The South African Medico-Legal Association

His Excellency the Honourable President Cyril Ramaphosa
The President of the Republic of South Africa

The Establishment of an Independent Multidisciplinary Medico-Legal Regulatory Authority

Dear Mr President,

We approach you on behalf of a group of leaders in the South African Medico-Legal Field. “Medico-Legal” in this context refers to conduct involving or relating to the sector in which healthcare and law interact, to promote justice in compensation for personal injury and disability. “Medico-Legal Practitioners” include an amalgam of healthcare-, legal- and aligned practitioners and other stakeholders, who pool their expertise, knowledge and experience in furthering the cause of justice in both litigation and mediation, where healthcare and law interact.

The group of leaders has been delegated by the South African Medico-Legal Association (SAMLA) and a number of its Coalition Partner Organizations (see attendance register), to address you on the medico-legal crisis in South Africa.

For reasons summarized below, and as expanded upon in the supporting documentation, **we appeal to you to authorize the establishment of an Independent Multidisciplinary Medico-Legal Regulatory Authority for South Africa** (see proposed details below). SAMLA and its Coalition Partner Organizations will gladly contribute their considerable experience, insight and constructive ideas to assist the relevant machinery of State in bringing this sorely needed Authority to life.

Directors : Claassen, Judge CJ - Neels (National Chairperson); Athmaram, Adv Reshma (- KZN Branch Chairperson); Becker, Prof Jan (Gauteng Branch Chairperson); Claassen, Dr Brand; Dutton, Adv Ian (Coalition Task team Convenor); Edeling, Dr Hannetjie (Administration- and Communications); Edeling, Dr Herman (Clinical Negligence and Mediation; Faculty Course Leader); Enslin, Dr Hans (RAF); Fredericks, Dr Gavin (National Treasurer); Jordaan, Mr Johan (FS Chairperson); Khan, Adv Jenine (Membership); Lamey, Adv Albert; Lerm, Dr Henry (National Deputy Chairperson - Legal; EC Chairperson); Munyaka, Dr Sharon; Ncongwane SC, Adv Thami (Transformation); Pienaar, Dr Hennie; Reynolds, Mr Trevor (National Deputy Chairperson - Health Sciences); Saayman, Prof Gert; Satyapal, Prof Kapil; Singh, Ms Irana; Sutherland, Ms Romany (WC Chairperson); Tiry, Adv Ayesha; Van Den Bout, Dr & Adv Anton; Wasserman, Dr Marlene.

Whereas awareness of the medico-legal crisis is not prominent in politics or the media, the consequences thereof for South African citizens and the South African economy are dire. There are numerous elements to the overall crisis. Two of them, which have received ineffectual political attention, are highlighted for your attention:

1. THE CLINICAL NEGLIGENCE CRISIS

1.1. Contingent Liability of Combined National and Provincial Departments of Health **>R90 billion**. Contingent Liability of the Private Healthcare Practitioners **R unknown**.

1.2. As staggering as these financial losses may be, the numbers do not reflect the extent of human suffering and loss of economic productivity by those citizens who are disabled by medical negligence. We are acutely aware that the harm is perpetrated or aggravated by unprofessional conduct, negligence, corruption, maladministration and constrained resources.

1.3. On 9 and 10 March 2015 the Minister of Health convened a Medico-Legal Summit. At this summit the Honourable Dr A Motsoaledi, spoke out against the massive claims for clinical negligence against the Departments of Health, which he labelled at that stage as a national crisis. Pursuant to the Summit, the Minister appointed a Ministerial Task Team, later converted to a Ministerial Advisory Committee, to consolidate the recommendations of the Commissions. The work of this committee culminated in the formulation of a Ministerial Declaration, which was approved and signed by the Minister on 15 March 2016. This Ministerial Declaration, and the substantial body of work behind it, have not resulted in any demonstrable improvement. The painful reality is that the clinical negligence crisis in South Africa continues to cause rampant destruction. The Esidimeni tragedy is but one example of preventable harm to the public resulting from negligence.

2. THE ROAD ACCIDENT AND RAF CRISIS

2.1. RAF debt at 2017/18 financial year – **R206.3 Billion**. Deaths on SA roads – **134 per 100 000 vehicles** (compared to the international norm of 7 to 14 deaths per 100 000 vehicles). Number of personal compensation claims against RAF – **92 000 p.a.** Number of claims completed – **40 000 p.a.** **(± 50 000 p.a**. carried over every year). Number of claims outstanding against RAF – **245 000**.

2.2. Numerous commissions of inquiry have been appointed to investigate the RAF and its predecessors, the last of which was the Satchwell Commission in 1999. The findings of these Commissions, which are a matter of record, have not been translated into any tangible benefit. Our courts have become intolerably overburdened by litigation over RAF claims, which account for the vast majority of civil matters on High Court rolls.

