

**IN THE SECTION 59 ENQUIRY**

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**WRITTEN LEGAL SUBMISSIONS ON BEHALF OF  
THE GOVERNMENT EMPLOYEES MEDICAL SCHEME  
(“GEMS”)**

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## **Introduction**

1. On 9 May 2023, the secretariat of the Section 59 Panel (*“the Panel”*) invited stakeholders to make legal submissions to the Panel in relation to the Interim Report of the Panel (*“the Interim Report”*) which was signed on the 4<sup>th</sup> of December 2020 and released to the public on Tuesday the 19<sup>th</sup> of January 2021.
2. In the abovementioned invitation, the secretariat indicated that any stakeholder who wishes to make oral legal submissions will be required to submit written legal submissions 7 calendar days before it is scheduled to present such oral legal submissions.
3. GEMS accepted the invitation to make oral legal submissions. These written legal submissions are submitted in response to the abovementioned invitation.
4. We point out that during the course of the section 59 Investigation, GEMS provided comprehensive written submissions and supplementary written submissions to the Panel, and that it had also submitted *detailed* written responses to each of the complaints submitted to the Panel which related to GEMS, thereby placing all facts relevant to each complaint before the Panel and clearly indicating that none of the decisions taken by GEMS were motivated by any racial considerations. GEMS also presented reports of experts, and the experts made verbal submissions to the Panel.

5. After the Interim Report had been released to the public, GEMS (and other affected parties) were provided with an opportunity to comment on the Interim Report. On 5 April 2021, GEMS submitted its written comments in relation to certain views and findings contained in the Interim Report (“*GEMS’ comments*”).
6. In the present written submissions, certain of the legal aspects of the earlier submissions and GEMS’ comments are emphasised. The present written submissions do not in any way limit or derogate from the earlier submissions by GEMS and the experts, or the GEMS comments, and the Panel is requested to consider all submissions and comments made by or on behalf of GEMS from the outset.
7. We point out that in GEMS’ comments, GEMS made it clear that it welcomes all investigations and efforts to identify and eradicate racial practices in the Republic, which has been plagued by racial prejudice and inequality for far too long, and that GEMS welcomed and commended the establishment of the Panel.<sup>1</sup>
8. GEMS demonstrated that it is a transformative organisation, with a clear focus on transformation, which progressively promotes Broad-Based Black Economic Empowerment.<sup>2</sup>

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<sup>1</sup> GEMS comments, p4, para 4 and 5

<sup>2</sup> GEMS comments, p6 to 8, para 11 to 17

9. GEMS pointed out that its policies, programmes and business activities should not only be geared towards creating and preserving value for the Scheme and its beneficiaries, but should not erode value for stakeholders in the health ecosystem. This is balanced with the responsibility to prevent, detect and appropriately respond to what is now commonly referred to as fraud, waste and abuse (“*FWA*”).<sup>3</sup>
  
10. GEMS furthermore demonstrated in GEMS’ comments that the Panel mis-identified the cause or causes of its findings in relation to unfair racial discrimination, and that the Panel came to conclusions, about GEMS, that are incorrect.<sup>4</sup>
  
11. In these written submissions we:
  - 11.1. provide an overview of the complaints of discrimination forming the subject matter of the Panel’s Terms of Reference;
  
  - 11.2. provide an overview of the Interim Report and the Panel’s findings;
  
  - 11.3. draw attention to certain views and findings that are welcomed and/or specifically noted by GEMS;

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<sup>3</sup> GEMS comments, p9, par 18

<sup>4</sup> GEMS comments, p5, para 7 to 8

- 11.4. refer to the relevant provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (*“the Equality Act”*);
- 11.5. emphasise that the objective facts do not indicate that there is any racially discriminatory act or omission on the part of GEMS;
- 11.6. discuss the clear absence of causation;
- 11.7. briefly refer to processes implemented by GEMS in relation to section 59(2) & (3) of the Medical Schemes Act 131 of 1998 (*“the MSA”*);
- 11.8. provide our conclusion.

### **The allegations of racial discrimination that had to be investigated by the Panel**

12. The allegations of racial discrimination, as per the Panel’s Terms of Reference,<sup>5</sup> are as follows:

- “(i) targeting Black and Indian<sup>6</sup> health care practitioners (“practitioners”) in relation to conducting practice audits;*
- (ii) forcing Black and Indian practitioners to enter into settlement agreements for the payment of large monetary*

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<sup>5</sup> Interim Report, para 7, 323; Terms of Reference, para 1

<sup>6</sup> GEMS indicated at page 31 of the GEMS comments, fn 24, that the use of the term “Indian” to refer to South Africans is most unfortunate. While the practitioners it seeks to describe may be of Indian descent, they are South Africans and the term “Indian” has unfortunately and shockingly been adopted from Apartheid terminology and classification. It is particularly troubling that it is used in an investigation that itself sought to investigate racial practices. GEMS stated that it is comfortable with the classifications adopted by the Panel of “Black” and Non-Black” for purposes of identification.

*amounts where alleged fraud or other illegal conduct is suspected;*

- (iii) generally engaging in racial profiling in the manner in which such medical schemes and their administrators are making use of section 59 of the Medical Schemes Act, 1998 (“the Act”);*
- (iv) illegally refusing to pay Black and Indian practitioners for services rendered to patients;*
- (v) causing Black and Indian owned health care practices to close down their practices, as a result of unlawfully withholding payments, and as a result reducing access to healthcare.”*

### **Overview of the Interim Report and the Panel’s findings**

13. The Interim Report, which was released to the public on Tuesday, 19<sup>th</sup> of January 2021, deals with the Panel’s investigation into complaints received from health care providers and organisations (*“providers”*). The complaints were divided by the Panel into two broad categories, which were described by the Panel as follows (with added emphasis):<sup>7</sup>

13.1. *“The first category related to racial profiling. The essence of these complaints was that Black providers (are) more likely to be targeted for*

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<sup>7</sup> Interim Report, par 10

