per 100 000 population, of 25.10. By comparison, other BRICS countries such as India, China and Russia are 16.60, 18.80 and 11.69 respectively. Most of Western Europe and the United Kingdon are less than 5.

15. As against this, South African road users and consumers contribute more than R48 billion a year in premiums.

16. It is the poor and disempowered - who make up the vast majority of claimants - who will bear the brunt of these amendments. They are the ones who are compelled by economic circumstances to utilise public transport, often in the form of taxis, or who commute by way of bicycle or as pedestrians, often, again by force of circumstance, close to busy roads and highways. If injured in a motor vehicle accident, they will now be thrown into the public health system as it is anticipated that the prescribed tariffs foreshadowed in the Bill will not cover the actual costs incurred for treatment in the private sector. Under the present system, many of those road accident victims receive treatment at dedicated private health care facilities who claim back the costs from the Fund. Currently, for future/ongoing expenses they can use their lumpsum payments and then reclaim in terms of an undertaking. Under the Bill, they will not be paid any lumpsums or general damages – often the only loss they are currently able to claim in addition to medical expense - affording them no opportunity to recover financially, and as all future treatment will have to be paid for up front, no chance of accessing private health care.

17. The working classes are also likely to suffer disproportionately. They, too, are in the main dependent on public transport, and in particular taxis, to get to work and are often conveyed in motor vehicles during the course of their employment.

18. By eliminating all lumpsum payments, the Bill also aims to remove attorneys from the system. The other statutory insurance funds, namely the **COMPENSATION FUND** and the **UNEMPLOYMENT INSURANCE FUND** - where claimants by and large do not have access to legal assistance - have built up substantial reserves, one assumes because many persons who are entitled to claim are either unaware that they can claim, or have difficulty in accessing their payouts. As at March 2022 the UIF had a surplus of over R120 billion, down from R153 billion the year before, and COIDA had a surplus of more than R11 billion in the 2021 year and net assets of more than R40 billion.

19. The CEO of the Fund has stated in the media (the last published annual reports on the Fund's website are for the 2020 year) that the Fund had achieved 91.3% of its predetermined targets for the 2022/2023 year, representing a steady improvement from the 57% in the Fund's 2019/2020 year. He also reported that legal costs had reduced to R3.7 billion, claims paid increased to R45.6 billion, and that revenue from the fuel levy amounted to R48.4 billion. He further said when commenting on the RAF future projected claims liability: "*Through the implementation of the 2020-25 strategy, the projected increase to R51 billion was not only averted but was actually reduced by around R42 billion to R9.3 billion*."

20. Currently the Fund (unlike COIDA and the UIF) is held accountable when payments or settlements are not forthcoming, by lawyers and a legal process of enforcing compliance through litigation and the courts. Despite this, the Fund in its 2020/2021 accounts claims that it had a surplus of over R428 million. The Fund operates as a pay-as-you-go scheme, and as long as expenditure can be contained close to revenue, its sustainability is not threatened. The fact that there was an excess of income over expenditure, as well as the fact that the Fund has been cashflow positive in previous years as well, militates against the necessity for such drastic measures to improve the solvency and sustainability of the Fund, this being the stated principle object of the Bill.

21. Statutory insurance schemes are not supposed to make a "profit", and references to budgetary constraints are insufficient to justify taking away rights.

22. In *Rail Commuters Action Group*, (*Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 88), O'Regan J explained as follows in the context of relief declaring the State's failure to take reasonable measures to protect rail commuters:

> *"A final consideration will be the relevant human and financial resource constraints that may hamper the organ of State in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided."*

23. The Bill seeks to create a scheme (similar to **COIDA** and **UIF**) where a claimant has to rely on the efficiency of the Fund to be compensated for whatever social benefits may be due, and in particular for the payment of loss of earnings or support by way of pensions. Payment of medical and hospital expenses will be made directly to the suppliers or medical aid concerned, or to the claimant, upon proof and subject to prescribed procedures. Currently the Fund does not keep up with payments due in terms of undertakings, and certainly will not have the capacity to process pension payments in addition to administering undertakings. It may, like SASSA, resort to appointing independent contractors to perform this service. The cost is likely to be substantial.

24. Future treatment must be pre-authorised to be claimable. This will require a further significant increase in capacity and skills within the Fund.

25. As with **COIDA** and **UIF**, very few claimants of the social benefits envisaged by the Bill will be represented by lawyers, should it be passed in its current form. Road accident victims must still prove fault and comply with all the procedures and provide all the supporting documents stipulated by the Board of the Fund, to receive any benefits at all. Many claimants will not be able to negotiate the process or afford to obtain the required documents. Of these many will simply give up or die before they are able to access whatever "*social benefits*" the Bill does provide.

26. Significant changes were made to the then legislation by the enactment of the 2005 Road Accident Fund Amendment Act, which came into effect in 2008. The most significant of these changes were the abolition of an injured party's common law right to look to the wrongdoer for any losses not covered by the statutory scheme, the imposition of a threshold limiting compensation for pain and suffering, loss of amenities of life, disability, disfigurement and shock (general damages) to those who sustained a ***"****serious****"*** injury as defined in the Act and Regulations, a cap on the amount to be awarded for loss of earnings and / or support, and the introduction of tariffs in respect of emergency and non-emergency medical, hospital and related treatment pertaining to injuries suffered in a motor vehicle accident.

