



**COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA  
ON THE LEGAL SECTOR CODE OF GOOD PRACTICE ON BROAD-BASED BLACK  
ECONOMIC EMPOWERMENT**

1. **INTRODUCTION**

- 1.1 The Law Society of South Africa (LSSA) comprises of the Black Lawyers Association (BLA), The National Association of Democratic Lawyers (NADEL), and the Independent Attorneys as its constituents. It is well documented and shown through its actions that the LSSA supports and is committed to transformation. These comments are submitted, and should be read, in the same spirit.
- 1.2 The LSSA supports, in principle, the development of a tailor-made Sector Code/Charter for the legal profession in South Africa. The LSSA is pertinently aware that transformation of the legal profession has become a topical and contentious issue in South Africa.
- 1.3 The LSSA believes, after perusal and study of the submissions made to the Legal Practice Council (LPC), that the draft code as it is currently formulated, was not drafted in accordance with the processes to develop a sector code as per the Amended Guidelines for Developing and Gazetting of Sector Codes, and is furthermore fraught with inconsistencies which will make the implementation thereof problematic, and will most probably be litigated upon. This will only delay the purpose of the Legal Sector Code, which is transformation.
- 1.4 The LSSA therefore believes, in summary, that these draft Legal Sector Codes will not be able to bring about meaningful transformation in its current format. We submit that proper discussions are held with stakeholders in person to ensure that workable Codes can be drafted in accordance with the processes to develop a sector code as per the Amended Guidelines for Developing and Gazetting of Sector Codes, and by means of consensus, to ensure that practical goals regarding true transformation can be set.

- 1.5 The LSSA had previously expressed its views to the LPC when comments on the previous version of the draft Legal Sector Code (LSC) were requested from the legal fraternity. These views, as well as the submissions of other stakeholders submitted to the LPC, were not taken into consideration when finalising the second draft of the LSC. The LSSA's views remain the same and are repeated here:
  - 1.5.1 The transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld, remains a priority;
  - 1.5.2 Measures introduced to date (Legal Services Sector Charter of 2007, Procurement Protocols for Legal Practitioners and the generic B-BBEE Codes of Good Practice) have not resulted in securing the desired economic transformation in the legal profession;
  - 1.5.3 There are common and unique commercial and other characteristics within the legal profession which make it feasible to formulate a transformation Legal Sector Code;
  - 1.5.4 Like the Chartered Accountancy (CA) sector, the LSSA acknowledges that transformation will take too long if left purely to economic forces, or the existing measures;
  - 1.5.5 Tailor-made intervention in the form of an LSC is required to redress the current situation; and
  - 1.5.6 The aim of black economic empowerment initiatives in the legal sector (similar to that of the CA sector) must be to significantly increase the number of black people engaging in legal enterprises and promote skills development within the legal sector.
- 1.6 The LSSA has circulated the draft LSC to legal practitioners with a view of soliciting their comments for submission to the LSSA and the Department of Trade, Industry and Competition (the DTIC). Submissions provided to the LPC had also been considered. The comments received which had merit and practical application are collated herein for consideration by the DTIC.
- 1.7 As expected, some comments underscore the contentious nature of the topic of transformation. In the recent judgment of *Cape Bar v Minister of Justice and Correctional Services and Others (9435/19) [2020] ZAWCHC 51*, the Western Cape High Court

remarked that “*Transformation of the legal profession has been a goal that has eluded the South African society since the dawn of our democracy, and is an area of challenge that our society has struggled to make significant strides in.*”

- 1.8 These comments are then based on the submissions provided by a large proportion of the legal sector, including the constituents of the LSSA, the LSSA itself, independent voluntary associations such as the Gauteng Attorneys’ Association (the umbrella association for *inter alia* the Pretoria Attorneys’ Association, The Johannesburg Attorneys’ Association and the West Rand Attorneys’ Association), as well as individual submissions by legal practitioners.
- 1.9 Despite the number of submissions, the LPC did not implement many of the proposals sought in the approximately 140 submissions it had received. The LSSA believes in light of this, that the LPC could not provide a thorough representation of the submissions of legal practitioners. There are many practical effects to be considered. The current draft LSC is still fraught with issues and ambiguous statements and definitions that would require further additional hours of work to identify and highlight.
- 1.10 This document will attempt to address the most concerning issues that need to be dealt with to draft a workable solution. Annexures A to C of this document will provide the LSSA’s specific comments on the draft LSC as per GG 47 061 dated 22 July 2022.

## 2. **COMPLIANCE WITH THE PROCESS TO DEVELOP A SECTOR CODE**

- 2.1 The first concern that needs to be addressed, is that the LSC was drafted without taking Statement 003 (Amended Guidelines for Developing and Gazetting of Sector Codes) (**Sector Code Statement**) of the *Codes of Good Practice on Broad-Based Black Economic Empowerment*, 2015 as amended (**Generic Codes**) which deals with the processes to develop a sector code, into consideration.
- 2.2 In accordance with paragraph 3.1 of the Sector Code Statement, there are a number of principles that must be complied with in order for a proposed sector code to be correctly prepared and published. All of these principles must be complied with. We set out each principle (as extracted from the Sector Code Statement) below, together with our comment on whether each individual principle has been complied with.
  - (1) **Principle 1:** There must be common commercial and other characteristics within the entities operating in the sector which would make it feasible to formulate a transformation charter subject to the proposed sector code.

**Comment 1:**

We are of the view that the LSC complies with Principle 1.

(2) **Principle 2:** The proposed sector code must fully address all the elements in the Generic Codes scorecard.

**Comment 2:**

(a) Although all five elements of the Generic Codes are provided for in name in the LSC, there are material omissions from the elements that result in the LSC not fully addressing the elements of the Generic Codes scorecard.

(b) In respect of the Ownership element:

(i) whilst the LSC acknowledges that the net value aspect of Ownership is a priority element, the net value sub-element of the ownership scorecard has been omitted from the LSC. Therefore a key aspect of the Ownership element (that was specifically included in the 2015 amendment of the Generic Codes and retained in the 2019 amendment) has not been fully addressed;

(ii) the sub-element of the Ownership scorecard that contemplates ownership by new entrants (as defined in the Generic Codes) is not included in the LSC Ownership scorecard; and

(iii) paragraph 18.3 of the Ownership Scorecard expressly states that the ownership element as contemplated in the Generic Codes has not been fully addressed. The paragraph states:

*“Certain principles applicable to ownership measurement set out in the Generic Codes, such as bonus points and new entrants, may not necessarily find full expression in the LSC due to the nature of the legal profession, and where practically possible, such shall be aligned accordingly.”*

The LSC therefore expressly notes that this Principle 1 has not been complied with in respect of the Ownership element.

(c) The Management Control element in the Generic Codes allocates 2 points for the sub-element dealing with black employees with disabilities. This sub-element does not appear in the LSC Management Control element. In the

LSC, persons with disabilities are simply one of the groups of persons that form part of “designated categories.” As a result, the points that are available for persons in “designated categories” can be achieved without the employment of any black persons with disabilities. Therefore the sub-element itself has not been fully addressed.

- (d) In respect of the Skills Development element:
  - (i) the sub-element of expenditure on bursaries for black students at higher education institutions has not been included in the LSC Skills Development element. This was a key amendment implemented as part of the 2019 amendments to the Generic Codes and it cannot be excluded;
  - (ii) the sub-element of expenditure for black employees with disabilities has not been included in the LSC Skills Development element; and
  - (iii) the sub-element measuring the number of black people participating in learnerships, apprenticeships and internships has not been included. We note that the LSC element does contemplate learnerships in relation to candidate attorneys, but this does not satisfy the requirement of compliance with the full element.
- (e) In the Enterprise and Supplier Development element (defined as PSED in the LSC, although this term is not substantively used in the element itself):
  - (i) less than half of the preferential procurement points fall within the actual procurement scope of a law firm. Almost all spend on advocates qualifies as “pass-through third-party procurement,” being expenditure incurred on behalf of clients who are the beneficiaries of and pay for the services of the advocates. The spend does not pass through the income statement of the law firm and thus cannot be treated as preferential procurement for a law firm’s BEE purposes. Despite this, the majority of points allocated for preferential procurement are incorrectly allocated towards spend on advocates; and
  - (ii) enterprise and supplier development have been treated as one when in fact they are two discreet aspects of the ESD element. The LSC does not provide for them individually, as it should.
- (f) We are accordingly of the view that the LSC does not fully comply with Principle 2.

**(3) Principle 3:** The proposed sector code must use the same definitions in respect of the beneficiaries as those used in the Generic Codes.

**Comment 3:**

- (a) Generally, there is a lack of alignment between the definitions in the LSC and the Generic Codes. More specifically, and as a result of this misalignment and changes to the elements themselves, the beneficiaries of BEE initiatives contemplated in the LSC do not align with those in the Generic Codes.
- (b) We set out instances of this below:
  - (i) The beneficiaries of the Ownership element in the LSC do not align with those beneficiaries of ownership in the Generic Codes.
  - (ii) The LSC ownership scorecard does not address ownership by new entrants, nor does it address ownership by a broader base of persons, including Black Designated Groups. The LSC element does, however, introduce a new ownership beneficiary base of Black legal practitioners with disabilities.
  - (iii) The beneficiaries of the Management Control element under the LSC do not align with those contemplated in the Generic Codes.
    - (A) Whilst the LSC has a significant focus on the measurement of legal practitioners, it fails to recognise and take into account the business services support staff. Business services support staff are fundamental to the operation of a law firm. They frequently outnumber legal practitioners in medium to larger law firms, but more importantly perform vital roles within all levels of management within a law firm.
    - (B) The LSC disregards the importance of non-legal practitioners within law firms and consequently does not appropriately measure them through the Management Control element as part of the beneficiaries.
  - (iv) The beneficiaries of Skills Development in the Generic Codes are black people, black students, and black employees. However, the Skills Development element of the LSC is primarily focused on black candidate attorneys and black legal practitioners. Training for non-legal and support staff is also limited to those from designated categories,

thereby excluding black men business services staff as beneficiaries of Skills Development.

- (v) In relation to the preferential procurement sub-element of the Enterprise and Supplier Development element, the LSC includes procurement from advocates (which does not qualify as procurement by law firms), and limits the recognition of other procurement to procurement that is “core to the business” of a law firm, for which there is no legal basis. The Generic Codes contemplate the inclusion of all procurement by a law firm (in accordance with the total measured procurement spend (**TMPS**) principles).
- (vi) The beneficiaries of Enterprise and Supplier Development in the Generic Codes are exempted micro enterprises (**EMEs**), qualifying small enterprises (**QSEs**) that are at least 51% Black Owned (as defined in the Generic Codes) and, in certain circumstances, large enterprises that are at least 51% Black Owned. The beneficiaries of Enterprise and Supplier Development in the LSC are legal EMEs that have a Level 1,75% Black Owned law firms, and law firms that are 51% owned by persons from designated categories.
- (vii) The beneficiaries of Socio-Economic Development in the Generic Codes are communities, natural persons, or groups of natural persons where at least 75% of the beneficiaries are natural persons. In the LSC, beneficiaries of Socio-Economic Development are limited to (1) “poor, marginalised and black clients from rural areas”, (2) “poor, marginalised and black clients in community legal centres”, and (3) “poor, marginalised and black clients who require legal commercial and contractual assistance”.

(c) We are accordingly of the view that the LSC does not comply with Principle 3.

(4) **Principle 4:** The proposed sector code must use the same calculation methodologies to measure compliance as those used in the Generic Codes.

**Comment 4:**

- (a) Due to the amendment of the various elements in the LSC, the calculation methodologies set out in the Generic Codes cannot be used for the purposes of the LSC.

- (b) Both the Management Control element and Skills Development element in the LSC use occupational levels that do not align with those set out in the *Employment Equity Act, 1998 (EE Act)*.
  - (i) The LSC has instead created subjective occupation levels that are based on title as opposed to operational capacity. In addition, these terms are not used uniformly across the legal sector.
  - (ii) In order to calculate certain of the actual targets for Management Control and Skills Development (i.e. the number of persons of each race and gender that need to form part of an occupational level or be trained), the economically active population (**EAP**) figures are required. The EAP figures are based on the occupational levels of the EE Act - thereby making the use of any other mechanism to determine occupational levels ill-conceived and unworkable, as the calculation methodologies required to be used as set out in the Generic Codes cannot be used.
- (c) The calculation methodologies used in the Generic Codes for purposes of calculating TMPS cannot be used for purposes of the LSC as the preferential procurement sub-element of the Enterprise and Supplier Development element fails to use TMPS as the basis for calculation of procurement.
- (d) We are accordingly of the view that the LSC does not comply with Principle 4.

(5) **Principle 5:** The proposed sector code may deviate from targets and weightings used in the Codes only where those deviations are justifiable based on sound economic principles, sectorial characteristics or empirical research.

**Comment 5:**

- (a) There are material deviations in the targets and weightings used in the LSC as compared to the Generic Codes. In several instances, the changes are completely unworkable taking into account the operations of a law firm and would appear to have a non-transformative impact on the legal sector. In these circumstances, the underlying economic principles, sectorial characteristics, or empirical research that substantiated these deviations must be more closely scrutinized to ensure that the deviations are appropriate and necessary.

(b) There is little guidance in the LSC regarding what economic principles, sectorial characteristics, or empirical research has been considered in the preparation of the LSC. However, paragraph 5 of the LSC (Introduction and Preamble) provides some indication of the information that was taken into account when preparing the LSC.

(i) Paragraph 5.3 relates to research conducted by the Centre for Applied Legal Studies and the Foundation for Human Rights.

(A) This research was published in 2014. Therefore, the information gathered as part of the research predicated 2014 (or at the latest have been gathered during 2014). The information therefore used for purposes of this research would be nearly a decade old and cannot be regarded as an accurate reflection of the legal sector in its current form.

(B) The extract from the research included in the LSC notes that only 12 firms were canvassed as part of the study. It would be a poor exercise of judgement to extrapolate and apply information sourced from a fraction of the firms across the entire legal sector.

(ii) Paragraph 5.4 relates to research conducted by Boitumelo Shalliam Phungwayo and published in 2018 for his Master of Business Administration Programme.

(A) The references contained within the research refer to publications made in 2007 and 2010. This information would be over a decade old and would not be an accurate reflection of the legal sector in its current form.

(B) Research conducted during the course of a masters programme does not constitute appropriate or reliable authority that warrants the implementation of legislation. Research conducted as part of a masters programme does not undergo the stringent peer review processes that a doctoral thesis or academic publication would undergo. It is simply a compilation of other people's research to develop the author's theoretical conclusion in response to the author's specific hypothesis.