*investigation for committing FWA and having their practices audited than their Non-Black counterparts”;*

13.2. *“The second category of complaints related to unfairness and abuse in the way the schemes implement section 59 of the Act.”*

14. In GEMS’ comments,<sup>8</sup> it was pointed out that the Interim Report:

14.1. contains several views and findings that are welcomed and/or specifically noted by GEMS;

14.2. also contains certain views and findings that are (it is respectfully submitted) fundamentally incorrect;

14.3. contains numerous general comments where the Panel elected not to draw a distinction between the position of GEMS and the position of other schemes or administrators, in circumstances where they clearly operate in different ways;

14.4. refers to or quotes contentions and submissions of certain complainants, without indicating as to which scheme or administrator the specific complaint related, thereby creating the impression that such complaints, contentions and submissions apply across the board to all the schemes and administrators involved, including GEMS;

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<sup>8</sup> GEMS comments, p10 to 14, par 21 to 21.6.7

14.5. reveals that, although the Terms of Reference of the Panel mandated it to investigate complaints submitted by providers, the Panel did not adjudicate *individual* complaints and the Panel did not make findings of ‘guilt’ or liability in the manner that a judicial body would in the context of a dispute between parties.<sup>9</sup> In this regard the following was specifically pointed out:<sup>10</sup>

14.5.1. GEMS had during the course of the section 59 Investigation submitted *detailed* written responses to each of the complaints submitted to the Panel which related to GEMS, placing all facts relevant to each complaint before the Panel and clearly indicating that none of the decisions taken by GEMS were motivated by any racial considerations.

14.5.2. In the Interim Report there is no finding by the Panel that any of the complaints lodged in respect of GEMS have merit.

14.5.3. The Panel records that the number of complaints contain no conclusive evidence of racial discrimination, more particularly that Black practitioners are targeted more than their non-Black counterparts.

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<sup>9</sup> Interim Report, para 36, 327

<sup>10</sup> GEMS comments, p13 to 14, par 21.6.1 to 21.6.7



- 14.5.4. Instead of focusing on the individual complaints made against GEMS and instead of considering and taking into account GEMS' specific and detailed factual responses to each such complaint, which reveal that the complaints do not establish racial discrimination, the Panel elected to shift the focus away from the individual complaints and to rather resort to a statistical analysis of selected data.
- 14.5.5. It was submitted that this approach, including the statistical workings themselves *and* the interpretation of the “*outcomes*” of the statistical workings, is fundamentally flawed and unreliable.
- 14.5.6. It was pointed out further that the approach adopted by the Panel has resulted in the Panel forming generalized and overarching views about unfair racial discrimination which are neither substantiated nor case-specific.
- 14.5.7. GEMS submitted that these views and the findings arrived at by the Panel are negated by, *inter alia*, certain of the Panel's own findings, GEMS' detailed factual responses to the individual complaints and the fundamental flaws in the statistical workings relied upon by the Panel.

15. In relation to the complaints of racial profiling, the Panel found that Black practitioners are more likely to be found *to have committed* FWA than their non-Black (White) counterparts, by Discovery, Medscheme and GEMS. The Panel stated that this meant, on the basis of the motivation provided in the Interim Report, that there is unfair racial discrimination.<sup>11</sup>
  
16. However:<sup>12</sup>
  - 16.1. The Interim Report contains no evidence whatsoever of explicit racial bias or discrimination by GEMS, and the Panel did not make any such finding.
  
  - 16.2. GEMS is an organisation with zero tolerance towards unfair discrimination, including but not limited to racial discrimination.
  
  - 16.3. GEMS fully participated in the Section 59 investigation and made a full disclosure of its policies, systems, data and further relevant information.
  
  - 16.4. GEMS had responded in detail to each of the individual complaints submitted to the Panel which related to GEMS. In the Interim Report, there is no finding by the Panel that any of the individual complaints lodged by providers in respect of GEMS have any merit. The complaints

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<sup>11</sup> Interim Report, par 707

<sup>12</sup> GEMS comments, p15 to 20, par 22.1 to 22.16

and the responses thereto contain no conclusive evidence of deliberate unfair treatment or racial discrimination.

- 16.5. GEMS does not provide for the inclusion of data reflecting the race of providers in GEMS' systems, nor is it included in the BHF (Board of Healthcare Funders) provider file that is shared with administrators. GEMS' systems do not contain a race category. GEMS is not involved in any form of racial profiling.
- 16.6. The Panel was able to properly assess the risk management systems of GEMS,<sup>13</sup> and the Panel did not find evidence of explicit racial bias in the algorithms (to the extent that the workings of the algorithms were disclosed) and the methods that GEMS uses to identify FWA. The Panel has not found evidence of deliberate unfair treatment either. According to the Panel, the evidence shows that there is unfair discrimination in the "outcomes",<sup>14</sup> which is a flawed conclusion.
- 16.7. GEMS carefully considered the finding of implicit unfair racial discrimination which has been leveled against GEMS by the Panel, including the statistical basis advanced for such finding. It is evident that

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<sup>13</sup> Interim Report, par 12.1

<sup>14</sup> Interim Report, para 708 & 753

the finding by the Panel is in conflict with the objective facts, and GEMS does not accept the finding.

