JOINT SUBMISSIONS OF DISCOVERY HEALTH (PTY) LTD AND DISCOVERY HEALTH MEDICAL SCHEME TO THE SECTION 59 INVESTIGATION PANEL ON SUBSEQUENT DEVELOPMENTS IN THE INDUSTRY

INTRODUCTION

1 These are the submissions of Discovery Health (Pty) Ltd ("**Discovery**") and the Discovery Health Medical Scheme ("**the DHMS**"), one of the medical schemes that Discovery administers, as envisaged by paragraph 2 of the Panel's ruling dated 6 July 2023. Discovery and the DHMS take the opportunity to provide evidence to the Panel of developments in their fraud, waste and abuse ("**FWA**") investigative processes and within the industry since the publication of the Panel's interim report in January 2021.

2 The discussion below focuses on two categories of developments:

2.1 First, there have been several developments within the private healthcare industry as a whole, initiated and implemented under the auspices of the Council for Medical Schemes ("**the CMS**"), which are relevant to the processes for investigating FWA.

2.2 Secondly, there have been initiatives undertaken by Discovery for the enhancement of their own FWA and other provider related processes and procedures but involving only healthcare practitioner ("**HCP**" or "**HCPs**") associations ("**HCP Associations**").

3 The Panel will recall that, in their written submissions to the Panel in advance of the hearing held on 26 June 2023, Discovery and the DHMS expressly requested the opportunity to tender the evidence summarised in paragraph 2 above. Before that evidence is described in detail below, we begin by identifying the purpose for which the evidence is tendered.

THE RELEVANCE OF THE NEW EVIDENCE

4 Discovery and the DHMS have, at all times, maintained in their submissions to the Panel that they do not accept that there has been any racial discrimination – direct or indirect – in the functioning of their FWA investigative processes or, that the basis on which the Panel has made an interim finding of implicit racial bias is (with respect) valid or made on a reliable basis. This has been the subject of various submissions made to the Panel, and we do not repeat the point here. A theme which Discovery and the DHMS have emphasised throughout this process is that fairness in the investigation of FWA is of cardinal importance. This stance is not taken from a perspective of defensiveness – rather our position has at all times been that there is always room for improvement in the FWA investigation process. Furthermore, it is important that healthcare providers feel that they are able to give input into ways in which their concerns may be taken into account to enhance the system.

5 From the perspective of Discovery and the DHMS, the question of fairness fits neatly into the parameters of the Panel's investigation. This is because our ultimate position is that the main focus when it comes to investigating FWA

should be on the fairness on the process as a whole, to HCPs, as well as to medical schemes and their members (bearing in mind that if medical scheme reserves are not properly managed, this impacts on scheme sustainability and members will face unnecessary increases in the cost of cover).

6 In particular, to balance the need for efficient and objective investigations with the need for respect for the rights of the subjects of investigations and the preservation of their dignity. If this is achieved, it is hoped and assumed that there would be widespread acceptance and endorsement of the system by all relevant stakeholders. This is particularly so, taking into account the objective systems used to identify cases for investigation in the first place and the fair investigative procedures which are in place (which are enhanced on an ongoing basis, as shown below).

7 In short, the ultimate position of Discovery and the DHMS is this:

7.1 Its systems used to commence FWA investigations are objective and fair, and do not give rise to any form of discrimination, whether direct or indirect.

7.2 The ultimate issue in FWA investigations is that there should be both procedural and substantive fairness.

7.2.1 Procedural fairness contains various elements, which include (but are not limited to): clear guidance on the nature of the concern and the documentation required to address it; proper

opportunities for representation and assistance; where appropriate, independent mediation; proper opportunities for preparation and engagement with the relevant association or society as part of that preparation; making sure that there is a clear distinction between investigations of prima facie cases of true fraud, on the one hand, and cases involving genuine errors on the other; and preservation, throughout the process, of the dignity of the subject of any investigation.

7.2.2 Substantive fairness involves making sure that any findings of non-compliance are based on proper evidence. And that any decisions involving the repayment of money take sufficient account of the circumstances of the individual practitioner involved.

