ROAD ACCIDENT BENEFIT SCHEME

FREQUENTLY ASKED QUESTIONS

There are a number of questions that have arisen since the Department of Transport's announcement that it intended to introduce a new no-fault based comprehensive social security scheme that would allow for expanded access to benefits for all road users.

The Road Accident Benefit Scheme (RABS) is necessary to address the legacies of the current third party insurance system under the Road Accident Fund (RAF), which have made the system unfair, inequitable, inefficient, unsustainable and vulnerable to widespread abuse.

Some of the questions relating to RABS include the following:

- **Will RABS cover people who drive recklessly or under the influence of alcohol?**

  RABS does not indemnify reckless and drunken drivers from criminal prosecution. It is meant to provide a social security safety net for accident victims and their dependents, regardless of fault or criminal action. This does not mean crimes will go unpunished as other State organs will (parallel to the RABS process) investigate and prosecute offenders under the criminal justice system.

- **Minors will allegedly only be able to claim for benefits once they turn 18 years. Is this true?**

  Yes, minors will only be able to claim income support benefits from the age of 18 onwards, but will qualify for other benefits, i.e. medical benefits from the date of injury. In addition to the income support benefit and medical benefit, a minor below the age of 18 would qualify for a family support benefit where the minor lost a breadwinner in the accident.

- **Why will victims be forced to convince the RABS Administrator (RABSA) that they are not able to work in order to access benefits?**

  Under the RAF dispensation a claimant will not succeed to claim compensation for lost income if the claimant is unable to prove that he, or she, is unable to work due to injuries sustained in the road crash. The same principle will apply under RABS, however under RABS the claimant is better off because provision is made for the RABS administrator to pay for the medical reports required to prove the claim. Additionally, under RABS the claimant will be assisted by the RABS staff to process the claim. Furthermore, should the claimant not be able to prove an income, the claimant will not be excluded, as is the case under the RAF dispensation, but an income will be deemed for the claimant, thus ensuring wider cover, especially for vulnerable groups.

- **Why is there a cut-off point of 15 years for people to be supported under RABS, even if their injuries do not warrant this?**

There is no overall cap with regard to how long claimants may receive RABS benefits. However, certain benefits do have limitations placed on the age of the beneficiary, e.g. a surviving spouse is entitled to a family support benefit for a period of 15 years, or until the surviving spouse turns 60 – whichever period is the shortest. Minor dependents are entitled to family support benefits until the age of 18, and are only entitled to income support benefits from the age of 18, until the age of 60 or until they are rehabilitated – whichever occurs first. Other dependents, including adult children, will be entitled to e benefit for as long as the deceased breadwinner would have been legally obliged to support such other dependent. No age limit applies to medical and rehabilitation benefits.

- **Why is it necessary for benefits under RABS to be capped irrespective of the motor vehicle crash victim's earnings?**

  The capping of income support and family support benefits (which is already taking place under RAF) is necessary in order for RABS to be sustainable. In addition, the capping of benefits reduces the cross subsidisation of rich claimants by poor claimants, thereby ensuring fair and equal access to benefits. Structured benefits will be paid directly to the beneficiaries for use for its intended purpose, thus ensuring their needs are met. Currently with lump sum payments, settlements tend to be abused and used on frivolous things such as luxury cars and holidays, rather than on medical and rehabilitation expenses. Another advantage of RABS benefits is that they are protected from being attached by creditors or other third parties.

  Claimants who are currently excluded from claiming loss of income from the RAF because of not being able to prove an income will be able to claim such benefits under RABS. In such cases, it will be assumed that the beneficiary earned an income equal to the average annual national income specified in the legislation. As is the case currently under the RAF, an upper income cap will apply to the claims of wealthier beneficiaries, who will have to acquire top-up insurance to make up for any shortfalls above the upper income cap.

- **What about allegations that RABS will not be financially sustainable?**

  The funding model for RABS balances the richness of the benefits with the anticipated income of the scheme. In addition, structured payments will ensure the scheme remains financially viable in that monthly payments will stop when the beneficiary is successfully rehabilitated and returns to work. The scheme would have over-paid the claimant if a lump-sum payment had been made. Emphasis will be placed on beneficiaries' rehabilitation and return to work, thus ensuring the scheme's long term sustainability.

