The final report of the Section 59 investigation panel: Will the recommendations be implemented, or will the report just gather dust on the shelf?

The Section 59 Final Investigation Report[1] on the Inquiry into Allegations of Unfair Racial Discrimination and Procedural Unfairness by Medical Schemes, dated 25 April 2025, was eventually made available in the public domain early in July. The investigation was established in terms of sections 7, 8 and 9 of the Medical Schemes Act 131 of 1998. By way of background (and to serve as a recap), early in 2019, a number of black healthcare providers, members of Solutionist Thinkers and the National Health Care Professionals Association (NHCPA), made allegations that they were being treated unfairly by schemes and administrators based on their race and ethnicity. They alleged that black and Indian healthcare practitioners were targeted in relation to conducting practice audits; they were forced to enter into settlement agreements for the payment of large monetary amounts where alleged fraud or other illegal conduct was suspected; through the use of section 59 of the Medical Schemes Act, the schemes and administrators generally engaged in racial profiling; they illegally refused to pay black and Indian practitioners for services rendered to patients; and they caused black- and Indian-owned healthcare practices to close down because they unlawfully withheld payments, thereby reducing access to healthcare.

Initially the Council for Medical Schemes (CMS) established a multidisciplinary steering committee to consider this issue. It supported the establishment of an independent investigation to conduct an inquiry into the allegations. A panel was appointed by the CMS to investigate the complaints and make recommendations to the Council. The allegations made by the complainants as described above were captured into the terms of reference (TOR) for the investigating panel. Of note, the CMS, in respect of its statutory mandate, has the power to investigate complaints and settle disputes relating to the affairs of medical schemes and to advise the Minister of Health on any matter concerning medical schemes. Written submissions were made to the panel in which it was alleged that the schemes were intimidating and bullying providers through the implementation of their fraud, waste and abuse (FWA) systems, including by refusing to reimburse providers directly and coercing them into agreeing to their acknowledgment of debt agreements. The schemes were alleged to be targeting black providers and to be treating them unfairly. The NHCPA explained that it had anecdotal evidence that the schemes' forensic audit process was more prevalent among black providers. When considered holistically, the written submissions suggested that there may be a systemic issue with the way the schemes and administrators were implementing their FWA systems. Because it was difficult to identify such a systemic issue with any accuracy from the written submissions, the panel appointed its own experts to assist with the investigation. These experts included specialists in statistics, statistical modelling, mathematical modelling and analysis of data, particularly survey data. The report explains that the investigation was focused on identifying trends and patterns using detailed data sets and in that manner recognising possible harms associated with the FWA systems implemented by the schemes. As mandated by its TOR, the panel investigated whether the FWA systems had a discriminatory impact. 'Black' in the report referred to individuals who identify as black, Indian and/or coloured.

All the schemes' FWA systems used software or algorithms that were designed to flag providers who were suspected of engaging in FWA. In addition, the FWA systems made use of other investigative techniques, which included staff within the schemes engaging with providers who were flagged as engaging in suspicious FWA behaviour, and often additional information from the providers was requested to test whether they were correctly flagged. According to the report, none of the schemes relied entirely on their software or algorithms to determine whether a provider was guilty of FWA.

The panel found that the complainants had genuinely held beliefs that they had been racially discriminated against. Often, the complainants were completely unrepresented. Where they were represented, they were often less well resourced than the schemes' representatives. In addition, activism rather than legally qualified professionals was used by Solutionist Thinkers and the NHCPA to further their complaints and concerns. The schemes appeared to suggest that the providers' experience of being discriminated against should be rejected. The panel found that there was no basis for the rejection – in their view, they stressed that it would be an affront to a person's dignity to suggest that their experience of discrimination was somehow irrelevant to an inquiry into systemic discrimination. The panel therefore considered the evidence from the complainant providers and accepted that they believed they were discriminated against on the grounds of race.

