PRETORIA ATTORNEYS ASSOCIATION
PRETORIASE PROKUREURSVERENIGING
MOKGATLHO WA BAEMEDI BA PRETORIA

PO Box / Posbus 3864
PRETORIA
0001
Room 5.18 / Kamer 5.18
High Court Building / Hooggeregshofgebou
Vermeulen Street / Straat
PRETORIA
0001
Tel: (012) 323 2520/323 6201
ppv@ppv.co.za ; lana@ppv.co.za

LEGAL PRACTICE COUNCIL **15 MARCH 2021**

BY EMAIL: legalsectorcode@lpc.org.za

Dear Sir

COMMENTS ON THE SECOND DRAFT LEGAL SECTOR CODE, AS AMENDED

We refer to your invitation to submit comments to the second draft Legal Sector Code ("LSC"), as amended, with thanks.

As you are aware, the Pretoria Attorneys Association ("PAA") is a voluntary association of attorneys practising within the Tshwane Magisterial jurisdiction whose purpose it is, amongst others, to facilitate and enhance an independent legal profession that broadly reflects the diversity of South Africa. To this end, the vision and mission of the PAA are firmly rooted in principles of non-racism and non-sexism and to promote the interests of justice and its members by upholding the values as enshrined in our Constitution. The PAA is committed to transformation of the legal profession and is broadly appreciative and supportive of the LPC's vision as set out in the preamble to the LSC however, after consultation with its members and industry leaders in the specialised fields of broad-based black economic empowerment it must caution that some of the proposals in their current form are not in the best interests of the profession.

We have taken the liberty of collating comments received from some of our members for your further consideration and trust that they shall be considered in the serious light in which they have been submitted:

1. General comments

1.1 The LPC could have used the existing Codes of Good Practice and tweaked the aforesaid Code where it was not particular to the legal sector, rather than draft

an entirely new LSC which is not aligned with the current Codes of Good Practice. LPC could have used current other aligned sector code legislation that works to accommodate the peculiarities of the LSC, much like what was achieved in the Construction Sector Code where various levels exempt Micro Enterprises have been catered for, with various levels of ownership, and a distinction drawn between Contractors, and Built Environment Professionals (BEPs), much like the distinction between attorneys and advocates.

1.2 *The Skills Development calculations are not clear.*

1.3 *How can a B-BBEE Certificate be possible without a verification process?*

1.4 *The only way in which one can increase your level is to contribute to the Legal Sector Transformation Fund and these contributions are not clear.*

1.5 *It is strange that criminal law and family law are not mentioned under the Supplier portion of the scorecard.*

1.6 *The contribution towards Supplier Development are unclear.*

1.7 *Voting rights for persons with disabilities has been introduced and this is not contained in the current Codes of Good Practice.*

1.8 *The number of partners in a practice must be addressed with the LPC.*

1.9 *Macro level*

- 1.9.1 *B-BBEE scorecard levels are unchanged.*
- 1.9.2 *Thresholds between ELE's, QLE's and Large Entities are significantly lower than under current legislation.*
- 1.9.3 *There are tougher targets on various elements.*
- 1.9.4 *There are reduced number of points available on certain elements.*
- 1.9.5 *There are incomplete definitions, for eg. ELE threshold is not defined in the definitions.*

1.10 *Micro level*

- 1.10.1 *Par 13.1 – duplication in par 13.2?*
- 1.10.2 *There are conflicting paragraphs, for eg. Under LSC001, it states that start-up LSME shall constitute a white advocate at Level 3 but under paragraph 15.2 it states Level 5?*
- 1.10.3 *LSC001 – ELE entities, reference is made to Confirmatory Affidavit, however this is not defined; and B-BBEE Certificates for ELE's – why for exempt entities?*
- 1.10.4 *Enhanced recognition for white-owned ELE's:*
  - 1.10.4.1 *Use of pro bono hours, poorly worded and unsustainable;*
  - 1.10.4.2 *Specialised law training – no clarity on calculation methodology;*

1.10.4.3 Any contribution towards Supplied Development – vague and no clarity is given on calculation methodology.

1.10.5 Par 18.9.2.1 refers to mandatory training but does not specify what this is?

1.11 All EME's with an annual turnover between R0 and R5 million and with less than 30% black ownership is an automatic Level 4, but with a procurement recognition of 80%. A level 4 in all other codes receive a 100% procurement recognition (this is can also be said for level 3). Why are the procurement recognitions for legal entities more onerous?

