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## EXECUTIVE SUMMARY

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### *Mandate of the Commission*

1 The Road Accident Fund Commission was appointed on 1 June 1999:

To inquire into and to make recommendations regarding a reasonable, equitable, affordable and sustainable system, for the payment by the Road Accident Fund of compensation or benefits, or a combination of compensation and benefits, in the event of the injury or death of persons in road accidents in the Republic.

2 In ascribing meaning and purpose to each of these four criteria the Commission has taken the following approach:

- a) A **reasonable** system of road accident compensation should acknowledge the symbiotic relationship between road accident compensation and the broader system of social security and its objectives. The system should be moderate, with no extremes of generosity or meanness. It should be sensible in its ambitions and reflective of both the needs and the resources of the South African society in which it is founded. It should be purposive, not a piecemeal mixture of legislative amendment.
- b) An **affordable** system should be within the financial means of road users

and South African society as a whole. The system (in its funding demands, administration costs and social security benefits) must provide value to road users.

- c) A **sustainable** system must be accessible and efficiently administered and facilitative of health care and rehabilitation as also the alleviation of financial hardship and anxiety. It should reinforce the broader system of social security, which, in turn, should support road accident compensation. It must be available in the long term and, accordingly must be financially and morally viable.
- d) It must be **equitable** in that there must be a relationship between the funding of the system and the demands made thereon. The treatment of road accident victims and their families must be impartial, unbiased and fair. There should be some balance or congruence between the benefits available for road accident victims and those available for other South Africans in need.

### ***Road Use in South Africa***

3 Environmental, socio-political and economic factors all have their influence on road use and road accidents in South Africa. One of the legacies of apartheid is the vast distances travelled by migrant labourers, the peasantry and black workers. Another is the poor transport infrastructure in areas formerly earmarked for black South Africans. The low ranking of South Africa in the Human Development Index (107th of 173 countries surveyed) indicates the particular vulnerability of certain sectors of the population to the hazards of road accidents and injuries.

4 Approximately 130 000 South African road users are injured in accidents each year, of whom nearly 10 000 are killed. More than 36 000 sustain injuries classified as “serious”. In 1998 nearly 900 000 motor vehicles were involved in accidents on South African roads. Of these, 62.5% were motorcars, 16.3% light delivery vehicles and 8% minibus taxis.

5 Accidents are caused by driver factors (including excessive speed, the influence of alcohol, fatigue and driver incompetence), vehicle fitness factors (under-inflated, smooth, worn or inappropriate tyres, overloading, poor brakes, faulty steering, poor lights and poor general maintenance) and road environmental factors (including poor maintenance of the road surface, road reserve and/or road verges and inadequate signs and markings).

6 There can be no doubt that there is an urgent need for effective initiatives to address and enforce road safety. The Road Accident Fund makes significant contributions of fuel levy funds towards the Arrive Alive Campaign managed by the Department of Transport, which aims, by means of a variety of programmes, to promote road safety.

### ***Victims of Road Accidents***

7 The 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.

8 More Africans (53%) are involved in accidents than whites (30%), coloureds (11%) and Indians (6%).

9 The largest group to claim compensation is passengers (44%) followed by pedestrians (28%), drivers (25%) and cyclists (3%). Eight percent of claims were in respect of victims who died as a result of the accident. The largest number of claimants (48%) was injured only slightly, with 27% sustaining moderate injuries and 17% serious injuries. The injuries for which compensation was most frequently paid were sprains and strains of the neck (12.7% of claims) followed by fractures of the lower leg (5.8%), superficial injuries to the head (4.1%), superficial injuries to the face (3.8%) and fractures of the upper leg (2.7%).

10 Road accident victims were mainly in the prime years of economic activity at the time of the accidents, with 66% between the ages of 20 and 49. Some 52% of all claimants in employment were employed in the formal sector with a further 12% employed in the informal sector. Some 12% of claimants were unemployed. Of those who were not economically active, 8% were students, 3% were homemakers and 3% were retired. Data available in respect of claimants in employment revealed that 74% earned less than R4 000 per month at 1998 values while only 3% fell into the highest income category of R15 000 and more per month.

### ***Road Accident Compensation Legislation***

11 The common law of South Africa provides, in the law of delict, a remedy whereby the injured road accident victim or the family of a deceased road accident victim can pursue a civil action for damages against the wrongdoer who has caused injury and loss to the victim or family. Statutory and compulsory motor vehicle insurance, instituted in South Africa in 1946, required the owners of motor vehicles to take out what was known as “Compulsory Third Party Motor Vehicle Accident Insurance”. The purpose of such legislation is perceived to be to indemnify the wrongdoer against a possible large claim from the victim whilst ensuring that the victim will get satisfaction against the wrongdoer, who might otherwise be uninsured and have insufficient means to satisfy a claim for damages.

12 Section 3 of the RAF Act of 1996 provides for the establishment of the Road Accident Fund which has as its objective:

The payment of compensation in accordance with this Act for loss or damage wrongfully caused by the drivers of motor vehicles.

13 The Act does not fundamentally alter the basic delictual requirements for liability as found in common law. It still requires a claimant to prove all the elements of a delict, which are contained in and partially codified by the provisions of the Act. “In the case of third party claims the driving of the motor vehicle constitutes the conduct. Unlawfulness exists in the prejudice to the corpus of a person or his rights to maintenance. Fault is mostly present in the form of negligence. Causality is required in that the driving of the vehicle must cause the injuries or death and damage is required in the form of pain or suffering or certain prescribed patrimonial loss. “The Act creates, defines and, to a limited degree, statutorily regulates a specific defined delict - i.e. the recovery of specified damage caused by the unlawful and negligent driving of a vehicle or other unlawful act” (Klopper, p. 2, fn. 7).

14 The effect of the Act is to suspend the common law delictual action against the wrongdoer and to compel the road accident victim to institute his or her claim against the Road Accident Fund. However, the common law delictual liability of the wrongdoer (owner or driver of the vehicle) still lies in cases where the Act excludes or restricts the liability of the RAF.

