THE 2018 SAMLA CHAIR PERSON'S REPORT

1. INTRODUCTION

In my New Year's letter at the beginning of 2018 I expressed the hope that this year will enlarge the participation and influence of SAMLA as a collective, as well as its individual members in addressing the serious crisis in the medical and health industries. I am confident that we have indeed attained this goal to a very large extent and I hope the readers will agree with me, once they have read this report.

2. PATIENT SAFETY AND MEDICO-LEGAL ADVISORY PANEL (PSMLAP)

2.1 The MEC for Health in Gauteng, Dr Gwen Ramakgopa, requested me to serve on the above-mentioned panel. I was asked to enlighten the CEO's and senior executives of the state hospitals in Gauteng on the benefits of mediation as an alternative to litigation, as well as the methods that can be implemented by state hospitals to minimise the downstream risk of medical negligence claims. I was also asked to conduct a surprise inspection of an outside clinic. The clinic was non-compliant in many respects, to the extent that the accompanying nurse from Dr Ramakgopa's office advised that the clinic should be closed.

2.2 Unfortunately, I had to resign from this position as my advice was not accepted, nor was the panel effective in improving the level of service in the state hospitals. It appeared as if the panel viewed holding meetings as equal to "activity". The panel became a discussion group without implementing any remedial strategies.

3. THE SOUTH AFRICAN LAW REFORM COMMISSION (SALRC)

During February 2018, SAMLA submitted a 59-page document with recommendations to the SALRC regarding the medical negligence crisis in our country.[1] Most of this submission was prepared by Dr. Henry Lerm, for which he is to be complimented. The

[1] This document is available for inspection on the SAMLA website.

submission was made in time for the SALRC to consider it. We now await their "Discussion Document" which will be circulated to all contributors for comment before a final document is submitted to the Department of Justice.

4. PRIVATE PRACTICING MIDWIVES ASSOCIATION (PPMA)

During March, SAMLA was approached by the above-mentioned organisation for assistance in its battle with Discovery to have their fees approved. This is still an ongoing process, which has not reached finality.

5. THE PROPOSED SOUTH AFRICAN NATIONAL HEALTH INSURANCE (NHI)

5.1 The British National Health Service (NHS) recently released a 4-year study on the effectiveness of its services. Key data findings show:

- "64% of doctors believe that patient safety has deteriorated over the past year – **10% higher than last year.**
- 93% experienced staff shortages across the team – **9% higher than last year.**
- 84% believe that the workforce is demoralized – **2% higher than last year.**
- 85% cite rising demand for their service over the past year – **7% higher than last year.**
- 47% cite lower-quality care over the past year – **10% higher than last year.**
- 80% are worried about the ability of their service to deliver safe patient care in the next 12 months – **6% higher than last year.[2]"**

5.2 SAMLA should consider using this research as background information in the event that submissions are called for in future regarding the South African equivalent.

6. THE ROAD ACCIDENT FUND (RAF) AND THE ASSOCIATION FOR THE PROTECTION OF ROAD ACCIDENT VICTIMS (APRAV)

6.1 A close association and cooperation exists between SAMLA and APRAV. One of our directors, Dr Hans Enslin, acts as our representative on APRAV. He has been very pro-active in opposing the new Road Accident Benefit Scheme

- [2] See https://www.rcplondon.ac.uk/projects/outputs/nhs-reality-check-update-2018

(RABS) Bill for which he is to be complimented. See a copy of the summary report of Dr Enslin – Annexure 1.

6.2 Dr Herman Edeling addressed the Parliamentary Portfolio Committee on Transport on the negative effect the RABS Bill will have on patients with brain injuries. On a second occasion I was able to address the Portfolio committee on the saving of costs occasioned by the use of mediation rather than litigation. The Portfolio Committee thereafter embarked on a road show visiting various rural towns to allow the public to air their views on the Bill. These public hearings were attended by APRAV representatives who reported the hearings to be a farce and the outcome to be a foregone conclusion. Needless to say, the Portfolio Committee recommended that the Bill should be accepted as is, despite all the representations contrary to its acceptance. This matter requires continued close observation and cooperation with APRAV and similarly-minded organisations such as the ANC Legal Research Group.

6.3 SAMLA was also approached by a group called "Grassroots Impact Solutions" who were retained by the RAF to research the tariffs payable to experts for reports and other services, as well as requirements for expert reports. This group was represented by Mr. Lusani Mulaudzi, the current chairperson of the South African Actuarial Association, and a lawyer, Ms Annami Roux. They met with Dr Herman Edeling, Dr Hans Enslin and Mr Trevor Reynolds who gave them valuable information regarding the above issues. This cooperation is still an ongoing process.

7. THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA (HPCSA)

7.1 Trevor Reynolds, our Vice Chairperson Healthcare, approached the HPCSA with a request for clarification of the question whether a psychologist of a certain discipline can refuse to prepare joint minutes with a psychologist of a different discipline. The Executive Council resolved that on the current ethical rules of conduct and policy guide lines, nothing prevented psychologists to do joint medical minutes in the medico-legal domain. It further resolved: "… that joint reports/minutes may be made by psychologists registered in different

categories or between registered practitioners in other registers of the HPCSA. In the context where it would involve peer to peer, there was no objection to preparing joint minutes."

7.2 Earlier in the year I submitted to the HPCSA a report, prepared by Adv. Albert Lamey, regarding the practice of Ms G Cloete of Multi Prof, which opined that her practice offended several ethical rules and professional guidelines. On 8 November the HPCSA replied as follows: "The Professional Board for Occupational Therapy & Medical Orthotics/Prosthetics Committee considered the matter in a preliminary inquiry and resolved that the matter be referred to the Board for discussion on (i) unethical advertising; (ii) unethical naming of the practice; (iii) preservative incentives; and (iv) contravention of Rule 8 on the ethical Rule on partnership."

7.3 We now await the further outcome of this investigation. Although Ms G Cloete is a member of SAMLA, the Board resolved that it was not for SAMLA to invoke its own disciplinary measures against her as she did not conduct her practice under the auspices of SAMLA. Indeed, she requested cooperation with SAMLA, but that was refused.

8. THE WORLD CONGRESS OF MEDICAL LAW

SAMLA was approached by the above-mentioned organisation to host its 2022 congress in South Africa. This matter was discussed amongst the members of SAMLA's Exco and it was resolved not to engage in such a venture. It was thought to be unwise to involve SAMLA in the organization of a World Conference at this juncture. We should rather concentrate on the Faculty and our other seminars and mock trials before engaging in such a risky, expensive and time-consuming adventure as suggested by the Conference Company.

9. PILOT PROJECTS

9.1 In this regard the following resolution was passed by the SAMLA Board:

"Noting that, after having been approved by the Gauteng MEC for Health, the proposed Gauteng Medical Mediation Pilot Project has fallen through due to inability of the Gauteng DoH (Department of Health) to provide settlement authority to their representative/s, and that Judge Claassen and Dr Edeling have offered a similar pilot project to the Mpumalanga DoH, the SAMLA Board approves the proposal to offer the pilot project to Mpumalanga DoH as a SAMLA Medical Mediation Pilot Project.

Noting that Judge Claassen and Dr Edeling have established the Medical Mediators SA Register [see http://medicalmediatorssa.com/], the SAMLA Board approves the proposal to invite the Medical Mediators SA Register to incorporate into SAMLA, which will require mediators on the Register to become members of SAMLA. We note that this may require a small revision to the SAMLA MOI."

9.2 The above resolutions have been implemented. The pilot project with the Mpumalanga DoH is still ongoing and the mediators on the list will be engaged in mediations emanating from there during 2019.

10. THE SOUTH AFRICAN MEDICAL ASSOCIATION (SAMA)

10.1 I was invited to address the SAMA 2018 Conference at Sun City on the topic "Rendering Quality Care in a Litigious Environment". When a change in my health prevented me from doing so, Dr Herman Edeling was invited as my replacement, and he delivered the address on behalf of SAMLA on 18 August 2018. His address was very well received as stated in the letter by Dr. Grootboom to the effect that:

"Please accept our sincere thanks and appreciation for serving as a speaker at the SAMA Conference 2018. When planning an event such as this, it is imperative to gain the participation of experts in the field. Your willingness to share your time and expertise was critical to the success of our conference.

Your enthusiastic and professional participation in the conference is highly valued, and I have no doubt it would not have been the success it was without your involvement."

10.2 The SAMLA Board then resolved that I should write a letter to Dr. Grootboom soliciting closer cooperation and making a few suggestions to SAMA for addressing the clinical negligence crisis in South Africa. Attached hereto as "Annexure 2" is a copy of the letter.