7.3 If the systems used by Discovery and the DHMS are both procedurally and substantively fair, there can be no complaint – whether based on allegations of discrimination or otherwise – about the system as a whole.

8 The purpose of the evidence below is to demonstrate that Discovery and the DHMS take the issue of fairness very seriously and have taken various steps to enhance the fairness of the FWA investigation system and have initiated other provider related initiatives as part of a continuous programme of improvements/enhancements.

9 As noted above, there is also evidence below on the developments that have taken place in the industry, facilitated by the CMS. What is important about these developments is that there is virtually uniform acceptance by all role-players in the private healthcare industry of the need to take a firm stance on FWA. The industry-wide developments are intended to introduce greater safeguards to balance the need to pursue this imperative with the need to ensure fairness and dignity throughout the process. This is discussed again below.

THE FWA SUMMITS AND CMS PROCESSES

10 Since 2019, the CMS has facilitated regular FWA Summits. The COVID-19 pandemic had an effect on the regularity of these Summits, but the CMS still managed to convene them in 2019, 2021 and 2022. Although some of the developments relating to these summits predate the publication by the Panel of its interim report, most of the important developments have taken place since then. We therefore address the full process below.

The 2019 Summit and the Industry Charter

11 The 2019 Summit was convened in the context of a desire to make private healthcare more affordable. The background and context are recorded in the Industry Charter to address Healthcare Fraud, Waste and Abuse ("**the FWA Charter**"), which was published after the 2019 Summit was held. It is attached here as "**DISCOVERY1**". It is not necessary to discuss the FWA Charter in much detail. Its main importance is not so much in the individual provisions in the text,

but rather the overarching goals behind the instrument. In particular, we note the following:

11.1 The FWA Charter is intended to be subject to voluntary commitment by all of the stakeholders in the private healthcare industry. This includes government, representatives of the regulators, representatives of the medical schemes and representatives of the bodies representing healthcare professionals.

11.2 One of the bedrock principles of the FWA Charter is the notion that FWA has a direct impact on the affordability of private healthcare. This is because, if not reduced or, even better, eradicated, the inevitable consequence is that the provision of healthcare becomes more expensive.[1]

11.3 An equally important principle, at the root of the FWA Charter and directly linked to the point highlighted immediately above, is that schemes have a duty to their members to curb FWA. The Charter is based on the premise that FWA inevitably results in higher membership contributions, which is why schemes have a duty to members to eliminate or reduce it. This requires a duty to be imposed on schemes to have adequate FWA risk management controls in place.[2]

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1 See Article 1

2 See Article 16(2)

11.4 The Charter is subject to voluntary participation. Importantly, however, it provides that:

> "by signing the Charter, the signatories undertake to adhere to the principles and duties contained therein. Acting in contravention of the principles and duties contained in this Charter shall lead to the removal of the affected signatory, subject to the consent of the other signatories on a two-thirds basis; and they shall not be afforded the benefits and assistance which emanate from the Charter when involved in a matter concerning FWA".[3]

11.5 The Charter provides that "Administrators, MCOs and Medical Schemes shall prepare an Industry Code of Good Practice for regulatory input and approval, that will govern their conduct when it comes to dealing with matters of FWA".[4]

The 2022 industry developments

12 The FWA Charter was the starting point of attempts to address the challenge of FWA comprehensively. In 2022, arising from the FWA Summit, there were two developments which aim to give more specificity to the goal of addressing FWA.

13 First, there was the publication of the Draft FWA Code of Good Practice ("**the FWA Code**"). It is attached here as "**DISCOVERY2**". We draw attention to the following:

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3 Article 17

4 Article 16.2.5

13.1 The FWA Code was drafted by the CMS with extensive input provided by the Health Funders Association pursuant to the obligation discussed in paragraph 11.5 above. The Health Funders Association is an organisation representing the interests of medical schemes representing approximately 73% of open medical schemes and 50% of total medical scheme membership in South Africa. The FWA Code makes clear that its intention is to complement the work done by regulators, most notably the CMS and HPCSA. Its aim is to impose heightened obligations on stakeholders in respect of FWA, working alongside regulators responding to the same challenge. Discovery and the DHMS were heavily involved, as part of their membership of the Health Funders Association, in the formulation of the FWA Code.

