



# Community Engagement Policy

by the Centre for Applied Legal Studies

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Centre for Applied  
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The inspiration, guidance and reason for this report are the communities and individuals with and for whom we work.

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## **Executive Summary**

A distinct hallmark of the work of CALS and other lawyers in the human rights sector is that much of its work has been in partnership with, and on behalf of, rural and urban communities in South Africa. This differs from the work of conventional private sector lawyers in that our clients are typically communities rather than individuals. As a group, our clients and partners often are dispossessed, hurt and/or marginalised by systems of political and economic power. The existing professional codes of conduct regulating the attorney-client relationship do not provide the framework in which to address the particular challenges that arise in the context of community lawyering. For this reason, CALS is developing a policy document to guide its staff in navigating this unique working relationship by articulating a standard of community engagement that facilitates meaningful representation and partnerships and mitigates power imbalances. The community engagement policy shall accomplish this through setting out guiding principles drawing on international standards and the personal experiences of CALS staff. To implement these guiding principles, a set of working methodologies informed by case studies has been developed.

The policy is not a final document. It is a living document, which should be responsive to CALS' on-going engagement with communities and critical self-reflection regarding that engagement.

## PART A

### 1. Introduction

#### 1.1. AIMS OF THIS POLICY

Established 35 years ago, the Centre for Applied Legal Studies (CALs) is a human rights non-governmental organisation based at the University of the Witwatersrand School of Law. CALs envisions a socially and economically just society where repositories of power, including the state and the private sector, respect human rights. Recognising the continuing historical legacy of apartheid, CALs endeavours to actualise a just society by challenging the structural nature of poverty and inequality and by holding to account the repositories of power that perpetuate human rights violations. CALs approaches its work through rigorous research, client engagement, advocacy, and creative lawyering. Increasingly, CALs has identified a fourth component of our work, namely, critical self-reflection to ensure that we are doing the 'right work' and that we are doing the 'work right'.

Since its inception, the hallmark of CALs has been to act on behalf of, and in partnership with, rural and urban communities in South Africa. Our clients and partners often are dispossessed, hurt and/or marginalised by systems of political and economic power. As legal representatives and partners, it is important that we are intentional and conscientious about our working relationship with our clients and partners.

This document comprises CALs' organisational policy on how we intentionally engage with the communities who constitute our clients and partners. Because of the complex and nuanced nature of community and group representation, it is our view that direction and guidance are needed to ensure a standard of community engagement that is deliberate, mitigates power disparities and is characterised by integrity, respect and dignity. Achieving this standard of engagement will always depend on the characteristics of individuals. However, an institutional policy to guide, inform and, as far as possible, standardise our work allows for some uniformity and consistency in our engagement.

This document also serves to encourage further critical self-reflection about the *methodology* of human rights lawyering, both for CALs and other human rights lawyers.



This document is designed to serve as a policy that guides the work of CALS' staff. It is also a living document, alive to the need for on-going revision and development based on best practices learned from experience. It is further hoped that the policy can inspire and be inspired by dialogues about human rights lawyering within South Africa and transnationally.

In summary, the purpose of this document is to ensure:

- That we serve all the members of our client and partner communities as service providers who strengthen our clients and partners and are similarly strengthened by them;
- That we advance the interests of the community as a collective, while simultaneously acknowledging individual voices and perspectives within the community;
- That we recognise and mitigate the information asymmetry that may arise in a client-lawyer relationship; and
- That we deliver the best possible service as human rights lawyers, both to the communities and individuals with whom we work; and to the broader vision of justice to which we aspire.

## **1.2. DEFINING AND UNDERSTANDING COMMUNITY ENGAGEMENT**

Much ink has been spilled about legal strategies to advance public interest and human rights law in South Africa. In particular, much has been written specifically about the progressive jurisprudence of the Constitutional Court and the utilisation of strategic litigation to achieve systemic change. By contrast, there has been little theorising or writing about the practical manner in which human rights lawyering should occur when working with and representing individuals and communities.

While many human rights lawyers spend a great deal of time thinking about this, it is not often documented. The result is that the nature of community engagement, and the extent to which community lawyering is effective, depends on individual characteristics, without creating an institutional culture of best practice.

This document seeks to address this. To this end, we consider the key questions and concepts.

### **1.3. KEY CONCEPTS AND QUESTIONS**

#### **1.3.1. WHAT IS A 'COMMUNITY'?**

Communities are clients. As is the case in any legal practice, lawyers are instructed by clients to further a particular interest of the client. Communities are not homogenous or monolithic entities. Communities are comprised of diverse individuals and power groups. Usually, communities cohere around a particular defined geographic area. However, client and partner communities are also geographically disparate individuals who are converge around a common identity or purpose, or through shared experiences or struggles. Community can be built through complex coalitions and alliances that can include numerous actors and leaders, intentional partnerships and relationships with various repositories of power.

Communities in certain contexts may self-identify as a cohesive group and approach legal organisations for assistance *qua* a community of individuals. Other times, we, as legal representatives, must take a more pro-active role in bringing a geographically disparate community together. In addition, there are times when there is no identifiable 'community' but rather a large number of people with similar experiences of human rights violations, such as survivors of sexual violence and detained persons in remand.

It is rare, however, that communities consist of equal power relations. Its members can be disaggregated on the basis of power disparities, status, identities, and needs. CALS seeks to strike a balance between respecting the cohesiveness and collective self-interest of the community unit, on the one hand, and, on the other hand, ensuring that the voices of individuals within the community are not subverted.

#### **1.3.2. WHAT IS COMMUNITY ENGAGEMENT?**

Community engagement occurs through differently structured relationships, including communities as clients, communities as partners, communities as research participants, and communities as allies. Sometimes these labels overlap. Each configuration alters the roles and responsibilities of the parties to the relationship, but the principles of community engagement are equally, if differently, applicable.

Given the diverse relationships, a baseline of common principles is necessary to guide community engagement by CALS lawyers and researchers.

CALS' approach to human rights lawyering consists of rigorous research, intentional community engagement, multiple forms of advocacy and creative lawyering. No one blueprint exists for CALS' work; it varies by matter, circumstance, and most importantly, the agenda of the communities with which we work. Depending on the particular relationship and tactics adopted, CALS alternately engages in what is often termed people's lawyering, collaborative lawyering, critical human rights lawyering, movement lawyering, public interest lawyering and/or community lawyering. Though the definitions of these models of lawyering are contested, these models share lawyers' commitment (to differing degrees) to representing groups and communities involved in broader political struggle, utilising non-traditional forms and venues of lawyering, referred to 'meta-legal tactics' by some, and perhaps most importantly, committing themselves to the overall political struggle with a nuanced understanding of the global political economy in which they work.

In all of these models, rather than saviours or gatekeepers, lawyers become tacticians in the struggle for change. The people with will be impacted by policies and decision-making are indispensable to a successful lawyering process. We must continually re-assess our responses to the following three questions: Who do we work with? What are we asked to do? And how do we work together? At a minimum, we believe community engagement requires an open, active and voluntary approach to dialogue that identifies the current positions of all parties, outlines their objectives and desired outcomes, and discusses and identifies the processes to best achieve them. The parties to engagement may change over time, but engagement itself is a continual process.

### **1.3.3. WHY HAVE A COMMUNITY ENGAGEMENT POLICY?**

Lawyers are governed by a range of regulatory and professional rules. There is, however, no single unified code of additional ethical and behavioural responsibilities in the context of human rights lawyering, where the traditional matrix of legal ethics of lawyer, client, and legal activity must be broadened to include indigence, power differentials between client and lawyers, collective rather than individual clients, and non-traditional lawyering tactics. This

community engagement and representation policy therefore serves to document a set of principles and processes that will guide and facilitate human rights lawyering.

Building partnerships between affected communities, partners and legal representatives requires courage, patience and determination over long periods of time. The process of partnering is often more challenging than the interventions themselves. As with any relationship, such partnerships can be effective, sustainable, and mutually rewarding but only if considered intentionally and designed, developed and managed systematically.

What is fundamental to all of CALS' community engagement, however, is that our relationships should be primarily concerned with supporting the efforts of communities to challenge the inequality of power relations by building clients' own power. In other words, we see our role primarily to enable a group of people to gain control of the forces which affect their lives. We remain vigilant against re-creating the dependency model that for so long has entrapped communities and left them reliant on external actors and external mechanisms.

