

# SOUTHERN AFRICA LITIGATION CENTRE

## SOUTHERN AFRICA LITIGATION CENTRE SUBMISSION

### ON THE ROAD ACCIDENT BENEFIT SCHEME BILL 2017<sup>1</sup>

#### *SUPPLEMENTARY SUBMISSION*

#### **1. INTRODUCTION**

The Southern Africa Litigation Centre<sup>2</sup> is a regional non-governmental organisation based in Johannesburg and operating in 11 Southern African countries. SALC's regional migration work has prompted us to make this submission. The Submission in its current form would create serious hardship and unfairness for undocumented migrants who are excluded from the protections and benefits which are outlined in this Bill. South Africa is a destination country for persons seeking asylum and economic opportunities. There are significant numbers of asylum seekers, refugees and migrants – both documented and undocumented in the country. The Immigration laws do not provide mechanisms for low skilled migrants to be able to regularise their immigration status regardless of the duration of time they have been resident in the country. This leaves a number of migrants including SADC citizens without the ability to obtain any kind of immigration status. We are concerned that there are provisions in this Bill which prejudice in particular undocumented migrants and make no provision for their care and treatment should they become injured in a motor vehicle accident. Contrary to the recommendations of the Satchwell Commission<sup>3</sup>, the common law rights of the innocent road accident victim to recover the damages suffered by him or her which are not covered by the statutory scheme have been abolished and road accident victims, who are injured, are even denied life enhancement benefits. The removal of the

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<sup>1</sup> Bill published in Government Gazette No. 40788 of 18 April 2017

<sup>2</sup> <https://southernafricalitigationcentre.org/>

<sup>3</sup> <https://pmg.org.za/committee-meeting/2257/> Judge Kathy Satchwell led the RAF Commission Report 2002

common law right that allows a victim to pursue claims directly against a perpetrator for damages and pain and suffering will encourage unnecessary litigation which can be avoided by the Bill removing these offending provisions.

Judge Satchwell outlined the factors to be borne in mind when preparing the legislation required:

- i. The Commission considered that for the road accident fund system to meet the first mandate requirement of a 'reasonable' system, it should be part of the social security system and should be moderate - neither too generous, nor too mean.
- ii. It should reflect the South African context and should be purposive in concept.
- iii. To be equitable the benefits must be proportional with the funding, and should be congruent with other social benefits available in South Africa, for example, to crime victims and the unemployed.
- iv. It must be impartial to those affected.
- v. The compensation provided should be affordable to road users and the society as a whole, and must provide value.
- vi. It must be sustainable by being efficient, and linked to the broader social security system.
- vii. It must be long lasting for those victims reliant on it, and must therefore be financially and morally viable in the eyes of all South African society.

Judge Satchwell further recommended that fault should play no part and that benefits should be available to all road accident victims. These recommendations have been incorporated into this Bill.

## **2. OBJECTIVES OF THE BILL**

The main objective of the Bill is to provide an effective benefit scheme in respect of bodily injury or death caused by or arising from road accidents. The Bill aims to provide a scheme which is reasonable, equitable, affordable and sustainable.

### **3. CONTEXT WITHIN WHICH THE BILL WILL OPERATE**

Deaths on South African roads are a serious concern. In 2017 more than 14 000 persons lost their lives on South African roads<sup>4</sup>. Many more people were injured and would have needed to claim support from the RAF. The current Bill will have a serious impact on road accident victims and their families as it seeks to drastically reduce the compensation which can be sought. Currently, the RAF only compensates those who are seriously injured in accidents, but who are not fully responsible for the accident. The RABS Bill seeks to introduce a “no-fault” system. Accident victims under the RABS will qualify for benefits regardless of who caused the road crash and benefits will also not be reduced based on the victim’s ‘contributory negligence’, as is currently the case under the RAF compensation scheme. Consequently, thousands of public and private transport passengers and their dependants, previously excluded by virtue of fault, will in future reap the benefits that will be provided under the RABS. This is a progressive move.

