JOINT SUBMISSIONS OF DISCOVERY HEALTH (PTY) LTD AND DISCOVERY HEALTH MEDICAL SCHEME TO THE SECTION 59 INVESTIGATION PANEL IN RESPONSE TO OTHER SUBMISSIONS

INTRODUCTION

1 These submissions are made by Discovery Health (Pty) Ltd ("**Discovery**") and the Discovery Health Medical Scheme ("**the DHMS**"), one of the medical schemes that Discovery administers. They are made in response to paragraphs 3 and 4 of the Panel's ruling dated 6 July 2023. For the sake of convenience, and unless it is necessary to refer to them separately, Discovery and the DHMS are described simply as "**Discovery**" below.

2 Discovery has considered all of the submissions mentioned in paragraph 3 of the Panel's ruling. Save for the submission from Solutionist Thinkers Group ("**Solutionist Thinkers**") none of the other submissions raises issues that affect or negatively implicate Discovery. In these submissions, Discovery thus responds only to the submission made by Solutionist Thinkers, which is dated 25 June 2023. Discovery's response is set out below.

3 For the sake of convenience, and because much of what is said below makes reference to Discovery's April 2021 submissions, we provide references below to the same Bundle which was submitted by Discovery together with its submissions (drafted by counsel) dated 19 June 2023.

4 We wish to make three observations by way of introduction:

4.1 First, Discovery wishes to place on record that, as shown in detail in the submissions made on 14 July 2023 dealing with developments since 2021,[1] it has gone to great efforts to engage with healthcare providers about various concerns relating to the FWA process. As noted in the 14 July submissions, Solutionist Thinkers was intermittently involved in the process.[2] Its submissions are critical of Discovery. However, the fact remains that some of the members of Solutionist Thinkers remain in contractual relationships with Discovery and, as a consequence, remain our partners. Because of the contents of the Solutionist Thinkers submissions, it is unavoidable for Discovery to respond. However, nothing said below should be understood to reflect any form of reluctance on the part of Discovery to engage productively with all of the healthcare providers ("**HCPs**") with whom it has relationships in order to attempt to accommodate their concerns.

4.2 Secondly, there are, in the Solutionist Thinkers submission, several allegations made against the Council for Medical Schemes ("**CMS**"). Although Discovery by no means endorses those criticisms, they are not addressed below. The purpose of these submissions is to focus only on those contentions which implicate Discovery's interest in these proceedings.

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1 July 14 Submissions at paras 18 to 22

2 July 14 Submissions at para 19

4.3 Thirdly, at the time of making oral submission to the Panel on 26 June 2023, Discovery had not had sight of Solutionist Thinkers' submissions, so was obviously unable to address them then. Hence, the detail in the present response.

THE ARGUMENTS ADVANCED BY SOLUTIONIST THINKERS

5 The submissions made by Solutionist Thinkers may conveniently be divided into the following nine contentions:

5.1 First, there is an allegation of "intentional racial profiling" on the part of the schemes including Discovery.[3] Without providing any context or elaboration, reliance is placed on an interview given by Dr Broomberg, the former CEO of Discovery, which is said to support this contention (although how is not clear).[4]

5.2 Secondly, there is a suggestion that the cost of FWA is exaggerated or overstated.[5] Although this is not entirely clear, Solutionist Thinkers appears to dispute evidence presented on the scale of FWA.[6]

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3 Solutionist Thinkers para 3 p 3

4 Solutionist Thinkers para 6 p 5

5 Solutionist Thinkers para 3 p 3

6 Solutionist Thinkers para 12 p 7

5.3 Thirdly, there is an allegation that "the significant and disproportionate impact of FWA on Black people's quality of life and dignity necessitated an investigation".[7]

5.4 Fourthly, there is an allegation that "the risk ratios, which indicate disparities in treatment, were consistently significant over the years, but started to decrease when the spotlight was put on the risk management systems".[8]

5.5 Fifthly, there is an allegation that the schemes have misleadingly argued that it is impossible to reimburse black healthcare providers who have been unfairly targeted and subjected to clawbacks when, in fact, the schemes are "mathematically strong" and in a "great position to recalculate how much they have miscalculated over the past years".[9]

5.6 Sixthly, it is alleged that, despite Discovery's contentions to the contrary, Solutionist Thinkers provided ample evidence that there was racial profiling of black healthcare providers:

> "Solutionist Thinkers presented evidence of black providers who were victims of all sorts of discrimination, verbal witness was presented on the first day of inquiry, letters of unfair audits, indirect and blocked practices were presented in this panel, proofs of entrapment and a significant number of providers who were coerced into signing Agreements of Debt (AOD). Additionally, Solutionist Thinkers submitted cases of doctors

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7 Solutionist Thinkers para 3 p 3

8 Solutionist Thinkers para 3 p 4

9 Solutionist Thinkers para 4 p 4

> who tragically took their own lives following the implementation of Discovery's AOD."[10]