In undertaking its mandate, the panel applied the anti-discrimination provisions of section 9(4) of the Constitution of South Africa, which states that '[no] person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.' The investigation focused on determining whether there was a systemic flaw in the schemes' and administrators' FWA systems, particularly the part of the system that implemented the Act and entitled schemes to 'claw back' monies for providers where the schemes had suffered loss. The concern with systemic flaws in implementation was that they could result in procedurally unfair treatment of all providers and that they might result in black providers being treated differently from non-black (individuals who do not identify as black, Indian and/or coloured) providers.

The findings in a nutshell, when each scheme was considered separately, were that the FWA outcomes data demonstrated that black providers were more likely than non-black providers to be guilty of FWA. Factual findings were made based on evidence of risk ratios showing racial discrimination against black service providers by the schemes. The results suggest that the implementation of the FWA systems affects black and non-black providers differently. According to the evidence placed before the panel, the report suggested that there was systemic unfair discrimination in the implementation of the FWA systems by the schemes. Systemic discrimination was described as 'forms of discrimination which reflect disproportionate outcomes or biases in the manner in which practices, policies and procedures of certain institutions impact on groups of people who share similar characteristics, such as race, gender, sexual orientation or ethnicity'. It was argued that systemic discrimination was more important to address, as it entrenches embedded inequalities that are often difficult to identify and root out, and that systemic discrimination tends to

affect a group as a whole or part of a group in a disproportionately disadvantageous manner. Systemic discrimination is distinct from individual discrimination. The latter focuses on the position of the individual (as a group member). The panel stated that addressing individual discrimination was just a small step towards addressing systemic discrimination. Because of its nature, systemic discrimination focuses on institutional structures, which embed the discriminatory outcomes. The Constitution prohibits both individual and systemic discrimination. It was emphasised that any finding relating to racial discrimination and a recommendation based on this finding was not a finding that the scheme and administrators were racist. It was further explained that in the public domain it appears that the concept of engaging in discrimination and being a racist are too easily conflated. The former, which in this case means that the FWA systems produced disparate outcomes based on race, demonstrates that there are errors in the FWA systems that must be corrected.

Recommendations by the panel include that schemes and administrators should develop early warning systems to notify providers as soon as they become aware of any circumstances that might lead to the application of section 59(3) of the Act; the audit and claw-back time period needs to be reviewed because of the unjustifiable hardship experienced by providers; there should be a mechanism, e.g. a mediator platform or FWA tribunal, to assist providers in engaging the schemes once providers are accused of conduct that amounts to FWA; there must be complete transparency regarding the software, algorithms and artificial intelligence programs that schemes use, even if it means that the CMS introduces a mechanism where it has full transparency relating to these tools used by the schemes; regulatory detail regarding FWA systems needs to be expanded; the CMS as the regulator responsible for the implementation of the FWA systems is required to ensure that schemes and administrators act procedurally fairly; and the implementation of the FWA systems does not breach section 9 of the Constitution and the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

The report is not concerned with historical blame but with the future protection and realisation of Constitutional aspirations, which include identifying and rooting out systemic inequalities. It is also important to bear in mind that equality law in South Africa, which sets out to correct the injustices of the past, is dynamic and constantly in development. Nevertheless, the right to equality provides that everyone is equal before the law and that everyone has the right to the equal protection and benefit of the law. It also provides that equality includes the full enjoyment of all rights and freedoms – a call, through the right to equality, to identify and root out systemic inequalities. It should be stressed that the findings made by the panel are not final in effect – they underpin the panel's recommendations to the CMS for consideration. There is no obligation placed on the CMS to accept either the panel's findings or its recommendations. It is hoped that when the CMS applies its mind to the findings and recommendations, its course of action is in line with South Africa's Constitutional mandate. Moreover, it took 6 years for the investigation and report to be finalised. With a bit of luck, we may see constructive action from the CMS sooner rather than later.

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1. Ngcukaitobi T, Hassim A, Williams K. Section 59 Investigation. Final Investigation Report. Inquiry into Allegations of Unfair Racial Discrimination and Procedural Unfairness by Medical Schemes. 25 April 2025. https://www.medicalschemes.co.za/section-59-investigation-final-report/ (accessed 16 July 2025).