

COMMENT OF THE
LAW SOCIETY OF THE NORTHERN PROVINCES
ON THE
ROAD ACCIDENT BENEFIT SCHEME BILL, 2014

Introduction

1. The Law Society of the Northern Provinces ("the Society") has taken note of the Road Accident Benefit Scheme Bill 2014 ("the Bill"), and refers to the media statement of the Road Accident Fund ("the RAF") dated 15 May 2014.
2. There can be no question that the Bill seeks to severely impact on the enforceable common law and fundamental rights guaranteed by the Constitution of the Republic of South Africa, 1996 ("the Constitution"), not only of all future Road Accident Victims ("victims"), but also of a multitude of stake holders that are directly and indirectly affected by the injuries and/or deaths of victims.

Public Participation: Misinformation

3. The dangers of an ineffective and/or factually incorrect public information campaign in respect of proposed government action are presently illustrated by the phenomenon of widespread public disobedience and refusal of road users to accept and adhere to the

system of open road tolling introduced for purpose of the Gauteng Freeway Improvement Project.

4. The state has an unquestionable constitutional duty to effectively facilitate public participation in the legislative process. The department is reminded of the following dictum of Brand JA, writing for the Court in ***Democratic Alliance v Ethekweni Municipality 2012 (2) SA 151 (SCA), paragraphs 21-23:***

"[21] This conclusion does not mean, however, that these decisions are immune from judicial review. The fundamental principle, deriving from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative — is only legitimate when lawful (see eg Fedsure para 56). This tenet of constitutional law which admits of no exception, has become known as the principle of legality (see eg Cora Hoexter Administrative Law in South Africa 117). Moreover, the principle of legality not only requires that the decision must satisfy all legal requirements, it also means that the decision should not be arbitrary or irrational (see eg Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) in para 85; Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) (2005 (6) BCLR 529) at paras 74 – 75).

[22] Departing from these well-established principles, the appellant contended that the impugned decisions were illegal in that they fell foul

of statutory requirements and that they also failed to meet the rationality test. As to the former, it is not the appellant's case that the decisions were not taken in accordance with procedural requirements that are prerequisites to their validity, ie that they suffered from what has become known as a 'manner and form' deficiency (see eg King and Others v Attorneys' Fidelity Fund Board of Control and Another 2006 (1) SA 474 (SCA) (2006 (4) BCLR 462; [2006] 1 All SA 458) paras 17 – 18). The objection is that the decisions were not preceded by a process of public participation required by statute. I propose to deal with this objection first.

[23] The Constitution places a specific duty on the National Assembly (s 59(1)) and on the National Council of Provinces (s 72(1)) to facilitate public involvement in their legislative and other processes. The same is expressly required from provincial legislatures — by s 118(1) of the Constitution — but not from municipal councils. Nonetheless, as I see it, municipal councils are also constrained to facilitate public participation in the performance of their executive and legislative functions. In my view that constraint derives, first, from their general constitutional obligation — under s 152(1)(a) of the Constitution — to 'provide democratic and accountable government for local communities' which by implication requires public involvement (see eg A Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) (2006 (12) BCLR 1399) at para 145)."

5. The effect of the Bill would practically be that:

- 5.1 the victim of a road accident is completely deprived of his hitherto actionable common law right to enforce recovery of actual damages suffered as a result of unlawful actions of another. (The source of the liability of the RAF in terms of the present dispensation remains the common law rights of the victim in terms of the law of delict);
- 5.2 the recoverable Rand value of the innocent victim's claim is drastically reduced;
- 5.3 the victim is to be effectively deprived of the right to access legal representation to recover as much of his actual damages as possible;
- 5.4 the victim is to be subjected to the mercy of a bureaucracy in accessing a system of benefits which already offers substantially less than what is presently his right to recover. This is to be done against a background that such bureaucracies at present perform dismally in ensuring that the intended beneficiary has access to the intended benefits. The poor administrative performance of the Road Accident Fund and the Compensation Commissioner is well documented.
- 5.5 the right to bodily integrity of the victim in the context of future medical treatment is to be severely compromised, insofar as the bill seeks to allow the Administrator to dictate what medical

treatment is to be administered to the victim and even which medical practitioners are to administer such treatment;

5.6 the motivation for affecting the rights of innocent victims in this drastic manner is to extend the proposed benefits to the very persons that have caused the injuries of the victims.