In addition, the RABS will continue to provide the indemnity already provided under the RAF scheme, to owners and drivers who would otherwise be liable at common law for the bodily injuries or death caused by a road crash. However, it is important to note that this indemnity does not extend to liability related to terrorist activity<sup>5</sup>. This appears to be the only criminal conduct which is excluded.

While this is likely to reduce costs and administration, it also means that all drivers who can prove they were in an accident, even if they were to blame, can claim compensation. This will result in more claims than which are being put forward for payment to the RAF currently.

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<sup>4</sup> According to the Road Traffic Management Corporation

[https://www.wheels24.co.za/News/Guides\\_and\\_Lists/road-accident-benefit-scheme-bill-to-replace-road-accident-fund-last-chance-to-speak-up-20180514](https://www.wheels24.co.za/News/Guides_and_Lists/road-accident-benefit-scheme-bill-to-replace-road-accident-fund-last-chance-to-speak-up-20180514)

Accessed on 17/05/2018

<sup>5</sup> As defined in the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.

## **COMMENTS ON THE DRAFT BILL 2017**

### **CHAPTER 5**

#### **LIABILITY OF ADMINISTRATOR AND OTHER PERSONS**

##### **Limitation of Administrator's Liability**

Section 27 (4) If, at the time of the road accident, an injured person or deceased breadwinner was not a citizen or permanent resident of the Republic or the holder of a valid permit or visa issued in terms of the Immigration Act, 2000 (Act No. 13 of 2002), or the Refugees Act, 1998 (Act No.130 of 1998), the liability of the Administrator is limited to payment for the provision of emergency health care services provided to such injured person or deceased breadwinner, while he or she was alive.

Section 27(4) limits benefits to emergency health care, only, for foreigners illegally in the Republic. The section refers to persons who are not citizens or permanent residents of the Republic, or persons who are not the holder of a valid permit or visa issued in terms of the appropriate legislation. It is anticipated that there will be many cases of hardship as a result of this exclusion.

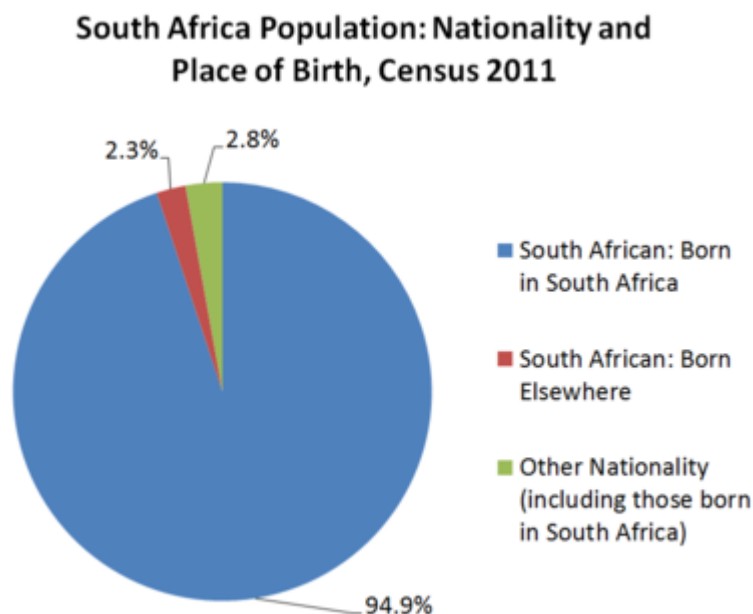
We place on record our serious concerns with this section. There are great number of asylum seekers who fail to have their permits renewed on time due to no fault on their part but rather on the ineffective and corrupt asylum system which they are obliged to navigate. This would apply equally to migrants including migrant children who are undocumented or stateless. They would be unable to seek healthcare nor would they be able to receive compensation for injuries suffered. The changes recommended in this section are *contra bonos mores*. The changes do not account for the migration reality in the country and could potentially leave thousands of people without access to life saving medical treatment and care. If the reasoning behind these exclusions are to create a deterrent effect in respect of irregular migration into the country; we fail to see how denying critical and lifesaving medical treatment to any victim of a motor vehicle collision would achieve this. Immigration management and control is not the purpose of this Bill.