There are three specific benefits to the development of a community engagement policy *for lawyers*:

- **Responsiveness**

The UN Guiding Principles on extreme poverty and human rights demand that people living in poverty should be included in the decision-making around poverty reduction. The same is true of the clients of human rights lawyers. Community inclusion in the strategy and direction of legal and advocacy action makes it more probable that the strategies will be responsive to local priorities. For example, attorneys representing a community entered into an agreement with the mine on behalf of the community without meaningfully consulting and confirming the memorandum of understanding with community members. As a result, there was no buy-in into the agreement from the community, thereby undermining the legitimacy of the agreement.

- **Legitimacy**

The involvement of clients in legal strategy, from design through to implementation, lends legitimacy to the human rights strategies adopted.

- **Leadership**

If properly implemented, community engagement should build leadership capacity within the community to become their own drivers for social change. Leadership and agency inherent in many communities; however, it is often blocked and challenged, either intentionally or unintentionally, by repositories of power, including well-intentioned lawyers.

Perhaps the most important purpose of community engagement, however, is not instrumental but rather fundamental to the realisation of human rights and valuable in and of itself. It is about breaking down the structures that impede and thwart the capacity of community members to exercise their agency, autonomy, and self-determination. Built on a rights foundation, meaningful and effective participation provides an opportunity for people living in poverty to be active agents in their own destiny; it therefore becomes critical to reclaiming dignity. In this way, expanding the freedom of agency through proper community engagement is both the primary end and the principal means of development.

As articulated by the UN Special Rapporteur on extreme poverty and human rights, rights-based participation:

'promotes and requires the active, free, informed, and meaningful participation of persons living in poverty at all stages of the design, implementation and evaluation of policies that affect them, based on a comprehensive analysis of their rights, capacity and vulnerability, power relations, gender relations and the roles of different actors and institutions.'<sup>1</sup>

## **2. Framework for Community Engagement**

Principles of participation are entrenched in human rights law, nationally, regionally and internationally. These principles underpin and inform the nature of community engagement by lawyers.

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<sup>1</sup> UN General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, A/HRC/23/36 (11 March 2013).

## 2.1. INTERNATIONAL FRAMEWORKS

The international human rights framework affirms the right to take part in the conduct of public affairs and the right of those affected by key decisions to participate in relevant decision-making processes. The right to participation is found in several key international human rights instruments.<sup>2</sup> These instruments are critical to understanding and advancing a right to participation.

### 2.1.1. CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (AARHUS CONVENTION)

The Aarhus Convention makes clear the link between environmental rights and human rights, particularly the right to participation.<sup>3</sup> The public participation requirements include: (1) timely and effective notification to the concerned public, (2) reasonable time frames for participation, including provision for participation at an early stage of decision-making strategies, (3) a right, at no cost, for the concerned public to inspect information relevant to the decision-making process, (4) an obligation on the decision-making body to take due account of the outcome of public participation, and (5) prompt public notification of the decision, with the text of the decision and the reasons and considerations on which it is based made publicly available and accessible.

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<sup>2</sup> These instruments include Articles 21 and 27 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Civil and Political Rights, Articles 13.1 and 15.1 of the International Covenant on Economic, Social and Cultural Rights, Articles 7, 8, 13(c), and 4.2 of the Convention on the Elimination of All Forms of Discrimination Against Women, Articles 12 and 31 of the Convention on the Rights of the Child, Articles 3(c), 4.3, 9, 29 and 30 of the Convention on the Rights of Persons with Disabilities, Articles 41 and 42.2 of the International Convention on the Rights of All Migrant Workers and Members of their Families, Articles 1.1, 2, and 8.2 of the United Nations Declaration on the Rights to Development, and Articles 5, 18, 19 and 41 of the United Nations Declaration on the Rights of Indigenous Peoples.

<sup>3</sup> Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters ([United Nations Economic Commission for Europe, 1998](#)).

### **2.1.2. INDIGENOUS PEOPLES**

Read together, the Indigenous and Tribal Peoples Convention of the International Labour Organisation (ILO Convention No. 169)<sup>4</sup> and the United Nations Declaration on the Rights of Indigenous Peoples<sup>5</sup> highlight the importance of participation of indigenous people in decision-making and require governments to consult with communities face-to-face in designing strategies of change. Consultation should occur through appropriate procedures, in good faith, and through the representative institutions of affected groups.<sup>6</sup>

### **2.1.3. FISCAL TRANSPARENCY**

The Global Initiative for Fiscal Transparency (GIFT) has been advancing the notion of civil participation in fiscal decisions by governments. This has led to the 2012 UN General Assembly resolution 'Promoting transparency, participation and accountability in fiscal policies' endorsing the GIFT High Level Principles and encouraging Member States to intensify efforts to enhance transparency, participation and accountability in fiscal policies<sup>7</sup>

## **2.2. REGIONAL FRAMEWORKS**

### **2.2.1. BANJUL CHARTER**

The African (Banjul) Charter on Human and Peoples' Rights contains several provisions that reinforce the right to participation.<sup>8</sup> Article 20 affirms the right of communities to self-determination, which has been defined as the ability of a people to freely determine their political status and freely pursue their

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<sup>4</sup> International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989, C169, available at: <http://www.refworld.org/docid/3ddb6d514.html>

<sup>5</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html>

<sup>6</sup> *Ibid.*

<sup>7</sup> The Global Initiative for Fiscal Transparency High Level Principles, United Nations General Assembly Resolution 67/218, adopted 21 December 2012, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/67/218](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/218)

<sup>8</sup> African Charter, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

economic, social, and cultural development.<sup>9</sup> Article 21 goes further to specify that 'all peoples shall freely dispose of their wealth and natural resources' in their own interest.

### **2.2.2. AFRICAN CHARTER ON POPULAR PARTICIPATION IN DEVELOPMENT AND TRANSFORMATION**

The 1990 African Charter on Popular Participation in Development and Transformation is also instructive. In a seminal judgment delivered in 2010, the African Commission on Peoples and Human Rights, drawing guidance from the Charter and the seminal *Saramaka* case from the Inter-American Commission of Human Rights,<sup>10</sup> held in favour of the indigenous Endorois peoples of Kenya, who had been displaced from their ancestral lands to make way for the creation of a game reserve. The Commission held that the Kenyan government had violated, among other rights, the community's right to development, which includes not only consulting with the community but also obtaining its free, prior, and informed consent in the development process.<sup>11</sup> The Commission articulated the standard of consultation to be one of free, prior and informed consent that must consider the unequal bargaining positions of the parties, adopt culturally appropriate procedures for information sharing, and require active consultation with the community according to their customs and traditions.<sup>12</sup> Complete information must be disseminated, and constant communication between the parties is required.<sup>13</sup>

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<sup>9</sup> *Ibid.* Article 20(1).

<sup>10</sup> *Case of the Saramaka People v Suriname, Saramaka People v Suriname*, Preliminary objections, merits, reparations and costs, IACHR Series C no 172, IHRL 3046 (IACHR 2007), 28th November 2007, Inter-American Court of Human Rights [IACtHR]

<sup>11</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003 at paragraph 292, African Commission on Human and Peoples' Rights, 4 February 2010, available at: <http://www.refworld.org/docid/4b8275a12.html>.

<sup>12</sup> *Ibid.* paras 288, 289.

<sup>13</sup> *Ibid.* para 295.



## 2.3. NATIONAL

### 2.3.1. THE SOUTH AFRICAN CONSTITUTION

The Constitution is founded on the democratic values of accountability, responsiveness, and openness.<sup>14</sup> Section 195(1) (e) and (g) respectively require that public administration must (i) respond to the needs of the public who 'must be encouraged to participate in policy-making'; and (ii) that the public must be given 'timely, accessible and accurate information' in order to ensure transparency.

In the case of *Doctors for Life International v Speaker of the National Assembly et al.*, the Constitutional Court of South Africa issued a seminal judgment about the constitutional role of the public in the law-making process.<sup>15</sup> The case specifically dealt with the National Council of Provinces' failure to invite written submissions and conduct public hearings in the development of certain health Bills as required by its duty to facilitate public involvement in its legislative processes. Ngcobo J. underscored the historical origins of 'people's power' as an alternative to the undemocratic system of apartheid, and that those processes became the foundation for a constitutional obligation of participatory democracy – not just 'legislative etiquette or good governmental manners.'<sup>16</sup> The Court suggested multiple ways through which to meet this obligation: through: public education that builds capacity for people's participation; access to information; access to law-making structures and processes; and the facilitation of learning and understanding in order to achieve meaningful involvement. Sachs J. identified the importance of public participation for people who had been the victims of processes of 'historical silencing,' noting the importance of their voices being heard, and for those who lack higher education, access to resources and strong political connections.<sup>17</sup>

In *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others*,<sup>18</sup> the Constitutional Court further developed its jurisprudence around the right to

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<sup>14</sup> Constitution of the Republic of South Africa Act No. 108 of 1996, 1(d).

