



6 October 2023

# **OUTA comments on the draft Road Accident Fund Amendment Bill, 2023**

**Submission by the Organisation Undoing Tax  
Abuse to the Director-General, Dept of Transport**

**Submitted by:**

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087 170 0639



6 October 2023

TO: THE DIRECTOR GENERAL  
DEPARTMENT OF TRANSPORT

C/O: MS LINDIWE TWALA

PER: [REDACTED]

AND TO: MR TREVOR MPHAHLELE

PER: [REDACTED]

Dear Sir/s

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## COMMENTS ON THE PROPOSED DRAFT ROAD ACCIDENT FUND AMENDMENT BILL, 2023

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### INTRODUCTION:

1. The Organisation Undoing Tax Abuse ("OUTA") is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority, in particular the abuse of taxpayers' money.
2. OUTA is further geared towards the harmonious cooperation with government and other institutions such as Parliament to assist wherever necessary in carrying out their mandate in the best interests of South African citizens.
3. It is a well-known fact that many public entities in South Africa are facing challenges like financial constraints, lack of expertise and governance issues (to name but a few). It is therefore of the utmost importance that all public entities, big or small, perform at its best and have legislative prescripts that can withstand constitutional scrutiny. The citizens of South Africa who are ultimately financing these entities, expect it.

4. As a matter of principle, OUTA does not oppose the introduction of new laws and regulations by Government, but rather wish to ensure that these laws and regulations are capable of effective execution and are aligned with the basic principles envisaged in our Constitution.
5. The Road Accident Fund Act 56 of 1996 came into operation on 1 May 1997. This act established the present Road Accident Fund whose object it is to pay compensation in accordance with applicable statutes for personal loss or damage wrongfully caused by the driving of motor vehicles.
6. On 08 September 2023, the Minister of Transport published The Draft Road Accident Fund Amendment Bill, 2023 for public comment. OUTA, with the support and requests from its supporters wish to submit comments on the proposed Road Accident Fund Amendment Bill, 2023.
7. OUTA will hereunder provide comments and a legal opinion on the issues identified in the proposed Draft Road Accident Fund Amendment Bill, 2023.

**OUTA'S COMMENTS:**

**CHANGE IN COMPENSATION STRUCTURE AND OBJECTIVE OF THE ROAD ACCIDENT FUND**

8. According to the Memorandum on the Objects of the proposed Road Accident Fund Amendment Bill, 2023, it states that the object of the Bill is to further limit the liability of the Road Accident Fund (herein after referred to as the "RAF") to improve the solvency and sustainability of the scheme, and to ensure a more equitable distribution of the risk assumed by the RAF, the private insurance industry and other stakeholders.
9. OUTA is not convinced that the proposed amendments will achieve this objective. We believe that if the amendment Bill is passed in its current form, it will not withstand constitutional scrutiny.
10. With specific reference to section 2(1A) and Section 3 of the proposed Bill, OUTA is of the opinion that the proposed amendments and the objective of the proposed Bill will blatantly discriminate against the poor and disempowered, with road accident victims suffering greater prejudice, and their rights to be compensated for harm due to the fault of another, will be taken away.

11. The proposed Bill wishes to limit the liability of the RAF yet remains silent on a possible reduction in the fuel levy, from which the RAF obtains its funding. The proposed Bill's objective is to favour and prioritise the interest of the RAF at the expense of the most vulnerable of society.
12. It is important to note that the RAF receives approximately R48 Billion a year in funding from the fuel levy. The draft amendment Bill proposes a change in the object of the Fund, by changing the payment of compensation (as a statutory insurer), to the provision of a social benefits (welfare).
13. While the envisaged "social benefits" will be far less than the losses actually suffered in a motor vehicle accident, the fuel levy income received by the RAF will continue to remain in place and grow, as the levy and/ or road traffic volumes increase.
14. Moreover, OUTA is of the opinion that Section 2(1A) and Section 3 of the proposed Bill amount to a clear limitation of several constitutional rights, such as Section 9 (The right to equality), Section 10 (The right to human dignity), Section 12 (The right to freedom and security of the person), Section 27 (The right to access to healthcare) and Section 34 (The right to access to courts) of the Constitution of South Africa, 1996.
15. OUTA strongly believes that road accident victims will be uniquely discriminated against by the proposed Bill and their right to be compensated for harm suffered by the fault of another will be taken away and will leave many victims of motor vehicle accidents with little to no recourse in respect of their injuries.
16. Persons who suffer harm from medical negligence or are injured by a host of other causes have unfettered rights to seek compensation from the person or entity who caused them harm. If these proposed amendments are to be accepted it will have the serious consequence in that innocent motor vehicle accident victims, alone, do not have this right, even though they pay premiums by way of the fuel levy.
17. Therefore, OUTA is of the opinion that in terms of the Bill, the common law rights of all road accident victims, to claim compensation for injuries they suffer in a motor vehicle accident, will now not only be limited but be removed and replaced with a package of "social benefits", which is grossly inadequate, or completely removed for certain categories of persons/claims.

ALTERNATIVE DISPUTE RESOLUTION AND THE ESTABLISHMENT OF THE OFFICE OF THE ROAD ACCIDENT FUND  
ADJUDICATOR

18. Section 12, read together with Section 21 of the proposed amendments, provides for alternative dispute resolution and the establishment of the office of the Road Accident Fund Adjudicator, before litigation can be instituted. Although OUTA is not in essence opposed to alternative dispute resolution mechanisms, OUTA is concerned about the prolonged time periods and cumbersome processes applicable to these types of alternative mechanisms.
19. According to the proposed Bill, the RAF has the discretion to stipulate alternative dispute resolution procedures for the resolution of complaints and only if the alternative dispute resolution procedure fails, does the complainant have the right to approach the office of the adjudicator.
20. OUTA is of the opinion that if these amendments are accepted in its current form, the amendment might infringe upon a complainant's right to just administrative action that is lawful, reasonable, and procedurally fair. Furthermore, the Constitutional Court emphasised that it is an important principle of the rule of law that legal disputes be decided by an independent and impartial court in a fair and public hearing.
21. It is our view that the RAF will not be able to timeously deal and process all the complaints that come before it and may result in claims prescribing. This in turn might have the adverse effect of limiting the right of a complainant to access the courts. This may frustrate the efforts of a victim of a motor vehicle accident and may shield the RAF's decisions from judicial scrutiny.
22. OUTA is sceptical about the practicality and workability hereof. OUTA has seen how government tries to legislate administrative process and then is unable to implement these systems effectively and efficiently.
23. OUTA is also concerned about the potential cost implication on ordinary South African taxpaying citizens if a new organ of state is established. We are of the opinion that a new organ of state (an administrative body) would be a waste of taxpayer money.

## **LEGAL OPINION**

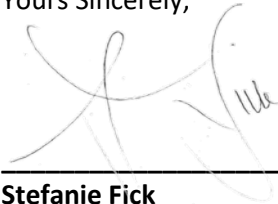
24. OUTA also wholeheartedly agree with the legal assertions made in the attached legal opinion.

## **CONCLUSION**

25. Due to the nature of the RAF, which is funded by the fuel levy, it is extremely important to ensure that adequate safeguards are in place to ensure that taxpayer money is not being wasted. It has not been the case thus far.
26. OUTA remains concerned about the high level of road fatalities in South Africa. We believe that these fatalities are largely due to poor enforcement of traffic laws, a lack of traffic infringement management and a variety of problems in the management of vehicle and driver licensing.
27. The high number of Road Traffic Crashes and its associated consequences has a significant impact on the South African society. It continues to impact the socio-economic development of all South Africans. This impact is measured in terms of the loss of human lives, pain, grief and suffering, as well as an increased cost to the economy.
28. OUTA is of the opinion that instead of dealing with the root causes of the problem namely road safety, the RAF's grossly inefficient administrative systems, poor processes and the dearth of leadership and expertise, the proposed amendment Bill seeks to obfuscate the RAF's responsibilities and to reduce its claims through legislative measures. The proposed amendments will not address the claim backlogs, fraud, corruption, political interference and a lack of accountability. It needs efficient systems and strong leadership.
29. OUTA is of the opinion that the RAF should first engage with civil society, the private sector and other stakeholders, to find meaningful solutions to the existing problems. OUTA is not aware of any independent and objective research/ assessments conducted by the Department of Transport or the RAF that definitively show that implementation of the proposed amendments, will result in improved financial sustainability and operational efficiency.

30. It is our respectful submission that the proposed Bill amounts to an unconstitutional, unreasonable and irrational cost containment measures that will have a significant impact on all South African citizens.
31. We reserve all our rights in this matter, as well as the right to amend, or to add to, these comments and to submit further comment should such a need arise as circumstances may require.

Yours Sincerely,



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**Stefanie Fick**  
**Executive Director: Accountability Division**  
**OUTA – Organisation Undoing Tax Abuse**

**PUBLIC COMMENT ON THE DRAFT ROAD ACCIDENT FUND AMENDMENT BILL, 2023, PUBLISHED IN GOVERNMENT GAZETTE NO. 49283, GOVERNMENT NOTICE NO. 3868**

**1. PART 1: INTRODUCTION**

- 1.1. At the outset, we respectfully submit that the 30 (thirty) day comment period provided was inadequate in light of the substantive amendments proposed in the Bill. Accordingly, we note, with concern, that the comments submitted within the comment period may not encompass all the views and comments of affected stakeholders. For further context in respect of our concern, kindly refer to Part 2 of this submission.
- 1.2. As will be set out in our submission below, we respectfully submit that the proposed amendments in the Bill will severely impact the rights of all Affected Road Users (i.e. drivers, passengers, cyclists and pedestrians involved in motor vehicle accidents in South Africa) to claim compensation for damages incurred from death or injuries attributed to motor vehicle accidents in South Africa. This is particularly in respect of the proposed limitation of the RAF's liability with the view to *"to improve the solvency and sustainability of the scheme, and to ensure a more equitable distribution of the risk assumed by the Fund, the private insurance industry, and other stakeholders."*<sup>1</sup>
- 1.3. As such, we wish to highlight that the Bill must at all times be considered through the lens of the Constitution of the Republic of South Africa, 1996 ("**Constitution**"), and must ensure that there is equitable access to medical and health services by Affected Road Users.
- 1.4. Accordingly, for purposes of this legal submission, we have paid particular attention to the following aspects:
  - 1.4.1. The importance of the Road Accident Fund;
  - 1.4.2. Our concerns in respect of the change in the object and intended purpose of the Road Accident Fund;
  - 1.4.3. The constitutional concerns in respect of the constitutional rights affected by the proposed provisions of the Bill; and
  - 1.4.4. Other specific concerns with the provisions of the Bill.

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<sup>1</sup> Page 2 "Memorandum on the Objects of the Road Accident Fund Amendment Bill, 2023".