6. Bearing in mind the drastic inroads that the Bill seeks to make on the rights of victims, the Society finds it disconcerting that members of the public have been informed of the Bill in the following, somewhat sugar coated manner:

"The Bill provides for a new no-fault benefit scheme and a new Administrator called the Road Accident Benefit Scheme Administrator (RABSA), which will replace the current Road Accident Fund ("RAF") and compensation system administered by it.

In terms of a fundamental overhaul, the legislation proposes that the RAF be replaced by the RABSA and that the current adversarial system be replaced with a scheme which is based on principles of social security and social solidarity.

The key change proposed by the draft legislation is a move away from the insurance based system of compensation which has been largely unchanged in South Africa since its inception in 1946, to a system of defined and structured benefits.

The RABS Bill forms part of an initiative to replace the third party compensation system currently administered by the RAF with a new scheme that is reasonable, equitable, affordable and sustainable.”

(Media statement issued by the Road Accident Fund, 15 May 2014)

7. The Society is unaware of publications by either the RAF or the Department of Transport (“the Department”) which are more informative in any meaningful way.
8. The Society considers it imperative that in order to ensure any form of meaningful public participation, the public should at the very least be advised of the extent of the inroads that the Bill seeks to make on their common law and constitutionally entrenched rights and the actual practical effect thereof:
9. Bearing in mind that all South Africans are forced to undertake the risks of road travel on a daily basis and the fact that very few members of public will be able to understand the practical effect of the Bill, the Society deems it of absolute necessity that a much more informative campaign should be launched. The practical effect of the Bill can be explained fairly easily by providing comparative Rand figures of the extent of cover that members of the public enjoy presently and that proposed by the Bill. Factual examples of comparative Rand value can

be provided by reference to actual matters that have been finalised under the present system.

10. The public should in addition be informed that the bill effectively deprives the vast majority of them of the option of obtaining legal representation to enforce their rights. They are deprived of the intended benefits of the Contingency Fees Act 66 of 1997. The proposed benefit system will make it impossible for legal practitioners to accept instructions at risk and victims are deprived of the prospect of recovering costs reasonably incurred in proving that they actually qualify for benefits. Section 51 of the Bill further removes the right to recover such costs, including the costs of obtaining medical evidence to show that their injuries entitle them to benefits. The public should be informed that they are offered only the cold comfort of the procedures provided for in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the limited powers of courts on review. The reality is that the vast majority of victims will be unable to access the courts for assistance in terms of PAJA. They will have no manner of accessing finance for such procedure, insofar as the proceeds of successful legal action in the form of eventual benefits provide no practical fund for recovery of the legal practitioner's costs.
11. The public is promised assistance by the Administrator in terms of section 5(a) of the Bill. It is in the public interest that they be made aware that they have no recourse if the Administrator and or its

employees negligently or even recklessly cause the victim damage in rendering such assistance.

12. The protection that victims of road accidents have to date enjoyed stands to be severely reduced and the Department of Transport and/or the Road Accident Fund has effectively prevented proper public consultation by not informing the public of the perils that they face by virtue of the unpublicised provisions that the Bill contains.
13. It is submitted that to proceed with the bill in light of the dismally insufficient public information campaign to date opens Government up to the criticism that it is stealing a march on its people.