5.7 Seventhly, a complaint is raised about investigations which go back to periods longer than 90 days.[11]

5.8 Eighthly, there is an allegation, relying on evidence supposedly given by Dr Kimmie, that Discovery admitted to using "algorithms which were designed by the past apartheid government which had two systems of their database that specifies European surnames and non-European surnames [sic]".[12]

5.9 Lastly, it is argued that there is a problematic lack of clarity on precisely what is meant by FWA and that a proper definition is needed.[13]

THE STRUCTURE OF THESE SUBMISSIONS

6 Discovery respectfully disagrees with the submissions made by the Solutionist Thinkers. However, in these submissions it adopts an approach in which not every one of the arguments in paragraph 5 above is addressed. This is because some of the arguments are expressed in terms which do not relate to findings reflected in the interim report and are factually incorrect. They also, respectfully, appear to be based on misunderstandings on what evidence was led and what interim findings were made. It would therefore not assist the Panel for Discovery

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10 Solutionist Thinkers para 5 p 5

11 Solutionist Thinkers para 8 p 5

12 Solutionist Thinkers para 13 p 8

13 Solutionist Thinkers para 16 p 10

to engage in those debates. The arguments summarised in paragraphs 5.1, 5.3, 5.5 and 5.8 above fall into that category. Should the Panel require a response, it will be provided.

7 In the submissions below, we address the remaining arguments summarised above. In doing so, we do not follow the order adopted by Solutionist Thinkers. Rather, we respond to the Solutionist Thinkers submission by addressing the topics below, in the following order:

7.1 The notion that the risk ratios are evidence of disparities in treatment (see paragraph 5.4 above).

7.2 The notion that the costs of FWA are overstated (see paragraph 5.2 above).

7.3 The issue of investigations going back further than 90 days (paragraph 5.7).

7.4 The issue of a proper definition of FWA (see paragraph 5.9).

7.5 The evidence presented of racial profiling (see paragraph 5.6 above).

THE RISK RATIOS AND THE FINDING OF DISCRIMINATION

8 Discovery has already pointed out as part of these proceedings[14] that it is not entirely clear at this stage what evidence presented by Discovery, the Panel does or does not accept. We mention this now only because it is relevant to the Solutionist Thinkers submission:

8.1 The interim report was prepared in the light of the evidence presented by Dr Kimmie and the schemes in 2019 and 2020. This evidence included a recordal of engagements by both Dr Kimmie and the schemes with each other's evidence. The interim report is very detailed and provides a comprehensive explanation of what submissions of all relevant parties were, or were not, accepted by the Panel. So, up to the point of the evidence submitted by the end of 2020, it is possible to see from the interim report how the Panel responded to the evidence.

8.2 But, Discovery then made detailed submissions in response to the interim report. And, at this stage, there is no indication whether the Panel accepts or rejects any of them and, if it rejects them, on what basis. This was submitted to be central to the question of fairness.

8.3 The Solutionist Thinkers submission appears to proceed from the premise that the conclusions on the risk ratios and racial profiling in the interim report are final. But, this is not the case. The Panel has not

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14 19 June 2023 Submissions at para 27

pronounced on the April 2021 submissions of Discovery and there is every basis to assume that those submission will be accepted and decisive in Discovery's favour.

8.4 Without belabouring the point of the uncertainty facing us, Discovery wishes to provide a brief response to the Solutionist Thinkers submission with reference to some of the evidence presented in April 2021. This is primarily to address any doubts which the Panel may have about that evidence.

8.5 Because the Solutionist Thinkers submission is based on findings made in the interim report, the most convenient way of dealing with Discovery's response is to take as a starting point the initial findings of the Panel in the interim report and develop its arguments from there.

9 Discovery's understanding of the initial findings as reflected in the interim report is that:

9.1 There is no evidence of direct discrimination or racial bias in Discovery's FWA process.

9.2 There is no evidence of any discrimination or racial bias (direct or indirect) when it comes to the investigation of tip-offs.[15]

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15 Discovery submission "Comments on 2020 report"; Discovery Bundle p 547

9.3 There is no evidence of anything inherent about the RRT which could serve to explain why it might result in some form of disproportionate impact on a particular group.[16] In other words, no evidence has been given to show that something about the RRT itself gives rise to bias/disproportionality.

9.4 So, in the light of what has been said in paragraphs 9.1 and 9.3 above, the Panel's initial conclusion that there has been discrimination arises from an inference which has been drawn from the way in which tip-offs and the RRT operate. This inference has been drawn from the risk-ratio model formulated by Dr Kimmie. In this regard, the Panel's reasoning is relatively straightforward: if the risk ratio demonstrates that black HCPs are disproportionately likely to be flagged for FWA, discrimination is established and it is presumed to be unfair (based on the South African approach to discrimination law). The Panel's approach seems to be that, because of the way in which discrimination is approached in South African law, any uncertainty as to why the risk ratio is greater than one, must count against Discovery unless it can adequately explain that feature of the process.