15 The current system of road accident compensation is “a hybrid” of insurance for wrongdoing drivers and compensation for victims of road accidents. However, it appears that it is in the process of being transformed from a liability insurance scheme providing cover for negligent motorists and funded by premiums to a social security scheme for the benefit of road accident victims and funded by a tax on road users. This metamorphosis can, perhaps, be ascribed to a number of developments. Individual insurance premiums for which payment motorists were personally responsible have been replaced by the RAF levy on fuel. The emergence of, first, the MVA Fund and, later, the RAF as reinsurer, then insurer and finally exclusive insurer has resulted in decreasing focus on the wrongdoing motorist and his or her insurer and increasing focus on the claimant and his or her claim against the RAF. The new political dispensation in South Africa has contributed to a more inclusive and concerned approach to the needs of members of society and road accident compensation has not been unaffected by the increasing emphasis placed on social security.

### ***Claims and Compensation***

16 In the 2000/2001 financial year 79 260 claims in respect of loss occurrence events were lodged with the RAF and in that same year 148 504 individual claims (including supplier claims) were lodged and, according to the RAF, R2 049 446 887 (R2 billion) was paid out as compensation (including legal costs).

17 Most of the claims finalised in the past five years have been for amounts below R20 000. These “small claims” constituted an average of 74% of total claims lodged between 1998 and 2001 and accounted for 21% of monies paid out by the RAF as compensation.

18 Eight percent of claims were lodged in respect of accidents in which victim had died and these accounted for 19% of the total compensation paid out by the scheme. Seriously injured victims lodged 17% of claims and received 39% of compensation. Victims with moderate injuries lodged 27% of claims and received 20% of the total compensation. Victims with only light injuries lodged 48% of claims and received 22% of the total.

19 The largest amounts of compensation (38% of the total) were paid in respect of general damages, followed by future loss of earnings (18%), future medical expenses (14%) and future loss of support (12%). Past medical expenses constituted only 8% of the total amount paid and past loss of support only 4%.

### ***Funding Road Accident Compensation***

20 One of the most fundamental questions in relation to social security generally and any scheme of road accident compensation in particular is “who will pay and how much?”. In South Africa the sole source of income for the scheme of road accident benefits is a Government regulated levy on petrol and diesel. In other jurisdictions road accident compensation is generally funded by compulsory third party insurance premiums paid by the owners of motor vehicles to private insurance companies.

21 The arguments in favour of a levy on fuel (sometimes known as “pay-at-the-pump”) include administrative efficiencies, automatic payment by each road user, elimination of the uninsured road user, some correlation with the degree of road use, a nexus with the risk arising from road use, and a clear link between taxation and services supplied. Disadvantages include the absence of any correlation between taxation levied and benefits paid, minimal contributions by pedestrians, disproportionate claims in relation to the levy paid and political and economic considerations in setting the levy.

22 The current RAF levy is calculated at a flat rate per litre of petrol and diesel sold, the income derived by the RAF being dependent upon two variables: the amount of petrol and diesel consumed and the rate of the levy, which is determined by Government.

23 Other sources of funding to be considered include regulated or unregulated compulsory third party insurance premiums and surcharges on drivers’ licences and vehicle registration and on fines imposed in connection with driving and motor vehicle offences.

24 The alleged insolvency of the RAF relates to assumptions about the growth in fuel sales, future interest rates, inflation, the increase in the quantum of claims above inflation, growth in the fuel levy, growth in the number of claims, future investment returns, administration expenses and the impact of HIV/AIDS. There is clearly a deficit between income and expenditure. The exact amount is unknown because of the uncertain nature of the outstanding claims liability. Some argue that the deficit should be fully funded, others would be content with a move towards partial funding, while yet others believe that it would be acceptable for a State regulated scheme to be funded on a “pay-as-you-go” basis.

### ***The Cost of Road Accident Compensation***

25 The funds raised through the RAF fuel levy are intended to provide compensation for the victims of road accidents. However, a significant proportion (approximately 23%) is currently consumed by “transaction costs”. These include the establishment and maintenance of the infrastructure of the RAF organisation (in the form of salaries, consultant fees, rentals, stationery and office expenses) which consumes approximately 7%, legal advice and services and medical expertise sought by

the RAF (5%); administration costs incurred by claimants (in the main, the infrastructure of attorneys' offices together with attorneys' fees) plus the services of advocates and other experts such as healthcare professionals, accountants and actuaries (11%).

26 Although "attorney-client" costs incurred by claimants (in respect of attorneys' and advocates' fees, and the fees of other professionals) are a private arrangement and neither the RAF nor the Commission knows the extent to which the "party-party" tariff (which is less than the tariff applied by the RAF to its own legal representatives and medical experts) covers them, it is estimated that a further 10%-30% is paid in respect of these "party-party" costs from monies which should go to claimants.

27 Accordingly, approximately 30%-55% of fuel levy income does not go to the victims of road accidents as compensation for loss incurred by them but is expended on remuneration for professionals and on RAF infrastructure and employees.

### ***Abuse of Social Security Benefits***

28 Abuse, in the context of a social security system funded by the taxpayer, is not limited to acts of dishonesty, misconduct or mismanagement, it also applies to the expenditure of public funds in a manner that does not enhance or support the principles upon which a system of social security is or should be based.

29 A significant proportion of claims for compensation can be described as false, exaggerated and opportunistic. There is also a disturbing incidence of fraud within the RAF itself.

30 Allegations of legal malpractice have received much publicity and some examples may be found in the disciplinary proceedings against attorneys initiated by the various provincial law societies. A referral to the Special Investigating Unit was successfully challenged in the Constitutional Court. Worryingly, there can be no doubt that the legal profession has a financial interest in and dependence on the current scheme of road accident compensation.

### ***Evaluation of the Current Scheme of Road Accident Compensation***

31 The current system of road accident compensation is predicated upon exclusion rather than inclusion:

- a) People injured in the home, in the course of sporting activities, as a result of crime, and even in the workplace, are excluded.
- b) Many victims of road accidents are also excluded because they are unable or struggle to negotiate the minefields of legal technicalities and bureaucratic complexities and to successfully access the system and the benefits to which they are entitled.
- c) Where the road accident victim is unable to establish negligence or the accident is the result of factors which do not involve negligence on the part

of the driver or on the part of another motor vehicle (for example, the accident is caused by a child running in front of a motor vehicle or by the hazards of negotiating a potholed road) the victim is not entitled to compensation.