- **RABS does not provide room for a claimant to hire a lawyer. Why?**

  This is untrue – claimants under RABS will not be denied the right to use an attorney. Certain attorneys, concerned with their fees, have however indicated that they would find it difficult to act for claimants as they would not under RABS be able to recover their fees (up to 25% of the

settlement) from the payment made by RABS, as is currently the case under the RAF, because RABS will be making structured payments, directly to the beneficiary.

- **Why is RABS being made difficult with complicated claims forms and the exclusion of legal advice?**

  The claim process under RABS has been simplified. RABS staff will proactively assist potential claimants to complete any required claim forms and lodge claims with RABSA. Staff will be accessible through the RAF's existing and growing countrywide infrastructure, which includes 5 Regional Offices, over 100 Hospital Service Centres, 5 Community Service Centres and 5 Walk-in Centres. Furthermore, claimants will still be able to phone the Call Centre on **0860 23 55 23** from Monday to Friday between 07h45 and 16h00.

  Besides this existing footprint, RABS will be empowered to contract with healthcare service providers nationally who will provide medical services to beneficiaries and serve as additional touch points where claims could be originated.

  Lastly, a claimant will be able to lodge a claim electronically, by post or manually, where required with the assistance of RABS staff.

- **Critics allege that RABS will disempower claimants as they will not have a say about their medical treatment.**

  This is untrue. The RABS Bill provides for the development of a treatment and rehabilitation plan with input from the beneficiary, medical treatment providers, current or prospective employers and RABSA medical staff. The beneficiary's consent is required before the plan is adopted.

- **Under RABS, will a claimant only be entitled to make use of public healthcare service providers?**

  No. A claimant's right to elect to use a private healthcare service provider or a public healthcare provider is retained in the RABS Bill. RABS will establish a national network of contracted public and private healthcare service providers, to provide healthcare and associated services to road crash victims, in terms of a contracted rate. Medical services provided by non-contracted healthcare service providers will also be compensated, based on a prescribed, clear, market-related, single medical tariff and treatment protocols. An individual treatment and rehabilitation plan may provide for a beneficiary to receive future healthcare services provided by a contracted healthcare service provider, or any other healthcare service provider, which may be a public healthcare service provider. The consent of the beneficiary is however required, before an individual treatment and rehabilitation plan can be adopted.

- **There are claims that a thorough legislative process has not been followed with the RABS Bill.**

This is also not true. RABS' legislative process has its roots in a 2002 Presidential Commission of Enquiry which recommended that RABS be implemented after establishing that RAF's inefficiencies – such as unnecessary delays by attorneys in lodging claims, overstated or fraudulent claims and inflated legal costs – were making the system administratively and financially cumbersome. Cabinet accepted the Commission's recommendation, which resulted in the development of a draft policy paper which was published for public comment, and later approved by Cabinet for implementation.

The Bill's first draft was published for public comment in 2013 – additional time for comments was requested resulting in the extension of the period for comment. A revised second draft Bill was again published for public comment in 2014 – the comment period was once again extended to allow ample time for comment. During the extended comment period, national RABS workshops were held in each of the provinces, in addition to workshops held with specific stakeholder groupings.

After the public comments were considered, the draft Bill was revised and submitted to the Office of the Chief State Law Advisor, before the Bill was referred to Nedlac for engagement. The Department of Transport has, and will continue to follow due legislative process.

- **Why are general damages not being considered under RABS?**

  Due to the removal of fault, which results in wider cover and more claims, no general damages will be paid to ensure the scheme remains viable and sustainable.

- **Is it true that accident victims who are 60 years of age and above are not eligible to claim?**

  No. Although claims for income and family support benefits are restricted to persons below the age of 60, these claimants do qualify for other benefits provided under RABS, i.e. medical and funeral benefits.

- **Why will victims allegedly only receive R3 500 per month for loss of support if they are unable to prove they earn an income?**

  To clarify:

  - Under RAF, where a dependent is unable to prove the income of the deceased breadwinner, the beneficiary would *not* receive any compensation.
  - Under RABS, such a beneficiary *would* receive a benefit based on an income that the deceased breadwinner is deemed to have received. Clearly under RABS, such dependents are far better off.