13.2 The Preamble to the FWA Code makes clear that methods to control FWA must be consistent with various relevant rights in the Bill of Rights. The objective of the FWA Code is to establish guidelines for minimum standards of good practice for the prevention, detection, investigation, restitution and penalisation of FWA.

13.3 The FWA Code contains comprehensive definitions of the terms “fraud”, “waste” and “abuse”.

13.4 The FWA Code is based on various fundamental principles. The most notable of these, for present purposes, are:

13.4.1 the need for clear and transparent investigation and recovery processes;

13.4.2 fair and lawful investigation and recovery processes with no coercion or intimidation;

13.4.3 a collaborative and inclusive approach to the development of policies and procedures;

13.4.4 facilitating a relationship of trust and cooperation between schemes, health professionals, regulators, scheme members and industry stakeholders; and

13.4.5 protecting scheme members from perverse expenditure or being denied access to benefits or cover and protecting the sustainability of schemes.

13.5 The idea of the FWA Code is to confer rights, and impose concomitant obligations, on various stakeholders. For instance, various obligations are proposed to be imposed on beneficiaries. These relate, for instance, to the duty to report instances of FWA which come to their knowledge, not themselves to engage in FWA practices, and to take steps to prevent FWA by, for instance, taking care to ensure that they are billed correctly and ensuring that their medical scheme cards and personal information are protected.[5] The FWA Code then envisages the conferral of various rights on members (many of which already exist in terms of contracts concluded with schemes, but which are codified in the interests of good

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5 See clause 1.1.2

practice). These include the right to receive cost-effective healthcare and the right to be protected from financial loss as a result of FWA.[6]

13.6 The FWA Code follows the same approach when it comes to schemes. Various important obligations are imposed on them. Most notably, the duty to conduct FWA investigations in accordance with regulatory requirements and the duty to treat the subjects of investigations fairly and without unfair discrimination.[7] These obligations create a concomitant right on the part of medical schemes to take a zero-tolerance approach to FWA. In particular, medical schemes have the right to institute investigations "where there is a reason to believe that the supplier is non-compliant with the legal provisions governing his/her/its activities".[8]

13.7 A similar approach is, again, adopted in the case of healthcare providers. A series of obligations are imposed, and rights created, to ensure the fair and efficient investigation of FWA. In essence, the obligations are designed to ensure that healthcare providers do not themselves engage in FWA and, equally importantly, to report FWA when they become aware of it.[9] The rights conferred on them are aimed at ensuring fairness in the FWA investigation process by entrenching the right to a legal defence, a reasonable opportunity and time to answer FWA allegations wherever possible, the right not to be accused of FWA without prima facie evidence

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6 Clause 1.1.3

7 Clause 1.2.2

8 Clause 1.2.3

9 Clause 1.4.2

and the right to be furnished with evidence before answering allegations or preparing for prosecution.[10]

13.8 The FWA Code deals in detail with the principles which should be reflected in the rules, policies and Standard Operating Procedures which should apply to the investigation of FWA. These are intended to address:

13.8.1 Rules for fraud and abuse detection applicable to the data curation component, the algorithm component, and the implementation process.

13.8.2 Regulation of data mining methods.

13.8.3 Compliance incentives; whistle-blowing; penalties for false, frivolous or vexatious reports; voluntary disclosure amnesty.

13.8.4 The notion that due cause in initiating an investigation should be in accordance with the values outlined above.

13.8.5 Conducting audits as a legitimate forensic mechanism.

13.8.6 Maintaining adequate records, including what gave rise to the investigation, its conduct, and the outcome.

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[10] Clause 1.4.3

13.8.7 Collaboration, information sharing among medical schemes and conducting investigations in a fair, consistent manner, and subject to appropriate oversight and supervision.

13.8.8 Policies and procedures must be cognisant of the rights of persons under investigation. These rights must be developed within a multi-stakeholder forum, such as the Health Sector Anti-Corruption Forum.

