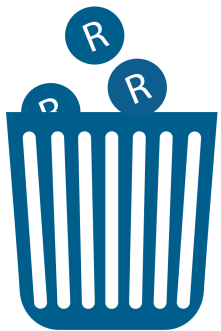


# Proposed Fraud, Waste and Abuse Tribunal

Mr John Letsoalo

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**FRAUD, WASTE & ABUSE  
WEBINAR**

**11 & 18 MARCH 2021**



IN ASSOCIATION WITH



Health Professions Council of South Africa

# Scope of the FWA Tribunal

**The FWA Tribunal will be a body established as per private healthcare industry.**

Code of Good Practice

Backlog problems

Efficiently resolve all Section 59 disputes



# Definition of the Tribunal

**“Tribunal”**, depending on the context, means either-

- a) The body established by section 9
- b) A panel of the Tribunal convened in terms of section 9
- c) A member of the Tribunal sitting in terms of section 9 or
- d) The Registrar of the Tribunal



# About the Tribunal

- The Tribunal will be objective and will remain impartial always. No individual or organisation will be able to unduly influence the Tribunal or the staff of the Tribunal in relation to any matter
- The Tribunal will act in the best interests of all the parties, taking both sides into consideration and considering the merits of each case carefully
- The Office of the Tribunal exists to effectively resolve section 59, regulations 5 and 6 disputes arising within the medical schemes industry, between members of the medical schemes, service providers, and any other relevant stakeholder and medical schemes on the other.





# About the Tribunal

- Tribunal will openly deal with any issues brought before it, pose the relevant questions and communicate clearly and transparently
- In resolving disputes, the Tribunal shall:
  - i. Act independently and objectively;
  - ii. Have regard to the law, fairness, justice, equity and fundamental human rights and values as prescribed by the principles of *UBUNTU*
- The Tribunal must balance the rights of parties to ensure that there are justices on the one hand and the rights of the members on the other hand
- There is a material risk of over-reach in so far as schemes' operational decision-making is concerned. The power to make binding decisions will further compound this. There is some risk that existing MSA Appeals processes may be undermined.



# About the Tribunal

An important part of sustaining this balance is to ensure that the Secretariat has the capacity to ensure that complaints are screened to confirm that;

- (a) all available avenues with the scheme have been exhausted, and
- (b) the case may be a valid contravention of applicable law and Codes.
- This will help to ensure that member funds are not wasted in following up spurious allegations.
- The implication is that Section 25(a) and (b) need to be properly defined in support of this discretion.



# Composition

**How will the Tribunal co-exist with but not duplicate current MSA structure?**

The powers and duties of the Tribunal shall be exercised in accordance with the limits and mandate determined by the Codes of Good Practice.



# Initiating Complaint proceedings

1. A Complaint Referral may be filed by any complainant
2. If, in respect of a matter, more than one person files a Complaint Referral, the Registrar must combine those referrals under a common case number.
3. The person who files a Complaint Referral must serve a copy of it within three business days after filing on-
  - a) The respondent; and
  - b) On each other person who has previously filed a Complaint Referral in that matter



# Complaint Referral

- 1) A complaint proceeding may be initiated only by filing a complaint
- 2) A complaint Referral must be supported by an affidavit setting out in numbered paragraphs -
  - a) A concise statement of the grounds of the complaint; and
  - b) The material facts or the points of law relevant to the complaint and relied on tribunal or complainant, as the case may be.
- 3) A complaint Referral may allege alternative prohibited practices based on the same facts.



# Settlement conference

At any time before the Tribunal makes a final order in a complaint proceeding, the Tribunal, on its own initiative or at the request of the participants, may order an adjournment of the proceedings to allow the participants to attempt to reach agreement on any outstanding issue.



# Confidentiality

1. If any party to Complaint supplies information to the FWA Tribunal and requests, in writing, that it is treated as confidential information, the FWA Tribunal shall not disclose that information to any other party, except with the written consent of the first mentioned party.
2. As far, as is practical and at the sole discretion of the Tribunal, all documentation should be provided to both parties to a dispute. However, it is not necessary for documents and information used by the Tribunal to be provided to both parties as long as the Tribunal's written reasons in the case of a recommendation and ruling, clearly identify the documents or information relied on and the identified documents or information are provided on request.