10 But, the expert evidence presented by Discovery in April 2021, identified and discussed below, demonstrates that the enquiry should be more nuanced than as summarised in paragraph 9 above.

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16 See interim report at para 708 Discovery Bundle p 310

11 Before explaining this contention in more detail, it might be helpful to identify certain assumptions which are (or should be) uncontroversial:

11.1 All of the analysis conducted in this matter (whether by the complainants, by the schemes, by other stakeholders or by the Panel itself) has proceeded, and must proceed, from the starting point that there is nothing inherent about any race group which makes it more susceptible to committing FWA.

11.2 This might be self-evident for moral/ethical/philosophical reasons, but our focus here is on evidentiary matters. In that context, the assumption is key.

11.2.1 To take an example: it might be said, without much controversy, that cats are inherently more likely to hunt birds than dogs because they are better equipped to do so. Imagining, then, that a study was conducted (combining video and other relevant evidence) which demonstrated that, of 1000 birds found dead with tooth-marks in them, 800 were killed by cats (proved either with direct evidence from video or with inferential reasoning based on the size of tooth marks, paw prints and the like). In that situation, it would not be necessary to look for explanations as to why cats were disproportionately found to have killed the birds. One could simply explain the evidence with reference to the innate nature (and abilities) of cats. In other words, faced with the result of this study, scientists would be unsurprised and

not have any particular interest in investigating the matter further.

11.2.2 But the starting point could have been that there is nothing particularly special about cats or dogs which makes one of these species better or more likely to catch birds than the other. If that were the starting point, then it would become an interesting exercise to attempt to work out why so many of the birds were killed by cats rather than dogs.

11.3 There is absolutely no evidence that any particular race group is inherently more likely to commit FWA than another. Therefore, the non-negotiable starting point is that no particular race group is inherently more likely to do so.

12 So, the assumptions from which we operate in the analysis below are:

12.1 First, no race group is inherently more likely to commit FWA.

12.2 Secondly, there is no evidence of any discrimination or bias (direct or indirect) in the investigation of tip-offs.

12.3 Thirdly, there is no evidence that there is anything about the nature of the RRT which could explain why it would disproportionately identify members of a certain race for investigation.

13 If one accepts these assumptions, then the question becomes what to make of the evidence presented by Dr Kimmie, the Panel's initial acceptance of it and the Solutionist Thinkers' reliance on it.

13.1 The short answer, as demonstrated in detail by Discovery's experts, is that the analysis is simplistic. We are aware that the Panel sought to engage with some of the criticisms of Dr Kimmie's evidence in the interim report itself. But since the evidence on which we rely comes after that, we limit ourselves to what was said in the expert evidence in April 2021.

13.2 The reason why, with respect, the evidence is simplistic is that it fails to account for various key variables, discussed below, which show that the ultimate conclusion is not as straightforward as the interim report seems to suggest. If the assumptions summarised in paragraph 12 above are correct, then something has to explain a conclusion (if indeed the conclusion is even correct) that black practitioners are disproportionately flagged. And that explanation cannot be any of (a) black practitioners are more likely to commit FWA (b) there is something racially biased about the investigation of tip-offs or (c) there is something about the RRT which lends itself to flagging black practitioners disproportionately. This is because all three of those hypotheses have already been discounted.

14 Discovery submits that there are two main reasons why the Panel's initial finding, and Solutionist Thinkers' apparent reliance on it, are incorrect:

14.1 First, there are so many variables that it is impossible to identify one risk ratio and it is impossible to reach one generalised conclusion of discrimination.

14.2 Secondly, and far more importantly, the analysis fails to distinguish between factors and considerations which the schemes can control and those which they cannot.

15 The first of these issues relates to the evidence. And the second, although reliant on some of the evidence which has been presented, is more a question of principle. It engages the question of what type of equality analysis is appropriate for South Africa.

16 Because the second is in many respects more important than the first, we begin with that.

A principled approach to discrimination in the context of this investigation

17 In previous phases of this inquiry, there has been much debate about confounders. The issue was addressed in detail in the submissions made before the panel issued its interim report, and therefore featured heavily in the report.[17] Discovery then took up the opportunity to respond to some of the conclusions in

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[17] See interim report at paras 461 to 470; Discovery bundle pp 213 to 217

the report (and the evidence on which it was based) and so the issue also featured heavily in Discovery's submissions in April 2021.[18]

18 We stress that Discovery is unaware of any basis on which its submissions of April 2021 can be rejected by the Panel.

19 While Discovery stands by everything which it has said on the topic (and it is addressed again below), it is not necessary to dwell on the issue here.