1.12 Further, the total annual turnover thresholds for legal entities, and which thresholds in the draft LSC dictates the measurement of such legal entities for BBBEE purposes, appears to be more onerous than in comparison with the BBBEE Generic Codes and other sector codes. This is especially so taking into consideration the economic stability and viability of most law firms.

1.13 Despite general belief, profit margins of law firms are not nearly as high as that of a product-selling business. The legal services industry, especially private practice law firms, have large overheads of which wages form the major part.

1.14 That being said, with reference to the annual turnover thresholds proposed in the draft LSC, we can assure you that most private law firms will not be in a financial position to accommodate the requirements and comply with the criteria proposed by the draft LSC, especially that of the proposed spend for skills development.

1.15 The draft LSC in its current form is not aligned with the truths of private legal practice's ability to transform. If at all, the LSC must be less onerous than the criteria proposed in the generic B-BBEE scorecards, as it is an already ailing task for private law firms to truly effect transformation under the criteria proposed in the generic B-BBEE scorecards.

1.16 Remaining compliant from the gazetting of these codes will be difficult for large enterprises. Will there be transition time from gazetting to allow for implementation and true transformation?

2. Ownership

2.1 *Large enterprises (LSC001): The erratic shift from 25+1 vote to 40% is immense. Black shareholders will acquire great debt to purchase shares. Radicality doesn't makes provision for proper transformation.*
Comment/Suggestion: Proposed amendment of year 1 to be 30%, year 2 to be 35% and year 3 to be 40% to allow for time to adjust with proper transformation in mind.

2.2 *According to the draft LSC, the ownership points available for QSE's and Large Enterprises have been reduced to 20 points (from 25 available points under the generic codes). Immediately a loss of 5 points for current complying QSE's.*

This is especially detriment to currently complying QSE's in the legal practice, also considering the fact that ownership points appear not to be recognized for broad based ownership schemes or employee share ownership schemes per the draft LSC. Although not affecting legal practices governed by the LPC's rules, it will affect legal advisory companies.

The enormous increase in targets for black voting rights for Ownership (i.e. from 25.1% to 40% for QSE's [R10mil – R60mil] and to 45% for larger enterprises ([above R60mil]) will force most legal practices to bring about an overnight change in management levels (as most shareholders are also practicing lawyers). Also refer our comments at 'management control' below.

3. Management Control

3.1 *The target for board participation / management participation (including equity participation, ownership and control and distribution of profits) have been increased from 50% to 60%.*

3.2 *Although the new wording per the draft LSC under the 'Management Control Scorecard', namely ''equity participation'' indicates that this should also be an economic participation. In most legal practices, there is only one class of shares, with voting rights and economic rights.*

3.3 *Therefore, to comply with the target of 60%, it would entail that a black person/s acquires and holds 60% of the equity shares in the legal practice.*

3.4 *It is our submission that the implementation of the LSC in its current form (especially with respect to the management control criteria) is not economically viable and will cause major job losses to the detriment of the public and legal professionals as a whole.*

3.5 We do not understand why the criteria for management control is more onerous than any other sector code and the generic codes? Also, why are ownership elements (such as profit distributions and equity participation) mentioned in management control criteria?

4. Skill Development

4.1 LSC300: In respect of attorneys, clarity is required on whether the points allocated for the recruitment or training initiatives directed at black attorneys as a total number in the LSME is measured against leviable amount?

4.2 The wording and calculation methodology is not clear regarding the achievements of targets per sub-elements, even though par 21 indicates the formula of GG 36928 should be used.

4.3 The draft LSC proposes skills development to be divided into four categories, namely:

4.3.1 Skills development initiatives specified on the training matrix as a percentage of black legal practitioners in the firm;

4.3.2 Recognition for the proportion of skills development spend on black candidate attorneys by the firm;

4.3.3 Recognition of learnerships / internships;

4.3.4 Appointment of black candidate attorneys as legal practitioners in the firm.

4.4 In order to comply, 40% of the total weighing points must have been achieved. The spend towards skills development appears still to be based on total wages. In private law firms, the largest expenditure is that of salaries. Compliance with skills development, even under the generic scorecard is expensive and costly, and will now prove to be even more costly and expensive under the proposed criteria of the draft LSC.