# Initiating interim relief procedures

1. A person wishing to apply for an interim must file a Complaint in Form, and supporting affidavit setting out the facts on which the application is based
2. The applicant must serve a copy of the Complaint and affidavit on the Tribunal and each Respondent named in the complaint, within 3 business days after filing it
3. A complaint in terms of this Rule must-
  - a) Allege each prohibited practice in respect of which the application is made by specific reference to the relevant section, subsection, paragraph or subparagraph of the Act;
  - b) Indicate the order sought, and the section of the Act under which that order may be granted;
  - c) State the name and address of each person in respect of whom an order is sought
4. A complaint may allege alternative prohibited practices based on the same facts.



# Answering and Replying Affidavits

1. Within 15 business days after being served with a Complaint, a respondent against whom an interim order is sought-
  - a) May serve an answering affidavit on the FWA Tribunal, the Applicant and any person against whom the order is sought; and
  - b) Must file proof of service with the affidavit.
2. Within 10 business days after being served with an answering affidavit that raises issues not addressed in the Complaint or its supporting affidavit, the applicant may-
  - a) Serve a replying affidavit on the Respondent, the Tribunal and on any other person against whom the order is sought; and
  - b) File a copy of the replying affidavit and proof of service



# Unreasonable complaints

- I. The Tribunal may, at its sole discretion, determine that a dispute should not be considered on the grounds that the complainant is pursuing it:
  - a) In an unreasonable manner; or
  - b) In a frivolous, vexatious, offensive, threatening or abusive manner as defined under common law.

Usage of Common law as a base.



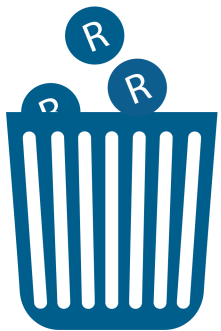
# Thank you.



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# Dispute Resolution Process Role

- There are existing processes for dispute resolution in the Registrar's office and in the Council.
- The Rules of the Tribunal delineate the respective roles of each of the regulatory bodies tasked with dispute resolution.
- There is justification provided for the establishment of an additional dispute resolution mechanism, when dispute resolution processes already exist under the stewardship of the CMS



# Current Complaint Process

- In terms of Section 47 of the Medical Schemes Act 131 of 1998 a written complaint received in relation to any matter provided for in this Act will be referred to the medical scheme. The medical scheme is obliged to provide a written response to the Registrar's Office within 30 days.
- The Registrar's Office shall within 4 days of receiving the complaint from the administrator, analyse the complaint and refer a complaint to a medical scheme for comments.
- Upon receipt of the response from the medical scheme, the Registrar's Office will analyse the response in order to make a decision of ruling. Decisions / rulings will be made within 120 days of the date of referral of a complaint and communicated to the parties





# Current Complaint Process

- The Registrar's Ruling and appeal to Council: Section 48 of the Act makes provision for any person aggrieved by any decision relating to the settlement of a complaint to appeal against such decision to Council.
- This appeal is at no cost to either of the parties. The operation of the decision shall be suspended pending review of the matter by the Council's Appeal Committee.
- An appeal lodged under Section 48 must be lodged in the form of an affidavit, within 3 months after the date on which the decision was made. The Council may condone late submission of an appeal, on good cause shown. The Registrar has no powers to condone late submissions.
- The secretariat of the Appeals Committee will inform all parties involved of the date and time of the hearing. This notice should be provided no less than 14 days before the date of the hearing.
- The parties may appear before the Committee and tender evidence or submit written arguments or explanations in person or through a representative. The Appeals Committee may after the hearing confirm or vary the decision concerned or rescind it and give another decision as they seem just.



# Current Complaint Process

## The Section 50 Appeal's process:

- Any party that is aggrieved with the decision of the Appeals Committee may appeal to the Appeal Board. The aggrieved party has 60 days within which to appeal the decision and must submit written arguments or explanation of the grounds of his or her appeal.
- The Appeal Board shall determine the date, time and venue for the hearing and all parties will be notified in writing. Appeal Board shall be heard in public unless the chairperson decides otherwise.
- The Appeal Board shall have the powers which the High Court has to summon witnesses, to cause an oath or affirmation to be administered by them, to examine them, and to call for the production of books, documents and objects.
- The decisions of the Appeal Board are in writing and a copy thereof shall be furnished to parties.
- The prescribed fee of R2800.00 is payable for Section 50 Appeals.