11. LLM RESEARCH ON MEDICAL MEDIATION

Mr. Johan Jordaan has enrolled for a Master's Degree in Medical Mediation. SAMLA supports him in this endeavour, as it will involve empirical data regarding the outcome of such mediations. It is critical that statistical evidence be obtained regarding the success rates and outcomes of medical mediations, in order to prove the benefits of mediation to the relevant authorities. In this regard all members of SAMLA involved in medical mediations are encouraged to assist Mr Jordaan in obtaining all relevant data.

12. ETHICS IN MEDICAL MALPRACTICE

12.1 During July, SAMLA was approached by Dr Willem Moore for cooperation in advancing the subject of ethics in the training of medical practitioners. After discussion the Board resolved as follows:

"That SAMLA enter into a formal relationship with Dr Willem Moore in the collaboration of promoting and teaching ethical conduct and that he be invited to serve on the Faculty as a lecturer of the second course."

12.2 The subject of ethics is of particular interest to Dr Lerm and Dr/Adv Anton van den Bout and they will be supporting Dr Willem Moore in preparing a code of conduct and ethical guidelines for medico-legal practitioners.

13. DISCIPLINARY MEASURES

13.1 In terms of clause 6.4.1 of SAMLA's Memorandum of Incorporation, members may be subjected to disciplinary investigation. The Board resolved to appoint a Disciplinary Committee consisting of 3 members namely Judge Claassen (as Chair of the committee), Adv Thami Ncongwana SC and Dr Hannetjie Edeling as Committee members.

13.2 During 2018 there were two instances where disciplinary proceedings were considered against two advocate members of SAMLA. In both instances the Committee engaged the two individuals and after various communications, both individuals voluntarily resigned, one as a member of SAMLA and one as

a director, but not as a member of SAMLA. As such, there was no need to hold official disciplinary hearings.

14. REGISTER OF VERIFIED MEDICAL MEDIATORS

14.1 A separate register of medical mediators was initiated by SAMLA. To be registered, applicants were to submit their mediators' qualifications, proof of registration with their professional body, CV, ID, recent photograph and a written undertaking to abide by the Professional Code of Conduct for Mediators issued by DISAC.

14.2 The Register of Verified Medical Mediators is for information purposes only. Mediators on the register may be appointed, by agreement between parties, to mediate a dispute between them. SAMLA does not have the statutory authority or capacity to accredit or endorse any professional. Any dissatisfaction with the professional conduct of a mediator may be referred to the applicable professional registration authority and/or to the applicable mediation accreditation authority. SAMLA is not responsible for, and expressly disclaims, all liability for damages of any kind, howsoever arising out of the conduct of any mediator. SAMLA will not accept any liability in respect of the conduct of any mediator, and such mediator will therefore be personally liable for any damages and/or other liability arising therefrom. SAMLA accepts no liability for the actions, views and decisions of any mediator, nor for the consequences of any actions taken by or against the mediator.

14.3 The board resolved that Members of the Medical Mediators SA Register accept the invitation of SAMLA to become (or remain) members of SAMLA and to incorporate the Medical Mediators SA Register into SAMLA.

15. SAMLA COALITION AND THE INDEPENDENT MEDICO-LEGAL DATA MANAGEMENT INSTITUTE.

15.1 The SAMLA Coalition is a voluntary association of South African organizations, convened for the purpose of seeking agreement on practical

interventions to curtail the damages that flow from clinical negligence and litigation. Such proposals should include both upstream- (curbing negligent harm to patients) and downstream (curbing the costs of negligence-related disputes) interventions. In addition to SAMLA, the Coalition at this stage includes representatives of Medical Protection Society (MPS), Constantia Ethiqal Division, Natmed, South African Medical Association (SAMA), South African Society of Obstetricians and Gynaecologists (SASOG), Society of Neurosurgeons of South Africa, South African Spine Society, South African Orthopaedic Association and Democratic Nursing Organization of South Africa, as well as attorneys representing Plaintiffs and Defendants and others.

15.2 Together with the establishment of the SAMLA Coalition, it was also agreed to establish an Independent Medico-Legal Data Management Institute. The purpose of the Institute will be the collection, collation and secure storage of relevant medico-legal information for academic research and knowledge dissemination, to promote improved clinical outcomes and inform improved conflict- and dispute resolution.

16. THE STATE LIABILITY AMENDMENT BILL

16.1 SAMLA submitted a document to the Parliamentary Portfolio Committee for Justice concerning the proposed content of the above-mentioned Bill. The signatories to the document were myself, Adv. John Mullins SC, Dr. Herman Edeling and Adv. Ian Dutton. A copy of the submission is attached hereto as "Annexure 3".

16.2 I also addressed a letter to Ms Mothapo, the Chair of the Portfolio Committee, requesting an extension of time to allow further submissions to be made. This request was not granted. A copy of this letter is attached hereto as "Annexure 4".

16.3 The main objection to the proposed Bill is the abolition of lump sum payments in respect of future medical expenses and the substitution therefor of a provision that periodic payments may be made at the rate of no more than the

costs of such services charged by State Hospitals. In effect it would mean that the injured have to return to the same type of hospitals that caused their injuries in the first place. This would be patently objectionable.

16.4 Clause 2A(2)(c) of the Bill provides that these services are to be rendered by State Hospitals compliant with the standards set by the OHSC. However, the OHSC recently published a report on research done between 2012 and 2016 of 1887 State Hospitals in South Africa. The report indicates that 660 of these hospitals are "Critically non-compliant". Only 39 are compliant. It seems unlikely that State Hospitals will pass muster for the delivery of these services on an adequate basis.

17. MEMBERSHIP

17.1 SAMLA lost the services and support of 3 valuable directors and members during 2018 who passed on. These are Adv Pat van den Heever SC, Prof Charles Lautenbach and Dr Frank Snyckers. Members of the SAMLA Board of Directors were able to attend the funeral and/or memorials for these valued members.

17.2 In addition, Adv. Natalie Lawrenson resigned as a director but not as a member, due to work obligations.

17.3 Our current membership stands at 457 paid-up members, 704 members whose subscriptions are still outstanding and 70 members whose details have not yet been verified – a potential of 1231 members. As at the end of 2014 our total membership was approximately 550. This indicates a growth of approximately 110% over 4 years.

18. THE SOUTH AFRICAN MEDICAL MALPRACTICE LAWYERS ASSOCIATION (SAMMLA)

SAMLA was recently approached by Mr Andre Calitz (attorney of Josephs Inc) to cooperate with the newly established association mentioned above. A copy of the

association's MOI was forwarded to SAMLA. On a perusal thereof, it would seem that it would benefit SAMLA to agree to cooperate as they are not averse to mediation as an alternative to litigation.

19. SAMLA FORUM

An internet platform, known as a Forum, has been established for SAMLA in order to streamline communication between members and directors. All directors are requested to acquaint themselves with this system and to register on the forum.

20. FUNDING AND BURSARIES

One student who enrolled for the faculty first year course was funded by SAMLA due to his peculiar health problems. A policy decision was thereafter made that such funding will not be provided for studies at any other educational institute than the SAMLA Faculty.

21. REVISION OF THE MOI OF SAMLA

A special task team consisting of Dr. H Lerm, Dr. Herman Edeling, Dr. Hannetjie Edeling, Adv. T Ncongwane SC, Adv. A Tiry and Adv. A Lamey was appointed to revise the MOI in substantial form to cater for the new challenges occasioned by the growth of SAMLA. Adv. Tiry was responsible for the bulk of the amendments for which she is to be complimented. This revised MOI was adopted at a special general meeting. The new MOI has, however, not yet been registered due to further amendments as indicated in paragraph 22.3 below.

22. FINANCIAL AFFAIRS AND AUDITORS AND FURTHER AMENDMENTS TO THE NEW MOI

22.1 In line with a previous resolution of the Board, the Exco resolved to outsource SAMLA bookkeeping functions to Azlyn Creative.

22.2 Due to previous difficulties, and repeated failures to resolve problems, an independent CA, Mr. Jacques Van Wyk of MMS Trust Services was approached for advice on several issues. MMS submitted a quotation which indicated the rendering of an Audit would cost about R20,000 more than an Independent Review by a CA. He also advised that the functions of SAMLA are such that an Independent Review by a CA would be acceptable according to company law.

22.3 At its meeting on 19 January 2019 the Board resolved to propose an amendment to clauses 5.2.2; 5.2.2.1; 5.2.3 and 8.1.3.3 in order to allow for Independent Review by a CA rather than Auditing.

