AASW Response to the NSW Compulsory Third Party Green Slip Insurance Scheme Reforms

[NSW Government – Motor Accidents Authority]

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Enquiries regarding this submission can be directed to:

Senior Manager, Social Policy and Mental Health:
Stephen Brand
Email: stephen.brand@aasw.asn.au
Phone: 02 6232 3916

This submission originates from the Social Workers in Brain Injury Practice Group (SWIBIPG) of the AASW.
Introduction
The Australian Association of Social Workers (AASW) appreciates the opportunity to comment on the Motor Accident Authority's proposals to change benefits under the CTP Scheme, due to the importance of the Scheme in the lives of many people with a brain injury, their families and carers. This response has been prepared by the Social Workers in Brain Injury Practice Group (SWIBIPG), auspiced by the AASW.

While there are strengths in the proposed reforms, the following comments highlight two areas of concern that are dealt with in two parts:

- the particular issues arising for individuals with brain injury as a result of motor vehicle accident, and their families
- an explanation of the positive aspects of the current scheme that should remain in the reform process.

PART 1
The Social Workers in Brain Injury Practice Group
The Social Workers in Brain Injury Practice Group (SWIBIPG) is the key practice group for social workers working in hospital, community, government, non-government, academic and private settings in the field of paediatric and adult brain injury in NSW.

Social Workers in brain injury work with their colleagues in multidisciplinary teams to provide therapeutic support to patients as inpatients, outpatients and in the community collaborating with team members and families to ensure care is focused and integrated. Social Workers provide therapy and supportive counselling for patients and their families to help them rebuild their lives.

SWIBIPG members discuss and work on many clinical practice issues. Many SWIBIPG group members are Clinical Specialists in brain injury. They also have a positive history of past contribution to the work of the NSW Legislative Council Law and Justice Standing Committee, representing issues of our client group as claimants and clients of the Motor Accident Authority CTP Scheme and interim and permanent participants of the Lifetime Care and Support Scheme (LTCSS), considering the common issues across adult and paediatric units in NSW.

People affected by Traumatic Brain Injury (TBI)
In NSW, over 100,000 people currently have a brain injury. Over 1,000 people each year sustain a traumatic brain injury and experience long-term disability. Motor vehicle accidents are one of the leading causes of brain injury in Australia. Over 22,000 Australians were hospitalised due to a TBI during 2004-2005 nearly one in three of these was due to a motor vehicle accident.1

Therefore, for social workers in all settings, clients with traumatic brain injury sustained as a result of motor vehicle accidents form a significant proportion of social work caseloads.

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The AASW feedback to this NSW Reform discussion document relates to social work clients who have been injured in motor accidents as drivers, passengers, pedestrians, cyclists or skateboard riders.

**The impact of traumatic brain injury**

The consequences of traumatic injuries mean that people and their families are left in a very vulnerable life situation and therefore require a range of health, care and social support. They also need assistance to access this support, to understand what assistance is available and to understand their rights.

Most of social work clients with brain injury and their families do not have the capacity or the energy to deal with insurance companies directly, and rely heavily upon us and on legal assistance to understand and access the support that is available. Even with the best intentions and with improvements in practices by insurance companies, it is not reasonable to expect clients to access their rights without knowledgeable advice and assistance.

Following a brain injury, children and adults may experience a number of changes. These may include: physical functioning; cognition (thinking); personality; behaviour and communication. They may experience long term, physical problems including weakness, poor balance or coordination, and fatigue. Cognitive effects can include reduced attention and concentration, difficulty in planning and organisation, cognitive fatigue, changes in behaviour and changes in communication such as expression and understanding.

Additional crucial issues for children and adolescents are that they require longer term follow up and monitoring after their accident as they are still growing and developing. It is often difficult to assess the long term impact of a brain injury on any person, particularly with children. From a medico-legal perspective, it is not appropriate for their claims to be settled as early as their adult counterparts as their future outcomes are more difficult to accurately predict.

Social workers see clients with various levels of injury, each of whom has had their lives changed as a result of their injury. Some of these clients go on to be assessed and categorised as having sustained above 10% whole person impairment (WPI), whereas many do not meet this threshold. However, even people with a lower percentage of impairment at the time of assessment often suffer profound and long term difficulties as a result of their injury, including limited work capacity, and require long term support and intervention.