## 2. PART 2: THE IMPORTANCE OF THE ROAD ACCIDENT FUND

2.1. We note that the Minister of Transport has stated that *“the Department of Transport will continue to prioritise the finalisation of the RAF Act Amendments to provide the adequate legislative framework to support the transformation of the RAF.”*<sup>2</sup>

2.2. Additionally, the Chief Executive Officer of the RAF has stated that:

*“[t]he RAF has submitted all its proposed RAF Amendment Act changes to the Department of Transport. The changes include payment of claims in instalments, the removal of general damages, and the exclusion of claims from foreigners. These proposed changes are designed to ensure the RAF’s financial and operational sustainability.”*<sup>3</sup>

2.3. Ahead of addressing any aspect of the Bill, we wish to highlight the important role of the RAF.

2.4. The Road Traffic Management Corporation (“RTMC”) has highlighted that Motor vehicle accidents are a growing economic, public health, and social issue, disproportionately affecting vulnerable groups of road users, especially the poor.<sup>4</sup>

2.5. It is noted that there are more than 800 000 (eight hundred thousand) motor vehicle accidents in South Africa per year.<sup>5</sup> In this regard, at least 10 466 (ten thousand four hundred sixty-six) fatal crashes were reported by the end of 2022.<sup>6</sup>

2.6. 5 352 (five thousand three hundred fifty-two) pedestrian fatalities were recorded in 2022 which equates to 43% of all recorded road fatalities in 2022 in South Africa.<sup>7</sup> The RTMC has highlighted that pedestrians between the age of 5 (five) and 14 (fourteen) are the most affected when relating to the most prominent causes of death and that inadequate provision has been made to ensure the safety of pedestrians who are required to share South African roads with motor vehicles.<sup>8</sup>

2.7. In 2016, 83% (eighty-three percent) of motor vehicle fatalities and injuries in South Africa affected the economically productive age groups (i.e. 15 (fifteen) - 64 (sixty-four) years).<sup>9</sup>

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<sup>2</sup> Page 4 “Annual Performance Plan 2023/2024” (available at: <https://www.raf.co.za/Media-Center/Annual%20Performance%20Plans/RAF%20Annual%20Performance%20Plan%202023-2024.pdf>).

<sup>3</sup> Page 7 “Annual Performance Plan 2023/2024” (available at: <https://www.raf.co.za/Media-Center/Annual%20Performance%20Plans/RAF%20Annual%20Performance%20Plan%202023-2024.pdf>).

<sup>4</sup> Page 1 “Road Traffic Booklet” (available at: <https://www.rtmco.co.za/images/rtmc/docs/publications/pamphlets/Road%20Traffic%20Booklet%20A5%20NEW.pdf>).

<sup>5</sup> See: <https://aa.co.za/dont-take-the-insurance-bait-cheaper-is-not-always-better-2/>.

<sup>6</sup> Page 33 “State of Road Safety in South Africa ‘January 2022 to December 2022’” (available at: [https://www.rtmco.co.za/images/rtmc/docs/traffic\\_reports/calendar/2022-State\\_of\\_Road\\_Safety\\_Report.pdf](https://www.rtmco.co.za/images/rtmc/docs/traffic_reports/calendar/2022-State_of_Road_Safety_Report.pdf)).

<sup>7</sup> Page 45 “State of Road Safety in South Africa ‘January 2022 to December 2022’” (available at: [https://www.rtmco.co.za/images/rtmc/docs/traffic\\_reports/calendar/2022-State\\_of\\_Road\\_Safety\\_Report.pdf](https://www.rtmco.co.za/images/rtmc/docs/traffic_reports/calendar/2022-State_of_Road_Safety_Report.pdf)).

<sup>8</sup> Page 3 “Road Traffic Booklet” (available at: <https://www.rtmco.co.za/images/rtmc/docs/publications/pamphlets/Road%20Traffic%20Booklet%20A5%20NEW.pdf>).

<sup>9</sup> See: <https://www.roadsafetyfacility.org/country/south-africa>.

- 2.8. The RAF's recorded net fuel levy revenue income for 2023 was R47,907,540,000 (forty-seven billion nine hundred seven million five hundred forty thousand rand).<sup>10</sup>
- 2.9. The Minister of Transport has stated that “[t]he human factor continues to be the main cause of fatalities on our roads, accounting for 87% of all crashes. This is followed by road and environment factors at 8%, with vehicle factors at 5%. During 2021 road crash fatalities alone resulted in a R188 billion economic loss, which poses a significant burden on our economy and the RAF. It is therefore our collective responsibility to ensure that the RAF is more sustainable by significantly reducing crashes and fatalities on our roads.”<sup>11</sup>
- 2.10. Having previously considered the Annual Performance Plan 2023/2024 and the emphasis placed by the Minister of Transport on the need to adopt collective measures to reduce crashes and fatalities on South African roads, we note this important aspect is not addressed in the Bill.

**The limited period to submit written comments on the Bill.**

- 2.11. It is clear that the Bill proposes the introduction of sweeping changes to the nature and purpose of the RAF.
- 2.12. In this regard, we note our concern in respect of the limited time provided by the Minister of Transport for interested persons to submit written comments on the Bill.
- 2.13. The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) gives effect to the constitutional right to just administrative action set out in section 33 of the Constitution, which right entitles persons to lawful, reasonable and procedurally fair administrative action, and to receive reasons for the decisions taken.
- 2.14. We object to the Bill on the basis that the process followed to date in respect of the introduction of the Bill has been irrational and procedurally unfair. This is because:
- 2.14.1. major stakeholders, have not been consulted by the Ministry or Department of Transport before the Bill was proposed; and
- 2.14.2. stakeholders have only been given 30 (thirty) days to comment on the Bill, which period, given the significance of the amendments proposed in the Bill and the amount of time it has apparently taken the Department of Transport and the RAF to prepare the Bill since 2021, is unreasonable.
- 2.15. While we do not doubt that the Department of Transport considered research and consulted with experts in the field (including considering the legal opinion from various senior advocates

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<sup>10</sup> Page 41 “Annual Performance Plan 2023/2024” (available at: <https://www.raf.co.za/Media-Center/Annual%20Performance%20Plans/RAF%20Annual%20Performance%20Plan%202023-2024.pdf>).

<sup>11</sup> Page 4 “Annual Performance Plan 2023/2024” (available at: <https://www.raf.co.za/Media-Center/Annual%20Performance%20Plans/RAF%20Annual%20Performance%20Plan%202023-2024.pdf>).

in South Africa), we are of the respectful view that all stakeholders in the industry should have been involved in framing the proposed revised framework intended to regulate the RAF.

2.16. It has been recognised by the courts that a failure to consult with certain stakeholders before exercising public power may be irrational. For example, in *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town & others*, the Supreme Court of Appeal found that rationality requires consultation with stakeholders if, in the circumstances, the stakeholders have special knowledge relevant to the decision and the decision-maker is aware of such knowledge.<sup>12</sup>

2.17. Furthermore, in *Doctors for Life International v Speaker of the National Assembly and Others*, the Constitutional Court confirmed that:

*“[I]nterested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions. The requirement that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.”<sup>13</sup>*

2.18. We submit that the fact that the process of developing the Bill to date has comprised of little to no consultation with stakeholders, cannot be remedied by the current notice and comment process. This is compounded by the fact that stakeholders are required to provide input on the Bill within a period of 30 (thirty) days. This period is not reasonable in light of the fact that there was inadequate consultation on the Bill before the Bill was published for comment.

2.19. We submit that all affected parties are entitled to know the likely impact the Bill will have on their rights and to ensure Parliamentary scrutiny thereon and with full public comment.

2.20. There are clear constitutional benefits to the ordinary legislative process. It facilitates sensible, considered and measured legislation. This is fundamental generally, but it is all the more important where there are severe intrusions into the rights in the Bill of Rights, as occasioned under this Bill.

2.21. Our proposed recommendation of developing amendments to the RAF Act in consultation with industry stakeholders will ensure that the intended operation model of the RAF does not unfairly prejudice Affected Road Users particularly where all stakeholders can share their expertise, independent research and learnings. Furthermore, we submit that this approach will ensure that the Minister of Transport can address proposed provisions of the Bill that stand to be challenged on various constitutional grounds.

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<sup>12</sup> *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town & others* 2013 (6) SA 421 (SCA) at para 72.

<sup>13</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 171.

- 2.22. We wish to highlight the importance of consultations with stakeholders and considering written comments (including legal submissions highlighting potential constitutional concerns in respect of contemplated primary and secondary legislation) for purposes of ensuring a more seamless adoption of legislation with limited legal challenges to same.
- 2.23. To the extent that the Department of Transport and the Minister of Transport decide to extend the period for comments, we hereby reserve the right to submit further comments.

### **The Socio-Economic Impact Assessment System**

- 2.24. As a starting point, we note that effective 1 October 2015, all Cabinet Memoranda seeking approval for draft Policies, Bills or Regulations must include an impact assessment that has been signed off by the Policy and Research Services unit in the Presidency.<sup>14</sup> The Socio-Economic Impact Assessment System (“SEIAS”) is a uniquely designed methodology for assessing the social and economic impact of policies, legislation, regulations and other subordinate legislation in line with our national priorities.<sup>15</sup>
- 2.25. The SEIAS Guidelines highlights the aims of SEIAS which include:
- 2.25.1. minimising unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes; and
  - 2.25.2. anticipating implementation risks and encouraging measures to mitigate such risks.<sup>16</sup>
- 2.26. The SEIAS Guidelines advise that policy initiatives, regulations or legislation can lead to the following unintended consequences:
- 2.26.1. inefficient implementation mechanisms;
  - 2.26.2. excessive costs for complying with regulations on stakeholders;
  - 2.26.3. over or underestimating the benefits associated with the new regulation/rule’s aims; and/or
  - 2.26.4. underestimating the risks involved (i.e. overestimating the likelihood of success in achieving the anticipated benefits),

where SEIAS consists of a set of common procedures and support institutions for assessing the socio-economic impact of new or to be amended policies, regulations and legislation.<sup>17</sup>

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<sup>14</sup> See: [Presentation on Socio-Economic Impact](#).

<sup>15</sup> See: <https://www.thepresidency.gov.za/sites/default/files/SEIAS%20leaflet.pdf>.

<sup>16</sup> Page 4 “SEIAS Guidelines” (available at: [SEIAS Guidelines](#)).

<sup>17</sup> Pages 4 & 7 “SEIAS Guidelines” (available at: [SEIAS Guidelines](#)).