20 What is more important is this:

20.1 The evidence presented by Discovery shows clearly that the risk ratio changes dramatically if one considers various relevant factors, including FWA arising from indirect payment, FWA arising from direct payment or FWA arising in a pool which includes them both.[19]

20.2 The evidence presented by Dr Kimmie himself shows clearly that the risk ratio changes dramatically depending on what discipline is the focus of the analysis.[20]

20.3 The underlying evidence on which both of these propositions is based is that FWA is far more prevalent in some disciplines than others and it is

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18 See Discovery Submission para 4.3; Discovery bundle p 509ff

19 Discovery April 2021 Submission at para 21 Bundle p 486-7

20 Discovery Bundle p 580 and table 5.3 of Dr Kimmie's report on Discovery

far more prevalent in the case of direct payment than in the case of indirect payment.[21]

20.4 There is a simple explanation for both of these factual matters:

20.4.1 Direct payment presents a greater opportunity for FWA because the patient is far less likely to scrutinise the ex post facto notifications of the details of the claim. In other words, once the patient leaves the office, no further engagement with the paperwork is necessary unless the patient takes an interest.[22]

20.4.2 In certain disciplines there is a greater opportunity to commit FWA. This is as a result of the different modes of practice and different opportunities (especially in the case of those disciplines using time-based billing).[23]

20.5 When it comes to the evidence before the Panel, it is necessary to distinguish between (a) direct payment and (b) membership of a particular discipline.

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21 Discovery Bundle pp 594 and 597

22 Transcript Discovery Evidence pp 71-2

23 Discovery April Submissions Discovery Bundle p 550

20.5.1 When it comes to direct payment, there was engagement on the question of whether a person's race influences whether they choose direct payment. We address that below.

20.5.2 When it comes to membership of a discipline, there is clear evidence that some disciplines are more susceptible to FWA than others. But there was then no further analysis of whether one can conclude that black HCPs are more likely to choose those disciplines. In terms of the framework suggested below, this would be essential analysis in those disciplines in which a risk ratio of greater than 1 is identified. But because it has not yet been done, we leave the question of discipline aside for the remainder of this section and focus on direct payments only.

20.6 There appears to be reluctance on the part of the Panel to accept direct payment as a confounder because the question whether a person chooses direct payment may itself be influenced by race.[24]

20.7 But, whether or not one sees it as a confounder, the evidence demonstrates that the final analysis will vary significantly depending on whether one treats all HCPs as falling in one globular pool, or whether one looks separately at direct versus indirect payment. Or, to put it differently, one could only arrive at accurate risk ratios by aggregating

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[24] See Interim Report paras 463 to 470; Discovery Bundle pp 214 to 217

correctly; which, at the very least, would involve aggregating on the basis of direct payment.

21 So, in the light of the analysis set out in paragraph 20 above, it is now necessary to approach the question of whether there is discrimination reasoning from the following propositions:

21.1 First, no race group is inherently more likely to commit FWA.

21.2 Secondly, there is no evidence of any discrimination or bias in the investigation of tip-offs.

21.3 Thirdly, there is no evidence that there is anything about the nature of the RRT which could explain why it would disproportionately identify members of a certain race for investigation.

21.4 Fourthly, direct payment gives rise to a greater risk of FWA, which means that more FWA cases arise from direct payment contexts than indirect payment contexts.

22 If one accepts all of these premises, it is then inappropriate to reach a conclusion that there is discrimination on the basis of race unless one conducts a detailed analysis using the following steps:

22.1 First, it has to be asked whether there is anything about the investigative methods used by Discovery which makes it more likely that black

practitioners will be flagged for FWA investigation. If the answer is yes, discrimination will be presumed.

22.2 In the light of what is said in paragraphs 21.2 and 21.3 above, however, the answer is no.

22.3 So, the second question becomes whether a disproportionate number of HCPs on direct payment are black.

22.4 Thirdly, if the answer is yes, then it has to be asked why that is so.

23 This framework demonstrates, with respect, why the approach to discrimination in the interim report, on which Solutionist Thinkers relies, should be reconsidered.

23.1 As already mentioned, the evidence shows that black practitioners are disproportionately on direct payment.

23.2 From that premise it is easy to explain an outcome which says that black practitioners are more likely to be flagged for FWA than their white counterparts. Since we have already shown that there is no evidence that black HCPs are more likely to commit FWA, the answer has to be: being on direct payment makes a person more likely to commit FWA.

23.3 This raises the main issue of principle to which all of the above is directed: how are the schemes meant to organise their FWA investigations differently, to avoid the implications of what has been set out above? This question must be answered from the premise that Discovery does not

impose direct payment on any practitioner and enters such arrangements at their request.

23.4 So, with respect, the Panel has inverted the proper order of enquiry in the interim report. The Panel dismissed direct payment as a confounder because it considered direct payment self-evidently to be influenced by race.[25] But, this is not the correct way to look at the issue. The correct way, in Discovery's submission, is to ask whether Discovery has any control over whether HCPs choose direct payment. If the answer is no, and if it is accepted (as it must be, for the reasons given above) that being on direct payment makes a person much more likely to be flagged for FWA, then it is hard to see how Discovery could be said to have discriminated against anyone.

