Is there operating room for compulsory PI insurance?

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Since its inception on 30 August 2010, the regulations requiring health professionals to have professional indemnity insurance have lain dormant in a state of moratorium, almost as a distant memory some do not wish to recall.

These regulations under the Health Professions Act envisage that health professionals, including doctors, specialists, psychologists and dentists in private practice, whether it be in a company, a partnership or an association, would acquire mandatory professional indemnity insurance.

South Africa has experienced a huge increase in both the amount and size of medical malpractice claims over the past decade, which is evidence of a nation whose patients are increasingly becoming aware of their rights and how effect should be given to them. This growing awareness of patient rights also comes on the back of an overburdened healthcare system with limited resources.

It is with this background in mind that the upheaval surrounding the regulations, which led to the moratorium, must be considered.

One of the requirements in terms of the regulations was that the professional indemnity insurance must be obtained specifically from an insurer registered in terms of the Short-term Insurance Act. This requirement, however, only applied to the private insurance sector as the state would be responsible for practitioners employed in public hospitals on the basis that the state had the financial resources to compensate patients for the negligent conduct of their health professionals. The Medical Protection Society (MPS) was especially affected by this requirement because, at the time, MPS provided the most comprehensive cover for health professionals but was not registered under the Short-term Insurance Act. The regulations also stipulated a four-month period in order for registration to occur, which, of course, was far too short a period to allow for the registration process and, naturally, allowance for extensions would be required.

Pre-2010 and in terms of our common law, professional indemnity insurance was not compulsory and many health professionals were not insured in the event of a medical malpractice claim being brought against them. This created scenarios where successful claims
would need to be paid by the health professional in their personal capacity and often, without the financial means to meet the judgment passed, the patient would suffer even more loss. According to the Health Professions Council of South Africa (HPCSA) it was thus imperative that these regulations be promulgated, as the council needed to ensure health professionals were sufficiently covered to indemnify themselves against malpractice claims and that the insurers offering this cover were regulated by laws. The aim was for the council to have adequate time to acquire input from the relevant stakeholders in an effort to resolve the matter expeditiously taking into consideration the applicable legislation.

One of the main issues with the regulations was that they were worded in too broad terms to be effective in the manner that they were intended to be. Issues such as the degree of the insurance cover required was not expressly stipulated, therefore a practitioner could get inadequate coverage and it would still comply with the regulations. Another issue was whether cover should be taken for claims made during the insured period, as the regulations made no provision for any run-off cover as consideration needed to be made for the fact that claims could be brought against practitioners who had either retired or left the profession to pursue another career. The regulations also made no provision for adequate aggregate cover. Due to the nature and amount involved in malpractice claims, it has been argued that the aggregate would need to be maximised to adequately cover the limit of claims. A major concern regarding the mandatory indemnity insurance requirement was that it could result in short-term insurers entering this very niche specific market without the necessary knowledge, expertise and experience to deal with the challenges surrounding medical professional indemnity cover.

These issues brought about the moratorium, which came about after consultations between the HPCSA, the Financial Services Board, the Department of Health and the MPS. The HPCSA subsequently committed to allowing the council to address concerns regarding the legislation that was also meant to give the MPS sufficient time to comply with the prescribed regulations. It is poignant to mention, however, that to date the MPS has still not attempted to register under the Short-term Insurance Act and it is contended that MPS has not done so as it would affect the comprehensiveness of the cover that it offers health professionals.

The HPCSA has also stressed, that despite the shortcomings of the regulations, it is important to note that the objective of the regulations is to indemnify and protect health professionals for the ultimate benefit of their patients. To avoid resistance to the regulations, the inadequacies of the 2010 proposed regulations need to be addressed and the question revisited. It is it necessary to delve into the possibility of it being viable options for patients, health professionals and medical insurers especially looking at the current insurance market.

However, moving forward with the attempt to make professional indemnity insurance compulsory for medical practitioners, it is apparent that any solutions proposed need to be in line with HPCSA’s aim to ensure the indemnification of health professionals for the benefit of
their patients, and that the Department of Health needs to ensure that meaningful consultations occur so that the regulations promulgated are for the benefit of society as a whole.

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