- 2.27. We highlight the need for the development of a detailed impact assessment providing an evaluation of the likely effects of the Bill in terms of implementation and compliance costs as well as the anticipated outcome where SEIAS applies to:
- 2.27.1. new or to be amended primary legislation;
  - 2.27.2. subordinate legislation that can have a significant impact on society;
  - 2.27.3. significant regulations, legislation and policy proposals; and
  - 2.27.4. major amendments of existing legislation, regulations, policies and plans that have country coverage with high impacts.<sup>18</sup>
- 2.28. Further to the SEIAS Guidelines providing that “[s]takeholders generally know more about their conditions and the likely impact of a proposal than government officials”,<sup>19</sup> we submit that the Department of Transport should ensure that it has developed an impact assessment and further updates such impact assessment following input the Department of Transport receives from stakeholders in respect of the likely impact of the Bill.
- 2.29. We note the importance of conducting an impact assessment, in light of the severity of motor vehicle accidents highlighted in this Part 2 as well as the significant impact motor vehicle accidents have on Affected Road Users.
- 2.30. Additionally, we submit that the Bill will have significant economic and social impacts throughout South Africa. Accordingly, the proper and *bona fide* consideration by the Legislature of these social and economic impacts requires detailed and considered input and contribution from a wide range of affected parties as well as the development of a detailed impact assessment.
- 2.31. It is our respectful submission that the Bill, as currently drafted, amounts to an unconstitutional, unreasonable and irrational cost containment measure that will have a significant impact on all Affected Road Users in South Africa.
- 2.32. In light of the fact that the SEIAS Guidelines recognise that impact assessments, by their nature, require an estimate of the likely effects of an action that has not yet been undertaken,<sup>20</sup> it is with grave concern that the Department of Transport and the Minister of Transport do not appear to have ensured that an impact assessment was conducted/carried out in respect of the Bill.
- 2.33. We respectfully submit that there is still a significant amount of work to be done to ensure that costs and benefits to different groups as a result of the provisions of the Bill are analysed (i.e.

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<sup>18</sup> Page 4 “SEIAS Guidelines” (available at: [SEIAS Guidelines](#)).

<sup>19</sup> Page 12 “SEIAS Guidelines” (available at: [SEIAS Guidelines](#)).

<sup>20</sup> Page 9 “SEIAS Guidelines” (available at: [SEIAS Guidelines](#)).

persons not entitled to “a benefit” as a result of such persons being in motor vehicle accidents in which the vehicles involved do not stop or are unknown).

- 2.34. Further to our above concerns in respect of the lack of stakeholder involvement, the 30 (thirty) day comment period and the failure to conduct an impact assessment, we note that the Constitutional Court has confirmed that:

*“[t]he flaws in the process leading up to the determination of the analogue switch off date meant that the determination was made without any reliable sense of its impact on millions of indigent persons, who’s currently working television sets will be rendered useless. If a central purpose of the analogue switch-off decision is to mitigate the adverse impact of switch-off, a process that failed to provide guidance on the number of households requiring STBs is inevitably coloured with irrationality. It follows that the decision to impose the registration deadline is irrational.”<sup>21</sup>*

- 2.35. Accordingly, the Constitutional Court has confirmed that failure to consider the numbers of households/persons that will be adversely affected by a policy implementation will most likely result in such policy being declared unconstitutional, invalid and subsequently set aside by a court.<sup>22</sup>

### 3. **PART 3: CHANGE IN THE OBJECT AND INTENDED PURPOSE OF THE ROAD ACCIDENT FUND**

- 3.1. As a starting point, we note that section 3 of the RAF Act as currently drafted sets out the object of the RAF and provides that the object of the RAF “*shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.*”
- 3.2. Section 4(1) of the RAF Act sets out the powers and functions of the RAF where section 4(1)(b) of the RAF Act provides that such powers and functions shall include “*the investigation and settling, subject to this Act, of claims arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of the owner or the driver thereof, or the identity of both the owner and the driver thereof, has been established*” (our emphasis).
- 3.3. The Constitutional Court in *Law Society of South Africa and Others v Minister for Transport and Another* (“**Law Society**”) provided the following background to statutory road accident compensation in South Africa:

*“the statutory road accident compensation scheme was introduced only in 1942, well after the advent of motor vehicles on public roads. And even so, it came into effect only on 1 May 1946. As elsewhere in the world, statutory intervention to regulate*

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<sup>21</sup> *e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Limited and Others* 2022 (9) BCLR 1055 (CC) at para 78.

<sup>22</sup> *e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Limited and Others* 2022 (9) BCLR 1055 (CC) at para 79 & 110.

compensation for loss spawned by road accidents became necessary because of an increasing number of motor vehicles and the resultant deaths and bodily injuries on public roads. The right of recourse under the common law proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk. It seems plain that the scheme arose out of the social responsibility of the state. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants"<sup>23</sup> (our emphasis).

3.4. Accordingly, in terms of the RAF Act, the RAF is currently responsible for:

- 3.4.1. providing appropriate cover/compensation to all road users within the borders of South Africa;
- 3.4.2. rehabilitating and compensating persons injured as a result of motor vehicles; and
- 3.4.3. actively promoting the safe use of all South African roads.<sup>24</sup>

3.5. The Memorandum on the Objects of the Road Accident Fund Amendment Bill, 2023 ("**Bill Memorandum**"), which accompanied the Bill, provides that:

*"[t]he object of the Bill is to further limit the liability of the Fund to improve the solvency and sustainability of the scheme, and to ensure a more equitable distribution of the risk assumed by the Fund, the private insurance industry, and other stakeholders."*<sup>25</sup>

3.6. Section 2 of the Bill proposes the inclusion of the following section 2(1A):

"[i]n accordance with this Act, the Fund shall provide social benefits to the victims of motor vehicle accidents which occurred on a public road."

3.7. Section 2 of the Bill qualifies the establishment of the RAF in section 2(1) of the RAF Act to providing "social benefits" in the event of qualifying motor vehicle accidents which occurred on a public road.

3.8. Furthermore, section 3 of the Bill proposes the substitution of the object of the RAF set out in section 3 of the RAF Act to provide that:

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<sup>23</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 17.

<sup>24</sup> Pages 19-20 "State of Road Safety in South Africa 'January 2022 to December 2022'" (available at: [https://www.rtmc.co.za/images/rtmc/docs/traffic\\_reports/calendar/2022-State\\_of\\_Road\\_Safety\\_Report.pdf](https://www.rtmc.co.za/images/rtmc/docs/traffic_reports/calendar/2022-State_of_Road_Safety_Report.pdf)).

<sup>25</sup> Page 2 "Memorandum on the Objects of the Road Accident Fund Amendment Bill, 2023".

*“[t]he object of the Fund shall be to, in accordance with this Act, provide social benefits to the victims of motor vehicle accidents which occurred on a public road.”*

- 3.9. As we hope the Minister of Transport will appreciate, the object of the Bill as contemplated in the Bill Memorandum read with sections 2 and 3 of the Bill suggest an alarming shift in the intended object and purpose of the RAF as well as the statutory road accident compensation framework in South Africa.
- 3.10. We submit that this monumental shift in will result in severe prejudice suffered by uncompensated and unsupported victims owing to the provisions of the Bill which we submit is removes the responsibility of the State, through the RAF, as set out in 3.4 above.
- 3.11. We submit that this move from the current compensation model (where the RAF effectively steps in the shoes of the common law wrongdoer in a motor vehicle accident) to a “benefits” model with a wide list of exclusions of the RAF’s liability is not aligned with constitutional mandate of the State as set out in *Law Society*. In *Law Society*, the Constitutional Court highlighted that:

*“the RAF Act is itself a social security measure directed at protecting the victims of motor vehicle accidents. It may properly be seen as part of the arsenal of the state in fulfilling its constitutional duty to protect the security of the person of the public and in particular of victims of road accidents. Its principal object is to ameliorate the plight of victims rendered vulnerable by motor accidents. The state may also respect and protect bodily integrity by creating a statutory right to compensation in the event of bodily injury or death arising from a motor collision. In this sense, the impugned legislation is part of that social security.”<sup>26</sup>*

- 3.12. Accordingly, we submit that the proposed shift in the object and purpose of the RAF has the effect of prioritising the interests of the RAF (without actively addressing the challenges in the RAF) at the expense of protecting the victims of motor vehicle accidents. The proposed selection of circumstances when the RAF will be liable to compensate the victims of motor vehicle accidents will severely impact the lives of all Affected Road Users in South Africa.
- 3.13. We respectfully submit that the shift in the object and purpose of the RAF, which is geared towards limiting the RAF liability (under the guise of improving the financial sustainability and operational efficiency of the RAF), arguably amounts to the abrogation of the RAF’s responsibility at the expense of Affected Road Users who directly or indirectly contribute towards the financing of the RAF by way of the Road Accident Fund levy contemplated in section 5(1)(a) of the RAF Act.

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<sup>26</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 66.



- 3.14. We object to this fundamental change to framework applicable to compensation of victims of motor vehicle accidents which will leave many victims of motor vehicle accidents with little to no recourse in respect of their injuries. We submit that the support of the amendment of the object and purpose of the RAF Act will have the effect of replacing the State's constitutional obligations in relation to victims of road accidents in South Africa with a self-serving inadequate framework which will further exacerbate the plight of victims of motor accidents in South Africa.
- 3.15. Notably, the Bill still retains the abolition of the majority of common law claims as regulated by section 21 of the RAF Act with only one minor deletion proposed in section 17 of the Bill.
- 3.16. We note that the State's proposed complete turnabout of its current statutory responsibility to step in the shoes of the common law wrongdoer in a motor vehicle accident (while still limiting the right of road accident victims and their families to sue a wrongdoer user in common law in respect of the damages which have not been accommodated or fully covered by the RAF) is unlikely to be accepted by South African courts as a justifiable limitation to several affected constitutional rights.

4. **PART 4: THE CONSTITUTIONAL RIGHTS AFFECTED BY THE PROPOSED PROVISIONS OF THE BILL**

- 4.1. Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State.
- 4.2. Accordingly, in terms of the Constitution:
- 4.2.1. the Bill of Rights binds the legislature, the executive, the judiciary and all organs of State; and<sup>27</sup>
- 4.2.2. organs of State must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>28</sup>
- 4.3. We submit that the proposed amendments to the RAF Act set out in the Bill, amount to a clear limitation of several constitutional rights of Affected Road Users.
- 4.4. Notably, the Constitutional Court in *Khosa v Minister of Social Development* ("**Khosa**")<sup>29</sup> held that the word "everyone" in a section of the Constitution cannot merely be interpreted to confer the right in that provision on South African citizens only. We therefore highlight the importance of considering the wording of the rights in the Bill of Rights.

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<sup>27</sup> Section 8(1) of the Constitution.

<sup>28</sup> Section 7(2) of the Constitution.

<sup>29</sup> *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para 47.

- 4.5. We now turn to set out specific constitutional rights affected by the proposed provisions of the Bill.