4.5 One only needed to comply with the skills development element under the generic codes if and when the annual turnover threshold of R50 million is exceeded. This threshold is in any event far too low to be used as a benchmark for reference to large law firms.

4.6 To make the compliance with skills development a priority element for law firms with an annual turnover of just over R10 million, seems extremely onerous. In the South African market, a large law firm is neither that with an annual total turnover of R10million, nor R50million.

4.7 The proposed thresholds of annual turnovers are onerous and will force a number of law firms, especially small to medium size firms, into liquidation or to

consolidate their operations, and in many cases law firms will be required to make redundancies, should the draft LSC be enforced in its current form.

5. Procurement and Supplier Enterprise Development

5.1 LSC400: Regarding large enterprises, the inclusion of procurement of legal services from senior advocates in its totality and clarity required if same is weighted against the total senior advocates the company procures from? Procurement from senior advocates totals 15 points on the scorecard that accounts for more than a third of the element total.

Comment/Suggestion: It is a client's right to appoint advocates of their choice and prescribing to clients in advocate appointments infringes clients' rights. Advocate spend is a flow-through spend and should not be considered as part of a firm's procurement spend. If advocate spend is included, the focus should rather be on junior advocates in the process of building their practices than senior advocates which will give effect to proper transformation. Attorneys have right of appearance that renders the appointment of advocates unnecessary in certain respects. WP should be reduced to provide for minimal impact to ensure that firms are not unfairly prejudiced and penalized.

5.2 LSC400: Regarding large enterprises, for the 1st year the change is erratic. Companies need to form new relationships with black senior advocates and entrust 60% of their advocate procurement work to a new person.

Comment/Suggestion: Year 1 needs to allow for the transformation then from year 2 allow for the radical change.

5.3 Only procurement from at least 75% black owned entities or at least 51% designated groups seems to have been catered for which is not practical – what about all other B-BBEE compliant suppliers that need to be used by measured entities?

5.4 Not all legal firms use advocates extensively and the targets seem unrealistic.

5.5 Supplier /Enterprise Development:

5.5.1 LSC400: In the category above R15 million, clarity is required on the partnering and JV's. Is this measured against the JV value between the measured entity and the benefiting black entity and if not, against what will it be measured?

5.5.2 LSC400: In the category above R 15 million, clarity is required on sub-contracting. Is it measured against all projects or any number of projects?

5.5.3 LSC400: In the category above R 15 million, clarity is required on measuring the impact of supplier development initiatives. Is this weighted against the NPAT? If weighted against NPAT the shift from 2% on the amended codes to 10% is extremely drastic for year 1.

Comment/Suggestion: Considering the impact of COVID, year 1 should be lowered against the impact of the pandemic to provide for a less radical and gradual manner of implementation.

5.6 The draft LSC proposes that all procurement spend of a law firm must from a 'Legal Sector Measured Entity' that is at least 75% black owned.

5.7 However, most of the procurement expenditure incurred by law firms are not from LSME's but rather stationary suppliers, security and courier services, landlords, storage facilities, IT companies and so forth, same which are not provided for in the LSC.

5.8 The wording with respect to the criteria proposed for Supplier Development also appears to be incorrect, as it refers to supplier development spend from black owned suppliers that are at least 75% black owned by 'black legal professionals'. A practicing lawyer is most likely not going to own a stationary business, supplying law firms? If this is reference to advocates (being procured by law firms) it must be clarified.

5.9 Supplier and ED targets are very high and pure monetary contributions only appear to address 4 of the potentially 6 points available under Socio Economic Development.

6. Socio-economic development

6.1 The element is completely based on the number of pro-bono hours clocked by a law firm. Beside from the fact that it is going to be an administrative monster in logging such hours and or the verification thereof, the number of pro-bono hours proposed by the LSC must also be linked to law firms based on its annual turnovers.

6.2 A law firm with a turnover of R11million will not have the necessary man-hours available for pro-bono work as that of a firm with an annual turnover of R55million, as an example. The allocation of pro-bono work must also be

practice specific. It's horses for courses, you can't send a criminal law expert to perform pro-bono work involving family and child laws.

6.3 *Pro bono hours targets are high and for QLE, 200 hours per annum per legal practitioner within a firm while large entities require 500 hours per firm – seems conflicted and more onerous.*

We look forward to hearing from you.

Yours faithfully

Manisha Maganbhai-Mooloo obo

Transformation, Diversity and New Membership

PRETORIA ATTORNEYS ASSOCIATION