<sup>15</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

<sup>16</sup> *Ibid.* para 118.

<sup>17</sup> *Ibid.* para 234.

<sup>18</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

participate. It held that the right of access to housing in Section 26 of the Bill of Rights requires municipalities to engage both individually and collectively with communities before evicting them from housing if they would be rendered homeless as a result of the evictions.<sup>19</sup> Yacoob J described the engagement requirements as a two-way process with certain objectives, including but not limited to: explaining the consequences of eviction; determining whether the city could undertake any mitigating steps to prevent homelessness; identifying whether buildings could be rendered safe and healthy at least temporarily; and considering whether cities had any obligations to occupiers, and if so, how they would be fulfilled.<sup>20</sup> He underscored the need for cities to deploy 'careful and sensitive people' to manage and ensure meaningful engagement with 'poor, vulnerable or illiterate people.'<sup>21</sup>

Other cases have reinforced that the notification, consultation and/or public participation requirements in various statutory schemes are constitutionally required as part of the right to administrative justice.<sup>22</sup>

### **2.3.2. NATIONAL DEVELOPMENT PLAN**

The South African government has approved the National Development Plan, a long-term strategic framework to advance the development of South Africa. Its purpose is to ensure that all South Africans attain a decent standard of living through the elimination of poverty and the reduction of inequality.<sup>23</sup> Central to this aspiration is the principle of participatory governance, particularly for municipalities to find ways of structuring participation so as to enhance service delivery; the need to invest in people's capabilities so as to ensure citizen participation; and the commitment to robust accountability. Against this backdrop of international, regional and national requirements in respect of participation, we identify the following principles and values of community engagement by human rights lawyers.

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<sup>19</sup> Ibid paras 2, 13, 18.

<sup>20</sup> Ibid para 14.

<sup>21</sup> Ibid para 15

<sup>22</sup> See for example: *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) (finding state and private actors had not complied with notification and consultation requirements under the MPRDA) and *Beja and Others v Premier of the Western Cape and Others* [2011] 3 All SA 401 (WCC) para 51 (finding municipal and provincial state actors violated consultation and participation requirements of the Housing Code, Housing Act, and the Upgrading of Informal Settlement Programme).

<sup>23</sup> National Development Plan: Vision for 2030, available at: <http://www.npconline.co.za/>

## PART B

### 3. Foundational Principles and Explanations

Recognising that there is no single unified code of principles and values guiding human rights work with communities, what follows is our articulation of principles and processes that will assist us in navigating the complexities of creating and sustaining such a relationship. We also look to a broad inter-disciplinary range of professional ethical codes for additional guidance, specifically from journalism, humanitarianism, law, medicine, academia, and public health. The traditional matrix of legal ethics posits a lawyer, a client, and some form of legal activity that forms the basis of the legal representation upon instruction from the client. This framework is insufficient to guide human rights work with communities. In identifying the following foundational principles and values of the community engagement policy, therefore, we wish to broaden this matrix to include other organisations, partners and other collaborators, a class or group or community of individuals and possibly a relevant social movement working in tandem, and a continuum of intervention from traditional lawyering tactics to non-traditional tactics in non-traditional forums.

The following are the specific principles which should guide the engagement of human rights lawyers with community clients and partners:

1. *Mutual Respect and Co-operation*
2. *Overlapping Consensus of Justice*
3. *Non-Discrimination and the Pursuit of Equality*
4. *Security and Dignity of Clients*
5. *Clarity regarding roles, responsibilities and mandate*
6. *Clarity regarding intended outcomes and managing expectations*
7. *Representative, Participatory, and Responsive Leadership Structures, and Individual Agency, within Communities*
8. *Clear Instructions based on informed decision-making*
9. *Professionalism*
10. *Honesty and Integrity*
11. *Regular and Accessible Communication*
12. *Confidentiality and Anonymity*
13. *Transparency and Sharing of Information*
14. *Enhancing Legal and Specialised Knowledge of our Clients and Partners*
15. *Inter-Disciplinary Enriched Problem Solving Collaboration*

16. *Pursuit of Cross-Cultural Competency*
17. *Avoiding Conflicts of Interest*
18. *Continuity and Longevity*
19. *Maintain Objectivity and Independence*
20. *Self-Reflection*
21. *Accountability*
22. *Compliance with Rules of the Profession*

These principles underpin and inform the nature of community engagement by lawyers.

### **3.1. MUTUAL RESPECT AND CO-OPERATION**

Building partnerships between affected communities, legal representatives and partners requires courage, patience and determination over long periods of time. The process of partnering is often more challenging than the interventions themselves. As with any relationship, such partnerships can be effective, sustainable, and mutually rewarding but only if considered intentionally and designed, developed and managed systematically.

What is fundamental to all of CALS' community engagements, however, is that our relationships should be primarily concerned with supporting the efforts of communities to challenge the inequality of power relations by breaking down the barriers that impede their own power. In other words, we see our role primarily to enable a group of people to gain control of the forces which affect their lives. We remain vigilant against re-creating the dependency model that for so long has entrapped communities and left them reliant on external actors and external mechanisms.

Mutual respect refers to the notion that both parties have respect for and co-operate with one another. Active listening and understanding are important tools in cultivating a respectful relationship. More specifically, CALS will respect the community structures, processes, and mandate. In turn, CALS as a human rights civil society organisation has a certain mandate and role which needs to be respected by the community. Communities will be asked to commit to regular meetings and the provision of information in order for CALS to achieve the mandate it negotiates with the community.

### CASE STUDY

#### **FOSTERING MUTUAL RESPECT AND CO-OPERATION**

CALS entered into a partnership with a foreign organisation to create a film about the lived realities of CALS' partner, a mine-affected community, for purposes of advocacy. Before the foreign film crew arrived, CALS met with community members to gain their consent to being filmed and then to explain the process.

During one long filming segment, a woman in the community, the main protagonist of the film, appeared tired. A CALS staff member explicitly inquired as to whether she wanted to stop for the day, to which she expressed that she was tired and wanted to leave to make it to church in time. CALS lawyers objected but when foreign filmmaker nevertheless encouraged the woman to stay for another few minutes to wrap up. The filming occurred for an additional 25 minutes, further exhausting the interviewee and making her late for Church.

During individual interviews, women stood patiently, unsheltered from the sun, in a queue waiting for their turn to be filmed. When their turn came, the filmmaker asked the women to remove their dukus (headscarves) for better shots. This was deeply offensive to the interviewees, who complained to their legal representatives.

#### **LESSON**

Given the power dynamics inherent in the relationships between lawyers and indigent communities, we must redouble our efforts to listen deeply and honour the desires and preferences articulated by community members, even if it means that our work does not occur the manner in which we planned.

### **3.2. IDENTIFYING OVERLAPPING CONSENSUS OF JUSTICE**

Communities and CALS staff will often have different goals that we initially bring to the collaboration. Whilst CALS adheres to the principle that it must take instructions from the community leadership structures before jointly determining its intervention(s), it also cannot expend its limited resources to support interventions that do not fall within its own theory of change. In this way, CALS must straddle the fine balance between accountability to the community client or partner as well as to its own mandate. Where communities and CALS share

different goals, we then must converge around a joint, shared vision of justice that can be pursued collaboratively. This becomes our principal goal through the representation, and the end to which we owe our allegiance. Articulating a shared vision of justice requires honest and candid discussions about the interests, goals and backgrounds of the multiple parties to a relationship.

### **3.3. NON-DISCRIMINATION AND THE PURSUIT OF EQUALITY**

As noted above, communities are not homogenous and the notion of human rights victims often triggers romanticised notions of an ideal survivor. Marginalisation and differentiation occurs within communities themselves affected by external discrimination and exclusion. Human rights lawyers must ensure that they do not replicate or entrench power disparities that are either harmful or contrary to the constitutional imperatives of equality.

CALS staff will ensure that they elicit the input of marginalised groups and individuals within a community by focusing on and understanding gender, racial, ethnic, age or other forms of intra-community discrimination. This principle is based on the need to respect community practices and structures without participating in or endorsing discriminatory standards. We believe that in order to unearth the reality of any given community, the rights of every group in that community need to be respected and not infringed or suppressed.

CALS will explain its mandate to the community, noting that it has a commitment to social structures that may differ from those embedded in the community. On this basis, CALS will ask whether it would be possible in its engagement with the community to meet with representatives of women, people with disabilities or health issues, different age groups and, if relevant, different racial and/or ethnic groups. If the community refuses to allow this type of engagement, the CALS representative will have the discretion, in consultation with other CALS staff members, to determine whether or not to proceed with the matter, always preferring respectful engagement. In this regard, it is important to bear in mind that community self-determination is paramount and that no external actor can compel a group to act in a specific way.

