

**Feedback on the proposals for South
Australia's Compulsory Third Party
Insurance Scheme transition to a no-fault
scheme**

**Presented to Department of Treasury and
Finance, Government of South Australia**

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Executive Summary

The Government of South Australia is currently considering some important amendments to the compulsory third party insurance (CTP) scheme.

The South Australian Department of Treasury and Finance has invited comment on the proposal to transition to a no-fault based compensable scheme which also proposes that such a scheme adopt a payment of excess for medical costs. The South Australian proposal for a no-fault CTP scheme is modelled loosely on the Victorian Transport Accident Compensation (TAC) scheme. Under Victoria's no-fault scheme, the claimant bears the costs of their own medical expenses up to the set medical excess amount of \$564.

The Australian Physiotherapy Association (APA) commends the proposal to extend compensation entitlements to some or all injured road users regardless of fault. The APA also acknowledges that it is important to rebalance the compensation amounts between those who are more severely injured and those who suffer only minor injuries. The APA acknowledges the importance of maximising available funds devoted to compensating injured motorists so as to achieve the best health, recovery and rehabilitation outcomes for all injured road users.

To help address these issues, the APA recommends that:

- transitioning to a no-fault based CTP scheme will reduce the human and financial costs of the legal and adversarial system, and it is important that cost savings be redirected into health care and support for injured road users;
- injured road users should not be disadvantaged by changes made that have the long term effect of reducing CTP insurance premiums;
- the imposition of a \$564 medical excess is inequitable and discriminates against lower income earners and therefore should not be implemented at any level;
- moving to a no-fault CTP scheme would provide a minimum standard for services, care and support needs of all injured road users;
- lifetime care and support should be provided for catastrophically injured road users - individually assessed to provide the most appropriate care and support - and proportionate to the severity of the injury sustained;
- by providing ongoing support for catastrophically injured persons regardless of who was at fault, such a scheme would re-distribute benefits between those who are severely injured and those who suffer minor injuries only;
- periodic payments should be introduced, as opposed to lump-sum compensation, as the receipt of weekly payments has yielded greater return to work rates and lead to better long-term health outcomes for injured persons; and
- the CTP scheme should be designed to support the provision of financially affordable early access to health care services.

Australian Physiotherapy Association

The Australian Physiotherapy Association (APA) is the peak body representing the interests of Australian physiotherapists and their patients. The APA is a national organisation with state and territory branches and specialty subgroups. The APA corporate structure is one of a company limited by guarantee. The organisation has approximately 12,000 members, some 70 staff and over 300 members in volunteer positions on committees and working parties. The APA is governed by a Board of Directors elected by representatives of all stakeholder groups within the Association.

The APA vision is that all Australians will have access to quality physiotherapy, when and where required, to optimise health and wellbeing. The APA has a Platform and Vision for Physiotherapy 2020 and its current submissions are publicly available via the APA website www.physiotherapy.asn.au

Feedback on South Australia's Compulsory Third Party Insurance Scheme (Green Paper, March 2012)

Background

In March 2012, the Government of South Australia released a Green Paper entitled *South Australia's Compulsory Third Party Insurance Scheme*.

Since 1936, South Australia's Compulsory Third Party (CTP) insurance scheme has covered members of the public against the risk of injuring a third party in a car crash. Injured road users can only claim under this scheme if they can show that another driver was wholly or partly at fault. The South Australian Government is currently considering whether it is fair for the CTP scheme to cover only road users injured as a result of another's negligence or whether the scheme should be amended to meet the needs of all persons injured on the roads. This is because in many cases, the accident is no-one's fault or due to a mechanical failure or unfortunate medical circumstances, such as a driver stroke. To create for a more equitable distribution of benefits amongst society, the South Australian Government has proposed moving to a no-fault CTP insurance scheme, with an applicable medical excess for treatment costs.

The proposed reforms will have a significant impact on the practice of physiotherapy and may resolve some current problems that physiotherapists face under the common law scheme. Under the current scheme, injured persons may well receive physiotherapy treatment for their injuries and continue with treatment for several months on the presumption that their CTP claim will not be litigious. If however the CTP claim is contested by the claims agent and litigation commences, the injured person's treatment can be delayed, compromising patient outcomes.