13.8.9 Dispute resolution and arbitration mechanisms under an FWA Tribunal to rule on the methods and adjudicate investigation outcomes and value of the liability.[11]

13.9 The FWA Code has detailed provisions on data sharing and reporting, aimed at protecting the confidentiality of patient information while at the same time recognising the importance of sharing of information as part of forensic processes. One of the key features of the rights confirmed by this section of the FWA Code is that medical schemes cannot place a provider on indirect payment as a result of the refusal of that provider to disclose a patient's confidential information.[12]

14 It is important to emphasise, by way of conclusion of this discussion of the FWA Code, that it was prepared with the contribution of various important role-players. Not only were the schemes represented, but various associations representing

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11 Clause 2.1

12 Clause 6.2

the interests of healthcare providers contributed to the draft. This includes participants in the proceedings before the Panel, including the Solutionist Thinkers Group.[13]

15 The second important development in 2022 was the taking of steps by the CMS to establish an FWA Tribunal. In this regard, we note the following:

15.1 The CMS is in the process of establishing a FWA Tribunal, and draft rules have already been circulated. As the Panel will be aware, sections 47 to 50 of the Medical Schemes Act ("**the MSA**") provide for the making of complaints for any breaches of the Act, and the mechanisms for resolution of those complaints – first with attempts by the CMS Registrar to resolve the complaint (section 47), then with referrals to the Council (section 48 and 49 appeals) and then ultimately with appeals to the Appeal Board (section 50). The CMS is in the process of taking submissions from stakeholders on the way in which the FWA Tribunal will interact with these provisions of the MSA.

15.2 Although the Tribunal is yet to be established for the reasons given above, its draft Rules give a sense of its intended nature. The draft Rules are annexed here as "**DISCOVERY3**". They are discussed below.

15.3 The Tribunal is intended to have two main functions.

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13 Clause 7

15.3.1 First to resolve disputes “relating to methods used to prevent, detect, investigate, sanction and restitute [sic] funds in FWA-related matters according to section 59” of the MSA.

15.3.2 Secondly, to “implement the FWA Code of Good Practice as per the Batho Pele Principles.”[14]

15.4 The intended composition of the Tribunal is:

15.4.1 One chairperson.

15.4.2 Not more than 10 members in addition to the chair.

15.4.3 3 of the members must be practising legal practitioners of not less than 10 years of experience, or retired judges. The chair must be one of these three legally-trained persons.

15.4.4 The remaining members must be appointed from the professional regulatory bodies including the HPCSA and SANC.[15]

15.5 It is intended that the Tribunal will be empowered to resolve any complaint in relation to an allegation of a contravention of section 59 of the MSA in the submission of a claim, payment of a claim and the prevention, detection, investigation or deduction or recovery of an

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14 Draft Rule 3

15 Draft Rule 6

amount arising from FWA. It will then be given ancillary powers to give effect to this main purpose, such as applying to court for its decision to be made an order of court or referring acts or omissions to the CMS.[16]

15.6 The draft rules envisage a detailed procedure in which a complainant may file a written complaint, in the form of an affidavit, setting out the facts and legal contentions on which the complaint is based. There is then provision for an answer from the respondent and a reply from the complainant.[17]

15.7 The draft rules then provide for various procedures which one ordinarily finds in the rules of court or the rules of modern quasi-judicial tribunals such as the Competition Tribunal, the Financial Services Appeal Board, the Appeal Board under section 50 of the MSA and the like. It is not necessary to discuss them in detail here. It is simply noted that these rules provide for the amendment of complaints, the closing of pleadings, the convening of a pre-hearing conference, the convening of a settlement conference by the Tribunal of its own accord or on application, and the protection of confidential information.[18] There are also other rules common to bodies of this nature, such as provisions dealing with the summoning of witnesses, the withdrawal or postponement of matters and the making of default orders.[19]

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16 Draft Rule 7

17 Draft Rules 12 to 14

18 Draft Rules 15 to 20

19 See draft rules 29 to 34

15.8 The draft rules envisage a procedure to be followed if any person wishes to apply for interim relief based on a prohibited practice.[20]

15.9 The draft rules envisage that parties will be represented in the proceedings. However, the use of legal representation will only be allowed with the consent of the other parties or on good cause shown.[21]

15.10 The draft rules will make provision for the making of costs order by the Tribunal.[22] They also establish a proposed referral fee of R2800, from which an exemption may be obtained on good cause shown.[23]

16 The implication of the developments summarised above is addressed in paragraph 36 below.

DISCOVERY INTERNAL INITIATIVES

17 As noted in the introduction, Discovery has introduced various interventions and changes to its FWA investigation and its provider related processes and procedures. These are discussed below.

