Mr T. Mofokeng
Chairperson
Committee on Security & Constitutional Development
Parliament
Cape Town
8000

Ref: Protection of Personal Information Bill (POPI)
Enq: Milford Chuene
t: 012 431 0523
f: 012 431 0623
e: m.chuene@medicalschemes.com
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Dear Sir

Representations on the Protection of Personal Information Bill (POPI)

1. Introduction

1.1. The Council for Medical Schemes (CMS) is a creature of statute, established by Section 3 of the Medical Schemes Act 131 of 1998 (MSA).

1.2. The primary role of the CMS is to protect the interests of the beneficiaries of medical schemes. It does so by, amongst others, regulating the medical schemes industry. The entities regulated by the CMS are medical schemes, medical scheme administrators, managed care organisations, as well as healthcare brokers and broker organisations.

1.3. The Protection of Personal Information Bill (POPI) will apply to the processing of personal information by or for responsible parties on the conditions prescribed in Chapter 3 of POPI.

1.4. The CMS has considered POPI and is of the opinion that it will apply to its regulated entities when signed into law.

1.5. The personal information of beneficiaries and in particular the processing of such personal information is the heartbeat of the industry we regulate; the impact of POPI on medical scheme beneficiaries is therefore of significant importance to the CMS. The entire relationship between a medical scheme and its beneficiary is based on the processing of personal information of beneficiaries which is integral to the contract that exists between a medical scheme and the principal member. Beneficiaries are, for example, required to furnish information to medical schemes at the time of membership applications. Personal information is also required for the risk-profiling of beneficiaries and the entities we regulate also process personal information for claims processing, benefit payments etc. Furthermore, third parties such as healthcare providers submit this information directly to medical schemes for processing to ensure that members and their dependants receive the benefits for health care treatment in accordance with the registered rules of the medical scheme in question and moreover, the benefit option selected by the member in respect of himself/herself and his/her registered dependants

1.6. The nature of the information processed by the entities we regulate comprises personal information as defined in Section 1, special information as defined in Section 26, and personal information of children as regulated in terms of Sections 34-35 of POPI.

1.7. In view of the above, our preliminary assessment is that POPI would have potentially far-reaching consequences for medical scheme beneficiaries and our regulated entities.

1.8. A "responsible party" is defined in Section 1 of POPI. The CMS accepts that medical schemes would qualify as "responsible parties". Medical schemes, administrators, and managed care organisations would qualify as "operators" as defined in Section 1 of POPI. Brokers and broker organisations could, however, qualify as either "responsible parties" or "operators", depending on context. All the regulated entities would also qualify as "data subjects".

1.9. The responsible parties must ensure compliance with POPI, or the final Act, once it will have been implemented in accordance with section 8. Our submission will therefore focus on the impact of the Bill on medical schemes as responsible parties and ultimately their beneficiaries.

2. Comments on POPI

2.1. As we have indicated above, we will not deal with the entire POPI, but will focus on the main areas of concern. Where possible, appropriate wording has been proposed to address our concerns. This will be further discussed at the workshop on 22 May 2013.

2.2. Ad Section 11 with Section 13 and Section 18:

2.2.1. Section 11(1)(a) provides that "personal information may only be processed if –

(a) the data subject or competent person where the data subject is a child consents to the processing.

2.2.2. Section 13(2) provides that "steps must be taken in accordance with Section 18(1) to ensure that the data subject is aware of the purpose of the collection of the information unless the provisions of Section 18(4) are applicable".

2.2.3. Section 18(1)(a) and (h)(iii) and (iv) provides that "[i]f personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of –

(a) the information being collected and where the information is not collected from the data subject, the source from which it is collected;

(h) any further information such as the –

(iii) existence of the right of access to and the right to rectify the information collected;

(iv) the existence of the right to object to the processing of personal information as referred to in Section 11(3)".

2.2.4. Medical scheme membership is based on the principle of multiple people enjoying cover on a single contract between the principal member and the medical scheme. A principal member is allowed in terms of the MSA to enroll his/her dependant/s as beneficiaries of his/her medical scheme. These dependants could be either a child or an adult (e.g. a spouse) dependant/s.

2.2.5. The implication of Section 11(1)(a) is that where a principal member applies to a medical scheme to register his dependants as beneficiaries of his/her medical scheme, the medical scheme must, before processing the information of those dependants, first obtain consent directly from such dependants. This will apply even in circumstances where such dependants are adult dependants.

2.2.6. Section 18(1) places an additional obligation on medical schemes to take reasonable steps to ensure that the data subjects (i.e. beneficiaries, meaning the principal member and all his/her dependants) are aware of, amongst others,

the information being collected and the purpose of this collection. The data subject should also be notified of the existence of the right to rectify the information collected and the right to object to processing of his/her personal information. This requirement presupposes that a medical scheme would also have to obtain consent from the dependants of the principal member and communicate certain information directly to them.