22.4 It will be recommended to the AGM to appoint MMS Trust Services as the Independent Review Accountants for SAMLA.

22.5 We have now received confirmation from SARS that SAMLA is registered as a PBO (public benefit organisation) exempted from paying income tax. Application is being prepared for SAMLA to be a registered VAT payer and authorised to issue section 18A certificates to donors.

22.6 The AFS are to be submitted to the AGM by the Treasurer, Dr Gavin Fredericks.

23. FACULTY AFFAIRS

23.1 In 2018 the SAMLA Faculty, in collaboration with UCT Law@work, presented the first Foundations of Medico-Legal Practice Course. The course was presented to 326 participants, at venues in 5 cities simultaneously by utilizing professional video-conferencing technology. At the end of the course 272 students wrote the UCT examinations. There were 11 failures. The revenue to the Faculty amounted to approximately R420,000.

23.2 Dr Herman Edeling and his team are to be complemented for a very successful course. In addition to promoting competent and ethical practice, the course

excelled in promoting transformational objectives. The course will be made available online as an e-learning course.

23.3 Planning of the second- and third year sections of this programme, in the form of a series of practical training workshops, is well underway, and the first workshop will be presented on 2 march 2019.

24. REGIONAL REPORTS

I received 3 regional reports, from Eastern Cape, Free State and Western Cape. These are attached hereto as Annexures 5, 6 and 7.

Judge Neels Claassen **19 January 2019**

Annexure 1

DR HANS B. ENSLIN

M.B. ChB M.Med (Orthop.) (Stell.)
CIME (from 22.04.2012 until 22.04.2017)

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SUMMARY - SAMLA / APRAV ANNUAL REPORT 2018

Note should be taken of the particularly significant and meaningful inputs from various persons who represent SAMLA and APRAV. In this regard mention must be made of Judge Neels Claassen (Vice Chairperson of SAMLA), Dr. Edeling (Vice Chairperson of SAMLA), Mr Pieter de Bruyn, Mr. N Mohlogoa and Mr. Gert Nel of APRAV, Mr. Trevor Reynolds (SAMLA), Dr. HB Enslin (SAMLA), Prof. H Klopper, Mr. J Sauer and Ms. E Jacobs.

An important event on the calendar of the RABS Bill in 2018 was the presentation by Dr. Edeling to the Portfolio Committee on Transport under the chairmanship of the Honourable D Magadzi. He explained in detail the discrepancies and deficiencies in terms of the RABS Bill as well as a written submission to Ms. Magadzi regarding the methodology that has been proposed by the STT of APRAV.

On 30 May 2018 there was a presentation by APRAV in Cape Town. The POCT was addressed by Mr. N Mohlagoa, Mr. G Nel, Mr. P de Bruyn, Prof. H Klopper and Mr. J Sauer.

The Committee was also addressed by Judge Neels Claassen, in terms of solving the problem of expenses and saving of time by using the methodology of mediation.

Ms. Magadzi, after the hearings at the end of May 2018, requested APRAV to have a financial audit performed on the proposals by Mr. Johan Sauer in respect of the costing of RABS and an Amended RAF Act. She did not give any such instruction to Mr. Greg Whitaker, the actuary who performed an assessment for the Portfolio Committee on Transport.

It is interesting that Mr. Whitaker at the meeting of the workshop arranged by the ANC Legal Research Group, stated that one must obtain a definition of the annual average income. He stated that in the USA the cost started to increase after a dual system was introduced. He stated that an updated actuarial calculation must be performed as information to his disposal was already two years old. He stressed that it was important to find out what funding would be required and he suggested that inputs should be obtained from Rand Mutual Insurance Company to calculate the costs of the RABS System versus an Amended RAF System.

In the same advice to APRAV, Ms. Magadzi stated that forensic proof must be forthcoming in respect of the costing structure suggested by Mr. J Sauer. She also mentioned that APRAV must accept accountability for their inputs and this accountability must be scrutinised timeously. In respect of accountability referred to by Ms. Magadzi after the hearings in Cape Town in May 2018, writer has perused the Bill of Rights Handbook, published by Juta in 2014.

On 20 October 2018 a workshop was held at the request of the ANC Legal Research Group with presentations being made by Mr. N Mohlagoa, Dr. Edeling, Dr. L Barrit, Mr. C Whitaker and Mr. B Maswazi of the Black Lawyers Association). Representatives of the ANC Legal Research Group was Mr. Mgwala and Mr. K Naidoo who requested inputs from the presenters, which they promised to present to the leadership of the ANC.

The ANC Legal Research Group was very positive in their rejection of the present RABS Bill.

The Transport Committee is now faced with the task of addressing the issues raised in the DA Report to comply with Rule 288 (3) of the National Assembly, which would include:

- **Accountability.**

- **Possible constitutional changes.**
- **Submitting an updated actuarial report.**
- **Accessibility.**
- **Exclusion of the poor.**
- **How a dual system will be funded.**
- **Impact of a no-fault on the South African public road user.**
- **The absence of an acceptable medical tariff.**
- **The absence of appropriate medical and rehabilitative infrastructure.**
- **The correct writing of the Bill.**

It is important to take note of the contradictions between the recent media statement by the Honourable Dikeledi Magadzi in December 2018, where she issued a statement and referred to representation. She noted the hard work put into the benefit scheme and the quality of the inputs received during public hearings. (Yet, she ignored these public hearings in total when she presented the Bill for final approval in Parliament in December 2018). Her request for Parliament to approve an amended RABS Bill was rejected on two occasions in December 2018.

Despite the areas of the Bill rejected by the DA as per Rule 288(3)(f), which were based on the desirability of the Bill, areas of unconstitutionality; no proper financial evaluation had been disclosed; inclusion of a no-fault system would lead to unaffordability of the scheme, and promote delinquent behaviour; the limitation of common law with respect to general damages against the defaulting party was disputed; as well as an objection to the proposed run of the RAF and RABS concurrently.

In Paragraph 4 of Ms. Magadzi's letter she rejected the abovementioned DA reservations and the Committee recommended that the House of Parliament adopts this report and approve the second reading of the Amendment Bill.

It is clear to members of SAMLA and APRAV that the Portfolio Committee on Transport has totally ignored all inputs relevant to the rejection of this proposed Bill that has been so poorly thought out, it is unconstitutional, unaffordable and will disadvantage the poorest of the poor South African public.

It is also well to remember at this stage that no tariffs have been arranged in respect of future treatment of road accident victims and as pointed out by Advocate Madonsela (Public Protector), the Minister of Health and in January 2019 by President Cyril Ramaphosa, that hospitals in South Africa are understaffed, poorly run and are not adequate to meet the needs of the people.

It is most important for the reader to take note of the Bill of Rights Handbook, page 710, Access to Courts – Section 34, which states that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum.

In this regard, it is patently clear that the proposed RABS Bill will not be manned by independent or impartial personnel as their fees will be paid by the Fund and they will always give a report for and in favour of the administrator of the Fund and will skirt their constitutional responsibility to report on the exact sequelae regarding the longterm effects on all future road accident victims.

It is also important to refer to page 594 of the Bill of Rights handbook, published by Juta in 2014, where under Section 34(2)(e) it is confirmed that the constitution did not require optimal medical treatment, but merely adequate treatment.

It is clear to any South African citizen who has been treated by the state medical system that very many people are not receiving adequate treatment under the present system as for example, the death of fifteen premature babies a month at the Kalafong Hospital in 2017 because there were no incubators available. Very few ambulances are serviceable in Gauteng etc. etc.

Future road accident victims will now be forced into a system where they will be treated under the state medical system, which for obvious reasons currently provides inadequate care. An urgent commission of investigation into the state of care that is available in South African hospitals as well as the morbidity associated with patients treated in these state-run hospitals should be implemented.

On page 7 of The Bill of Rights Handbook, Section 1.3 the Basic Principles of a New Constitutional Order are discussed under the following headings: Constitutionalism – **the first principle of which would be constitutional supremacy which dictates that the rules and principles of the constitution are binding on all branches of the state and have priority over any other rules made by the Government, the Legislature or the Courts**.

Furthermore, on page 9 of The Bill of Rights Handbook it states that the Constitution is the supreme law of the Republic: Law or conduct inconsistent with the constitution is invalid and the obligations imposed by it must be fulfilled.

The Rule of Law on page 10 discusses the principle of legality and the prohibition of arbitrariness and refers to the English constitutional lawyer, Avi Dicey, more than a century ago. **The purpose of the rule of law was to protect basic individual rights by requiring the Government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.**

On page 11 of the Bill of Rights Handbook, it is stated that the state cannot exercise power over anyone unless the law permits it to do so. In this regard, the POCT is attempting to enforce a law upon the population of South Africa in a manner that it is not allowed to do, because it is breaking the rules of the constitution at multiple levels.

