

LSSA COMMENTS: LEGAL SECTOR CODE OF GOOD PRACTICE ON BROAD-BASED BLACK ECONOMIC EMPOWERMENT

Introduction

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.

Legal Services Sector Charter

During December 2007, the Law Society of South Africa, the General Council of the Bar, and the Department of Justice and Constitutional Development adopted the Legal Services Sector Charter, which identified and recognised several stakeholders.

The Charter was focused on two key objectives, i.e.:

1. an independent legal profession: and
2. the eradication of the inequalities of the past.

The Charter sought to achieve, amongst other, the following objectives:

- a. facilitating the transformation of the legal services sector so as to ensure it is representative of the demographics of South Africa, and by ensuring a body of well-trained and competent professional providers of legal services to enable appointments to be made to the judiciary;
- b. adopting measures to promote the equitable distribution of legal work effectively and meaningfully, and to eliminate barriers and provide equal opportunities by empowering HDIs through ensuring equal participation in the economic opportunities within the legal services sector;
- c. ensuring and enhancing representivity in respect of ownership, management, control and employment of legal practices; and
- d. creating conditions conducive to ensuring that historically disadvantaged providers of legal services are able to establish, manage and build sustainable practices.

The Summit on Briefing Patterns

In its Summit on *Briefing Patterns in the Legal Profession*, held on 31 March 2016, participants expressed their deepest concerns about the legal briefing patterns in the public and private sectors insofar as this endangers the constitutional democracy and insofar as there appears to be bias against black practitioners and women practitioners in these sectors.

The Summit concluded that the briefing patterns had a negative impact on the occupational progression of practitioners in these groupings and their economic wellbeing and recognised that meaningful action must be taken by all stakeholders from the date of this Summit and that this process be subjected to strict accountability.

Many attorneys signed the Procurement Protocols for Legal Practitioners that were prepared as a result of the Summit and undertook, amongst other, to:

1. positively promote the procurement of legal services of black and women practitioners;
2. actively create better access for black and women practitioners;
3. bridge the skill set deficits, if any, among black and female practitioners;
4. increase the exposure of black and female practitioners to all areas of the law;
5. help broaden the pool of black and women practitioners;
6. ensure that fair selection criteria are used in the briefing of black and women practitioners;
7. promote a change in attitude so as to promote the inclusion of black and women practitioners in the mainstream of practice;
8. render bi-annual reports for the monitoring of compliance with the aims of the protocols, holding signatories to the protocols accountable; and
9. widen the pool of practitioners and ultimately affect the transformation of the judiciary; all in order to progressively realise the achievement of the transformation of the legal profession

The Legal Practice Act and the BEE Act

Section 3(a) of Legal Practice Act lists the first objective as to provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld.

The above objectives of the (i) Legal Services Sector Charter, (ii) Procurement Protocols for Legal Practitioners and (iii) the Legal Practice Act are broadly aligned with the key objectives reflected under section 2 of the Broad-Based Black Economic Empowerment Act (the BEE Act), in particular, to:

facilitate broad-based black economic empowerment by promoting economic transformation in order to enable meaningful participation of black people in the economy; achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.

The legal profession is currently being assessed according to the generic Revised BEE Codes. The development of the Protocols in 2016 is arguably an illustration that the generic BEE Codes have not resulted in securing economic transformation in the legal profession.

It must be noted that legal provision is not the only profession to which a focused BEE Charter/Code would apply. The Chartered Accountancy Charter was published as a Sector Code for black economic empowerment in terms of the BEE Act. The vision of the Chartered Accountancy (CA) Sector Code is similar to that of the legal profession, being:

“To grow the number of Black people in the CA profession to reflect the country’s population demographics, to empower and enable them to meaningfully participate in and sustain the growth of the economy, thereby advancing equal opportunity and equitable income distribution.”

The Chartered Accountancy (CA) Sector Code is binding of nature on all stakeholders operating in the Chartered Accountancy Profession. The following motivation is, amongst other, offered for the existence of the CA Sector Code:

“There should be common commercial and other characteristics within the entities operating in the sector which would make it feasible to formulate a transformation Sector Code.

This is indeed the case in the CA profession, where the entities operating in the sector share a number of commercial and other characteristics which makes it feasible to formulate a common transformation Sector Code for this sector of the Accountancy profession.”

The Chartered Accountancy (CA) Sector Code further states that:

“The CA sector has thus come to realise that transformation will take too long if left purely to economic forces, and that intervention on a large scale will be required to redress the situation as to achieve a restructured business environment in which business and organisational composition reflect population demographics.

The aim of black economic empowerment initiatives in the CA sector is therefore to significantly increase the number of black people that manage, own and control enterprises in the sector as well as to contribute to decreases in income inequalities in the country in general. This is to be achieved by means of an integrated and coherent socio-economic process that directly contributes to the economic transformation in South Africa.”

Draft Legal Sector Code

The LSSA is of the view that:

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;
2. Measures introduced to date (Legal Services Sector Charter, Procurement Protocols for Legal Practitioners and the generic BEE Codes) have not resulted in securing the desired economic transformation in the legal profession;
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;
4. Like the Chartered Accountancy sector, the LSSA acknowledges that transformation will take too long if left purely to economic forces or the existing measures;
5. Tailor-made intervention in the form of a Legal Sector Code is required to redress the current situation; and
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 that own and management enterprises and promote skills development within the legal sector.

Comments from legal practitioners

The LSSA has also circulated the draft Legal Sector Code to legal practitioners with a view of soliciting their comments for submission to the LSSA and the LPC. Practitioners have submitted their comments to the LPC directly whilst also informing the LSSA thereof.

As expected, some comments underscore the contentious nature of the topic of transformation. In a recent judgment, 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." *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51.

It is imperative for the legal profession to engage fully with the intent and the implications of the draft Legal Sector Code. The LSSA notes that several questions (and conclusions) have been raised, including:

1. Whether the Legal Practice Council has acted within its legal mandate to initiate the draft Legal Sector Code;
2. Whether justifiable motivation has been provided for the proposed deviations from the generic BEE Codes, including the threshold for exempted enterprises, the distinction between attorneys and advocates, etc;
3. Whether the draft Legal Sector Code will negatively impact on the independence of the legal profession; and
4. Whether the proposed number of pro bono hours under the Socio-Economic Development Element are reasonable.

It is also evident that a number of aspects remains to be clarified and discussed under the draft Legal Sector Code.

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 Legal Sector Code will require more vigorous engagement with the legal profession and stakeholders to understand its objectives and to clarify some ambiguities. There appears to be significant confusion on the content, application and impact of the proposed Code.

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

1. The expected level of contribution to the Legal Sector Transformation Fund.
2. The proposed deviation from the deemed status level 4 of EMEs, under the generic BEE Codes, to seemingly status level 5 under the draft Legal Sector Code.
3. The proposed deviation under the SED requirement of the generic Codes which has a 75% requirement in relation to black people.
4. The number of pro bono hours applicable to legal practitioners as opposed to the LSME (entity).
5. The impact of the draft Legal Sector Code on the smaller firms

In pursuing the above, the stakeholders must vigorously engage with the draft Legal Sector Code 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 draft Legal Sector Code promulgated without robust engagement.