27. The legitimacy of the 2005 Road Accident Fund Amendment Act was challenged by LSSA in the case of **Law Society of South Africa and Others vs the Minister of Transport and Another (CCT 38/10) [2010] ZACC25 (25 November 2010)** ("Law Society").

28. The judgment of the Constitutional Court was handed down on 25 November 2010. In paragraph 51 the Constitutional Court said:

> *"Another relevant factor is that the Minister assures us that the scheme is transitional and thus an interim measure. It is a step in the journey to reform the compensation regime to motor accident victims. However, it must be said that during the interim stage, the obvious soft belly of the scheme is that it is still fault based".*

And further in paragraph 53:

> *"However, if on all accounts the impugned legislative scheme is an incremental measure towards reform and is a rational step in that direction, the law maker should be permitted reasonable room or leeway to advance the reform. This does not however mean that the mere fact that a prevailing system is but a step in the wake of a wonderful legislative ideal can for that reason only ever justify the violation of constitutional rights in the interim".*

And further in paragraph 54:

> *"We must keep in mind not only the Government's immediate purpose in enacting this legislation, but also its long turn objective. 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. The new scheme is a significant step in that direction. On all the evidence it is clear, and the Minister and the Fund assure us, that the ideal legislative arrangement should not require fault as pre-requisite for a road accident victim to be entitled to compensation for loss arising from bodily injury or death caused by the driving of a motor vehicle. Therefore, the abolition of the common law claim is a necessary and rational part of an interim scheme whose primary thrust is to achieve financial viability and a more effective and equitable platform for delivery of social security services."*

29. If passed into law, the Bill will create a scheme that in fact regresses from 2008, and will fail to protect the very persons who require protection the most. It is first and foremost anti-poor. It arbitrarily denies the limited benefits it does offer, to certain widows and orphans and classes of claimants. It protects the wrongdoer at the expense of the victim. Legislation such as this does not fulfil the State's constitutional obligation to provide social security and access to healthcare services to all road users and their dependants. It can hardly be seen as a fair scheme which will

provide a more effective and equitable platform for the delivery of social services. If it fails to meet the standard already pronounced upon by the Constitutional Court, it will be vulnerable to being struck down as failing to meet a legitimate government purpose.

30. In *Jaftha v Schoeman*, the Constitutional Court explicitly held that any "*measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)*." The same would apply to existing access to social security and healthcare. As a matter of principle, removing existing access to a right, amounts to a limitation thereof that requires special justification. Mere averments of resources constraints and budget cuts by the State are not sufficient for such purposes.

31. At the very least, should the Minister wish to proceed with this Bill and have any hope of it withstanding constitutional scrutiny, the common law rights of those who are denied any benefits have to be returned to them, as well as the rights of all accident victims to look to the wrongdoer for general damages.

MAJOR CHANGES

32. Many of the provisions in the Bill have been foreshadowed by Board Notices and management directives issued by the Road Accident Fund during 2021 and 2022.

33. On 8 March 2021, a management directive was issued seeking to stipulate the terms and conditions upon which claims would be administered. This met with a storm of protest, as a result whereof its implementation was delayed to 1 May 2021. In response, no less than 11 urgent court applications were brought in May 2021, seeking orders compelling the Fund to accept lodgements which would otherwise have prescribed.

34. The Fund withdrew the management directive but shortly thereafter published Board Notice 58 in the Government Gazette on 4 June 2021, containing the same or similar terms. This precipitated an urgent application for an interim interdict suspending the operation of the Board Notice 58, pending a judicial review. This was granted and shortly thereafter the review proceedings were launched. The review was argued in May 2023 and judgment is currently awaited.

35. Undeterred by this, the Fund caused a further Board Notice 66 to be published in the Government Gazette of 22 June 2021 calling for public comment. The content echoed what had been in the previous management directive and Board Notice 58. LSSA submitted comments and pointed out that the attempt to introduce additional requirements for the lodgement of a substantially compliant valid claim, in addition to the provisions of Section 24(1) of the Act, by way of a Board notice, was *ultra vires* the powers of the Fund, the Board and the Minister. A copy of the LSSA submissions is attached to this submission.

36. On 6 May 2022 the Fund caused Board Notice 271 to be published in the Gazette. Its terms were almost identical in all material respects to Board Notice 66. Its implementation was suspended pending publication of a revised RAF Form 1 (being the claim form now to be used to lodge a claim). The revised RAF Form 1 was published by the Minister in the Government Gazette of 4 July 2022, thus triggering the operation of Board Notice 271. In response, at least two applications for review have been launched. It is anticipated that one of these may be heard before the end of the year.

37. In June 2022, an internal management directive was issued, denying claims from foreign nationals who are undocumented or cannot produce - to the satisfaction of the Fund - documentary evidence that they were legally in South Africa at the time of the accident. The directive also prohibited payment to those foreign nationals, regardless of whether they already had settlement agreements or court orders. Currently, even upon presentation of writs the Fund refuses to pay in terms of those court orders and in certain cases has launched applications to set writs aside, pending applications to rescind the judgements granted, regardless of whether judgements may have been obtained by way of settlement agreements, in an opposed trial or by way of default judgment proceedings. The prospects of success in all these matters are nil and the consequential wasted costs will have to be carried by the Fund, many on the attorney and client (punitive) scale.