The third point in respect of constitutionalism is C – **Democracy and Accountability**: it is stated that it follows from this that the Government can only be legitimate in so far as **its legislation rests on the consent of the governed.**

As the preamble to the constitution puts it, Government must be based on the will of the people. The consent of the governed is the defining characteristic of the relationship. Furthermore, like any other constitutional norm or conduct that is inconsistent with the principle of democracy will be invalid.

Writer believes that the present proposal in respect of RABS will be shown in the Constitutional Court to be invalid.

On page 15 of the Bill of Right Handbook, it is stated that the constitution is primarily aimed at establishing and safeguarding a representative democracy that has participatory elements (e.g. the DA in this matter).

The democratic government contemplated by the Constitution is one that is accountable, responsive and transparent and makes provision for public participation in the law-making process. The Portfolio Committee on Transport (POCT) has not taken note of public participation and surely their proposals must fall in respect of their failure to make use of public participation.

On page 16 it is stated that direct democracy is therefore of particular importance for those individuals and groups whose interests are neglected by the political parties or who find it difficult to make use of the possibilities for participation.

On page 17 of the Bill of Rights Handbook, in the second paragraph, it is stated as with the principle of democracy, some of the most important specific provisions flowing from the principle of accountability are found in the Bill of Rights. Most prominent is the right to have access to information in Section 32 and the right to just, administrative action in Section 33, particularly the right to written reasons and **to reasonable administrative action.**

The RABS and POCT are acting contra the constitution and if they further attempt to pass this Bill and if these attempts are successful, the only solution will be a presentation to the Constitutional Court.

In Paragraph D – page 18, Constitutional Principle VI required the 1996 **Constitution to have a separation of power between the legislature, the executive and the judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.**

In a phrase formulated by Rudjyard Kipling: What if this matter is brought before the Constitutional Court and if the Constitutional Court allows a no-fault system to be introduced, but refuses to allow for the exclusion of common law allocations for seriously injured patients? Ms. Magadzi and her Committee must then be able to present a scientific, credible and affordable basis of how the fiscus will afford to pay for a dual system where the Constitutional Court allows for common law to prevail also allows for a 'no fault' system to be introduced.

Our bankrupt country will not survive such an onslaught on the Treasury.

Sincerely

HANS ENSLIN

RAF DIRECTOR OF SAMLA

DATE: 8 JANUARY 2019

Annexure 2

Dr M. Grootboom,
National Council Chairperson,
South African Medical Association.

Dear Dr Grootboom,

1. On behalf of the Board of SAMLA, I wish to thank you for the invitation to address the SAMA 2018 Conference on the topic "Rendering Quality Care in a Litigious Environment". When a change in my health prevented me from doing so, Dr Herman Edeling was invited as my replacement, and he delivered the address on 18 August 2018. This afforded Dr Edeling the opportunity to focus attention on the central role of ethical practice in avoiding negligent harm to patients, and thereby avoiding litigation. Copies of his paper, slides and annexures are attached hereto for reference.

2. You are no doubt well aware of the seriousness and magnitude of the Clinical Negligence Crisis in which South Africa finds itself. At a meeting of the SAMLA Board, in January 2015, a resolution was adopted to commit SAMLA to doing what it can to address the Clinical Negligence Crisis in South Africa. A brief summary of subsequent events is relevant to the purpose of this communication, which is a formal request by SAMLA for SAMA to consider certain specific interventions (see below).

   2.1. In March 2015, together with 3 SAMLA Directors, I represented SAMLA at the Medico-Legal Summit of the Minister of Health. Pursuant to the summit I was appointed to the Ministerial Task Team, which later became the Ministerial Advisory Committee on Medico-Legal Litigation. In March 2016 the Minister of Health approved the Declaration developed by the Task Team, and in July 2016 approved the Implementation Plan developed by the Advisory Committee. During this time I was assisted by a number of SAMLA Directors, who contributed from their experience to the work of the Task Team and Advisory Committee. A copy of the Declaration and Implementation Plan is attached hereto for reference.

      2.1.1. In the first section (Patient Safety) please note in particular the recommendations on Checklists, M&M meetings, Peer Review Meetings and Communication.

2.1.2. In the second section (Management and Administration), please note in particular the recommendations on Record-Keeping, Communication, Properly Informed Consent, In-Service Training and Early Action upon receipt of letters of demand or complaints.

2.1.3. In the third section (Legal Matters), please note in particular the recommendations, consistent with the policy of the Department of Justice, on Mediation of disputes between State Healthcare Facilities and Patients.

2.2. Since February 2016 SAMLA has collaborated with Dr Willem Moore (DPhil - *Patient Autonomy and Evidence-Based Patient Choice – Philosophical and Ethical Perspectives*), in an international research project in the field of Applied Medical Ethics. This collaboration has related to the concepts of Medical Information Therapy, Medico-Legal Information Mediation, Integrated Undergraduate Education in Medical Ethics, and CPD Training in Applied Medical Ethics. Constructive proposals have been developed in relation to undergraduate- and postgraduate training in Medical Ethics, focusing particularly on Applied Medical Ethics.

2.3. In March 2017 SAMLA participated in the DoH – Constantia – Hogan Lovells Medical Malpractice Workshop, which was attended by the Minister of Science and Technology and the Minister of Health inter alia. Discussion points included Patient Safety, the SASOG Better Obs Program, Legally Privileged Peer Review Meetings, A Pre-Mediation Clause and Mediation. A copy of the report of Panel 1 of this Workshop is attached hereto for reference.

2.4. In June 2017 SAMLA convened the South African Medico-Legal Coalition Task Team.

2.4.1. We thank SAMA for sending representatives to the meetings of this Coalition. In addition to SAMLA and SAMA, the Coalition at this stage includes representatives of SASOG (SA Society of Obs & Gynae), SNSA (Society of Neurosurgeons of SA), SASS (SA Spine Society), SANC (SA Nursing Council), Gauteng DoH, Defendant- and Plaintiff Attorneys, MPS (Medical Protection Society), Constantia Ethiqal and Natmed. Other relevant organisations have not as yet accepted invitations to participate.

2.4.2. The Coalition has established standing committees on Mediation, Peer Review and Expert Witnesses, each to investigate and report back to the Coalition.

2.4.3. Accepting that no single organisation can effect major effective change on its own, the intention of the Coalition is to determine proposals for practical and constructive interventions, both upstream- (curbing negligent harm to patients) and downstream (curbing the costs of negligence-related disputes), that can be implemented by the participating organisations acting in cooperation, in order to curtail the damages that flow from clinical negligence and litigation.

2.4.4. The Coalition anticipates that any agreement, and its successful cooperative implementation, will provide impetus for wider participation and further effective implementations. The work of the Coalition is ongoing.

2.5. Between January and June 2018 SAMLA, in conjunction with the University of Cape Town and Function Venues, presented a highly successful and transformative multidisciplinary certificate course on Foundations of Medico-Legal Practice, focusing on competent- and ethical medico-legal practice. The course, with lectures by experts from across the country, was presented simultaneously at 5 venues in Bloemfontein, Cape Town, Durban, Johannesburg and Port Elizabeth, via interactive high grade video-conferencing facilities. The course was presented on 11 Saturdays, followed by an online examination.

2.6. In addition, SAMLA has engaged on this issue in numerous seminars, lectures and meetings over the years. Despite all the talk-shops, the Clinical Negligence Crisis continues unabated.

2.7. This brings me to the formal request.

2.7.1. Recognising as it does the ethical nature of SAMA, and the influence that SAMA does and can wield to effect significant change for the good, the Board of SAMLA hereby requests and urges SAMA to consider the following specific interventions, which we believe will have the power to meaningfully curtail damages that flow from clinical negligence and litigation : -

2.7.1.1. A co-ordinated drive towards widespread and regular <u>CPD training in Applied Medical Ethics</u> (practical examples of ethical decision-making) as opposed to the History or Philosophy of Ethics.

2.7.1.2. Urging Medical Faculties to include <u>integrated undergraduate education in Medical Ethics</u> from first to final year medical studies, to include Applied Medical Ethics as well as the History and Philosophy of Ethics.

2.7.1.3. Promote and teach the practice of regular morbidity and mortality meetings for cases with adverse outcomes.

2.7.1.4. Promote and teach the practice of legally privileged peer review meetings whenever a summons claiming damages for negligence has been received.

2.7.1.5. Promote the inclusion of a pre-mediation meeting clause into patient registration documents, and take active steps to promote resolution of disputes through mediation rather than litigation.