CALS carefully considers the unequal bargaining positions of the parties. We aspire to a form of lawyering that is appropriate for cultural and contextual imperatives. This requires active consultation with communities according to the

customs, traditions and/or rules of engagement established by the client community in question.

#### **CASE STUDY**

##### **NON-DISCRIMINATION AND PURSUIT OF EQUALITY**

In mine-affected communities, it is common for the mining companies to primarily consult with traditional leadership structures about proposed mining plans. When CALS first approached a community about to experience coal mining, traditional leaders monopolised community meetings. CALS staff repeatedly made it clear that all voices needed to be heard, and not just those of the traditional council. That call for diverse perspectives allowed particularly the younger members of the community to come forward and articulate their views about the proposed mining, and in time, the traditional leadership began to lessen its hold on community meetings. A representative from the traditional leadership is always present at the meetings. It is important to have a preliminary engagement with tribal authorities in order to access a community.

##### **LESSON**

CALS must be firm but respectful in our request to hear from diverse voices from within the community. Sometimes an explanation of why we are seeking these diverse voices will suffice; other times we will need to be creative in how we achieve inclusion of perspectives.

### **3.4. SECURITY AND DIGNITY**

Every intervention must consider intended and unintended consequences. Every intervention should have a positive component of enhancing the wellbeing or rights-knowledge of the community in question (intended consequences). CALS should also analyse the potential harm legal intervention may trigger (unintended consequences).

It will not be possible to map every possible outcome but a thorough analysis will reduce the risk of offensive, undignified or dangerous consequences for the clients and partners with whom we work. Above all else, the life, health and human dignity of community members should always be protected and

respected. This comes before any objectives CALS may have in respect of law reform.

### **3.5. ENCOURAGE REPRESENTATIVE, PARTICIPATORY, AND RESPONSIVE LEADERSHIP STRUCTURES AND INDIVIDUAL AGENCY WITHIN COMMUNITIES**

Subject to the provisions relating to equality and non-discrimination, CALS will respect and work with the community's existing decision-making structures. Where those structures do not exist, CALS will facilitate the establishment communal structures to guide the matter and provide instructions. These structures are usually developed and adopted over time in order to ensure both that the community can come to decisions on issues that require a single community position, and that these decisions are perceived as legitimate. CALS will actively raise questions, though, about participation, take steps to ensure that all voices within the community are being heard, and ensure that the structures remain responsive to the larger community's concerns and interests.

As far as possible, community representation should include subgroups so that we can ensure that our representation and partnership effectively meets the needs of the entire community, and not just a sector thereof. If this is not possible, a joint decision should be made about how to manage such representation. Where CALS identifies a strong bias that calls into question whether it can honestly rely on the community's structures to represent the interests of the community, its staff will engage in a candid negotiation with the community to modify these structures. At all times, CALS strives to promote leadership of those parts of the community that are or will be most affected by the particular human rights violations.

Though CALS' primary relationship is with the community as a partner or a client, we recognise that individuals constitute communities. As such, CALS always strives to listen to individual voices and to promote the development of individual agency, whilst recognising that individuals exist within and in relation to others. Where the exercise of individual agency could undermine the communal structure, process or mandate, we will reflect on 'whose interests are we representing' and discuss this with the individual in question. CALS may be well placed to play a limited role in highlighting and resolving the tension. If consistent with CALS' vision and mandate, it may be necessary to consider individual assistance. This could only happen if there is no conflict in CALS representing both an individual and the community. If such a conflict does



exist, CALS will undertake to find alternative legal representation for such individuals.

### **3.6. MANAGE EXPECTATIONS**

Many marginalised communities have been disappointed by over-commitment and underperformance. CALS undertakes to manage expectations and give undertakings on which we can realistically deliver. CALS has a three-pronged approach to all of its work: rigorous research, strategic advocacy, and creative lawyering. CALS endeavours to facilitate systemic change while ensuring the wellbeing of the individual. CALS recognises that the law is often a blunt instrument to effectuate this kind of social change, and therefore works in multiple forums, including with media, in courts, with lawmakers, and with social movements. Even where a legal strategy is appropriate, legal processes are unpredictable and outcomes a risk. It is therefore imperative that the nature of CALS' interventions and the risks involved are properly communicated to client. We would rather err on the side of promising less and delivering more than disappointing individuals and communities who already face significant difficulties.

### **3.7. CLEARLY DELINEATE ROLES, RESPONSIBILITIES, AND MANDATE**

The importance of reaching a 'meeting of the minds' cannot be overstated when defining the relationship between lawyers and communities seeking legal assistance. Often it will take multiple meetings to determine the nature and scope of the relationship, including CALS' intervention mandate and the roles and responsibilities of each party. CALS believes that documenting this relationship in the form of a power of attorney, a resolution and /or a memorandum of understanding is beneficial in several respects. The recorded agreement lends dignity to the process; it allows clients to hold its legal advisors to account; and, it acts as reference for people who were not present at meetings. CALS will offer communities the option of our assistance in concluding the written agreement, but recognises that this process is owned and driven by the community.

### **CASE STUDY**

#### **CLARITY REGARDING ROLES, RESPONSIBILITIES, AND MANDATE**

CALS has partnered with mine-affected communities which have required CALS' participation in a series of consultations with the inhabitants of various affected villages. In the course of one of these meetings, streams of community members kept arriving with the result that a meeting of roughly 40 eventually became a meeting of about 300. Because the later arrivals had not heard CALS introduce itself and were hearing the advice for the first time, it was necessary to repeatedly clarify that the lawyer does not work for the mine or government. It takes time to build trust and explain the nature of CALS' intervention but this cannot be compromised.

#### **LESSON**

Mine affected communities will receive visits from many lawyers representing government or a mining company. It is vital to explain the nature of your organisation and mandate to prevent misunderstandings. When addressing a growing meeting, one strategy is to repeat the introduction periodically for the benefit of new arrivals. This could reduce the likelihood of a suspicious and contentious atmosphere emerging that could divert limited time from the issues the meeting was arranged to discuss.

### **3.8. PROFESSIONALISM**

CALS staff undertakes to conduct themselves with communities in the utmost professional manner with honesty and integrity. Critical to our theory of social change is the uncompromising principle that indigent people deserve the highest quality legal representation.

Professionalism manifests in:

- An understanding that we may not have the specialised legal skills to handle all cases. CALS therefore will only work within its areas of competency, ensuring that it uses its expertise to advance a pro-poor agenda. Where a matter is not within our area of specialisation, we will refer such cases to our partners and other organisations.
- Maintaining a level of decorum in our words, dress and demeanour with the individuals with whom we engage.

### 3.9. REGULAR AND ACCESSIBLE COMMUNICATION

Many potential or actual conflicts in collective representation can be addressed through proper communication. For example, when circumstances in a case change, this may lead to a change in expectations of how we should intervene. Such confusion could be averted through reinforcing our role in each phase of the engagement.

From the moment of initial consultation through to evaluation of the intervention and follow-up after the completion of the matter, CALS staff commit to maintaining regular communication in order to convey important information and developments to community leadership structures.

Communication must continue even if there is no development. Often we will be waiting for responses from government or private company lawyers. Lawyers must continue to communicate and explain the delay. In turn, we rely on leadership structures within our partner/client communities to consistently relay such messaging to the broader community.

All communication must be documented, regardless of the format that communication takes. Communication is not only about written interaction. CALS believes that face-to-face interaction with the community is critical. Rapport is much more easily established in person, and having a presence in the community to engage with the individual members helps to provide a picture of the context within which the community members live and develop trust. Such a presence could take the form of, for example, a designated community member who is in constant communication with CALS attorneys and staff. CALS' staff must not lose sight, however, of the need to strike a fine balance between liaising with a designated community member and maintain contact with the broader community as a whole.

In order to be effective, communication must be free from 'legalese'. This is important for two reasons:

- There is less chance of misunderstanding of the information presented; and
- Lawyers are forced to break down the principles behind the legal terms on which they regularly depend. This ensures that the lawyer has a thorough understanding of all parts of the legal process.

### 3.10. CONFIDENTIALITY AND ANONYMITY

Client confidentiality is the benchmark of any attorney-client relationship. Often the clients with whom we engage require an even higher standard of confidentiality and anonymity to protect their safety and well-being.

CALS will never utilise or distribute information shared with CALS staff unless otherwise instructed by community leadership structures. We will assure community members that the proceedings of meetings are covered by the attorney/client privilege so that they may speak freely.