23.5 A direct analogy would be this. We give a hypothetical example that it could be shown that there are a disproportionate number of white men employed in the financial sector. It could be shown, further, that people in the financial sector are disproportionately the subject of corruption investigations by the Hawks. On these assumptions, it would be inappropriate to accuse the Hawks of discrimination – on pain of apologising to the population of white financiers – and placing the burden on the Hawks to justify investigating such people. Nothing said here would suggest that it would be inappropriate to investigate why white men were disproportionately members of the financial sector. On the contrary,

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25 Interim report at para 465 Discovery Bundle p 214

such an investigation would be essential. But it would not be within the remit of the Hawks to conduct it, and the Hawks could not be blamed for investigating all cases of corruption without fear or favour.

23.6 This is why the propositions summarised in paragraph 12 above are crucial. If it were found that there was something skewed about the RRT or that Discovery was selectively pursing tip-offs, then this would be a different matter. But, since that is not the case, the principled reasoning above stands.

24 The ultimate point is this: from all of the evidence presented thus far, Discovery (as shown again below) has demonstrated that, even on Dr Kimmie's preferred approach, the conclusion of discrimination is flawed.

25 However, let us assume (because this is certainly plausible) that the Panel would wish to reach the following conclusions:

25.1 There is evidence that when it comes to direct payment, FWA is more common.

25.2 Disproportionately more black practitioners use direct payment.

25.3 The reason why the proposition in paragraph 25.2 above is true is because of historical race-based factors.

25.4 Therefore, the prospects of being flagged for FWA are influenced, to a significant degree, by race.

26 Even if the Panel were to reach these conclusions, Discovery respectfully submits that – taking the propositions in paragraph 12 above as the starting point – it cannot be said to discriminate on the basis of race. This is because it has no control whatsoever of the factors mentioned in paragraphs 25.3 and 25.4 above.

27 We respectfully suggest that the approach to discrimination law reflected in the interim report is inappropriate. We do not refer here to the summary of the relevant legal principles, which have been addressed separately by Discovery and are not relevant to the present discussion. We refer, instead, to the whole premise of the discrimination enquiry. Statistics may be very useful in various contexts in discrimination law. But they should be the start of the discussion, not the conclusion. In the South African context in particular, a method based on the analysis conducted by Dr Kimmie, creates a real risk (as demonstrated by this case) that people or entities will be blamed for discrimination for reasons beyond their control. This is counterproductive because it erodes the distinction between meritorious (or justified) claims of discrimination and cases which are misdirected.

28 By way of conclusion, we can do no better than to quote the expert report, which we discuss in the next subsection below. This extract, which appears in the executive summary,[26] serves to summarise the overall critique of the approach thus-far adopted by the Panel:

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[26] See Discovery Bundle p 559

> "We make seventeen statistical observations to address the validity or otherwise of the finding of the Investigation that: that Black providers are unfairly discriminated against on the grounds of race. Our analysis shows that this statement is untrue after consideration of confounding factors. The reality of inequality in South Africa is well established. South Africa has the highest inequality coefficient in the world measured by the gini which has hovered between 0.68-0.71 in the last two decades. Therein may be plausible reasons for confounding factors. Remedy for that rests well beyond the expert evaluation of the findings. But in our opinion the profundity of inequality is a significant underlying and ecosystem factor whose ruthless path, the health systems delivery infrastructure cannot escape. This is a feature that is well beyond the health system but a consequence of historic biases in South Africa's social, economic and political discrimination." (Emphasis added.)

The evidence supports this approach

29 If the Panel rejects the reasoning above, it is Discovery's case that, even based on an acceptance of the paradigm flowing from Dr Kimmie's analysis, the Panel cannot conclude that there has been racial discrimination.

30 Discovery submitted an expert evaluation of the Discovery data (including updated data), and the report of the Panel's expert, as Annexure 3 to our 5 April 2021 submission.[27] The report was compiled by Dr Pali Lehohla, the former Statistician General of South Africa, and Dr Arul Naidoo. Their expertise cannot reasonably be disputed.

31 The report was based on a full analysis of the data and not a review of analysis. We provided the full (and updated) dataset to our experts as we wanted to ensure that we had a comprehensive assessment of whether there was any evidence of

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[27] See Discovery Bundle p 557

bias. The expert report includes the full analysis, and results are presented for the period considered by Dr Kimmie (2012 to June 2019) and the updated period (2012 to 2020) of data provided.