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20 See section B of the draft rules

21 Draft Rule 27.8

22 Draft Rule 39

23 Draft Rule 40

The Health Professionals Reference Group

18 In 2021, Discovery established the Health Professionals Reference Group ("**the HPRG**"). Its purpose is to allow key stakeholders to offer advice and contribute to the review, development and redesign of the forensic processes used by Discovery to enhance their fairness and effectiveness. The HPRG Report, which is discussed again below, is annexed here as "**DISCOVERY4**".

19 Seven HCP Associations participated in the process from the outset. These were the Radiological Society of South Africa; Solutionist Thinkers Group; South African Medical Association; South African Private Practitioners Forum; South African Society of Anaesthesiologists; South African Society of Physiotherapists; and IPA Foundation of South Africa/United Forum of Family Practitioners. The Solutionist Thinkers Group's formal participation in proceedings of the HPRG has been intermittent but was at all times still sent documents arising from the process.

20 The following process was followed:

20.1 Dr Ntuthuko Bhengu was appointed as the independent chair of the HPRG and was supported by attorney Charles Nupen, an independent expert on process design and dispute resolution.

20.2 The HPRG initially took the form of regular meetings (initially weekly) as well as additional work undertaken between such meetings. At each

meeting, the engagements facilitated by the independent convenors were reported to the HPRG as part of the formal agenda of the meetings.

20.3 The intention of the process was to allow the HCP Associations to give their input into the ways in which Discovery's investigation of FWA could be improved. The overarching theme, and conclusion, was that there was consensus that there was room for improvement in the tone of engagement and general approach to investigations.

20.4 As may be seen from the report, there was consensus of members of the HPRG that the following principles are critical for the development of a fair and effective forensic system:

20.4.1 there must be appropriate full disclosure and transparency with due regard for relevance and patient confidentiality;

20.4.2 it must be fair, equitable and be underpinned by mutual respect;

20.4.3 there must be commitment to embrace change;

20.4.4 it must incorporate a system of peer review in relevant cases;

20.4.5 it must promote and be based on ethical practices;

20.4.6 data used for analysis must be accurate;

20.4.7 the system must be applied consistently;

20.4.8 there must be an agreement on the standards that are referenced in the process;

20.4.9 all processes must be underpinned by professionalism;

20.4.10 there must be an acceptable, optimal coding system;

20.4.11 the system must contribute towards sustainability of the health system;

20.4.12 there must be early engagement with the practitioner under investigation;

20.4.13 there must be an effective dispute prevention and resolution process;

20.4.14 interaction with practitioner associations must be encouraged;

20.4.15 the system must be underpinned by good governance and oversight;

20.4.16 the system must be affordable;

20.4.17 the approach to practitioners must be proportional to the level of probable risk;

20.4.18 there must be zero tolerance for fraud;

20.4.19 there must be effective management of waste and abuse; and

20.4.20 forensic processes should not be premised on preconceptions of guilt and interventions must be reasonable, proportionate and based on the presence of sufficient evidence. The *audi alterem partem* principle and rules of natural justice must apply.

20.5 There was also consensus as to the ways in which the Discovery forensic system could be enhanced. This was reflected in various proposed adjustments to the twelve-step Discovery forensic investigation process and included the following:

20.5.1 To encourage early involvement of HCP Associations/Societies in the process, at the invitation of HCPs under investigation. HCPs must be encouraged to involve their societies from the outset noting that at every level of engagement, patient confidentiality must remain paramount.