#### CASE STUDY

##### **CONFIDENTIALITY AND ANONYMITY**

In one community meeting, when it was discovered that a participant had been recording the proceedings with a hidden camera, a community leader instructed that individual to delete the footage to preserve confidentiality.

##### **LESSON**

At the beginning of each and every meeting, you must communicate to community clients that the consultation is protected by attorney-client privilege. This privilege protects all matters discussed in the course of the meeting as confidential vis-à-vis all external parties.

CALS recognises the distinction between confidentiality and anonymity. Community members may instruct CALS to share information but not to reveal the identity of the persons involved. We will explain both processes when collecting information from community members and follow their instructions as to how to proceed.

Confidentiality and anonymity demand caution when engaging with media. The media may not attend a consultation unless we are so instructed.

### 3.11. TRANSPARENCY AND ACCESS TO INFORMATION

Transparency relates to openness of decisions and actions. Throughout the process of the matter, CALS must remain open, candid and clear about its

actions and decisions. It is CALS' belief that it is only through such transparent processes of conducting our work that we can be truly accountable to the communities with which we work. In particular, transparency includes:

- *Transparency regarding finances and other related resources*  
In the event that a donor or funder provides CALS with money or resources for the matter in question, CALS will ensure that community members are informed of such resources. Resources could be in the form of salaries for CALS staff, equipment, such as cameras and laptops and/or money to provide transport and/or refreshments for community meetings.
- *Transparency regarding information*  
The responsibility to be transparent with information is symbiotic. CALS will report accurately on the progress of its intervention to community leadership structures. On assessing the outcomes of its intervention in a community, CALS will disseminate the outcomes of such assessment to the community members. Reciprocally, community clients/partners must endeavour to share all information that is deemed valuable for purposes of the legal strategy decided upon.

### **3.12. ENHANCING LEGAL AND SPECIALISED KNOWLEDGE OF OUR CLIENTS AND PARTNERS**

Through its community engagement, CALS strives to mitigate power disparities that prevent access to the legal system. Community engagement is a critical opportunity to strengthen capacity and leadership through the transfer of formal skills learned through legal training. Community members should have the legal language, which is often the key to getting a response from a repository of power.

CALS acknowledges the role it is often asked to play within communities to strengthen leadership capacity. While communities must manage their own leadership processes, where it is within CALS' competency to do so, we will assist with training and information about various aspects of leadership if so requested by partner/client communities. We also see it as our mandate to support and strengthen social movements where they manifest organically and not according to a pre-determined formula.

The most important component of leadership development is through the bringing together of similarly affected communities. Community exchanges are key to ensuring robust leadership and more aligned strategies for individuals and communities affected by human rights violations.

This process also contemplates CALS facilitating a better understanding of the law and their rights in relation to the challenges communities face, where appropriate.

### **CASE STUDY**

#### **ENHANCING LEGAL AND SPECIALISED KNOWLEDGE OF OUR CLIENTS**

We represent communities that have faced or face eviction from their homes in inner city Johannesburg. Through legal representation of these communities, we discovered that most clients lacked an understanding of the housing and evictions 'system.' We therefore created a set of educational resources to share and exchange information with these communities about the roles of the different stakeholders in the housing arena. Different mediums were explored to share information, including an animated video, pamphlets, community radio interviews and educational workshops. Though our representation of these communities had been narrowly focused on evictions law, we noted that the educational workshops would have to go beyond this area of law to address the manner in which they experienced multiple violations.

We facilitated a series of three workshops covering housing law and policy, as well as sexual violence. Community members were also given an opportunity to meet and hear from each other, in an effort to provide the space for people similarly affected by eviction processes to come together and build their own power.

#### **LESSON**

We must not underestimate the capacity of our community clients and partners to engage with the information necessary to properly analyse and devise solutions to the challenges they face.

### 3.13. INTER-DISCIPLINARY AND ENRICHED PROBLEM SOLVING COLLABORATION

Re-iterating that law is a limited tool for promoting effective social change, CALS routinely works across disciplines, as necessary, in order to achieve a more holistic understanding about the nature of human rights violations and the solutions they require. To this end, CALS may call upon professionals from other disciplines, depending on the nature of its negotiated mandate with a community. These collaborations must be founded on a shared understanding of the deliverables by all parties, and the nature of CALS' mandate from the community must be clear.

Professionals from other disciplines must also review and accept CALS' community engagement methodology before interacting with CALS' community partners. They must engage in a rigorous and thorough briefing by CALS staff.

#### CASE STUDY

##### INTER-DISCIPLINARY AND ENRICHED PROBLEM SOLVING COLLABORATION

CALS serves as a social and labour plan specialist to a mine-affected community in the platinum belt, to ensure the mine's social and labour plan reflects the aspirations and needs of the community. The attorneys running the case have organised periodical meetings of specialists in which all come together to discuss the areas of focus (including archaeology, paleontology) and achieve consensus on the strategy. Law serves but one tool as part of this broader strategy. Lawyers, specialists, and community representatives are equal participants who anchor the discussion in community objectives and bring their understanding of their particular area of expertise.

##### LESSON

Social injustices that occur at a community level are always multi-faceted. Lawyers working on behalf of communities will need the input of a vast range of specialists. This will not only require the enlisting of the correct specialists but will also require the integration of the different forms of knowledge they bring with the community's knowledge to advance the overlapping vision of justice.

### 3.14. PURSUIT OF CROSS-CULTURAL COMPETENCY

It is critical for CALS staff to engage in a reflective practice of building cross-cultural competencies as part of our human rights lawyering. One helpful model of cross-cultural lawyering builds on three principles:

- i. That all lawyering is cross-cultural;
- ii. That the competent cross-cultural lawyer is respectful of the client's dignity, voice and story;
- iii. That the cross-cultural lawyer must know oneself as a cultural being to understand his or her biases and ethnocentric world views.

In this practice, it is critical not to depoliticize the role that race and culture play in perpetuating systemic injustice and creating the material inequalities that our clients and partners confront. Understanding this also improves our ability to understand how other vectors of oppression operate in the legal system.

We understand that culture is everywhere; indeed, the law itself is a culture that cannot be taken for granted, especially amongst communities who have been shaped by differing values and behaviour. We commit to learning about our implicit bias and ethnocentric thinking, which, in turn, we hope will allow us to comprehend the ways that all people misjudge, mishear and use their power inappropriately.



### **CASE STUDY**

#### **PURSuing CROSS-CULTURAL COMPETENCY**

A CALS attorney assisting clients in an eviction case experienced some of the cultural issues that may arise in the process of engaging the community. She was registering the clients for their alternative accommodation, and had prepared a client list. This list would enable her to facilitate the process that would assist them in being allocated alternative accommodation. It was later discovered that in Zulu culture the husbands (as heads of their households) do not deem it necessary to register their wives independently when identifying households. They also did not see the need to register their children for accommodation. This gap in cultural understanding ultimately proved problematic as a discrepancy arose between the number of clients that needed to be allocated housing and those registered on the client list.

#### **LESSON**

It is not always possible to know beforehand the way in which culture may manifest in certain situations. We must be pro-active and open in our understanding of how these factors may affect our partnership with communities. We must understand the context of the information we are seeking to develop a particular legal strategy.

### **3.15. AVOID CONFLICTS OF INTEREST**

Conflicts of interest, whether perceived or actual, often derail delicate relationships. Within the human rights lawyering model, conflicts of interest can develop around any host of issues, from the perception of improper financial gain of community members, the manipulation of CALS' mandate by one faction of the community against another, and CALS' engagement with both victims and perpetrators of human rights violations.

Conflict may also arise where CALS engages simultaneously in individual and community representation.

CALS will be mindful of any conflict of interest and will attempt to resolve and/or manage the situation as early as possible. Full disclosure of information and regular communication are critical to achieving this.

### **3.16. CONTINUITY AND LONGEVITY**

CALS commits to ensuring continuity and longevity of the relationships it builds with communities. Ultimately, building relationships with communities relies on building trust. CALS recognises the 'fly-in fly-out' syndrome in which human rights organisations stage once-off interventions in communities to obtain information without considering the long-term consequences for the community.

Moreover, personnel changes can erode the working relationship with communities. CALS endeavours to be more intentional about the community engagements into which it enters and commits itself to partnering with the community over a long term.

CALS will, to the extent possible, appoint one staff member as the ongoing point of contact with communities.

### **3.17. MAINTAIN OBJECTIVITY AND INDEPENDENCE**

CALS strives to maintain its objectivity and independence at all times and to act in a manner that creates a perception of being objective and independent. CALS will not advance the interests or agenda of any political party, interest group, journalist, or other third party in the name of working 'on behalf of' the community. The community is the client/partner, and therefore CALS takes its instructions from the community.