- 16.8. GEMS takes serious issue with the Panel's view that ostensible racial differentiation in statistical "*outcomes*" amount to unfair racial discrimination by GEMS.
- 16.9. GEMS takes serious issue with the Panel's view "*that Black providers are more likely to be targeted by GEMS for investigation for committing FWA*", and with the Panel's further related/similar views as contained in the Interim Report.
- 16.10. GEMS requested its statutory actuaries ("*Insight Actuaries*") to review the Interim Report together with the report prepared by the statistical experts appointed by the Panel, to consider the approach adopted and the findings arrived at and to provide a report in relation thereto ("*the Insight Report*").<sup>15</sup>
- 16.11. The Insight Report fortified the submission by GEMS that the approach adopted by the Panel is fundamentally flawed: In short:<sup>16</sup>

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<sup>15</sup> The Insight Report is attached to the GEMS comments

<sup>16</sup> GEMS comments, p17 to 20, par 22.11 to 22.16

- 16.11.1. The execution of the analyses by the Panel's expert were fundamentally flawed;
  - 16.11.2. Analyses were subject to a variety of gross technical errors and oversights as detailed in the Insight Report and which are emphasized below;
  - 16.11.3. Results were incorrectly interpreted. No credence should be given to either the analyses or the resultant conclusions based thereon.
17. In relation to the complaints about the way the schemes implement the provisions of section 59 of the MSA, the Panel found (by way of broad summary) that the powers to claw back money in terms of section 52(3) and the placing of a provider on indirect payment, must be exercised lawfully, reasonably and in a manner that is procedurally fair.
18. In this regard<sup>17</sup> GEMS demonstrated *inter alia* that:
- 18.1. its implementation of the provisions of section 59 is indeed lawful and reasonable; and
  - 18.2. it is done in a manner that is procedurally fair.

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<sup>17</sup> GEMS comments, p21, par 24.1 and 24.2; p87 to 110, par 103 to 126

**Views and findings that are welcomed or specifically noted**

19. The following views and findings were welcomed and/or specifically noted by GEMS:<sup>18</sup>

19.1. The statement by the Panel that it was able to properly assess the risk management systems of GEMS (amongst others).<sup>19</sup>

19.2. The Panel *did not find evidence* of explicit racial bias in the algorithms (to the extent that the workings of the algorithms were disclosed) and methods that the administrators and schemes use to identify FWA. The Panel stated that it is important to stress that *the Panel has not found evidence* of deliberate unfair treatment. According to the Panel, the evidence shows that the unfair discrimination which had been found by the Panel is in the “*outcomes*”.<sup>20</sup> This finding has no merit and is dealt with in GEMS’ comments.

19.3. The Panel recorded that it did not adjudicate individual complaints and that the Panel did not make findings of ‘*guilt*’ or liability in the manner that a judicial body would in the context of a *lis* between parties.<sup>21</sup>

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<sup>18</sup> GEMS comments, p24 to 27, par 32.1 to 32.11

<sup>19</sup> Interim Report, par 12.1

<sup>20</sup> Interim Report, para 708 & 753

<sup>21</sup> Interim Report, para 36, 327

- 19.4. The Panel noted that the schemes provided comprehensive responses to many of the complaints, and that, in many of these responses, it is clear that there was a sufficient basis on which to initiate investigations.<sup>22</sup>
- 19.5. The loss sustained by schemes due to irregular claims including FWA is significant. The lack of precise figures notwithstanding, the Panel accepted that the impact of this problem is serious.<sup>23</sup>
- 19.6. It is clear that FWA is profoundly serious, has a decidedly negative impact on members and schemes, and there is a constant need to address it.<sup>24</sup>
- 19.7. FWA is also a problem for members of schemes as money that is lost to FWA has a direct impact on members' contributions and the ability of lower income earners to join schemes. This is particularly so as the negative impact of FWA is ultimately experienced by members of medical schemes – as the schemes hold members' monies in trust and both administrators and schemes are obliged to take steps to prevent FWA.<sup>25</sup>

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<sup>22</sup> Interim Report, para 165

<sup>23</sup> Interim Report, para 75 & 76

<sup>24</sup> Interim Report, para 166

<sup>25</sup> Interim Report, par 700.2 & 700.3

- 19.8. The Panel recorded that the Panel had proceeded on the basis that no one entity had the onus of proving or disproving unfair discrimination by schemes and administrators.<sup>26</sup>
- 19.9. The Panel received hundreds of complaints of discrimination. The number of complaints does not prove differential treatment or racial profiling. While they provide evidence both of the experience of possible discrimination (through for example, feeling racially profiled or targeted) and its concomitant harm, it is not alone conclusive evidence of racial discrimination, and more particularly that Black practitioners are targeted more than their non-Black counterparts.<sup>27</sup>
- 19.10. A proper control system would include a proper system of financial control. A proper system of financial control would include systems which prevent payments being made to providers where it is reasonably certain that such providers are engaged in fraud, theft, professional misconduct or negligent behaviour which is causing the scheme loss.<sup>28</sup>
- 19.11. When a scheme makes a decision to deduct an amount in terms of section 59(3), it must do so based on, at the very least, a rational method of calculation and probably on a reasonable method of calculation. The method of calculation should therefore be justifiable, in that it should be

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<sup>26</sup> Interim Report, par 44

<sup>27</sup> Interim Report, par 433

<sup>28</sup> Interim Report, par 433



based on the logic of mathematics and/or statistics. On this standard it seems that the methodologies put forward by GEMS and Discovery pass muster in that they are *probably reasonable*.<sup>29</sup>

### **Relevant provisions of the Equality Act**

20. In section 1 of the Equality Act, discrimination is defined as follows: -

*'discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-*

- (a) imposes burdens, obligations or disadvantage on; or*
  - (b) withholds benefits, opportunities or advantages from,*
- any person on one or more of the prohibited grounds;”*

21. Section 4(2) of the Equality Act provides as follows:

*“(2) In the application of this Act the following should be recognised and taken into account:*

- (a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and*
- (b) the need to take measures at all levels to eliminate such discrimination and inequalities.”*

22. Sections 6 and 7 of the Equality Act provide as follows:

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<sup>29</sup> Interim Report, para 671 & 672

*“6 Prevention and general prohibition of unfair discrimination*

*Neither the State nor any person may unfairly discriminate against any person.*

*7 Prohibition of unfair discrimination on ground of race*

*Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-*

- (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;*
- (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;*
- (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;*
- (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;*
- (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.”*

23. Section 13 of *the Equality Act* provides as follows with regard to the burden of proof:

*“13 Burden of proof*

- (1) If the complainant makes out a prima facie case of discrimination-*
  - (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or*

- (b) *the respondent must prove that the conduct is not based on one or more of the prohibited grounds.*
- (2) *If the discrimination did take place-*
  - (a) *on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair [this prohibited ground includes race];*
  - (b) *on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair-*
    - (i) *if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and*
    - (ii) *unless the respondent proves that the discrimination is fair."*

**No discriminatory act or omission on the part of GEMS**

24. It is clear from the definition of discrimination in terms of the Equality Act that, in order for discrimination to be established, there must firstly be evidence of **conduct** in the form of:

24.1. an **act**;

or an

24.2. **omission**.

which could include **a policy, law, rule, practice, condition or situation**.