Motivation for Necessity and Factual Data

14. The Society is of the view that the Bill is being proposed prematurely and that the rights of victims are being endangered whilst alarmingly little factual investigation and/or research has been done regarding the necessity for its introduction.
15. Generally the motivation has to date been the argument that the present dispensation is no longer affordable, that same is open for abuse and that a more equitable dispensation is sought, presumably by also extending road accident benefits to persons who have actually caused their own harm. The necessity for introduction of the proposed

new system is largely motivated by reference to the proposals of the Road Accident Fund Commission of 2002 ("the Satchwell Commission")

16. It is submitted that equity dictates the exact opposite of what the bill intends. If equity is to be understood in the normal grammatical context, it is submitted that it is doubtful that equity dictates that cover should be taken from the innocent to extend to the guilty.
17. The present fault based system does leave room for inequity to the extent that injured persons and dependants who are entirely innocent in causing the harm that they suffer from motor vehicle accidents are sometimes incapable of showing that the accident was caused through negligent driving.
18. It is submitted that such inequity is capable of redress by simply extending blanket cover under the current dispensation to all victims to the extent that they did not cause the harm themselves. Such a system would remove the necessity and costs of establishing fault in the vast majority of road accident claims.
19. The Society considers it unwise and irresponsible to rely on the findings of the Satchwell Commission which:
 - 19.1 made its findings twelve years ago; and

- 19.2 made its findings on evidence that is older than twelve years;
and
- 19.3 made its findings without having had the benefit of considering the saving effect that the amendments introduced by the Road Accident Fund Amendment Act 19 of 2005 ("the amendment act") have had.
20. In particular, the members of the Society have experienced that, due to the proclamation of the amendment act, the number of claimants in terms of the Road Accident Fund Act 56 of 1996 ("the act") have reduced substantially, which should reasonably have had a substantial impact on its legal costs and its own administrative costs. The effect of the amendment act was obviously unknown to the commission.
21. Regrettably, the saving in the total expenditure of the RAF has been far from optimised, due to a number of reasons:
- 21.1 The removal of the limitations on the claims of passengers injured solely as a result of the driving of the vehicle in which they were passengers, should have removed the necessity of merits disputes in the vast majority of claims. In the vast majority of cases, such accidents were obviously caused by the negligence either the claimant's own driver or that of another driver. Our members however report that the RAF invariably continues to dispute such liability up to the date of trial, when liability is invariably conceded. Accordingly the legal costs

relating to such claims, and the obvious administrative costs, are vastly inflated through sheer reckless disregard of the duty of the RAF's employees to apply their minds to the matter. An artificial view of the necessity to do away with the present system is accordingly created;

- 21.2 Simple issues such as the extent of past medical expenses are never resolved before the trial date. Quite often this head of damage has to be separated and postponed, resulting in the costs of an additional trial date because a simple matter of mathematics has not been resolved, again resulting in artificially inflated costs.
 - 21.3 Claims properly lodged are not even acknowledged, let alone met with an offer or an objection during the period of 120 days allowed for by section 24 of the act. Indeed offers for settlement of claims are invariably left until the date of the trial.
 - 21.4 The RAF appears to completely disregard the expertise of their legal representatives. Advices to settle are not heeded, invariably up to the date of trial.
22. Insofar as the purported motivation for introducing the proposed system is the necessity of limiting the expense of the road accident compensation system, the Society fears that the rights of citizens are to

be severely curtailed without reliable factual and present day investigation into:

22.1 the actual necessity to curtail such rights; and

22.2 the actual causes for the necessity; and

22.3 whether the system proposed will be capable of being managed effectively reducing the total expense of road accident compensation by any significant margin ;

22.4 whether the system proposed by the bill will actually be capable of being practically implemented.

23. The Society is unaware of recent, if any, feasibility studies published regarding the application of the scheme proposed by the Bill in a country with difficulties as unique as South Africa.

24. It is foreseen that the administrative costs of the system will far exceed the present system, especially in respect of the employment and training of sufficient staff, for the following reasons:

24.1 It is pointed out that at present, very little of the investigation of a claim is done by the claims handlers of the RAF. The victim is

usually assisted by an attorney who investigates and submits proof of:

- (a) the occurrence of the accident, bearing in mind that many accidents are not reported or are so-called hit and run accidents and that victims are often disbelieved by the RAF; and
- (b) proof that the victim was actually injured in the accident; and
- (c) the injuries, including complicated injuries often not identified by the treating physician, such as brain injuries; and
- (d) the impact of the accident on the victim's employment, which requires extensive knowledge and experience of personal injury matters, bearing in mind that, especially in brain injuries and psychological injuries the inability of a victim to properly execute his duties are often perceived as mere malingering or mere personality issues, leading to loss of employment;
- (e) the income of the victim, including many self-employed who and earn cash only, such as vendors and contractors;