CALS recognises that it often assumes multiple roles depending on the nature of its intervention. For example, when it acts as attorney, it is promoting the interests of the community, and when it acts as researcher, it is attempting to unearth multiple perspectives on the causes and possible solutions to a particular set of human rights violations. These roles must always be borne in mind and explicitly stated and agreed upon when working with communities. CALS will carefully consider the impact of its actions on community perceptions of its objectivity and independence.

### CASE STUDY

#### **MAINTAINING OBJECTIVITY AND INDEPENDENCE**

We conducted field research for a project exploring educator accountability for sexual abuse against learners in schools. Our community partner, an established social movement, worked in the particular community where we were conducting research. The partner facilitated our entry into the community and accompanied our team into several schools to interview educators and management about sexual abuse. During one interview with a principal, the community partner disclosed for the first time that her daughter had attended the school and had raised a concern about a particular educator at that school who was later dismissed for alleged rape of pupils. She stated that she, in her capacity as the learner's mother, had reported the case to the principal who had not acted in a timely manner. A high level of tension arose during the interview, and the principal suddenly directed his suspicion towards us. We quickly appeased his concerns by re-affirming our objective role as researchers who were there not to publicly shame him with our future report but to understand the structural challenges faced by all stakeholders around effective accountability of educators.

#### **LESSON**

Whenever working with a community-based partner, including with interpreters and translators, we need to conduct a thorough briefing of the terms of our engagement and methodology and ensure that the partner agrees. We also need to unearth any potential conflicts of interest. If not, unintended consequences may result.

### **3.18. SELF-REFLECTION**

CALS must be engaged in a regular practice of self-reflection. The lawyering relationship is rife with power dynamics that do not evaporate simply because the long-term goals of the lawyer are aligned with that of the community. We commit to creating the space and resources to facilitate self-reflection in our work.

Self-reflection also includes self-care. Much of the work we work will trigger emotional responses, which requires internal support structures. We must set and adhere to personal boundaries in respect of our work. We must recognise our

limited professional role as legal representatives and strive not to assume any other professional role. Where the assistance of other professionals is required, we will connect our partner and client communities to our referral networks.

### **3.19. COMPLIANCE WITH RULES OF PROFESSION**

As legal professionals and academic staff, CALS staff are members of professional organisations with their own sets of professional rules. The Law Society regulates admitted attorneys by prescribing rules related to the attorney-client relationship. Many of the Law Society professional rules are equally relevant to the human rights lawyering setting. For example, CALS must also take instructions from clients, maintain attorney-client privilege, and keep thoroughly documented client files. In addition, all CALS staff must adhere to the research ethics guidelines of the university, which prescribe how we design and implement research in respect of non-medical human subjects. These professional rules represent a floor, and not a ceiling, to guide the work of CALS staff.

## PART C

### 4. Methodology

Below we provide the methodology for implementing the principles at each moment of community engagement.

1. Identifying Community Clients and Partners
2. Gaining Access to the Community
3. Holding an Initial Community Meeting
4. Collecting Information / Power-mapping
5. Gathering Additional Information and Analysing Options
6. Documenting Relationships
7. Promoting Inclusive Participation of the Community
8. Jointly Deciding on Nature of Intervention
9. Building Capacity within Community
10. Facilitating Strong Leadership Structures
11. Following Through with Community on Outcome of Intervention
12. Engaging in Self-Reflection
13. Forging Broader Partnerships

#### 4.1. IDENTIFYING COMMUNITY CLIENTS AND PARTNERS

CALS must carefully consider the communities with which it forms relationships, either as partners or as legal representatives.

Generally, CALS is introduced to prospective community clients and partners:

- By invitation from the community or another community-based organisation working with the community;
- By referral from a partner in civil society or other sectors; and/or
- By identification of an issue in a community.

In determining whether to partner with a particular community, CALS should:

- Evaluate a community's commitment to an overlapping vision of justice (i.e. compatibility of objectives, commitment to equal participation, readiness of dialogue, desire for learning, and capacity for action);

- Consider CALS' capacity to work with the community (i.e. access to the community, level of trust, and capacity to engage marginalised groups);
- Establish scope and nature of involvement of other organisations (i.e. what were reasons for other organisations refusing to assist and/or what was outcome of other interventions); and
- Assess the risk of harm to community members (e.g. fuelling conflict and/or re-traumatisation).

CALS, in some instances, will have to decline representation, but should always be in a position to provide a principled basis for this refusal.

In the event that a matter is urgent, the normal process of carefully selecting community partners can be temporarily suspended but this must be done in consultation with a senior member of CALS' staff. Instructions may be taken speedily in order to be able to assist the relevant community timeously, but once the urgent matter has passed, CALS then commits itself to returning to the task of engaging in a proper assessment regarding the scope of its engagement with the community.

#### **4.2. GAINING ACCESS TO COMMUNITY**

In gaining access to a community, varying methods may be employed including:

- Identify and have a preliminary dialogue with a champion through a local grassroots organisation, e.g., a church, school or youth organisation based within the community with which we intend to engage; and
- Identify and have a preliminary dialogue with the traditional leadership of the community with which we intend to engage. It is important to note that it is possible to be refused access into a community if the traditional leadership structures are bypassed as a starting point. Research needs to be conducted to ascertain community protocol regarding traditional leadership structures.

Multiple entry points may be used to gain access to the community.

## CASE STUDY

### IDENTIFYING COMMUNITY CLIENTS AND PARTNERS

CALS represented a community which was dealing with the fallout following the closure of a coal mine. CALS' assistance was sought on two issues: housing and rehabilitation of the environment. First, the community reported unlawful evictions from houses built by the mine to house employees. They stated that the mine had undertaken to transfer ownership of the houses to employees upon closure of the mine. Second, the community members sought the removal of a slurry dump which was causing severe air pollution and contributing to high incidence of respiratory disease. CALS consulted with a group of community members who presented themselves as representing the community as a whole. CALS became suspicious when, following several consultations and many calls to these community members, there was still no documentation needed to establish ownership of the homes. The limited documentation we received did not support the community's claims. It further became clear that the majority of the community had successfully resolved the housing issue and did not support the group's campaign. The members of the group had previously approached other organisations to handle their housing issue. When those organisations declined, they turned to CALS. CALS subsequently took the decision to confine our involvement to the rehabilitation of the slurry dump, an issue around which there were no apparent divisions.

### LESSON

It is critical to sensitive to the micro politics within a community and cautious of taking on representation before obtaining necessary documentation. We must not be guided by the representations of community members, but must determine for ourselves whether there is *prima facie* evidence to establish a clear violation. It is also useful to limit our assistance to issues which are not divisive, if possible.

## 4.3. HOLDING AN INITIAL COMMUNITY MEETING

### 4.3.1. STEPS

CALS should plan carefully for an initial community meeting. Decisions must be made, including:

- Who from the community and from CALS should be invited to the meeting;
- How notice about the meeting is disseminated;
- Time, date, and venue of the meeting;
- Whether money for transport and/or refreshments will be provided;
- Whether an interpreter is needed, and if so, who will be identified;
- How the proceedings of the meeting will be documented;
- Information CALS would like to share in the meeting; and
- Information CALS would like to obtain during the meeting.

Some of the considerations that inform these decisions include:

- That the meeting place is public and local (e.g. open fields, town halls/ community centres, schools);
- That the local committee in the community publicises the meeting to community members through neutrally-worded invitations;
- That the timing of the meeting does not interfere with competing obligations or religious or cultural commitments;
- That community members should not be paid for their attendance at meetings but can be provided with food/refreshments/transport directly connected to the meeting;
- That the CALS delegation should be large enough to signal respect for community partnership while not so large as to take over the meeting;
- That CALS staff attending should be trained in proper facilitation skills or take along someone who is trained;
- That CALS staff should decide ahead of time a division of roles during the meeting, including documentation of the proceedings; and
- That CALS staff devise a safety plan that considers procedures for any emergencies that may arise.