The APA also has some significant concerns with the proposed scheme - in particular in relation to the introduction of a medical excess, which may in fact prevent some victims of road accidents from accessing timely and appropriate medical services. Therefore, this scheme could penalise those who have been injured through absolutely no fault of their own, with the result of a compromised outcome, as already exists.

This submission outlines the APA's position on the proposed changes to the CTP scheme, primarily addressing the question of whether a transition to a no-fault compensable scheme, and payment of excess for medical costs, is preferable to the current fault-based scheme.

1. Would a no-fault CTP scheme be preferable to the current fault-based CTP scheme? (Question 1 – Green Paper)

The APA supports the transition from a fault-based CTP scheme to a no-fault CTP scheme. As a principle, the APA supports the move to a CTP scheme which ensures all road users, regardless of fault, can access the health services they need.

The APA acknowledges that if all current benefits are provided to all injured road users, the scheme costs would be blown out, and there is a need to adjust the scheme to ensure that costs are kept within reasonable parameters.

One significant disadvantage of the current at-fault scheme is that it may take some time to establish which party to an accident was at fault and in what proportion. Claims made in fault schemes may be contested and a dispute may arise between the injured person and the claims agent as to the amount of compensation payable.

Under the no-fault scheme being proposed by the SA Government in the Green Paper, there would be minimal need for litigation which itself achieves a number of cost saving measures, savings which can then be directed to those road users not currently covered by the CTP scheme. The APA supports the proposal to limit the payment of damages for pain and suffering to only 'catastrophic' injuries.

Moving through the court process is time consuming and there is often a delay for health service providers as between the date at which a service is provided to an injured road user and when the

medical provider receives payment for services rendered. Transition to a no-fault compensable scheme should have the effect of providing for timely payment of physiotherapy consultation costs.

Another significant advantage of a no-fault CTP scheme is that it would make the uncertain and costly process of accessing support payments through the common law redundant. At present, South Australia has the highest rate of claims per vehicle, even though South Australia has less serious injuries per vehicle than occur in other states, such as Queensland and New South Wales. There is also no minimum harm requirement for making a compensation claim in South Australia. This means that the scheme currently pays out significant amounts in compensation to road users with minor injuries. Under the current at-fault scheme, compensation and legal fees are paid out by CTP insurance as a lump sum payment and given that 75% of claimants in South Australia hire lawyers, this is a significant cost to the scheme. A major benefit of a no-fault CTP scheme is that injured road users have immediate access to benefits, thus reducing the incentive to seek out legal services which are usually paid out by the CTP scheme. Moving to a no-fault system would improve the affordability of the scheme and reduce payouts for legal expenses, freeing up valuable funds that can be redirected to provide early and appropriate intervention to injured people.

The APA recommends that:

- Funds diverted from litigation expenses under new arrangements be redirected to provide care and support for all injured road users, regardless of fault status.
- That a specific lifetime care and support scheme for catastrophically injured people be implemented.

1.1 Scheme affordability

So, is the scheme affordable? As noted in the Green Paper, no-fault compensable schemes, such as those adopted in Victoria and Tasmania, generally yield lower premiums compared with premiums payable in South Australia. A transition to a no-fault scheme would make premiums more affordable for the public.

The APA supports a more affordable CTP scheme, provided that care remains affordable for people needing to claim under the scheme. That is, it is imperative that injured road users are not disadvantaged by changes made that have the long term effect of reducing CTP Insurance premiums.

1.2 More equitable access to health services for all injured road users

The current at-fault CTP scheme does not cover all persons injured in road accidents. Injured road users are only able to join the CTP scheme if they can establish that the injury they sustained was wholly or partly someone else's fault. Such a scheme is inequitable to people who have had an accident or injury that is no-one's fault. For instance, an accident or injury could be caused by an unpredictable mechanical failure or unexpected medical emergency, such as a heart attack.

If an accident is the driver's own fault, for instance due to a driver being distracted by unruly children, or other disturbances to the driver's concentration such a driver would not be covered under the current CTP scheme. If such a driver does not hold disability insurance, the driver would have to rely on state based disability services or on Medicare benefits and Centrelink payments to meet their basic needs and injury-related medical expenses. Therefore, injury-related costs are shifted from the CTP system onto the social welfare, disability support systems and Medicare scheme. This is despite CTP being specifically designed to ensure that early intervention is provided which minimises the risk of simple injuries becoming long term or chronic. It is well established that early and appropriate intervention has considerable potential to save money in the long term, and the CTP scheme should ensure that all injured road users are able to access health services.