- 24.2 In addition the claims handler is at present usually assisted by the RAF's own attorneys to investigate the legitimacy of claims;
- 24.3 The proposed system will deny the Administrator of such assistance, multiplying its investigative duties;
- 24.4 Many victims live in remote areas of the country with limited access to transport and communication. It is assumed that to effectively execute its duties and assist claimants the Administrator will have to be geographically much more accessible than the RAF;
- 24.5 Many victims have not had the benefit of adequate schooling, illiteracy is still rife while the general ability of most lay persons to access and understand legislation, regulations and rules is doubtful;
- 24.6 Dependants of breadwinners will mostly be minors and often orphans, requiring additional assistance;
- 24.7 Section 5(a) of the Bill places a positive obligation on the Administrator to assist claimants in submitting a claim. The Administrator accordingly has to ensure that their staff members are capable of protecting the interests of victims. It is accordingly submitted that extensive training in the assessment of injuries, the sequelae and the impact thereof and when to call for

additional expert investigation will be essential. The RAF is known to have settled claims with claimants directly without advising that the possibility of an obvious head injury be investigated. The track record of claims handlers of the RAF in appreciating the impact and effect of injuries is unfortunately not good, as is evident from the ratio between the invariably ridiculously low offers that are eventually made and the eventual awards obtained in the final instance;

- 24.8 Insofar as the Administrator will be administering public funds, it will have to ensure that all claims are legitimate and it is doubtful that mere reliance on documentation at face value will be sufficient. It is clear from section 15(1) of the Bill that the funds of the RABS will have to be managed in accordance with the Public Finance Management Act 1 of 1999. Sound verification principles will accordingly have to be applied. Such duties are confirmed by section 5(g) of the Bill. Documents are notoriously capable of falsification and regrettably the social welfare systems of the country have frequently been the target of fraudulent claims. It must be borne in mind that the administrator will not have the luxury of having evidence tested through the court processes. In order to ensure compliance with its duties, it is foreseen that frequent use of the powers of interrogation in terms of section 46 of the bill will have to be made, placing a further burden on the staff resources of the Administrator;

24.9 Section 48(1) of the Bill requires claims to be accepted or rejected in 180 days. It is clear from the history of the RAF that it finds it impossible to process and execute its substantially less onerous duties in respect of claims lodged in terms of section 24 of the act in any period close to 180 days. It often does not manage to acknowledge receipt of the claim in the current 120 day period. It is submitted that this is to some extent due to limited staff resources. It accordingly has to be accepted that a substantial increase in staff component will be necessary to execute the extensive duties of the Administrator;

24.10 The number of persons entitled to benefits will be substantially more than the claimants in terms of the present regime. All injured drivers, irrespective of whether the injuries or death was caused by the negligence of others, including guilty drivers, are now entitled to benefits. In addition, even victims who were unemployed and/or unemployable for whatever reason before the accident are proposed to be entitled to income support benefits, in accordance with section 36 and 37 of the bill;

24.11 Staff members trained in the ability to assess the necessity of medical treatment, as well as the pre-approval of treatment will be required;

24.12 Staff members, trained in ensuring compliance with administrative justice are additionally required to conduct the appeals procedure in terms of chapter 8;

24.13 Additional staff requires additional accommodation and infrastructure, with the obvious cost implications.

25. It is accordingly by no means clear that the proposed system will lead to any limitation in the expense of the road accident compensation system.
26. Conversely, it is submitted that the continued unaffordability of the present system (subsequent to introduction of the amendment act) is with respect artificially overinflated and overstated.
27. The RAF is presently close to meeting its obligations. The members of the Society report that delays in payment of compensation, once determined, are virtually unheard of in recent times.
28. The alleged poor financial position of the RAF is artificially overstated. The 2013 financial statements of the RAF reveal a substantial deficit amounting to R51.4 billion. It should however be noted that this deficit includes an estimated and contingent provisional future liability of R45.4 billion in respect of claims not actually submitted. The provision has been carried and increased for years, notwithstanding the fact that the claims liability of the RAF has been on the decline year on year, since the advent of the amendment act. The provision will only have

practical effect if one is to assume that at the time of compilation of the financial statements, the RAF will no longer receive any fuel levies.

