

Clumsy patient-friendly regulations could strip 25 000 of MPS cover



Dr Graham Howarth, Medical Protection Society (MPS) Head of Medical Services for Africa.

The Medical Protection Society (MPS), a financial and legal haven for 25 000 South African health care practitioners and reliable source of recompense for countless casualties of care, may be legislated out of the country.

Unless negotiations scheduled over the next 14 months result in amendments to the regulations due to kick in this December, the MPS will from December 2011 be unable to protect its members from the legal consequences of any post-2011 adverse event. The new requirement is that private health care practitioners must sign up for cover using only insurers or indemnifiers registered under Section 7 of the Short-term Insurance Act, something the MPS, which is not a short-term insurer, cannot do. The MPS, which has no shareholders and consists entirely of its members, covers any member 'to the grave and beyond' (providing the incident occurred while the doctor was a member). It has among the strongest financial reserves of any health care indemnifier globally, with assets available to meet claims and other costs standing at R16.5 billion at the end of last year. It currently has more than a billion rand in outstanding claims and a substantial amount for matters that have already occurred but are not yet

claims, boasting that it has never once turned down a proven claim of negligence. Health care practitioners who take out a second (dual) indemnity/insurance in an attempt to comply with the new regulations may put themselves at risk of rendering their cover invalid. At the time of going to press, the MPS was working feverishly to resolve the matter and had through its lawyers written to the national Minister of Health, Dr Aaron Motsoaledi. Pressed by *Izindaba*, the Health Professions Council of South Africa (HPCSA), which jointly crafted the law with the national health department, revealed that it had agreed to grant the MPS a one-year extension to next December (2011) and would not prosecute MPS members under a special moratorium over this period.

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Regulator failed to contemplate adverse outcome

The corrective intent of the new regulations is noble and supported by the MPS – independent health care practitioners are currently not required to be appropriately covered for medical malpractice claims. In some circumstances, patients with deserving medical malpractice claims have found practitioners to be without insurance, indemnity or any funds to meet a judgement. However, according to Donald Dinnie, a Johannesburg medical law/malpractice specialist and advisor to short-term insurers, the legislators seem to have 'entirely overlooked' the need for run-off cover, aggregate cover and extent of cover required. Dinnie adds caustically, 'Theoretically a practitioner who pays R1.00 for indemnity cover will comply with the new regulations.'

The MPS strongly believes that short-term insurance is not the best way to offer indemnity for health care practitioners and objects to the preclusion of the indemnity it provides.

Where a practitioner has indemnity cover from an entity other than a short-term insurer, for example through membership of a recognised society or organisation such as the MPS, that society or organisation has to register as an insurer under the Short-term Insurance Act within four months of 30 August 2010 (as the regulations stand). The MPS strongly believes that short-term insurance is not the best way to offer indemnity for health care practitioners and objects to the preclusion of the indemnity it provides.

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Shepherding indemnifiers into SA's legal 'kraal'

Advocate Tshepo Boikanyo, legal services manager at the HPCSA, told *Izindaba* that the regulations were specifically crafted to make sure anyone providing cover fell 'within the existing laws of this country'. While the MPS was at the time of going to press still trying to persuade the minister to review the regulations, they have bought their members time, and possibly long-term tenure in the country. The MPS wants the minister to withdraw the regulations and 'improve' on them. It also wants the legislators to spell out just what an 'adequately funded insurer or indemnifier' is.

The regulations were promulgated on 30 August under a section of the Health Professions Act which allows the Minister of Health to determine conditions under which a practitioner may practise (after consultation with the HPCSA). Dinnie said he 'presumed' that 'appropriate consultations were held' and that the effect of requiring indemnity cover only via a registered short-term insurer was 'duly considered'. Dr Graham Howarth, MPS Head of Medical Services for Africa, told *Izindaba* that his organisation was politically 'in full agreement' with the health department but that 'unfortunately we're not and cannot be a short-term insurer'. The regulations came as a surprise to both him and the Financial

Services Board (FSB), which oversees South Africa's non-banking financial services industry. The FSB had been negotiating with the HPCSA for nearly two years on the topic, he said. Having spoken to the FSB, Howarth was of the impression that the FSB felt that the MPS was 'not beyond regulation'. The MPS operates in over 40 countries around the world, with a 'significant' presence in the UK, Ireland, Singapore, Hong Kong, Malaysia, South Africa, New Zealand and the Caribbean.

