



Section 59

Established in terms of Section 7(a)(b)(c)(d), 8(a) and (k) and 9(2) of the Medical Schemes Act, 131 of 1998.

NOTICE 2

29 August 2019

UPDATE: PROVISIONAL WORKING METHODS OF THE PANEL

Panel Members: Adv Tembeka Ngcukaitobi (chair) | Adv Adila Hassim | Adv Kerry Williams

Secretariat: Hogan Lovells (South Africa) Inc.

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1. The Investigation Panel refers to its Terms of Reference (“**TOR**”), the Rules of Procedure for the Panel (“**Procedural Rules**”) and Notice 1 setting out its Provisional Working Methods, issued on 25 June 2019, 4 July 2017 and 22 July 2019, respectively (“**Notice 1**”).
2. The Panel wishes to update its provisional working methods to assist interested and affected parties who engage with and appear before the Panel.
3. At the outset, the Panel notes that there has been a tremendous response to the call for interested and affected parties to respond to the TOR with complaints or allegations. In sum, the Panel has received correspondence (in the form of emails, letters, affidavits, court papers and other documents), from approximately 164 health care providers (“**HCPs**”) or entities providing health care services (“**HCP entities**”) as well as their representative associations and consultants and other entities representing HCPs.
4. We note that we refer loosely to the above correspondence as “complaints and allegations”, with the awareness that the nature and the quality of the complaints and allegations vary significantly (some complaints and allegations are factually sparse whilst others are detailed and substantiated; some are in affidavit form and some are in letter form etc.). In this regard, the Panel notes:
 - a. The variance in the nature and quality of complaints is unsurprising and does not detract from their substance;
 - b. The Panel will use the complaints and allegations to identify trends or patterns of behaviour. Where necessary the Panel will engage with the relevant HCP or HCP entity and request that further evidence is provided to the Panel in the form of oral testimony or affidavit/s.

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The dual function of the Panel

5. On the one hand the Panel is mandated to act as an investigator. As part of performing this function it will correspond with parties.
 - a. Already the Panel has sent out correspondence to two medical scheme administrators (Discovery Health and Medscheme) and a medical scheme (GEMS) requesting certain information. Other medical scheme administrators and medical schemes may receive similar requests. Further, parties who have and who may receive such requests should expect follow up requests from the Panel.
 - b. The Panel expects to request HCPs and HCP entities to provide further information, in relation to specific complaints and allegations. Such HCPs and HCP entities should also expect follow up requests from the Panel.
6. On the other hand the Panel is mandated to collect evidence, without the assistance of evidence leaders, both by way of taking oral evidence at the public hearings and collecting documentary evidence which is most likely to be done by way of affidavit.
7. The way in which an investigation body, like the Panel, is intended to function has been previously explained. The Panel's role is therefore to: "... find the answers to certain questions put ... in the terms of reference. A Commission is itself responsible for the collection of evidence, for taking statements from witnesses and for testing the accuracy of such evidence by inquisitorial examination – inquisitorial in the Canonical, not the Spanish sense"¹.

¹ Van de Heever, Masson, Schulz, Van de Merwe, Report of the Commission of Inquiry into the Riots in Durban (1949) p 2. Available at <http://disa.ukzn.ac.za/sites/default/files/DC%20Metadata%20Files/Gandhi-Luthuli%20Documentation%20Centre/DOC%201949/DOC%201949.pdf>.



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8. Parties should be aware that the rules of evidence (both in relation to the burden of proof and the standard of proof) as applicable to investigative panels will be applied by the Panel.²

Point of clarity – Complaints will not be adjudicated by the Panel

9. The Panel has, with the assistance of the CMS, enabled interested and affected parties to submit complaints, allegations and submissions through an email address managed by the CMS (cmsinvestigation@medicalschemes.com).
10. As of 13 August 2019, the Panel had received approximately 349 complaints, allegations and submissions (the deadline for submission of complaints and allegations having been effectively extended).
11. No further complaints or allegations have been received by the Panel since the aforementioned date.
12. The aforementioned email address is closed and any further correspondence with the Panel should be done through the Secretariat (Hogan Lovells: ushir.ahir@hoganlovells.com / Ushir.Ahir@cmsinvestigation.org.za).
13. A number of email queries have also been sent to the aforementioned email address. Some emails have queried when a particular complaint or allegation will be resolved. The TOR provide that the Panel will:
 - a. “investigate complaints and allegations received by the CMS relating to section 59”;

² Farlam, Hemraj SC, Tokota SC, Marikana Commission of Inquiry: Report on matters of Public, National and International concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province (2015) p 22 – 29, para 1 – 3. Available at <https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf>.



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- b. “make recommendations to the CMS in relation to addressing the complaints and allegations”;
 - c. “identify any trends emerging from the complaints and allegations which may require further legal or policy interventions”.
14. The Panel wishes to emphasise that it does not intend to resolve individual complaints and allegations. The Panel is relying on the complaints and allegations to understand the issues and identify any trends which may be helpful in fulfilling its functions.
15. Complainants should therefore continue to make use of the formal statutory mechanisms for the submission and resolution of complaints through the CMS.

Responding to complaints and allegations

16. The Panel has received a number of queries by those against whom complaints and allegations have been made (“**Respondents**”). The Panel will as far as possible respond to these queries individually.
17. The Panel wishes to draw to the Respondents attention that:
- a. To the extent that the Panel receives written complaints or allegations these will be made available to the Respondents for comments (in accordance with the Procedural Rules);
 - b. Respondents should also have reference to the transcripts and video recordings which are published on the CMS investigation website (www.cmsinvestigation.org.za) in order to determine any complaints and allegations that are made against them during the public hearings;

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- c. Respondents may submit written responses to the above complaints or allegations. Respondents may also choose to respond the complaints or allegations during their oral hearings;
- d. Respondents may accordingly choose the timing and form of the response they wish to submit.

Phases of work

- 18. As explained in Notice 1, the Panel will divide its work into a number of phases.
- 19. The second phase of work has involved a further public hearing, between **20 - 23 August 2019** and **29 August 2019** for associations and other related health care provider organisations.
- 20. The third phase of work will involve further public hearings for specific HCPs and HCP entities in **September 2019**.
- 21. The fourth and fifth phases of work will involve further public hearings for medical schemes and administrators (against whom allegations have been made) in **October 2019**.
- 22. Thereafter there may be a further phase of work for public hearing for NGOs or other interested parties.
- 23. The dates and schedules for such further hearings are still to be determined.
- 24. Finally, the Panel notes that it is actively investigating issues in parallel with the aforementioned public hearings. The Panel requests that parties respond to letters from the Panel and requests for meetings promptly.

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Yours sincerely,

The Investigation Panel

TRANSMITTED ELECTRONICALLY WITHOUT SIGNATURE

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