##### **Concern about the removal of protection for undocumented foreign nationals**

Currently in terms of both the RAF Act and the RAF Amendment Act, the RAF provides cover to all users of South African roads for loss or damage caused by the negligent driving of motor vehicles within the borders of the Republic. The client base of the RAF therefore comprises not only the South African public, but all foreigners within the borders of the

country. The RAF provides two types of cover, namely personal insurance cover to accident victims or their families, and indemnity cover to wrongdoers<sup>6</sup>. This situation is set to change, with the RABS Bill seeking to remove liability and cover for undocumented foreign nationals.

The philosophy behind the introduction of the MVA Act of 1942 and its successors is the protection of society against the socio-economic consequences of road crashes by providing full compensation for injury or loss caused by or arising from the driving of motor vehicles. The state has exercised its regulatory function by retaining and using the common law right of a road accident victim, but legislating for security of recovery of such damages by substituting the original wrongdoer by a deep-pocket defendant (currently the RAF). The burden of providing social security is spread among the actors in society who create the socio-economic consequences of road crashes – namely, drivers by requiring them to contribute through a fuel levy to the funding of the Fund<sup>7</sup>.



<sup>6</sup> <https://www.raf.co.za/Legislation/Pages/Legal-Framework.aspx> accessed on 17th May 2018

<sup>7</sup> <http://www.derebus.org.za/a-critical-evaluation-of-the-rabs-bill-and-the-common-law-right-to-delictual-claims/>

According to the 2011 SA Census data 2.2 million foreign nationals live in SA- which has a population of 55 million. According to Statistics South Africa's 2011 census, 2.2 million foreigners live in South Africa. Stats SA 2015 data estimates that there are between **500,000** and **one million undocumented migrants living in South Africa**. This equates to less than 2 % of the total South African population. Of this number- it is difficult to say how many undocumented migrants will be involved in future car accidents- but the numbers would be so small that it would not make a significant impact to include these persons when providing access to health care and possible damages. We would recommend for the Bill to reconsider its position on this issue.

**There is no equitable treatment or fairness in removing liability for persons who are not holders of valid permit of visas**

**Section 27 (4)** If, at the time of the road accident, an injured person or deceased breadwinner was not a citizen or permanent resident of the Republic or the holder of a valid permit or visa issued in terms of the Immigration Act, 2000 (Act No. 13 of 2002), or the Refugees Act, 1998 (Act No. 130 of 1998), the liability of the Administrator is limited to payment for the provision of emergency health care services provided to such injured person or deceased breadwinner, while he or she was alive.

This fuel levy is imposed on all fuel sold in the country. This contribution would therefore be made by owners and drivers of motor vehicles as well as by persons taking public transport in buses, taxis and motor vehicles. This would include citizens, non-citizens, documented and undocumented persons. If the RAF receives contributions from all persons in the country; Equitable treatment and fairness would require that the benefits available from the scheme should also be for all persons in the country.

It is not the objective of the RAF to be involved in immigration enforcement. It is not the objective of the RAF to deter persons from residing in the country without a regular immigration status. However, this is precisely what the scheme is purporting to do- by preventing undocumented persons from benefiting on an equal basis with the protections provided for citizens, permanent residents and documented foreign nationals.

This will result in serious difficulties for persons/breadwinners who are injured or killed in motor vehicle accidents. The former Minister of Transport, Hon Dipuo Peters has stated that,

“The new scheme will be more reasonable, equitable, affordable and sustainable in the long term than the current scheme.”<sup>8</sup> This scheme would not be equitable and would not afford equal treatment to persons if they were prevented from protection on the basis of immigration status. The Bill of Rights requires national legislation to be enacted to prevent or prohibit unfair discrimination.