32 Because the report has already been presented to the Panel, we simply highlight some of its key conclusions:

32.1 Dr Kimmie used the number of investigations as the unit of analysis which is incorrect for the nature of the question. He should have used the number of practices.[28]

32.2 Dr Kimmie did not include an odds ratio to test the reliability of the results. This is particularly troubling because of the well-documented problem of Simpson's paradox (inappropriate aggregation),[29] which makes the single statistic (aggregating disciplines, years, payment arrangements and sources) unreliable.[30]

32.3 Dr Kimmie has not used appropriate statistical analysis considering the relative frequencies of the statistics being considered. The Panel has relied on an aggregated statistic (ie, one risk ratio) calculated using an inappropriate unit of analysis. It has relied on a single inappropriate statistical test to draw a conclusion ignoring other information in the

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28 Discovery Bundle pp 581-5

29 Although the quality of content on Wikipedia is somewhat erratic, there is an excellent Wikipedia explanation of Simpson's paradox available at https://en.wikipedia.org/wiki/Simpson%27s_paradox

30 Discovery Bundle pp 560-1

expert report. The most notable examples are tables 5.2 and 5.3 which clearly demonstrate that the single statistic is not a reliable assessment of the question of bias.[31]

32.4 Dr Kimmie has not used valid dichotomous variables in his two-way analysis. He has distorted the ratios by counting practices investigated in any year as if they were investigated in every year. For example, there were 57 854 practices which were active at any time in the investigation period, but they were not all active for the whole period (and this is more the case with practices categorised as black). In fact, there were 311 319 practice years of exposure (i.e. an average of 5.38 years of exposure per practice). The number of unique investigated practices with a valid finding over this period was 19 600. The appropriate ratio for outcomes per unit of exposure was therefore 6.3%. This is consistent with table 5.2 of Dr Kimmie's report which shows the ratios per year and that not all years are statistically significant. Table 5.1, on which the Panel relies, has a ratio of 13 757 FWA out of 57 718 practices, which amounts to 23.8%. This is a meaningless ratio as it does not in any way reflect the proportion of investigated practices in any period. Discovery's expert report demonstrates that using the appropriate unit of analysis to the aggregate statistic reduces the ratio to 1.065 which further demonstrates that the statistic on which the Panel has relied is unreliable.[32]

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31 This is a reference to Dr Kimmie's November 2019 report at pp 21-22

32 Discovery Bundle p 585

32.5 Dr Kimmie's analysis has ignored the period of time in which the practice has been in existence in his analysis. This is a significant oversight: the number of black providers increases at a faster rate than non-black providers over the period, which creates a distorting effect.[33]

32.6 Investigated providers are counted multiple times depending on the number of investigations but providers who are not investigated (the vast majority of providers) are counted only once. This distorts the ratio and makes any comparison of ratios unreliable.

32.7 The proportions calculated to obtain a risk ratio should be done only for investigations, on the basis that each provider has an equal chance of being selected for an investigation. The aggregated risk ratios for investigated providers are:

32.7.1 1.001 for 2012 to June 2019; and

32.7.2 0.976 for 2012 to 2020.[34]

33 The examples given above demonstrate that it would be inappropriate for the Panel to retain the conclusions on discrimination reflected in the interim report, which are based on Dr Kimmie's evidence. At the level of evidence, the position is this:

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33 Discovery Bundle p 587

34 Discovery Submission para 5.2 p 515

33.1 The evidence presented by Discovery's experts refutes the conclusions reached by Dr Kimmie.

33.2 As a matter of fairness, Discovery's evidence cannot be rejected without proper justification, and none has been suggested.

33.3 The conclusions in the interim report must be re-examined (and we submit, rejected) in the light of the evidence as a whole.

Direct payment

34 In the discussion in paragraphs 17 to 28 above, we focused on direct payment for two reasons:

34.1 First, because the evidence is overwhelming that it has a major influence on the overall assessment of the analysis proposed by Dr Kimmie.

34.2 Secondly, because it is entirely beyond Discovery's control whether a particular HCP asks to use direct payment.

35 We wish to substantiate what we have said in paragraph 34.1 above with reference to the evidence already on record.

36 Discovery has conducted an analysis based on Discovery's data using racial splits and direct payment. The analysis is based on evidence of a direct payment arrangement being used in less than 85% of payments to the practice. Race was assigned to the providers using Dr Kimmie's race classification methodology.

37 A practice is counted as investigated in a year if there is at least one investigation.

38 The numbers in the table are practice years i.e. if a practice was active for 2014-2019 it would be counted 6 times in the “grand total” and if it was investigated in 2015 and 2018 it would be counted 2 times in the “investigated” column. This means there is correspondence between the numerator and denominator.

39 Because of the many variables identified above, a single ratio is not a reliable indicator of discrimination, and the analysis below demonstrates that a single ratio cannot be used for drawing robust conclusions.

Table 1: Split of investigations by Direct Payment and Race:

	Not investigated	**Investigated**	**Grand Total**
Black	80,225	9,922	90,147
Not Direct	13,753	1,955	15,708
Direct	66,472	7,967	74,439
Not Black	202,129	18,989	221,118
Not Direct	71,694	3,749	75,443
Direct	130,435	15,240	145,675
Grand Total	282,354	28,911	311,265

40 This table shows that 29% of practices (over the period) are classified as black. For black practices the proportion on direct payment is 83% whereas for not-black practices the proportion on direct payment is 66%.