Many people access social work services intermittently throughout their lives as their injury may affect their decision making, their ability to maintain relationships or their general ability to cope. A brain injury is often not something that is externally visible. Even for mild levels of brain injury, the long term impact on a person’s life can be far reaching and take years to be fully understood by the person affected, their family and their treating health professionals.

Social work practice in brain injury rehabilitation encompasses therapeutic intervention to address trauma and adjustment issues; the impact of the TBI on the patient and their family; assisting with a complex range of practical, financial, medico-legal and accommodation issues taking into consideration the patient’s pre-accident personal and family situation, socio-economic background
and their cultural and linguistic background. Social workers encounter people with TBI in a number of settings including emergency, trauma services, intensive care units, neurosurgical wards, rehabilitation services and community disability agencies.

Cognitive problems such as impaired planning and organisation, impaired memory, behavioural and/or emotional disregulation are common sequelae of brain injury about which the client and family may have varying levels of awareness and insight. In fact, brain injury can present as a ‘hidden disability’.

The challenge of working with adults with TBI and children and their families whose child has a TBI, is outlined clearly by Simpson, Simons & McFadyen in their published paper, “The challenges of a hidden disability: Social work practice in the field of traumatic brain injury”.

This paper is of particular relevance to this discussion because it is proposed that this group of CTP claimants will liaise directly with insurers and supposedly demonstrate the capacity to understand the complex CTP system and the subsequent financial settlement offered. We would argue that this would greatly disadvantage the TBI client group who usually would not have the capacity to manage this critical process.

PART 2
Response to NSW Motor Accidents Authority, Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme, February 2013

There are some positive aspects of the current Scheme that should not be lost in the reform process.

The AASW outlines its responses to particular proposed changes to the NSW CTP Scheme.

1. Current system
The existing MAA Scheme works well for children and adults with TBI in a range of areas. We would particularly highlight:

- The Special Benefit for children under 16 years of age in all motor vehicle accidents regardless of fault
- The benefits available through the submission of the Accident Notification Form
- Ability of parents to apply for reimbursement of lost wages if they forced to take leave from work to care for their traumatically injured, hospitalised child
- The right of all claimants to:
  a. engage an advocate
  b. seek legal advice and support in order to understand and navigate the insurance scheme
- This is particularly noted as The Motor Accidents Authority Claims Advisory Service specifically states that it does not and cannot provide legal advice

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2. Proposed changes

i  No Fault Scheme

The AASW welcomes the expansion of no fault benefits for motor vehicle passengers, but hopes that this will not come at the expense of people who current entitlements. Improved no fault benefits could help an additional group of injured people who are currently ineligible to claim, although their injuries, medical and rehabilitation needs and long term outcome did not differ from their counterparts who were able to prove fault in an accident.

We emphasise the concern that the provision of additional no fault benefits should not come at a cost to the entitlements of many of our clients who do not meet the 10% Whole Person Impairment (WPI) threshold but who have significant, complex and long term needs for support due to the complex sequelae outlined above.

ii  Proposed removal of the right to legal advocacy and advice

In the proposed Scheme clients with TBI will be expected to advocate for themselves, with insurers making decisions about what is a reasonable offer of compensation or payment for future medical and rehabilitation costs.

When considering the cognitive impairments experienced following TBI, claimants may be vulnerable to poor decision-making in a crucial area affecting their future and that of their families.

This issue is also particularly difficult for parents/family members of children with TBI as they face the psychological challenges of living with the uncertainty of the child’s future development, abilities and potential as well as coping with their child’s brain injury outcomes.

The rights of claimants to seek legal advice about this complex system should not be eroded or removed because there have been problems with the conduct of some lawyers. We are concerned that people who do not meet the 10% WPI threshold will not only have no right to legal representation, but also may not have a right to properly dispute a decision made by an insurer or to seek redress for inappropriate or unfair decision-making.

Currently, in both adult and paediatric brain injury settings the injured parties are highly reliant on the knowledge and skills of legal practitioners, particularly specialists in Personal Injury Law. This is equally important for people who meet or do not meet the 10% WPI threshold, as both groups usually have some cognitive decision making, memory, or communication difficulty resulting from their injury.

From the social workers’ perspective, Personal Injury Law Specialists consistently demonstrate the requisite skills and ability to negotiate and advocate on behalf of clients in what is now and will remain, an adversarial insurance system even with the widening of eligibility for no fault claims. The conduct of the majority of personal injury solicitors does not appear to be the key problem. Brain injury social workers rely on their high standards of professional conduct which allow them to be advocates for clients in complex legal situations.
The Reform discussion document states that the legal profession is the cause of high green slip prices and delays. While the AASW does not consider it to be its role to dispute this claim, the SWIBIPG believes that there are mechanisms and other bodies who could undertake a review of this problem while avoiding leaving the community without redress or recourse if they do not understand or are unhappy with decisions made about them or their family member.