#### Section 9. Equality<sup>9</sup>

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To 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.
3. 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. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). **National legislation must be enacted to prevent or prohibit unfair discrimination.**
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

We are further concerned that the Department of Home Affairs does not assist persons who should be legally in the country with documents to prove their immigration status. These are a few illustrations of challenges which Home Affairs have failed to satisfactorily resolve which often results in persons being without requisite documentation due to no fault of their own. :

1. Despite a court order that it must open, the Cape Town Refugee Reception Office (RRO) remains closed<sup>10</sup>. Asylum seekers and refugees who were serviced by that office are accordingly unable to renew their permits and for the purposes of this Bill appear to be undocumented and will not be covered should the Bill pass in its current form. The Cape Town RRO has been closed since 2012.

<sup>8</sup> [https://www.raf.co.za/Documents/RABS%20TNA%20-%20Advertorial%20\(H200%20X%20W163\).pdf](https://www.raf.co.za/Documents/RABS%20TNA%20-%20Advertorial%20(H200%20X%20W163).pdf)  
accessed 22 May 2018

<sup>9</sup> Bill of Rights, The Constitution of the Republic of South Africa, Act 108 of 1996

<sup>10</sup> <https://scalabrini.org.za/the-cape-town-refugee-reception-office-closure-case-explained/>

2. Since 2011 three RROs have closed – in Johannesburg, Port Elizabeth and Cape Town making access to asylum extremely difficult.
3. There is on average a 96% rejection rate of asylum claims at the first instance<sup>11</sup>. All these rejected asylum seekers can then appeal and these appeals take many years to finalise- despite the legislation declaring that they will receive a final outcome in 180 days. The long duration of time which it takes to finalise an asylum claim negatively impacts on an asylum seekers ability to be able to regularise their status and be in possession of documents which accurately reflect their status.

#### **What is the process for someone applying for asylum?<sup>12</sup>**

Refugee status is granted when the applicant is believed to be in need of protection. A refugee is a person who cannot return to their country of origin because their life would be at risk, either due to persecution or due to conflict. The exact definition of a refugee, in terms of South Africa law, is set out in Section 3 of the Refugees Act. An asylum seeker in South Africa is required to lodge their application for asylum in person at an RRO. The asylum seeker is required to fill in a prescribed form and undergo an individual refugee status determination interview to examine the merits of their claim. If the individual is rejected at this level, they may then either request an appeal hearing or submit written reasons as to why they require international protection. Throughout this process, the asylum seeker is to receive documentation to legalise their stay in South Africa in the form of a temporary asylum seeker permit. During the adjudication process, the asylum seeker must continually renew his or her documentation every one to six months by visiting an RRO. While the process is envisioned to be finished within six months, it regularly takes many years and as long as a decade or more. This requires an asylum seeker to make numerous visits to RRO's before receiving a final status determination on their application.

South Africa's national legislation incorporates the basic principles of refugee protection, including freedom of movement, the right to work, and access to basic social services. However, some public institutions do not recognise refugees' permits, preventing them from benefitting fully from these rights. The current socio-economic environment—high unemployment, poor service delivery, and economic inequality –has strained relations between refugees, asylum-seekers and host populations. South Africa presently hosts **91,043 refugees** compared to **218,299<sup>13</sup> asylum seekers**, the majority from Zimbabwe — those still in the long and arduous evaluation system that can take several years — and

<sup>11</sup> <https://www.groundup.org.za/article/96-refugee-applications-are-refused-say-lawyers/>

<sup>12</sup> <https://scalabrini.org.za/the-cape-town-refugee-reception-office-closure-case-explained/>

<sup>13</sup> UNHCR Global Trends Forced Displacement In 2016, at page 63. Available at <http://www.unhcr.org/globaltrends2016/>.



certainly many more undocumented migrants. By comparison Malawi, Zambia, Zimbabwe, Mozambique host far fewer refugees. Ethiopia, Kenya (refugees 552, 272), Chad (420,000 refugees), Uganda (428, 397) are carrying the burden of hosting the largest numbers of refugees in Africa and have been doing so for many years.