(C) Even more so, it is insufficient to warrant the implementation of legislation that is so fundamental to the development and transformation of the legal sector.

- (iii) Paragraph 5.5 notes that the considerations set out in paragraph 5.3 and paragraph 5.4 were taken into account when preparing the 2007 transformation charter. These considerations are now at least 15 years out of date. However, paragraph 5.11 continues to state that the development of the LSC must be seen in the context of the whole of paragraph 5, which includes the above as the only reference to economic principles, sectorial characteristics, or empirical research.
- (c) On the basis of the above, we are of the view that the LSC does not comply with Principle 5.

**(6) Principle 6:** A sector code development in terms of this statement must set targets which are over and above the minimum targets set out in the Generic Codes.

**Comment 6:**

- (a) In relation to statement LSC201 (the Management Control scorecard for large law firms), the targets set for Heads of Department, Middle Management and Junior Management in the LSC are lower than those in the Generic Codes for Senior Management, Middle Management and Junior Management.
- (b) In relation to statement LSC300 (insofar as it relates to Skills Development for large law firms), it is unclear what the targets are based on and therefore it cannot be determined whether the principle has been met in this regard.
- (c) In relation to Enterprise and Supplier Development, and Socio-Economic Development, the elements as contemplated in the LSC deviate in nature to such an extent from the Generic Codes that a comparison of targets is not possible. It therefore cannot be determined whether the principle has been met in this regard.
- (d) Despite the elements in which a clear comparison cannot be made, the Management Control targets in the LSC are below those in the Generic Codes.
- (e) We are accordingly of the view that the LSC does not comply with Principle 6.

**(7) Principle 7:** The proposed sector code may deviate from the thresholds set out in the Generic Codes only where those deviations are justifiable based on sound economic principles, sectorial characteristics, or empirical research.

**Comment 7:**

- (a) The total number of points available in the Generic Codes is 120. The total number of points available in the LSC is 102. However, the thresholds for the various BEE procurement recognition levels have not been altered in the LSC e.g. a Level 2 in both the Generic Codes and the LSC requires 95 points. The result is that it is now more difficult to achieve a BEE procurement recognition in terms of the LSC as compared to the Generic Codes.
- (b) The LSC has changed the thresholds for EMEs, QSEs, and large enterprises as contemplated in the Generic Codes.
  - (i) An EME is defined in the Generic Codes as an entity with an annual turnover of R10 million or less. An EME (described as ELE in the LSC), is defined as an exempted law firm or an advocate, as contemplated in the LSC. This definition is largely unhelpful, as there are various conflicting descriptions of an ELE in the LSC.
    - (A) Paragraph 14 of the LSC states that an entity will qualify based on annual revenue and the number of years after being admitted as attorneys. Paragraph 17 (the summary of the scorecards) provides that an ELE qualifies as such if it simply falls within the monetary threshold of R0 to R3 million.
    - (B) The ELE scorecard then describes an ELE as having three criteria, namely (1) a monetary annual threshold of R0 up to R3 million annual revenue, (2) a number of partners or directors and type of firm, although reference is only made to the number of partners being between one and three and no reference is made to any type of firm, and (3) the number of years in existence as a law firm. This directly conflicts with paragraph 14 and paragraph 17.
    - (C) In addition, a hanging paragraph below the ELE scorecard then proceeds to state that, despite the number of partners or years in existence, if the monetary threshold has been exceeded, an entity cannot be measured as an ELE.
    - (D) The threshold for an ELE is therefore unclear, but regardless, deviates unnecessarily and without substantiation from the threshold of an EME under the Generic Codes. No explanation is provided for the reduction in the threshold, which it could be

argued is counter-transformative, as an ELE that is less than 51% Black Owned has less time to qualify for an automatic BEE procurement recognition level under the LSC as opposed to the Generic Codes.

- (ii) A QSE is defined in the Generic Codes as an entity with an annual turnover of between R10 million and R50 million. A QSE is defined in the LSC as a qualifying small measured LSME or an advocate which or who for the purposes of this LSC, is measured as such in terms of the LSC. This definition is largely unhelpful as there are various conflicting descriptions of a QSE in the LSC.
  - (A) In terms of the table included in paragraph 18.4 (ownership scorecards for QSEs and large enterprises), a QSE is described with reference to two criteria, namely (1) a monetary annual threshold of over R3 million but not more than R15 million annual revenue, (2) a number of partners or directors and type of firm, although reference is only made to the number of partners being between four and 15 and no reference is made to any type of firm.
  - (B) In each of the elements, the measurement indicator for a QSE is then only stated as an entity generating above R3 million but not more than R15 million.
  - (C) Paragraph 17 (the summary of the scorecards) provides that a QSE qualifies as such if it falls within the monetary threshold of above R3 million but not more than R15 million.
  - (D) The threshold for a QSE is therefore unclear, but regardless deviates unnecessarily and without substantiation from the threshold of a QSE under the Generic Codes.
- (iii) A large enterprise is described in the Generic Codes as an enterprise with an annual total revenue of R50 million or more. A large enterprise is defined in the LSC as an LSME with more than 15 directors and/or partners and which generates a total revenue of more than R15 million per annum.
  - (A) In terms of the table included in paragraph 18.4 (ownership scorecards for large enterprises), a large enterprise is described with reference to two criteria, namely (1) a monetary annual

threshold of over R15 million per annum, (2) a number of partners or directors and type of firm, although reference is only made to the number of partners being more than 15 partners/directors and no reference is made to any type of firm.

- (B) In each of the elements, the measurement indicator for a large enterprise is then only stated as an entity generating above R15 million.
- (C) Paragraph 17 (the summary of the scorecards) provides that a large enterprise is such if it falls within the monetary threshold of above R15 million.
- (D) The threshold for a large threshold is therefore unclear, but regardless deviates unnecessarily and without substantiation from the threshold of a large enterprise under the Generic Codes.
- (E) Paragraph 15.4 (Start-up LSMEs) then refers to the QSE and large enterprise thresholds as contemplated in the Generic Codes. There is therefore another inaccuracy in relation to the thresholds of entities contemplated in the LSC.

(c) We are accordingly of the view that the LSC does not comply with Principle 7.

(8) **Principle 8:** The proposed sector code may introduce a new additional element for measurement where such addition is justifiable based on sound economic principles, sectorial characteristics, or empirical research.

**Comment 8:**

- (a) No new elements are introduced as part of the LSC. However, elements have been amended such that new sub-elements have been created, for example, the alternative Socio-Economic Development (**SED**) scorecard contemplated in LSC500 of the LSC.
- (b) The alternative option provides a way for LSMEs to avoid rendering pro bono services, which could well be seen as counter-transformative. (Incidentally, there are only four points available for this alternative option despite LC500 indicating that the total points are six.)

- (c) We are accordingly of the view that the LSC does not comply with Principle 8.

**(9) Principle 9:** The proposed sector code must clearly define its scope of application.

**Comment 9:** The scope of application of the LSC is not correct.

- (a) Any sector code that is developed must address specific transformation hurdles within that industry.

- (b) In terms of section 10(3) of the *Broad-Based Black Economic Empowerment Act, 2003 (BEE Act)* “an enterprise in a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that code.”

- (c) Paragraph 9 of the LSC deals with the scope of the LSC.

- (i) In the first instance, the LSC will apply to LSMEs (being legal sector measured entities in the form of a law firm or an individual advocate). This would be appropriate for the LSC as it would comply with the general principle that a sector code applies to the entities operating within the identified industry.

- (ii) However, paragraph 9 of the LSC contemplates that the LSC should also apply to all organs of state and public entities, specifically insofar as they procure legal services. The LSC therefore looks to apply to customers of the legal industry - which is outside of the appropriate scope of application of a sector code.

- (d) We are accordingly of the view that the LSC does not comply with Principle 9.

**(10) Principle 10:** There must be support by the line ministry responsible for the sector and the Minister of the Trade, Industry and Competition (**DTIC**) responsible for the gazette of the sector code. There must have been a clear demonstration that the line ministry was part of the drafting of the sector code and a letter of support must be sent to the Minister of the DTIC.

**Comment 10:**

- (a) We understand that the line ministry responsible for the legal sector is the Department of Justice and Constitutional Development (**DoJ**). There is no evidence in the LSC that the drafters have complied with this requirement. There is simply an assumption that it has been done, and that all relevant stakeholders have been appropriately involved and the LPC has been involved in drafting the LSC.
- (b) In terms of section 29 of the *Legal Practice Act*, 2014 (**Legal Practice Act**), it is the responsibility of the Minister of the DoJ, after consultation with the LPC, to prescribe the requirements for community service (i.e. pro bono). The introduction of pro bono work in the LSC will effectively create two similar but different types of pro bono work (one being in the LSC and one in the Legal Practice Act). The pro bono will accordingly be subject to overlapping regulatory frameworks under the influence and governance of different regulators. This will inevitably result in a duplication of pro bono obligations by law firms, due to similar but conflicting pro bono requirements under the different regulatory frameworks.
- (c) We are accordingly of the view that the LSC does not comply with Principle 10.

- (11) **Principle 11:** No transitional period shall be provided for the implementation of the sector code.

**Comment 11:** Paragraph 35.1 of the LSC states that the LSC will come into effect from the date on which the LSC is gazetted. We are of the view that there is compliance with Principle 11.

### 3. OTHER CRITICAL ISSUES TO BE CONSIDERED

- 3.1 After the issue of the implementation of processes to develop a sector code as per Amended Guidelines for Developing and Gazetting of Sector Codes has been dealt with, it is imperative for the legal profession to engage fully with the intent and the implications of the draft LSC. The LSSA notes that several questions (and conclusions) have been raised, including:

- 3.1.1 Whether the LPC has acted within its legal mandate to initiate the draft LSC;

- 3.1.2 Whether justifiable motivation has been provided for the proposed deviations from the generic B-BBEE Codes of Good Practice, including the threshold for exempted enterprises, the distinction between attorneys and advocates, etc;
- 3.1.3 Whether the draft LSC will negatively impact on the independence of the legal profession; and
- 3.1.4 Whether the proposed number of pro bono hours under the Socio-Economic Development Element are reasonable.

3.2 It is also evident that a number of aspects remain to be clarified and discussed under the draft LSC.

3.3 The LSSA is conscious of the fact that, as stated by the Western Cape High Court, transformation in the legal profession is an area of challenge that our society has struggled to make significant strides in. However, it is evident that the draft LSC will require more vigorous engagement with the legal profession and stakeholders to understand its objectives, extent of compliance requirements, consequences of non-compliance, and to clarify some ambiguities. There appears to be significant confusion on the content, application and impact of the proposed LSC.

3.4 Regardless of the merits of the intentions with the draft LSC, the LSC will have an effect on:

- 3.4.1 legal practitioners' freedom of trade;
- 3.4.2 legal practitioners' ability to operate cost-effectively;
- 3.4.3 smaller legal practices' profitability;
- 3.4.4 legal practitioners' increased compliance burden;
- 3.4.5 legal practitioners' willingness to operate as legal professionals within South Africa and within a recognised regulatory framework;
- 3.4.6 clients' ability to be represented by a legal practitioner of their choice, or clients' ability to afford legal practitioners;
- 3.4.7 the independence of the legal profession (as a pillar of the South African constitutional order) from political interference;

- 3.4.8 regulating industries and impact on industries that fall outside of the scope and ambit of the Legal Practice Act; and
- 3.4.9 the relationships between legal practitioners and the natural integration of the industry, by subjecting their relationships to political policy.

3.5 Examples of specific aspects that will require further discussion and clarification are:

- 3.5.1 The expected level of contribution to the Legal Sector Transformation Fund;
- 3.5.2 The proposed deviation from the deemed status level 4 of EMEs, under the generic B-BBEE Codes of Good Practice, to seemingly status level 5 under the draft LSC;
- 3.5.3 The proposed deviation under the Socio-Economic Development requirement of the generic B-BBEE Codes of Good Practice which has a 75% requirement in relation to black people;
- 3.5.4 The number of pro bono hours applicable to legal practitioners as opposed to the LSME (entity); and
- 3.5.5 The impact of the draft LSC on the smaller firms.

3.6 The LSC is inherently problematic, as the foundational constitutional considerations - the legal community's independence and the supremacy of the Constitution and the Rule of Law - are impacted upon.

3.7 It is acknowledged that the LSC will go a long way in enabling the legal sector to achieve the objectives of the LPA and broader transformation of the legal sector, provided the current crucial deficiencies are adequately addressed.

3.8 There is a need for a careful re-think to prevent suffocating legal firms, particularly the smaller ones, with the burden of compliance with the LSC. It is suggested that an incremental approach be adopted so that, as a firm grows, so should the LSC compliance requirements over time.

#### 4. **TRANSFORMATION THROUGH CONSENSUS**

The majority of legal practitioners supports transformation, but through consensus. The draft LSC in its current form is still not aligned with the truths of private legal practices' 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 arduous task for private law firms to truly effect transformation under the criteria proposed in the generic B-BBEE scorecards. Remaining compliant, from the gazetting of these Codes, will be difficult for large enterprises. A transition time to allow for implementation until true transformation is also omitted.

## 5. **INDEPENDENCE OF THE LEGAL PROFESSION**

- 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 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 profession, just like the judiciary is not negotiable and is sacrosanct.
- 5.2 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 supremacy of the law, the independence of legal practitioners and the interest of the client. Now a client is faced with the reality that, when his or her attorney is appointing counsel on his or her behalf, the interest of the client is not the sole determining factor, but also the standing of the attorney with regard to the scorecard. This may compromise the integrity of services and advice in instances where the client is for example advised against his or her counsel of choice in instances where the attorney may be at risk of non-compliance of the scorecard.

## 6. **DEVIATIONS FROM THE GENERIC B-BBEE CODES**

- 6.1 The draft LSC is expansive and stricter than the generic codes. Furthermore, the total annual turnover thresholds for legal entities, and which thresholds in the draft LSC dictates the measurement of such legal entities for B-BBEE purposes, appear to be more onerous than in comparison with the B-BBEE generic Codes and other sector codes. This is especially so taking into consideration the economic stability and viability of most law firms.
- 6.2 It is uncertain why the existing Codes of Good Practice were not used and tweaked where it was not particular to the legal sector, rather than draft an entirely new LSC which is not aligned with the current B-BBEE Codes of Good Practice. Other current aligned sector code legislation works to accommodate the particular sector and therefore should also 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.