38. On 12 August 2022, a further internal management directive was issued instructing all claims handlers to reject any claim for past expenses covered by a medical aid or medical insurance. This resulted in an application by Discovery Health to set the directive aside, which succeeded before Judge Mbongwe in the Pretoria High Court on 26 October 2022. Applications for leave to appeal to the court a quo and the Supreme Court of Appeal both failed as having no prospects of success. The Fund, nevertheless, went on to lodge an application for leave to appeal with the Constitutional Court in May 2023. A decision is still awaited.

39. Even though Board Notice 271, the revised Form 1 published on 4 July 2022, and the management directives of June and August 2022 have met with universal opposition, all these provisions are included in the Amendment Bill.

40. Most of the changes put in place to date in anticipation of the Bill are *ultra vires* the powers presently granted to the Fund and/or the Minister in the current Act. The Bill seeks to rectify this by amending the Act. However, many of the proposed changes are not only *ultra vires* but also offend the Bill of Rights and will be susceptible to constitutional challenge. Amending the Act will not save the day in respect of those provisions.

41. Below is a summary of the major changes proposed in the Bill. We comment more fully when dealing with the Bill clause by clause:

- Only accidents on a public road covered (therefore any injuries suffered in accidents on all farm roads or roads in private estates, game reserves, sports clubs, school grounds or playing fields, parking lots, shopping centres excluded);
- A person who is not a South African citizen or direct permanent resident has no claim;
- No claim if the offending vehicle did not stop or is unknown, regardless of fault (hit and run accidents);
- Pedestrians crossing a highway and their dependants denied compensation, regardless of who is at fault;
- Drivers, pedestrians and cyclists who are over the legally prescribed alcohol limit denied compensation, regardless of who is at fault. Their dependants are also non-suited;
- No general damages for pain and suffering, loss of amenities or life disfigurement and shock, regardless of how catastrophic the injuries are;
- Medical expenses benefit limited to a prescribed tariff and all payments covered by medical aids excluded;
- Future medical expenses subject to a prescribed tariff and to be pre-authorised;
- Loss of earnings and support capped and to be paid as an annuity (probably monthly) and subject to constant review at the discretion of the Fund in respect of liability;
- Passenger claims reduced by the amount of the operator's passenger liability cover;
- Motor vehicle accidents involving a train or an aircraft excluded;

- Motor vehicle accidents in circumstances where a producer, importer or retailer is liable for harm caused by driving a motor vehicle excluded;
- Motor vehicle accidents occurring whilst filming a movie or an advert, or drag racing or performing a stunt or similar event excluded;
- Claimants can now be represented by any person, functionary or institution as prescribed by Regulation;
- No right to institute proceedings in a court of law without first exhausting an internal complaints process as stipulated by the Fund, which will include referral of unresolved complaints to the Office of the Road Accident Fund Adjudicator, yet to be established;
- Prescription of claim after lodgement no longer extended to five years;
- Minister's power to regulate extended;
- Board's power extended to include the power to stipulate terms and conditions upon which claims will be administered.

42. All road accident victims will be denied compensation for general damages for pain and suffering, loss of amenities of life, disability, disfigurement and shock, and all payments for future loss of income and support will be by way of annuities (monthly payments), subject to review at any time by the Road Accident Fund. Should a breadwinner be in receipt of such an annuity and die, the annuity will cease, leaving his or her dependants destitute.

43. Those who can afford it, will be compelled to take out private accident cover for medical and other expenses, as well as accident benefits. This is likely to be costly, as there will be no reimbursement of those expenses covered by such insurance from the Fund. The Bill also denies reimbursement for those expenses covered by medical aid, which in turn will impact on the finances of all medical aids to the detriment of all their members. Medical aids may be forced to exclude expenses incurred in accidents, not covered by a prescribed minimum benefit and will have to increase their premiums to cover those expenses it is obliged to pay, in order to protect its funds for the benefit of all members.

44. If the Bill is passed, road accident victims will be uniquely discriminated against. Their rights to be compensated for harm suffered by the fault of another will be taken away, in some cases with no remedy at all. Persons who suffer harm from medical negligence or who are injured in a train or plane or boat accident - or in shopping centres, hotels, constructions sites, holiday resorts, private homes or by electrocution, pollution or a host of other causes - have unfettered rights to seek

compensation from the person or entity who caused them harm. Innocent motor victims alone do not have this right but will continue to pay *"premiums"* by way of the fuel levy, in excess of R48 billion per year, to a fund from which they will derive little or no benefit.

45. The Bill is a radical change to the nature of the RAF by excluding certain claims and claimants from accessing benefits. If this is to be done, then other aspects of the RAF scheme must also undergo radical changes. The State cannot both exclude categories of claims and claimants (rather than merely capping what may be claimed) and at the same time leave those persons who fall into these categories without any means of obtaining justice and compensation from the person who caused the harm in the first place.

46. In the words of Edmund Blackadder: "*Law without remedies is like a broken pencil. Pointless."*

47. To exclude categories of victims from claiming compensation from the wrongdoer and from obtaining benefits from a social security scheme, would be to render these victims without any remedy for their loss in law. If the law is precluded from providing them a remedy, then they may have no other way of exacting justice than to take extra legal means. That would undermine the rule of law and the constitutional order.