Table 2: The analysis by race ONLY using Dr Kimmie's methodology:

Row Labels	**Not investigated**	**Investigated**	**Grand Total**	**Ratio**
Black	80,225	9,922	90,147	0.11
Not Black	202,129	18,989	221,118	0.09
Grand Total	282,354	28,911	311,265	**1.28**

41 This analysis generates a risk ratio of 1.28 (which is different from Dr Kimmie's number as we have ensured that the numerator and denominator correspond). As per Dr Kimmie's tables 5.2 and 5.3[35] this ratio varies per year and per discipline and we have used the whole period as per Dr Kimmie's table 5.1[36] to demonstrate the effect of cofounders. Over the whole period there were 11% of black practices investigated and 9% of not-black practices investigated. It is the ratio of these proportions that gives the factor of 1.28.

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35 This is a reference to the tables in Dr Kimmie's report of November 2019, pp 22-3

36 November 2019 report at p 20

42 Table 3 uses exactly the same methodology but with analysis by direct payment status ONLY (rather than race).

Table 3: The analysis by direct payment ONLY using Dr Kimmie's methodology:

	Not investigated	**Investigated**	**Grand Total**	**Ratio**
Not Direct	85,447	5,704	91,151	0.06
Direct	196,907	23,207	220,114	0.11
Grand Total	282,354	28,911	311,265	**1.68**

43 This analysis generates a ratio of 1.68 which is self-evidently much greater than 1.28. This shows that there is a more significant difference in the ratio of investigated practices depending on whether they are on direct payment or not, rather than race.

44 We then use exactly the same methodology for the subset of practices that are on direct payment.

Table 4: The analysis of direct payment practices by race using Dr Kimmie's methodology:

	Not investigated	**Investigated**	**Grand Total**	**Ratio**
Black	66,472	7,967	74,439	0.11
Not Black	130,435	15,240	145,675	0.10

Grand Total	196,907	23,207	220,114	**1.02**

45 This analysis generates a ratio of 1.02. It demonstrates that it is the direct payment factor which is the explanation for the differences in Table 1. This is because 83% of black practices are on direct payment compared to 66% which are not-black practices.

46 This means that there is no significant difference by race and the difference by race is driven by the greater proportion of black practices (83%) compared to practices that are not black (66%) electing to participate in direct payment arrangements.

47 This analysis has only considered the confounder of direct payment, which appears to have explained the vast majority of the difference (93% of the difference per the above tables). As we have noted there are other confounding factors such as discipline which also have explanatory power but which have not been addressed here.

48 The analysis above demonstrates that not taking account of direct payment means that the comparison is not on a like for like (or all other things equal) basis.

Summary – Solutionist Thinkers are wrong to say that discrimination is proved

49 Based on what we have said above, Discovery's position is the following:

49.1 The use of a single risk ratio is inappropriate for all the reasons already given.

49.2 There are too many question marks about Dr Kimmie's approach for it to serve as a reliable basis for the conclusions reflected in the interim report.

49.3 Leaving these issues aside, the more important issue is that the only fair way to assess the issue of disproportionately is to compare those HCPs who are similarly situated. Direct payment status is one of the factors, amongst others, that is relevant in this regard. Because of the huge impact which direct payment makes in the analysis, one has to approach the matter – as to the evidence – in the way we have proposed in paragraphs 34 to 48 above.

49.4 Once one does that, it becomes clear that the question whether an HCP is on direct or indirect payment, rather than race, is the key to determining why he or she is more likely to be flagged for an FWA investigation.

49.5 Since Discovery has no control over the race of practitioners who select direct payment, it cannot be said to discriminate on the basis of race.

49.6 A similar analysis could (and ideally should) be done in respect of other issues. We have given the example of membership of a particular discipline. But for the purposes of what we say in this submission, it is not

necessary to go that far. Simply based on the evidence relating to direct payment, it is clear that Dr Kimmie's model is inappropriate.

49.7 The Panel should not, therefore, accept the submission of Solutionist Thinkers that discrimination has been proved.

THE COSTS OF FWA

50 On 29 January 2020, Discovery gave its presentation to the Panel. It is available on the Panel's website.[37] The evidence was that:

50.1 The investigation of FWA between 2012 and 2018 resulted in a saving of R7.8bn.[38]

50.2 Without these investigations, the contributions of DHMS members would have been 14% higher.[39]

50.3 The CMS estimates that up to 15% of total claims paid by medical aids in South Africa are paid as a result of FWA.[40]

50.4 It is estimated that DHMS members lose R1.7bn per year to FWA.[41]

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37 https://cmsinvestigation.org.za/index.php/hearings-2/presentations/

38 Slide 4

39 Slide 4

40 Slide 15

41 Slide 15

51 It is not clear on what basis Solutionist Thinkers disputes this evidence. To what has been said above, we can only add a reference to the evidence we gave in the 14 July 2023 submissions. There it was stressed how seriously the CMS takes the issue of FWA.[42] It does so because of the scale, as demonstrated above.

