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15 March 2021

THE LEGAL PRACTICE COUNCIL
Thornhill Office Park
Building 20
94 Bekker Road
Vorna Valley Midrand

By E-mail: legalsectorcode@lpc.org.za

RE: COMMENTS ON THE SECOND DRAFT LEGAL SECTOR CODE

1. We refer to the second draft Legal Sector Code ("LSC") which has been circulated for comment.

2. We have considered the draft LSC and the scope and ambit of our commentary is predominantly based on the various areas of concerns surrounding QSE's (as defined in the LSC) and the various impacts which the LSC has on those areas in respect of the QSE's.

3. We herewith comment as follows:-

3.1. ***AD ANNUAL REVENUE THRESHOLDS LINKED TO COMPLIANCE***

3.1.1. If one has regard to the existing BBBEE legislative framework, which includes the various generic codes of good practice ("Generic Codes"), it is evident that the total annual revenue thresholds differentiating between ELE's, QSE's, Medium enterprises and Large enterprises differ substantially from those contained in the existing Generic Codes. In fact, in relation to the existing Generic Codes, the total annual revenue thresholds have been reduced to up to 70%, thereby likely including a much larger scope of enterprises.

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3.1.2. This is somewhat problematic for QSE's in as much as small law firms which barely manages to exceed the annual revenue threshold of R 3 million would then be regulated under the LSC. In most cases, one would find that most of these QSE's may have, but a few commercial client's and/or other stakeholders who would then require observation of and compliance with the provisions in the LSC, in which case lack of compliance or rather unsatisfactory compliance with the LSC would cause those smaller firms to lose a significant portion of the income of the firm should they not meet certain obligatory criteria and/or fail to promptly adhere to these criteria.

3.1.3. You may also find that those QSE's may not have the necessary infrastructure and/or financial resources to adequately comply with the requirements in terms of the LSC, in which case the reduction of the annual threshold may in more ways be far more damaging to the profession than beneficial.

3.1.4. In our opinion there is no justification as to why there is a need to significantly deviate from the existing BBBEE legislative framework and Generic Codes and it is pertinent to consider the impact on QSE's.

3.2. ***SKILLS DEVELOPMENT AND PROCUREMENT***

3.2.1. The LSC, and in particular sections 18.9 up to 22, refers to two elements of BBBEE compliance *inter alia,* Skills development and Procurement. In our opinion, although the LSC provides guidelines as to how certain targets and weighing points can be achieved, there are no particular formulae as to how certain criteria is measured in order to achieve the required targets and/or weighing points. This is ambiguous and should be rectified in as much as certainty is required.

3.3. ***SOCIO ECONOMIC DEVELOPMENT (PRO BONO HOURS)***

3.3.1. This contention is to be read in conjunction with paragraph 2 herein *supra*.

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3.3.2. The LSC, in respect of QSE's requires 200 *pro bono* hours per legal practitioner per annum in contrast to Large enterprises where only 500 *pro bono* hours are required annually from such an enterprise as a whole.

3.3.3. By way of simple mathematical calculation; let us for example look at a fictitious QSE with 3 legal practitioners. This practice would be required to do at least 600 hours of *pro bono* work per annum, in relation to a Large enterprise which is only required to do 500 hours of *pro bono* work per annum in respect of the entire practice. If, for example, the legal practitioners work at an average hourly tariff of R 1000.00 per hour, per legal practitioner, that is approximately R 600 000.00 rand per annum which is lost by an QSE in annual revenue. Again, this has far reaching detrimental consequences for such QSE's in relation to Large enterprises.

3.3.4. Currently, the total hours in respect of annual *pro bono* work required from attorneys is but 24 hours per annum. We trust that, in practice, the majority of the legal practitioners exceed the annual 24 hour threshold, however, do not believe that it meets or will ever meet the *pro bono* hours, currently proposed by the LSC. In this respect perhaps in consultation with the legal practitioners a reasonable and workable threshold can be determined. Should the LSC require more *pro bono* work as an incentive for the adequate compliance with the LSC by QSE's, there should be a much more reasonable compromise in respect of the *pro bono* hours required from the QSE's. Careful consideration should be given in finding a balance between what is currently expected from legal practitioners by the LSSA in respect of *pro bono* hours, what is practical and feasible for QSE's, the impact of the proposed threshold on QSE's in relation to Large enterprises and at the same time to achieve the proposed objectives of the LSC.