Additionally the document’s proposal that a largely no fault system will change the relationship between insurers and claimants to a wholly positive, neutral and mutually beneficially relationship is quite disingenuous. The insurer will have total control over the clients’ rehabilitation, medical and compensation rights, and clients will have no advocacy entitlements.

Experiences in Victoria indicate that there many disputes remain over no fault entitlements. These may include comparatively low cost items of equipment or the provision of medical and rehabilitation expenses, but the process of disputing entitlement is an additional very stressful for patients and their families. This issue will persist because of the nature and imbalance in the relationship between insurer and claimant.

The AASW understands the CTP insurance companies to be private businesses with primary responsibility to shareholders and then, secondarily to their ‘customers’ who take out insurance policies and are engaged in a different form of relationship. Even with the best plans to improve their practices, insurers are unlikely to have the capacity to consistently perform at the high standard required for this complex and vulnerable group when social workers are aware many problems persist with the current Scheme. For example: insurers may make poor decisions, lose files and fail to respond to phone calls in a timely manner.

iii Delayed settlement of case under the current Scheme
The Reform discussion document refers to the significant expenses incurred as a result of delayed settlement of claims due to legal disputes regarding fault and liability. We suggest the responsibility for this lies with both parties dealing with a fault-based system which requires thorough assessment of a claimant’s current and future needs rather than the fault of the legal profession.

iv Special consideration of claimants with cognitive impairments
The discussion document is unclear as to whether the needs of claimants with serious injuries resulting in cognitive impairment were considered. Social workers’ current clinical experience indicates that not all of these claimants would qualify for the Lifetime Care & Support Scheme; hence they will be offered services under CTP Scheme. They may require assistance in dealing with CTP insurers.

v Time limits for active CTP Cases
The discussion document is also unclear as to how the proposed time limitations are intended to work in practice and indeed, whether they are appropriate for claimants with TBI and whether they indicate a potential erosion of rights.
If the new system will mirror the timeframe of 3 years based on the Victorian Transport Accident Commission or 5 years based on NSW Workcover this will greatly disadvantage people with TBI. In traumatic brain injury rehabilitation, it is well documented that while initial physical injuries may appear to have stabilised, it be take a much longer period before the full impact on cognitive, behavioural, emotional functioning in daily life is fully understood. This is relevant for the injured group who may be assessed as falling below the 10% WPI.

As previously noted, this issue is pertinent for paediatric claims. No mention of the need to wait until injuries have settled and true picture of the future needs of injured children, is made in the Proposed Reform discussion document.

vi The implementation of the proposal with Lifetime Care & Support Scheme (LTCSS)
Some interim participants in LTCSS may leave that Scheme after 2 years yet still require services under CTP. They may not reach 10% impairment but still require support in decision making and understanding the impact and long term nature of their brain injury.

It is crucial to acknowledge that the CTP Scheme runs parallel to the LTCSS. The increase in CTP insurance costs is also due to the introduction to LTCSS but no mention is made of this in the Reform document.

Summary
In summary, the AASW response to the Reform discussion document, prepared by the SWIBIPG, raises that people with traumatic brain injury have unique and lasting care needs, and a requirement for legal advocacy to negotiate when making a claim, and to dispute decisions made by insurers. There are concerns that people with TBI who do not meet the 10% WPI may be disadvantaged through the proposed changes due to possible time limit restrictions and withdrawal of their right to legal advocacy resulting in substantially less compensation. It is felt that the document does little to acknowledge the circumstances and needs of people with TBI and does not acknowledge or provide for the longer term needs of children with brain injuries where the resulting impact may not be able to be assessed in the short term.

Social workers engaged in the field of Traumatic Brain Injury feel strongly that while an introduction of a ‘no fault’ scheme would be beneficial to some people, this may come at a cost to the rights and entitlements of many who have been injured through no fault of their own.

Thank you for the opportunity to comment on the proposed changes. The AASW is willing to further clarify or discuss the issues raised.

Submitted for and on behalf of the Australian Association of Social Workers Ltd

Glenys Wilkinson
Chief Executive Officer