**Section 27 of the Constitution - the right to access to health care.**

- 4.6. At the heart of this submission is an acknowledgement of the right of persons to access health services as contemplated in section 27(1) of the Constitution and the need to preserve existing access to health services.
- 4.7. We are cognisant of the fact that most of the RAF patients treated at its facilities do not have medical scheme cover and are some of the most vulnerable persons in South Africa. Consequently, it is of the utmost import that the State (along with the private sector) does everything it can to preserve the current access these persons have to medical treatment.
- 4.8. Section 27(1)(a) of the Constitution provides that everyone has the right to access health care services.
- 4.9. As noted in 4.4 above, the *Khosa* case confirms that the reference to “everyone” in section 27(1) of the Constitution must be interpreted broadly. Accordingly:
- 4.9.1. the State has a positive obligation to provide access to health care to all people in South Africa. The inclusion of “everyone” also indicates that any developments implemented by the State, which are related to the provision of health care services in South Africa, must benefit everyone;<sup>30</sup> and
- 4.9.2. section 27(2) of the Constitution provides that the State must take reasonable measures to progressively realise the right to access to health care. Where the State has taken steps within its available resources to provide health care services; the State will not be in breach of its obligation.
- 4.10. In the *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* case, the Constitutional Court interpreted the right to access to health care services in section 27 as follows:

*“In Grootboom, relying on what is said in the First Certification Judgment, this Court held that:*

*“[a]lthough [section 26(1)] does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.”*

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<sup>30</sup> *ibid.*

*That “negative obligation” applies equally to the section 27(1) right of access to “health care services, including reproductive health care”.*<sup>31</sup>

- 4.11. We submit that section 27 of the Constitution places a negative obligation on the State to abstain from impairing existing rights to access to health care. Where a category/ group of Affected Road Users already enjoy access to health care services as provided for by the RAF Act, provisions of the Bill that have the effect of preventing or impairing the right of such Affected Road Users to access to health care services would amount to a retrogressive measure. Such retrogressive measures are prohibited by section 27 of the Constitution. Accordingly, Affected Road Users would be able to argue that the State has a negative obligation to maintain their existing right to access to health care services, that such Affected Road Users were previously entitled to under the RAF Act.
- 4.12. The Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others* (“**Grootboom**”) found that the State will be in breach of its obligation to progressively realise socio-economic rights where it reduces or removes an existing right without justification.<sup>32</sup>
- 4.13. The Constitutional Court confirmed that the obligation on the State to progressively realise socio-economic rights is incompatible with the State taking retrogressive measures, and that to the extent that retrogressive measures are introduced, they “*would require the most careful consideration and would need to be justified by reference to the totality of...[rights]... and in the context of the full use of the maximum available resources.*”<sup>33</sup>
- 4.14. In *Law Society*, the Constitutional Court was tasked with considering the constitutionality of the abolition of a motor accident victim’s common law claim in terms of section 21 of the RAF Act. Section 21 of the RAF Act was challenged on the basis that it was not rational and offended the constitutional right to security of the person, the right not to be deprived of property arbitrarily, the right to have access to healthcare services and the right to an adequate remedy.<sup>34</sup> Furthermore, the Constitutional Court considered whether the tariff, identical to the Uniform Patient Fee Schedule (“**UPFS**”), for health care services prescribed by the Minister for Transport under regulation 5(1) in terms of section 17(4B)(a) limited the right of access to health care services required by sections 27(1)(a) and (2) of the Constitution.
- 4.15. In this regard, the Constitutional Court confirmed that: “*[i]t is indisputable that imposing public health tariffs on road accident victims amounts to restricting them to treatment at public health institutions if they cannot fund the healthcare themselves. In some instances, that restriction will be perfectly reasonable and adequate. However, the overwhelming and undisputed evidence demonstrates that road accident victims who are rendered quadriplegic or paraplegic*

<sup>31</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at para 46.

<sup>32</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 at para 45.

<sup>33</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 at para 45.

<sup>34</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 4.

*require specialised care for life without which there can be life-threatening complications which if unattended lead to their inevitable demise.”<sup>35</sup>*

4.16. The Constitutional Court held that regulation 5(1) was unreasonable and thus in breach of section 27(1)(a) read together with section 27(2) of the Constitution for the following grounds:

4.16.1. actuarial evidence demonstrated that an implementation of the UPFS tariff would save the RAF no more than 6% of its total compensation bill;

4.16.2. the relatively meagre saving seen against other compelling factors made it unreasonable to consign quadriplegics and paraplegics to a possible death by reducing their adequate access to medical care in pursuit of a financial saving of a negligible order;

4.16.3. the respondents did not suggest that there was a historical or present unfairness related to providing serious spinal injury accident victims access to private health care services whilst public health provision was being progressively improved;

4.16.4. the Constitutional Court found that the UPFS tariff was incapable of achieving the purpose which the Minister for Transport was supposed to achieve, namely a tariff which would enable innocent victims of road accidents to obtain the treatment they require;

4.16.5. the Constitutional Court held that the UPFS was not a tariff at which private health care services were available where it did not cover all services which road accident victims required with particular reference to spinal cord injuries which lead to paraplegia and quadriplegia;

4.16.6. in light of the fact that the public health sector was not able to provide adequate services in a material respect, the Constitutional Court held that the means selected were not rationally related to the objectives sought to be achieved (i.e. to provide reasonable healthcare to seriously injured victims of motor accidents).

4.17. It has long been established that good post-crash care reduces deaths and reduces disability and suffering for road crash survivors.<sup>36</sup> Furthermore, the emergency medical care system elements and processes need to be effective to attain this objective.<sup>37</sup>

4.18. In this regard, we submit that any provision of the Bill that:

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<sup>35</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 96.

<sup>36</sup> See: <https://www.roadsafetyfacility.org/country/south-africa>.

<sup>37</sup> *Ibid.*

- 4.18.1. is a retrogressive measure (i.e. amounts to a limitation or the removal of existing rights of certain groups of Affected Road Users); and
  - 4.18.2. removes the existing rights of certain Affected Road Users thereby having the opposite effect of progressively realising the right to access to health care; and
  - 4.18.3. will have the effect that the State does not meet the immediate needs of vulnerable and desperate people,
- is unlikely to pass the constitution muster.

### **Section 9 of the Constitution - the right to equality**

- 4.19. Section 9(1) of the Constitution provides that: *“everyone is equal before the law and has the right to equal protection and benefit of the law.”*
- 4.20. Section 9(2) of the Constitution provides that equality includes the full and equal enjoyment of all rights and freedoms and further provides that *“[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”*
- 4.21. Section 9(3) provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- 4.22. Section 9(5) of the Constitution provides that discrimination on one or more of the grounds listed in 4.21 above is unfair unless it is established that the discrimination is fair.
- 4.23. The Constitutional Court in *Khosa* found that the right to equality is demonstrated by the inclusion of the word “everyone” in a provision of the Bill of Rights.<sup>38</sup>
- 4.24. When dealing with an analogous ground (“**unspecified ground**”), the Constitutional Court has confirmed that there will only be discrimination if the differentiation has the potential, of objectively, impairing the fundamental dignity of the affected person as a human being and or to affect them adversely in a comparably serious manner.<sup>39</sup> The first inquiry is whether there has been differentiation on a specified or an unspecified ground must be answered objectively.<sup>40</sup>
- 4.25. If the enquiry leads to an affirmative answer, it is necessary to proceed to the second stage of the analysis and determine whether the discrimination is “unfair”.<sup>41</sup> In the case of

<sup>38</sup> *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para 42.

<sup>39</sup> *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 at para 46.

<sup>40</sup> *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 at para 47.

<sup>41</sup> *Ibid.*

discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still be established.<sup>42</sup> The Constitutional Court held that, in the case of discrimination on an unspecified ground, the unfairness must still be established before it can be found that a breach of section 8(2) of the Interim Constitution has occurred.<sup>43</sup>

4.26. In *Harksen v Lane NO and Others*,<sup>44</sup> the Constitutional Court considered the following factors regarding what constitutes unfair discrimination:

4.26.1. the position of the affected persons (i.e. whether the discrimination affected a vulnerable group or a group that previously suffered from patterns of disadvantage);

4.26.2. the nature of the provision or power and the purpose sought to be achieved by it (i.e. whether the section aims to achieve a worthy and important societal/community goal); and

4.26.3. any other relevant factors, the extent to which the discrimination has affected the rights or interests of the affected persons and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

4.27. In this regard, the Constitutional Court provided that the above factors: “*assessed objectively, will assist in giving “precision and elaboration” to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.*”<sup>45</sup>

4.28. In *Khosa*, the Constitutional Court held that for the provision to comply with sections 9(1) and 27(2), the state’s differentiation between citizens and non-citizens required a rational connection between the exclusion and a legitimate government purpose.<sup>46</sup>

4.29. In light of the above, we submit that the provisions of the Bill may be challenged where the provisions of the Bill limit the equitable access to compensation by the RAF currently provided for in the RAF Act.

### **Section 10 of the Constitution - the right to human dignity**

4.30. Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 at para 50.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para 53.

- 4.31. We submit that any provision of the Bill that excludes the rights of certain categories of Affected Road Users, may amount to the limitation of the rights of such Affected Road Users in a manner that affects their right to dignity and equality in material respects. Dignity and equality are founding values of the Constitution as well as constitutionally protected rights and lie at the heart of the Bill of Rights.<sup>47</sup> Moreover, In *Minister of Home affairs v Watchenuka*<sup>48</sup> the Supreme Court of Appeal held that when it comes to human dignity; everyone in South Africa has a right to have that right respected regardless of their citizenship.

#### **Section 12 of the Constitution - the right to freedom and security of the person**

- 4.32. Section 12(1) of the Constitution provides that “[e]veryone has the right to freedom and security of the person”.
- 4.33. Section 12(1)(c) provides that the right to freedom and security of the person includes the right to be free from all forms of violence from either public or private sources.
- 4.34. The emphasis in section 12(1)(c) of the Constitution is on a person’s protection from violence by both the State as well as private persons. This therefore finds a vertical and horizontal application in terms of section 8(2) of the Constitution and poses a negative and positive obligation on the State.<sup>49</sup>
- 4.35. The negative duty informs the State to not bring harm to an individual while the positive obligation requires the State to protect an individual from suffering harm from another person. This includes the State taking steps to criminalise certain acts/ conduct (i.e. offences related to driving without a valid licence, roadworthiness of motor vehicles, speeding, reckless and negligent driving and driving under the influence of alcohol)<sup>50</sup> and thereby providing protection to people against violence and the invasion of their personal security, which ultimately amounts to the violation of the physical integrity of a person.<sup>51</sup>
- 4.36. In *Law Society*, the Constitutional Court highlighted that:

*“[s]ection 12(1) of the Constitution is directed at protecting the physical integrity of a person. In its terms, everyone has the right to “security of the person”. It is clear from section 12(1)(c) that the protection includes the right “to be free from all forms of violence from either public or private sources”. It seems correct, as some commentators suggest, that the right is engaged whenever there is an “immediate threat to life or physical security” deriving from any source.”<sup>52</sup>*

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<sup>47</sup> *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para 85.

<sup>48</sup> *Minister of Home affairs v Watchenuka* [2004] 1 All SA 21 (SCA) at para 25.

<sup>49</sup> Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 281 and *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 64.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 58.