Considering that motor vehicle accidents happen for any number of reasons, the APA commends a proposal to create a scheme that improves fairness and creates a more equitable distribution of benefits amongst injured road users in South Australia. Expanding the remit of the insurance

scheme to cover all injured road users would ensure that all injured persons have equitable access to health services. Providing an appropriate length of access to services and support would prevent delayed or partial recovery, reducing exacerbation of injury. This could encourage savings in social welfare costs by providing all injured road users with access to health services that are required to make a speedy recovery. A quick recovery to better health enables persons to take control of their financial future and facilitates early and durable return to work, reducing the indirect costs of motor accidents.

1.3 Compensation payouts proportionate to severity of injury

The proposed scheme is modelled on the National Injury Insurance Scheme (NIIS) and the priority of the reform is the establishment of no-fault lifetime care and support for all catastrophically injured persons. Under the proposed national scheme, the financing of claims would be jurisdictionally based but the standard of care provided and associated benefits under the individual schemes would be subject to minimum reasonable standards¹.

Under the current South Australian CTP scheme, significant lump sum payments can be paid out for minor injuries, but leave injured road users who suffered catastrophic spinal or brain injuries but who cannot establish that another driver was at fault, to receive no benefit. The South Australian Government has indicated in their Green Paper that about 20% to 25% of injured road users are not eligible for compensation under the current scheme. In catastrophic cases, involving spinal and brain injuries, the figure is as high as 30%.

Moving to a no-fault compensable scheme would provide certainty around a minimum standard of services, care and support needs. It would also eliminate unwarranted variations in provision of and access to health services, in particular people with minor injuries accessing health services, whilst at-fault motorists with severe injuries can be excluded under the fault based system. Further, a no-fault CTP scheme would fund injured motorists' support needs, rather than rely on arbitrary lump sum payments which are often paid out before the severity and likely progression of an injury can be accurately determined.

The APA supports the proposal for a no-fault CTP scheme and recommends that the new scheme should individually assess the needs of each injured road user to ensure that a person-centred approach facilitates access to the most appropriate care and support.

1.4 Improving better health outcomes and quicker return to work

Emphasising the benefits of return to work

One of the more notable features of the suggested no-fault CTP scheme is the proposal to replace the lump sum method of payment with periodic payments. Research indicates that persons receiving lump sum payments generally had poorer health outcomes and worse return to work rates than persons who received weekly benefit payments². Without fulfilling work, people may not achieve their potential at the expense of themselves, their families and their communities, and work is of great importance to an individual's health and wellbeing.^{3,4}

It is largely accepted that the longer a worker remains absent from work, the more likely they are to remain off work on a long-term or permanent basis.⁵ This highlights the need for early intervention in provision of health care services, to ensure that injuries are treated early and to prevent acute conditions progressing to chronic conditions that prevent return to work. Early intervention for injured people improves health, social, financial, interpersonal and intrapersonal outcomes by promoting recovery and preventing long term disability and work loss.^{6,7}

Benefits of periodic payments versus lump sum payments

The current South Australian CTP scheme does not focus on rehabilitation but on monetary compensation. Monetary compensation provided may, in reality, be insufficient to fund the costs of lifetime care for catastrophically injured persons who require lifetime care needs.

Understandably there are two competing issues. From the individual injured road user's perspective, there is a risk that the lump sum payments provided may be inadequate to fund lifetime care. If the lump sum payment is insufficient, then the taxpayer-funded health, disability and welfare services will have to be utilised. Taking steps to improve return to work rates amongst injured road users would also reduce indirect injury costs related to lost productivity, health service usage and reliance on Australia's social security system. The APA supports a scheme that focuses on improved recovery, rehabilitation and ongoing care and support for all injured road users. Alternatively, there is a risk to the current scheme that the lump sum payment proves to be too high.