- d) Many victims of road accidents are entirely excluded from the current system of road accident compensation or receive limited compensation by reason of their own negligence.

32 Such exclusion is incompatible with the concept of social security and does not contribute towards **equity** or **sustainability**. Within the system of road accident compensation marginalised individuals are less able to access the system successfully and to receive benefits therefrom, which compounds the **inequity**.

33 The focus of the current system of road accident compensation is the presence or absence or degree of “fault”, rather than the prevention or amelioration of the consequences of road accidents:

- a) Skills, time, money and energy are expended on attributing or denying blame instead of being dedicated to road safety, emergency medical services, trauma care and early and effective medical and rehabilitative intervention.
- b) During the considerable period that “fault” is in dispute the road accident victim has no entitlement to any compensation.
- c) Transaction costs financially advantage “experts” in issues of “fault” (specialists in accident investigation and reconstruction and the legal profession).

34 The result is that the cause of the accident takes priority over the need for healthcare and rehabilitation, trauma care and rehabilitative intervention are not available during the “golden” period (the window of opportunity for treatment - whether an hour, a day, a month or even a year) and appropriate healthcare may not be accessible until the patient’s entitlement to rehabilitative assistance is established, which may take a considerable amount of time. The denial of access to compensation is frequently denial of the only possibility for rehabilitative intervention. Exclusion continues to perpetuate disparities between urban and rural sectors, the employed and the unemployed, the rich and the poor, which is not conducive to concepts of social security. Not only is such a system **inequitable**, it is also **inefficient**, **unsustainable** and **unreasonable**. Uncertainty for everyone and preferential treatment for the rich and networked is not **equitable**, **reasonable** or **sustainable**.

35 Compensation funds are not allocated in a manner conducive to optimal rehabilitation outcomes for persons seriously injured in road accidents:

- a) The majority of claims paid out by the RAF are in respect of “minor” injuries such as contusions, sprains, strains and lacerations.
- b) A disproportionately large amount (38% in 1999, 41% in 2000 and 43%

in 2001) of compensation is expended on non-pecuniary loss, i.e., general damages.

36 The result is that money is not available or is less generously applied to those who have sustained catastrophic or life-changing injuries and disablement and for whom rehabilitative intervention and life care are vital. What appears to be misallocation of compensation cannot meet the criteria of **reasonableness**.

37 Entitlement to and payment of compensation is currently predicated upon achieving the impossible – restoration of the position of the victim of a road accident as if such accident had not occurred:

- a) Since the system is based upon the premise of injury and disablement it seeks to pursue the chimera of equating the pain and suffering of injury and the absence of health and lost opportunities with the illusion of monetary restitution.
- b) No limit is placed upon the compensation that may be paid to the victims of road accidents, save that of the burden of proof (or the statutory limit on compensation payable to certain passengers).
- c) Macro-economic and political considerations limit the premiums that may be imposed in a system of compulsory third party insurance or the levy that may be raised on fuel consumption. There is no rational correlation between the fuel levy, the risks created by individual motorists, motor vehicles, the number of road users or roads used and the type and extent of cover of (or potential compensation required by) road users.

38 It is not **reasonable** to expect a developing country such as South Africa to provide unlimited benefits or compensation to road users. The lack of moderation in the system that allows for and perpetuates disparities of wealth between road users cannot meet the standard of **reasonableness**. The absence of any relationship between the fuel levy and the compensation to which a victim may be entitled is not economical and is therefore **unaffordable**. A system of compensation without limits or boundaries is **unreasonable**. The absence of any congruence between the fuel levy, risk and cover is **inequitable, unaffordable, unreasonable and unsustainable**.

39 Transaction costs enrich facilitators and not the victims of road accidents:

- a) The administration of the RAF and the costs of experts utilised both by the RAF and by claimants consume tax revenues intended for those who have suffered injury and loss.
- b) Claimants are usually obliged to utilise portion of their compensation to pay their own costs and thus funds allocated to “future medical costs” are further expended for legal and administrative purposes.

40 The result is that “party-party” transaction costs reduce the availability of already limited resources for seriously injured patients, while “attorney-client” transaction costs oblige the patient to expend monies earmarked for healthcare and

rehabilitation for other purposes. This is **unreasonable** and **inequitable**. The fact that access to and implementation of the system is so costly renders the system **unaffordable** and **unsustainable**.

41 Payment of compensation in lump sums offers no security to disabled road accident victims:

- a) Once-and-for-all lump sum payments are based on “guesstimates” of future needs and costs which are frequently inaccurate or not borne out by real experience and are often overtaken by events that cannot be anticipated.
- b) Patients cannot be reassessed, needs cannot be reviewed and benefits cannot be adjusted upwards or downwards.
- c) Lump sum payment presupposes that road accident victims are wiser, more disciplined and better able than other persons to manage the expenditure and investment of large sums of money. Road accident victims are frequently in dire financial straits after months or years of waiting for compensation while they are disabled, unemployed, in debt, or faced with high healthcare expenses and legal costs. It is not surprising that compensation, which has been specifically earmarked for healthcare and rehabilitation purposes, is often expended for other purposes such as food, clothing, housing and education for the claimant and his or her extended family. Compensation can also disappear or be reduced by investment mishaps.
- d) With the advent of the HIV/AIDS pandemic, life expectancy tables are less reliable. Claimants may die earlier than anticipated of causes unrelated to the motor accident and compensation monies are retained by heirs who have no need for healthcare or rehabilitation and for whom the system of road accident compensation was not intended.

42 The result is that the payment received may be inadequate for unanticipated healthcare needs, insufficient for increasingly expensive life care arrangements, and leave the patient financially unprepared for the remainder of his or her lifespan. Road accident victims are frequently left destitute or fall back upon the State’s already overburdened resources. Where the system fails to achieve the purpose for which it is created one can only conclude that it is **unreasonable** and **unsustainable**.