4.37. Considering whether section 12(1)(c) protects the security of the person of someone injured or killed as a result of the negligent driving of a motor vehicle, the Constitutional Court noted the Minister for Transport's concession that when someone is injured or killed as a result of the negligent driving of a motor vehicle, the victim's right to security of the person is infringed by the negligent driver and that the State is obliged, in terms of section 7(2) of the Constitution, to protect road users against the risk of infringement of this kind.<sup>53</sup>

4.38. In this regard, the Constitutional Court held that:

*"A plain reading of the relevant constitutional provision has a wide reach. Section 12(1) confers the right to the security of the person and freedom from violence on "everyone". There is no cogent reason in logic or in law to limit the remit of this provision by withholding the protection from victims of motor vehicle accidents. When a person is injured or killed as a result of negligent driving of a motor vehicle the victim's right to security of the person is severely compromised. The state, properly so, recognises that it bears the obligation to respect, protect and promote the freedom from violence from any source."*<sup>54</sup>

4.39. Having also considered that the State "*may also respect and protect bodily integrity by creating a statutory right to compensation in the event of bodily injury or death arising from a motor collision*", the Constitution Court held that the State incurs section 12 obligations in respect of victims of road accidents.<sup>55</sup>

4.40. In *Law Society*, the applicants sought to challenge the proposed provisions of the amendment of the RAF Act including, amongst others, the introduction of section 21 and section 17(4)(c) which limits the amount of compensation that the RAF is obliged to pay for claims for loss of income or a dependant's loss of support arising from the bodily injury or death of a victim of a motor accident.<sup>56</sup>

4.41. The applicants contended that the impugned scheme terminated the duty of the wrongdoer to recompense the victim and affected the effectiveness of the remedy and provided for the infringement of the right to physical integrity.<sup>57</sup> In this regard, the Constitutional Court held that:

*"when Parliament abolishes the common law right of recourse it also limits the right entrenched in section 12(1)(c) of the Constitution. It diminishes the motor accident victims' capacity to protect and to enforce the right to the security of the person. This*

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<sup>53</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 60.

<sup>54</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 63.

<sup>55</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 66.

<sup>56</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 3.

<sup>57</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 68.



limitation would render the abolition of the common law remedy unconstitutional unless it is justifiable<sup>58</sup> (our emphasis).

- 4.42. Having found that the section 12(1)(c) of the Constitution was limited by a law of general application, the Constitutional Court considered whether the limitation was reasonable and justifiable in a democratic society that prides itself on the founding values of the Constitution.<sup>59</sup>
- 4.43. The Constitutional Court highlighted that the Minister for Transport and the RAF had provided several substantive grounds of justification for the limitation with the over-arching grounds relating to the urgent need to make the RAF financially viable and sustainable, and to make the RAF's compensation regime more inclusive, transparent, predictable and equitable.<sup>60</sup>
- 4.44. Furthermore, it was emphasised that the right to the security of the person was "*protected by the state in a myriad of ways. The protection includes providing a publicly funded insurance to compensate accident victims. However, the state's constitutional duty to protect and enforce the right to security of the person need not always include a civil claim for damages in delict or indeed any private law remedy.*<sup>61</sup>"
- 4.45. Finding that the legislative abolition of the residual common law claim passes constitutional muster in *Law society*, the Constitutional Court held that:

*"[t]he impugned scheme puts in the place of the common law residual right a compensation 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. 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).

- 4.46. It is our submission that the retained abolition of the common law right of the victim to sue the wrongdoer for loss or damage not covered by the State in terms of the Bill is unlikely to pass the constitutional muster in circumstances where the Bill:
- 4.46.1. is not presented as an inclusive, transparent, predictable and equitable compensation regime in light of several exclusions to the application of the responsibility of the RAF;
- 4.46.2. intends to move from the current compensation model (where the RAF effectively steps in the shoes of the common law wrongdoer in a motor vehicle accident to

<sup>58</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 75.

<sup>59</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 76.

<sup>60</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 78.

<sup>61</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 79.

provide publicly funded insurance to compensate accident victims) to a “benefits” model with a wide list of exclusions of the RAF’s liability; and

- 4.46.3. will render Affected Road Users with little to no recourse in the face of a framework where the provision by the RAF of injury and death benefits is subject to prescribed limits and periodical review as opposed to a transparent and predictable framework.

## **Section 25 of the Constitution - arbitrary deprivation of property**

- 4.47. Section 25(1) of the Constitution provides that:

*“[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”* (our emphasis).

- 4.48. The Constitutional Court has cautioned that this section 25 right is not absolute and not intended to protect against state interference, *“but to safeguard it from illegitimate and unfair State interference”*.<sup>62</sup> Hence deprivation of property may take place through a law of general application provided that it is not arbitrary.

- 4.49. In order to succeed with a section 25(1) Constitutional challenge, a person must establish that:

- 4.49.1. such person’s right to exploit the person’s property (i.e. claims compensation for damages incurred from death or injuries attributed to motor vehicle accidents in South Africa is constitutionally protected property);
- 4.49.2. the interference of the Bill on the use of such person’s property amounts to deprivation; and
- 4.49.3. such deprivation is arbitrary.

- 4.50. The Constitutional Court, in *Law Society*, provided that:

*“[f]or present purposes let it suffice to state that the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth. In many disputes, courts will readily find that a particular asset of value or resource is recognised and protected by law as property.”*<sup>63</sup>

- 4.51. The Constitutional Court highlighted that *“[e]ven if the impugned law does deprive the victim of property in the form of reduced compensation for loss of earning capacity or support, the deprivation must be arbitrary before a limitation of the right may occur. Arbitrary deprivation of*

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<sup>62</sup> *Reflect-All 1025 CC and others v MEC for Public Transport, Road and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) at 32.

<sup>63</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 83.

property may be procedural or substantive. I do not understand the applicants' constitutional challenge to include a complaint that the impugned statute resorted to an arbitrary procedure for reducing compensation. They attack the scheme as substantively irrational; as an arbitrary deprivation of property"<sup>64</sup> (our emphasis).

4.52. Rejecting the section 25(1) constitutional challenge, the Constitutional Court found that the amendments did not amount to an arbitrary deprivation of property as the amendments properly advanced the governmental purpose to make the RAF financially viable and sustainable and to render the compensation regime more transparent, predictable and equitable.<sup>65</sup>

4.53. The Constitutional Court has previously interpreted deprivation as "*any interference with the use, enjoyment or exploitation of private property*",<sup>66</sup> where the CC has subsequently noted that:

*"[S]ome deprivations of property rights, although not depriving an owner of the property in its entirety or depriving the holder of a real right of that real right, could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property."*<sup>67</sup>

4.54. The Constitutional Court, in *First National Bank v Commissioner, SARS; First National Bank v Minister of Finance*, confirmed that deprivation would be arbitrary if the law "*referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair*."<sup>68</sup>

4.55. The Constitutional Court confirmed that 'sufficient reason' is to be established as follows:

*"(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.*

*(b) A complexity of relationships has to be considered.*

*(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.*

*(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*

*(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order*

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<sup>64</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 85.

<sup>65</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 86.

<sup>66</sup> *Phumelela Gaming and Leisure v Gründlingh and others* 2007 (6) SA 350 (CC) at 57.

<sup>67</sup> *Reflect-All 1025 CC and others v MEC for Public Transport, Road and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) at 36.

<sup>68</sup> *First National Bank v Commissioner, SARS; First National Bank v Minister of Finance* 2002 (4) SA 768 (CC) at 100.

*for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.*

*(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*

*(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.*

*(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with “arbitrary” in relation to the deprivation of property under section 25.”<sup>69</sup>*

- 4.56. Although the Bill is a law of general application, if the Bill amounts to an arbitrary procedure for reducing compensation of certain Affected Road Users having regard to the requirement to provide sufficient reason for the particular deprivation in question, then the Bill would be regarded as being designed to target a particular person or category of Affected Road Users rather than to regulate and provide a transparent and equitable mechanism of regulating claims for compensation for injuries suffered in a motor vehicle accident.
- 4.57. Furthermore, we note that the deprivation could be held to be arbitrary if there is no link between the restriction to the property of Affected Road Users in terms of the Bill and the (ostensible) purposes of the Bill.
- 4.58. Accordingly, we respectfully submit that the broad limitations of the RAF's liability proposed in the Bill would likely face constitutionality challenges in light of their impact on the property rights of Affected Road Users.

#### **Section 28 of the Constitution - the best interests of the child**

- 4.59. Section 28(2) of the Constitution provides that “[a] child’s best interests are of paramount importance in every matter concerning the child” where section 28(3) defines a “child” as a person under the age of 18 (eighteen) years.
- 4.60. In *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (“**Teddy Bear Clinic**”),<sup>70</sup> the Constitutional Court highlighted that

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<sup>70</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) at para 65.

section 28(2) is both a self-standing right and a guiding principle in all matters affecting children. The Constitutional Court provided that what is in the best interests of a child is a balancing exercise and in each case various factors need to be considered. The Constitutional Court held that the best-interests principle applies in circumstances where a statutory provision is shown to be against the best interests of children in general, for whatever reason and further held that what is bad for all children will be bad for one child in a particular case.

4.61. The Constitutional Court, in *Teddy Bear Clinic*, provided that:

*“[c]hildren are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development. Indeed, this Court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.”<sup>71</sup> (our emphasis)*

4.62. We submit that in circumstances where parents or guardians of children and/or children are victims of a motor vehicle accident, it is in the best interests of children for such children to not be precluded from being compensated or receive little to no compensation for their injuries and loss of support in respect of a deceased breadwinner owing to the myriad of limitations set out in the Bill.

4.63. In this regard, we submit that children will be exposed to harsh circumstances where the provisions of the Bill contemplate a complete shift in the object and purpose of the RAF while limiting the circumstances under which victims of motor vehicle accidents may claim compensation from the RAF as well as the significant decrease in the quantum of the contemplated compensation. Accordingly, we respectfully submit that several provisions of the Bill will have a direct and indirect effect on children and are consequently not in the best interest of the child.

4.64. Although we accept that in certain instances there may be legitimate reasons for limiting a child's fundamental rights, we submit that such limitation will be subject to a justification analysis in terms of section 36 of the Constitution (“**limitations clause**”) as set out below.

4.65. Consequently, we are of the respectful view that the provisions of the Bill proposing severe limitations to victims of motor vehicle accidents (which would include children) would not pass constitutional scrutiny as such provisions are inconsistent with section 28(2) of the Constitution where we further submit that such blanket limitations are not in the best interests of children.

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<sup>71</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) at para 1.

## **Section 34 of the Constitution - right of access to courts**

4.66. Section 34 of the Constitution provides that “*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.*”

4.67. In *Engelbrecht v Road Accident Fund and Another*, the Constitutional Court provided that:

*“[a]s was held in Moise, “untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom.”... The period of time within which to comply with a requirement, allowed by regulation 2(1)(c), prior to the exercise of the right, will be unfair if it is so inadequate or restrictive as to unduly deprive the majority of claimants of the right of access to the courts, on the one end of the spectrum, or if it is indefinite and prolongs uncertainty because it depends on the subjective knowledge of the provisions of the regulation on the part of the claimant, on the other.”<sup>72</sup>*

4.68. In this regard, the Constitutional Court emphasised that section 34 of the Constitution guarantees that justiciable disputes be settled by a court of law where the Constitutional Court emphasised that it is an important principle of the rule of law that legal disputes be decided by an independent and impartial court in a fair and public hearing.