THE PROPOSED AMENDMENTS

Section 1 of the Act: Definitions

48. The changes in the definition section are dealt with when considering the sections of the Bill which refer to those definitions.

Section 2 of the Act: Establishment of the Fund

49. Section 2 of the Act is amended by the introduction of a Section (1A) as follows:

"(*1A) In accordance with this Act, the Fund shall provide social benefits the victims of motor vehicle accidents which occurred on a public road*."

50. Contained in that brief sentence are two significant restrictions, namely, the substitution of reduced social benefits (welfare) for compensation, and the limitation of claims to accidents which occur on the public road.

51. There are many private roads within the Republic. Farm roads, in particular, are where many vulnerable persons can and do sustain injuries in motor vehicle accidents. The vehicles using these roads use petrol or diesel, and as such they are entitled to be indemnified (having paid the fuel levy), and the persons they injure should be entitled to claim. The exclusion is arbitrary and cannot be justified as fulfilling a legitimate government purpose. Although of vital importance to a farm worker seriously injured on a farm road, the percentage savings that could be achieved to the Fund by this exclusion cannot be significant. No doubt the Fund does not have any statistics to back up the advantage it will achieve by this exclusion as against the obvious devasting harm it will cause. The circumstances of any accident, regardless of where it takes place, must be proven by a claimant in order to be compensated in terms of the current system. As fault remains a fundamental requirement to claim benefits in terms of the Bill, this is a sufficient filter to exclude unjustified claims. It is no more difficult to investigate a claim on a "private" road than on a public one.

52. Other areas also hit by this exclusion would be parking lots, shopping centres, sports clubs, wine estates – often open to the public - and other major tourist attractions.

53. Thus, a person injured on private roads has no claim in terms of the Bill and despite this, they are also denied a claim against the wrongdoer by virtue of section 21 of the Act.

54. The Constitutional Court has already found that the state incurs obligations in terms of section 12 of the Constitution in relation to victims of road accidents. It also found in *Law Society* that the abolition by Parliament of the common law right, limits the rights entrenched in section 12(1)(c) of the Constitution and would be unconstitutional unless it is justifiable in a democratic society that prides itself on the founding values of the Constitution. In justifying the abolition then, the Court found that the scheme in the Act:

> *"..puts in place of the common law residual right a comprehensive regime that is directed at ensuring that the Fund is inclusive, sustainable and capable of meeting its constitutional obligations towards victims of motor vehicle accidents."*

Most importantly, the Court went on to say:

> *"In any event, the limitation of the right is only partial because a victim is entitled to compensation, although now limited, under the legislative scheme".*

(Our emphasis)

55. The Bill falls far short of being "*inclusive, sustainable and capable of meeting its constitutional obligations towards victims of motor vehicle accidents*", and by its own definition no longer provides "*compensation*".

56. This can only be partially remedied by reinstating the common law rights for damages not covered in the Bill, or radically revising the Bill itself.

Section 3 of the Act: Object of the Fund

57. This section now reads:

> "*The object of the Fund shall be to, in accordance with this Act, provide social benefits to victims of motor vehicle accidents which occurred on a public road".*

58. This amendment aligns Section 3 with the amendments to Section 2, discussed above.

Section 4 of the Act: Powers and Functions of the Fund

59. The power to stipulate the terms and conditions upon which claims are to be administered is removed from the Fund and vested in the Board, in terms of a new section 26A, referred to more fully below.

60. In line with the re-characterisation of the Fund from a statutory insurer to the provider of social benefits, the power to procure reinsurance for any risk undertaken is removed and in its place the Fund is empowered to procure "*risk mitigation instruments for any risk undertaken by the Fund under this Act"* by way of the insertion of a new subsection (j) in (2).

Section 9 of the Act: Co-operation with other institutions

61. The existing section - which provides for agreements with private or public institutions in respect of reciprocal recognition of compulsory motor vehicle insurance or compulsory motor vehicle accidents compensation - is deleted and in its place the Minister is now empowered, upon recommendation of the Board, to cooperate and enter into agreements with other MVA funds or similar in SADC, AU and globally.

62. Once again, this is in line with the change of the identity and nature of the Road Accident Fund, from a compulsory motor vehicle insurer to the provider of social benefits.

Section 10 of the Act: Board of the Fund

63. Section 10 of the Act has been amended to provide for 12 non-executive members appointed by the Minister (previously 8 – 12), and the introduction of the Chief Executive Officer and the Chief Financial Officer of the Fund as executive members of the Board. All board members other than the Director General - Transport have a vote. The other provisions remain largely the same.

64. Is it desirable for the independence of the Board and good governance to have two executive employees of the Fund as Board members with voting rights?

Section 12 of the Act: Chief Executive Officer and staff

65. Clause 12 of the principal Act has been amended to increase the powers of the CEO over the appointment, conditions of employment and dismissal of all staff, excluding only those on the executive management level.

Section 13 of the Act: Annual report

66. Clause 13(1) of the principal Act now reads:

> *"The Board shall publish an annual report in accordance with chapter 6 of the Public Finance Management Act 1999 (Act 1 of 1999)."*

67. Currently section 13 obliges the Fund to publish an annual report and to lay upon the Table in Parliament a copy of this report within 30 days of receipt.