20.5.2 While it is acknowledged that correct billing is the responsibility of the HCP and adverse trends in experience that alert Discovery to the possibility of irregular claims take time to become evident, solutions should be sought to progressively reduce the three-year window set by Discovery to trigger an investigation into irregularities noting the resultant financial as well as administrative burden this places on practitioners.

20.5.3 There should be a managed “balance of power” in forensic meetings so that HCPs do not feel intimidated or coerced. This can be achieved by ensuring that the identity of Discovery

representatives and information relating to the case are communicated to the HCP in advance and that the number of Discovery attendees is minimised to those required.

20.5.4 Engagement between Discovery and HCP Associations to resolve coding-related problems as well as a more nuanced approach to FWA is required and it is acknowledged that fraud is not the same as dealing with issues arising from coding interpretations.

20.5.5 Collaboration on industry issues that require engagement with regulators for resolution.

20.5.6 Guidelines in circumstances that require escalation of complaints to the HPCSA and/or law enforcement authorities.

20.5.7 Establishment of effective dispute prevention and resolution systems.

20.5.8 Forensic processes should not be premised on preconceptions of guilt and interventions must be courteous, reasonable, proportionate and based on the presence of sufficient evidence. The *audi alterem partem* principle and rules of natural justice must apply. This was identified as a core element and affects the content of correspondence and the tone of engagement.

21 The HPRG process and report was the first step in ongoing engagements between Discovery and the HCP Associations aimed at improving the system. The HPRG process is, in fact, ongoing because there are quarterly meetings of the group.

22 As a consequence of the HPRG report, Discovery has introduced various changes to its FWA investigation and billing systems. These are addressed in the next section.

Interventions following the HPRG process

23 Before dealing with specific interventions made by Discovery, it is important to note at the outset that most of the interventions made as a result of the HPRG process concern more than one of the principles reflected in the summary in paragraphs 20.4 and 20.5 above. This will become clearer when specific interventions are explained below. The point we wish to emphasise, though, is that the approach adopted by Discovery and the DHMS pursuant to the HPRG process is based on a desire to enhance the system as a whole by making incremental changes and improvements.

(a) The Review of Codes

24 One of the issues which has been raised in the Panel's interim report is the connection between the use of scheme codes and the flagging of fraud cases.[24] Also, as noted above (see paragraph 20.5.4 above), the issue of coding-related problems was expressly raised as part of the HPRG process as a concern of HCPs.

25 Discovery has considered the evidence and have determined that FWA cases involving potential misinterpretations of clinical codes constitute less than 15% of the total annual investigations. Nevertheless, concerns relating to clinical coding are a key concern for practitioners and so Discovery undertook measures to address this issue in 2022 and 2023.

26 The key point to emphasise here is that a distinction needs to be drawn between two discrete scenarios. On the one hand, there are true cases of fraud, in which supposed misinterpretation of codes is used as an illegitimate attempt at exculpation by the subject of the investigation. On the other hand, there are genuine misinterpretations of codes which lead to incorrect claims. Genuine errors could extend beyond misinterpretations of codes and could involve other incorrect claims based on clinical interpretation which need to be corrected. So, in both cases, the medical scheme pays a sum to a member or HCP which is incorrect. But in the one scenario this is because of fraud, and in the other it is

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[24] See interim report at paras 64 to 68

because of genuine error. Therefore, the interventions made in relation to coding and clinical interpretation are aimed at adopting a process which distinguishes between errors which relate to genuine fraud and errors which relate to *bona fide* misinterpretation as early as possible. This is so that the cases can then be addressed by appropriate (and, necessarily, different) procedures.

27 The main intervention designed to draw the aforementioned important distinction as early as possible has been the establishment of an internal billing review committee ("**BRC**"). As shown below, the BRC's mandate extends beyond only the issue of coding, and serves to address some of the other issues highlighted in paragraphs 20.4 and 20.5 above. The mandate of the BRC is to:

27.1 Review any possible coding anomalies to determine into which of the two categories identified above (ie fraud or misinterpretation) they fall.

27.2 Engage with Societies/Associations to give support in the use of the internal systems relating to the making of claims.

27.3 Have oversight over letters/templates before distribution (which is an important function, to which we return below).