CALS staff should utilise the following techniques during the first meeting:

- Introduce CALS and its mandate, involving our status as a university-based law clinic and an 'NGO-type' organisation that is donor-funded; and making it clear that we will at all times be providing a service free of charge, that no payment will be forthcoming, and that we are non-aligned with government, corporate, or political party interests;
- Listen actively and carefully to what the community members are saying and probe with questions to clarify mutual understanding and positions;
- If an interpreter is used, meet with that person before the meeting to assess whether he/she has a pre-existing bias and to ensure he/she is



well-trained in interpreting, including that he/she asks questions and speaks in the local language, uses the first person when interpreting, and requests the speakers to frequently stop to provide accurate interpretation;

- Ask open questions that enable the community to share as much information as possible, rather than limiting them with closed questions;
- Ask community members whether they have any questions regarding what has been discussed;
- Summarise what has been said to see if we have understood correctly;
- Provide an assessment of next steps whilst managing expectations and clarifying roles. Generally, CALS should not be advising the community on a legal strategy at this stage, without further information collection and frank discussion; and
- If there are 'troublemakers' who attend the meeting, e.g. a 'community specialist' who has been hired by a mining company as a community liaison, they should be managed, and if they monopolise the discussion or become hostile, should be asked to leave.

#### **4.3.2. CHALLENGES**

There are multiple challenges that often present themselves at this stage in the relationship with communities.

First, we must take care and time to discover what agendas are in the room. We have often encountered in mine-affected communities that the company in question will send an instigator/infiltrator to community meetings to report back to the company about our agenda. It is thus very important to get a full sense of who attends the community meetings and to understand the biases and agendas people bring. Each person should sign a register for himself/herself, and community members should be encouraged to look around the meeting and confirm whether they know one another. Legal strategy should also not be discussed at this stage, not only because it is often premature but because it is crucial to understand whose interests and agendas are being represented in the meeting. Hidden agendas can be unearthed by asking each person to articulate his or her objectives in being present at the meeting.

Second, prospective interpreters must be selected carefully. It is often preferable to have an interpreter who does not come from the community, in order to maintain objectivity, but the reality does not always allow for this. If a community member plays this role, his or her biases should be explored on the

broader issue, in addition to assessing proficiency in the local language and experience with prior interpretation/translation. For this reason, it is always preferable for CALS to have at least one meeting with the interpreter(s) before he or she interprets for community members.

Third, we must consider any information that reveals actual or potential conflicts of interest. We must also disclose information to communities in order to allow them to determine, from their perspective, whether there is a conflict of interest. For example, a community could feel uncomfortable with the fact that they are resisting a particular company and we are also seeking to negotiate with that company. Once we disseminate the information needed for the community to assess whether there is a conflict of interest, actual or potential, they need to evaluate whether to proceed. This is also an analysis to return to throughout the partnership or representation, as new information will emerge.

Fourth, we must maintain our objectivity, both perceived and actual. For example, while it may make sense to subsidise the travel of a community member to attend a meeting we organise, and to provide refreshments at that meeting, we should be careful not to create a dependency of communities on us for travel and food. If meetings continue for more than four hours, CALS may cover the cost of food if budget is available. These indirect incentives should be reserved for exceptional circumstances.

### **CASE STUDY**

#### **AVOIDING PARTY POLITICS**

A community, predominantly of one political constituency was experiencing a sanitation crisis. The province in which this community is located is ruled by the opposition party. The community attempted in vain to bring its crisis to the attention of municipal authorities. At a committee meeting, committee members suggested presenting this issue as a partisan issue. A female law graduate attending the meeting advised the committee not to politicise the issue because it would undermine the nature of the issue as a human rights violation. Suddenly, female members of the committee, who had been silent, started to agree with this strategy, saying 'Let's not politicise the issue, it's a community issue.' A motion was adopted to form a new independent community structure that was not politically affiliated, specifically to carry forward this struggle.

#### **LESSON**

Taking politics out of issues that affect everyone as rights violations also may have the benefit of giving license to members of the community who ordinarily do not speak out to make their voices heard.

### **4.3.3. GATHERING OF ADDITIONAL INFORMATION / POWER-MAPPING**

CALS must collect data about the community that has experienced harm, including its historical, political, and cultural context. We must try to understand the community's conception of the problems they face, not just through listening but through actively engaging them in the identification of solutions.

The participatory research model offers communities a mechanism to investigate their experience of past human rights violations, to scrutinise current efforts to address them and then to formulate an action plan that describes how the community will become active participants in the justice process.

Another method is to use introductory workshops to mutually share histories (both the community's history and CALS' history). Community members may be

asked to provide timelines of events critical to the emergence of the problem. This may form the basis of the community's narrative of harm and identify the key moments on the timeline that require our deeper understanding. In turn, CALS could utilise the opportunity to present an introductory workshop about the organisation and its own motivation in the prospect of working with the community.

Whichever method of data collection and/or power mapping is used, communities and CALS should reach agreement about:

- The objectives of the research;
- The methods of participatory research used;
- That these methods are 'culturally appropriate'. For example, if it is appropriate for women to provide information separately from men, this should be considered;
- That these methods conform to the principle of non-discrimination and equality;
- That these methods also contemplate CALS sharing information or providing services that are beneficial to the community, as a kind of *quid pro quo*;
- That informed consent should be obtained from each participant;
- The extent to which research will be confidential and anonymous;
- Options to address re-traumatisation and conflict resolution.

In designing workshops, CALS needs to adhere to a participatory community-led approach that seeks to address the actual concerns and questions communities have. CALS should select its facilitators carefully, and ensure that they receive some training in facilitation techniques. CALS should interrogate the information desired by communities, and design the workshop accordingly. The workshop should continuously seek the active participation of community members through small-group exercises and role plays, in which the conceptual information is applied to actual scenarios faced by members. There should be abundant opportunity for communities to devise practicable solutions to the problems they face, and to follow through on facilitating those interventions.

Electronic and technological scarcity can complicate the exchange of documentation necessary to proceed with the representation/partnership. Multiple strategies can be utilised to overcome these barriers, including investing in a portable scanner that CALS' staff can then take to communities, requesting community members to travel with staff to the nearest photocopier/printer,

even if it is a town away, and assisting with the establishment of an email account for the community structure to maintain ongoing communication.

#### **4.4. DOCUMENTING RELATIONSHIPS**

Documenting the relationship between CALS and a community is a pivotal moment in our engagement, particularly because it can reflect a deliberative process of negotiation. This documentation can take the form of a Power of Attorney (articulating the contours of a traditional attorney-client relationship), a Resolution (confirming the leadership structure appointed to act on behalf of the community), or a Memorandum of Understanding (reflecting a partnership between two or more parties). CALS is fully aware that most of these are standard documents usually drafted by the attorneys with little to no involvement by clients in the drafting process.

All of these documents represent a social contract between two or more parties that are meant to define the precise nature of the relationship between the parties. For this reason, we believe that documentation of the relationship between CALS and the community becomes the perfect site of discussion and negotiation about the goals and expectations of all parties, and an opportunity to put into writing the commitments made by each party. Parties to the relationship should justify the inclusion or exclusion of any terms, and the resulting document should reflect the process of these negotiations.

In respect of content, the document should contain the names of the parties, the precise nature of the legal strategy contemplated by the relationship, and the goals of the community in pursuing that legal strategy. Articulating community goals at the outset of this relationship could later be important if the community's goals shift and conflicts emerge. Also important to anticipate are potential issues that could arise in the course of the relationship. Due to the complexity of these issues, and shifts over time, the parties could agree to periodically re-assess the document at regular intervals to ensure that the relationship with CALS continues to serve the goals of the community. CALS could also propose 'deal-breakers', or terms within the document that, if not met, may cause a re-evaluation of the client/partner relationship.

#### 4.5. PROMOTING INCLUSIVE PARTICIPATION OF THE COMMUNITY

Community committees should regularly meet with the entire community it purports to represent in order to convey important information, and to seek meaningful input into the representation. To do this, committee members need to be provided with information that they can understand, is accessible, and that responds to the nature of the violations being experienced by the community.

CALS and committee members should employ creative strategies to ensure full participation, e.g. while one team member participates in the all-male indaba, another team member could assist the women in the community-allocated role of preparing food for the indaba, and in the process, conduct an informal meeting that covers the same issues as in the indaba. A similar strategy could be used to meet with young people who have different perspectives, but whose voices may not be taken as seriously in a larger community meeting.

CALS staff should resist attempts by one or a handful of vocal community members to dominate conversations. Where these attempts to bring in the voices of less powerful community members results in new opinions or ideas, CALS and committee members should create spaces for these perspectives to be meaningfully considered.

#### 4.6. JOINTLY DECIDING ON NATURE OF INTERVENTION

CALS' relationships with communities are action-oriented, and seek to assist communities to design and implement actions to respond to human rights violations. Proposed action plans should contemplate the active involvement of the community, and can encompass a range of lawyering strategies. CALS should strive to link the proposed actions back to the community's goals and to discuss possible and probable consequences of any particular legal strategy. CALS should also consider whether a *quid pro quo*, or providing something for taking something, is appropriate. For example, if the community agrees to be filmed, or to be researched, CALS could provide rights-based workshops on the particular violations being explored or could provide legal assistance for organising a protest or march.