4.69. Section 7(2) of PAJA provides that:

“(2)

- (a) *Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
- (b) *Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
- (c) *A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”*

4.70. Accordingly, section 7(2) of PAJA sets out the duty to exhaust internal remedies. The Constitutional Court, in *Koyabe and Others v Minister for Home Affairs and Others* confirmed that unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative

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<sup>72</sup> *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) at para 30.

actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.<sup>73</sup>

- 4.71. The Constitutional Court highlighted that “[i]nternal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.”<sup>74</sup>
- 4.72. The duty to exhaust internal remedies was therefore held by the Constitutional Court as a valuable and necessary requirement in our law.<sup>75</sup> However, the Constitutional Court highlighted that the requirement in section 7(2) of PAJA for an individual exhaust internal remedies is not absolute and should not be rigidly imposed.<sup>76</sup> Additionally, the Constitutional Court highlighted that section 7(2) of PAJA should not be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny.<sup>77</sup>
- 4.73. Having confirmed that the duty to exhaust defers access to courts in terms of section 34, the Constitutional Court confirmed that “*this is not to say, however, that if an aggrieved party had made an attempt in good faith to exhaust internal remedies but had been frustrated in his or her efforts to do so, a court would be prevented from granting the exemption. It is for the court to determine, on a case-by-case basis, whether circumstances exist for judicial intervention.*”
- 4.74. In light of the proposed internal alternative dispute resolution mechanism in sections 12 and 21 of the Bill as well as the establishment of the Office of the Road Accident Fund Adjudicator (“**Adjudicator**”) in section 21 of the Bill, we note that the section 21 of the Bill will have the effect that the Adjudicator, being a new organ of State, will need to be funded.<sup>78</sup>
- 4.75. We understand that the introduction of an alternative dispute resolution procedure as a prerequisite to referring a complaint to the Adjudicator as well as the establishment of the Adjudicator, as proposed internal remedies, are mechanisms intended to aid in disposing of complaints by the third party in relation to the claims. However, we note our concern in respect of the source of funding and capabilities of the alternative dispute resolution procedure and Adjudicator to ensure that sections 12, 20 and 21 of the Bill do not have the effect of limiting the right of Affected Road Users to access to courts thereby having the effect of either:
- 4.75.1. frustrating the efforts of a victim of a motor vehicle accident; or

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<sup>73</sup> *Koyabe and Others v Minister for Home Affairs and Others* 2009 (12) BCLR 1192 (CC) at para 34.

<sup>74</sup> *Koyabe and Others v Minister for Home Affairs and Others* 2009 (12) BCLR 1192 (CC) at para 35.

<sup>75</sup> *Koyabe and Others v Minister for Home Affairs and Others* 2009 (12) BCLR 1192 (CC) at para 38.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Page 6 “Memorandum on the Objects of the Road Accident Fund Amendment Bill, 2023”.

4.75.2. shielding the administrative process from judicial scrutiny.

4.76. In light of the proposed prescription regime for all claims in section 19 of the Bill, we submit that the proposed deletion of section 23(3) of the RAF Act will limit the amount of time Affected Road Users will have to finalise their claims with the RAF. Accordingly, we submit that the proposed prescription regime together with the proposed internal remedy (which may likely be protracted) may result in claims prescribing. This is owing to the fact that irrespective of the proposed internal remedies, a claim must still be prosecuted to finality within 3 (three) years from the date upon which the cause of action arose.

### **The limitation of constitutional rights**

4.77. We note that one of the noted threats to the RAF include litigation against the new operating model of the RAF as well as an inadequate legislative framework.<sup>79</sup>

4.78. Although rights contained in the Bill of Rights are not absolute and may be limited in certain instances, such limitations must comply with the provisions set forth in the limitations clause. Furthermore, the reasons for limiting a right need to be exceptionally strong.<sup>80</sup>

4.79. Any limitation of rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>81</sup>

4.80. Certain factors that must be taken into account when determining if a limitation is reasonable and justifiable include the nature of the right;<sup>82</sup> the importance of the limitation;<sup>83</sup> the nature and extent of the limitation;<sup>84</sup> the relation between the limitation and its purpose<sup>85</sup> and whether there are less restrictive means to achieve the purpose.<sup>86</sup>

4.81. The factors listed above are not intended to be a closed list and the courts may take into account any additional factors which it may deem necessary. Furthermore, the Constitution requires less restrictive means to be considered, rather than limiting the rights of a person, in achieving the purpose intended as a result of the restriction.

4.82. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court found that the violation of multiple constitutional rights is indicative of the impact of the infringement by a provision.<sup>87</sup> We note the importance of considering the right that is injured,

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<sup>79</sup> Page 20 “Annual Performance Plan 2023/2024” (available at: <https://www.raf.co.za/Media-Center/Annual%20Performance%20Plans/RAF%20Annual%20Performance%20Plan%202023-2024.pdf>).

<sup>80</sup> Currie & De Waal *The Bill of Rights Handbook* 2013 at 151.

<sup>81</sup> Section 36(1) of the Constitution.

<sup>82</sup> Section 36(1)(a) of the Constitution.

<sup>83</sup> Section 36(1)(b) of the Constitution.

<sup>84</sup> Section 36(1)(c) of the Constitution.

<sup>85</sup> Section 36(1)(d) of the Constitution.

<sup>86</sup> Section 36(1)(e) of the Constitution.

<sup>87</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 at para 114.



the purpose of limiting the right as well as whether the State could have used another method/alternative means to achieve the same purpose.

4.83. Further to the rights set out above, we submit that we are not aware of any evidence that the Department of Transport and the RAF will achieve improvement of the financial sustainability and operational efficiency of the RAF by implementing some of the proposed amendments to the RAF Act. In particular, we submit that it is unclear whether the Minister of Transport is able to demonstrate that the broad limitations proposed in the Bill are reasonable and justifiable in light of the leading case law set out above and the constitutional rights of Affected Road Users.

4.84. Accordingly, we wish to highlight that the purpose of this submission, with specific reference to this Part 4, is to note the potential practical and legal implications that the Bill may have on the constitutional rights of Affected Road Users which we hope the Minister of Transport will consider ahead of the Bill being introduced to the National Assembly.

## 5. **PART 5: OTHER SPECIFIC CONCERNS WITH THE PROVISIONS OF THE BILL**

5.1. The preamble of the Bill provides that the aim of the Bill is to amend the RAF Act, in respect of the following aspects, amongst others:

- 5.1.1. to clarify the nature of the RAF;
- 5.1.2. to give effect to the findings and recommendations of the RAF Commission;
- 5.1.3. to reorganise the powers and functions of the RAF;
- 5.1.4. to amend the constitution of the Board of the RAF ("**Board**") by including the Chief Executive Officer as an executive member of the Board;
- 5.1.5. to simplify the RAF Act by moving procedural and administrative matters to the regulations and Board Notices;
- 5.1.6. to limit the liability of the RAF to motor vehicle accidents occurring on public roads;
- 5.1.7. to remove the obligation for the RAF to compensate a third party for non-pecuniary loss;
- 5.1.8. to provide for the provision by the RAF of injury and death benefits subject to prescribed limits and periodical review;
- 5.1.9. to clarify exclusions of liability of the RAF;
- 5.1.10. to remove the right of suppliers to claim from the RAF;

- 5.1.11. to provide for the further exclusion of the Fund's liability in respect of specific third parties and specific situations;
  - 5.1.12. to authorise the Board to stipulate terms and conditions for administrative claim processes and claim forms;
  - 5.1.13. to provide for dispute resolution mechanisms and the establishment of the Office of Road Accident Fund Adjudicator to dispose of complaints by the third party in relation to the claims;
  - 5.1.14. to restructure the Minister's powers to make regulations; to empower the RAF to make annuity payments for claims and to monitor and re-assess active claims;
  - 5.1.15. to make provisions to ensure compliance with Protection of Personal Information Act, 2013; and
  - 5.1.16. to align the provisions of the RAF Act to case law.
- 5.2. Although the statistics set out in Part 2 above are intended to illustrate the alarmingly high rate of motor vehicle accidents in South Africa, we wish to highlight that motor vehicle accidents do not just have a negative impact on the victims of motor vehicle accidents but their dependants and the broader economy. While we support the RAF's dedication to "*enhance the claimant experience with the RAF*",<sup>88</sup> we note our concern with only protecting certain claimants (by way of the proposed limited "benefits"). In light of the significant impact the broad exclusions proposed in the Bill will have on the rights of all Affected Road Users and their dependants (where applicable), we respectfully submit that the proposed provisions in the Bill will have the opposite effect of aligning with the leading case law. On the contrary, it would appear that the RAF is seeking to achieve through a legislative amendment what the High Court has already interdicted as unlawful.
- 5.3. Accordingly, we respectfully submit that a number of the proposed amendments in the Bill fail to take into account the wider context within which the Bill is intended to operate. In particular, we wish to address the impact of the following aspects of the Bill in this submission:
- 5.3.1. the contemplated limited liability of the RAF and proposed "social benefits";
  - 5.3.2. the proposed exclusion of the liability of the RAF in certain cases;
  - 5.3.3. abolishing supplier claims;
  - 5.3.4. the proposed determination of tariffs in the Bill; and

- 5.3.5. the impermissible delegation of legislative power of Parliament.

**The contemplated limited liability of the RAF and proposed “social benefits”.**

- 5.4. In line with the object of the RAF set out in 3.1 above, section 17(1) of the RAF Act provides that the RAF shall:

*“be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any 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 at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.”*

- 5.5. The liability of the RAF in section 17(1) must be read with the abolition of the common law right of the victim to sue the wrongdoer for loss or damage not covered by the State set out in section 21 of the RAF Act.
- 5.6. Accordingly, the RAF Act’s point of departure, thus, is to take the common-law delictual claim that a third party would have had against the person who wrongfully caused the third-party harm arising from the driving of a motor vehicle, and to impose it on the RAF (i.e. where the RAF effectively steps in the shoes of the common law wrongdoer in a motor vehicle accident).
- 5.7. In this regard, the RAF Act effectively prohibits the third party/Affected Road User from suing the wrongdoer and requires the third party to instead lodge a claim for compensation from the RAF. In almost all cases, Affected Road User’s only recourse is against the RAF.
- 5.8. In *Law Society*, the Constitutional Court provided that “*the prime purpose of the legislative scheme is to provide reasonable, fair and affordable compensation to all innocent victims of motor accidents. It is to be expected that a scheme which depends on public funding would at times have income less than the compensation victims may be entitled to. It is thus fair and reasonable that the scheme should have a cap as to the character and extent of the compensation each victim is entitled to.*”<sup>89</sup>
- 5.9. Accordingly, the Constitutional Court recognised that the compensation of all innocent victims of motor vehicle accidents may be limited.
- 5.10. In terms of the Bill, the common law rights of all Affected Road Users to claim compensation for injuries they suffer in a motor vehicle accident will now not only be limited (as was the case

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<sup>89</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 77.

in *Law Society*) but either removed and replaced with a package of “social benefits” or completely removed for certain categories of persons/ claims.