25. Secondly, ***such conduct*** must **directly or indirectly impose** burdens, obligations or disadvantage on; ***or withhold*** benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.
26. The Panel made reference to the Walker case.<sup>30</sup> In Walker the main issue was whether the use by the applicant of differential tariffs in the recovery of service charges and the selective enforcement of debt recovery amounted, in the circumstances, to a breach of the equality provisions in the interim Constitution.
27. In Walker the **conduct** of the City Council is plain to see: it used differential tariffs and it selectively enforced debt recovery.
28. In the present investigation there is simply no act or omission on the part of GEMS that has been identified and found by the Panel to constitute racial discrimination.
29. We have already referred to the specific allegations of racial discrimination, as per the Panel's Terms of Reference.<sup>31</sup> The facts before the Panel do not reveal any such **conduct** (explicit or implicit, intentional or unintentional) on the part of GEMS, and neither does the Interim Report. None of the complaints against GEMS, read with the detailed responses submitted by GEMS, could support a finding of any such conduct on the part of GEMS and no such finding has been made by the Panel.

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<sup>30</sup> Pretoria CC v Walker 1998 (2) SA 363 (CC) (1998 (3) BCLR 257; [1998] ZACC 1)

<sup>31</sup> Interim Report, para 7, 323; Terms of Reference, para 1

30. The Panel has not identified any specific act, omission, policy, law, rule, practice, condition or situation on the part of GEMS, falling within the Terms of Reference (or otherwise) that could possibly qualify as an act or omission falling within the definition of *discrimination* in the *Equality Act*.
  
31. In this regard it is emphasised that there is no factual finding of GEMS having:
  - 31.1. targeted Black and “Indian” health care practitioners in relation to conducting practice audits;
  
  - 31.2. forced Black and “Indian” practitioners to enter into settlement agreements;
  
  - 31.3. generally engaged in racial profiling in the manner in which GEMS and its administrator are making use of section 59;
  
  - 31.4. illegally refused to pay Black and “Indian” practitioners for services rendered to patients;
  
  - 31.5. caused Black and “Indian” owned health care practices to close down their practices, as a result of unlawfully withholding payments.
  
32. Instead, without first identifying any such alleged conduct, the Panel started at the tail-end of the enquiry, recording their view that taking responsibility for the

conduct which produced skewed outcomes should have been the first step in properly addressing the allegations, where it stated:<sup>32</sup>

*“Having said that, the schemes and administrators all denied that they engaged in conduct which produced racially discriminatory outcomes. In the view of the Panel this is a pity as the first step in properly addressing the allegations is taking responsibility for the conduct which produced skewed outcomes – even where such conduct was not intentional.”*

33. We emphasise that:

33.1. The Panel did not find evidence of explicit racial bias in the algorithms and methods that the administrators and schemes use to identify FWA:<sup>33</sup>

*“We do not find evidence of explicit racial bias in the algorithms (to the extent that the workings of the algorithms were disclosed) and methods that the administrators and schemes use to identify FWA”*

33.2. The Panel stated that it is important to stress that the Panel has not found evidence of deliberate unfair treatment:<sup>34</sup>

*“But we believe that it is important to stress that we have not found evidence of deliberate unfair treatment – the evidence shows the unfair discrimination is in the outcomes”*

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<sup>32</sup> Interim Report, par 331

<sup>33</sup> Interim Report, par 708

<sup>34</sup> Interim Report, par 753

33.3. None of the complaints against GEMS, read with the detailed responses submitted by GEMS, could support a finding of any such conduct on the part of GEMS and no such findings were made.<sup>35</sup>

*“The Panel did not adjudicate individual complaints.”*

34. Despite the fact that there is no evidence of explicit racial bias, the Panel expressed the view that the statistical outcome of the FWA investigations, conducted by Discovery, GEMS and Medscheme between 2012 and 2019, amount to unfair racial discrimination against Black practitioners.<sup>36</sup>

35. However, reference to statistical “outcomes” (which in any event are incorrect) which may seem to present a racially skewed outcome, does not logically, or in law, establish any conduct on the part of GEMS falling within the definition of discrimination and having such result. An assumption that such flawed statistical “outcomes” which may seem to present a racially skewed outcome constitutes proof of discrimination in the FWA processes followed by GEMS, is not sound or justified in any way.

36. At best, the flawed statistical “outcomes” merely show that there is a potential *correlation* between two variables. *Correlation* does not imply *causation*<sup>37</sup> and

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<sup>35</sup> Interim Report, par 36

<sup>36</sup> Interim Report, par 712

<sup>37</sup> Insight Report, par 2

there is no basis to conclude that GEMS is responsible for (or has in any way caused) the alleged correlation between race and investigations into FWA.

37. Furthermore, the objective facts clearly illustrate that:

37.1. GEMS is a true transformative organisation which does not engage in racism and it views any allegations of racism in a serious light;

37.2. GEMS has no motive whatsoever to engage in “*racial profiling*”;

37.3. GEMS does not engage in “*racial profiling*”;

37.4. GEMS’ systems are not equipped to engage in “*racial profiling*”: there is no evidence of any explicit racial bias in the algorithms and methods used by GEMS to identify FWA and there is no evidence of any deliberate unfair treatment by GEMS;

37.5. The ratio of the complaints received from the outside world (whistleblowers and members), over which complaints GEMS has no control, corresponds with the ratio of providers investigated by GEMS. There is clearly no conduct on the part of GEMS which *caused* the ratio of calls received via the Vuvuzela hotline to be what it is.