### ***Social Security and the Road Accident Benefits Scheme***

43 The delictual system of compensation for injuries and death occasioned by road accidents raises challenging questions about allocation of fault, distinctions between misfortune and accident, and the form, allocation and financing of compensation. Of great significance is the minimal interchange between the delictual system of compensation and the State operated social security system.

44 In both the short and long term principles of social security should be embodied in a scheme for the provision of road accident benefits. The crucial question

in the design of a scheme of road accident benefits is whether this process should continue to advance the interests of road accident victims as a more fortunate group amongst those afflicted by accidents or illness or whether there should be a move towards integrating of such a scheme into a comprehensive social protection plan.

45 The rationale or justification for continuing preferential treatment of road accident victims rests on a number of factors: participation in the economic, social and political life of modern society demands that citizens use public roads, with concomitant exposure to the unavoidable hazards of injury or death in road accidents; the State has a responsibility to ensure that road users travel in the greatest possible safety and, where accidents and injuries do occur, to ameliorate the impact on health and on living and family conditions; no road user is exempt from these hazards because the risk of falling victim to a road accident is evenly distributed amongst all sectors of the population; both the scale and seriousness of injuries sustained in road accidents call out for dedicated intervention and assistance in road safety programmes, healthcare and rehabilitative intervention and income support; there is one identifiable cause of this misfortune, namely road use and road accidents; there is presently no other recourse available to victims of road accidents which will begin to provide the interventions and support proposed for the envisaged road accident benefits scheme.

46 The delictual system offers full compensation for all economic and non-economic loss. However, the Commission takes the view that it is not the function of a State funded and regulated scheme of road accident benefits to expiate every wrong while the victims of violent crime receive no compensation; to provide full recompense for loss of wages while so many work seekers are without employment; to reimburse all healthcare, rehabilitation and life care costs while the State is unable to afford anti-retroviral treatment for pregnant mothers and persons who are HIV+; to make financial amends for pain and suffering and loss of amenities of life while the majority of South Africans do not have access to clean water or sufficient food.

47 A State system of social security can offer no more than a “safety net”. Such a “safety net” requires the introduction of thresholds of entry to participation and ceilings or limits on the benefits available. Considerations of equity, however, continue to allow for acknowledgment of difference between claimants.

### ***The Common Law Remedy to Sue for the Balance of Damages***

48 Where the proposed road accident benefits scheme does not make available full compensation for loss or offer full absolution to wrongdoing vehicle owners or drivers, both victims and wrongdoers will find themselves vulnerable. Road accident victims and their families may find themselves with a significant financial shortfall by reason of the wrongdoing of another, whilst the wrongdoer may be exposed to a claim for damages from the victim or prejudiced family member.

49 There is considerable debate about the retention or abolition of the common law right of the victim to sue the wrongdoer for loss or damage not covered by the State funded scheme of road accident benefits. Such debate is concerned with the financial impact on the wrongdoer, the discrimination between wrongdoers which may result, the quid pro quo which may be expected from a “no-fault” approach, the harm and sometimes severe prejudice suffered by uncompensated and unsupported victims,

encouragement of safer driving and the deterrent effect of litigation, and the distinction to be drawn between the common law of delict and the social security component of road accident benefits.

50 Both liability and personal insurance are available at affordable premiums to road users and motor vehicle owners.

### ***“Fault” and “No-Fault” Approaches***

51 Road accident compensation in South Africa is based upon delictual action, to which the concept of “fault” is central – there must be a wrongdoing motorist for the RAF to be liable to pay compensation to a non-wrongdoing injured road user or his or her dependants.

52 Advocates of the “no-fault” approach base their arguments upon perceived inefficiencies, high transaction costs and inequities in the traditional system of delict or tort. It is argued that, in the interests of equity, deserving persons who have suffered misfortune should not be excluded because of the negligence of those who administer the compensation system, with resultant hardship to themselves and their families and the creation of a burden on the State and society.

53 Proponents of the traditional system, who oppose the introduction of “no-fault”, argue that such a system would result in inefficient and expensive bureaucracies and a reduction of benefits for innocent road accident victims, who will be obliged to support wrongdoing motorists or pedestrians.

54 There are a number of different options within a “no-fault” approach, all of which shift the emphasis from third party liability based compensation to first party compensation. In a pure “no-fault” system access to third party compensation via common law delictual remedy is denied. A modified “no-fault” approach provides a set of benefits without regard to “fault”, but the injured party retains the ability to sue the at-fault third party for certain damages in excess of “no-fault” entitlements, provided the injury meets or exceeds a certain threshold. Under an add-on “no-fault” approach, the underlying scheme is common law without restriction to sue the at-fault party or recover non-economic loss, and a select set of first party coverage benefits is simply added on.

### ***Awards of Compensation and Payment of Benefits***

55 There are many difficulties attendant upon attempting to restore the victim of a road accident to the same position he or she would have been in financially if he or she or the breadwinner in his or her family had not been injured. The once-and-for-all lump sum payment of compensation has the advantage of finality and allows the claimant independence in disposing of the award. These advantages are, however, greatly outweighed by the disadvantages attendant upon the difficulties of accurately estimating future economic loss. Incorrect prognoses frequently result in under or over compensation, while the impact of HIV/AIDS upon the South African population compounds the difficulties of quantifying compensation for the future. Interviews with and information received from disabled persons strongly suggest that once-and-for-all awards may result in insecurity and continuing impoverishment because compensation is insufficient or mismanaged.

56 Alternatives to lump sum awards include the Undertakings provisions of Section 17 of the RAF Act, annuity or structured settlements, as used in North America, the United Kingdom and Europe and reviewable periodic payments as are found in Australia and Canada.

57 Annuity or structured settlements retain the core challenges of calculating lump sum compensation, although the annuity stream ensures continuing availability of funds.

58 The advantage of reviewable periodic payments is that they provide for actual loss, avoid uncertainty, enable benefits to be accessed almost immediately and eliminate double compensation. Because they are reviewable they can be adjusted to the changing needs of the road accident victim according to improvement or deterioration in health or disability, increase or decrease in availability or costs of services and facilities, and so on. In respect of economic loss, these benefits take the appropriate form of monetary payments for loss of income and earning capacity and for family loss of support, while healthcare, rehabilitation and life care needs are met by the provision of services, equipment and facilities by suppliers who are paid directly by the administrators of the scheme. Section 17 Undertakings are a form of periodic payment, but the current experience of all concerned suggests that an entirely new infrastructure of professional and competent management and administrators, including experienced healthcare personnel, is required before the purposes of either the current or the proposed scheme can be implemented.