2.3. The RAF Amendment Act of 2005, and its Regulations of 2008, were tied up in counterproductive litigation for years, culminating in a Constitutional Court Judgment in 2010 that set aside Regulation 5(1), in which the Minister of Transport prescribed tariffs for health services to accident victims. The Regulations for determination of serious injuries, in terms of the said Act, have resulted in a counterproductive and dysfunctional RAF4 system, in which the RAF (Road Accident Fund) pays the HPCSA (Health Professions Council of South Africa) to adjudicate disputes between the RAF and claimants. The lack of independence of the HPCSA in this uncomfortable arrangement, which does in any event not fall within the mandate of the HPCSA, together with a multitude of associated problems, has resulted in a slew of Review Applications in the High Courts.

2.4. The Road Accident Benefit Scheme (RABS) Bill, which was published for public comment in 2014 by the Minister of Transport, has been tied up in the Parliamentary Portfolio Committee process for years. Despite serious challenges to its constitutionality by many well-informed and benevolent experts, and rather than amending or replacing the Bill to serve the rights and interests of vulnerable citizens in line with the policies of the governing party, the Bill was eventually forced through the Portfolio Committee process by political power. Notwithstanding the political power, the Fifth Parliament has failed to pass the Bill, which is destined to be a major headache for the Sixth Parliament. If passed in its current form it is destined for litigation which will probably again end in the Constitutional Court.

3. REASONS FOR THE OVERALL CRISIS

3.1. The causes for the crisis are not principally related to South African legislation. They are related to the unethical behaviour of certain professional practitioners, who abuse the system to their own advantage, siphoning money out of the fiscus for illegitimate gains.

3.2. The Honourable Ministers of Health, Transport and Justice have been aware of the problem of unethical behaviour by various professional practitioners for years. This is publicly evident in repeated statements by the Honourable Dr A Motsoaledi, as well as the problematic RAF Amendment Act of 2005 and Regulations of 2008, the RABS Bill of 2014, and the State Liability Amendment Bill of 2018. Each of these legislative interventions seeks to save money by clipping the wings of professional practitioners, or by excluding professional practitioners, in the process of determining compensation for personal injury due to clinical negligence or road accidents.

3.3. These legislative interventions suffer a common moral failure, in that they seek to eradicate the corruption of the few by punishing all. In the process they wittingly or unwittingly infringe on the rights of innocent victims, with particularly harsh consequences to victims who are poor or otherwise vulnerable.

3.4. Despite the existence of the HPCSA, Law Society and other authorities, unethical professional practitioners have found ways of navigating the uncharted waters between these authorities. Medico-legal practice occupies a largely unregulated space between the Departments of Health, Justice, Transport and Social Development, as well as the Treasury.

4. OUR PROPOSED SOLUTION

4.1. We believe that the most effective solution to this crisis will be the establishment of an Independent Multidisciplinary Medico-Legal Regulatory Authority. To be effective such an authority would need appropriate representation of relevant stakeholder organisations; as well as measures to safeguard its independence; and stipulation of the minimum necessary qualifications, experience and character of the men and women who are elected to its Board.

4.2. The core functions of such an authority would be : -

4.2.1. Publication of entry qualifications as well as training standards for medico-legal practitioners.

4.2.2. Accreditation of an educational institution or institutions to train medico-legal practitioners.

4.2.3. Publication of a code of conduct for medico-legal practitioners.

4.2.4. Effective disciplinary procedures for medico-legal practitioners who violate the code.

4.2.5. Collaboration with stakeholders on any and all medico-legal matters impacting on the Constitutional Guarantees of South African Citizens.

4.3. In contemplation of 4.2.5 above, areas of collaboration may include, but would not be limited to, supporting : -

4.3.1. The establishment and oversight of Centres of Excellence, specializing in the care of children with Cerebral Palsy and others living with Disabilities.
4.3.2. The promotion of effective and constitutionally sound reform of the RAF.
4.3.3. The establishment, training and management of RAF Appeal Tribunals.
4.3.4. The establishment of an independent and secure South African Medico-Legal Data Institute.
4.3.5. The formulation of "Upstream" Recommendations to effectively reduce the incidence of Road Accidents.
4.3.6. The formulation of "Upstream" Recommendations to effectively reduce the incidence of Clinical Negligence.
4.3.7. The formulation of "Downstream" Recommendations to streamline the cost-effective and labour-effective resolution of Disputed Compensation Claims for Personal Injury and Clinical Negligence.
4.3.8. The formulation of Recommendations to various Departments of State in relation to New Legislation that will impact on Medico-Legal Practice.

Yours faithfully,

The Hon. Mr Justice C.J. Claassen
SAMLA National Chairperson

Dr Herman J. Edeling
SAMLA Faculty Leader, Clinical Negligence & Mediation Director

5 August 2019