Weekly payments however allow for a base payment of compensation, sufficient to fund the daily living costs and healthcare expenses of the injured road user. This system of payment enables all injured road users to have an ongoing supply of funds that enables injured persons to seek out health services. The no-fault schemes described in the Green Paper provide a more carefully assessed range of benefits, as they seek to meet the care and support costs of injured people as they arise across the lifespan and in line with individual care needs. Such a scheme provides financial security to scheme participants.

The APA acknowledges that periodic payments would be capped at twice the average weekly earnings and that high-income earners would not get full replacement of their lost earnings. However, the APA supports a no-fault scheme that would create greater equity amongst all injured road users through the provision of ongoing support payments sufficient to meet the daily care requirements and associated healthcare costs of all injured persons.

A no-fault CTP scheme would increase access to appropriately co-ordinated lifetime care and support, individually assessed for each injured person, which would lead to better health and social participation outcomes.

2. Should the CTP scheme introduce an excess for medical costs and, if so, what would be an appropriate amount? (Question 4.4 – Green Paper)

As proposed above, a litigation process that requires less reliance on predicting life expectancy and ongoing care requirements may result in cost saving measures, by reducing payouts for expenses associated with the litigation process. Although there would be a significant cost saving incentive to the scheme if no-fault provisions were adopted, the introduction of an excess may make the scheme less affordable for various sectors of society.

Under Victoria's no-fault CTP scheme, the claimant bears the costs of their own medical expenses up to the set medical excess amount of \$564. The TAC applies the medical excess to the first medical services received after a transport accident with regard to the date order in which the services were provided. The medical excess is not paid directly to the TAC. The patient is responsible for payment of medical services until the relevant excess amount has been met. Under the Victorian TAC scheme, orthoses or mobility aids that were required following an accident are not subject to the medical excess. The proposal of the South Australian Government would introduce a similar medical excess of about \$564 under the newly proposed scheme.

2.1 Medicare and private health insurance coverage

Medicare may cover the costs of certain expenses under the excess threshold, for instance visits to a general practitioner. However, physiotherapy treatments are generally not covered by Medicare, and the APA believes that virtually no injured road user would be eligible for the physiotherapy consultations that currently exist under the Medicare Benefits Schedule

Private health insurance generally cannot be claimed for health expenses if an injured road user has an accepted claim for compensation benefits under the relevant compensable scheme of their state or territory. Private health insurers are able to set their own policies, and will generally not provide rebates where another insurer has jurisdiction, regardless of the existence of an excess. Adopting a medical excess of \$564 imposes a heavy financial burden on injured road users for a very minimal cost saving to CTP insurance consumers.

It has been the experience of APA members that that injured road users who cannot afford to pay the medical excess may instead choose to evade payment and become bad debtors, imposing a financial burden on small physiotherapy businesses.

Lack of private health insurance and economically disadvantaged sectors of society

Were this situation to change, and private health insurers agree to pay rebates for services accessed before reaching the \$564 excess, APA members have reported that many of their CTP patients do not hold private health insurance.

The APA considers that if private health insurance cannot cover part of the medical excess, injured road users may well find the payment of excess unaffordable and only some road users could pay the excess amount. The risk in delaying care can increase expense in the long term, as acute or sub-acute conditions can develop into long-term chronic conditions.

The APA believes that the imposition of a \$564 medical excess is inequitable and discriminates against lower income earners, therefore should not be implemented at any level.

2.2 Importance of early intervention in preventing development of chronic conditions

If injured road users cannot afford to pay the medical excess, this may deter them from seeking early and appropriate interventions for injuries.

APA members have highlighted that a financial deterrent, such as a medical excess, may mean that early signs of chronic pain are not 'yellow flagged' and therefore education about self-management of pain may not be provided early enough to prevent the development of chronicity.

The potential for development of complex chronic pain is a serious issue in Australia. The APA Position Statement on Pain Management recognises that 1 in 5 Australians experience pain⁸. Physiotherapists play a key role in preventing acute painful conditions from developing into chronic pain. Physiotherapists often work with the direct support of clinicians from other disciplines to treat pain and provide patients with the knowledge and skills necessary to self-manage their pain. Providing information and support to family and significant others, the workplace and other healthcare providers is also an important physiotherapy role.