Currently there is a huge appeal backlog in the asylum processing system with the UNHCR reporting 1,096,100 pending asylum claims by the end of 2015 revised to **218,300** by the end of 2016.<sup>14</sup> No plans are in place to deal with this backlog, and further impediments are being put in place to deter asylum seekers and make the process even more unfriendly.

### **An Anti-xenophobia initiative at cross purposes with its original intention: Operation Fiela**

The SAPS do not take their protection mandate seriously in respect of foreign nationals: In 2015, SAPS launched Operation Fiela as an anti-xenophobia initiative. The end results however did not offer protection to foreign nationals, much the opposite is true. Operation Fiela was initially launched to combat attacks on foreigners and has been criticised for then targeting foreigners and rushing their deportations. According to former Minister in the Presidency Jeff Radebe, between April and July, 15 396 people were deported for being in the country illegally.<sup>15</sup> SAPS commenced Operation Fiela II in 2018. It would be unfortunate for the Transport Department to also start discriminating unfairly against foreign nationals and undocumented foreign nationals in particular – as proposed by the Bill.

### **Section 27 Limitation of Administrator's Liability**

#### **Section 28 (1) (4)**

Only payment for emergency health care services is provided for injured persons who are undocumented migrants. This is certainly a problem for many reasons:

1. The Department of Home Affairs' permit processing procedures and time frames are a very serious problem. In particular the problems with the Asylum Seeker Management are a particular concern. There are very serious challenges for some asylum seekers and refugees to remain in a regular status on account of DHA's failures to provide easily accessible services.

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<sup>14</sup>*id* at page 45.

<sup>15</sup> <https://www.dailymaverick.co.za/article/2015-09-08-operation-fiela-thousands-of-arrests-doubtful-impact/#.Wha2iVWWYdU>

In particular the Cape Town Refugee Reception Office which closed in 2012 and which has been ordered by a court to re-open has failed to do so. It is accordingly unable to renew permits of asylum seekers and refugees who applied at that office or who reside in the Cape Province.

Persons in this situation would face undue hardship and could possibly not be in a position to return to their country of origin. The joint submission by Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa addresses these issues in detail.

### **Exclusion of liability of owner, driver and employer of driver**

**Section 28.** No civil action for damages in respect of bodily injury or death of any person caused by or arising from a road accident shall lie against—

(a) the owner or driver of a vehicle involved in the road accident; or

(b) the employer of the driver.

The common law rights of the innocent road accident victim to recover the damages suffered by him or her which are not covered by the statutory scheme have been abolished and road accident victims, who are injured, are even denied life enhancement benefits. The removal of the common law right that allows a victim to pursue claims directly against a perpetrator for damages and pain and suffering opens us a space for litigation which would more than likely be challenged at the highest level.

In April 2017 the Minister of Transport gave notice in the *Government Gazette* (GenN 302 GG40788/18-4-2017) of the intention to introduce the Road Accident Benefit Scheme Bill, 2017 (RABS Bill) into Parliament in terms of r 241(1)(b) of the National Assembly. The RABS Bill excludes non-patrimonial benefits. It has been suggested that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) presents a basis for RABS justifying the abolition of non-patrimonial compensation and the common law right to recover statutory regulated insufficient compensation. This point of view calls for critical evaluation<sup>16</sup>.