2.2.7. Our concern is that compliance with the provisions of the two Sections above could result in a delay in the enrollment processes of medical schemes, as the schemes will have to communicate with all the potential beneficiaries directly and afford them, amongst others, the opportunity to object to the processing of their personal information. This might result in those persons not being covered by a medical scheme for prolonged periods, potentially expose them to significant medical bills, or require them to seek medical treatment in the public sector, thereby increasing the burden on the state.

2.2.8. Our regulated entities (i.e. medical schemes, administrators, healthcare brokers and managed care organisations) also receive extensive information on members and dependants on a daily basis. Some of this information is submitted by healthcare providers for claims. To first notify the dependants where treatment relates to such a dependant, as contemplated in Section 18, will not be practically feasible due to the high rate of claims and other information. This requirement will result in a delay in the finalisation of claims processing and could even result in the rejection of claims by medical schemes should the claims be submitted outside of the time periods prescribed in the MSA. It will also be difficult for schemes to process information where a dependant, not the principal member, objects to the processing of his/her personal information. The medical scheme would then potentially not be able to pay benefits and/or include the transactions related to the dependant/s in a statement of account to the principal member as required in terms of the MSA.

2.2.9. Recommendations

2.2.9.1. It is doubtful that POPI, as it currently reads, entitles a principal member of a medical scheme to consent on behalf of his/her dependant/s where such a dependant is not a child. We are of the opinion that, given the concerns raised above, Section 11(1)(a) should be amended to entitle a principal member to consent on behalf of his/her dependant/s.

2.2.9.2. We believe that, should the provision be amended as per our proposal, there will be a minimal adverse implication of the particular Section on our regulated entities. To this end we propose that Section 11(1)(a) be amended to read as follows:

"(1) Personal information may only be processed if –

(a) the data subject, <u>any other person authorised in writing by the data subject</u>, or a competent person where the data subject is a child consents to the processing."

2.3. Ad Section 11(2)(b)

2.3.1. Section 11(2)(b) provides as follows:

"(b) The data subject or competent person may withdraw his, her, or its consent, as referred to in subsection (1)(a), at any time: provided that the lawfulness of the processing of personal information before such withdrawal or the processing of the personal information in terms (1)(b) to (f) will not be affected."

2.3.2. The implication of this provision is that a member may withdraw his/her consent at any time, for instance when claims are to be processed by the regulated entities. The implication is even worse in circumstances where a dependant, and not a member, acts in terms of this section, e.g. when claims are to be processed. We reiterate that

a contractual relationship exists between a member and a medical scheme, and not between a dependant and a medical scheme. Where a member or dependant withdraws or revokes consent, the regulated entities will find themselves in a difficult if not impossible position to process the personal information.

2.3.3. The above will result in the regulated entities potentially contravening the law and in particular the MSA. It is accepted that this was not contemplated by POPI, but might be an unforeseen implication.

2.3.4. It is further a concern that, as the Section reads now, a principal member or dependant can withdraw or revoke his/her consent granted for the purpose of processing his/her personal information for membership purposes, but still retains his/her status as a member or a dependant.

2.3.5. Recommendations

2.3.5.1. It is recommended that the Section be amended to provide that where consent is revoked or withdrawn, any contractual relationship or any other form of a relationship that existed before such revocation or withdrawal of consent, can be suspended or terminated forthwith by the responsible party with or without liability for the responsible party.

2.3.5.2. The implication of a continued contractual relationship is that a scheme will be restrained from discharging its contractual and statutory liabilities as indicated above. To this end we propose the following wording for Section 11(2) (b):

(b) "The data subject or competent person may [on reasonable notice] withdraw his, her, or its consent, as referred to in subsection (1) (a): provided that –

(i) the lawfulness of the processing of personal information before such withdrawal or the processing of the personal information in terms of subsection (1)(b) to (f) will not be affected; and
(ii) any contractual relationship or any other relationship that exists between the parties concerned may be suspended or terminated forthwith by the responsible party.

2.4. Ad Section 34 and 35

2.4.1. Section 34 provides that "[a] responsible party may, subject to Section 35, not process personal information concerning a child".

2.4.2. Section 35(1) provides as follows:

"(1) The prohibition on processing personal information of children, as referred to in Section 34, does not apply if the processing is —

(a) carried out with the prior consent of a competent person;

(b) necessary for the establishment, exercise, or defence of a right or obligation in law;

(c) necessary to comply with an obligation of international public law;

(d) for historical, statistical, or research purposes to the extent that –

(i) the purpose serves a public interest and the processing is necessary for the purpose concerned; or

(ii) it appears to be impossible or would involve a disproportionate effort to ask for consent, and sufficient guarantees are provided to ensure that the processing does not adversely affect the individual privacy of the child to a disproportionate extent; or

(e) of personal information which has deliberately been made public by the child with the consent of a competent person."

2.4.3. A child is defined in Section 1 of POPI as "a natural person under the age of 18 years who is not legally competent without the assistance of a competent person, to take action or decision in respect of any matter concerning him or herself".

2.4.4. The regulated entities process personal information concerning children on a daily basis. The implication of Section 35(1) is that processing of special personal information concerning a child is prohibited unless it is carried out with the prior consent of a competent person.