- 6.3 The proposed LSC has a high variance from the generic codes and before / after each element, there are insufficient guidelines on measurement and principles. In many cases the measurement is difficult to follow and verification agencies will find it hard to measure and verify.
- 6.4 The Skills Development calculations are also not clear.
- 6.5 How can a B-BBEE Certificate be possible without a verification process? 80% of attorneys are single practitioners. The LPC in its recommendation did not give much thought to this.

## 7. **PRO BONO HOURS**

- 7.1 The LSSA is not opposed to the principal of giving back to the community by means of providing pro bono service.
- 7.2 In terms of section 29 of the Legal Practice Act, 2014 (**Legal Practice Act**), it is the responsibility of the Minister of the Department of Justice and Constitutional Development, after consultation with the Legal Practice Council, to prescribe the requirements for community service (i.e. pro bono service). The introduction of pro bono work in the LSC will effectively create two similar but different types of pro bono work (one being in the LSC and one in the Legal Practice Act). The pro bono will accordingly be subject to overlapping regulatory frameworks under the influence and governance of different regulators. This will inevitably result in a duplication of pro bono obligations by law firms due to similar but conflicting pro bono requirements under the different regulatory frameworks.
- 7.3 It is unclear how the amount of pro bono hours as proposed by the LPC was arrived at. Draft Regulations were published to regulate the provision of community service (including pro bono) by legal practitioners and candidate legal practitioners pursuant to the provisions of Section 29 of the LPA. In terms of the draft Regulations, a legal practitioner must render 40 hours per annum community service, which includes pro bono. Assuming that there are 34 000 attorneys, the vast majority of whom are not exempted from mandatory pro bono service, this would translate to some 1 360 000 hours of free work per year according to the proposed 40 hours. The LSC further increases the number of pro bono hours for some practitioners.
- 7.4 The existing pro bono advice provided by law firms should already be recognised towards their Socio-Economic Development initiatives - legislating this as a requirement would make no real difference to current Socio-Economic Development initiatives. Where there

are other Socio-Economic Development initiatives that law firms are able to provide that would not fall within legal pro bono parameters, but would still have substantive transformative effect, these initiatives must be recognised.

- 7.5 BEE is intended to be for the benefit of black people. Pro bono work, by its nature, already requires a financial means test to be undertaken when determining whether a person qualifies for the pro bono services. It is therefore unclear why the black persons that benefit from pro bono services are being limited to comply with certain additional criteria. This consequently excludes black persons who are not poor, marginalised or from rural areas from receiving the benefit of a law firm's pro bono work.
- 7.6 Based on the drafting of the measurement indicators, it is not stated who the intended beneficiaries of pro bono services are. i.e. is it black people who are poor and marginalised and from rural areas, or does it include Black people who are poor, or black people who are marginalised, or black people who are from rural areas. Whether these targets are workable and can be complied with would largely depend on the drafting, i.e. to clarify who are beneficiaries.
- 7.7 Other questions which the LPC is silent on, are:

- 7.7.1 How will pro bono instructions be distributed amongst attorneys in rural areas?
- 7.7.2 How will speciality fields be allocated among attorneys? Will it be practice specific?
- 7.7.3 How will pro bono hours be regulated?

## 8. **CALCULATION METHODOLOGY**

There is no clarity on calculation methodology for specialised law training. Any contribution towards Supplier Development is vague and no clarity is given on calculation methodology. The draft LSC refers to mandatory training, but does not specify what this is.

## 9. **TURNOVER OF EME'S**

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

9.2. The major changes in Turnover thresholds, in terms of determining whether a LSME is an ELE, QSE or Large Enterprise, remain at onerous levels based upon Total Annual Revenue of the LSME, as opposed to the number of directors/shareholders/or partners in a practice.

9.3 It is also unclear why there are discrepancies between standards applicable to attorneys and advocates.

10. **VARIOUS OTHER SUBMISSIONS**

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

10.2 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.

10.3 Other questions which were raised are:

10.3.1 **Who is eligible to qualify as an Exempt Legal Entity (ELE)?**

a. Paragraph 14.1 lists two requirements:

(i) Annual income below R3m; and

(ii) Number of years **after being admitted as attorneys and advocates**, respectively.

b. Also, LSC000 provides:

Exempted Legal Entities: number of years in existence as a law firm, i.e.: LSME established by one or more attorneys and registered with the LPC (Less than 3 years).

10.3.2 On page 33 it is stated: *The ELEs scorecard applies to at least 84.6% of the total number of legal practices in SA.*

It appears that the number of ELEs are limited, as many practitioners with an annual income below R3m would have been in existence for more than three

years. It is unlikely that the ELE scorecard applies to at least 84.6% of the total number of legal practices in South Africa.

**10.3.3 Is a legal practitioner who is not eligible as an ELE, required to undergo verification?**

- a. For example, is a practitioner who has been practising for 5 years and with an annual income below R3m required to undergo verification? Is LSC000 applicable? Is the ELE partially exempted?
- b. How can this practitioner enhance his, her or their recognition status? The current ways to do so under LSC000 are: (1) contribution to Legal Sector Transformation Fund (LSTF), (2) training in specialised areas of law for BLP, or (3) any contribution towards either the enterprise or supplier development.

**10.3.4 Is compliance with the LSC obligatory for legal practitioners who are not ELEs?**

- a. The answer seems to be 'yes.' The draft LSC provides that any LSME with total revenue as set out in relevant categories **shall comply with the elements** of the LSC Scorecard (14.2).
- b. What about those with a total revenue below R3m, but who have been admitted for more than 3 years? Are they required to comply with the remaining elements of the LSC Scorecard?
- c. It appears that several practising attorneys who earn below R3m will have to comply with additional verification and pro bono requirements. Many of these attorneys who are, for example, practising in rural towns are unlikely to receive instructions from national and provincial departments, which would ordinarily make use of legal services through the Office of the State Attorney that will in turn brief advocates – not attorneys. By implication, practising attorneys operating in rural towns and earning below R3m would, despite their enhanced B-BBEE status, have limited or virtually no opportunities to render legal services to such departments, but they will be faced with additional compliance obligations. Sadly, the proposed Legal Sector Codes, in its current format, would have unfair and unintended outcomes for many practising attorneys.

**10.3.5 What are the consequences of non-compliance with the LSC?**

This appears to be unclear. Would it impact on the right to practice? Would it be considered misconduct? Also, consider the consequences of non-compliance with the generic B-BBEE Codes of Good Practice.

**10.3.6 Consider the interface between:**

- a. Community service and pro bono – if a practitioner is compliant with community service requirements (which may not include pro bono) in terms of Section 29 of LPA, would it qualify as pro bono under the LSC?
- b. City versus rural – why the distinction?
- c. Generic Codes, 75% versus 100% - why the deviation from the generic codes?

10.4 The LSC is rooted in a vision, although admirable (i.e. the sustained and effective economic participation in the economy by black people) that is far removed from the reality of, *inter alia*, LSME's as defined in section LSC 100 (QSE's).

10.5 The proposed unilateral and phased “*sub-minimum*” of ownership (40%) is not based on empirical data and is arbitrary. This sub-minimum, ostensibly rooted in historical exclusionary acts, cannot conceivably be based upon the commonly accepted (and practical) functioning of the majority of LSME's.

10.6 To the point and as applicable to most incorporated LSME's: ownership is based upon performance of each and every attorney and the contribution to the firm's financial- and client-based goals. The financial and commercial risks involved in an LSME is borne by its directors (as applicable to most incorporated firms) and, ultimately so, by its shareholders or by its partners in the case of a partnership.

10.7 The proportionality of ownership, when weighed against the performance of an attorney/director/partner, cannot be overstated. Differently put: the director/partner must be a competent and functional attorney in light of the commercial risks associated with LSME firms. This statement applies to “*commercial work*,” “*commercial litigation*” and the like.

10.8 Consequently, to simply impose a phased ownership of 40% is at complete variance and ignorant of the core principle of professional fees written and collected, equates to firm sustainability, the burden of financial risk and the right to ownership/participation. The LSC

is thus not aimed at “facilitating” a sustainable and measured ownership by black people, it wishes to impose it absent of regard for the clients of LSME’s.

- 10.9 The facilitation is completely absent of any measurable criteria. Thus, to simply impose a phased approach is arbitrary in the extreme.
- 10.10 The LSSA is in favour of inclusionary participation in the legal profession and actively promotes the appointment of previously disadvantaged individuals. However, to do so without any regard for the core values of the legal profession, within a 3-year period and absent of any regard for the ultimate responsibilities attributable to attorneys and “management” alike, would be detrimental to all legal practitioners.

## 11. CONCLUSION

- 11.1 As stated in the introduction, the LPC had received 140 submissions. These submissions were summarised in approximately 800 pages. This document is a summary of the issues raised by legal practitioners and stakeholders. Many of these submissions overlap and raise the same concerns.
- 11.2 Most of these submissions, however, has come from different angles, but raised mutual concerns. We believe that, should these draft Legal Sector Codes be approved, it will open a floodgate of unintended consequences.
- 11.3 As shown in this document, these draft Legal Sector Codes, will not be able to bring about meaningful transformation. Legal practitioners are already burdened with various compliance requirements, including obligations pursuant to the Financial Intelligence Centre Act and the Protection of Personal Information Act. The draft Legal Sector Codes, in its proposed form, will just amplify the burden, specifically on smaller firms, not to mention the uncertainty it will bring. Put differently, it would thwart the noble transformation objectives for the legal profession.
- 11.4 There is a real risk that, due to the uncertainty and issues raised in these submissions, the Codes will most likely be tested in the courts (should the Codes be gazetted in its current form). Certain constitutional issues have also been raised. Should these issues be litigated upon, the Codes will get stuck in a legal quagmire and transformation will once again be left at the wayside.
- 11.5 Ideally, the LSC could provide for broad-based black ownership schemes and entrepreneurship schemes with special incentives to recognise and reward the transformation initiatives, and encourage participation by all the stakeholders.

11.6 Better results can be achieved by consensus reached with legal practitioners, rather than dictating to legal practitioners. In seeking consensus, government can ensure that the central pillars of our constitutional democracy are not undermined, and that there is no erosion of the fundamental principles, including the independence of the legal profession and the judiciary.

11.7 The draft LSC goes a long way in ensuring participation in the primary economy by black legal practitioners who were systemically disempowered and excluded, but there are fundamental issues that need to be addressed before the LSC can be considered for adoption.

11.8 In pursuing the above, stakeholders must vigorously engage in an attempt to pursue the noble transformation objectives, as aspired to by the legal profession for a number of years. The stakeholders should not be in a rush to get the LSC promulgated without robust in personal engagement. We submit that proper discussions are held with stakeholders in person to ensure that workable Codes can be drafted by means of consensus and that practical goals regarding true transformation can be set.

11.9 In summary, the current format of the LSC should be redrafted as it:

1. was not drafted in accordance with the processes to develop a sector code as per the Amended Guidelines for Developing and Gazetting of Sector Codes, causing it to be fatally flawed;
2. failed to take into account previously invited comments provided to the Legal Practice Council;
3. includes misleading and divisive language that does not support an inclusive approach to BEE and transformation;
4. fails to be based on sound economic principles, sectorial characteristics, or empirical research;
5. will not be able to achieve real transformation of the legal sector; and
6. is impractical and does not take into account the practicalities of a legal practice.

## Annexure A: Comments on Interpretations and Definitions

### 1 Interpretation and Definitions

1.1 There is inconsistency in the LSC definitions where some definitions are capitalised and others are not. The use of capitalised terms to indicate use of defined concepts in legislation is a fundamental tool used to ensure proper and consistent understanding and interpretation of the relevant legislation. We therefore recommend that all definitions contained within LSC are capitalised, and the consequential changes are made to the body of the LSC to reflect the capitalised terms.

1.2 We have only commented on the concepts in respect of which we have a concern.

Concept	Definition	Concern and proposed amendment if any
annual revenue	means the income generated by an LSME in providing its services in the course of rendering professional services as regulated by the LPA	<p>It is unclear why the concept of annual revenue has been used instead of annual turnover, as contemplated in the Generic Codes.</p> <p>We recommend that the concept of “annual turnover” is retained and utilised, and this concept is deleted.</p>
associate	means an attorney employed in such a capacity, by an LSME in terms of an employment agreement concluded by these parties	<p>We understand that the Management Control element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the</p>

		<p>standards contemplated in the regulations set out in the EEA to include subjective employment concepts.</p> <p>We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.</p>
Associate director	<p>means an attorney employed in that capacity by an LSME, in terms of an employment agreement, ranking above a position of a senior associate or senior professional assistant and below a position of a director or partner, as the case may be, in that LSME</p>	<p>We understand that the Management Control element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the standards contemplated in the regulations set out in the EE Act to include subjective employment concepts.</p> <p>We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.</p>
B-BBEE	<p>means broad-based black economic empowerment, a national government</p>	<p>BEE is a specific regulatory framework that forms only one of the empowerment frameworks provided by</p>

	<p>policy that enables the participation of black people in the mainstream of the economy</p>	<p>Government. It is incorrect for BEE to include considerations that are outside of this specific regulatory framework.</p> <p>The definition should therefore be amended as follows:</p> <p><u>“means broad-based black economic empowerment as contemplated in the B-BBEE Act and associated laws, a national government policy that enables the participation of black people in the mainstream of the economy”</u></p>
B-BBEE Commission	<p>means the regulatory monitoring and compliance commission responsible for investigating and prosecuting B-BBEE contraventions and fronting</p>	<p>This definition is incorrect as the B-BBEE Commission does not have the authority to prosecute any person in relation to BEE conventions or fronting.</p> <p>We recommend that the definition is amended as follows:</p> <p><u>“means the regulatory monitoring and compliance commission responsible for investigating and prosecuting B-BBEE contraventions and fronting “has the meaning of Commission as set out in the B-BBEE Act”</u></p>

B-BBEE compliant LSME	means legal services measured entity that has achieved a level 1 to level 8 B-BBEE status level as set out in the B-BBEE Act	This concept is not used in the LSC – the concept should therefore be deleted.
B-BBEE verification agency	means an entity which has been confirmed, approved and classified as such, by the B-BBEE verification regulator, to verify compliance with the LSC in terms of the provisions of the B-BBEE Act	<p>A verification agent would not specifically be confirmed, approved and classified to verify compliance with the LSC.</p> <p>The concept “B-BBEE verification regulator” is only used for purposes of this definition whereas “SANAS” is used multiple times, and therefore “B-BBEE verification regulator” should be deleted.</p> <p>In addition, the definition of B-BBEE verification agency should be amended as follows:</p> <p><i>“means a rating agency accredited to conduct B-BBEE verifications by SANAS an entity which has been confirmed, approved and classified as such, by the B-BBEE verification regulator, to verify compliance with the LSC in terms of the provisions of the B-BBEE Act.”</i></p>