2.7.2. SAMLA would be keen to assist SAMA in implementing these recommendations.

2.8. I suggest a meeting to discuss specifics of these proposed interventions.

Sincerely,

_____

Judge Neels Claassen.
SAMLA National Chairperson.

SUBMISSION BY:

THE SOUTH AFRICAN MEDICO-LEGAL ASSOCIATION;

(and request on behalf of :

THE COALITION FOR THE SOUTH AFRICAN PRIVATE HEALTHCARE SECTOR);

IN RESPECT OF:

THE STATE LIABILITY AMENDMENT BILL (B16 – 2018)

Please note:

1. **We request the opportunity to make oral representations to the Parliamentary Portfolio Committee.**

2. **Although every effort has been made to prepare a comprehensive submission, this has simply not been possible in the allocated time. We accordingly reserve the right to supplement this submission in due course.**

Summary

The Organisations making this submission express concern that the Bill makes no provision to address or deal with the incidents, and frequency, of medical negligence in State institutions. The Organisations would strongly encourage a comprehensive programme which would introduce measures to promote both "upstream" interventions (that is, provisions dealing with treatment of patients before an adverse incident occurs), and "downstream" interventions (that is, provisions dealing with the resolution of disputes after an adverse incident has occurred).

This Bill is distinguishable from other measures taken by the State to reduce its liability for negligence – for example, in respect of Road Accident Fund legislation – in that the cause of liability in this Bill is by definition the negligence of the State. For that reason, statutory measures aimed at indemnifying the State for its own negligence must not be a primary response, but part of a comprehensive and coherent response to the prevailing medical negligence crisis in South Africa, with indemnity for the State being a measure of last resort.

The Organisations are concerned further that the effect of the measures in the Bill will be to create a budgetary time-bomb in that the delayed payments will lead to an even greater financial crisis in time. Added to this is the disincentive which the Bill will cause for the State to address the underlying cause of the State's liability – the number of medical negligence incidents in State health institutions.

The Organisations are of the view that the proposed limitation of the liability of the State where treatment is to be provided at a private health establishment to the potential costs that would be incurred if such care was provided in a public health establishment, is unconstitutional, as held in the matter of *The Law Society of South Africa and Others v The Minister for Transport and Another*[1].

Introduction

1.

This is a submission by the South Africa Medico Legal Association ("SAMLA") and request on behalf of the Coalition for the South African Private Healthcare Sector ("the Coalition"). SAMLA and the Coalition will be jointly referred to as "The Organisations".

2.

The Organisations subscribe to the view that our Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people. We associate ourselves with the goal as set out in the Preamble to the Constitution of establishing "a society based on democratic values, social justice and fundamental human rights".

[1] CCT 38/10; [2010] ZACC 25

3.

We take justifiable pride in the protection of socio-economic rights in the Constitution, and in particular the right of access to healthcare services. We take the view that the provision of acceptable healthcare services is a crucial requirement for the realisation of the society which is visualised by our Constitution, due to the enormous influence the provision of such services have on the well-being of the people of South Africa.

4.

We also endorse and place a high priority on the importance of access to healthcare services for all South Africans and, in particular, the provision of such services through the organs and institutions of the State, which bear the responsibility of providing healthcare to the majority of South Africans, including the most disempowered and marginalised members of our society.

5.

The Organisations therefore make this submission with the intention of offering their assistance in addressing the complex and far-reaching challenges currently facing those who provide healthcare services, and in a spirit of constructive engagement on those issues in order to achieve a workable, effective solution to those problems through the development of a systematic, comprehensive programme that is designed to progressively realise the right of access to acceptable quality of healthcare services within the available resources.

The South African Medico-Legal Association

6.

The South African Medico-Legal Association ("SAMLA") is incorporated as a non-profit company with non-share-holding members.

7.

The main object and business of SAMLA is the arrangement and organisation of activities to advance the interaction between medicine and law within the health professions and legal professions; and to advance the inter-relationship between medicine and law in the medico-legal field of study and practice of health professionals, legal professionals and academics.

8.

SAMLA currently has a membership of approximately 1 000. SAMLA's membership is made up to a large extent of health professionals, legal professionals and academics who practice and/or study in the medico-legal field.

9.

SAMLA has a long involvement in the medico-legal sector. It was established in 2000 by Dr/ Adv Anton van den Bout as the South African Medico-Legal Society. The name was changed under the direction of Judge Claassen in 2015 to the South African Medico-Legal Association.

The Coalition for the South African Private Healthcare Sector ("the Coalition")

10.

The Coalition for the South African Private Healthcare Sector is an initiative hosted by SAMLA with the purpose of creating a forum for organisations with knowledge, capacity and goodwill to address the issue of the clinical negligence crisis in South Africa. The Coalition has operated on an informal basis over the past two years. It is currently in the process of formally establishing itself and is presently drafting a Memorandum of Incorporation and investigating the appropriate structure to pursue its objectives.

11.

Organisations which have participated in the activities of the Coalition, in addition to academics and mediators, include representative associations of healthcare practitioners, lawyers and actuaries; as well as providers of professional indemnity cover to healthcare practitioners. A list of these organisations will be provided on request.

12.

Insofar as this submission is concerned, we regrettably advise that there was insufficient time in which to canvass the views of the organisations which have participated in the Coalition, and it is accordingly not possible for the Coalition to make a submission on the substance of the Bill. However, the Coalition would invite the opportunity to make contributions both to this Bill, and in respect of any future developments. Considering the range and scope of organisations who have participated in the Coalition, we are of the view that its contribution would be extremely beneficial to this Committee.

13.

SAMLA and the Coalition are broad churches. Together, they represent a wide range of interests, with a multi-faceted constituency which allows those organisations to draw on a wealth of experience and expertise. The Organisations subscribe to the view that, like South Africa itself, the organisations' greatest strength lies in their diversity. The Organisations jealously guard their neutrality and independence. Due to the diverse membership of the organisations, they do not represent the narrow interests of any particular perspective. The organisations are mindful of their independence from the narrow interests of any group or organisation. For this reason, the organisations have a privileged, objective perspective on clinical negligence issues.

Public participation and the value of written and oral submissions

14.

The presenters wish to state that we welcome the opportunity to make written submissions. We subscribe to the view expressed by the Constitutional Court that written and oral submissions are an essential component of the notion expressed in the Preamble to the Constitution that the Constitution lays *"the foundations for a democratic and open society in which government is based on the will of the people"*, and that the ability to make written representations accords with Constitutional provisions that require National and Provincial legislatures to facilitate public involvement in their processes.

Submissions by other organisations

15.

We acknowledge the important contributions made by other organisations who have made written submissions. We would indicate that at this stage, due to the extremely short time constraints, the Organisations have not had the opportunity to properly reflect on and digest all written submissions.

16.

We are in agreement with many points made in those submissions, and do not seek to repeat those submissions. We therefore restrict our submissions to a number of specific points regarding the Bill.

17.

However, it is quite evident from the variety and the nature of the submissions made, that further public participation is essential. In this regard, we respectfully refer to the following comments by the Constitutional Court regarding public participation:

> *"The idea of allowing the public to participate in the conduct of public affairs is not a new concept. In this country, the traditional means of public participation imbizo/ lekgotla/ bosberaad. This is a participatory consultation process that was, and still is, followed within the African communities. It is used as a forum to discuss issues affecting the community. This traditional method of public participation, a tradition which is*

widely used by the Government, is both a practical and symbolic part of our democratic processes. It is a formal participatory democracy."[2]

18.

We are of the view that such public participation would prove to be of tremendous benefit in addressing the issues at stake. The Coalition, in particular, is supportive of the idea of an imbizo/lekgotla/bosberaad and would be willing to participate in such an initiative.

Comment on specific points made by other organisations

19.

We take note of the submissions made by other organisations. Although we do not intend repeating submissions made by those organisations, we would like to highlight a number of issues:

19.1 The process being followed by the South African Law Reform Commission should be incorporated into the process in dealing with this Bill. It appears to us that the insights and work done by the Law Reform Commission would be of tremendous value in

[2]Paragraph 101 of Doctors for Life International v Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11.

achieving a proper understanding of the issues involved, and in constructing a coherent and comprehensive scheme into which the initiatives dealt with in the Bill could be appropriately accommodated.

19.2 We would also support the involvement of the National Treasury on the financial costing of implementation of payments, particularly regarding contingency liability. We would in particular refer to the submissions made by the Actuarial Society in this regard.

19.3 We would also emphasise the importance of properly considering the implications of Section 66 of the PFMA.

19.4 We also make particular reference to the submissions made on behalf of the South African Medical Malpractice Association which, in our view, is a well informed and thought through submission, and is especially informative regarding the right of access to the courts.

Comment on Specific Provisions of the Bill

20.