27.4 Centralise all decision-making processes.

28 The BRC is made up both of coding specialists and specialists in forensic and legal processes relating to FWA investigation. Using these skills, the BRC oversees a thorough investigation process which is aimed at distinguishing between cases of fraud and true misunderstandings relating to the use of codes

or clinical interpretations. When cases flagged for possible FWA and investigations, overseen by the BRC, reveal that a coding misinterpretation is at the root of the problem, further engagement processes are triggered to identify the appropriate next step. This may involvement engagement with professional societies or further training and support.

29 The BRC meets on a weekly basis to review cases and make a determination on the appropriate way for them to be handled, taking account of the distinction drawn above – ie, whether they should be dealt with by forensic processes or through alternative engagements with respect to clinical interpretation and assessment of codes. The BRC then gives feedback to the HPRG, which continues to hold quarterly meetings, as already noted.

30 It is, for reasons of fairness, clearly appropriate to adopt the measures above, to ensure that those HCPs with a genuine misunderstanding of codes are treated fairly from the outset. But in addition to procedures adopted to achieve that goal, it would of course be even better to eliminate genuine misunderstandings about coding in the first place.

31 To that end, in 2022 and 2023, 17 separate workshops and training sessions were held to assist healthcare providers to use the codes correctly. There has been very positive feedback from healthcare providers, who in written feedback have said that they have benefited from the training.

32 Reference was made above to the role of the BRC in overseeing letters/templates before they are distributed (see paragraph 27.3 above). This does not relate only to the issue of coding, but is relevant to the FWA process as a whole. It is necessary for this to be explained in more detail:

32.1 The reference to templates is a reference to the standard wording that is used in letters sent to HCPs when a query is raised as a precursor to a formal investigation or when a formal investigation has been triggered. The letter is the actual document sent to a specific HCP. So, the BRC has oversight over the templates – which is important because, by the nature of the scale of Discovery's operations, it is necessary to have standardised wording which can be reused. But it also has oversight over changes made in the case of specific HCPs – ie, where a letter deviates from the standard wording of the templates.

32.2 One of the main features of the FWA investigation process has always been the convening of meetings with the HCP involved. This applies whatever the nature of the subject of the investigation (ie, coding or otherwise). Under the oversight of the BRC, the template relating to letters involving invitations to meetings has been updated, in consultation with the HPRG, to identify which Discovery representatives will be present at the meeting, and to clarify that the HCP concerned is entitled to bring his or her own representative. Importantly, greater emphasis is now placed, in the wording of the template, on an encouragement to the HCP to involve his or her professional society, either by attendance at the meetings or with other interventions and preparation. This is important

because, as shown above, one of the key issues raised as part of the HPRG process was recognition that HCPs should involve their associations/societies as early as possible, so that they may be properly represented (see paragraph 20.5.1 above).

32.3 As the Panel is aware, because it featured in its interim report,[25] Discovery generally applies an approach which accords with the ordinary rules of prescription by investigating potential FWA up to three years from when the incorrect payment was alleged to have been made. As shown above, this was raised again (ie, in addition to serving as complaint before the Panel) as part of the HPRG process (see paragraph 20.5.2 above). HCPs and their associations were sympathetic to the fact that reducing this period gives rise to greater potential loss to the scheme, and therefore prejudice to members. This is why the wording in paragraph 20.5.2 refers to a progressive reduction in the 3-year period. At this stage, and with reference to the 3-year period, Discovery's assessment is that trends in data are required to identify some FWA practices – for example, HCPs routinely charging for consultations for a longer time than they actually spend with a patient. Taking this into account, and taking into account the sheer volume of claims, it is not always possible to intervene earlier. Capping this period would therefore be to the detriment of medical scheme members whose funds have been abused and would unduly benefit unethical providers. However, the letter templates have been updated, in consultation with the HPRG, to provide greater clarity on data

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25 See paragraph 121 of the interim report

requests and expressly to record that there is the opportunity to engage with Discovery on what can be feasibly provided. These interventions are important because one of the main complaints of HCPs is that, when there is a long delay between the anomaly at the root of the investigation and the commencement of the investigation, it is sometimes hard to accumulate the necessary data.