B-BBEE verification certificate	means any certificate prepared and issued by a B-BBEE verification agency verifying compliance with the LSC by the LSME in terms of the provisions of the B-BBEE Act	<p>There is no definition for B-BBEE affidavits, despite there being a definition for B-BBEE verification certificate.</p> <p>Assuming a separate definition for a B-BBEE affidavit is included, the definition of B-BBEE verification certificate should be amended as follows:</p> <p><i>"means <u>such any</u> certificate prepared and issued by a B-BBEE verification agency <u>after assessing the B-BBEE initiatives implemented by the LSME in order to determine its B-BBEE status verifying compliance with the LSC by the LSME in terms of the provisions of the B-BBEE Act.</u>"</i></p>
B-BBEE verification regulator	means a body appointed by the Minister for the accreditation of rating agencies or the authorisation of B-BBEE verification professionals	The concept "B-BBEE verification regulator" is only used for purposes of this definition whereas "SANAS" is used multiple times, and therefore "B-BBEE verification regulator" should be deleted.
black people	shall for the purposes of the LSC means black	We recommend that the definition is simplified to state:

	people as defined in the B-BBEE Act	<del>"shall for the purposes of the LSC means black people as defined has the meaning as set out in the B-BBEE Act"</del>
board of directors	means, in respect of an incorporated LSME, a body that is constituted by the directors of such LSME, and in respect of a partnership, a body which is constituted by the partners of such an LSME, which, in each event, is responsible for the executive management decisions and/or strategic direction of such an LSME	We therefore recommend that the concept name should instead be changed to "Supervisory Board" or "Executive Committee."
Charter Council	means the Legal Sector Code Charter Council to be established by the Minister to oversee and implement the LSC, as set out in paragraph 10 of this LSC	The word "Minister" in this definition is incorrect as it refers to the Minister of the DTIC. Paragraph 10.2 states that the Charter Council will be established by the Minister of Justice. This definition needs to be updated to reflect the correct position.
continuous legal education	means the practical legal training, which is intended to improve the practical knowledge and skills of the practitioners (including the skills and	The definition should include reference to "legal practitioners" instead of "practitioners."

	knowledge of the candidate attorneys and pupils)	
designated categories	means black women, black youth, black people with disabilities and/or from the rural, as contemplated in this LSC	<p>It is unclear why this new concept has been introduced which is similar but different to Black Designated Categories as contemplated in the Generic Codes.</p> <p>The definition should include reference to “from the rural areas” instead of “from the rural.”</p> <p>It is unclear what the reference to “as contemplated in this LSC” means. We recommend that this phrase is deleted.</p>
discretion	means the unfettered and absolute discretion	<p>This concept is only used in relation to paragraph 20.5.5 “non-discretionary procurement.” The concept can therefore be deleted.</p>
EAP	means the economically active population, comprising persons between the ages of 15 and 65, as may be determined, from time to time, by the quarterly labour force survey published periodically by Statistics South Africa. The operative	<p>This definition does not align with the Generic Codes, and it is unclear why this is.</p> <p>The definition should be amended to state “has the meaning set out in the Generic Codes.”</p>

	EAP for the purposes of any calculation under the LSC shall be the most recently published EAP statistics	
economic interest	means a legal practitioner's right to a share in the profits and liabilities of an LSME, receive distributions from that LSME, representing a return on ownership similar in nature to a dividend right and to receive distributions from that LSME	<p>This definition does not align with the Generic Codes, and it is unclear why this is.</p> <p>The definition should be amended to state "has the meaning set out in the Generic Codes."</p>
ELE	means an exempted law firm or an advocate as the case may be, as contemplated in the LSC	<p>It is unclear why a new definition has been introduced to replace the existing concept of "EME" as contemplated in the Generic Codes. We recommend that this concept is deleted and the concept of EME is utilised.</p>
employment agreement	means any written agreement concluded between an LSME and an attorney for the employment of the attorney by the LSME	<p>Other than in definitions which we have noted should be deleted, this concept is only used in relation to paragraph 20.4.1. The definition is therefore unnecessary and should be deleted.</p>

ESD	means an enterprise and supplier development programme as set out in this LSC	This definition specifically refers to a programme. All of the references in the LSC do not refer to a programme, therefore we recommend that this concept is deleted.
equity partner/director	means a partner or a director, the latter, notwithstanding the definition ascribed to that term in the Companies Act who has an ownership interest in an LSME and shares in the profits of that LSME and is liable for the expenses and liabilities of such an LSME	The concept of equity partner is not used in the LSC other than in a quote. The concept of equity director is only used in the definition of top management, which we have recommended to be deleted. We therefore recommend that this concept is deleted.
executive management	for the purposes of this LSC, executive management shall be constituted by the various sub-committees established by the board, to carry out and implement specific functions and/or duties, as may be delegated to such sub-committees, by the board, from time to time	We understand that the Management Control element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards contemplated in the Generic Codes. We recommend that this concept is deleted and the Generic Codes

		terminology regarding management levels is retained.
GDP	means gross domestic product	This concept is not used and therefore can be deleted.
goods and services	for the purpose of this LSC, goods and services shall without limiting the generality thereof refer to and include, textbooks, technology hardware and software, furniture, accounting services and electrical equipment and services and all other goods and services that are essential for the carrying on of legal practices	This is an unnecessary and circular definition and provides no further insight or context when used in the LSC. This concept should therefore be deleted.
incorporated LSME	means an LSME constituted, organised and incorporated by one or more attorneys, in accordance with the provisions of the Companies Act, and registered and established as a law firm with the LPC, in terms of the provisions of the LPA	This is an unnecessary definition and provides no further insight or context when used in the LSC. This concept should therefore be deleted.

in-service training	<p>means practical training which is intended to improve and enhance the skills and knowledge of the support staff in any relevant LSME</p>	<p>This concept is only used in the objectives of the LSC. This is an unnecessary definition and provides no further insight or context when used in the LSC. This concept should therefore be deleted.</p>
junior management	<p>for the purposes of this LSC, shall be constituted by associates and/or professional assistants, within an LSME with no specific management duties and/or responsibilities, unless the board determines otherwise</p>	<p>We understand that the Management Control element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the standards contemplated in the regulations set out in the EE Act to include subjective employment concepts.</p> <p>We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.</p>
large enterprise	<p>means an LSME with more than 15 directors and/or partners and which generates a total</p>	<p>This definition conflicts with multiple instances in the LSC that describe what constitutes a large enterprise.</p>

	revenue of more than R15 million per annum	We recommend that this definition is therefore amended as follows: “means an LSME <del>with more than 15 directors and/or partners</del> and which generates a total annual turnover of more than R15 million per annum”
law firm	means an LSME which has been established by one or more attorneys and is duly registered with the LPC, in terms of the provisions of the LPA, for the purposes of engaging in the business and practice of law in South Africa	The definition of law firm refers to an LSME, but the definition of LSME includes a reference to law firm. These two definitions are therefore circular and the use of both is unnecessary. We recommend that one is used consistently and the other concept is deleted.
legal entity	shall, for purposes of this LSC, have similar meaning as a law firm, and the two terms may be used interchangeably throughout this LSC	This concept is not used and therefore can be deleted.
LPC	means the Legal Practice Council, which is a national, statutory body established in terms of section 4 of the LPA. The LPC and its provincial councils regulate the affairs of and exercise jurisdiction	We recommend the following amendment to this definition: “means the Legal Practice Council, established in terms of section 4 of the LPA. <del>The LPC and its provincial councils regulate the affairs of and</del>

	over all legal practitioners (attorneys and advocates) and candidate attorneys and pupils	<del>exercise jurisdiction over all legal practitioners (attorneys and advocates) and candidate attorneys and pupils."</del>
LSME	means a legal sector measured entity in the form of a law firm in the case of attorneys whether as sole practitioner, partnership or incorporated legal entity or an individual advocate	The definition of law firm refers to an LSME, but the definition of LSME includes a reference to law firm. These two definitions are therefore circular and the use of both is unnecessary. We recommend that one is used consistently and the other concept is deleted.
LSTF	means the Legal Sector Transformation Fund, to be established in terms of paragraph 31 of this LSC, by the Charter Council, for the purpose of receiving and administering contributions made by LSMEs and ELEs in terms of this LSC, to provide financial assistance and support to black legal practitioners and for related purposes as may be determined by the Charter Council from time to time	This definition conflicts with paragraph 31 of the LSC. We refer to our comments in paragraph 18.5 of this submission. This definition must be amended accordingly.

measurement date	means the last day of the measurement period (or such later date agreed upon with the LSME) that is as close as practically possible to the commencement of the verification or to the date of making of the LSME confirmation affidavit, whichever the case may be	<p>This concept is not used in the LSC - the concept of "date of measurement" is used. We recommend that the phrase "date of measurement" is removed and the defined concept is used instead.</p> <p>We recommend the following amendments to this definition:</p> <p><i>"means: the day agreed to between the LSME and the B-BBEE Verification Agency <del>last day of the measurement period (or such later date agreed upon with the LSME)</del> that is as close as practically possible to the commencement of the verification or to the date of making of the LSME confirmation affidavit, whichever the case may be."</i></p>
medium enterprise	means an LSME with a minimum of 4 partners or directors but not more than 15 partners or directors, with an annual revenue of not less than R3 million and not more than R15 million	<p>This concept is used interchangeably with the concept "QSE." We recommend that this concept is deleted and the concept of QSE is retained and used consistently throughout the LSC.</p>
middle management	means an associate directors), (or) senior	We understand that the Management Control

	<p>associates and/or senior professional assistants, where applicable, within any LSME, who carry out and/or implement any decisions, functions and/or management duties, as may be delegated to them by directors, partners or practice group heads from time to time</p>	<p>element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the standards contemplated in the regulations set out in the EE Act to include subjective employment concepts.</p> <p>We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.</p>
NDP	<p>means the National Development Plan which is a set of proposals devised by the government of South Africa aimed at eliminating poverty and reducing inequality by 2030</p>	<p>We recommend that this concept is deleted as the concept is only used once in the LSC.</p>
partner	<p>means an attorney who has been employed in such capacity, by an LSME, who is entitled to the profits of such LSME and is liable for its expenses and losses</p>	<p>This definition is not correct. A partner is not employed. The definition also does not contemplate a partner as a member of a partnership.</p>

		<p>This concept should be amended to be appropriate and instead a more consistent concept should be used (for example Equity Director).</p>
partnership	<p>means an LSME other than an incorporated LSME established and constituted by two or more attorneys, registered with the LPC, in accordance with relevant provisions of the LPA, to manage and oversee the business operations of such LSME and share the profits and liabilities of such LSME</p>	<p>We recommend that this definition is amended as follows:</p> <p><del>"means an LSME, other than an incorporated LSME, established and constituted by two or more attorneys as a partnership and registered with the LPC, in accordance with relevant provisions of the LPA, to manage and oversee the business operations of such LSME and share the profits and liabilities of such LSME."</del></p>
PGL	<p>means practice group leaders, who are generally equivalent and have the same rank as the heads of departments, within the LSME, and carry out the same mandate and/or functions, as heads of departments, as the case may be, within an LSME</p>	<p>We understand that the Management Control element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the standards contemplated in the regulations set out in the EE Act to include</p>

		<p>subjective employment concepts.</p> <p>We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.</p>
priority scorecard elements	means the compulsory elements that must be complied with in terms of the LSC, as outlined in the scorecards, referring to ownership, skills development and enterprise and supplier development	<p>This concept is not used in the LSC - the concept should therefore be deleted.</p>
professional assistant	this term shall bear a similar meaning as an associate, unless the context indicates otherwise	<p>We understand that the Management Control element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the standards contemplated in the regulations set out in the EE Act to include subjective employment concepts.</p>

		We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.
PSED	means procurement, supplier and enterprise development element as a measurement statement as contained in this LSC	<p>This concept is inconsistently used in the LSC, and it is unclear why the concept has been created where the concepts in the Generic Codes are sufficient.</p> <p>We recommend that this concept is deleted.</p>
public entities	means enterprises that are listed as public entities in Schedule 2 or 3 of the Public Finance Management Act No.: 1 of 1999, as amended	<p>This concept is unnecessary, taking into account the proposed changes to the definition of SOE. We recommend that this concept is deleted.</p>
QPB	means a qualifying procurement beneficiary who is a recipient that qualifies, in terms of the qualifying enterprise and supplier development contributions and interventions, as set out in this LSC	<p>This concept is used only in relation to paragraph 30. However, paragraph 30 is incorrect in that it deals with concepts that are not contained within the Enterprise and Supplier Development scorecard.</p> <p>We recommend that this concept is deleted.</p>
QSE	means a qualifying small measured LSME or an advocate, as the case	We refer to our comment under “medium enterprises.”

	may be, which or who for the purposes of this LSC, is measured as such in terms of the LSC	
QSED	means qualifying supplier enterprise development initiatives that are intended to benefit communities and/or individuals, measured in monetary value or hourly rates, using generally accepted standards of valuation methods, as may be approved by the Charter Council from time to time	<p>This is an unnecessary definition as it is only used twice in paragraph 34. Whilst the concept is described elsewhere in the LSC, this term is not used.</p> <p>In addition, the element that QSED is used in reference to is the Enterprise and Supplier Development element (referred to as ESD). “SED” is a reference to the Socio-Economic Development element. Therefore the term QSED creates unnecessary confusion.</p> <p>We recommend that it is deleted.</p>
rural areas	means for the purposes of this LSC, low population density geographical areas which are located outside towns and cities, and are recognised as such by the Statistics SA, and have limited access to ordinary public services, such as water, sanitation, infrastructure	<p>It is unclear what the reference to “as contemplated in this LSC” means. We recommend that this phrase is deleted.</p>

	and/or economic opportunities	
salaried director	means, for the purposes of this LSC, and notwithstanding the definition ascribed to that term in the Companies Act, an attorney employed in that capacity by an LSME who does not participate in the profits of the LSME nor has a legal entitlement to such profits and is not liable for the expenses and liabilities of such LSME	This appears only in the definition of top management in the LSC. We recommend that it is deleted on the basis of our recommended changes to the definition of top management.
SANAS	means the South African National Accreditation Agency, an agency responsible for carrying out accreditations in respect of conformity assessments mandated through the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act No. 19 of 2006, as amended	We recommend that this definition is amended as follows: “means the South African National Accreditation Agency, <u>or any similar body that may replace it</u> , an agency responsible for carrying out accreditations in respect of conformity assessments mandated through the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act No. 19 of 2006, as amended”.
senior associate	means an attorney employed by an LSME, in that	We understand that the Management Control