We turn now to discuss specific provisions of the Bill as it currently stands. In doing so, we at times place a particular interpretation on such provisions. We do not seek in doing so to adopt

a dogmatic approach to our interpretation, but state our views in the interests of contributing to a fuller understanding of the Bill.

Comment on Paragraph 2A(1): "A Court must …"

21.

We respectfully express our reservation regarding the peremptory language of this provision. We take due cognisance of the polycentricity of the rights of access to healthcare services, and the related rights which are dealt with in the Bill. We also acknowledge that Courts typically resolve disputes between two (or a small number of) parties, and that the "winner takes all" resolution of a dispute is not suited to the resolution of such polycentric issues. The issues raised and dealt with in the Bill entail the coordination of mutually interacting variables: a change in one variable will produce changes in all of the others. With regard to the provision of access to healthcare services, the degree of polycentricity is extremely high.

22.

Nonetheless, we submit that the fact of the matter is that socio-economic rights are, in terms of our Constitution, justiciable. It is submitted that the justiciability of those rights requires an appropriately deferent but also appropriately transformational judicial role within a reconceptualised doctrine of separation of powers.[3] For this reason, we are concerned that the

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[3] See esp Marius Pieterse "*Coming to terms with judicial enforcement of socio-economic rights*" (2004) 20 SAJHR 383.

structure of the Bill, through the peremptory obligation of the Courts to order that compensation be paid to the creditor in terms of a structured settlement in any claim against the State that exceeds the amount of R1 000 000.00, when read with the narrow scope of the Bill in that it does not seek to address the underlying issue (being the negligent treatment of patients by the State) imposes an inappropriately deferential role by the Court's towards the payment of compensation at the expense of an appropriately transformative judicial role in supervising and, if needs be, enforcing the progressive realisation of the right of access to healthcare services.

23.

We would comment further that it is regrettable that the Bill has not sought to implement an appropriate form of dispute resolution process which would, in our view, be more suitable to the resolution of disputes in which the polycentricity of interests is extremely high.

Comment on Section 2A(1):

"A structured settlement which may provide for –

(a) past expenses and damages;

(b) necessary immediate expenses;

(c) the cost of assistive technology or other aids and appliances;

(d) general damages for pain and suffering and loss of amenities of life; and

(e) periodic payment for costs referred to in sub-section (2)"

24.

This sub-section will oblige a Court in any successful claim against the State resulting from wrongful medical treatment with a value in excess of R1 000 000.00 to order that compensation be paid in terms of a structured settlement.

25.

However, the contents of the structured settlement are not prescribed to the Court. That much is apparent from the words *"may provide for*". This will allow the structured settlement in question to have a degree of flexibility insofar as the structured settlement is concerned.

26.

Moreover, in respect of past expenses and damages, necessary immediate expenses; the cost of assistive technology or other aids and appliances; and general damages for pain and suffering and loss of amenities of life, it is notable that the sub-section makes no provision for periodic payments. The only items in respect of which periodic payments is dealt with is that "*for future costs referred to in sub-section (2)"*. It accordingly seems to us that the structured settlement in Section 2A(1) does not contemplate a postponement of payment in respect of the heads of damages itemised in 2A(1)(a) - (d).

27.

Comment on Section 2A(2)(a):

"where the state is liable to pay for the cost of future care, future medical treatment and future loss of earnings of an injured party, the Court must, subject to sub-section (4) order that compensation for the said costs…"

28.

This sub-section correlates with the provisions of 2A(1)(e) and identifies the future costs referred to. What is of particular concern is that these provisions include the future loss of earnings of an injured party. Our concern arises from the consideration that a substantial number of injured parties would be breadwinners. When one has regard to the provisions of section 2A(2)(a)(ii), it is our view that the Bill seeks to preclude a Court from ordering that loss of future earnings would be compensable, notwithstanding the fact that the loss of future earnings was caused by the negligent medical treatment by the State.

29.

In our view, this would have far-reaching adverse consequences for the dependants of a breadwinner. Of importance is the distinction between the costs of future care and future medical treatment, on the one hand, and future loss of earnings on the other.

30.

The former two categories (costs of future care and costs of future medical treatment) can be rationally justified on the basis that, where the person receiving the care and/or treatment passes away, there is no requirement for any further such care or treatment. The right is, in this sense, personal to the injured party. However, where the payment by the State relates to future loss of earnings of an injured party (as assessed at the time of judgment), the right is not restricted to that of the injured party, but vests in the dependants of the injured party as well. It is our view that the deprivation of the dependants' benefits by way of compensation for the loss of future earnings of the injured party represents an unacceptable deprivation of rights, and we have considerable reservation as to whether it will pass Constitutional muster in its present form.

31.

In this regard, we wish to emphasise the "ripple effect" of negligent medical treatment. The physical and mental impact of the injuries to the patient causes a series of knock-on effects not only for the patient, but for the patient's family, friends and wider society. The more serious injury, the more far-reaching these negative consequences are. Since, by definition, the Bill deals with successful claims which exceed the amount of R1 000 000.00, the effects of the negligent medical treatment are far-reaching for our society.

32.

Comment on paragraph 2A(2)(b):

"The Court may –

(i) in lieu of the amount; or

(ii) **at a reduced amount, of compensation that would have been paid for the future medical treatment of the injured party, or to the State to provide such treatment to the injured party at a public health establishment."**

33.

We must express considerable reservation regarding this proposed section. We take due cognisance of the provisions of Section 2A(2)(c) that

> *"Where the State is ordered to provide future medical treatment at a public health establishment, the public health establishment concerned must be compliant with the norms and standards as determined by the Office of Health Standards Compliance established in terms of Section 70 of the National Health Act, 2003 (Act no 61 of 2003)".*

34.

We acknowledge that the reference to the Office of Health Standards Compliance ("the OHSC") is a commendable attempt at safeguarding the quality of care which would be provided at a public health establishment. We would like to indicate that we are much encouraged by the initiatives of the OHSC, and support the important work upon which they have embarked. We must however express grave concern about the unacceptably low standards of compliance at public health establishments as assessed by the OHSC.

35.

Regarding this sub-section, in the final analysis we are left with a sense of dismay at the level of care provided at State health establishments. An important plank of the Bill – the provision of future medical treatment at a public health establishment in lieu of a portion or the entire amount of compensation - is therefore seriously undermined by this state of affairs. Had the level of care provided at public health establishments been at an acceptable standard, then this would play an important role in leading us to reconsider our reservations in respect of this sub-section.

36.

However, as things stand, it seems to us that this sub-section effectively relegates the injured persons back to the clutches of institutions which are demonstrably underperforming. We would add to this observation that, should the quality of treatment and care at public health establishments improve to meet the accepted norm set by the OHSC, then that would have the primary benefit of reducing incidents of clinical negligence in the first place. We would therefore urge the drafters of the Bill to incorporate into the proposed scheme measures aimed at achieving the progressive realisation of access to adequate healthcare services by all South Africans. It seems to us that by addressing not only the financial consequences of the prevailing clinical negligence but the cause of the crisis - namely, the widespread clinical negligence at public health institutions, that the constitutional imperative of the provision of adequate healthcare services would be achieved.

37.

In respect of Section 2A(2)(d), we would refer this Honourable Committee to the decision of *The Law Society of South Africa and Others v The Minister of Transport and Another* (Case CCT38/10 [2010]) ZACC 25, in which the Constitutional Court considered a constitutional challenge to amendments to the Road Accident Fund Act, 1996 (RAF Act). The proposed tariff in that instance (the UPFS tariff) was found by the Court to be such that no competent medical practitioner in the private sector with the requisite degree of experience would consistently treat victims at UPFS rates.

38.

The Court held at [91] that "*[this] simply means that all road accident victims who cannot afford private medical treatment will have no option but to submit to treatment at public health establishments*" and at [94] "*A quadriplegic or paraplegic is constantly at risk in a State Hospital as a result of the chronic lack of resources, paucity of staff and inexperience in dealing with spinal cord injuries."*

39.

At [99] the Court held:

"I am satisfied that the UPFS tariff is incapable of achieving the purpose which the Minister was supposed to achieve, namely a tariff which would enable innocent victims of road accidents to obtain the treatment they require. UPFS is not a tariff at which private healthcare services are available; it does not cover all services which road accident victims require with particular

reference to spinal cord injuries which lead to paraplegia and quadriplegia. The public sector is not able to provide adequate services in a material respect. It must follow that the means selected are not rationally related to the objective sought to be achieved. That objective is to provide reasonable healthcare to seriously injured victims of motor accidents."

40.