68. Whether this amendment is aimed at and/or will achieve the curtailment or removal of Parliament's oversight function in relation to the finances and activities of the Fund, is not clear to us. The Fund is already a Schedule 3 listed entity and subject to PFMA. In terms of section 14(2) of the Act, which has not been amended, the accounts of the Fund are still to be audited by the Auditor-General.

Section 14 of the Principal Act: Financial control

69. Section 14 (1) previously obliged the Fund to "*keep proper records of all its financial transactions and its assets and liabilities".* It now reads:

> *"(1) The Fund shall adhere to all provisions as provided for Public Entities in the Public Finance Management Act, 1999 (Act 1 of 1999)."*

70. The implications, if any, of this change are not clear to us.

Section 15 of the Principal Act: Legal status of and proceedings by Fund, and limitation of certain liability

71. Section 15 (2) has been amended to introduce a condition precedent to the institution of an action to enforce a claim, namely the exhaustion of the complaint process administered by the Adjudicator.

72. The definition of "*complaint*" refers to a decision taken in excess of powers and/or that the third party may sustain prejudice as a consequence of maladministration, whether by act or omission, and/or a dispute of fact or law that has arisen between the Fund or any person and the third party.

73. An amendment to section 24, by the introduction of sections 24A and 24B, provides for an alternative dispute resolution procedure for the resolution of complaints and the establishment of the Office of the Road Accident Fund Adjudicator.

74. Further comment on this will be made when dealing with the changes to section 24. The prescribed procedure will be dealt with more fully when we analyse section 26, which empowers the Minister to make regulations to further the purposes of the Act.

Section 17 of the Principal Act: Liability of the Fund and agents

75. The existing section is deleted in the principal Act and the following is substituted:

> *"17 (1) The Fund shall subject to this Act and any regulation made under Section 26 in the case of a claim for a benefit under this section arising from the driving of a motor vehicle where the identity of the owner or driver thereof has been established, excluding hit and run, be obliged to provide the benefits specified under this section to a third party for loss or damage which the third party has suffered as a result of bodily injury to himself or herself or the death of or any bodily injury to any other person caused by or arising from the driving of a motor vehicle by any person on a public road within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver of the owner the motor vehicle or of his or her employee in the performance of the employee's duties as an employee: Provided that the Fund shall not be obliged to provide a benefit to a third party for non-pecuniary loss.*

76. The underlined portions in section 17 are the core of the fundamental changes effected to the scheme by the Bill.

- Only benefits provided not compensation;
- No cover for hit and run accidents;
- No cover if accident not on a public road;
- No claim for general damages for pain and suffering, loss of amenities of life, disability, disfigurement and shock.

77. The Bill goes on to introduce a Section 2(2A) which further limits the stated social benefits which will be provided to a qualifying third party as follows:

- Medical expenses subject to a prescribed medical tariff, and medical expenses covered by medical aid excluded;

- Subject to the prescribed medical tariff an undertaking to compensate a third party or service provider for the cost of future medical treatment after costs have been pre-authorised in the prescribed manner;

- Subject to prescribed limits a past loss of income benefit;

- Subject to prescribed limits and the periodical reassessment of the Fund's liability a future loss of income benefit paid in annuity; and

- Subject to prescribed limits a funeral benefit;

- Subject to prescribed limits a past loss of support benefit;

- Subject to prescribed limits and the periodical reassessment of the Fund's liability a future loss of support benefit by way of an annuity.

78. "*Prescribe*" in the existing definitions in the Act, means prescribe by regulation in terms of section 26. Section 26 empowers the Minister of Transport to make regulations regarding any matter that shall or may be prescribed in terms of the Act, in order to achieve or promote the object of the Act.

79. The Draft Bill thus leaves the determination of the limits for the various "*benefits*" to the Minister to prescribe in regulations. This amounts to an impermissible delegation of legislative authority to define exactly what benefits are to accrue to those victims who are not otherwise excluded.

80. What is more, the draft Bill appears to give the Minister the discretion to determine the content and extent of each of the benefits. This is because the draft Bill does not state what "*a medical expense benefit*", a "*past loss of income benefit*", or a *"future loss of income benefit*" are. In making regulations, the Minister will no doubt seek to define that only certain medical expenses and past and future income benefits will be payable.

81. The Constitution draws a distinction between delegating subordinate law-making power (which may be delegated to the Executive), and plenary legislative power (which may be exercised only

by Parliament). The delegation of the determination of what benefits are capable of being claimed by road accident victims entirely to the Minister, is to grant him powers to determine the nature, content and extent of victims' rights. This is not merely giving effect to the framework of a statute but passing on to the Executive important decisions that properly vest in Parliament.

82. If delegation of this sort were permissible, which it is not, the Bill provides no guidance whatsoever to the Minister in exercising a discretion to make these decisions, which determine the nature, content and extent of victims' rights and therefore also potentially take away and limit rights.

83. It is well-established that where Parliament gives executive officials a discretion that may impact upon or limit rights, it must provide sufficient guidance to ensure that such rights are respected.

84. In August 2022 the Minister published a medical tariff which is currently the subject of a review application brought by the National Council of and for Persons with Disabilities (NCPD) and the LSSA as co-applicants. An interim order was granted preventing the implementation of the tariff, pending the outcome of the review which is still pending.