38. It is emphasized that the flawed statistical “*outcomes*” which may seem to present a racially skewed outcome does not logically, factually, or in law, establish, even



on a *prima facie* basis, any **conduct** on the part of GEMS which has **caused** any of the results contemplated in the definition of “*discrimination*”.

39. As mentioned above, GEMS requested Insight Actuaries to review the Interim Report together with the report prepared by the statistical experts appointed by the Panel, to consider the approach adopted and the findings arrived at and to provide a report in relation thereto. Pursuant to this mandate, the Insight Report was produced.<sup>38</sup> The Insight Report contains a review of the analytics underpinning the Interim Report.
  
40. The Insight Report fortified the submission by GEMS that the approach adopted by the Panel is fundamentally flawed. In summary:<sup>39</sup>
  - 40.1. The execution of the analyses by the Panel’s expert were fundamentally flawed;
  
  - 40.2. Analyses were subject to a variety of gross technical errors and oversights as detailed in the Insight Report and which are emphasized below;
  
  - 40.3. Results were incorrectly interpreted. No credence should be given to either the analyses or the resultant conclusions based thereon.

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<sup>38</sup> The Insight Report is attached to the GEMS comments

<sup>39</sup> GEMS comments, p17 to 20, par 22.11 to 22.16

40.4. The methodological flaws in the approach adopted by the Panel's expert include, but are not limited to, the following:<sup>40</sup>

40.4.1. Public hospitals cannot be assigned a race, but public hospitals were nevertheless erroneously included in the assessment and were typically deemed to be non-Black based on their practice name;

40.4.2. Corporate practices cannot be assigned a race in the absence of detailed studies in relation to ownership and employment, but corporate practices were nevertheless erroneously included and were typically deemed to be non-Black based on their practice name;

40.4.3. Group practices cannot be assigned a race in the absence of detailed studies in relation to ownership and employment, but group practices were nevertheless erroneously included in the assessment and were typically deemed to be non-Black based on their practice name;

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<sup>40</sup> Insight Report, par 2

- 40.4.4. Practices were assigned a *race* based on their *surnames*. A high number of errors have been detected in the mapping between practice surnames and race;
- 40.4.5. The GEMS membership has a greater propensity to consult with Black practitioners as opposed to non-Black practitioners. No adjustments for differences in exposure were made;
- 40.4.6. Differences between Black and non-Black practitioners may be attributed to confounding factors. No effort was made to identify and to adjust for confounding factors.
- 40.5. The flaws in the report prepared by the Panel's expert are too significant to be fully remediated in any workings by the schemes or the actuaries appointed by them. Schemes can only demonstrate that the partial remediation of the serious flaws in the methods adopted by the Panel's expert, dramatically influences the results. A complete remediation of results (to the extent that this could be possible) could profoundly change results.<sup>41</sup>
- 40.6. Even if the results were correct and even if the results showed that there were differences between Black and non-Black practitioners, this is not

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<sup>41</sup> Insight Report, par 2

indicative of racial discrimination. This merely shows that there is a *correlation* between the two variables. *Correlation* does not imply *causation*.<sup>42</sup>

40.7. Insight Actuaries furthermore point out that it is absurd to conclude that GEMS is responsible for the alleged correlation between race and investigations into FWA.<sup>43</sup>

40.8. The Vuvuzela hotline is of particular importance:<sup>44</sup>

40.8.1. Practices can be identified for investigation based on either tipoffs (primarily from members of GEMS) or via analytical processes.

40.8.2. Tipoffs are sourced via the Vuvuzela hotline. GEMS and its services have no ability to influence who reports and which practitioners are reported via the hotline. After excluding corporate, state and group practices, the Vuvuzela hotline is responsible for 56.9% of the practices investigated.

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<sup>42</sup> Insight Report, par 2

<sup>43</sup> Insight Report, par 2

<sup>44</sup> Insight Report, par 7

- 40.8.3. The remediated risk ratio based only on practitioners identified by the Vuvuzela hotline is 1.30. Based on analytical processes, the risk ratio is a comparatively low 1.24.
- 40.8.4. This demonstrates that GEMS is no more likely to flag Black practitioners for investigations into FWA than a completely neutral and independent process.
- 40.8.5. Insight Actuaries point out that this suggests that the GEMS analytical process is itself neutral and independent. This argument was presented to the Panel and its expert. The argument was disregarded, in the absence of a clear rationale for having done so.
- 40.8.6. Insight Actuaries state that it should also be noted that GEMS has no choice but to investigate independent and unbiased tipoffs. Failing to investigate tipoffs in relation to FWA would amount to a dereliction of duty.

40.9. Insight Actuaries' conclusions and recommendations include the following:<sup>45</sup>

40.9.1. Insight Actuaries point out that the methodology underpinning the assessment used to suggest that Black practitioners are more likely to be investigated by GEMS for FWA is fundamentally flawed. A flawed methodology results in erroneous results which cannot be trusted.

40.9.2. Insight Actuaries point out further that the interpretation of the results (even if these results were correct) is also fundamentally flawed. A difference between Black and non-Black practitioners does not equate to racial bias on the part of GEMS. Insight Actuaries point out that no credence should be given to the results and no conclusions can be drawn therefrom.

40.9.3. Insight Actuaries state that the flaws in the approach adopted by the Panel's expert are too significant to be fully remediated by schemes (or the actuaries appointed by them). Schemes can only demonstrate that the partial remediation of these flaws dramatically influences statistical results. The complete

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<sup>45</sup> Insight Report, par 8

remediation of statistical results (to the extent that this is possible) has the potential to influence results even more dramatically.

40.9.4. Insight Actuaries indicate further that even if the results were correct and even if the results showed there to be a difference between Black and non-Black practitioners, this is not indicative of racial discrimination. This merely shows that there is a *correlation* between two variables. Correlation does not imply causation. The correlation could be explained by a multitude of extenuating factors such as, for example, economic hardships.