INVESTIGATIONS GOING BACK LONGER THAN 90 DAYS

52 In our 14 July 2023 submissions, we explained the process involving the Health Practitioners Reference Group in detail. We explained that, as part of that process, HCPs raised a concern, also raised with the Panel and featuring in the interim report, that FWA investigations may relate to matters arising up to 3 years before the investigation was initiated. The HCPs consider this timeframe to be prejudicial and some argue for a limit of 90 days.

53 We have discussed that issue in detail in the 14 July 2023 submission[43] and do not wish to repeat it. All we would wish to raise in response to the Solutionist Thinkers submission is that the HPCSA, the SA Pharmacy Council and SARS all have requirements that documents must be retained for 5 years.[44] It is therefore suggested that a 3-year timeframe is not unreasonable. This, coupled with improved communication about what documentation needs to be provided to

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42 Discovery 14 July Submission at para 11

43 Discovery 14 July Submission at para 32.3

44 Discovery Submission para 14; Discovery Bundle p 484

assist in an FWA investigation (also addressed in detail in the 14 July submission[45]), makes the system fair.

A DEFINITION OF FWA

54 The premise from which the Solutionist Thinkers' submission proceeds is that there is no definition of FWA and that one needs to be formulated. With respect, Discovery disagrees with this premise.

55 In the 14 July 2023 submissions, references were made to the FWA summits held by the CMS.[46] In those references, the importance of the process initiated by those summits was explained. As noted above (see paragraph 50 above), on 29 January 2020, Discovery gave its presentation to the Panel. In dealing with the proper description of FWA, Discovery expressed respectful agreement with the CMS's definition of FWA, arising from the FWA Summit.[47] Those definitions were the following:

55.1 Fraud is "knowingly submitting, or causing to be submitted, false claims or an intentional misrepresentation of the facts in order to access payment of a benefit to which one would otherwise not have been entitled."

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45 Discovery 14 July 2023 submission at para 32

46 Discovery 14 July 2023 submission at para 10ff

47 This appears at slide 14 of the presentation.

55.2 Waste and abuse is "[c]laiming for healthcare treatment and services that are not absolutely medically necessary including any form of over-serving or over-charging of a patient, that may objectively be considered unethical or unconscionable or contrary to best practice principles."

56 It is submitted that these statements reflect clear and understandable definitions which should not leave any of the stakeholders – most importantly HCPs – in doubt as to what conduct needs to be avoided.

57 A mistake which should be avoided, with respect, is to conflate the difficulty with identifying the scale of FWA with whether it may be properly defined. By analogy, the definitions of the various crimes which make up corrupt activities in the Prevention of Corrupt Activities Act are clear. However, it would be practically impossible to establish with certainty the scale of corrupt activities in a particular jurisdiction. This does not mean that there is a problem with the definitions, but rather that detection presents a major challenge. So it is with FWA.[48] The evidence given above (see paragraph 50 above) provides ample reason to conclude that FWA is a major problem. The evidence is necessarily based on estimates because not every case of FWA is detected.

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48 See Discovery Submission at para 10; Discovery Bundle p 484

RACIAL PROFILING AND THE EVIDENCE OF COMPLAINANTS

58 Solutionist Thinkers says that extensive evidence was led of the ways in which FWA investigations ruined the lives of HCPs and that this was evidence of racial profiling (see paragraph 5.6 above).

59 This issue was addressed in the submission by counsel for Discovery on 19 June 2023.[49] The point which was made there was the danger of taking allegations of mistreatment at face-value and without a consideration of the countervailing evidence. In the example used by the Panel, and discussed in the 19 June 2023 submission,[50] a comprehensive affidavit was submitted to demonstrate that not only was the substance of the allegations against the complainant established, but all allegations of mistreatment were unfounded. The Solutionist Thinkers has, in its submission, failed to give concrete examples of any form of mistreatment because there is insufficient evidence to substantiate such a claim. Importantly, in all of the evidence submitted by complainants during the course of the Panel's investigation, there was no example of any HCP who was required to repay money in terms of section 59 for an unlawful reason (or, to put it colloquially, there was simply no evidence that any "innocent" HCP was required to repay money).

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49 Paragraph 51.3.3

50 Paragraph 51.3.3

CONCLUSION

60 Discovery respectfully takes the view that the submission of Solutionist Thinkers does not serve to assist the Panel in deciding what to include in its final report. Discovery commends an approach to discrimination which does not take one risk ratio in isolation, but rather focuses on what is the true cause of disproportionality. As shown above, the overwhelming evidence is that the causes of disproportionality, if it exists, cannot be attributed to Discovery.