85. It is assumed that this is the tariff (or one very similar) that will apply should the Bill be enacted. The application for review shows that the August 2022 tariffs are patently unlawful, for at least the following reasons:

- They are so low that road accident victims will no longer be able to obtain the care they need in the private sector. Given that the public sector cannot provide this care – either at all or at a sufficient quality or urgency – the result of the impugned tariffs will be that many thousands of road accident victims will die or be permanently disabled. This renders the impugned tariffs irrational, unreasonable and an unjustified limitation of the rights of access to healthcare and bodily integrity.

- The impugned tariffs are unlawful as they were promulgated without complying with various stipulated and compulsory procedures. They would also apply retrospectively – which is unlawful.

- The impugned tariffs are irrational, unreasonable and an unjustified limitation of the rights to access to healthcare and bodily integrity.

86. The Constitutional Court in *Law Society* found that a tariff which would not enable innocent road accident victims to obtain the treatment they require, is incapable of achieving the purpose which the Minister is supposed to achieve.

87. It further found that the public sector is not able to provide adequate services. In this regard reference was made to the National Plan for the Efficient and Equitable Development of Tertiary and Regional Hospital Services (National Plan) published in 2004. The National Plan in great part acknowledges the deficiencies of public health systems described by the expert testimony of the applicants. The situation today is no better and, in fact, in many cases has deteriorated.

88. That tariff was struck down by the Constitutional Court on the basis that the means selected was not rationally related to the objectives sought to be achieved. That objective was to provide reasonable healthcare to seriously injured victims of motor accidents.

89. Despite this finding by the Constitutional Court in November 2010, the Minister in August 2022 proceeded to publish tariffs which again fail to provide reasonable healthcare to seriously injured victims of motor accidents. They will suffer the same fate as the tariffs struck down in 2010.

90. Section 17(4B) of the Act, which required the Minister of Transport to consult with the Minister of Health before publishing a tariff for healthcare benefits, has been deleted in the Bill, giving the Minister of Transport unfettered powers to prescribe tariffs, provided that they are rationally related to the objectives sought to be achieved.

91. It may be that in changing the object of the Act to the provision of social benefits rather than compensation, the Fund and the Minister hope to circumvent the finding of the Constitutional Court. If this is so, it is our view that the failure to provide reasonable healthcare to seriously injured victims of motor accidents still offends the Bill of Rights, thus rendering the tariffs susceptible to constitutional attack. Furthermore, the current medical tariff is a clear indication of the severe restrictions on the social benefits envisaged in the Bill by the Minster and the Fund, which will no doubt be reflected in any regulations prescribed by the Minister in terms of sections 17 and 26 of the Bill.

92. Section 17(3) of the Act has been amended to provide that interest will not run unless 120 days have elapsed from the date of the court's relevant order. Currently this section reads 14 days.

93. The Fund still enjoys a moratorium of 180 days within which to effect payment of claims. Initially it agreed to pay interest at the prescribed rate, so that claimants would at least be compensated for the wait. Recently the Fund has refused to enter into a settlement of any claim unless the claimant waives the right to claim interest during the 180-day moratorium. Payments are by and large not made before the expiry of the waiting period. This is indicative of the fact that the Bill presumes that payment of the social benefits due will similarly be delayed.

Section 19 of the Principal Act: Liability excluded in certain cases

94. The revised section 19 continues to limit liability to loss or damage for which the driver or owner would have been liable (a common law delictual claim requiring proof of fault) but for the provisions of section 21 (which abolishes the common law right to sue the wrongdoer). Simply put, if a victim of a road traffic accident does not have a remedy in terms of the scheme envisaged in the Bill, there is no remedy at all for him or her.

95. The revised section 19 now also excludes the provision of benefits in the following circumstances and to the following extent:

- The reduction of a claim by the amount of any insurance cover that the operator may carry in respect of passenger claims;

- The deduction for any claim of any expense covered by medical aid or medical insurance;

- The denial of any benefits if the injured party was a driver of a motor vehicle or a pedestrian or a cyclist and at the time of the accident was over the legally prescribed alcohol limit or under the influence of a drug, regardless of who caused the accident. Dependants of such persons are also denied a claim;

- The denial of any benefits if the third party was a pedestrian crossing a highway. Dependants are also denied a claim;

- The denial of any benefits if the motor vehicle accident involves a train or an aircraft;

- The denial of any benefits if there is a product liability claim in terms of the Consumer Protection Act;

- The denial of any benefits if the motor vehicle accident occurred during filming of a movie or an advertisement or during drag racing or during the performance of a stunt or similar event;

- The denial of any benefits if the claimant is not a South African citizen or direct permanent resident as defined in the Immigration Act.

96. These exclusions are startling to say the least, and are irrational and unconnected to any legitimate Government purpose. Most, if not all, are unlikely to withstand constitutional attack.

97. Most persons crossing highways do so because there is no other means of getting from where they live, in an informal settlement adjacent to busy roads and highways. Many highways run through the middle of small towns.

98. The exclusion of someone over the legal limit who may be waiting on the pavement for a taxi or bus is nonsensical and arbitrary. This exclusion is further carried over to the dependants of such a person, should they be killed.