Complex chronic pain is best managed in a multidisciplinary pain setting. The application of a medical excess for physiotherapy and other health services may well disadvantage people who cannot afford to pay and deter them from seeking treatment when it is most effective – that is in the early stages of injury. Alternatively, it may push financially disadvantaged persons to seek out some limited medical treatment, at the expense of a multi-disciplinary range of services that may help to speed up their recovery and prevent relapse.

Chronic complex pain patients can often present with symptoms that are incongruent with biomedical expectations and physiological knowledge⁹. Although the APA acknowledges that a very small percentage of patients may malingering, the reality is that chronic pain is complex and requires recognition and management of the medical and psychosocial features of pain within a biopsychosocial framework.

The APA considers that an integrated approach of coordinated health services is required to improve care for all types of pain. This is because early intervention at the acute stage of pain development may reduce chronicity of pain, optimise recovery and encourage quicker return to work.

The APA recommends that the new no-fault South Australian CTP scheme should be designed to support the provision of financially affordable early access to multi-disciplinary treatment services.

3. Should road users who engage in illegal acts leading to injury be excluded from the scheme? (Question 5 – Green Paper)

3.1 Is punishment under criminal law sufficient enough?

The APA does not dispute that punishment under criminal law is an acceptable form of punishment for persons engaging in criminal activity.

Providing health care services acknowledges the legitimacy of meeting some basic level of need for health care. This is only fair considering that many other persons in society may make negligent decisions, such as the decision to smoke tobacco, which may present a burden on Australia's health system, and yet such negligent persons are not excluded from the benefits of access to medical and other care services.

Though there may be a social push to punish a criminally liable party there is a fair argument for saying that other innocent persons, such as family members who generally fill the gap in injury-related needs, should not suffer financial detriment. Taxpayer-funded health and disability services may only stretch so far, thus putting an unfair burden on informal support systems.

The APA recommends that health care services be available to all injured road users.

3.2 If exclusions and restrictions are implemented, should all benefits be denied or only some forms of compensation, such as pain and suffering?

In terms of which behaviours should be subject to restrictions/exclusions from compensation, this should be in accordance with current laws but generally the APA will support payment of medical expenses only and *not* compensation for loss of income, ongoing benefits or pain and suffering payments.

4. Other issues with the current South Australian CTP system (Question 9 – Green Paper)

4.1 Problems with CTP insurers

APA members have noted problems in current arrangements when dealing with CTP insurers. A problem that seems to be widespread is a lack of communication between CTP case managers who alter liability or refuse to pay for treatment but do not inform the injured road users or physiotherapists of their decision.

In some cases, the physiotherapist may not be aware that the insurer will no longer pay for treatment until they contact an insurer to chase up outstanding accounts. In a recent case, the claim had been settled some months before, meaning that the injured person was now responsible for their own physiotherapy fees. This meant that the physiotherapist, having waited for several months for payment, then had to tell their client that they must pay the outstanding accounts. It is usual practice in the physiotherapy industry, that client accounts must be settled at the time of consultation, and to change this practice significantly increases the risk of non-payment for services rendered.

The outstanding fees for physiotherapy treatment received before the claim became contested are often left unpaid and APA members have noted that compensable scheme patients often go on to become bad debtors. The proposed transition to a no-fault compensation scheme may well circumvent the unnecessary delays and costs associated with complex litigation processes.

4.2 Refining definitions of 'minor' and 'catastrophic' injury

The definitions of 'minor' and 'catastrophic' injury as discussed in the Green Paper need to be clarified.

For instance, the current at-fault compensation scheme gives rise to potential classification errors in determining catastrophic injury. By way of example, the severity of brain injury may not be able to be determined initially and the extent of injury and scope of recovery may be uncertain for several months or even years as the injury progresses. A no-fault based scheme would manage an injured person's lifetime care needs and ensure that all injured road users can access health and associated services (such as home-modifications) more permanently.

The costs of covering participants at the margin may well prove cost-effective in the long term by providing for each injured case to progress and be determined at a later stage. In this regard, a brain injury that starts out as a moderate injury may well not progress to a severe injury. Therefore, providing periodic payments in the short term may well prove more cost-effective in the long run, than a lump-sum payment that may well over-compensate the relative severity of injury progression.

4.3 Final Comments

Overall, the APA would advocate for a no-fault CTP scheme that takes into account people's individual circumstances and includes a greater role for self-directed funding and self-determination of medical care and associated support services.

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