	<p>capacity, who is at a senior level above an associate but who is not a partner or a director at such LSME</p>	<p>element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the standards contemplated in the regulations set out in the EE Act to include subjective employment concepts.</p> <p>We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.</p>
senior management	<p>for the purposes of this LSC, shall be constituted and refer to the heads of departments or PGLs, as the case may be, of the various departments, within a relevant LSME, who are the leaders of such departments, and oversee the performance, effectiveness and efficiency of such departments</p>	<p>We understand that the Management Control element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the standards contemplated in the regulations set out in the EE Act to include subjective employment concepts.</p>

		<p>We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.</p>
senior professional assistant	this term shall bear a similar meaning as a senior associate, unless the context indicates otherwise	<p>We understand that the Management Control element in the LSC contemplates allocating employment designations based on title, and not based on function (as contemplated in the Generic Codes). It is unclear why there would be a deviation from the objective standards of the standards contemplated in the regulations set out in the EE Act to include subjective employment concepts.</p> <p>We recommend that this concept is deleted and the Generic Codes terminology regarding management levels is retained.</p>
SOEs	means the state-owned enterprises which are entities that are wholly or partly owned by the state or any organs of state	<p>We recommend that this definition is amended as follows:</p> <p><u>"has the same meaning as State Owned Company in the Companies Act means the state-owned</u></p>

		<p>enterprises which are entities that are wholly or partly owned by the state or any organs of state.”</p>
specialised areas of law	<p>means those areas of law where black people have been historically excluded from and remain largely excluded or have limited exposure to, including, but not limited to the following:</p> <ol style="list-style-type: none"> <li>1. corporate and commercial law;</li> <li>2. intellectual property law;</li> <li>3. information technology;</li> <li>4. maritime law;</li> <li>5. regulatory law;</li> <li>6. conveyancing and property law;</li> <li>7. pension law;</li> <li>8. aviation law;</li> <li>9. entertainment law;</li> <li>10. arbitration and mediation;</li> <li>11. insolvency and business rescue;</li> <li>12. banking law;</li> <li>13. initial public offerings and the securities exchange;</li> <li>14. business and corporate tax law;</li> <li>15. assets restructuring;</li> <li>16. mergers, acquisitions and take overs;</li> <li>17. competition law;</li> <li>18. mining, energy and natural resources;</li> </ol>	<p>It is not correct to state that Black people have been excluded from the attorneys' profession in areas of law. Some of the areas are simply areas that are performed either by larger law firms or smaller boutique law firms that specialise in certain areas of law, not to the exclusion of anyone.</p> <p>In addition, many of the identified areas of law have only recently been developed and therefore to state that Black people have been excluded is similarly not appropriate. For example, entertainment law, media law, and sports law.</p> <p>All areas of law, individually described, are specialised. No attorney excludes any other attorney from practicing these or any areas of law. All large law firms recruit without bias; therefore any legal practitioner (including Black legal practitioners) may practice within any area of law available within the law firm.</p>

	<p>19. international trade;</p> <p>20. corporate governance;</p> <p>21. due diligences and compliance;</p> <p>22. forensic and fraud investigation;</p> <p>23. transaction advisory services;</p> <p>24. environmental law;</p> <p>25. project finance;</p> <p>26. corporate finance;</p> <p>27. structured finance;</p> <p>28. construction and engineering law;</p> <p>29. media law;</p> <p>30. telecommunication law;</p> <p>31. sports law; and</p> <p>32. B-BBEE transaction advisory and related services</p>	
targeted procurement	<p>means procurement from preferred categories of bidders, such as persons previously disadvantaged by unfair discrimination, provided that such procurement</p> <p>(a) does not compromise the value for money requirement; and (b) is an incentive for recognising and rewarding genuine innovators in the case of unsolicited proposals, provided that such incentives do not compromise the competitive bidding</p>	<p>This definition is inappropriate taking into account our comments in relation to the application of the LSC and the specialised scorecard for Preferential Procurement. This concept must therefore be deleted.</p>

	process and (c) complies with the provisions of the Preferential Procurement Policy Framework Act 5 of 2000	
top management	refers to a board of directors, in case on an incorporated LSME, or a board of partners, in case of a partnership, constituted by equity directors or partners and salaried directors or partners, as a case may be, who participate in the overall strategic direction of an LSME and have the final decision-making powers in relation to the professional and business affairs of such relevant LSME; and	This concept is only used in limited instances of the Management Control scorecard that relates to Executive Management. Taking into account our comments on Executive Management, we recommend that this concept is deleted.
voting rights	the term shall have similar meaning as defined in the Companies Act	This definition does not align with the Generic Codes, and it is unclear why this is. We also note that this definition is inappropriate for partnerships. The definition should be amended to state "has the meaning set out in the Generic Codes."

## Annexure B: Introduction and Preamble to Summary of Scorecards

### 2 Paragraph 5: Introduction and Preamble

- 2.1 Paragraph 5.3 to paragraph 5.11 provide the background and, it is understood, the underlying economic principles, sectorial characteristics, and empirical research that forms the basis for the LSC being prepared. This was addressed *supra*.
- 2.2 It must be emphasized that the LSSA is not opposed to the introduction of an LSC. However, any such sector code that is introduced must be done so in accordance with the Sector Code Statement, must be practical and workable for all legal practitioners and, most importantly, must effect transformation of the legal sector as a whole.

### 3 Paragraph 6: Business Case and Imperatives of the LSC

- 3.1 Paragraph 6.3 sets out the outcomes and objectives of the LSC. It is unclear how they have not already been addressed in the Generic Codes. It is less clear how they have been appropriately addressed in the LSC.
  - (1) Paragraph 6.3.1: The LSC refers in multiple instances to the “unique features and characteristics” of the legal sector. However, the LSC does not clearly state what the unique features and characteristics of the legal sector are that it is attempting to address. Where unique features and characteristics may arise, the LSC also does not comprehensively address those. Therefore it does not achieve this objective.
  - (2) Paragraph 6.3.2: This states that an objective of the LSC is to ensure that industry stakeholders commit to the implementation of the LSC. It is unclear how the LSC would achieve this. It is important to bear in mind that BEE is a regulatory framework that entities are entitled to elect whether they participate in or not. Those industry stakeholders that are committed to transformation are committed regardless of the mechanism through which BEE is implemented. The introduction of an LSC would not suddenly ensure stakeholder commitment to transformation and the implementation of BEE via the LSC. In addition, those law firms committed to transformation of the legal sector have implemented BEE through the Generic Codes – it is unclear how the LSC would change a law firm’s stance on commitment to transformation.
  - (3) Paragraph 6.3.3: This states that the LSC has the objective to achieve “industry specific and practical thresholds, targets, measurement principles and weighting points are clearly defined and outlined in the LSC for all to understand and implement.” As noted in many instances in this submission, this has clearly not been achieved in the LSC. The thresholds, targets, measurement principles and

points set out in the LSC scorecard are not well described, are impractical, incomplete, and substantively unworkable. The LSC does not achieve its objective to create an LSC that is practical or that provides a document that is clear to understand and implement.

- (4) Paragraph 6.3.4: This states that the LSC wishes to achieve more effective interventions in certain elements of the scorecard. It is unclear where the LSC looks to achieve this: (1) it is unclear on what basis many of the proposed new interventions are required, and (2) the scorecard does not provide sufficient information for many of the interventions to be understood and implemented.
- (5) Paragraph 6.3.5: This states that the LSC wishes to ensure that incentives for innovation and progressive implementation of the LSC in a unique manner are promoted, encouraged and protected. It is unclear what this objective is meant to refer to, or how it is achieved through the LSC.
- (6) Of all the stated objectives the LSC seeks to achieve, it is unclear how many of them have been achieved. We strongly recommend that, if these are the objectives that the LSC wishes to achieve, the LSC is closely scrutinised and amended to ensure the objectives can actually be achieved through the LSC.

3.2 Paragraph 6.4 states that the LSC is purported to achieve objectives of the BEE Act and the Legal Practice Act. It is agreed and acknowledged that, as a sector code published in terms of the BEE Act should align with the objectives of the BEE Act. However it is important to note that the Legal Practice Act is a separate and distinct regulatory framework from BEE. Whilst the LSC should be developed in a manner not to conflict the Legal Practice Act, BEE and the Legal Practice Act are governed by two separate regulators and have separate purposes. As has been seen in other empowerment spaces where there are two regulators that govern a similar empowerment space, there is often unnecessary confusion between which regulator would be the regulator ultimately responsible for the interpretation, implementation and compliance of the regulations. The LSC is a sector code to be published in accordance the BEE Act, therefore it should be clear and unequivocal that the regulator is the DTIC. References to the Legal Practice Act in the LSC should therefore be removed.

- (1) Paragraph 6.4.1: Despite this statement that an objective of the Legal Practice Act and BEE Act is that the entire legal sector in all its forms supports the transformation of the legal sector, the LSC includes the divisive and negative narrative as commented on in paragraph **Error! Reference source not found.** of the main submission does not support this. We recommend that the drafting of the LSC is reconsidered to be drafted in a manner that is positive and inclusive for all participants in the legal sector.

- (2) Paragraph 6.4.2: It is unclear why the LSC would need to align with the principles of the National Development Plan. We recommend that this should be removed.
- (3) Paragraph 6.4.3: It is stated that the introduction of EAP targets is aimed at addressing the unequal representation of racial sub-groups. However the LSC has not been drafted in a manner that allows for the use of EAP targets. Therefore this purported objective is not complied with and the LSC should consider the LSC to ensure proper alignment with this and the Generic Codes.
- (4) Paragraph 6.4.4: This states that there is an objective to set aside “aside of minimum levels of procurement spend and the procurement of work from LSMEs having regard to racial and gender demographics at a national level, with specific reference to LSMEs that are at least 75% black owned or at least 51% black women owned”. The LSC cannot apply to persons that are not themselves within the legal sector, therefore this cannot be complied with as an objective of the LSC.
- (5) Paragraph 6.4.5: This states that there is an objective to set aside “aside of minimum levels of allocations of work for LSMEs that are, having regard to the racial and gender demographics at a national level, with specific reference to LSMEs that are at least 75% black owned or 51% black women owned are affected”. It is unclear what this objective of is intended to address and how it has been addressed in the LSC. It should therefore be deleted.
- (6) Paragraph 6.4.6: Whilst we appreciate the underlying sentiment regarding this objective, law firms already provide significant levels of pro bono services. To demonstrate this, the large law firms most often have departments dedicated to providing such services on a full-time basis. It is therefore unclear why this has been specifically included as an objective of the LSC. Additionally, the alternative Socio-Economic Development scorecard only caters for the provision of funds to certain entities which would negate the proposed objective of providing pro bono services to this defined group of beneficiaries.

3.3 Paragraph 6.5 inexplicably includes further objectives of the LSC that have not been included in those objectives set out in paragraph 6.3 of the LSC. We have set out below our comments in relation to the objectives that we have concerns in respect of.

- (1) Paragraph 6.5.3: It is unclear how the LSC specifically addresses this in a manner that was not already contemplated in the Generic Codes. Any general training in respect of the quality of legal services being provided should be addressed by the Legal Practice Council and not in the LSC. We therefore recommend that this objective should be deleted.

- (2) Paragraph 6.5.5: It is unclear how the LSC addresses challenges of entry into the legal profession. It is worth noting that the Skills Development scorecard no longer allows for skills development initiatives for non-employees. As a result, this has resulted in an increased barrier of entry into the legal sector by black students. Therefore the LSC has in fact directly frustrated this objective.
- (3) Paragraph 6.5.6: This is a duplication of paragraph 6.5.3 – we therefore recommend that it is deleted.
- (4) Paragraph 6.5.7: The provision of pro bono services has already been dealt with in our response to paragraph 6.4.6 of the LSC.
- (5) Paragraph 6.5.8: We appreciate the sentiment that the LSC is intended to facilitate the transformation of the legal sector. Transformation that would be most effectively driven through the legal sector would be by those law firms that are required to comply with all of the elements of the scorecards. However the LSC, by its own admission, notes that it is only an aggregate of 15.4% of law firms that fall within the category of law firms that would have to apply the scorecards. Therefore, whilst the LSC wishes to transform the legal sector, it is placing the obligation to do so on a small subsect of the legal sector.
- (6) Paragraph 6.5.9: This appears to be a restatement of the objective set out in paragraph 6.4.5 of the LSC. We therefore recommend that it is deleted.
- (7) Paragraph 6.5.11: It is unclear how the objective to create conditions conducive to ensuring the providers of legal service are able to establish, manage and build sustainable (1) falls within the ambit of BEE, and (2) has been addressed by the LSC. We therefore recommend that it is deleted.
- (8) Paragraph 6.5.12: It is unclear how the objective to create an enabling environment to reflect the diversity of society and to ensure the promotion of equality and the prevention of discrimination has been addressed by the LSC. This is particularly important taking into account, as set out in response to paragraph 6.5.8 of the LSC above, that the initiatives to be implemented to achieve this objective would only apply to 15.4% of the legal sector.

#### 4 Paragraph 7: Undertakings and Commentary by the Industry Stakeholders

- 4.1 As noted in various instances through this submission, the LSC in its current form does not achieve the purpose for which it was prepared as set out in paragraph 7.2 of the LSC.
- 4.2 In terms of paragraph 7.3, we note that the members of the Steering Committee have no authority to bind the persons that they represent. In addition, we understand that none of

the members of the Steering Committee actually implement BEE in accordance with the scorecards, and therefore have limited knowledge of what is practically involved. Therefore, whilst the Steering Committee can support the sentiment and introduction of an LSC, they are not in a position to undertake to bind the persons that they represent.