# New FWA Complaint Process

- A Complaint Referral may be filed by any complainant; it must set out the grounds of the complaint, the material facts of the case, and the alleged prohibited practice in question.
- Within 30 business days after being served with a Complaint Referral filed by the FWA Tribunal, a Respondent who wishes to oppose the Complaint Referral must –
  - a) Serve a copy of their Answer on the Tribunal; and
  - b) File the Answer with proof of service.
- The Complainant has 15 business days to respond to the Answer. Amending documents may be filed as required.



# New FWA Complaint Process

- At any time before the Tribunal makes a final order in a complaint proceeding, the Tribunal, on its own initiative or at the request of the participants, may order an adjournment of the proceedings to allow the participants to attempt to reach agreement on any outstanding issue.
- A person wishing to apply for an interim relief order must file a Complaint, and supporting affidavit setting out the facts on which the application is based. The Tribunal may convene an Interim Relief hearing.
- The Tribunal hearing may include representative parties, witnesses, interpreters and translators; some of whom may be paid fees.
- Matters may be postponed, set down, or struck off.



# New FWA Complaint Process

- The Appeals Committee may after the hearing confirm or vary the decision concerned or rescind it and give another decision as they seem just.
- Tribunal hearings will proceed in accordance with guidelines developed by the Tribunal. The Tribunal findings may be accompanied by an order for costs.
- A fee of two thousand eight hundred Rands (R2, 800) is incurred by any party who intends to lodge a Complaint to the Tribunal; but this fee may be waived.



# FWA Tribunal Process



With the addition of the additional FWA Tribunal process, this process will link to the already established process approved in the Scheme Rules for resolving irregular claims under Section 59 of the MSA.



# FWA Codes of Good Practice Process

Stage of investigation	Key actions
1. Trigger for investigation	<ul style="list-style-type: none"> <li>• Whistle-blower tip-off</li> <li>• Outlier identification through data analytics</li> <li>• Investigation projects</li> <li>• Routinely scheduled audits</li> </ul>
2. Conducting an investigation	<ul style="list-style-type: none"> <li>• Information requests to providers</li> <li>• Witness statements</li> <li>• Structured meetings with providers</li> <li>• Undercover investigations</li> </ul>
3. Actions to mitigate risk of adverse loss to scheme	<ul style="list-style-type: none"> <li>• Suspension of direct payment</li> <li>• Withholding of claims</li> <li>• Calculation of recoveries</li> <li>• Blocking of payments</li> </ul>





# FWA Codes of Good Practice Process

Stage of investigation	Key actions
4. Reporting	<ul style="list-style-type: none"> <li>• Reporting to Board of Scheme Trustees</li> <li>• Submission of suspected criminal cases to PRECCA and DPCI</li> <li>• Discretionary reporting to other regulatory authorities, including HPCSA</li> </ul>
5. Resolution of investigations	<ul style="list-style-type: none"> <li>• Investigations suspended</li> <li>• Investigations closed</li> </ul>
6. Dispute resolution	<ul style="list-style-type: none"> <li>• Medical Scheme's independent dispute procedure</li> <li>• Providers may complain to the CMS in terms of S47 of the MSA</li> <li>• An external arbitration mechanism may be agreed on</li> </ul>



# Considerations

- The fiduciary duty upon Medical Scheme Trustees and the CMS to act in the interests of members. This means that Trustees are responsible for ensuring that members' funds are spent for the purpose of defraying genuine medical expenses. In addition, it means there should be mechanisms to ensure that resources are not spent on spurious or unsubstantiated complaints.
- The process as outlined above is in compliance with the MSA and administrator accreditation requirements. The process must be allowed to proceed to completion before an appeal is lodged with the Regulator.