59 No road accident benefits should be subject to taxation and necessary legislation should be enacted to ensure that is the case.

### ***Assessment of Injuries and Disablement***

60 In order to assist persons who have suffered bodily injury it is necessary to enquire into and establish as full a picture as possible of their state of health. This requires information about the physical and emotional state of the victim prior to the accident, the precise nature of the injury sustained, the extent of impairment suffered, whether and to what degree disability is to be endured, availability of medical and therapeutic treatment and rehabilitation and the prognosis for outcome of such treatment.

61 There is a disturbing lack of clarity in medico-legal reports and the current RAF claims process about the objectives of, the concepts used and the methodology to be followed in the assessment of the health status of road accident survivors. Medico-legal reports that record examination of road accident victims, interpret the implications for current and future functioning and indicate possible future treatment may be of a high standard but do not always “talk the same language” and apply the same criteria to the assessment of each patient. The result is often a haphazard compilation of repetitive reports, obtained at great inconvenience and considerable expense, which are not directed towards asking or answering the same questions and referring to the same benchmarks.

62 In many jurisdictions there has been a move from common law adversarial litigation dependent upon divergent medico-legal opinions to the use of accepted

methodologies for achieving consistent and allegedly objective assessment of injury, impairment or disablement. Different assessment criteria can be used for different purposes: some are directed to classifying the type and severity of injury (Abbreviated Injury Scale), others are concerned with tabulating the loss of use of a body part, organ system or organ function (*American Medical Association Guides*). Yet others describe the experience of disability or functioning of a person suffering from a health condition (International Classification of Functioning).

63 The perceived advantages of utilising any assessment framework or guidelines may be identified as objectivity, consistency, greater certainty and efficiency. The criteria are clearly articulated and the same criteria are utilised in respect of all assessments. The standards are purposive because they are directed towards understanding explicit conditions such as injury or impairment or disability. Clear articulation of criteria and explicit benchmarks enable claimants and their advisors to evaluate possible outcomes more accurately. Measurement against defined criteria allows for speedier processing of claims, and the reduction in uncertainty may promote greater confidence in the outcome of the assessment and the scheme itself. The use of objective, certain and purposive standards encourages congruence in assessments of the same or similar injuries with the same or similar sequelae. The use of clearly articulated and consistent criteria enables the compilation of a database, which facilitates review of the patient's condition, informed policy decisions and refinement of assessment.

64 South African medical practitioners, therapists and healthcare providers should be trained and accredited in the use of assessment guides or frameworks which will enable appropriate and efficient and professional determination of the healthcare needs and benefit entitlements of road accident victims. The International Classification of Functioning (ICF) is valuable in describing human functioning and disability as a component of health, particularly for purposes of determining entitlement to income benefits in respect of loss of earning and loss of earning capacity. The *American Medical Association (AMA) Guides* are a valuable means of evaluating the impairment sustained by the human body and should be used to determine eligibility for life enhancement benefits in respect of pain and suffering, loss of amenities and loss of enjoyment of life.

### ***Litigation***

65 The litigation experience inherent in the current scheme is adversarial and complex, results in delay, increases costs and does not necessarily meet the needs of any of the litigants. These flaws are particularly undesirable when the dispute concerns access by victims of road accidents to timeous and appropriate healthcare, rehabilitation and financial support.

66 The Commission accepts the inevitability and even the value of dispute in a scheme of road accident benefits but believes it is essential that road accident victims who seek to access benefits should not be unaided in their endeavours. The role of the Legal Aid Board is considered. Initiatives in litigation costs and funding and in arbitration projects are discussed. An appeal structure is proposed, involving a system of benefits review panels and benefits appeal tribunals. The establishment of the post of Ombud is recommended.

### ***Healthcare for Road Accident Victims***

67 The current scheme of road accident compensation is liable for “reasonable” medical and hospital costs as well as expenditure on nursing and other care, medication, medical devices, prosthesis, specialised accommodation, transport, and so on that are reasonably required to remedy or ameliorate a condition.

68 The majority of road accident victims are treated in the public sector, which mainly serves the indigent, low-income population, while the private sector serves more affluent groups who choose to take out insurance for their health cover. Since October 1995 the RAF has paid no capitation fee to provincial health authorities as a nominal reimbursement for expenses incurred in treating victims. However, since 2001 both hospital and medical practitioners in the public sector have submitted directly to the RAF claims for compensation at private tariffs in respect of treatment and services rendered by them to road accident victims. This new class of “service providers”, in combination with those from the private sector, has been responsible for a notable increase in the number of claims submitted to the RAF as well as in the amount of compensation expended on healthcare. Researchers estimate the cost of treating all motor vehicle injuries (including trauma and medical care but excluding rehabilitation and life care) in public hospitals for the first year only to be in the region of R537 million.

69 The compensation allocated in the 1999 financial year to reimburse past medical expenses and provide for future medical expenses was approximately 22% of the total compensation paid out of fuel levy funds. Serious injuries occasioned 17% of claims, which accounted for 39% of healthcare compensation. The majority of claims were in respect of “slight” (48%) and “moderate” (27%) injuries, which accounted for 22% and 20% of expenditure on compensation supposedly earmarked for healthcare.

70 Compensation was most frequently claimed for strains and sprains of the neck (12.7%), fractures of the lower leg (5.8%), superficial injuries to the head (4.1%), superficial injuries to the face (3.8%), fracture of the upper leg (2.7%), sprain and strain of the back (2.7%) and superficial injury of the knee (2.7%). The RAF paid the largest amount of compensation in respect of strains and sprains of the neck (7.7%), fractures of the lower leg (6.7%), fractures of the upper leg (3.7%), intracranial injuries (3.4%), pelvic fractures (2.6%), rib fractures (2.5%), superficial face injuries (2.3%) and ankle fractures (2.2%). The problems for which claimants individually received the greatest amounts of compensation were injuries to the spinal cord, fracture of the vertebral column, amputation of the foot, fracture of the upper back, dislocation of the back and amputation of the forearm. Compensation in excess of R95 000 for the 27 most “needy” or most “expensive” injuries comprised only 1% of claims and 10.6% of the total amount paid out in compensation.