40.9.5. Insight Actuaries point out that it is thus absurd to conclude that GEMS is responsible for any possible correlation between race and investigations into FWA. This is especially because GEMS has demonstrated that its processes are free of bias.

41. It is evident from the Insight Report that the conclusions reached by the expert appointed by the Panel do not establish any conduct on the part of GEMS which amounts to racial discrimination.

42. This is *inter alia* clearly illustrated by the fact that the remediated risk ratio based only on practitioners identified by the Vuvuzela hotline is 1.30. Based on analytical processes, the risk ratio is a comparatively low 1.24.
43. This demonstrates that GEMS is no more likely to flag Black practitioners for investigations into FWA, than a completely neutral and independent process. Furthermore, this fortifies the fact the GEMS' analytical process is itself neutral and independent (it having already been found that there is no explicit bias).
44. It was stated in the Interim Report that the GEMS experts submitted that Black practitioners are 45% more likely to be flagged as possibly guilty of FWA than non-Black practitioners via the Vuvuzela hotline. Because this is almost precisely the same as the revised risk ratio of 47%, it implies that GEMS' FWA processes arising from their analytics and investigations are not racially biased.<sup>46</sup> It should be borne in mind that these ratios had not been remediated to the same extent as those in the Insight Report. But nevertheless, even the higher ratios referred to in the Interim Report prove the same point, i.e. that the GEMS analytical process is itself neutral and independent.
45. The fact that the GEMS analytical process is itself neutral and independent is further confirmed by GEMS' evidence that there is no act or omission or other element within the systems, policies and processes of GEMS which could result

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<sup>46</sup> Interim Report, par 480.3



in the identified risk ratio. The ratio of calls received via the Vuvuzela hotline is simply the ratio of the complaints received from the outside world, over which GEMS has no control - there is no conduct on the part of GEMS which *caused* that ratio to be what it is.

46. The facts before the Panel simply do *not* establish any conduct on the part of GEMS which could possibly fall into the definition of discrimination.
47. It furthermore appears that the Panel relied on the reverse onus contained in section 13 of *the Equality Act* in support of the Panel's findings:

*“The onus is on GEMS, Discovery and Medscheme to show that the discriminatory outcome is not unfair (or is fair)”<sup>47</sup>*

48. The Panel relied on the reverse onus, despite the Panel having specifically recorded that the Panel had proceeded on the basis that *no one entity had the onus of proving or disproving unfair discrimination* by schemes and administrators.<sup>48</sup>
49. The Panel further found that *“the onus is on GEMS to demonstrate what these factors are and hence we reject the assertion that no unfair discrimination has occurred.”*<sup>49</sup>

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<sup>47</sup> Interim Report, par 445

<sup>48</sup> Interim Report, par 44

<sup>49</sup> Interim Report, par 480.3

50. It is clear that the reverse onus contained in section 13 of the Equality Act would only be triggered ...

*“If the complainant makes out a prima facie case of discrimination.”*

51. Such *prima facie* case must include proof of conduct falling into the definition of discrimination (and it must include causation too).

52. As illustrated above, no *prima facie* case of any such conduct has been made out against GEMS. On the contrary, the facts before the Panel prove the absence of any such conduct on the part of GEMS.

53. The statistical “*outcomes*” have been shown not to be reliable and such outcomes *per se* can never be regarded as having established conduct in the form of discrimination which could trigger the reverse onus.

54. Therefore, a *prima facie* case of discrimination has not been made out against GEMS and the reverse onus contained in section 13 of the Equality Act has *not* been triggered. It cannot be expected of GEMS to prove that the discrimination did not take place or that its conduct is not based on one or more of the prohibited grounds of conduct, when no such *prima facie* conduct of discrimination had been established in the first place.

55. But even if it were to be found that the statistical “*outcomes*” had made out a *prima facie* case of discrimination and the reverse onus had been triggered, GEMS

reiterates that the objective facts before the Panel and its own findings prove the absence of any conduct on the part of GEMS falling into the definition of discrimination.

56. The Panel mentioned the fact that the medical schemes, including GEMS, denied unfair discrimination on the basis of race by referring to the fact that the FWA investigations are triggered by either:

56.1. an automated system, underpinned by an algorithm, that flags outlier practices for investigation; or

56.2. tip-offs and whistleblowers and that only the practice numbers of service providers are known in the first method and that there is no assignment or identification of race either explicitly or implicitly;<sup>50</sup>

and then it makes a leap from that proposition to incorrectly concluding that because there is a higher incidence of Black practitioners being found to have committed FWA that it automatically translates to unfair discrimination.<sup>51</sup>

57. This leap of reasoning goes against the very case cited by the Panel (*Walker*) and while GEMS accepts that intention is not required in either direct or indirect discrimination, the objective facts do not support the conclusion reached by the Panel that there was unfair discrimination based on race. The following portion of

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<sup>50</sup> Interim Report, paragraph 706.

<sup>51</sup> Interim Report, paragraph 708.

the *Walker* judgment has not been taken into account by the Panel, despite mentioning it earlier in their report:

*“Both elements, discrimination and unfairness, must be determined objectively in the light of the facts of each particular case. This seems to me to be consistent not only with the language of the section, but also with the equality jurisprudence as it has been developed by this Court.”*<sup>52</sup>

58. The facts are that neither the tip-offs, nor the automated systems result in discrimination. The expert, Advocate Trengove SC, cautioned the Panel not to confuse differentiation with discrimination and that is a further indication that the Panel failed to properly consider and failed to properly take the expert’s view into account when he stated *“But the unfairness enquiry will immediately tell you that there is nothing unfair about the differentiation men commit robbery more often than women and it is not because the law is biased.”*<sup>53</sup>
59. That more Black practitioners are investigated by GEMS is not based on any racial profiling as the objective evidence is that it is a scheme with beneficiaries who are overwhelmingly Black and that it is a transformative organisation. The process of the automated system, reporting by way of tip-offs and whistle-blowers are aspects that are not within the control of GEMS.<sup>54</sup>

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<sup>52</sup> Interim Report, paragraph 428.