It is our submission that the remarks of the Constitutional Court would apply with equal force to the provisions of this sub-section. We would simply add that the particular reference to spinal cord injuries which lead to paraplegia and quadriplegia made by the Constitutional Court on the facts of the LSSA case would apply with equal force to a wide range of injuries and, as is evident from the report of the OHSC, to the overwhelming majority of public health establishments in the country.

Conclusion

We therefore recommend that further public participation be held regarding the Bill.

Judge Neels Claassen

John Mullins SC

Dr Herman Edeling

Ian Dutton

Annexure 4

The Honourable Ms Mothapo,

Chairperson,

Portfolio Committee on Justice and Correctional Services.

Dear Ms Mothapo, 05 November 2018

State Liability Amendment Bill (B16 – 2018)

1. I address you in my capacity as Chairperson of the South African Medico-Legal Association (SAMLA), an independent, neutral, educational and transparent organisation not for profit, funded by membership contributions, donations and funds generated through seminars.

2. The objectives and mission statement of SAMLA are to advance the inter-relationships between medicine and law, and to promote excellence in medico-legal practice, by promoting dialogue and mutual understanding between members of the involved professions, guided by justice, ethical practice and constitutional values. Membership of SAMLA includes judges, academics, legal practitioners and healthcare practitioners who have an interest in the objectives and mission statement of SAMLA.

3. I address you further in my capacity as Chairperson of the SAMLA Coalition, a voluntary association of organisations that seeks to serve the public good by curbing the human suffering and financial harm associated with the South African Clinical Negligence Crisis. The Coalition at this stage includes SAMLA, SNSA (Society of Neurosurgeons of SA), SASS (SA Spine Society), SASOG (SA Society of Obstetricians and Gynaecologists), ASSA (Actuarial Society of SA), MPS (Medical Protection Society) and Constantia Ethiqal.

4. On behalf of the above organizations I earnestly request the honourable **Portfolio Committee on Justice and Correctional Services** to:

4.1. extend the period for written submissions on the **State Liability Amendment Bill (B16 – 2018)**; and

4.2. allow for further public hearings relating to the said Bill, in order to ventilate all issues relating to:

4.2.1. the necessity for the amendment of the said Bill;

4.2.2. the financial, legal and humanitarian consequences of the proposed amendments; and

4.2.3. the future administration of justice relating to medical malpractice claims against the State.

5. We make the request against the background that public participation was called for on **5 October 2018** and closed on **19 October 2018**, in effect, allowing **ten** working days for preparation of a submission that requires various factual, legal and administrative enquiries, before proper comment may be made. Furthermore, formulation of alternative options and administrative sanction of our proposals by our members require an extended period of time, which could not, and cannot, be accomplished within a period of 10 days.

6. We furthermore express our surprise at the tabling of the **State Liability Amendment Bill (B16 – 2018)**, considering that the **South African Law Reform Commission** is currently seized with an evaluation of the need for an amendment of the **State Liability Act, No 20 of 1957** and, if so, the nature and extent thereof. We submit, with respect, that this is the appropriate forum to ensure that a proper, detailed and reasonable ventilation of all issues relating to any proposed amendment of the Act, are made. The consideration of the current Bill is therefore, in our opinion, premature.

7. Therefore, considering the inordinately short period of time allowed for public participation, coupled with the profound long-term consequences across many areas that will result from the passage of the **State Liability Amendment Bill (B16 – 2018)** as currently formulated, we request the relief as sought in paragraphs **4.1** and **4.2** above.

8. We thank you for your attention and assure you of our bona fides in actively and constructively engaging with your committee.

Sincerely,

_____

Judge C.J. Claassen

Annexure 5

CHAIRPERSON'S REPORT FOR THE EASTERN CAPE 2018

1. INTRODUCTION

The report filed herewith serves as a report for the Annual General Meeting to be held on Saturday, 19 January 2019. Its general aim is to highlight all the activities the Branch was involved in during the year 2018.

2. ACTIVITIES WITHIN THE EASTERN CAPE REGION

The main activities executed on behalf of SAMLA in the Eastern Cape for the year 2018 centred mainly around the planning, promoting and taking part in the Certificate course, Foundations of Medico Legal Practice, offered by the Organization in collaboration with the University of Cape Town (UCT). The turnout for Port Elizabeth, one of the 5 centres where the course was hosted, was reasonably good in that 28 delegates registered for the course. The feedback received from the delegates was positive as they were of the opinion that the course would add value to their practice. Lectures commenced on 27 January 2018 and were completed in early June 2018. That was followed by an examination, designed by UCT after contributions had been made by the Course leaders who were handpicked from the SAMLA members, the Chair being one.

Besides the participation in the said course, not many other activities were planned and carried out in the Eastern Cape. Factors attributable to a possible

cause include the Chair's workload before his retirement from Legal Aid South Africa, followed by his absence from South Africa. Another activity worth mentioning includes a mediation Dr. Edeling and the Chair commenced in East London in July 2018 that is still ongoing. Allied to that are the attempts made by the Chair to establish with the Department of Health a Pilot Project to do a series of mediations on a pro bono basis, similar to those established in Mpumulanga and Gauteng.

CONCLUSION

As Chairperson of the Eastern Cape, I hope that 2019 will be a year where more activities will be introduced and we can grow our membership in this part of the world.

Dr. Henry Lerm
Chairperson of the Eastern Cape

13 January 2019 Duly Signed on this day

Annexure 6

Our Ref: JL Jordaan

Your Ref: N Claassen

8 January 2019

National Chairperson – Judge N Claassen

SAMLA

Per email: neelsclaassen15@gmail.com

: info@samla.org.za

Sir,

RE: SAMLA FREE STATE ANNUAL REPORT

Samla Free State had an exciting year that marked our inaugural Medico-Legal Symposium that was held on 15 September 2018. This symposium was held at the University of the Free State, in collaboration with their department of Private Law.

Presentations dealing with ethics in negligence, hospital admission forms and mediation were delivered.

We had sponsorships from SAMLA National Office, University of the Free State, Cure Day Hospitals and Lexis Nexis who all contributed to a most memorable symposium.

The symposium was attended by 34 attendees representing a variety of professions. It was encouraging to have the attendance of the State Advocate's office and legal representatives of the Free State Department of Health.

The invitation, registration form and list of attendees are attached hereto.

The organization of the symposium cemented the enthusiasm of the Free State Samla membership and branch committee in a productive and positive way. Several meetings were held to organize this event. Our branch committee act in unison and proved to be equally equip to act as professionals in their respective fields of expertise and chief bottle washers for the SAMLA cause. Truly a bunch of committed individuals prepared to work for SAMLA without praise or fortune.

The Department of Obstetrics and Gynaecology at the University of the Free State invited me to participate in their yearly symposium during October 2018. I presented feedback on mediation and the latest developments in the medico-legal environment. The implementation of mediation in Mpumalanga

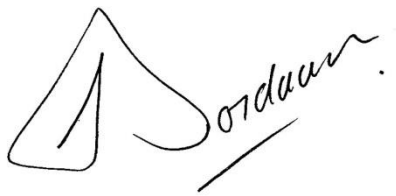
was highlighted as well as the SAMLA protocol. The feedback from Dr Herman Edeling and Jennifer Mathibela was conveyed to the symposium. NATMED was represented at this symposium by Mr Donald Dinnie who showed interest in further discussions regarding the development of mediation in the medico-legal environment. A follow up meeting with him is envisaged for 2019.

The Free State department of health accepted our proposal during 2018, to mediate 5 medico-legal cases on a pro bono basis. Unfortunately the process has grinded to a halt, without any clear reason therefor. We will attempt to revitalize the process in 2019.

The bank account seems to present on going challenges. We were unable to open a branch account and conducted the financial arrangements for our symposium through JL Jordaan Attorneys Trust account. We currently have a surplus of R7 737.44.

We thank SAMLA National for their on going support and mentorship.

Regards



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JOHAN JORDAAN

Chairperson SAMLA Free State

Annexure 7

8 January 2019

2018 SAMLA WESTERN CAPE BRANCH- CHAIR'S REPORT:

2018 was another stellar year for us in the Western Cape. We hosted four conferences/seminars: 1) an evening seminar at the Lung Institute on 23 March 2018; 2) a two day conference focusing on case management; 3) a seminar addressing physician burnout, suicide and PTSD and 4) Eugene Rossouw hosted a talk by Dr. Munjed Al Muderis on the 5th of November 2018 who had assisted two South Africa Doctors perform the first Osseointergration surgery in South Africa that morning. All four events were an overwhelming success.