- **Who, or what, is the Association of the Protection of Road Accident Victims (APRAV) and why does APRAV oppose the introduction of RABS?**

  APRAV has been very vocal in its opposition of RABS. Its representatives state that it is a *non profit* organisation with the aim to protect the rights of people who have been affected by road accidents. However, closer scrutiny of this organisation reveals that its key members and decision makers are attorneys and medical experts, representing professions which profit handsomely from the current RAF dispensation.

  Under the current RAF dispensation fault must be investigated and apportioned, and damage (loss) must be quantified and proven. To do this, assessors, accident reconstruction experts, medico-legal-experts, actuaries, attorneys, and advocates, amongst other intermediaries, all get involved, at considerable cost to the claimant and the RAF. In the 2015/16 financial year the RAF paid more than R 5 billion to intermediaries, including attorneys, medical experts and other industry players. The aforementioned sum does not include the additional billions of Rand recovered from claimants as "contingency fees".

  Considering the substantial and direct financial interest that members of APRAV have in sustaining the current RAF dispensation, and further noting that RABS will significantly reduce the role of such intermediaries, it comes as no surprise that APRAV is critical of RABS.

  RABS will bring to an end the abuse described by Deputy-Judge President P.M. Mojapelo in the matter of MM Nelson v Road Accident Fund as the ever "*increasing, rampant and persistent attempt by legal practitioners (especially attorneys) to recover more than the legitimate and legalised success fee*" from road accident victims.

- **APRAV alleges that a claimant's access to court under RABS is removed, and that this, coupled with the removal of the claimant's common-law rights, renders RABS unconstitutional. Is that so?**

  This is not true. The RABS legislation does not remove a claimant's right to have a dispute settled in court. RABS simply introduces an appeal process that must be followed first, prior to the claimant referring the dispute to court, in the event that the dispute could not be resolved.

  The purpose of the appeal process is to seek to resolve disputes in a cost effective and expeditious manner – something that does not sit well with APRAV, for the reasons discussed above.

  As regards the removal of common-law rights, this too is not novel. In 2010 the Constitutional Court confirmed the removal of certain common-law rights by the Road Accident Fund Amendment Act, No. 19 of 2006. Years prior to this, a much more comprehensive legislative reform received the nod from the Constitutional Court in *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening) 1999 (2) SA 1 (CC)*, which matter dealt with the move

away from a delictual system of compensation to a no-fault, defined benefit, dispensation under the Compensation Fund. The following extract from this judgment is instructive:

> "*Whether an employee ought to have retained the common-law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the Legislature and not a court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined. The Legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The scheme is financed through contributions from employers. No doubt for these reasons the employee's common-law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. It may be mentioned in passing that Courts in the United States of America, Canada and Germany have found similar legislation providing for worker compensation and limiting the right of the worker to claim common-law damages not to be irrational or arbitrary*"

RABS will introduce a scheme that is inclusive, equitable and sustainable. The provision of access to *defined benefits*, on a *no-fault basis*, paid in a *structured* manner does not sit well with APRAV, for the reasons discussed above.

- **APRAV alleges that the RAF is solvent. Is that so?**

This is not true. Not only does the RAF sit on an actuarial deficit of over R 150 billion, and growing, but its cash constraints has resulted in a backlog of payments to over 5000 creditors, with a combined value of close to R 10 billion, as at September 2016. The RAF's liabilities far outstrip its assets, and the cash received each month continue to be less than the value of the claims it settles.

- **APRAV alleges that students and public servants are excluded under RABS. Is that so?**

This is not true. Those accident victims who are unable to prove an income will be deemed to have earned an income. Those who earn more than the upper income cap will receive benefits limited to this cap. In both instances neither accident victim will be excluded, regardless of whether the claimant is a student, public servant or employed in any other industry or sector of the economy.

- **APRAV alleges that the income RABS will receive will not be ring-fenced and will be used for other purposes. Is that so?**

  Again, this is not true. The income RABS will receive will be ring-fenced and can therefore not be used for any other purpose than what is provided for in the Act.

Ends