<sup>53</sup> Interim Report, paragraph 429.

<sup>54</sup> GEMS comments, p79, par 78

60. While there is a recommendation that the algorithms be investigated as these algorithms are subject to human design, there are no objective facts that demonstrate that the algorithms used by GEMS are *per se* discriminatory. In fact, the Panel confirms and indicates that this still needs to be investigated:

*“Without transparency, at least in relation to the factors driving algorithmic decisions, one can never properly assess if the algorithms on which the schemes and administrators rely are not racially discriminatory and/or lead to racially discriminatory outcomes.”<sup>55</sup>*

61. These facts, objectively taken, would in any event have discharged the reverse onus, if it were applicable, and the decision that the Panel should have come to was firstly that there was no proven discrimination against GEMS as per section 13(1) of the *Equality Act*.

62. Furthermore, if it were to be found that discrimination has been proved against GEMS (it is reiterated that the objective facts do not justify such a finding, so this submission is made in the *alternative*), then the Panel should have taken all the facts and circumstances into account and it should have come to the conclusion that such alleged discrimination against GEMS is not unfair, as per section 13(2) of the *Equality Act*.

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<sup>55</sup> Interim Report, paragraph 751.

**Absence of causation between any alleged conduct on the part of GEMS and the “outcome”**

63. The second requirement which is evident in the definition of discrimination, is the element of **causation** which is required between the **conduct** and the **consequences** of such conduct.
64. As mentioned above, there must be an **act or omission** which **directly or indirectly impose** burdens, obligations or disadvantage on; **or withhold** benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.
65. The well-established test for **factual causation** is the 'but-for' test which is formulated by Corbett JA as follows in *International Shipping Co (Pty) Ltd v Bentley*:<sup>56</sup>

*'(T)he so-called but-for test, . . . is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but-for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis the plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not the cause of the plaintiff's loss; aliter, if it would not so have ensued.'*

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<sup>56</sup> *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) ([1989] ZASCA 138) at 700F – G

66. But, in addition to factual causation, there should also be legal causation. The issue of legal causation, or remoteness, is determined by considerations of policy. It is a measure of control. It serves as a 'long stop' where right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of liability.<sup>57</sup>
67. In SA Hang & Paragliding Association<sup>58</sup> reference was made to the following illustration by Lord Hoffmann in South Australia Asset Management Corp v York Montague Ltd 1997 AC 191 (HL) ([1996] 3 All ER 365) at 371j (All ER):

*'A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering, but has nothing to do with his knee.'*

At 382e – g Lord Hoffmann then concluded:

*'Your Lordships might, I would suggest, think that there was something wrong with a principle which, in the example which I have given, produced the result that the doctor was liable. . . . There seems no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition.'*

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<sup>57</sup> mCubed International (Pty) Ltd and Another v Singer and Others NNO 2009 (4) SA 471 (SCA) ([2009] 2 All SA 536; para 27; SA Hang & Paragliding Association v Bewick 2015 (3) SA 449 (SCA) at par [37]

<sup>58</sup> SA Hang & Paragliding Association v Bewick 2015 (3) SA 449 (SCA) at par [37]

68. An important further principle (of law and statistics) to bear in mind in the context of causation is, as explained by the Supreme Court of Appeal in Media 24 Books (Pty) Ltd v Oxford University Press,<sup>59</sup> that **correlation** does not imply **causation**.

68.1. What this means is that the mere fact that there is a correlation between two things, does not necessarily mean that the one is the cause or source of the other.

68.2. In other words (on the facts of Media 24 Books), the fact that there is correspondence between different example sentences does not establish that those that came into existence later in time were copied from the earlier ones. That is merely one possibility.

69. In the context of the issue of causation in the present matter, it is important to bear the following in mind:

69.1. the fact that the risk ratio of those flagged by the analytical systems employed by GEMS, is almost identical to the risk ratio for anonymous complaints received by GEMS through the Vuvuzela whistle-blower system;<sup>60</sup>

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<sup>59</sup> Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017 (2) SA 1 (SCA) at par [28]

<sup>60</sup> Interim Report, par 480.3



- 69.2. GEMS' evidence that there is no act or omission or other element within the systems, policies and processes of GEMS which resulted in a risk ratio;
- 69.3. the Panel not having found any evidence of explicit racial bias in the algorithms (to the extent that the workings of the algorithms were disclosed) and methods that the administrators and schemes use to identify FWA;<sup>61</sup>
- 69.4. the Panel not having found any evidence of deliberate unfair treatment;<sup>62</sup>
- 69.5. no finding has been made that any of the individual complaints against GEMS have any merit;
- 69.6. the contents of the Insight Report, and in particular the parts dealing with correlation and causation.
70. It is submitted that it is clear on the facts that no finding can be made that any **act or omission on the part of GEMS** has **directly or indirectly imposed** burdens, obligations or disadvantage on; **or withheld** benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

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<sup>61</sup> Interim Report, para 708

<sup>62</sup> Interim Report, para 753

71. In other words, there is **no conduct** on the part of GEMS which has **caused** any of the results contemplated in the definition of discrimination.

**Section 59(2) & (3) of the Medical Schemes Act as implemented by GEMS**

72. The Panel *inter alia* found that:<sup>63</sup>

*“On this basis, it is our view that the powers exercised in terms of section 59(3) of the Act are public powers and are constrained by the principles of administrative justice embodied in sections 1 and 33 of the Constitution and PAJA.”*

73. However, this view is in conflict with the correct legal position:

73.1. The relationship between members and the scheme is essentially one of a contractual nature.

73.2. The rules of a medical scheme and any amendment thereof is binding on the medical scheme concerned, its members, officers and any person who claims any benefit under the rules or whose claim is derived from a person so claiming.

73.3. GEMS is a restricted medical scheme and only employees qualifying to be registered as members and their dependents may be registered as beneficiaries of the scheme.