29. It is a matter of record that the RAF has been able to meet its obligations without the need for financial assistance from government, outside of its fuel levy income ever since the effect of the amendment act has become a reality.
30. It is submitted that there is no present day evidence that, properly administered, the present system is capable of substantial cost savings, without the necessity of stripping road accident victims of their common law and a multitude of fundamental rights.

Comments on the Provisions of the Bill

General

31. The Bill seeks to introduce an administrative system similar to that provided for in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA").
32. Government would be remiss in the execution of its duties, if it were not to take cognisance of the performance of such a system in practice, prior to replacing a system which provides equitable compensation to victims, with an inefficient procedure.

33. On 18 April 2013 it was reported by the SA Labour Guide that the office of the Compensation Commissioner has admitted to be in a state of dysfunction, has been so for a period in excess of 10 years. The Auditor General found that the Compensation Commissioner suffers from a poor service culture, lack of skilled staff, inefficiencies, inadequate systems and fragmented business processes.
34. It is submitted that the lack of compliance by the Compensation Commissioner with its duties stems exactly from the fact that intended beneficiaries have been left without effective remedies to enforce their rights.
35. Bearing in mind the admitted lack of performance over a period of 10 years, it is significant that very few intended beneficiaries have been able to approach the courts for review of the performance of the Compensation Commissioner in accordance with PAJA.
36. Workmen, like most road accident fund victims, simply do not have the means to access legal representation in order to ensure, in the absence of the right to claim an award in a form practically capable of serving as security for the costs of legal services on a contingency basis.
37. In short, workmen have been effectively deprived of their right of access to courts, guaranteed in terms and to legal representation, in violation of section 34 of the Constitution.

38. The Bill clearly seeks to introduce the same limitations on the victims of road accidents.

Duty to Assist: Section 5(a)

39. The duty to assist claimants to submit claims is nullified by the absence of liability of the Administrator in terms of section 52 of the Bill for damages caused to claimants by the negligence and even recklessness of the Administrator or its employees.

Determination of Appeals: Section 5 (e) Read with Chapter 8

40. Section 34 guarantees as follows:

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

(emphasis added)

41. There can be no question that the intended appeal tribunal will be called to determine factual disputes. Insofar as section 49(2) of the Bill intends the Appeal Tribunal to consist of solely officers of the

Administrator, it does not begin to make any pretence of independence and impartiality.

42. The review jurisdiction afforded by PAJA does not include the determination of such disputes.
43. It follows that these provisions are plainly unconstitutional.

Programs and Projects Concerning Road Safety: Sections 6(i), 37(9) and 39(9)

44. In terms of sections 37(9) and 39(9), increases of the long term income support and family support benefits are subjected to affordability.
45. The general duty to promote road safety is a function of different organs of state.
46. It is objectionable that the resources of the RABS be utilised to usurp the functions of such other organs of state resulting in reduction of the affordability of increased benefits.

Non Liability for Illegal Aliens: Sections 28(4) and 29

47. It should be borne in mind that section 29 of the Bill seeks to strip the road accident victim from his common law remedies against his wrongdoer.
48. The effect of section 28(4) is to offer the illegal alien only medical care in return and his dependants (who might be children) nothing.
49. The unreasonableness of the limitation is exacerbated in an instance where the dependants are legally present in the Republic.
50. The provisions unreasonable offend sections 9 (Equality Clause), 12 (Freedom and Security of the Person), 22 (Freedom of Trade Occupation and Profession), 25 (Property), and 28 (Children) of the Constitution.