## 5 Paragraph 8:Unique Features and Strategic Objectives of the LSC

- 5.1 It is unclear why the LSC has been drafted to, again, include the objectives of the LSC in a separate section of the document. We recommend that all objectives of the LSC are consolidated into a single, concise paragraph of the LSC to avoid duplication.
- 5.2 Paragraph 8.1 states that the LSC is premised to address the need for a “significant increase in the fair and equitable procurement of specialised areas of law by black practitioners from both the private and public sectors.” As stated in various instances through this submission, the LSC cannot regulate those that do not fall within the scope of a sector code. Therefore this cannot be achieved through the LSC.
- 5.3 In addition to paragraph 6.3 and paragraph 6.5, paragraph 8.2 sets out further objectives of the LSC. We have set out below our comments in relation to the objectives that we have concerns in respect of.
  - (1) Paragraph 8.2.3: The Skills Development scorecard does not achieve the purpose of addressing the shortage and lack of skills and increasing skills pipeline to accelerate the advancement of black legal practitioners, black women legal practitioners, and practitioners with disabilities. This is most evident through the removal of black students as beneficiaries of Skills Development initiatives. This objective also fails to consider the impact of support staff in a law firm, and any shortage of skills and skills pipeline in this regard.
  - (2) Paragraph 8.2.4: The LSC cannot apply to persons that are not themselves within the legal sector, therefore this cannot be complied with as an objective of the LSC.
  - (3) Paragraph 8.2.5: The Enterprise and Supplier Development scorecard as contemplated in the LSC does not deal separately with Enterprise Development and Supplier Development. It is also incomplete and unworkable. We have set out our comments more comprehensively elsewhere in this submission.
  - (4) Paragraph 8.2.6: The Enterprise and Supplier Development scorecard as contemplated in the LSC does not deal separately with Enterprise Development and Supplier Development. It is also incomplete and unworkable.
  - (5) Paragraph 8.2.7: The LSC cannot apply to persons that are not themselves within the legal sector, therefore this cannot be complied with as an objective of the LSC.

- (6) Paragraph 8.2.8: It is unclear how this objective has been obtained in the LSC. The LSC in various instances has created mechanisms that would make fronting easier as opposed to more difficult to implement. Paragraph 8.2.9: This has already been dealt with in paragraph 6.4.6 and paragraph 6.5.7 of the LSC.

6 Paragraph 9: Scope of Application

We have addressed our concerns in this regard in paragraph **Error! Reference source not found.** of the main submission.

7 Paragraph 10: Responsibilities for Monitoring the Implementation of the LSC

- 7.1 BEE is created by the DTIC and ultimately monitored by the BEE Commission (as created and contemplated in the BEE Act). The Department of Justice does not have experience in implementing BEE, and we would caution against the creation of a council responsible for monitoring BEE when they would not have the appropriate knowledge or experience to do so. Any of the reporting made to the Charter Council as contemplated in the LSC would be better placed under the scope of the DTIC as opposed to the Department of Justice.
- 7.2 Paragraph 10.4 states that the Charter Council will have executive authority and will be supported by support staff. It is unclear what is meant by “executive authority” and on where this assumedly delegated authority would be derived from.
- 7.3 Paragraph 10.5 states that the Charter Council will be jointly funded by the LSTF, the Department of Justice and the Legal Practice Council, in the proportions and manner to be agreed from time to time or as may be regulated by the BEE Act.
  - (1) As stated in this submission, contributions to the LSTF are made in terms of the Enterprise and Development scorecard. The use of these funds to fund the Charter Council is not appropriate, and would not be transformative. It is also concerning that the proportions of the contributions are simply to be agreed from time to time, which could result in the funds received by the LSTF being improperly used.
  - (2) The BEE Act does not regulate the funding of Charter Councils. There are some provisions contained within the Sector Code Statement, but not to the extent contemplated above.
- 7.4 In relation to the content set out in paragraph 10.7, it is unclear why this has been stated in the LSC as (1) they repeat statements dealt with otherwise stated in the LSE, and (2) the matters have been sufficiently dealt with in the Generic Codes and the restatement of these is unnecessary.

7.5 In relation to paragraph 10.7.6 states that “no contractual obligations between the B-BBEE verification agencies and the LSMEs shall preclude the B-BBEE verification agencies from providing such information and data as the Charter Council may require from time to time for measurement purposes.” It is unclear on what basis the Charter Council would fulfil any sort of assessment for measurement purposes, and what information would be required. The information that forms part of any BEE verification belongs to the measured entity itself and it would be unacceptable for the Charter Council to source that information from verification agents directly, especially as that information is not owned by the verification agent and the consent of the measured entity would be required for it to be shared. Any requests for information regarding any verification should be addressed directly to the measured entity itself.

7.6 Paragraph 10.8 requires that the Charter Council ensures that the LSC is complied with within the private sector and public sector, and the relevant public sector clients and procurers of legal services achieve the procurement targets set out in the LSC. As stated previously, the LSC cannot apply to persons that are not themselves within the legal sector, therefore the Charter Council cannot have a function to monitor this.

## 8 Paragraph 11: Priority Elements and Sub-minimum

8.1 Paragraph 11.1.1 of the LSC reflects that the priority element of ownership has a sub-minimum requirement of 40% of the net value points. However the ownership scorecard as contained within the LSC does not include the sub-elements in relation to net value. It is therefore unclear how this would be complied with. We further note that the LSC does not state that a law firm will have its BEE status discounted due to non-compliance with the ownership priority element. It is therefore also unclear whether it was an oversight to include ownership as a priority element.

8.2 Paragraph 11.1.3 of the LSC reflects that the priority element of Enterprise and Supplier Development has a sub-minimum requirement of 40% of each of the sub-elements of the Enterprise and Supplier Development element (i.e. each of Preferential Procurement, Enterprise Development, and Supplier Development). However the Enterprise and Supplier Development element scorecard as contained within the LSC does not distinguish between the Enterprise Development and Supplier Development sub-elements. It is therefore unclear how this would be complied with.

8.3 Paragraph 11.2 is a duplication and should be deleted.

## 9 Paragraph 12: Key Measurement Principles

9.1 We do not have a concern regarding the principles set out in paragraph 12.3. However we note in paragraph 12.3.1 that the phrase “date of measurement (as defined)” is included

but the defined term in the LSC is “measurement date.” This paragraph should therefore be updated to align with the correct terminology.

9.2 Paragraph 12.6.2 states “any misrepresentation or attempt to misrepresent an LSME’s true B-BBEE status shall be dealt with in accordance with the provisions as set out in the B-BBEE Act, and may lead to the disqualification of the entire scorecard of the entities’ concerned.” We note that misrepresentation or attempted misrepresentations in BEE would ordinarily result in a fronting offence being committed. We note that a consequence of misrepresentation (or fronting) would not be the disqualification of an entity’s entire scorecard and it is unclear where in the BEE Act this provision is extracted from. This wording should therefore be deleted.

#### 10 Paragraph 13: Interpretation of B-BBEE Initiatives in the LSC

We understand the principles that paragraph 13 is attempting to relay. However, the drafting of paragraph 13 does not clearly communicate the principles. As mentioned above, BEE is a regulatory framework that an entity may elect to be measured in terms of and it is not mandatory for any entity to comply with BEE. However, the principle that we understand is attempted to be relayed, is that once the LSC has been implemented a law firm that wishes to be participate in BEE can only be measured in terms of the LSC.

#### 11 Paragraph 14: Eligibility to Qualify as an ELE

As set out in paragraph (7)(b) of the main submission, the concept of ELE is unclear in the LSC as there are multiple, and conflicting, thresholds set to determine whether a law firm/legal practitioner qualifies as an ELE. It is also unclear why the concept of “ELE” has been introduced instead of the existing concept of “EME” as contemplated in the Generic Codes – this is especially so considering that the term “QSE” has been retained.

#### 12 Paragraph 15: Start-up LSMEs

12.1 In respect of paragraph 15.1, the term “new entrant” is used with reference to a start-up LSME. However, we recommend against the use of such a term as “new entrant” has a specific defined meaning in terms of the Ownership element of the Generic Codes.

12.2 In respect of paragraph 15.1 and paragraph 15.2, the LSC provides that a law firm qualifies as a start-up for a period of 3 years as a time period threshold. The Generic Codes only provide for a 12-month period. The reason the Generic Codes use a 12-month period is due to the inherent historically looking nature of BEE (i.e. a measurement period is an entity’s last 12-month financial year). An entity that has not been in existence for more than 12 months would therefore not have the relevant information for it to undergo a verification in the ordinary course. On this basis, it is unclear why the LSC contemplates that an LSME would qualify as a start up for a 3-year period.

12.3 We recommend that paragraph 15.3 is updated to take into our comments on the automatic BEE status set out in 0.

12.4 Paragraph 15.4 has not been updated to refer to the entity thresholds in the LSC and refers to the R10 million and R50 million thresholds set out in the Generic Codes.

13 Paragraph 16: B-BBEE Recognition levels in the LSC

13.1 The total number of points available in the Generic Codes is 120. The total number of points available in the LSC is 102. However, the thresholds for the various BEE procurement recognition levels have not been altered in the LSC e.g. a Level 2 in both the Generic Codes and the LSC requires 95 points. The result is that it is now more difficult to achieve a BEE procurement recognition level in terms of the LSC as compared to the Generic Codes.

13.2 It is unclear why the points set out in the LSC would deviate from those set out in the Generic Codes. Should the actual points be different in the elements of the LSC, the thresholds that set out the points for each BEE level should then be reviewed and be reduced to take into account the lower number of total points available.

13.3 Please note that the BEE recognition levels are incorrect as the points allocated between the levels include duplications. For example, the number of points for a BEE level 1 is 100 points. However the LSC reflects the points required for a level to be a minimum of 95 but no more than 100 points. Therefore an entity that obtains 100 points would fall within both the BEE level 2 and BEE level 1 statuses. We recommend the BEE recognition levels in the LSC be aligned with those in the Generic Codes.

14 Paragraph 17: the Summary of the scorecards

14.1 We note that the Code Series references for the various elements of the LSC is inconsistent with the naming convention reflected in the Generic Codes. We recommend that these are amended in the summary scorecard as well in the elements themselves.

14.2 We note that the descriptions of the categories are incorrect and conflict with the various descriptions of each category set out elsewhere in the LSC. The summary scorecard table must be updated to reflect the correct position.

14.3 In respect of the specialised scorecard – we note that this should not be included in the summary table as the specialised scorecard should be removed from the LSC in its entirety.

## Annexure C: Comments on the LSC scorecards

### 15 Ownership element

#### 15.1 General comments

- (1) Ownership points
  - (a) The number of points allocated towards the ownership element has been reduced from 25 points in the Generic Codes to 20 points in the LSC. If ownership remains a key focus of the LSC, then it is unclear why the number of points allocated to it has been reduced by 20% (being 5 points).
  - (b) This reduction in points is despite the target for large law firms being increased from 25% +1 point in the Generic Codes to 50% points by year 3 in the LSC. The LSC is therefore requiring that all affected law firms effectively double their ownership in three years (i.e. a 50% target is twice the current 25% target).
    - (i) In terms of the Legal Practice Act ownership in law firms can only be by persons that are also directors of the law firm. The path to directorship in a law firm, specifically in a large law firm, is a path that ordinarily takes between 7 to 10 years. To require a 15% ownership increase in year 1 (from 25% to 40%) and a 25% increase by year 3 (from 25% to 50%) simply cannot be reasonably nor rationally achieved. Nor does the LSC describe, on the basis of sound economic principles, sectoral characteristics or empirical research, how these targets could be achieved.
    - (ii) A law firm confined by the provisions of the Legal Practice Act cannot reasonably and rationally introduce an ownership structure to increase its black ownership in the manner proposed. The only way for these targets to then be achieved in the timeframes presented would be to:
      - i. promote black lawyers to directors without them having the necessary skills or experience to perform at this level, or carry the responsibilities of being a director. In addition, as required by the Legal Practice Act, law firms must be structured as partnerships or incorporated entities – therefore the black lawyers must also be in a position to shoulder the financial burden of sharing in the profit and loss of the law firm; or
      - ii. recruit black lawyers from other law firms with the same levels of skill, experience, and knowledge attained by black lawyers within the firm at director level which large law firms seek to do.

- (iii) The changing world of work has seen law firms introduce alternative and flexible career paths for their legal practitioners to cater for those who wish to remain in the law firm but do not wish to assume the responsibilities of ownership. An ownership target of 50% would negatively impact this option and possibly drive talent away from law firms, rather than attracting it.
- (iv) An ownership target of 50% would be one of the highest (if not the highest) ownership target out of all of the sector codes that are in force. No rationale given for such an increase and what economic principles, sectorial characteristics, or empirical research support this requirement.

(c) The reduction in points also does not take into account the significant increase in Black women ownership targets. In terms of the Generic Codes, Black women ownership has a target of 10%. The LSC requires an increase to 25% in year 1 (being a 15% increase), and to 35% by year 3 (being a 25% increase). These increases are multiple times the Black women ownership target set out in the Generic Codes and our comments set out in relation to Black ownership targets similarly apply to the increase in Black women ownership targets.

(2) Paragraph 18.2 describes peculiar characteristics of the legal profession that the LSC considered in order to address by the ownership scorecard. The peculiar characteristics described do not in any way support the changes to the ownership scorecard for law firms.

(3) The ownership scorecard as contained within the LSC does not include the sub-elements in relation to new entrants, or net value. This is specifically concerning in relation to net value as:

- (a) paragraph 11.1 still includes net value as a priority element; and
- (b) the consequence of non-compliance with the priority elements would still be that a law firm has its BEE level discounted.

## 15.2 Comments on LSC001 (Ownership scorecard for large entities)

- (1) The ownership scorecard for QSEs is numbered **LSC100**. We assume that the ownership scorecard for large entities should be **LSC101**.
- (2) We note that the heading of this scorecard is incorrect – the reference should be to “large enterprises” (being a term defined in the LSC) not “large entities.”

- (3) The wording contained within the introductory box of the scorecard is unnecessary and conflicts with the definition of 'large enterprise' set out in the LSC. We recommend that this wording is deleted.
- (4) The columns entitled "Monetary Threshold" and "Number of Partners / Directors & type of Firm" are redundant for three reasons.
  - (a) First, these concepts are already contained within the definition of "large enterprise."
  - (b) Second, a "large enterprise" is any law firm with an annual revenue of above R15 million therefore the number of partners or directors at a law firm is irrelevant. This is confirmed in the first hanging paragraph under table LSC001.
  - (c) Finally, the LSC001 table contains no information regarding what criteria would need to be considered in relation to the type of firm that constitutes a "large enterprise".
- (5) There are 8 points allocated to voting rights by black legal practitioners, however only 4 points allocated to economic interest in the hand of black legal practitioners. Taking into account the same compliance targets apply to each, it is unclear why there would be such a distinction between the points allocated between these sub-elements. Any rationale purported to underlie this distinction would then be negated by the fact that the points allocated to black women legal practitioners are the same for each of voting rights as for economic interest.
- (6) The ownership scorecard has been amended to include 2 bonus points for ownership held by Black legal practitioners with disabilities. Whilst we accept the principle of bonus points being allocated to Black legal practitioners with disabilities, priority should be given with dealing with the ownership element correctly in its entirety before bonus points are contemplated.
- (7) There is no reason why any requirements relating to black women legal practitioners and Black legal practitioners with disabilities should not apply to all law firms, regardless of size.