2.4.5. The requirement will present difficulties to the regulated entities in that the Children's Act 38 of 2005, for example, entitles a child below the age of 18 to consent to treatment and even operations in certain circumstances. In terms of Section 133(2) of the Children's Act, a child of 12 and younger on certain conditions must consent to the disclosure of an HIV-positive result. This provision of the Children's Act might therefore be in conflict with certain o provisions of POPI.

2.4.6. The Choice of Termination of Pregnancy Act 92 of 1996, for example, provides that a female of any age may consent to a termination of pregnancy, as long as such a patient is capable of giving informed consent.

2.4.7. The Children's Act 38 of 2005 provides that children who are 12 years of age or older, and who are of sufficient maturity and have the mental capacity to understand the benefits, risks, social, and other implications of medical treatment, may consent to such treatment without assistance from their parents or guardians. These include HIV testing and disclosure of HIV results.

2.4.8. The conflicting provisions in the legislation are of concern to the CMS as its regulated entities will find themselves in untenable positions of having to interpret and comply with the various legal provisions.

2.4.9. Section 35 also does not afford a suitable justification for medical schemes to process the personal information of a child similar to those provided in Section 32(1) and Section 11.

2.4.10. Section 32(1)(a) and (b) provides that "[t]he prohibition on processing of personal information concerning a data subject's health or sex life, as referred to in Section 26, does not apply to the processing by –

(a) Medical professionals, healthcare institutions or facilities, or social services, if such processing is necessary for the proper treatment and care of the data subject or for the administration of the institution or professional practice concerned.

(b) insurance companies, medical aid schemes, medical aid scheme administrators, and managed healthcare organisations, if such processing is necessary for –

(i) assessing the risk to be insured by the insurance company or covered by the medical aid scheme and the data subject has not objected to the processing;

(ii) the performance of an insurance or medical aid agreement; or

(iii) the enforcement of any contractual rights and obligations".

2.4.11. The specific authorisation for the processing of health information to medical schemes, administrators, managed care organisations, and healthcare providers as provided for in Section 32 are not applicable to the processing of health information of children and therefore concerning to us as it would restrict the ability of our regulated entities to process health information concerning children.

2.4.12. Recommendations

2.4.12.1. It is necessary to align the age of consent for the processing of personal information of children with the relevant provisions of other legislation, such as the Children's Act, to preempt and avoid any conflict resulting in difficulties with their application in practice.

2.4.12.2. We recommend that specific authorisation granted in Section 32(1) related to health information be made applicable to the processing of health information of children in Section 35(1) of POPI. This will enable our regulated entities to process personal information concerning children for reasons referred to this Section without placing inordinate burdens on them to discharge their statutory and contractual responsibilities.

2.4.13. Cost implications for our regulated industry of complying with POPI

2.4.13.1. The CMS supports the implementation of measures to enhance privacy standards pertaining to personal information. However, the cost of compliance should be balanced with affordability and the resultant impact on data subjects with specific reference to the medical schemes industry.

2.4.13.2. We have at the outset indicated that the primary role of the CMS is to protect the beneficiaries of medical schemes. The CMS, amongst others, regulates the expenditure of medical schemes on matters such as administration, which includes legal compliance (the so-called non-healthcare expenditure) to ensure that a sufficient proportion of medical scheme contributions is spent on healthcare benefits for beneficiaries.

2.4.13.3. In our view, the cost of complying with POPI by medical schemes, administrators, managed care organisations as well as brokers and broker organisations will be significant. POPI will increase the administrative burden on schemes as it will require, amongst others, the implementation of system enhancements, processes, and reporting mechanisms to ensure that medical schemes discharge their responsibilities under POPI.

2.4.13.4. The above will result in an increase in costs for our regulated entities and all other parties involved in the provision of medical care and the processing of medical claims. These costs will unfortunately be passed on to beneficiaries, either in part or in full, e.g. through the increase in medical scheme contributions and the costs of healthcare delivery. The impact of these contributions is likely to result in existing medical scheme beneficiaries cancelling their cover and creating a barrier to entry for new applicants. This is not ideal in terms of the constitutional obligation on government to implement legislative measures to increase access to healthcare. Medical schemes are just one example of such measures taken by government to date.

2.4.14. Ad Section 114

2.4.14.1. Section 114(1) provides as follows:

(1) "All processing of personal information must within one year after the commencement of this section be made to conform to this Act."

(2) "The period of one year referred to in subsection (1) may be extended by the Minister, on request or of his or her own accord and after consultation with the regulator, by notice in the *Gazette*, in respect of different

class or classes of information and bodies by an additional period which period may not exceed three years."

2.4.15. We submit that a retrospective application of POPI will present difficulties to our regulated entities with regard to the size of the industry. It will be impossible for medical schemes to entirely comply with POPI in respect of all their beneficiaries where, for example, consent has to be obtained from existing beneficiaries.

2.4.16. We take a view that our concerns could be alleviated if POPI were to apply prospectively or, alternatively, the period of one year to comply contemplated in Section 114(1) of POPI be amended to five years.

Yours sincerely

Dr Monwabisi Gantsho
Chief Executive & Registrar