5.11. Section 13 of the Bill sets out the proposed amendments to section 17 of the RAF Act. In this regard, section 13 of the Bill broadly proposes the following amendments to section 17 of the RAF Act:

5.11.1. the RAF shall 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 the driver thereof has been established, excluding hit and run,<sup>90</sup> be obliged to provide the benefits specified under section 17 to a third party for loss or damage which the third party has suffered as a result of any 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 South Africa;

5.11.2. the RAF shall not be obliged to provide a benefit to a third party for non-pecuniary loss irrespective of whether an Affected Road User suffered serious injury; and

5.11.3. the RAF shall be required to provide injury benefits to a qualifying third party.

5.12. Section 1 of the Bill defines ‘social benefits’ as “the benefits provided for in section 17(2A)”.

5.13. Section 17(2A) as proposed in the Bill provides that the RAF shall provide the following injury benefits (which are all subject to the prescribed medical tariff or prescribed limits):

5.13.1. a medical expense benefit where it is not part of the Prescribed Minimum Benefits or Emergency Medical Condition as per the Medical Schemes Act 131 of 1998 and its Regulations;

5.13.2. an undertaking by the RAF to compensate the third party directly or the service provider directly for the cost of future medical treatment and related goods and services, after the costs have been pre-authorised in the manner prescribed;

5.13.3. a past loss of income benefit;

5.13.4. a future loss of income benefit (subject to both prescribed limits and the periodical re-assessment of the RAF’s liability), paid in annuity; and

5.14. Section 17(2A) as proposed in the Bill also provides that the RAF shall provide the following death benefits (which are all subject to prescribed limits):

5.14.1. a funeral benefit;

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<sup>90</sup> Defined in section 1 of the Bill as follows:

“**hit and run**” which denotes or relates to a motor vehicle accident in which the vehicle involved does not stop or is unknown.”

- 5.14.2. a past loss of support benefit; and
- 5.14.3. a future loss of support benefit (subject to both prescribed limits and the periodical re-assessment of the RAF's liability), paid in annuity.
- 5.15. We submit that all traces of the framework set out in sections 17(4), 17(4A), 17(4B) and 17(5) has been removed in the Bill where the Bill does not propose replacing the framework set out in section 17 of the RAF Act with an adequate framework and clear guideline for statutory road accident compensation in South Africa.
- 5.16. Furthermore, we submit that the proposed deletion of sections 17(4), 17(4A), 17(4B) directly affects the rights of Affected Road Users to access to health and security of the person as set out in Part 4 above. This is because the proposed deletion in the Bill has the effect of impairing existing rights (as set out in the framework provided in sections 17(4), 17(4A), 17(4B)) where it is intended that qualifying Affected Road Users will only be entitled to a medical expense benefit and/or an undertaking by the RAF to compensate the third party directly or the service provider directly for the cost of future medical treatment and related goods and services, after the costs have been pre-authorised in the manner prescribed. Such benefits contemplated in the Bill are further restricted to the prescribed medical tariff where the Bill proposes an approach where no guidance is provided for the determination of the contemplated medical tariffs.
- 5.17. We submit that the Bill has the effect of weakening the compensation that Affected Road Users can meaningfully claim from the RAF, the very body that by statute they are forced to look to. This is corroborated by the fact that the provisions of the Bill set out above limit the rights of all drivers, passengers and pedestrians to claim compensation for injuries they suffer in a motor vehicle accident are extinguished in terms of the Bill. Furthermore, instead of such Affected Road Users being able to claim against either the negligent driver who caused the accident or the RAF for the compensation, such Affected Road Users are provided with a significantly curtailed package of "social benefits".
- 5.18. It is our respectful submission that the "social benefits" contemplated in the Bill are not inclusive, transparent, predictable or equitable.
- 5.19. Accordingly, we note that it is unlikely that a court considering:
  - 5.19.1. the proposed "social benefits";
  - 5.19.2. significant limitations to the rights of Affected Road Users occasioned by the retrogressive provisions proposed in the Bill; and
  - 5.19.3. impermissible delegation of legislative power in the Bill with no adequate framework being set out in the Bill,

will come to the same conclusion as the Constitutional Court in *Law Society*.

- 5.20. We wish to reiterate our concerns in respect of proposed amendment to the object and intended purpose of the RAF set out in Part 3 above which we submit is not directed at protecting the victims of motor vehicle accidents but rather expressly empowering the RAF to implement additional “*risk mitigation instruments*” with a view of improving the RAF’s financial position.

**The proposed exclusion of the liability of the RAF in certain cases**

- 5.21. The current system of compensation contemplated in the RAF Act provides for the payment of compensation to Affected Road Users according to the common-law principles of delict. In this regard, the compensation payable includes both patrimonial and non-patrimonial loss (i.e. general damages) (in the event of where the Affected Road User incurs serious injuries).

- 5.22. We note that the functions of the law of delict include, amongst others:

- 5.22.1. providing compensation for harm that has been suffered or an interest that has been infringed;
- 5.22.2. protecting certain interests; and
- 5.22.3. promoting social order and cohesion.

- 5.23. The Executive Summary of the Satchwell Report provides that:

*“[t]he majority of road accident victims are drivers, closely followed by passengers and thereafter pedestrians. An analysis of the most common injuries reveals that fractures, superficial injuries and sprains and strains, together with superficial abrasions to the skin, make up 81% of all injuries sustained. There are noticeable differences between the types of injuries sustained by different road users. Passengers and pedestrians are more likely to experience head injuries; drivers have more than twice the number of strains and sprains of the neck than other victims; pedestrians are most likely to experience injuries to the lower limb or the head; the majority of motorbike riders suffer lower limb injuries”<sup>91</sup> (our emphasis).*

- 5.24. In this regard, the Bill sets out circumstances where the RAF shall not be obliged to provide a benefit to any person for any loss or damage and effectively extinguishes (amongst others) the following claims:

- 5.24.1. all claims for general damages or non-pecuniary losses suffered by any victim of a motor vehicle accident irrespective of whether a victim suffered serious injury;

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<sup>91</sup> Executive Summary of the Satchwell Report at Para 7.

- 5.24.2. any claims for damages suffered by the victim of a motor vehicle accident where the accident does not occur on a public road;
  - 5.24.3. any claims for damages suffered by the victim of a hit and run motor vehicle accident in which the vehicle involved does not stop or is unknown;<sup>92</sup>
  - 5.24.4. all claims for past medical expenses where the victim's medical scheme provides cover for the injuries sustained;
  - 5.24.5. all claims where the victim was a driver of a motor vehicle, a pedestrian, or a cyclist, and at the time of the accident was over the prescribed legal alcohol limit or was under the influence of a drug, including the dependants of such victim;
  - 5.24.6. all claims where the victim was a pedestrian crossing a highway, including the dependants of such victim;
  - 5.24.7. all claims where the accident involved a train or aircraft.
  - 5.24.8. all claims where the victim is not a South African citizen or permanent resident.
- 5.25. Accordingly, the Bill proposes the exclusion of the liability of the RAF (in addition to the limited liability of the RAF proposed in section 13 of the Bill). We submit that the abovementioned exclusions will affect a significant number of victims (as well as their dependants in some circumstances) and extinguish the victim's claim against the Fund entirely. This is particularly concerning where victims and their dependants are left with no claim against the common law wrongdoer as well as the RAF in light of the abolition of a motor accident victim's common law claim in terms of section 21 of the RAF Act.
- 5.26. For those victims that will be affected by the provisions of the Bill, we respectfully submit that the Bill amounts to a retrogressive measure and violates majority, if not all, of the constitutional rights set out in Part 4 above (including section 28(2) of the Constitution).
- 5.27. We note that the above limitation will also have a direct impact on medical schemes, the interests of their members and the public in general and amounts to the arbitrary deprivation of property contemplated in section 25 of the Constitution where such victims would have ordinarily received compensation from the RAF.
- 5.28. We submit that that medical aid scheme benefits are a form of indemnity insurance and accordingly should be disregarded in an award of damages in accordance with the *res inter alios acta*<sup>93</sup> principle.

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<sup>92</sup> Defined in section 1 of the Bill as follows:

““**hit and run**” which denotes or relates to a motor vehicle accident in which the vehicle involved does not stop or is unknown.”

<sup>93</sup> A transaction/arrangement between persons which cannot be relied on by a third party.

- 5.29. We submit that the applicable legal precedent (establishing that a claimant who has private insurance for medical expenses does not forfeit his or her claim against the wrongdoer) dates back even further, to at least 1910. It was upheld in *McKenzie v SA Taxi Cab* 1910 WLD 232 at 234 and is aligned with the recent High Court decision in *Discovery Health v The Road Accident Fund* (“**Discovery Health Judgment**”).<sup>94</sup>
- 5.30. In the Discovery Health Judgement, which was subsequently upheld by the Supreme Court of Appeal, the High Court held that a directive requiring the RAF offices to reject any claims for past medical expenses if the claimant’s medical scheme had already settled such medical expenses (“**Directive**”) was unlawful. The High Court held that the Directive constituted a breach of the RAF’s statutory obligation to pay for past medical expenses of road accident victims, including those who are members of medical schemes.
- 5.31. Although the RAF has filed an application for leave to appeal to the Constitutional Court, which application is still pending, it is our submission that the Bill attempts to achieve an outcome that has already been declared unlawful by the High Court. We note that that it has been predicted that the proposed exclusion of claims where the victim’s medical scheme provides cover for the injuries sustained will drastically increase medical scheme premiums resulting dire consequences for all medical aid members. Accordingly, we submit that the proposed exclusion of claims in circumstances where the victim’s medical scheme provides cover for the injuries sustained is not aligned with the leading case law set out above.
- 5.32. Our concern in respect of the prejudice that will be suffered by all victims excluded from lodging claims with the RAF in terms of the Bill as set out in this Part 5 is predicated on the fact that the Road Accident Fund levy (levied on fuel throughout the country) will still apply to such victims who either directly or indirectly contribute towards the Road Accident Fund levy.
- 5.33. Accordingly, we respectfully submit that the proposed amendments in the Bill do not take into account the factual background in South Africa set out in Part 2 above which highlight that pedestrian safety remains the most significant road safety challenge in South Africa. This is particularly owing to the road infrastructure in South Africa where there are limited pedestrian bridges in South Africa for pedestrians to use thereby resulting in pedestrians being required to cross highways. The proposed limitations in the Bill attribute no fault to the common-law wrongdoer by excluding the liability of the RAF in the abovementioned circumstances regardless of whether the motor vehicle accident was caused by the fault of another driver.
- 5.34. Furthermore, we submit that the exclusion of claims where the victim is a foreign national (i.e. not a South African citizen or permanent resident) will most likely face constitutional challenge on various constitutional grounds including sections 27, 9, 10, 12, 25 and 28 of the Constitution.

