Health market inquiry tried to fill gaps in SA's regulatory framework – Business Day 3 October 2019

The system is fragmented and incomplete, and partial acceptance of the suggestions will fill only some of these gaps, leaving others unaddressed

NICOLA THERON

The past five years have been an intensive period of fact finding, data analyses, public hearings and data room exercises for the Competition Commission's health market inquiry panel, during which it worked through volumes of submissions and data. While not without problems along the way, the process in general was one of robust engagement with participation by all stakeholders.

Submissions were received from medical schemes, private hospitals, medical practitioners and nongovernmental organisations (NGOs), and were published on the health market inquiry website. These submissions provided important insights into the process and the position of the various players. Anybody interested in gaining a thorough understanding of the private health market in SA would be well advised to study these submissions. Many stakeholders also attended the public hearings conducted by the panel over this period.

In his presentation of the final report, the panel chair, judge Sandile Ngcobo, emphasised that no submission was received from the national department of health following the publication of the provisional report during July 2018. This sentiment was also expressed during the final seminars arranged by the panel during April 2019.

This is an important point, as it places the panel's recommendations in context. It noted throughout the report that the current regulatory framework is fragmented and incomplete: "We have found there has been inadequate stewardship of the private sector with failures that include the department of health not using existing legislated powers to manage the private healthcare market, failing to ensure regular reviews as required by law, and failing to hold regulators sufficiently accountable. As a consequence, the private sector is neither efficient nor competitive"

This statement provides more insight into the extensive range of recommendations made by the panel. A careful reading of the recommendations shows that the inquiry was largely trying to fill the missing gaps in the current regulatory framework. The panel notes, for example, that the principles of open enrolment and prescribed minimum benefits (PMBs) — which are aimed at protecting consumers — were always meant to be implemented alongside a risk adjustment mechanism, which would have protected the risk position of the medical schemes. It laments the fact that such a risk adjustment mechanism was never introduced through regulation and now recommends the creation of such a mechanism.
In fact, anyone that has closely been involved in regulatory processes in the private healthcare sector over the past number of years, will notice that the panel, in many instances, recommends a revival of some of the past initiatives which have either been abandoned or never implemented. Again, as pointed out by the panel, the department of health has not used its existing legislative powers effectively, as many of these recommendations are already possible under the National Health Act.

The risk adjustment mechanism is not a new idea: the industry made significant progress with the creation of a Risk Equalisation Fund (a version of a risk adjustment mechanism), but this initiative was never completed. At the time, the department instead focused on the move towards national health insurance (NHI). It is interesting to note that the panel sees an important role for a well-functioning medical schemes market, and recognises the important role a risk adjustment mechanism can play in this regard.

Another recommendation with its foundation in an earlier process is the creation of a multilateral tariff negotiating forum. It is envisaged that this forum will create the platform for medical practitioners and medical schemes to negotiate fees through collective bargaining. The rationale is that strong buyers (the medical schemes) will use their buyer power to negotiate competitive prices with medical practitioners.

This forum reminds one of the previous regime of collective bargaining, when the schemes collectively negotiated via their industry association with the hospitals (via their industry association). This was the status quo before 2003, when such collective bargaining was found to be a contravention of the Competition Act. This system was then replaced by bilateral negotiations between each hospital group and each scheme, which the panel recommends should continue.

In its provisional report the panel recommended that hospitals also participate in the forum, but this idea has not found its way into the 2019 final report. This is a recognition of the robust negotiations between hospital groups and schemes, of which much evidence was provided to the panel during the investigation process. The forum is envisaged to aid medical practitioners and medical schemes to reach agreement on tariffs, under the auspices of a new body called the supply-side regulator for health.

The detail of this will have to be worked out, but this is also reminiscent of the earlier process around a national health recommended price list (NHRPL). It is envisaged that the tariffs for PMBs will be set at a maximum level nationally — likely a response to the finding of the panel that PMBs are an important driver of costs. The tariff for non-PMB items will be a reference price.
While this recommendation will potentially cause concern among medical practitioners who now have to comply with a new set of reference (and maximum PMB) prices, it is preferable to a price that is directly determined by government. The idea is at least to use the market mechanism (MTNF) to determine these prices. The majority (non-PMB) prices will in any event be reference prices. This is a far better solution than one where government unilaterally sets the tariffs. This could also be an important milestone for the NHI, as these tariffs might form the basis of future NHI tariffs.

Apart from its recommendations around pricing and the forum, the panel also recommends the introduction of a standard benefit package by all medical schemes. The idea is that consumers should be able to choose between schemes based on one comparable package. This is specifically aimed at addressing the finding of the panel that schemes compete on "benefit design", which comes "at the expense of competition on metrics which improve consumer welfare".

While this seems like a good idea at face value, the fact is that healthcare products are not homogeneous and are by nature difficult to compare. Schemes might continue to compete on the benefit design of other packages — apart from the basic package. Hopefully, the

introduction of a risk adjustment mechanism and maximum PMB prices will do more to address this issue.

In terms of recommendations pertaining to hospitals, it is important to note the differences between those contained in the provisional and the final reports. The 2018 provisional report contemplated remedies such as divestiture of hospitals and/or moratoria on new licences, to reduce the market shares (and overall concentration) of the large private hospital groups.

These have not found their way into the final report. This is important, as it is an implicit recognition by the panel that high concentration in itself is not enough to justify intrusive remedies such as divestiture. Remedies must be proportional to the harm identified, and although the panel is concerned about the structure of the market, it did not find evidence of excessive private hospital tariffs or profits.

Instead, the panel's recommendations rely on market-based mechanisms, such as the continuation of bilateral negotiations and a directive to move towards risk-based tariffs, such as alternative reimbursement mechanisms. It is not clear how this will be enforced, but this recommendation will benefit the whole system as risk needs to be shared between the different providers.
An important related recommendation is that the rules of the Health Professions Council of SA should be amended to facilitate the move towards value-based contracting and risk-sharing models.

The final report also contains numerous other recommendations that will improve the system and potentially facilitate the implementation of the NHI in due course. These include the gathering of data, monitoring and publishing of quality outcomes, and an integrated licensing regime.

The recommendations are extensive, and more detail will become available as stakeholders apply their minds to the practical implications. Importantly, the panel maintains that “the interventions we recommend should be viewed as an integrated whole; and market failures may persist if a partial approach to the implementation of the recommendations is adopted”.

This is probably a reflection of its view that the current regulatory system is fragmented and incomplete, and partial acceptance of the recommendations would only fill some of these gaps while leaving others unaddressed. As noted by the panel: “We are concerned that although the NHA was enacted 16 years ago, its key provisions, in particular those relating to the licensing of facilities, reference lists, the creation and publication of a national database on financing and pricing of healthcare goods and services, have not yet been implemented.”

It is encouraging that the panel's final report tries to revive some of the earlier industry initiatives, albeit in a different form. It also aims to create a more effective and complete regulatory framework for the private healthcare sector. This is a better approach than direct interventions such as divestitures and unilateral price setting by a government body (without industry participation).

The report still has to be tabled in parliament and whether these recommendations will be implemented “as an integrated whole” remains to be seen. It will need support from the department of health, which has to implement and give practical form to many of the

recommendations. This may take a number of years, in a period where the department has already shifted its focus to the implementation of the NHI.

• Theron is extraordinary professor with the Stellenbosch University department of Economics and senior MD at FTI Consulting.