Common Law Rights: Section 29

51. In ***Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC)***, the Constitutional Court accepted that the deprivation of the common law remedy of the victim was rationally connected with Government's legitimate purpose of providing a broader scheme of social security.
52. The Constitutional Court had to consider the abolition of the common law remedy against the wrongdoer against the background of the

substantial protection still offered to the victim in terms of the amendment act.

53. It is important to note that the evidence of Government's contentions regarding the necessity for the interim measure provided by the amendment act as well as its proclaimed legitimate purpose went largely unchallenged. The decision further came against a backdrop of a complete lack of evidence regarding the positive saving effect that the amendment act has brought about. It has already been illustrated that the protests of the RAF and government regarding the former's precarious financial position is overestimated and open to valid criticism. In a media statement issued on 13 September 2012, the RAF admitted that the greater portion of the RAF's professed liabilities consists of a mere book entry in the form of a provision for contingent liability that will only be incapable of being met if the funding of the RAF was to cease on a specific day and the contingent claims do in fact realise. It is further curious why the provision is based on a 5 year term when the prescribed period for lodgements of claims is in fact 3 years. An insignificant portion of the provision represents claims foreseeable in terms of existing section 17(4)(a) undertakings.
54. The Bill proposes benefits that are not comparable to the dispensation under the amendment act. Whereas the amendment act affected the enforcement of the victim's common law right against the wrongdoer, in turn offering substantial enforceable redress against the RAF, the

system proposed in the Bill strips the victim of his right to recover general damages irrespective of the seriousness of the injury, severely reduces his protection against a loss of income, seeks to deprive the victim of his right to decide on medical treatment and makes it practically renders the victim powerless to protect himself by accessing the Court system.

55. The Constitutional Court did not have the benefit of evidence regarding the probable reality of the benefits that that this Bill proposes in the stead of the common law remedy.
56. Government will, in a renewed attack on the constitutionality of the deprivation of the victim's common law rights have to show that the limited benefits proposed in the Bill are indeed a measure intended to provide an equitable system of social security. As matters stand, evidence of the probable practical effect of the system will show the opposite, bearing in mind the experienced gained with the COIDA system will and the absence of proper feasibility studies of the system proposed.

**Contracted Health Care Services, Treatment Plans, Pre-approval and
Forced Health Care: Sections 32, 33 and 34**

57. Section 32 of the Bill essentially seeks to introduce a system of preferred health care providers, who will presumably be appointed

without input from any persons or representatives protecting the interests of victims.

58. Section 34 entitles the Administrator to virtually take control of the bodily integrity of the victim, prescribe treatment to be undergone and, in terms of section 33(3), designate the medical service provider to whose mercy the victim is to subject himself.
59. The provisions represent a complete disregard of the right to bodily integrity of the victim and are irreconcilable with section 12(2) of the Constitution.
60. Section 33(2) entitles the Administrator to require prior approval for all health care service, except emergency treatment. Presumably pre-approval may be required for simple conservative and pain management treatment. In the event that the Administrator chooses to disregard the advice of the medical practitioner of the victim and decline such authorisation, or simply delay a decision, which, considering the present performance of the RAF's employees is entirely probable, the victim is left only with the option of following the appeals procedure in terms of Chapter 6 and if sufficiently funded, a resort to the remedies in terms of PAJA. The inevitable time delay or cost implication to obtain the recommended medical treatment is an unacceptable inroad to the victim's rights.

Income Support Benefits: Residence

Section 35

61. Section 35(1) of the Bill disentitles all persons not ordinarily resident in the Republic from any income protection and irrespective of the citizenship of the victim.
62. In term of section 35(2) persons are so deprived if they have been absent from the Republic in excess of 6 months per year for a period of 3 years preceding the accident.
63. The deeming provision in section 35(2)(b) subjects the victim to the same fate if he fails to submit proof of residency within a reasonable time of being requested to do so. Once established that a reasonable time has elapsed, it appears that the victim remains so disentitled, irrespective of the reason for his failure.
64. Section 35 is an astonishing inroad into the rights of the victim, bearing in mind that he is simultaneously deprived of redress against his wrongdoer.
65. The provision holds considerable peril for many South Africans, who by virtue of a lack of employment opportunities in South Africa are forced to work outside of the borders of the country.