99. The refusal of compensation to persons injured on a South African road who are not South African citizens or direct permanent residents, is similarly discriminatory, xenophobic and irrational. All persons have constitutional rights, even foreign nationals who may be here illegally or who may even be wanted criminals. This exclusion may also have a significant impact on the tourism industry, a source of significant revenue and employment. It may be practical and acceptable to exclude benefits in countries where the accident death rate per 100 000 is below 5. However, how will this affect the tourism industry in a country with an unacceptably high road accident death rate? Has the Minister of Tourism been consulted?

100. Section 19 (c) in the Act currently provides that the Fund is not obliged to compensate a third party if the claim is not instituted and prosecuted by the third party, or on behalf of the third party, by any person entitled to practice in the Republic as an attorney, or a person in the service of or who is a representative of the State. The Bill proposes the following amendment to this.

> *"19 (c) if the claim concerned has not been instituted by the third party, or on behalf of the third party by any person, persons functionary or institutions as prescribed in the Regulations."*

101. No indication is given as to the type of person, persons functionary or institution that will be prescribed.

102. The reservation of work for professionals and persons in the service of the State, protects claimants from being represented by unregulated bodies or persons.

103. Attorneys are subject to regulation by the Legal Practice Council and the public is covered for misappropriation of trust funds by the Fidelity Fund. Attorneys are also insured for negligence by the Legal Practitioners Indemnity Insurance Fund. It is unknown what provision will be made, if any, to ensure that persons or functionaries or institutions authorised to represent road accident victims will also be obliged to carry the appropriate insurance, and will be regulated by an appropriate body. Failure to do so will render claimants vulnerable to exploitation with little hope of recourse.

Section 23 of the Principal Act: Prescription of claims

104. Section 23 is amended by the removal of the extension of the time period of prescription once a claim has been lodged, from 3 to 5 years. Bearing in mind that the average rate of settlement of a claim is currently over 5 years, and taking into account the newly introduced internal dispute resolution procedure and thereafter referral to the Office of the Adjudicator, it is envisaged that many claims will be trapped and prescribe in the internal dispute process, as action can only be instituted in order to interrupt prescription once the internal processes have been *"exhausted"*.

Section 24 of Principal Act

105. Significant changes have been affected to section 24 which deals with the process of claiming from the Fund. Section 24(1) in the Bill now reads:

> *"A claim for a benefit under Section 17 (1) shall be dealt with in accordance with the prescribed procedure".*

106. The remainder of the existing section 24 of the Act has been deleted.

107. The comments made earlier about the unfettered right to "*prescribe*" granted to the Minister, also have relevance here.

108. In the Act as it now stands, section 24 provides that a claim for compensation and accompanying medical report under section 17(1) shall be set out in the prescribed form which shall be completed in all its particulars.

109. There is currently no requirement that any further supporting documents need to be submitted for a valid lodgement that will interrupt prescription, other than the requirement in section 19(f)(i) that the third party submits with the claim form or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which the particulars of the claim are fully set out, and in terms of 19 (f) (ii) that copies of all statements and documents relating to the accident are furnished to the Fund within a reasonable time of having come into possession thereof.

110. The courts have interpreted this section to mean that any substantially completed claim form and statutory medical report, plus a merits affidavit, will comply with the provisions and will interrupt the running of prescription.

111. There is currently no requirement in the Act to submit evidence of the damages suffered at the time of lodgement, such as itemised vouchers for past expenses, medical reports (other than the statutory medical report which is completed from records in the possession of the treating doctor or hospital), proof of earnings, employer's certificate or tax records, unabridged birth certificates, certified copies of identity documents, hospital and medical records, photographs of injuries and consent to inspect records. Often these documents are not available to a claimant or are expensive

to obtain. There is also no requirement to submit a South African Police report, sketch plan and key.

112. We will discuss this in more detail when dealing with the changes to section 26, which is the section which empowers the Minister to make regulations to achieve or promote the object of the Act.

113. Two new sections are introduced as 24A and 24B.

114. Section 24A empowers the Fund to stipulate an internal alternative dispute resolution procedure for the resolution of complaints, and section 24B empowers the Minister to establish an independent office to be known as the Office of the Road Accident Fund Adjudicator, in consultation with the Board.

115. The functions and administration of the Office of the Adjudicator are to be provided for in the Regulations.

116. In terms of section 24A the Fund must stipulate alternative dispute resolution procedures for the resolution of complaints, and only if the alternative dispute resolution fails to resolve the dispute may the complaint go to the office of the Adjudicator, which section 24B stipulates shall be an independent office established by the Minister.

117. There are no further details as the procedures have not yet been stipulated by the Fund or prescribed by the Minister. However, it is of concern that the primary alternative dispute resolution is “in house”. One does not know to what extent a claim can be held up in this process before a claimant is entitled to have an independent mind applied to the dispute. Thus, for the first part of the process, the Fund is judge and jury in any dispute with a claimant. Furthermore, it is very unlikely that claimants will be represented by attorneys, leaving them to argue a complaints process, unaided, with the very body against which they are claiming.

118. There is no detail available yet as to the process before the Adjudicator and the costs, if any, involved. The amended section 26B empowers the Minister, on recommendation of the Adjudicator, to make rules in respect of the investigation of complaints by the Adjudicator.