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Doctors skittish about insufficient cover

Contrary to short-term insurers, the MPS offers uncapped, 'occurrence-based' (versus claims-made) cover, meaning that claims do not have to be reported in the current policy year and members do not have to pay excesses or top up the cover. 'To be fair some insurance companies do sell you what they call a tail, giving you for example an extra three years, but even this can run out,' Howarth warned. He said his society did not exclude any group of practitioners just because they were high risk. Being a 'mutual' meant they did not have to generate profits for shareholders. 'At the end of the day all the money goes back to our members,' he added. He predicted that under the new

regulations several doctors would seek out the cheapest cover, particularly younger ones 'not thinking about their retirement'.

'But if the big beast (the MPS) goes, everyone will see a cake of 25 000 clients and want a cut – that could make the market unstable. Four or five years down the line if some short-term insurers start to run, everyone would lose confidence in the market and that would be to no-one's advantage,' he said.

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A spokesperson for the FSB said the Board would continue its regulatory policy review of the issues. It considered the process to be a 'live' one. She added, 'unfortunately the final regulations were published by the national Department of Health'. The substance and implications of the regulations relating to the indemnity cover for registered health practitioners would be dealt with jointly by the Ministry of Finance and the Ministry of Health going forward, the FSB spokesperson added.

Boikanyo expressed surprise at the FSB reportedly believing that the MPS was 'not

beyond regulation'. He said the HPCSA had correspondence from the FSB confirming that the MPS was being 'investigated for possible contravention of the laws regulated by the FSB,' but declined to elaborate. He said the 'pertinent question' in deciding whether the MPS must register in terms of Section 7 of the Short-term Insurance Act (of 1998), was whether the MPS was carrying out short-term insurance business. Boikanyo said the HPCSA was committed to a speedy and amicable resolution 'within the confines of the relevant legislative framework'.

The controversy has provoked heated debate in health care circles with Boikanyo's explanations viewed with caution and suspicion over the regulatory intent. *Izindaba* confirmed that the contested regulations were additions to the original regulations drafted in 2007 (with which the MPS was satisfied). In a reply to detailed *Izindaba* questions, Boikanyo revealed that it was the Department of Health's legal unit that made the contested changes to ensure that anyone who provided indemnity cover to health care practitioners was 'themselves regulated by the laws of the Republic'. Upon hearing of the moratorium and extension, Howarth expressed his 'delight', adding that the MPS supported the principles behind the regulations but wanted to find a way to implement them that would meet the needs of health practitioners and patients.

Chris Bateman

Stop press:

Izindaba learnt at the last minute that the feverish lobbying, backed by imminent legal action by the MPS, succeeded in having the new indemnity regulations repealed by national Health Minister, Dr Aaron Motsoaledi.

Dr Graham Howarth, MPS Head of Medical Services for Africa, expressed delight, saying the repeal would give MPS and other 'interested parties' an opportunity to engage further with the health department on how future regulations might be drafted.

'We're also grateful to the Health Professions Council of South Africa (HPCSA) and the Financial Services Board (FSB) for listening to and discussing our concerns,' he said.

Howarth said the MPS continued to support the principles behind compulsory indemnity. The repeal would enable a 'true doctor/patient solution'. The sudden government turnaround fuelled speculation as to the motive for the original exclusive clauses. The MPS, a mutual, not-for-profit organisation, has 270 000 members worldwide.