66. The Society is unaware of any factual research done as to the extent of the “saving” that this deprivation will bring about.
67. On the face of it the deprivation seems arbitrary and is a fragrant disregard of the equality clause contained in section 9 of the Constitution.
68. It is in any event doubtful that the deprivation will pass constitutional muster at the hands of the equality clause in respect of foreigners legally but temporarily present in the Republic.

Income Support Benefits

69. Section 36(3), read with section 36(4)(b) appears to entitle persons who were economically inactive immediately before the accident to temporary income support benefits, subject only thereto that their injuries would have prevented them from working if they were if they had been employed.
70. The provision appears to be gratuitous and hardly appears to be in line with the purpose of the Bill to relieve the effects of an accident. Bearing in mind that various classes of claimants (persons younger than 18, older than 60, and persons not ordinarily resident), whose actual income have been affected by accidents are deprived of benefits, the extension of the benefits to economically inactive persons seems unjustified.

71. In terms of Sections 36(2) and (3) and sections 37(1)(b) and(c), should a person have been obliged to file tax returns, the extent of the victims pre-accident income is determined by reference to the tax returns of the previous 3 years. If the victim was not so obliged, his actual pre-accident income will either be accepted as the average annual national income, or if more than that, may be proven by other means.
72. The provisions apparently subject the victim who was obliged to submit tax returns, but whose tax affairs were not in order to a “hidden penalty”, in the sense that his income will automatically be deemed to be only equal to the average annual national income.
73. The “hidden penalty” is unjustifiable, represents a deviation from the common law and in the light of the severe penalties provided for by income tax legislation appears arbitrary. It also disregard the interests of commercial farmers, who by virtue of intended consequences of the income tax legislation will seldom if ever be able to show that they have suffered losses of income far in excess of what their tax returns might reflect.
74. In terms of sections 36(5)(i) and 37(7)(i) of the Bill, the possible recoverable maximum income support benefit, in lieu of a loss of income is even capped further than what is the presently the position in accordance with the amendment act. Insofar as the amendment act

has already brought about a satisfactory saving and in the absence of any factual research in respect of the cost of the system proposed by the bill, this further limitation appears to be unjustified.

75. The mechanics of determining whether a victim has, due to the effects of a road accident become entitled to an income support benefit have clearly been designed to prevent anticipated factual disputes.
76. It is submitted that the bill seeks to accomplish the impossible. Factual disputes arise as a matter of natural cause, whenever a factual entitlement to benefits and/or damages has to be enforced by one party against another. The unfortunate reality is that fraudulent claims will be submitted whereas the Administrator has an obligation to prevent such fraud.
77. In an attempt to design a system that will prevent factual disputes, the Bill seeks to adopt the system provided for in terms of COIDA. The difficulty is that the COIDA system is designed for persons formally employed, making determination of benefits relatively simple. Pre-incident income is determined by simple reference to salary.
78. Road Accident victims are not necessarily so employed. Victims include children, self-employed persons and persons informally employed, as well as persons still at the beginning of their career paths.

79. The system proposed does not cater for child victims whose income earning capacities have been destroyed. It is unlikely that even a reasonable percentage of the parents of minor children will ever be able to finance a proper investigation to show that their injured children will eventually become entitled to benefits when they reach normal income earning age. Insofar as they are economically inactive at the time of the accident, they appear to be sentenced to forever be receiving benefits relevant to the average annual national income.
80. Similar difficulties arise with persons who might well have only commenced their career paths. It cannot be justified that their benefits will forever be limited relative to the income they earned at the time of the accident.
81. The aforesaid benefits make the Bill open to constitutional attack by virtue of a gross violation of the equality clause in terms of section 9 of the Constitution, the Children's clause in terms of section 28.
82. It is obvious that the exclusion from income support benefits of persons younger than 18 and older than 60 is likewise open to attack in terms of the Equality clause and the Children's clause.

Family Support Benefits: Part C

83. Section 39 of the Bill introduces a further, apparently arbitrary, deprivation of benefits to dependants who are not ordinarily resident in the Republic.