71 Drivers most frequently sustained neck (47%) and trunk (13%) injuries; passengers most frequently sustained lower limb (23%) and neck (19%) injuries. Pedestrians were mainly injured in the lower limbs (48%) and the head (19%); and lower limb injuries were most frequently sustained by motorcyclists (43%) and cyclists (38%).

72 There is concern that the current scheme of road accident compensation

focuses on “fault” and not on healthcare; the calculation and payment of compensation in once-and-for-all lump sums is not conducive to optimal healthcare arrangements; the allocation of compensation to less serious injuries diverts funds from those who have sustained serious and disabling injuries; expenditure on general damages reduces the funds available for healthcare; the limitation on passenger claims impacts on seriously injured claimants, who are under-compensated; potential disputes on the merits of the accident combined with the necessity to calculate a once-and-for-all amount of compensation results in delay in the provision of healthcare, rehabilitation and life care; there is a free-for-all amongst healthcare providers, who are subject to no tariff in respect of fees for services rendered to the victims of road accidents; there is a complete absence of managed healthcare for road accident victims; there is no control over whether recipients of compensation expend the monies they receive on healthcare, rehabilitation or life care at all.

73 Among the policy issues that are frequently raised are whether the scheme of road accident benefits should provide healthcare at all; whether it should contribute to the provision of healthcare within public sector facilities only and whether fuel levy funds should be expended in the private sector. The solutions suggested stress the importance of the provision of timely and appropriate healthcare, rehabilitative and life care interventions, irrespective of the source of such service, in order to ensure optimal outcomes. They emphasise the importance of affordable and sustainable costing and, to this end, recommend many of the managed healthcare strategies.

74 Compensation is currently awarded to persons who have not themselves sustained any bodily injury but suffer from psychiatric illness or post-traumatic stress syndrome as the result of observing or learning of the injury of another in a road accident. It is suggested that it is inappropriate for a State funded and regulated scheme that aims to provide a “safety net” in order to restore health and dignified living and to prevent a decline into poverty to provide such compensation, which is more appropriately situated within the private delictual and civil law remedy.

75 The “golden hour” is a window of opportunity within which treatment must be administered to avoid either loss of life or disablement. Current emergency medical services and trauma care in South Africa do not provide all the components of a trauma care system necessary to deal with the magnitude of trauma on South African roads and there is a need to restructure the healthcare system.

76 The Commission is especially concerned about those road accident victims who have sustained serious injuries resulting in long-term and life-changing disablement. The proposed scheme of road accident benefits should stress the purpose of rehabilitation and the value of early intervention and should focus on the processes involved in rehabilitation. The intended and achieved outcome of the provision of healthcare, rehabilitation and life care by a road accident benefits scheme should be to return the victim to pre-accident functioning or to living with dignity. In this regard, the incorporation of managed healthcare involving quality management, care and case management and clinical pathways within the road accident benefits scheme is essential.

### *Loss of Earning Capacity*

77 The current liability of the RAF is to pay compensation in respect of past loss

of income and future loss of earning capacity by reason of the inability to work because of the accident.

78 Compensation for loss of income (both past and future) accounts for approximately 23% of compensation paid to road accident victims.

79 Compensation for future loss of earnings was not only claimed by persons who were earning an income at the time of the accident but also on the basis of future earning potential. A small majority of successful claimants (52%) were employed in the formal sector of the economy, 12% were in informal sector employment, while 12% were unemployed. Those who were not economically active were students (8%), homemakers (3%) or retired (3%). Where information was available on the income of claimants (in only 67% of successful claims) the majority of successful claimants (81%) were earning less than R4 000 per month (compared to the 74% of all claimants in employment earning under this amount) while only 6% of successful claimants fell into the highest income category of R8 000 and more per month.

80 What emerges from the research is that there is considerable inequity: the 81% of claimants who earned less than R4 000 per month received only 52% of the total amount of compensation paid out for loss of earnings while the 6% who earned more than R8 000 per month received 32%. Similar figures emerged in respect of claims for future loss of income. It is clear that high earners, or those who come from more privileged backgrounds, receive a far greater proportion of total compensation paid in this category than do disadvantaged South Africans.

81 A small proportion of road accident victims claim compensation for past loss of income and a slightly higher proportion seek compensation for future loss of earnings. In both cases it is clear that the high earners receive a far greater proportion of the total compensation paid than do the disadvantaged.

82 A distinction is drawn between “earners”, who are persons in employment at date of the road accident or for a significant period prior thereto, and “non-earners”, who were not in employment at date of the accident or for a significant period of time prior thereto or who had retired or who had not yet begun to search for employment. It is suggested that “earners” should receive income support benefits in respect of both temporary or short-term and permanent or long-term incapacity while “non-earners” should receive benefits only in respect of long-term or permanent incapacity.

83 An important consideration is the responsibility of all persons with income from any source to register as taxpayers in terms of the Income Tax Act, which requires them to make full disclosure of income and to pay income tax thereon. It is believed that income support benefits should only be awarded on the basis of income that has been declared to the Commissioner for Inland Revenue. Failing such disclosure, income support benefits can only be calculated by reference to the tax threshold below which recipients of income are not obliged to declare income or pay income tax.

84 In view of the fact that it is envisaged that the proposed road accident benefits scheme will not provide full compensation but will merely act as a “safety net”, it is suggested that income support benefits should only be payable after a defined waiting period, that they should be limited to a percentage of pre-accident earnings or of the tax threshold and that they should be subject to a monetary ceiling.

85 Income support benefits should not be taxed and should be indexed annually in accordance with the Consumer Price Index.

### ***Funeral and Family Support Benefits***

86 The number of people who die in road accidents in South Africa has ranged from 10 691 in 1988 to 9 068 in 1998. A total of 5 037 (8%) of the claims settled during the 1999 financial year was in respect of deaths.