# Considerations

- Administrator process outlined above is allowed to proceed to completion of Stage 6, before an appeal may be lodged with the CMS. This has the added advantage of allowing a full dossier to be developed before the Tribunal Panel is called to deliberate on the matter.
- MSA Section 47 - FWA Tribunal.
- It is recommended that the FWA Tribunal establishes a preliminary process of vetting prospective complaints to verify which regulation is alleged to have been breached whether the Medical Scheme dispute resolution process has been utilised. Section A-12(a) and (b) should be amended to capture both of these conditions



# Considerations

- Note that (by way of comparison) the Competition Commission evaluates complaints according to specific regulatory criteria and will only refer complaints to the Competition Tribunal if the competition regulations are deemed to have been breached.
- Best practice and information sharing;
- It is recommended that the CMS generates an annual report on FWA in the medical scheme industry, drawing from various resources, including the Health Sector Anti-Corruption Forum, the HFA, the BHF, the FWA Tribunal, and health professional associations.
- This will assist to raise awareness and to highlight trends and could be an important reflection of successes and ongoing challenges in combating fraud and corruption in the sector. Such a publication would prove useful to the NHI Fund as well.

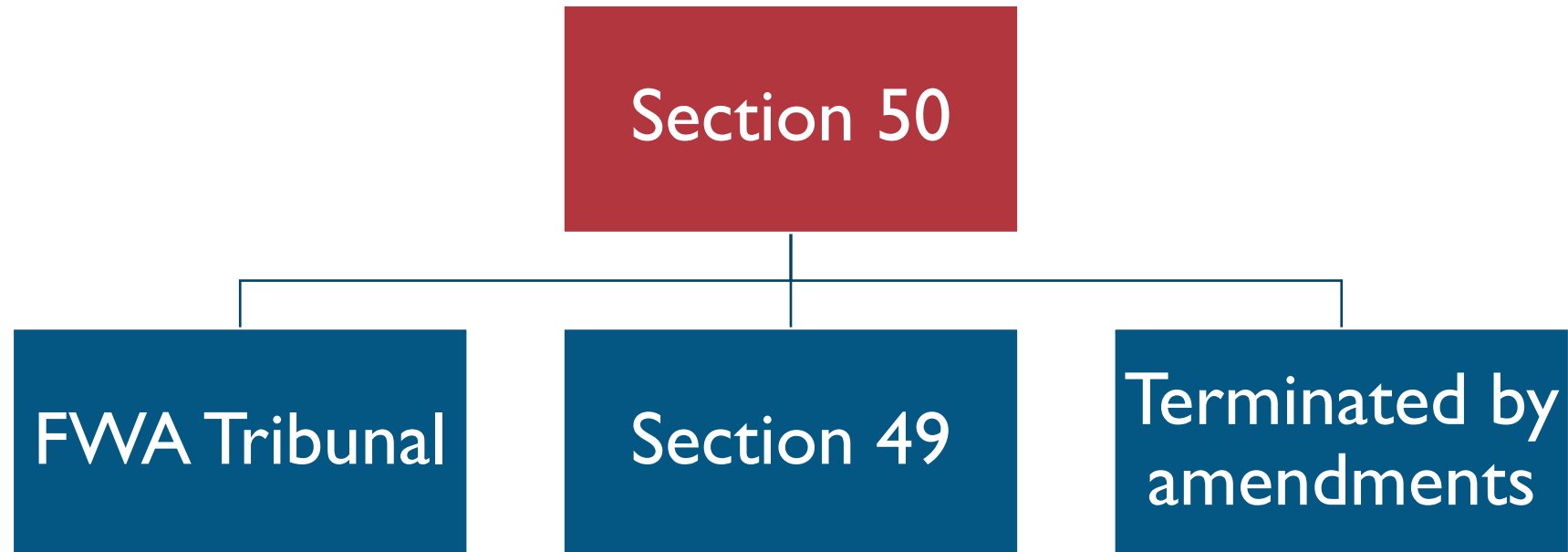


# Medical Schemes Amendment Bill

- The MS Bill proposes the removal of the dual appeal process between appeal process between Appeals Council and Appeals Board
- For this body to align with the proposed alignments, this body must be structured like the section 50 Appeals Board
- However, it is envisaged that this body will not duplicate the current structures of the MSA , but will co-exist along side the Appeals Board



# Proposed Structure



# Composition of the Tribunal

## Who must appoint these people?

- One shall be a person appointed on account of his or her knowledge of the law, who shall be the chairperson; and
- Two shall be persons appointed on account of their knowledge of medical schemes.





# Binding effect of Tribunal Rulings

One common criticism levelled against ombudspersons in some jurisdictions is that these institutions lack the power to make binding decisions.



# Cost: Funding Model

We propose a fee of five thousand Rands (R5000) to any party who intends to lodge a complaint to the Tribunal –



# Thank you.

