

## 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.'

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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'.

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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.