87 The majority (76%) of those who died were African, 12% were white, 6% were coloured and 6% Indian. Nearly half (46%) of the deceased were between the ages of 20 and 39. Passengers constituted the largest proportion (48%) with almost half only having limited claims for compensation. The next largest group (37%) were pedestrians, while only 12% were drivers.

88 The current scheme of road accident compensation limits assistance in respect of funeral expenses to “the necessary actual costs to cremate the deceased or to inter him or her in a grave”. The RAF’s average contribution towards a funeral is R2 408. It is recognised that funeral rites have considerable religious, cultural, familial and community significance in South Africa and that a more generous approach towards individual bereavement, family distress and community loss is to be encouraged. A flat-rate non-reimbursive funeral benefit is proposed.

89 The consequences for family members of people who are killed in road accidents are life changing and frequently catastrophic. Spouses are bereft of a life partner and co-parent, children are deprived of the love and guidance of a mother or father, parents suffer an irreplaceable loss of the family they have created. Benefits to assist with such loss are justifiable on several grounds: the need to provide for the immediate costs of death; in the case of the death of an earner there is financial need created by the loss of material support provided by the deceased; the dislocation to the family unit and the necessity to adjust to changes in the family’s social and economic situation often require financial outlay.

90 The present system of road accident compensation obliges the RAF to compensate any person for loss or damage suffered “as a result of the death of or bodily injury to any other person”. Damages can only be claimed if the deceased owed the third party a legal duty to maintain him or her and the third party was reliant on the deceased for his or her maintenance. A total of approximately R235 million (16% of total compensation paid) was paid during the 1999 financial year in respect of both past and future loss of support. Of this, 75% (R176 million) was for future loss of support and the balance (R58 million) for past loss of support. During the 1999 financial year 1 553 claimants received compensation in respect of past loss of support. Of these 63% were spouses, 14% children and 12% parents of victims. A significant proportion (20%) of claims did not involve children. The total number of children cited as dependants in claims for past support was 2 963 and in claims for future loss of support, 4 320.

91 Family support benefits should be directed towards the immediate needs of survivors, to be used as a financial buffer and to allow them to readjust to their lives. Emphasis should also be placed on the need to encourage able-bodied surviving family members to become self-supporting. No scheme of road accident benefits should use its

limited resources to support able-bodied survivors for substantial periods. Material dependency of family members is considered an inappropriate criterion for the provision of family support benefits. Priority should be given to immediate family members of the deceased and the circumstances of different families and family members should be acknowledged. These differences include childcare responsibilities, inability to earn by reason of disability or age, and variations in responsibility depending on whether the deceased was an “earner” or a “non-earner”.

92 Family support benefits should be a portion only of the income support benefits which would have been available to the deceased road accident victim. The suggestion is that the portion should be 50% for spouses or domestic partners and 50% divided amongst defined children.

93 It is recognised that the death of a spouse or parent imposes sudden, and often desperate conditions upon a family which it is ill-equipped to meet at a time of bereavement. Other systems of road accident benefits acknowledge this by payment of a substantial lump sum, and it is proposed that a nominal family adjustment benefit should be paid.

### ***Life Enhancement Benefits***

94 The delictual system of damages awards compensation for certain intangible “losses” such as pain and suffering, loss of health, disfigurement and loss of amenities and enjoyment of life. It is impossible precisely or exactly to assess or calculate an appropriate amount in respect of such losses. There is no real monetary equivalent.

95 In South Africa, the precedents established by decisions of the courts and by negotiated settlements indicate the parameters within which such compensation is awarded.

96 General damages accounted for approximately 43% of the total compensation paid to the victims of road accidents in 2001 (compared to 38% in 1999 and 41% in 2000). Research indicates that this form of compensation tends to be paid to persons who have sustained light or moderate injuries and that sometimes claimants seek only to recover such general damages and not to be compensated for medical costs or loss of income. Research also indicates that persons who have sustained serious and long-term disability receive proportionately less acknowledgement of their pain and suffering and loss of enjoyment of life than do persons who have sustained minimal and short-term injuries.

97 There are many arguments both in favour of and against general damages. At the end of the day, the discussion rests on the affordability of such a category of benefits within a State funded and regulated scheme of social security. The use of guidelines or even tariffs to determine the quantum of general damages or permanent impairment benefits may assist in meeting certain policy considerations. Among these would be provision of such benefits only to persons who have sustained serious and long-term injuries and disablement; the achievement of a measure of consistency between recipients and the control of expenditure in this category and insurance that sufficient funds are available to provide benefits for healthcare, rehabilitation, life care, loss of income and family support. The introduction of thresholds by reference to the American

Medical Association Guides to Whole Person Impairment, the imposition of a maximum sum of compensation for each life enhancement benefit and the use of the AMA Guides to determine the proportion of life enhancement benefits to be paid are all recommended.

### ***Delivery of Road Accident Benefits***

98 Responsibility for the current scheme of road accident compensation is vested in the Minister of Transport, the Financial Services Board, the Auditor-General, the Board of the RAF and RAF Management.

99 Oversight and management of the RAF has been criticised by reference to standards of political independence, financial dependence, accountability and a sense of service. The unlawful donations over a period of time by the RAF to the Arrive Alive initiative of the Department of Transport were indicative of a lack of political independence as well as a failure of the previous Board to ensure that fuel levy funds were properly utilised, with identifiable results. The current representation of “sectoral interests” within the Board has exposed the Board to allegations of “conflict of interest” and led to queries about the financial independence of the organisation. The absence of a database and analysis and research capacity, the failure of the RAF to respond to requests from auditors for information and the format of the RAF Annual Reports all contribute to an inability to provide proper accounting and conduct proper planning. They are also indicative of a complete lack of accountability to the road using public and the wider South African community and an inability to understand that the organisation should serve and be responsive to the needs of road users.

100 The greatest indictment to be levelled against the RAF is that it has “functioned” for so many years without any attempt to identify and acknowledge people whom it is supposed to serve. The failure of the RAF is circular - where there is no appreciation of the concept of service there is no appreciation of the need to be able to identify who is being served and why and for what purposes; where the accidents, the injuries, the disablements, the individual victims and their families cannot be identified, it is not possible to place the concept of service at the core of the organisation’s operations.

