PERVERSITIES – BEWARE OF BEING 'SUCKED IN'



Advocate Tshepo Boikanyo, General Manager of Legal Services at the Health Professions Council of South Africa.
Picture: Chris Bateman

A significant percentage of susceptible dispensing doctors are being 'sucked into' a shady system where the punitive decks are stacked against them because gaps in the law allow organised pharmacy to offer 'undue rewards' with relative impunity.

They face stiff Health Professions Council (HPCSA) sanctions equal to the quantum of any kickbacks or ill-gotten gains plus 5% – but the pharmaceutical industry can drive a bus through gaps in the laws and regulations discouraging them. A pharmaceutical industry draft marketing code and a recently published code of conduct, although reportedly having '90% buy-in', are simply not enough to significantly change shady practices that put profit above patient interests.

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These were some of the broad themes to emerge at a 2-hour briefing and debate session organised by Qualicare, the Western Cape's largest independent practitioners association and founder member of the South African Managed Care Co-operative, on 18 February.

The convenor, Dr Tony Behrman, warned his Cape Town audience of mainly pharmaceutical company directors and shareholders, that although the law was stacked against doctors, 'if we're taken down, we'll request assistance to go back to the company that provided the incentive in the first place'.

He described those attending the briefing as 'directly or indirectly represented on the stock exchanges of the world', and appealed to them not to let the meeting deteriorate into adversity.

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On the other hand, a drug company sales rep recently complained to him that a doctor was demanding up-front payment merely to place an order. 'He told me he was having huge trouble getting into the doctor's surgery because his company wouldn't pay to get in – as I scratched the surface I discovered a divide between the pharmacy side and the medical side – that's why we're here today.'

Gaping legal holes encourage kickbacks

There was consensus between four key experts who briefed the meeting that gaping regulatory holes and lack of definition in Section 18A of the Medicines and Substances Control Act and delays in promulgating parts of the Health Act were among the main reasons for continuing perversities and harmful business practices.

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Val Beaumont, executive director of Innovative Medicines of South Africa said, 'the problem is that a (drug industry) code of conduct alone will not solve the problem faced by the HPCSA – the principles need to be supported by broader health legislation. As an industry we've tried to ensure alignment across the health sector'.

She said perverse incentives would persist as long as there were gaps in the legislation or ill-fitting legislative attempts to cover things such as the recent 'escalation in a whole lot of behaviour that cannot be covered by our marketing code'.

She was referring to the publication of the drug pricing regulations, which she said urgently needed the support of further regulations to create transparent and capped logistics fees to prevent perverse practices.

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Although the Medicines Amendment Bill was meant to address this, 'the process is stalling and it's a problem'.

Singling out the issue of 'sampling' as one example of where the act was not being properly enforced, she said there were several other places where the law could be broken. 'It's very important that the rules are the same for all players – not just pharma and the medical profession, but hospitals and all health establishments as well.'

While the HPCSA had an enforceable code, the Pharmacy Council had begun 'working in this direction and we hope to reach alignment'. She described the pharmaceutical code as 'super', but said it needed the backing of legislation and support from the Medicines Control Council, the HPCSA and the national health department. 'We need the marketing code to be regulated with meaningful sanctions and we need the regulatory gaps to be closed,' she concluded.

Doctors 'are real suckers'

Morgan Chetty, Professor of Managed Care and Health Services Management at the University of KwaZulu-Natal and chairperson of the South African Managed Care Coalition, said doctors were 'real suckers for this kind of thing'.

'They're getting sucked into a system where the ethical rules punish them for what they do wrong. We're morally obliged to circulate the discussion at this meeting to our membership.' He said the issue centred on 'what doctors do because they get paid more (commercial versus clinical)' and how easily greed became normative practice.

Chetty cited a medical representative from a wholesale company recently asking him whether she should make out a cheque to him or to him and his partner, 'because their IT company had identified our practice as a big user, so it calculated our cheque to be this much'. When he asked that she supply him with 'clearance from the respective ethical houses on reasons why I should accept', she responded in an aggrieved tone that no other doctor had responded to her in that manner that day.

'What we're saying to our doctors today is, don't take that cheque – ever! You'll get into something that you won't be able to get out of. Your colleagues will report you and you'll be made a precedent case with the HPCSA.'

Advocate Tshepo Boikanyo, General Manager of Legal Services at the HPCSA, cited the famous perverse incentives case against specialist Percy Millar, which they won in spite of protracted appeals from an incensed Millar who believed he was unfairly singled out.

In 2003, the Linksfield neurosurgeon was charged with disgraceful conduct after receiving kickbacks amounting to R765 153 for referring patients from Linksfield Clinic to another private practice. He proved a guinea pig for the HPCSA's new sanctions.

Chetty said that while the number of doctors involved in such practices had dropped 'to a very tiny number' since the HPCSA came into being, the debate remained highly relevant.

Asked what kind of sanction could be 'realistically enforced' on companies enticing doctors to accept backhanders, Boikanyo said this was dealt with in terms of criminal law, where a 'corrupt relationship between a practitioner registered with us and somebody who is not, is referred to the courts'.

He said the issue centred on 'what doctors do because they get paid more (commercial versus clinical)' and how easily greed became normative practice.

'Where there's a corruptee, there's a corrupter,' he added, recalling 'from memory' that the stipulated sentence was a year in jail or a R12 000 fine or both, something an audience member quipped could be 'made up in 10 minutes of trading'.



Morgan Chetty, Professor of Managed Care and Health Services Management at the University of KwaZulu-Natal.
Picture: Chris Bateman

Boikanyo said magistrates were required by law to refer cases involving doctors to the HPCSA, while the reverse also applied. He said the HPCSA regulations relied on the profession of medicine being based on a relationship of trust with patients. On researching the definition of *profession*, he had discovered that it meant 'a dedication or promise or commitment publicly made'.'That makes it a moral enterprise,' he stressed.

Behrman described the meeting, which delegates paid to attend, as a 'joint attempt to clean up the act and get on with delivery of health care to a very large number of South Africans who have nothing at present'.

He appealed to his audience to 'go back to your boards and tell them this is a Third World country of 45 million people. How can we afford to over-incentivise doctors to utilise medicine that is not necessary?'

Chris Bateman