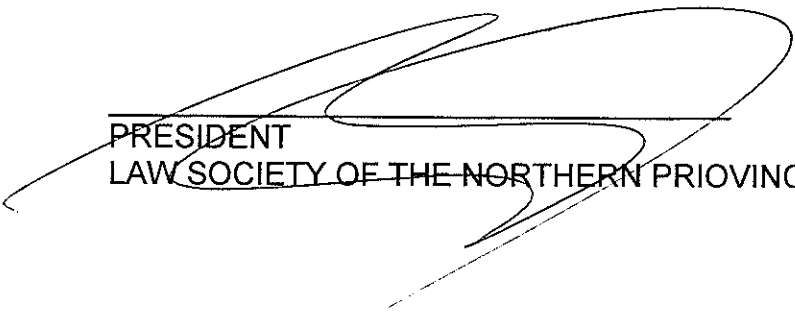
- 84. Dependants have no common law redress. Dependant children of divorced parents, where the custodian parent lives are deprived of benefits.
- 85. Likewise, children studying abroad are so deprived.
- 86. The provision is unlikely to pass constitutional muster.
- 87. The comments relating to calculation of pre-morbid income for purposes of income support benefits apply equally to the provisions relating to the calculation of the income of the deceased.
- 88. The limitation in Schedule 1 of the bill, limiting the benefit to a period of 15 years in respect of a surviving spouse, without qualification relating to the income earning capacity of such a spouse appears to be arbitrary. Likewise the limitation of the benefit of children to the age of 18 without reference to the circumstances affecting the income earning capacity of such children appear arbitrary. Such spouses and children might well be, for unrelated reasons, be completely incapable of earning a living.
- 89. The aforesaid provisions are unlikely to pass constitutional muster.

Procedures: Claims Adjudication and Appeal

90. The difficulties foreseen with the fact that the claimant is principally responsible for submission and proof of his claim have been dealt with above.
91. Because of the necessity to safeguard against fraud and the notorious inefficiency of bureaucratic systems, it is foreseen that claimants are likely to have their limited benefits unacceptably delayed as they get tied down in paper wars with the Administrator.
92. The workload that the Bill seeks to impose on the administrator will inevitably lead to an inability to investigate every claim properly and timeously. A similar result to the present state of the office of the Compensation Commissioner appears difficult to prevent.
93. It is pointed out that, notwithstanding the time limitations purportedly placed on the Administrator by the bill, ample opportunity is built into the system to stall the claim of the victim by various requests for further documentation, sanctioned by the Bill.
94. The sting of the Bill for victims is in the limited remedies they are afforded to enforce diligent processing of their claims and their obligation to fund proof of their claims themselves. Medical reports for purposes of either litigation or a quasi-litigation process such as proposed by the Bill are prohibitively expensive. It is unlikely that victims will be able to prove complicated injuries such as brain injuries and the actual sequelae thereof. If such costs are incurred, they will be

irrecoverable. Victims of such complicated injuries seldom have insight into the difficulties that their injuries actually create.

95. Unlike in the present system the victim will not be able to approach an attorney willing to work on contingency and to finance medico-legal reports. The prospect of recovering fees and expenses from a successful claimant who consequently receives a pittance as a pension will be remote.
96. Lay persons will have limited to non-existent knowledge of the principles of administrative justice and will undoubtedly lack the knowledge and skill to effectively conduct PAJA litigation.
97. As has been the experience with claimants in terms of COIDA, a large number of road accident victims will probably simply become disillusioned with the process and seek to access other state resources in order to survive.
98. Insofar as the intention with the Bill is to provide an effective and equitable compensation system to alleviate the impact of road accidents on victims, the Society foresees a severe danger that the proposed Bill will accomplish exactly the opposite.
99. For the reasons stated in these comments, the Society regrettable cannot and does not support the Bill. The insult to injury is that the Administrator is absolved of virtually all responsibility in terms of section 52 of the Bill. It is unclear why this particular organ of state should enjoy such a privileged position.



PRESIDENT
LAW SOCIETY OF THE NORTHERN PROVINCES