101 The current scheme of road accident compensation is situated within a monopolistic environment, funded by Government and operating in an historical context where it has been completely immune from any critical evaluation. It is only fair to distinguish between the “old”, the “interim” and the “emerging” RAF. There have been and continue to be external and internal pressures on the RAF to transform itself: firstly, to become representative of all of South African society and responsive to the needs of that society; secondly, to attain the capacities required to enable it to meet its current legislative mandate.

102 The Board of the RAF, appointed in mid-2000, and the new management of the RAF, appointed in 2001, have indicated a commitment to create and develop a professional and efficient organisation. Parliament has been presented with numerous plans for achieving this goal. To this end, there has been extraordinary reliance upon the services and skills of outside consultants, resulting in enormous expenditure of fuel levy funds. However, there are still many examples of deterioration in the competence

of the organisation. Staff capacity continues to be problematic. Expenditure of fuel levy income is sometimes challenged as being wasteful or irresponsible. It is questioned whether the current organisation can ever meet the standards expected of the proposed road accident benefits scheme.

### ***Transition and Implementation***

103 The financial predicament of the RAF was originally presented as the impetus to design and implement a completely new scheme for the provision of road accident benefits but the research conducted by the Commission has focused on considerations of equity as a driving force for such change.

104 Opposition to the proposed scheme can be expected from a number of sources and on a number of grounds. Opponents will include those who adhere to the concept of individual responsibility as opposed to social solidarity, the legal profession, and the RAF itself. The grounds of objection are likely to include doubt about the capacity of Government to administer the scheme, the anticipated costs of the scheme and concern for the diminution of the common law. In view of the fact that South Africa is a society in transition that is continually grappling with new concepts and practices the prognosis for a radical restructuring of the scheme of road accident compensation is good.

105 There is discussion about whether the proposed road accident benefits scheme should fall under the aegis of the Ministries of Transport, Finance or of Social Development. Consideration is given to whether the proposed scheme should be administered by a government department, a parastatal or the private sector.

106 It is proposed that a new authority, called the Road Accident Benefits Scheme (RABS), should be created to implement a “no-fault” system that provides benefits in the form of periodic payments governed by an approved tariff, subject to thresholds and monetary ceilings and paid directly to service providers. The administrative authority of this Road Accident Benefits Scheme should operate in accordance with certain principles of delivery including entitlement, independence, flexibility, decision-making and speed. Management and staff of the administrative authority should be persons with appropriate skills and expertise in the management of a corporate entity run on business principles, the administration of managed healthcare programmes and experience of pension claims. It is vital that the road using public supports the proposed Road Accident Benefits Scheme and this requires that the scheme be successfully promoted. Policy formation should be a core function and this requires information and research. Claimants must be assisted to obtain access to the benefits to which they are, as of right, entitled. One or more “benchmarking” processes should be an intrinsic part of the management process.

107 Outstanding claims should be ringfenced and administered by the current RAF organisation that should operate on the basis of an annual budget financed partly from allocations granted by the Department of Finance and partly from fuel levy income.

### ***The Cost of the Proposed Road Accident Benefits Scheme***

108 The mandate of the Commission requires its members to have regard to criteria of “reasonableness”, “affordability” and “sustainability”, all of which have cost

implications. The objective of this Commission must therefore be to create an equitable scheme for the payment of benefits to the victims of road accidents which falls within the range of costs the South African community can reasonably be expected to bear. The approach of the Commission has not been formulated by reference to a pre-determined cost or primarily by reference to general considerations of cost. On the one hand, the proposed Road Accident Benefits Scheme should offer a range of benefits to a wider and more inclusive group of road accident victims, on the other it should limit the benefits available and attempt to ensure a more equitable and reasonable allocation of fuel levy funds. The Commission has obtained advice on the possible cost of the proposed scheme and has attempted, by means of a valuation or costing exercise, to outline, in principle, and fill in with broad brushstrokes, this potential cost. Among the obvious difficulties are an absence of information, distorted data, continuously changing experience of road use and claims, the transformation within the RAF and its own administrative costs.

109 The value of engaging in this costing exercise has been that it highlights the need to develop capacity in data capturing, compilation of statistics, analysis and research. It also illustrates the need for the administrative authority to report systematically on all functions, thus enabling a more accurate forecast of expenditure. The exercise indicates the factors that should be considered in managing and implementing any scheme providing road accident benefits and provides encouragement to identify variables that may impact on costs.

110 Proposals which should contribute towards a reduction in costs are: reviewable periodic payments of pensions as opposed to non-reviewable lump sum once-and-for-all compensation; abolition of compensation paid in foreign currencies to meet expenses at foreign rates; the introduction of healthcare tariffs; direct payment to suppliers of healthcare services and facilities; managed healthcare arrangements; waiting periods to access income support benefits; earnings-related benefits limited to income declared to the Receiver of Revenue; monetary ceilings on income and family support benefits; a limitation on the number of eligible dependants; a time limit on the period during which family support benefits will be paid; severity impairment thresholds for life enhancement benefits; a monetary ceiling on the maximum life enhancement benefits.

111 Those features of the proposed scheme which, when compared with the current scheme of road accident compensation, would increase costs include: entitlement to participate in the scheme on a “no-fault” basis; payment for healthcare provided in the public sector; flat-rate funeral and family adjustment benefits; the provision of income support benefits to all non-earners and family support benefits to the dependants of all non-earners; removal of the ceilings on passenger claims; expansion of the definition of spouse.

112 Making appropriate allowance for the difficulties in predicting escalations in costs, there is every possibility that the proposed scheme will prove to be affordable and it should not be rejected simply on the grounds of cost. The proposed scheme is certainly more equitable as between road users and other members of the South African community; it is reasonable in its desire to direct expenditure to the most deserving; it articulates a philosophical underpinning and anticipates moral support which would render it more sustainable and, it is believed that these considerations will contribute to its affordability.

113 A new approach cannot be further delayed to await a more detailed database to indicate trends in road accidents, injuries, claims and compensation experience. What is needed is the actual claims experience of the proposed Road Accident Benefits Scheme in order to obtain proper understanding of the financial implications thereof.