(b) The Enhancement of Dispute Prevention and Resolution Processes

33 A further suggestion arising from the HPRG process was that there should be effective dispute prevention and resolution systems (see paragraph 20.5.7 above). Discovery and the DHMS have taken this seriously:

33.1 Discovery engaged Tokiso Dispute Settlement (Pty) Ltd ("**Tokiso**") to conduct a pilot independent facilitation process for dispute resolution during late 2021/early 2022.

33.2 This process demonstrated the value of independent facilitation in progressing the investigation processes although the number of practitioners electing to participate in this process was disappointing.

33.3 Following discussion on the Tokiso pilot process with the HPRG, the independent facilitators of the HPRG have supported Discovery in establishing an independent dispute resolution process and seven panellists have been appointed to provide such facilitation. The process of communicating the availability of this process to providers is underway

and will be incorporated in the correspondence with providers during investigations.

(c) The Upskilling of Discovery's Investigation Team

34 Discovery has made interventions to give effect to the suggestion that forensic process should not be premised on preconceptions of guilt, should be courteous and fair (see paragraph 20.5.8 above):

34.1 This principle was agreed and adopted in the HPRG process and underpinned a number of the wording updates in the templates. Discovery also instituted a "soft-skills" training programme for its forensic team which includes topics such as dealing with difficult conversations and negotiation skills.

34.2 This training was conducted during May/June 2022 and included 10 modules of at least 4 hours each. The independent training facilitator noted the high level of commitment in terms of attendance and senior management support (including at Discovery CEO level). The training material has been incorporated into the Discovery training programme and will be part of onboarding as well as refresher training.

(d) The Review of Discovery's FWA Reporting Obligations

35 Lastly, reference was made above (see paragraph 20.5.6 above) to the need for there to be guidelines as to when it is necessary for Discovery to refer matters to the law-enforcement authorities or the HPCSA. In this regard:

35.1 Discovery has a clear set of Standards of Practice documents with respect to reporting of cases to law enforcement authorities and/or regulatory bodies and these were submitted during the Section 59 investigation process and are continuously updated as required.

35.2 In accordance with Section 34(a) of the Prevention and Combating of Corrupt Activities Act ("**the PRECCA**"), Discovery will report to the Directorate of Priority Crime Investigations ("**DPCI**"):

35.2.1 any matter where prima facie evidence of corruption, fraud or theft exists; and

35.2.2 where Discovery has reason to believe that the estimated total value of such acts of corruption, fraud or theft would amount to R100 000 or more.

35.3 The PRECCA requires the reporting of certain offences under certain conditions to the DPCI, in a prescribed format. Discovery has a clearly documented company policy that aligns with PRECCA and all other applicable legislation.

35.4 Discovery has clarified to the HPRG that if the provider has declared that the amount was a genuine, innocent mistake and was billed in error and therefore undertakes to repay such amounts (since they were not actually entitled to receive them) then it is not fraud and so it is not reported as such. Participants in the HPRG have also noted their concerns with respect to the slow pace of action taken by the HPCSA in responding to complaints and that, in some cases, the penalties imposed are inadequate to deter unethical conduct.

THE IMPLICATION OF THESE DEVELOPMENTS

36 It was explained above (see paragraphs 4 to 7 above) that the main focus of Discovery and the DHMS is on ensuring procedural and substantive fairness throughout the FWA investigative process. We have sought to provide the Panel with a comprehensive explanation of developments not only within Discovery and the DHMS, but also throughout the industry. This is because both are relevant to the improvement of the system as a whole. The CMS, from which this Panel derives its mandate, has repeatedly emphasised, through its FWA Summits, the importance of stamping out FWA. The developments within the industry serve, in our respectful view, to confirm that Discovery's emphasis and focus on fairness is justified. This is because the attempts at improvements within the industry, most notably through the creation of the Tribunal, are primarily aimed at enhancing fairness. If those interventions are successful, there will be proper

safeguards in place to ensure that FWA investigations and interventions are both effective and preserving of the dignity of the subjects of those processes.

Discovery Health (Pty) Ltd

Discovery Health Medical Scheme

14 July 2023