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<sup>63</sup> Interim Report, par 558

- 73.4. The Rules are thus not of general application. They only apply to a restricted class of persons. GEMS is restricted to government employees, but such membership is not compulsory.
74. In the circumstances GEMS points out that, as a matter of law, the business of a medical scheme does not encompass the performance of a public or government function or the exercise of a public power.
75. This principle has been confirmed by the Supreme Court of Appeal in Government Employees Medical Scheme and Others v The Public Protector:<sup>64</sup>

*“[22] The business of a medical scheme does not appear to encompass the performance of a public or government function or the exercise of a public power. The relationship between members and the scheme is essentially one of a contractual nature. The rules of a medical scheme and any amendment thereof are binding on the medical scheme concerned, its members, officers and any person who claims any benefit under the rules or whose claim is derived from a person so claiming. GEMS is a restricted medical scheme and only employees qualifying to be registered as members and their dependants may be registered as beneficiaries of the scheme. The Rules are thus not of general application. They only apply to a restricted class of persons. It is so that membership of GEMS is restricted to government employees. But such membership is not compulsory.*

*[23] GEMS does not itself provide a health service. Like other medical schemes, it operates rather in the nature of a health insurance. As rule 5.1 makes plain, in exchange for the payment of a premium, GEMS 'undertakes liability in respect of health and health-related expenses in respect of its members and their dependants'. Failure by a member to pay any amount due may result in the suspension or termination of membership as provided for in the Rules. Accordingly, complaints arising from the Rules*

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<sup>64</sup> Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others 2021 (2) SA 114 (SCA)

*do not concern the general public. They remain domestic in nature and cannot be described as the exercise of a public power.”*

76. The implementation of the provisions of section 59 of the MSA by GEMS is accordingly not subject to the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).
77. GEMS demonstrated further<sup>65</sup> that regardless of whether principles of procedural administrative justice apply, GEMS’ implementation of the provisions of section 59(2) & (3) is in any event lawful, reasonable and it is done in a manner that is procedurally fair.
78. The following further statements in the Interim Report have been identified in relation to this issue:
- 78.1. Black providers are treated differently from their White (non-Black) counterparts during investigations in that more information is requested from Black providers than from White providers. Accordingly, the burden on Black providers is more onerous than on White providers;<sup>66</sup>
- 78.2. Threatening communication and/or bullying;<sup>67</sup>
- 78.3. With regard to the initial investigation process~

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<sup>65</sup> GEMS comments, p87 to 110, par 103 to 126

<sup>66</sup> Page 46 of the Interim Report

<sup>67</sup> Page 49 of the Interim Report

78.3.1. Limited explanation is furnished to the provider as to why the audit is conducted;<sup>68</sup>

78.3.2. Excessive information is requested to validate claims and the time period in which it should be furnished;<sup>69</sup>

78.3.3. Investigations and the utilisation of medical experts in the specific field of specialization;<sup>70</sup>

78.4. Procedural fairness.

Information requested from Black and white providers during investigations

79. The complainants who contended that Black providers are requested to produce more evidence during an investigation than White providers, have never been investigated by GEMS.<sup>71</sup>

80. GEMS requests similar information from providers based on the relevant anomalies identified, regardless of race.<sup>72</sup>

81. These allegations do not have relevance to GEMS.<sup>73</sup>

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<sup>68</sup> Page 51 of the Interim Report

<sup>69</sup> *ibid*

<sup>70</sup> Page 52 of the Interim Report

<sup>71</sup> GEMS comments, p 90, par 113

<sup>72</sup> GEMS comments, p90, par 114

<sup>73</sup> GEMS comments, p90, par 115

### Bullying

82. GEMS does not resort to bullying. GEMS always ensures fairness to the provider, but still bearing in mind its members' best interests as is required of it by the MSA.<sup>74</sup>

### The investigation process and procedural fairness

83. In GEMS' comments it provided a comprehensive explanation of its investigation process, and it provided various examples of how the process is followed in practice.<sup>75</sup>
84. GEMS follows reasonable and procedurally fair processes. The Panel did not provide any detail to the effect that any particular aspect of GEMS' processes is not procedurally fair.
85. Providers are afforded many opportunities to present information and engage the Scheme. It has also been shown how far GEMS is willing to go in order to accommodate providers. This includes *inter alia* the following:
- 85.1. The fact that GEMS's period of review is the shortest; and

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<sup>74</sup> GEMS comments, p91 to 93, par 116 to 122.7

<sup>75</sup> GEMS comments, p93 to 113, par 123 to 127.13

85.2. That GEMS affords the providers an opportunity to re-submit claims with correct codes (where there were coding errors) prior to the irregular claims being quantified.

### **Conclusion**

86. The facts do not establish any conduct amounting to unfair discrimination on the part of GEMS.
87. There is no causation between the statistical “*outcomes*” and any conduct on the part of GEMS.
88. A statistical finding of a disproportionate outcome cannot factually or legally be found as having established unfair discrimination based on race, in circumstances where it is accepted that the anonymous complaints received are beyond the scheme’s control, the algorithms utilised by the scheme and the other systems employed to investigate FWA are neutral, and that race is not recorded in the scheme’s database of health care providers.
89. It is submitted that there is evidently a fundamental *lacuna* between the facts before the Panel and the views, findings and conclusions of the Panel, in particular (but not limited to) the finding that there has been racial discrimination on the part of GEMS.

90. Furthermore, the objective facts indicate that GEMS' implementation of the provisions of section 59 is lawful, reasonable and that it is done in a manner that is procedurally fair.
91. Finally, we make reference to the fact that GEMS reiterates its appreciation of the focus which the Section 59 investigation has placed on historical racial divides and inequality which continue to plague the industry, and the pressing need to actively promote transformation and to ensure that the provisions of section 59 are implemented in a fair and reasonable manner.<sup>76</sup>

**A Bava SC**  
**E Kromhout**  
*Counsel for GEMS*  
*Chambers, Sandton*  
*13 June 2023*

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<sup>76</sup> GEMS comments, p118, par 148