<sup>16</sup> <http://www.derebus.org.za/a-critical-evaluation-of-the-rabs-bill-and-the-common-law-right-to-delictual-claims/>

The philosophy behind the introduction of the MVA Act of 1942 and its successors is the protection of society against the socio-economic consequences of road crashes by providing full compensation for injury or loss caused by or arising from the driving of motor vehicles. The state has exercised its regulatory function by retaining and using the common law right of a road accident victim, but legislating for security of recovery of such damages by substituting the original wrongdoer by a deep-pocket defendant (currently the RAF). The burden of providing social security is spread among the actors in society who create the socio-economic consequences of road crashes – namely, drivers by requiring them to contribute through a fuel levy to the funding of the Fund<sup>17</sup>.

The new Section 21 seemingly proceeds from the mistaken premise that the action against the Fund is based on the RAF Act itself and not on common law. As stated above it is quite clear that the basis of a road accident victim's claim is rooted in the common law and based on delict. To this end the wrongdoer's liability is suspended on condition that the Fund can pay, and the claimant complies with the provisions of the RAF Act (see in this regard *Rose's Car Hire* at 474 – 475 and *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A)). It also in error assumes that the RAF Act must protect the wrongdoer, where in fact and in law, the road accident victim is the sole beneficiary of the RAF Act (see *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA))<sup>18</sup>.

The common law basis of the Fund's liability is clearly established by the wording of s 19(a), which was not amended by the Amendment Act. Section 19(a) states that if the wrongdoer is not liable the Fund's liability is excluded but for s 21. As the amended s 21 after amendment by the Amendment Act contains no reference to liability of the Fund, the effect of s 19 is that the common law delictual claim, which is the premise of s 19(a) is abolished except where the Fund is unable to pay or where it is a claim for emotional shock by a secondary road accident victim. In addition to the legislative short-circuit created by the amendment of s 21 and the retention of s 19(a) it has a discriminatory consequence as it is the only Act that is based on common law where the common law liability on which the Fund is liable is all but abolished and in addition where no residual common law rights are retained as is the case

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<sup>17</sup> <http://www.derebus.org.za/a-critical-evaluation-of-the-rabs-bill-and-the-common-law-right-to-delictual-claims/>

<sup>18</sup> <http://www.derebus.org.za/a-critical-evaluation-of-the-rabs-bill-and-the-common-law-right-to-delictual-claims/>

with s 36(1) of COIDA. In short, the common law based RAF Act as amended fully abolishes the common law right to claim from the wrongdoer (except where the Fund is unable to pay and where it is a claim for emotional shock) and the no-fault based legislation (COIDA) retains the right to claim from a wrongdoer<sup>19</sup>.

Any attempt to fully substitute the road accident victim's common law rights with limited statutory compensation benefits without retention of the right to a residual common law claim to serious and justifiable constitutional challenge. This is precisely what the proposed Road Accident Benefit Scheme sets out to do.

## **CHAPTER 6**

### **FUNERAL BENEFITS**

#### **Liability of Administrator in respect of funeral benefits**

**The flat rate of R10 000.00 has been replaced by a “*prescribed sum*” payment may be made to a family member or to a funeral director.**

The previously prescribed amount of R10 000.00 has been substituted for payment of a “*prescribed amount*”.

If it is “*impractical*” to await a claim for a funeral benefit the administrator may, independently, pay either to an immediate family member, or, after consultation with a family member, or, if unable to locate a family member, without consultation, to a funeral director the prescribed lump sum.

The amount awarded may be inadequate to cover the costs of transporting the body of a deceased migrant worker back to family for burial. The family of a foreigner without a visa or permit killed in an accident, are denied any compensation for the costs of repatriating the body or the funeral. There is no indication of who would be responsible for the death and funeral or repatriation costs of an undocumented person. Does the Bill mean to imply that for these persons there are no means to cover these costs? This section offends the right to

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<sup>19</sup> <http://www.derebus.org.za/a-critical-evaluation-of-the-rabs-bill-and-the-common-law-right-to-delictual-claims/>

dignity<sup>20</sup> which is a constitutionally protected right of every person in the country. Dignity is not limited to citizens and documented foreign nationals only.

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*Revised supplementary submission 22 May 2018*

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<sup>20</sup> Section 10 Bill of Rights, Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)