## 16 Management Control element

## 16.1 General comments

- (1) There is a defined concept of “board of directors” but this concept is not used in the Management Control element.
- (2) Management Control points

The number of points allocated towards the Management Control element has been reduced from 19 points in the Generic Codes to 16 points in the LSC. It is not stated why the number of points allocated to it has been reduced by approximately 16% (being 3 points). A decrease in the number of points allocated to the Management Control element indicates a de-prioritisation of this element against the remainder of the LSC scorecard. A law firm's management are often the easiest way for demonstrate, both internally and externally, that a law firm has been implementing long term transformation initiatives. The number of points for Management Control should there, at least, be maintained at the current number of points allocated to the element.

- (3) Changes to measurement indicator

- (a) As discussed in paragraph (4), the Management Control element no longer contemplates the use of the Employment Equity targets. This is confirmed in paragraph 19.1 of the LSC where it is stated:

*“In view of the unique features of the legal sector and profession, the measurement of LSMEs shall not take the usual form of categories of management as found in other commercial entities and/or sectors or as they may apply in the generic scorecard.”*

- (b) It is unclear what unique features the LSC is referring to in this instance as the primary unique feature of a law firm is its ownership. Changing the measurement indicators from objective EE Act criteria to subjective, title-based criteria would not appropriately address the mischief the LSC purports the change to address.
- (c) The EE Act information submitted as part of a law firm's annual BEE verification is supported by the law firm's EEA2 Form which a law firm is required to submit to the Department of Labour. This cross-checking mechanism ensures that there is alignment between a law firm's reporting of their employment statistics and mitigates the risk of a law firm manipulating data for BEE purposes.

(4) The general provisions that apply to Management Control in the LSC are dealt with in paragraph 19 to paragraph 22. It is unclear why they have been split through various paragraphs. We recommend that there are consolidated in a single paragraph.

## 16.2 Comments on LSC201 (Management Control statement – large LSME)

- (1) The heading of this scorecard is incorrect – the reference should be “large enterprises” (being a term defined in the LSC) not “large LSME.”
- (2) The wording contained within the introductory box of the scorecard is unnecessary. We recommend that this wording is deleted.
- (3) The columns entitled “Monetary Threshold” and “Number of Partners / Directors” are redundant for the same first two reasons set out in paragraph 15.2(4). In addition, the column entitled “Number of Partners / Directors” is different to the same column in the Ownership scorecard as it removes reference to “type of firm.”
- (4) The measurement indicator for board participation measures the percentage of “equity participation of black legal practitioners as a percentage of board members.” This measurement indicator conflates ownership and board participation as it looks to measure equity participation as a percentage of board members. The appropriate wording - as reflected in the Generic Codes - would be to measure the percentage of black board members as a percentage of all board members.
- (5) There is an increase in board participation by black people from 50% to 60% by year 3, and an increase of black women participation from 25% to 45% by year 3. No rationale is given to support these increases in compliance targets, especially in respect of black women which is an effective 80% increase on the compliance target in the Generic Codes. This increase should apply to all law firms, regardless of size.
- (6) In respect of the category of “Heads of Department (HODs) (senior management):
  - (a) the restriction on senior management being measured only in respect of legal practitioners results in the persons that would normally qualify as senior management in accordance with the Generic Codes but who are not legal practitioners not being recognised. A law firm cannot operate successfully without its non-legal practitioner staff. To remove these persons from the measurement category would result in less transformation within law firms;
  - (b) there is no defined concept for heads of department or HODs, and it is unclear on what basis the concept of PGLs has been included; and

- (c) the category heading has “senior management” in brackets - but the defined concept of senior management simply refers back to heads of departments and PGLs.
- (7) The same concerns raised in relation to senior management exist in relation to both middle management and junior management.
- (8) There is a separate category for persons within support roles. This approach disregards the importance of non-legal practitioners not only within a law firm as a whole, but also in relation to their roles within management levels within a law firm and their relevance to transformation.
- (9) The Management Control element in the LSC should therefor remain aligned with the Management Control element in the Generic Codes.

## 17 Skills Development element

### 17.1 General comments

- (1) There are no additional points allocated to the Skills Development element of the LSC, despite all of the compliance targets seeming to have increased.
- (2) The general provisions that apply to Skills Development in the LSC are dealt with in paragraph 23 to paragraph 26. It is unclear why they have been unnecessarily split. We recommend that there are consolidated in one paragraph.
- (3) Paragraph 23.1 requires that the approval of the Charter Council is required for all other training interventions that are not to merely facilitate entrance into the legal profession (i.e. bursaries, stipends and mandatory training programmes).
  - (a) This is a resource-and time-consuming process that is unnecessary to ensure valid training. This condition is not required in terms of the Generic Codes and it is unclear whether this is required in terms of any of the other existing sector codes.
  - (b) To the extent that there are concerns regarding the training of legal practitioners within law firms generally, this would be an issue raised in the ordinary course by the Legal Practice Council and should be distinct from any BEE consideration.

- (4) Paragraph 23.2 states that statutory and mandatory training initiatives cannot be recognised towards a law firm's Skills Development initiatives.
  - (a) The training initiatives that cannot be recognised includes "the completion and submission of workplace skills plan, an annual training report." It is unclear what is intended to be excluded by this reference as the completion and submission of a workplace skills plan would not qualify as a Skills Development initiative – therefore to exclude it would be nonsensical. Should the intention be that the training contemplated in the workplace skills plan is intended to be excluded, this would similarly be nonsensical as all of a law firm's training is recorded and tracked in that document. It is therefore unclear what the purpose of this provision is and we recommend its deletion.
  - (b) These initiatives are not excluded in the Generic Codes and it is unclear what rationale based on economic principles, sectorial characteristics or empirical research would require or support this deviation from the Generic Codes.
- (5) Paragraph 23.4 refers to the YES Programme. The Yes Programme does not deal with the allocation of points in accordance with the BEE scorecard, and is not part of the Skills Development element. It therefore serves no purpose.
- (6) Paragraph 23.5 states that the Charter Council may from time to time announce specific sector training and capacity building initiatives.
  - (a) Any general concerns raised in relation to the training of legal practitioners that would require such training would only be appropriate to be raised by the Legal Practice Council in the ordinary course of its monitoring the legal profession. This is not appropriate to fall within the scope of the Charter Council which is a BEE construct and must have a clearly defined and separate role to the Legal Practice Council.
  - (b) Our view aligns with the functions of a Charter Council as contemplated by paragraph 6.4 of the Sector Code Statement.
- (7) When the Generic Codes were updated in 2015, the Skills Development element was specifically amended to broaden the scope of persons that could benefit from such training to include persons that are not employees.
  - (a) Removing the ability to provide skills development to persons that are not employees will discourage law firms from providing skills development initiatives such as bursaries to law students which wish to enter the legal sector. Without this support, many black students may not have the opportunity to start or complete their studies which would have a significant

impact on the ultimate transformation of the Legal sector. This aspect of skills development was further considered of such importance that when the Generic Codes were updated in 2019, they specifically included a new sub-element in respect of bursaries to black students at Higher education Institutions.

- (b) Re-introducing a limitation of this nature negates the development in BEE laws that have been successful to date.

#### 17.2 Comments on LSC300 (Skills Development Element for attorneys)

- (1) The Skills Development scorecard in the LSC is in no way based on the scorecard contained within the Generic Codes. It is unclear on what basis a completely new scorecard would be developed.
- (2) In respect of the sub-element entitled “Skills development expenditure/spend on initiatives undertaken by the LSMEs in pursuing training of a percentage (%) of black candidate attorneys within the LSME as part of the leviable amount”:
  - (a) the training is limited to black candidate attorneys, which deviates from the principle of training black people in terms of the Generic Codes. When the Generic Codes were updated in 2015, the Skills Development element was specifically amended to broaden the scope of persons that could benefit from such training to include persons that are not employees. Re-introducing a limitation of this nature negates the development in BEE laws that have been successful to date;
  - (b) the second category referring to persons from designated categories makes no mention of candidate attorneys (which we expect is a drafting error) and refers to “recognizable training programmes (essential)” despite no indication being given as to what training would meet this requirement and is therefore void;
  - (c) the measurement indicators are unclear and consequently unworkable as they do not provide the appropriate descriptions to show what the compliance targets are based on i.e. it is unclear whether the compliance targets actually relate to percentages of leviable amount or headcount; and
  - (d) the total leviable amount target in terms of the Generic Codes is 6.3% (being  $3.5\% + 2.5\% + 0.3\%$ ). Assuming, based on the heading, that the compliance targets relate to leviable amount, the total leviable amount target is 16%. This is over twice the target set out in the Generic Codes and it is unclear what the

rationale (underpinned by economic principles, sectorial characteristics, and empirical research) would be to support this change.

- (3) In respect of the sub-element entitled “Recognition of skills development expenditure on black candidate attorneys and junior black legal practitioners from designated categories as a percentage of the measured entity’s annual training budget”:
  - (a) despite the heading of this category:
    - (i) the measurement indicators only deal with the training of candidate attorneys and do not include junior black legal practitioners;
    - (ii) the measurement indicators refer to “points allocated for recruitment or training,” however the heading states that it is meant to calculate Skills Development expenditure as a percentage of the annual training budget;
    - (iii) the first measurement indicator refers to initiatives directed at black candidate attorneys “as a total number in the LSME.” This conflicts with the compliance target being based on the law firm’s annual training budget;
    - (iv) the second measurement indicator refers to initiatives directed at black candidate attorneys “drawn from black designated groups.” This conflicts with the compliance target being based on the law firm’s annual training budget;
  - (b) the measurement indicators refer to the recruitment of black candidate attorneys, however by the time that a person qualifies as a candidate attorney the recruitment process would be completed; and
  - (c) most importantly as a result of the above, it is not stated what the consolidated compliance target 14.5% (being 7% +7.5%) relates to. Therefore compliance with this sub-element is impossible.
- (4) In respect of the sub-element entitled “Recognition for specialised areas of the law as defined in this LSC”:
  - (a) the compliance target is set at 3%. However, there is no indication what this is a percentage of. The measurement indicator simply states “Recognition for expenditure on training in specialised areas of law for candidate black legal practitioners and post-qualification training for black legal practitioners;”

- (b) it is also not specified what the LSC expects to be provided as evidence to show training that would ordinarily occur through on-the-job experience and day-to-day training and skills development;
- (c) the reference to “post-qualification training” does not say whether it is intended to refer simply to black legal practitioners, or whether it is intended to mean that the training must be of such a nature that it results in a black legal practitioner receiving a certificate, diploma, or degree or other formal qualification; and
- (d) we cannot comment more specifically on whether the compliance target is appropriate or realisable due to the lack of unenforceable clarity on this sub-element.

(5) In respect of the sub-element entitled “Registration of Learnerships and continuous legal training”:

- (a) continuous legal training is already dealt with and contemplated in the Legal Practice Act. It is not stated what the purpose is to specifically deal with this programme in terms of the Skills Development scorecard. Also, notable, this is training that is mandatory and therefore excluded in terms of paragraph 23.2 but then irrationally included as part of the Skills Development scorecard;
- (b) similarly, the SETA training programmes are excluded in terms of paragraph 23.2 but are then specifically included as part of the Skills Development scorecard; and
- (c) the measurement indicator and heading provide no indication of what the compliance target of 3.5% is based on. Therefore invitation to cannot comment on whether the compliance target is appropriate or realisable due to the lack of clarity on this sub-element cannot be exercised as the process is flawed.

(6) In respect of the sub-element entitled “Recognition of enhanced levels training for non-legal and support members of staff,” as mentioned previously, it is unclear why training initiatives are primarily focused on legal practitioners with a limited focus on non-legal practitioners. Whilst there is a specific sub-element in the Skills Development scorecard that addresses this, the LSC’s scorecard disregards the importance of non-legal practitioners who perform fundamental roles within a law firm and are a major part of the transformation process.

(7) In respect of the sub-element entitled “Mentorship and creation of employment opportunities”:

- (a) this entire sub-element is unclear in wording and purpose;
- (b) it is fatally unclear what a mentorship programme would include, and what authority would be required to approve and verify such programme;
- (c) it is fatally unclear what the purpose of the mentorship would be where it is given by an attorney to beneficiaries in the Black Designated Categories (which is not a defined term in the LSC);
- (d) the heading refers to the creation of employment opportunities, but the measurement indicator makes no reference to this requirement;
- (e) the compliance target is set at 5.5%, but there is no indication of what the compliance target is measured against. We therefore cannot comment on whether the compliance target is appropriate or realisable due to the lack of clarity on this sub-element and the consultative process is flawed.

## 18 Enterprise and Supplier Development element

### 18.1 General comment

- (1) The overall points allocated to the Enterprise and Supplier Development element have been reduced from 42 points in the Generic Codes to 40 points in the LSC.
- (2) The LSC has re-named this element as the “Preferential Procurement and Supplier Enterprise Development.” However, in the breakdown of the LSC scorecard in paragraph 17, this element is referred to as PSED. In terms of paragraph 11 (Priority Elements and Sub-minimum), the element is referred to as the enterprise and supplier development as in the Generic Codes. Therefore, in addition to the reason for a change in name of the element being unclear, the LSC is also inconsistent in its use of terminology regarding this element. The name of the element as in the Generic Codes should be retained and used in the LSC.
- (3) We note that paragraph 27.3 and paragraph 27.4 raise concerns regarding the procurement by third persons from both the public and private sector of services from black legal practitioners. However, as set out in paragraph **Error! Reference source not found.**, a sector code can only be applied to the entities that are operating within that sector – not their clients, customers, or other third parties. The LSC is not the appropriate mechanism or forum to address this concern.