1. **Costings in Expert Reports; Quantification of Future Medical Expenses; and Augmentative and Alternative Communication (ACC) held at the Lung Institute on 23 March 2018.**

2. **The Case management conference held at Schoenstatt retreat on 21 and 22 October 2018:**

   Both days were well attended by over 80 delegates. Case managers have extraordinarily important roles during and after litigation which, to date, had not received the necessary support, attention and promotion. Our aim was to address this: Lawyers, doctors and case managers from the private and public sector gave presentations, as well as Carol Garner from the Case management Association of South Africa (CMASA). Carol took us through the various guidelines used by CMASA. Thereafter, a fruitful debate ensued on whether

these guidelines could be used to assist us in establishing our own guidelines for case managers in medico-legal matters. We also had various speakers from the financial/ actuarial sector addressing the intricacies of the inter-relationships between Trusts/ Curatorships/ Lawyers and case managers, who need to make sure payouts to injured persons are directed correctly.

Day 2 of the seminar saw a translation of what was discussed on day 1 into reality. Case studies were presented by four case managers and a workshop was held to deliberate and ponder ideas on how to deal with various difficulties presently experienced by case managers. This was a great success; a standing committee was established which aims to put the ideas into practice and assist other case managers with difficulties they may experience.

3. **On the 3rd of November 2018, at The Inner City Cartel Bar and Auditorium a seminar was held to address Physician Suicide, PTSD and Burnout:**

With the assistance of very generous sponsors, Ethiqal (South Africa), Yvelin (Paris) and JLT(London) we were able to host a lavish day at the Inner City Ideas Cartel venue. The day was incredibly emotional and most, if not all who attended left misty eyed. The speakers came from all over the country and Professor Saleh joined us from the US via a “whatsapp call” (skype was intended but a last minute glitch resulted in the tech guy and I needing to improvise which turned out better expected actually! There have been numerous requests to re-do the same seminar upcountry which may be done in 2019. We intend to continue to investigate and create awareness by hosting the Producer and Director of the documentary film: “Do No Harm – the Hippocratic Hoax” in 2019 who will present and début the documentary film.

4. **5 November 2018, Crystal Towers Hotel, Century City: Osseointegration with Dr Al Muderis:**

Our team member Eugene Rossouw, had visited Dr Munjed Al Muderis, the doyenne of osseointegration in Orthopaedic Surgery, in Australia early in 2018. After spending some time learning about this revolutionary surgery, Eugene engaged Dr Al Muderis and discussions ensued about bringing this surgery to South Africa. On the 5th of November 2018, the first surgery was performed by Dr Nando Ferreira, head of the Clinical Unit of

Tumour, Sepsis and Limb Reconstruction at Stellenbosch University, and Dr Gerhard Pienaar, Orthopaedic Surgeon, Medi-Clinic Stellenbosch, under the guidance of Dr Al Muderis. We will do a follow up discussion in 2019 where we will look at the surgery itself as well as study the progress the patient is making after her surgery.

2019:

In 2019 the Western Cape Team hope to offer exciting and innovative seminars again exploring the changes in the medico-legal climate and continue to strive to make medico-legal practice a well-oiled machine.

I would like to thank my team, Julia Buchanan, Anita Erens, Rowan Haarhof and Eugene Rossouw, Stephanie Wainswright, Marlene Wasserman, Dr Paul Dalmeyer, and Adv Natalie Lawrence for their hard work in making 2018 such a success.

Yours Sincerely
Romany Sutherland
SAMLA Director and Western Cape Branch-Chair

SAMLA AGM 26 January 2019 – Communication- and Administrative Director's Report – by Dr Hannetjie van Zyl-Edeling

1. General:

2019 has been a challenging year for SAMLA. Several of our directors have been ill and three of our senior directors died - Adv Patrick van den Heever, Prof Charles Lautenbach and Dr Frank Snyckers. Dr Rita Kellerman continues to battle ill health. We wish her and all of our directors strength for the journey ahead.

Two directors resigned – Adv Ayesha Tiry and Adv Natalie Lawrenson. We wish them every success in their new ventures.

SAMLA's educational-and community activities have grown exponentially, and with that, the administrative challenges. We have been dragged, some kicking and screaming, into the digital age and we encourage all of our members to become as tech-savvy as possible and to embrace all the developments in our communication systems. Let's all do our best to stay on the bus for as long as possible.

M**ediation** has continued to be at the forefront of activities, with promises of pilot projects, but frustratingly slow action from government side. On the positive side, the SAMLA verified Mediator's list is growing and we suggest that members interested in Medical Mediation complete the extra requirements to have their names on the list.

2. Communication:

WhatsApp: The Directors' and Faculty WhatsApp communications continue to work really well. This is the place where you will receive notifications about issues you will need to attend to.

Forum: We also now have a dedicated forum for communication, also for members. This is to minimise e-mail correspondence and allows for opinion polls and answers to questions to be on one site. Information such as attendance for meetings, proxies etc. is then readily accessible, both currently and to track the history. The forum contains several groups and will be of great use for future seminars and committees.

The website has matured and is functioning well. However, we are dependent on your visits to the website as well as contributions to keep it vibrant.

Please send articles, relevant judgements, photos, news and happenings in your region to han@emlct.com

Members are urged to update their details on the website and check them for accuracy. According to the POPI act, one has to give special permission for personal details to be discoverable online by members of the public, so please ensure that your visibility on the site is to your satisfaction.

Visits to the website:

Grant Colyn from ITNT reports: “Compared to the previous period there is a 9% reduction in users overall but a 5% increase in page viewership or page sessions. So viewers are reading more info/pages on the site.

Stats are still healthy with an average readership time of 4 minutes online which is very good.

Some online marketing needs to be considered to change the downward trend and expose yourself to a wider audience related towards users not familiar with SAMLA.”

3. Members and behaviour:

It remains disconcerting that so few members are currently “visible” on the website, even though the office mailing list has 1246 members on our books. 475 are paid up; 700 are noted to be expired; and 71 have not been validated.

Member numbers per region (2017 - EC 14 now 26; FS 10 – now 15; Gauteng 198 – now 301; KZN 29 – now 46; Limpopo 4 – now 8; Mpumalanga 4 – now 6; N West 2 – now 6; W Cape 39 – now 66.)

Members and directors are encouraged to find information directly on the website, but you are welcome, as always, to contact the SAMLA office and Christa Koelewyn at info@samla.org.za or on 0828395466.

4. The office:

I want to thank our secretary, Christa Koelewyn, for another year of friendly and loyal service to SAMLA.

Other Services: Instead of employing another secretary and/or opening another office, we have contracted Azlyn Communications (previously known as Function Venues) to assist our office with admin – particularly for the Faculty Workshops and larger projects such as opinion polls, marketing, updating and verifying the SAMLA Medical Mediator’s lists, as well as bookkeeping and general admin assistance.

Azlyn (Function venues) were chosen as our admin partner because of their excellent track record in organising last year’s Foundations Course. The staff of Azlyn have done magnificent work and we thank them for their professional and courteous support.

Regional Branches may contract ad-hoc workers to assist with seminars – fees consistent with those of Azlyn.

5. **CIPC, MOI, Director's registrations and opening of bank accounts.**

We have had many challenges regarding the CIPC registration and registration of the MOI. This process was complicated by a serious glitch at the accountant's office which delayed the registration of the MOI and in a cascade also all other applications, even for regional bank accounts. MMS Trust Services came to the rescue and registration processes are now again on track.

6. **Bank Accounts and SARS**

Because of the delays in 5 above, all registrations were delayed. There was confusion as to whether or not SAMLA was properly registered as a PBO (Public Benefit Organisation). After our bookkeeper and accountant firm were unable to clarify the matter, we approached MMS Trust services who were able to deal with the matter swiftly and efficiently.

SAMLA is indeed a PBO and tax exempt, but we do have to pay VAT now that our turnover has increased.

Our new treasurer, Dr Gavin Fredericks and his wife, Michelle, have done a sterling job in taking over the treasury and currently he, Judge Claassen and myself are signatories to the SAMLA accounts. Only Dr Fredericks and myself have access to the internet banking.

We have very recently installed a QuickBooks bookkeeping system that will facilitate the bookkeeping.

7. **Special thanks:**

We appeal to our members to make themselves available for their regional committees and to get actively involved in the SAMLA activities. It may not be financially rewarding, but the rewards in the sense of contribution, making a difference and uplifting and the profession are enormous. The sense of closeness and camaraderie that developed during last year's Foundations Course was phenomenal – let's build on that.

To the organisers in the other regions and all our loyal members and directors – thank you for your dedication and hard work during the year. We absolutely cannot function without you.

Blessings to you all and wishes for good health, energy, inspiration and wisdom to you for 2019.

As always, SAMLA is invested in your excellence.

Dr Hannetjie Edeling.