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<sup>94</sup> *Discovery Health (Pty) Ltd v Road Accident Fund and Another* (016179/2022) [2023] ZAGPPHC 523 (26 June 2023).



### **Abolishing supplier claims**

5.35. Section 17(5) of the RAF Act provides that:

*“[w]here a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may, notwithstanding section 19(c) or (d), claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and such claim shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.”*

5.36. We note that the ability of suppliers to claim compensation for incurred costs from the RAF is directly linked to the ability of such suppliers to provide services to people that fall victim to motor vehicle accidents.

5.37. In *Van der Merwe v Road Accident Fund*, the Supreme Court of Appeal confirmed that section 17(5) of the RAF Act confers on a supplier a statutory right to recover, directly from the RAF, the costs of accommodation, treatment, services or goods instead of claiming such costs from the third party.<sup>95</sup> The Supreme Court of Appeal recognised that section 17(5) of the RAF Act was enacted for the benefit of suppliers to ensure that they receive payments made to injured persons who incur hospital and medical expenses in respect of their injuries where the right only arises if the third party is entitled to claim the amount as part of his or her compensation from the RAF.<sup>96</sup>

5.38. We note with concern, that the removal of a supplier's entitlement to claim compensation for costs incurred in respect of accommodation, treatment or services or goods supplied to Affected Road Users (i.e. an amount in accordance with the tariff contemplated in section 17(4B) of the RAF Act) will have a direct negative impact on the ability of private health service providers to provide services to victims of motor vehicle accidents thereby indirectly limiting the constitutional rights of victims to access to healthcare and security of the person as set out in Part 4 above. We highlight that the proposed limitation will likely disproportionately affect vulnerable groups of Affected Road Users (i.e. the poor and children) who will need to provide upfront payments as a result of the proposed abolition of supplier claims.

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<sup>95</sup> *Van der Merwe v Road Accident Fund* 2007 (6) SA 283 (SCA) (29 May 2007) at para 7.

<sup>96</sup> *Ibid.*

### **The proposed determination of tariffs in the Bill**

- 5.39. We note that Government has recognised this symbiotic relationship between the public and private health sectors in its National Health Insurance policy and efforts to achieve universal access to health services. Under the current system, many victims of motor vehicle accidents receive treatment at dedicated private healthcare facilities.
- 5.40. As noted in 5.16 above, the Bill proposes the deletion of sections 17(4), 17(4A), 17(4B). We submit that this directly affects the rights of Affected Road Users to access to health and security of the person.
- 5.41. Section 17(4B)(a) of the RAF Act provides that the liability of the RAF regarding any tariff contemplated in sections 17(4)(a), 17(5) and 17(6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act 61 of 2003 and shall be prescribed after consultation with the Minister of Health.
- 5.42. Section 17(4B)(b) of the RAF Act sets out the current framework applicable when determining tariffs and provides that a tariff for emergency healthcare must be:
- 5.42.1. negotiated between the RAF and health care providers; and
  - 5.42.2. be “reasonable” taking into account factors “*such as the cost of such treatment and the ability of the [RAF] to pay*”.
- 5.43. In terms of the existing legal framework applicable to tariffs, any failure to take into account relevant factors could risk the reasonableness of the proposed tariffs.
- 5.44. In this regard, we note that the RAF Act currently provides a guideline for determining tariffs in terms of section 17(4B) where a tariff must:
- 5.44.1. be prescribed after consultation with the Minister of Health in terms of section 17(4B)(a) of the RAF Act;
  - 5.44.2. be negotiated between the RAF and health care providers in terms of section 17(4B)(b)(i) of the RAF Act and be “reasonable” taking into account factors “such as the cost of such treatment and the ability of the RAF to pay” in terms of Section 17(4B)(b)(ii) of the RAF Act.
- 5.45. Accordingly, we respectfully submit that the proposed deletion of section 17(4B) and introduction of the reference to “medical tariffs” in the Bill amounts to an impermissible delegation of legislative power as will be discussed below.
- 5.46. We submit that the absence of an adequate framework for determining tariffs will severely impact the ability of Affected Road Users to access private health care services (given their

prohibitive costs) and therefore undermines the constitutional rights of Affected Road Users to access to health care and security of the person.

- 5.47. Prescribed tariffs render any claim for future medical expenses inherently unfair unless they are tariffs which a reasonable medical practitioner may charge. When the tariffs are so low, as is clear from the *Law Society and National Council for and of Persons with Disabilities and Another v Minister of Transport and Others*,<sup>97</sup> that they have the effect of being unconstitutional.
- 5.48. We note that the proposed determination of tariffs in the Bill (which provides that the medical tariffs will be prescribed) may further result in the following unintended consequences:
- 5.48.1. victims without means or medical aid coverage will not be able to obtain the care they need in the private health sector where the public health sector is already overburdened; and
  - 5.48.2. the poor and disempowered, who make up the vast majority of claimants and who are compelled to use public transport or walk, will bear the brunt of the consequences of the proposed amendments where they will be forced into the public health system in circumstances where the prescribed medical tariffs will not cover the actual costs incurred the private sector.

#### **The impermissible delegation of legislative power in the Bill**

- 5.49. As noted in 5.1.14 above, one of the aims of the Bill include the restructuring of the Minister of Transport's powers to make regulations.
- 5.50. Section 1 of the Bill defines 'stipulate or any similar expression' as a stipulation by the Minister of Transport or the Board as contemplated in section 26A.
- 5.51. Section 23 and 24 of the Bill propose significant amendments to section 26 of the RAF Act. These amendments broadly include:
- 5.51.1. amendments to section 26 of the RAF Act to provide the Minister of Transport with powers to make regulations regarding:
    - 5.51.1.1. the procedure to lodge a claim for a benefit under section 17, including electronic lodgement;
    - 5.51.1.2. the additional documents that must accompany the claim form or forms when lodging a claim for a benefit under section 17;

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<sup>97</sup> *National Council for and of Persons with Disabilities and Another v Minister of Transport and Others* (GJ) (unreported case no 039100/2022, 15-12-2022)

- 5.51.1.3. the procedure to pre-authorise benefits provided under an undertaking;
    - 5.51.1.4. the procedure and form to lodge a complaint with the Adjudicator;
    - 5.51.1.5. 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 under section 17; and
    - 5.51.1.6. other persons or functionaries who may lodge claims on behalf of a third party;
  - 5.51.2. the introduction of section 26A where section 26A(1)(a) proposes providing the Board with broad powers to stipulate the terms and conditions upon which claims for a benefit under section 17 shall be administered; and
  - 5.51.3. the introduction of 26B which proposes providing the Minister of Transport with powers to make rules in respect of the investigation of complaints by the Adjudicator (on the recommendation of the Adjudicator).
- 5.52. Section 20 of the Bill proposes replacing the procedural framework regulating lodging claims for compensation with the following proposed section:
- “(1) A claim for a benefit under section 17 (1) shall be dealt with in accordance with the prescribed procedure.”*
- 5.53. We note that section 20 of the Bill proposes replacing the procedure for making claims with a “prescribed procedure” which would be determined by the Minister of Transport by way of regulations at some future date as contemplated in 5.51.1.1 above. Accordingly, the Bill proposes that the entire framework for lodging claims should be delegated to the Minister of Transport for determination by way of regulations.
- 5.54. The Bill removes all requirements for the Minister of Transport to consult the Minister of Health ahead of the publication of regulations.
- 5.55. We submit that the lack of certainty in respect of the framework applicable to dispensing complaints in the Bill is likely also to frustrate the efforts of a victim of a motor vehicle accident thereby potentially limiting such victims right to access to courts as contemplated in Part 4 above.
- 5.56. In *Dawood and Another v Minister of Home Affairs and Others*, the Constitutional Court provided that:

*“it is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG by sections 26(3) and (6) is constrained by the provisions of the Bill of Rights, and in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit. If rights are to be infringed without redress, the very purposes of the Constitution are defeated.”*<sup>98</sup>

- 5.57. The Constitutional Court confirmed that the legislature is required to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable and confirmed that it is not ordinarily sufficient for the legislature merely to provide that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution.<sup>99</sup> Accordingly, the Constitutional Court noted the above issues relevant to granting subordinate legislative powers and the impact such powers may have on constitutional rights.
- 5.58. We note our concern with references to “prescribed limits” and “periodical re-assessment of the RAF’s liability” in section 17(2A) as proposed in the Bill. This is owing to the fact that the Bill provides no guideline for the determination of the limits or facts to be considered ahead of prescribing limits.
- 5.59. It is constitutionally impermissible to leave large substantive sections of the Bill to future regulatory-making power by the executive. This is because such provisions will have the effect of undermining the democratic process where ordinarily Parliament will debate proposed legislation and scrutinise its contents with particular regard to the separation of powers, its duty to hold the executive to account, and compliance with the country’s fundamental law, the Constitution, and its Bill of Rights.
- 5.60. Accordingly, we submit that the Bill must still provide an adequate framework in respect of aspects that may affect Affected Road Users rights in the Bill of Rights as the Minister of

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<sup>98</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 at para 47.

<sup>99</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 at para 54.

Transport should only be given authority to make subordinate legislation within the framework of a statute under which the delegation is made.

- 5.61. We further submit that the further delegation of powers to the Board is unlikely to be justifiable and would constitute an infringement of the constitutional rights of Affected Road Users.

## 6. **PART 6: CONCLUSION**

- 6.1. This submission made the following primary submissions in support of our objection to the Bill, namely:

- 6.1.1. the lack of stakeholder involvement ahead of the publication of the Bill, the insufficient 30 (thirty) day comment period and the failure to conduct an impact assessment in respect of the Bill has the effect that the Department of Transport will not have a complete view of the impact the Bill will have on all Affected Road Users in South Africa;
- 6.1.2. the Bill proposes a complete turnabout of the State's current statutory responsibility to step in the shoes of the common law wrongdoer in a motor vehicle accident (while still limiting the right of road accident victims and their families to sue a wrongdoer user in common law in respect of the damages which have not been accommodated or fully covered by the RAF);
- 6.1.3. the provisions of the Bill will negatively impact on numerous constitutional rights of Affected Road Users by providing a wide range of claims that the RAF will not be liable to cover;
- 6.1.4. the provisions of the Bill will have a significant impact on private sector hospitals as well as other health care service providers by abolishing supplier claims and the proposed determination of tariffs in the Bill which will ultimately affect the most vulnerable persons in South Africa; and
- 6.1.5. the Bill provides an impermissible delegation of legislative power by leaving large substantive sections of the Bill to future regulatory-making power by the Minister of Transport.