### 18.2 Key Measurement Principles in Determining the Suitability of Preferential Procurement in the Legal Sector Code

- (1) The heading refers to the “suitability” of Preferential Procurement, but it is unclear why there would be any suitability assessment in relation to a law firm’s Preferential Procurement. This element is a factual measurement a law firm’s Preferential Procurement, whether it is suitable for a law firm to incur is not within the ambit of BEE.
- (2) Taking into account the comments on the Enterprise and Supplier Development scorecard set out in this paragraph 18, the proposed scorecard and specialised scorecard in the LSC is inappropriate and unworkable. The purposes that it attempts to achieve as set out in paragraph 29.1 and paragraph 29.2 is either (1) inappropriate to address in the LSC, or (2) are not achieved.
- (3) The Generic Codes already contemplate bespoke methodologies for the calculation of TMPS. The LSC in paragraph 29.4 and 29.5 should (1) not use TMPS as the basis of its Preferential Procurement, and (2) should not deviate from the TMPS calculation methodologies as set out in the Generic Codes.
- (4) Paragraph 30 (Supplier & Enterprise Development Initiatives and Interventions) includes a non-exhaustive list of initiatives that would ordinarily be recognised as Supplier & Enterprise Development initiatives. However the Supplier & Enterprise Development scorecard does not deal with Enterprise Development and Supplier Development as separate elements. Importantly, Enterprise Development initiatives are not recognizable in terms of the Supplier & Enterprise Development scorecard in the LSC. It therefore makes no rational sense to include such a list.

### 18.3 Comments on LSC300 (Skills Development Element for attorneys)

- (1) Preferential Procurement sub-element
  - (a) The Preferential Procurement sub-element relates to the procurement of legal service and the briefing of advocates by law firms.
    - (i) The primary concern with this requirement is that, save in limited instances, law firms do not procure the services of advocates for themselves.
      - (A) Where advocates are briefed in the ordinary course, those instructions are matter related and are on behalf of clients. The costs incurred in briefing any advocate do not pass through the income statement of a law firm. As would be contemplated in paragraph 29.5.3 of the LSC, procurement of advocate services is passed through third-party procurement.

- (B) Of the total 29 points available in terms of the Preferential Procurement sub-element, 17 of those points are allocated to this element. Therefore approximately 58% of a law firm's entire Preferential Procurement scorecard is designed to measure procurement that does not constitute Preferential Procurement in the hands of a law firm for purposes of BEE.
- (C) This portion of the Preferential Procurement sub-element must therefore be deleted.
  - (ii) The measurement category is described as "measurement of procurement of legal services from advocates, as a percentage of the total fee expenditure on advocates over the LSMEs last financial year." This description is incorrect – we expect that the word "Black" is missing from the first portion of the measurement category.

(b) The Preferential Procurement sub-element relates to the procurement of goods and services that support the business of a legal practitioner.

- (i) The measurement category is described as "Measurement of procurement of goods, equipment and assets that are core to the business of the LSME, as a percentage of the total expenditure on goods, equipment and assets."
- (ii) It is unclear and irrational why this Preferential Procurement measurement would be limited to procurement that is "core to the business" of a law firm, whatever that may mean.
- (iii) This Preferential Procurement deviates from the standard calculation of TMPS, and instead incorrectly measures Preferential Procurement against "total expenditure on goods, equipment and assets."
- (iv) The Preferential Procurement indicators set out in the LSC significantly deviate from the Generic Codes in a number of aspects. These include that:
  - (A) the indicator in the Generic Codes that measures Preferential Procurement from suppliers based on their BEE statuses does not appear in the LSC Preferential Procurement scorecard;

- (B) the indicators in the Generic Codes that measure Preferential Procurement from suppliers that are EMEs or QSEs do not appear in the LSC Preferential Procurement scorecard;
- (C) the indicator in relation to procurement from Black Owned suppliers unjustifiably relates to suppliers that are least 75% Black owned (as opposed to suppliers that are 51% Black owned in the Generic Codes). The target for procurement from 51% Black owned suppliers in the Generic Codes is 50%, however the procurement target in the LSC from 75% Black owned suppliers is 60%. In addition, the points allocated to this element is only 6 points in the LSC versus 11 points for a materially lower target in the Generic Codes. There is no rationale nor justification given for these overall changes;
- (D) the Generic Codes include a sub-element in relation to Preferential Procurement from suppliers that are at least 30% Black Women Owned. The compliance target for this Preferential Procurement is 12%, and 4 points are allocated to this. In terms of the LSC, procurement from designated groups (which includes Black Women) is set at 51% ownership by designated groups. In addition, the compliance target has increased from 12% to 60%. This a target 5 times higher than that in the Generic Codes. There is no rationale nor justification given for these overall changes; and
- (E) the indicator in relation to procurement from Black Women Owned suppliers relates to suppliers that are least 75% Black owned (as opposed to suppliers that are 51% Black owned in the Generic Codes). The target for procurement from 51% Black owned suppliers in the Generic Codes is 50%, however the procurement target in the LSC from 75% Black owned suppliers is 60%. In addition, the points allocated to this is only 6 points in the LSC versus 11 points for a materially lower target in the Generic Codes. There is no rationale nor justification given for these overall changes.

(2) Supplier / Enterprise Development

- (a) In the Generic Codes, these are two separate and distinct sub-elements of the Enterprise and Supplier Development element. The LSC has not maintained this distinction as is required by the Sector Code Statement, and

the Enterprise. The Supplier Development element has therefore not been fully addressed. Despite this, we have set out our comments below.

- (b) The first sub-element measurement category is entitled “Partnering, Joint Venturing and Sub-Contracting of LSMEs to facilitate capacity and transfer of skills.”
  - (i) The reason why the nature of the initiative has been limited from the broad scope of initiatives available under the Generic Codes, to this narrower scope is not stated.
  - (ii) The beneficiaries of Enterprise and Supplier Development in the Generic Codes are EMEs and QSEs that are at least 51% Black Owned and, in certain circumstances, large enterprises that are at least 51% Black Owned. Despite that it is not permissible in terms of the Sector Code Statement. It is also not stated nor justified why the beneficiaries are of this type of initiative are now limited to “ELE level 1 or 75% black owned LSME” or 75% black owned LSMEs or 51% LSME owned by persons from designated categories”. This would appear to have a less transformative impact than the Generic Codes currently contemplate.
  - (iii) The compliance targets are an aggregate value of 61% (36% + 25%). However there is no indication in the scorecard what the compliance targets are based on. We therefore cannot analyse the appropriateness of the compliance targets, or talk to whether they are reasonable or workable.
- (c) The second sub-element measurement category is entitled “Recognition of enterprise or supplier development initiatives for black owned ELES, Start-ups and contribution to the Legal Sector Transformation Fund.”
  - (i) The first part measures “the impact of supplier development initiatives as outlined in this LSC,” and more specifically “the contributions made towards the development of black owned ELES and start-ups.” The compliance target for this is 16%. The drafting of this part is unclear and unworkable. It creates no calculation methodology and consequently would be impossible to comply with.
  - (ii) The second part measures “contribution to the LSTF,” which measures the “monetary contributions made by LSMEs to the LSTF.” This is a fixed contribution requirement of R18 000 by year 3. It is unclear how

a contribution to the LSTF would substantively contribute towards the development of a supply chain in the manner contemplated by the Enterprise and Supplier Development element.

18.4 In respect of the Specialised Scorecard, we have addressed our concerns in this regard in paragraph **Error! Reference source not found.** and paragraph 18.1(3).

18.5 The Legal Sector Transformation Fund (LSTF)

- (1) Paragraph 31.1 notes that the stakeholders agree to set up the LSTF. The LSTF would be a creature created by the LSC and administered by the Charter Council, and not by the stakeholders. This is an important distinction to be made in the LSC.
- (2) The LSTF is defined as “the Legal Sector Transformation Fund, to be established in terms of paragraph 31 of this LSC, by the Charter Council, for the purpose of receiving and administering contributions made by LSMEs and ELEs in terms of this LSC, to provide financial assistance and support to black legal practitioners and for related purposes as may be determined by the Charter Council from time to time”. The definition of LSTF in the LSC does not align with the wording of paragraph 31, and appears to broaden the scope of what the funds provided to the LSTF can be used for.
- (3) It is unclear whether paragraph 31.4 supersedes the wording in the definition of LSTF that allows the Charter Council to determine the use of funds received by the LSTF from time to time.
- (4) Paragraph 31.5 allows for the Charter Council to roll over LSTF funds for investment purposes. It is unclear what investment purposes the Charter Council would have, the nature of the investments contemplated by the Charter Council, and what the governance and risk palatability the Charter Council would have regarding these funds (and consequently the realistic possibility that the funds may be lost). The Charter Council does not represent the stakeholders. However, if the stakeholders will be in any way influencing the investment requirements or conditions regarding the LSTF this must be reflected in the LSC.
- (5) Paragraph 31.6 states that the LSTF will be used for Skills Development and Enterprise and Supplier Development. However it is only the Enterprise and Supplier Development that contemplates contributions to the LSTF. It is therefore unclear why contributions made in terms of Enterprise and Supplier Development would be used towards Skills Development.
- (6) In terms of paragraph 31.1 (also numbered 31.6.6), the Charter Council undertakes to develop a policy and criteria for access to the LSTF, the quantum of support, and

the quantum of disbursements. This policy will be prepared after consultation with the stakeholders. However, the LSC does not pass muster from either a procedural perspective, substantive perspective, or transformative perspective. It is therefore a concern that all law firms would be required to make contributions to the LSTF where the policy that governs the use of funds would be the same persons that developed the LSC in its current draft. The policies must be developed by independent persons that would receive no benefit from the LSTF.

- (7) We understand that there is a cap on the funds that may be used towards the administration and management of the LSTF of 5% of the total income received by the LSTF in any financial year. However, paragraph 31.7 states that the LSTF will also contribute towards the funding of the Charter Council. It is concerning that the same entity, being the Charter Council, which is responsible for the development of the policy governing the LSTF, the management and administration of the LSTF, and can in its sole discretion determine what the funds are used for can also determine to use the LSTF funds to fund the Charter Council. This is a conflict of interest, and goes against the purpose of the LSTF being for Enterprise and Supplier Development. There should be a capped amount that the funds received by the LSTF can be used towards funding the Charter Council.

## 19 Socio-Economic Development element

### 19.1 General comment

#### Basis of compliance targets

- (1) Paragraph 33.1 states “In view of the inherent differences in the operational nature of the attorneys and advocates’ practices, the targets for the SED scorecard shall be based on the average time spend/billed (which is converted into hourly rates) by the LSME, over a three (3) financial year period that precedes the first date of the LSME being measured.”
- (2) Despite this paragraph, the actual targets set out in the Socio-Economic Development scorecard in the LSC are purely hours based. It is therefore unclear on why this wording has been included.
- (3) In relation to the second hanging paragraph under the LSC500 table, the Charter Council may amend the pro bono hours having regard to any regulations relating to community services that may be promulgated in terms of the Legal Practice Act.
  - (a) The Charter Council has no authority to make such a determination. More importantly, the LSC forms part of the BEE legislative framework. No amendments to the LSC can be made without the proper, procedural

processes being followed. Any purported attempt by the Charter Council to circumvent due process to amend legislation would undoubtedly be legally impermissible.

- (b) The Legal Practice Act is a completely separate legislative framework from BEE that falls under two separate departments of government. Whilst it is important that there should be alignment between the Legal Practice Act and the LSC, the two different regulatory regimes cannot be confused nor treated as having the same purpose and function.

#### 19.2 Comments on LSC500 (Socio-Economic Development (attorneys and advocates)

- (1) The scorecard for Socio-Economic Development is substantially different from the Socio- Economic Development contemplated in the Generic Codes.
  - (a) Practically, the existing pro bono advice provided by law firms may already be recognised towards their Socio-Economic Development initiatives - legislating this as a requirement would make no real difference to current Socio-Economic Development initiatives. However, it is unclear why the Socio-Economic Development initiatives have been ring-fenced only for the provision of pro bono services. Where there are other Socio-Economic Development initiatives that law firms are able to provide that would not fall within legal pro bono parameters, but would still have substantive transformative effect, these initiatives must be recognised.
  - (b) BEE is intended to be for the benefit of black people. Pro bono work, by its nature, already requires a financial means test to be undertaken when determining whether a person qualifies for the pro bono services. It is therefore unclear why the black persons that benefit from pro bono services are being limited to comply with certain additional criteria. This consequently excludes black persons that are not poor, marginalised or from rural areas from receiving the benefit of a law firm's pro bono work.
  - (c) Based on the drafting of the measurement indicators, it is not stated who the intended beneficiaries of pro bono services are. i.e. is it black people who are poor and marginalised and from rural areas, or does it include black people who are poor, or black people who are marginalised, or black people who are from rural areas. Whether these targets are workable and can be complied with would largely depend on the drafting of who the beneficiaries are being clarified.

- (d) The monetary threshold column is incorrect as it refers to “an LSME attorney” whereas all other scorecards clearly reflect that the monetary threshold relates to the law firm as a whole to determine it as an ELE, QSE or large enterprise. The Socio-Economic Development scorecard must therefore be updated.
- (e) In relation to the sub-element entitled “Number of hours spent on a pro bono basis dedicated in rendering legal services for the benefit of poor, marginalised and black clients who require legal commercial and contractual assistance for the enhancement”:
  - (i) some lawyers may not have skills to provide the advice required in this sub-element;
  - (ii) there appears to be wording missing from the end of the measurement indicator. Therefore, without the remaining wording, we cannot comment on the appropriateness of this sub-element; and
  - (iii) the compliance target is set at 100 hours per annum implemented by each legal practitioner. A law firm by its nature sells time to its clients. To require that each legal practitioner to commit an effective two and a half weeks of their time to pro bono services is irrationally high and, in short, unworkable.
  - (iv) Together with the other increased compliance targets in respect of the spend elements of the Legal Practical Council, the implementation of the LSC in its current form would have such a significant impact on a law firm’s profitability and sustainability that it would call into question whether:
    - (A) the law firm should continue in operation with such requirements; or
    - (B) they halt all BEE initiatives, and any transformational initiatives that are subsequently undertaken by the law firms will be in accordance with their own transformational objectives.

(2) Alternative scorecard

- (a) Taking into account the amendments to the Socio-Economic Development scorecard and the emphasis on the importance of access to legal services (for example paragraph 32 of the LSC), it is unclear why an alternative scorecard that relates only to monetary contributions would be included. We

would recommend instead of creating an alternative scorecard that the Socio-Economic Development scorecard is based on the scorecard in the Generic Codes and adapted to be appropriate for the legal sector.

- (b) The monetary threshold column is incorrect as it refers to “an LSME attorney” whereas all other scorecards clearly reflect that the monetary threshold relates to the law firm as a whole to determine it as an ELE, QSE or large enterprise.
- (3) The total number of points allocated to the alternative Socio-Economic Development scorecard does not amount to 6 points. There are only two sub-elements to the alternative scorecard and each is allocated 2 points – therefore 2 points +2 points = 4 points and not 6 points.