Possible MPS eviction ‘an unmitigated disaster’ – patient litigator

One of the country’s top patient litigators and a seasoned opponent of the Medical Protection Society (MPS), Mervyn Joseph, says forcing the MPS out would prove an ‘unmitigated disaster’ for patients and doctors alike.

Joseph, who has over the years received ‘substantial’ compensation from the MPS on behalf of patients, says he would rather litigate against an informed, professional opponent with solid financial reserves than ‘fight tooth and nail against someone bent only on avoiding both the merits of an action and paying justifiable quantum’. Warning that the highly specialised health care indemnity/insurance market could be flooded with unschooled and/or underfunded newcomers, Joseph cited a current defendant whose insurers he is suing to prevent their renegeing on their contractual obligation to cover the doctor in terms of his policy.

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‘I took judgement against the gynaecologist (facing a Down’s syndrome claim with non-MPS cover limited to R20 million (including costs)) when his insurers suddenly repudiated his policy after having defended him.’ By getting the doctor to cede his claim under the policy to his patient (Joseph’s client), Joseph opened the way to protecting both the doctor and his profoundly affected patient. ‘I don’t want to bankrupt the doctor or sequester his estate. This kind of scenario would never emerge with the MPS. When push comes to shove, if they’re obliged to pay liability they will. They always put up a good fight if it is justified. There is good collegiality and we often settle the matter without prejudice or admission of liability. The doctor’s name doesn’t get

dragged through the press. They’re entitled to have their practice remain as unaffected as possible.’

Potential for shabby cover would soar

Joseph says a sudden deluge of 25 000 (the South African MPS membership) health care practitioners onto the market would result in an unseemly scramble, especially with the Road Accident Fund drying up as ready income for lawyers. The net result would be a burden on already overloaded courts, unnecessary legal expenses, doctors facing sequestration when run-off cover dried up and patients’ constitutional rights to equitable compensation being compromised. Short-term insurers with limited reserves would be far more likely to use unseemly or clumsy strategies in stark contrast to the MPS who, whenever a claim was medically and legally justified, put no ceiling on payouts. He re-emphasised the levels of medico-legal knowledge required to prosecute a complaint.

‘It’s very intricate footwork because you need to know the patient, the medicine and the law, the damage suffered and for quantum, the ability to investigate and prognosticate for the rest of that patient’s life. It entails provision for the patient’s future in respect of reasonable medical interventions, including surgery, regular check-ups (via MRIs, or EEGs to monitor epilepsy) or catering for caregivers for the rest of their lives. It could also, for example, provide for architectural changes needed in their environment.’

He said one of the reasons doctors stayed in South Africa was that they could currently practise relatively unhindered in the knowledge that they had appropriate indemnity in place to protect their personal estate.

Another ‘push’ factor?

Joseph, many of whose clients are low-income patients, agrees with what he understands as the intent of the new legislation – that patients are entitled to contract with doctors legally covered against negligence. He said one of the reasons doctors stayed in South Africa was that they could currently practise relatively unhindered in the knowledge that they had appropriate indemnity in place to protect their personal estate. ‘Now you go and take away (proper) indemnification in the event of negligence and expose these guys to bankruptcy. I often call a doctor and say unfortunately this has happened, you’re obliged to give me your records, I am investigating a claim against you, you should get hold of your insurer. The last thing I want is for him not to be appropriately covered.’

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While describing the conceivable edging out of the MPS from South Africa as ‘an unmitigated disaster’, Joseph does not however believe the situation is irretrievable. ‘We need to do everything we can to encourage our professionals to stay. I think if the minister [health minister Dr Aaron Motsoaledi] is approached appropriately, this can be worked out to the benefit of all.’

He said that after studying the new regulations, the controversial clauses ‘looked like afterthoughts’. ‘It is inconceivable that it was the intention of the legislature to expose this country’s medical expertise to bankruptcy due to the exclusion of professional indemnity cover against negligent acts or omissions,’ he added.

Chris Bateman