119. It is not possible to make meaningful comment on the process without the detail. However, in principle, the denial of the right to a claimant to have a dispute ventilated in a court of law and to institute proceedings at will to interrupt prescription, should be approached with extreme caution.

120. On the face of it, this is a significant inroad into a claimant's constitutionally protected right to access to courts and to justice. The process may result in claims being trapped in dispute resolution and prescribing before the process is exhausted. This will be discussed further when dealing with the amendments to section 26.

Section 25 of the Principal Act: Right of recourse of Fund

121. Section 25 deals with the right of recourse of the Road Accident Fund - to recover from the owner or any person whose negligence or other wrongful act caused the loss of damage concerned paid by the Fund. Such right of recourse was limited to any case where the driver of the motor vehicle at the time of the accident was under the influence of intoxicating liquor or of a drug, to such a degree that his or her condition was the sole cause of such accident. The amendment to section 25 in the Bill is confusing and difficult to read. The qualification of the right of recourse now reads that:

> *"It shall only be applicable in any case where the motor vehicle at the time of the accident which gave rise to the payment of the benefit was being driven by a person other than the owner and the driver was over the legally prescribed alcohol limit or under the influence of a drug to such a degree that his condition was the sole cause of the accident and the owner allowed the driver to drive the motor vehicle knowing that the driver was over the legally prescribed alcohol limit or under the influence of a drug."*

122. It appears that the words "*to such a degree that his or her condition was the sole cause of the accident"* now apply only to someone under the influence of a drug.

123. Thus, a person over the legally prescribed limit is automatically exposed to a right of recourse. It is further not clear whether this right of recourse can be exercised against the owner who allowed someone to driver over the legal limit regardless of fault.

Section 26 of the Principal Act

124. Section 26 as it stands in the Act, deals with the power of the Minister to make regulations. In the changes proposed in the Bill to section 26 (1A), and without derogating from the general power to regulate in section 26(1), the Minister is specifically empowered to make regulations regarding:

- The procedure to lodge a claim for a benefit under section 17;
- The additional documents that must accompany the claim formal forms when lodging a claim for a benefit;
- The procedure to pre-authorise benefits provided under an undertaking;
- The procedure and form to lodge a complaint with the Adjudicator;
- A tariff of fees between party and party applicable to litigious work performed by a legal practitioner acting for a third party to recover a benefit;
- Other persons or functionaries who may lodge claims on behalf of a third party.

125. In terms of the general power to make regulations, the Minister will also make regulations to define the "*prescribed*" benefits envisaged in the amendments to section 17. We have already commented on this.

126. New Sections 26A and 26B have been added.

127. In terms of section 26A, the Board is empowered to stipulate:

- Terms and conditions upon which claims were a benefit shall be administered;
- The form or forms to be used to lodge a claim for a benefit under section 17;
- The information and form or forms to be used for the purposes of section 22 to provide the Fund with accident information;

- Provisions to ensure compliance with the Protection of Personal Information Act 2013.

128. Section 26A further provides that a stipulation made by the Board in terms of sub-section (1) must be published as a Board Notice in the Gazette. The same considerations apply regarding the impermissible delegation of legislative authority to a statutory board, who is empowered by way of issuing "*stipulations*" published by Board Notices in the Government Gazette, to create insurmountable barriers for unrepresented road accident victims to attempt to negotiate.

129. Although the Board has not published any stipulations for comment, one can safely assume that the stipulations will follow the directives issued in Board Notice 271, which was promulgated in the Government Gazette in May 2022, and which stipulated the terms and conditions upon which claims would be administered. Its operation was triggered by the publication of a revised Form 1 claim form on 4 July 2022.

130. Board Notice 271 currently requires that a claimant submit with his or her claim - in addition to the completed prescribed form and medical report - a South African Police report sketch plan and key, itemised vouchers for past expenses, medical reports (in addition to the statutory medical report completed by the treating doctor or hospital), proof of earnings, employer's certificate or tax records, unabridged birth certificates, certified copies of identity documents, hospital and medical records, photographs of injuries and consent to inspect records.

131. Often there is no South African Police report available at the time of lodgement (and sometimes it is never available), and more often than not no sketch plan was ever prepared. Medical reports in support of claims for loss of earnings and/or future medical expenses are expensive and time consuming to obtain. The Department of Home Affairs does not provide unabridged birth certificates easily and sometimes they do not exist. Provincial hospitals will usually not provide records to a patient directly.

132. If the Bill goes through in its present form, it is very unlikely that claims will be prosecuted by attorneys. The vast majority of current cases are handled in terms of the Contingency Fees Act, which provides access to justice for the impoverished road accident victim. In fact, very few accident victims are able to fund their claims, particularly those who are rendered unemployable as a result of the accident or who have to provide care for a seriously injured family member. In

the event of there being no lump sum payments, there will be no way for a claimant to fund such litigation on contingency.

133. LSSA made submissions in respect of the forerunner to Board Notice 271, namely Board Notice 66. A copy of those submissions is attached to this submission.

134. Section 26B empowers the Minister, on recommendation of the Adjudicator, to make rules in respect of the investigation of complaints by the Adjudicator. The section further provides that the rules contemplated in sub-section (1) shall be published in the Gazette. It is not possible to comment on this in a meaningful way until such time as the rules are made available for comment.