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3.4. ***OWNERSHIP THRESHOLDS***

3.4.1. The LSC provides that in order for an entity to obtain the desired weighing points and/or targets in respect of ownership it would need to have at least 75% black ownership and at least 51% black women ownership within the practice.

3.4.2. Although we appreciate the intention behind the differentiation between complete black ownership *versus* black women ownership, the question begs as to why there is a definitive 24% increase in the proposed minimum requirement for black ownership under the LSC when the Generic Codes only requires 51%.

3.4.3. In fact, there is also a difference of 24% between complete black ownership and black women ownership under the LSC. If the objective of the LSC seeks to promote transformation for black women in the legal profession, then surely this should be the focal point.

3.4.4. Also, it is suggested that in the event that it necessitates a complete differentiation between complete black ownership and black women ownership it is suggested that should the LSC need to deviate in this respect from the current existing Generic Codes, then careful consideration should be given regarding the reasonableness requirements set in respect of the weighing points and targets in respect of the ownership element under the LSC. With respect, in our opinion, the LSC does not speak to the objective which it is seeking to achieve in this respect.

3.5. ***HIGH LEVEL CONCERNS***

3.5.1. An important concern with the provisions of the draft LSC is the fact that it implies the end of professional self-regulation and introduces ministerial (political) control over the profession. The undesirability of undermining the

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independence of the legal profession, a key player in maintaining the supremacy of the constitution and in upholding the rule of law, is self-evident. The independence of the legal professional, just like the judiciary is not negotiable and is sacrosanct.

3.5.2. Secondly, while the transformation of the profession is a necessary and supported imperative, the conditions that are being proposed ought to be considered within the context of the interest of the client. Now a client is faced with the reality that when his attorney is appointing counsel on his behalf, the interest of the client is not the sole determining factor, but also the standing of the attorney with regards to the scorecard. This may compromise the integrity of services and advice in instances where client is e.g. advised against his counsel of choice in instances where the attorney may be at risk of non-compliance of the scorecard.

3.6. ***VAGUE & CONFUSING***

3.6.1. The draft provisions contain a number of requirements with regards to contributions to Skills Development, Supplier Development and contributions to the Legal Services Transformation Fund. Our concern with regard to these provisions is not so much what they set out to achieve, rather than the fact that they are bewilderingly confusing and vague. The fact that these provisions, as in the case of provisions relating to ownership, Levels and size and category thresholds, are inconsistent with both current legislation (Broad-Based Black Economic Empowerment Act) as well as the generic Codes of Good Practice of 2015.

3.7. ***FINANCIAL AND PRACTICAL IMPLICATIONS***

3.7.1. We are supportive of Social Investment on the part of the legal profession. The manner in which it proposed though, is fraught with impracticalities and

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conditions that are potentially destructive of the commercial feasibility of legal practices of a certain size.

3.7.1.1. Firstly, it commands a disproportionate invasion or inhibition in the manner in which legal practitioners spend their "capital". Both in terms of time and resources, the imposition of an effective 25 days of pro-bono work will bring many smaller practitioners to their knees in terms of either direct and indirect costs, or the consequences for failing to comply. The code also offers no solution for those legal specialists whose field of expertise are not included in the pro-bono themes.

3.7.1.2. Secondly, and closely related to the above, the thresholds to distinguish between ELE, QLE and Large Firms for purposes of exemptions are out of kilter with reality and unduly onerous. In addition, the provisions relating to qualifying suppliers set the ownership hurdle so high that multiple B-BBEE compliant supplier are effectively disqualified from supplying the profession, rendering the transformation thresholds in respect of those services and supplies in effect redundant and nonsensical.

3.7.2. I refer to a few specific examples of the aforementioned:-

3.7.2.1. The revenue exemption threshold of R3m for EME's;

3.7.2.2. The thresholds for QSE's of 3 million to R15m;

3.7.2.3. Large entities (Generic entities) under the proposed legal sector Code (15 mil to R50 mil) opposed to entities with a turnover of 50 million (DTI); and

3.7.2.4. Up LSME'S described in draft LSC differs from DTI (a recently formed or incorporated Law firm who has been in practice for less than 3 years opposed to 1 year).

4. Although an extension was granted to submit comments, the extension period is insufficient to address all the concerns.

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5. We therefore suggest that all stakeholders be granted an opportunity in the near future to either submit supplementary written and/or oral submissions to raise all our concerns.

Yours faithfully

MC Irwin

Melissa Candice Irwin

Honorary Secretary - GAA