Often developments take place, e.g. a corporation offers a settlement, which triggers a splintering within the community about what the proposed course of

action should be. CALS must explain the consequences of the different options presented, whether it is to continue with litigation (so as to publicly vindicate the community's desire to be heard) or to accept the settlement (to advance community goals of having the resources to build better lives) or other options. What is clear, however, that each of these options must be discussed in detail, weighing the pros and the cons, and with the community's collective goals in mind. Sometimes, it has been helpful for us to stay focused on the legal issues, and the facts, noting that division is often fuelled by personalities and politics. Throughout, though, CALS must remain vigilant in keeping the control of the process in the hands of the community.

Where the community decides to utilise a violent strategy, CALS can advise on the legal ramifications of so choosing but ultimately is not in a position to supersede the community's decision. What it must do, within its mandate, is to distance itself from any interventions that are illegal, while continuing to support the community with other legal interventions it may choose to advance in partnership with CALS. At all times, it should be conveyed to community members that they should feel comfortable to communicate any discomfort, withdrawal of consent or any grievances.

### **CASE STUDY**

#### **JOINTLY DECIDING ON NATURE OF INTERVENTION**

CALS was representing a group of women in a mine-affected community who wanted to march in protest against police violence. The protest was denied. CALS took the case to court on an urgent application. While the case was proceeding, the clients made it clear that they would march, with or without the court's approval. We decided together that the women would march in groups of fourteen (thereby coming in below the threshold of a 'gathering' in the legislation) and would move in separate groups keeping a distance between each one. It was not ultimately to implement the plan as we won the appeal to have the march lawfully.

#### **LESSON**

Part of the legal services we offer is to devise alternative and creative approaches to respond to an unjust action or policy implemented by a government agency or private actor is part of our legal services.

#### 4.7. BUILDING CAPACITY WITHIN COMMUNITY

CALS has many capacity building strategies it can employ. First, CALS can assist committees to develop and document their by-laws and dispute resolution mechanisms. Second, CALS can draw upon its network of community legal education providers to offer legal education workshops on a variety of topics and through different mediums. Third, CALS can use existing relationships with media outlets to offer assistance to communities interested in strengthening or establishing a community media presence through radio, newspapers, newsletters, etc.

Building community capacity in this manner is not just a good idea but is also mandated by the transformation project envisioned by the Constitution. Communities, which are the lifeblood of the Constitution, must receive the training, information and skills necessary to meaningfully participate in society. The UN similarly recognises the right of people living in poverty to fully participate in society and its decision-making processes and that the lack of such participation is both a "defining feature and cause of poverty, rather than just its consequence."<sup>24</sup> Participation undertaken with a rights foundation can encourage people "to be active agents in their own destiny; thus fundamentally important to reclaiming dignity."<sup>25</sup>

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<sup>24</sup> UN General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, A/HRC/23/36 (11 March 2013).

<sup>25</sup> *Ibid.*



### CASE STUDY

#### **BUILDING COMMUNITY CAPACITY**

The Mining and Environment Justice Community Organising Network (MEJCON)'s objectives include promoting and defending the rights of communities affected by mining, the training and capacitation of community members, accessing information about mining law and impacts and to engage all relevant role-players including government at all levels, industry, civil society, traditional leaders and chapter 9 institutions. MEJCON grew out of MECA, a collective of civil society organisations working on mining and environmental issues. The clients of these civil society organisations started to attend MECA meetings, and after coming together, decided to form another structure that would directly represent the communities affected by mining and environmental violations. A civil society partner assisted MEJCON with forming and drafting a constitution. MEJCON is a member of MECA, along with civil society organisations, and reports bi-annually on its activities. MEJCON functions as a network, with a steering committee and representatives from communities in 5-6 provinces in South Africa.

#### **LESSON**

MEJCON was the only coalition of voices directly from mine-affected communities which made submissions on the Mineral Resources and Petroleum Development Act Amendment Bill. Traditional, more elite civil society organisations can facilitate the development of these community-based organisations.

#### **4.8. FACILITATING STRONG LEADERSHIP STRUCTURES**

Time and time again, the most effective community lawyering relationships and legal strategies are found where strong community leadership structures exist. CALS investment in training and capacitating committees to develop leadership skills therefore cannot be overstated. All aspects of building leadership should be explored, from developing crucial management skills to understanding relevant legal principles and processes to being properly trained as community facilitators and researchers. For this reason, committee members must be chosen deliberately and those who already assume leadership roles within the community, whether publicly or more behind the scenes, must be identified. Identifying well-respected elders, and women, and youth, irrespective of

whether they have formal leadership titles yet within the community, becomes critical in creating a cohort of leaders who may have otherwise been overlooked in favour of concentrating power within only certain individuals. Developing the interest, passion and capacity of these individuals to be effective committee members working on behalf of their broader communities becomes an important tool in advancing empowerment, in its truest sense, for the community at large.

Certain characteristics tend to produce good committees:

- Vocal members (often younger community members)
- Legitimacy within social group
- Acceptance within broader community
- Relevant skills
- Knowledge of community's history and culture
- Commitment to shared vision of social justice
- Availability

Leadership structures can exist either for the purposes of the partnership or more generally to advocate for the larger community with external actors and processes. These structures must be formalised, with communities determining how the committees should be constituted, which dispute resolution mechanisms to put into place, and how to ensure representative voices are included. These structures must account to the broader community, with whom they should conduct regular meetings and remain responsive. Finally, committees should document the proceedings of their own internal meetings to remain accountable and ensure full participation of the members of the committee.

How communities choose to select their committees will vary, but some tried and tested methods include:

- Through election;
- Through nomination by each social group present in the community; or
- Through a selection committee.

CALS can present a range of options regarding leadership structures and carefully explain each possibility, with its processes and consequences.

In the event of division within a community, CALS will attempt to identify the cause of the division and explain the legal permutations of each proposed position. CALS recognises its limitations and will not seek to mediate or

contribute further to the division. CALS will, however, be courageous in its position as an equal partner with the communities.

### **CASE STUDY**

#### **DEMOCRATIC LEADERSHIP STRUCTURES WITHIN COMMUNITY**

CALS was approached by a group of community members who identified themselves as the committee of the residents of approximately 5000 households in an informal settlement. Over time, as our relationship with this group developed, we noticed that the committee members were not working together. At a meeting held with the committee, we found that a sense of mistrust had developed amongst the committee members. The cause of the mistrust, as we understood it, was that two key members of the committee had been selected by a government office dealing with housing issues to form a steering committee. The committee foresaw a potential conflict of interest and agreed that these two selected members could no longer actively participate in the committee. This presented a challenge, however, in that these two individuals were key members of the committee and without them the committee struggled. One of the two members (the chairperson) resigned openly at the meeting. As a result of her resignation and the issues that arose at the meeting, we advised that the committee re-elect a committee.

#### **LESSON**

Our role must be one that attempts to stay impartial and not side with any particular factions within the community. We should promote a structure that responds to the community's desires but that will also be sustainable in the long term. We must provide information about models of committee structures and provide rigorous explanations, and perhaps workshops, about how to establish and sustain these structures.

#### 4.9. FOLLOW THROUGH WITH COMMUNITY ON OUTCOME OF INTERVENTION

Community relationships often fall apart when lawyers disappear after gaining the information they deem necessary to effectuate a particular legal strategy. CALS must remain vigilant in communicating with committees the progress of a particular strategy, or developments that have occurred. In communicating with its clients, CALS aims to use one of the following methods:

- Through a paralegal that is based in that community;
- Through a representative based in the community who is part of a local grassroots organisation, local church or school;
- Being present at community meetings;
- Social media where it is relevant; and
- Text messaging where it is relevant.

We aim to build community trust by being consistent in our communication with the community and providing them with regular updates in relation to the progress we are making. CALS attorneys understand that frequent face-to-face meetings with the community will be a crucial part of establishing their trust, but where that is not always possible will endeavour to find other ways to stay connected.

As stated before, CALS believes in investing in its partner and client communities over the long-term, and as such, it must commit to maintaining the relationships.

We also deem it necessary to collaborate with communities to evaluate the success of our interventions in respect of the impacts it has had on a community, in society, and in influencing some change in the system. The community partnership-based interventions are invariably complex and can therefore be very challenging to evaluate. Outputs and impacts are generally diverse and often unexpected. Accordingly, building an evaluative tool into all of our community partnerships is important for us to gather information that will allow us to gauge our partnerships and representation and, if necessary, to make improvements for future interventions.

Some indicators of success include, but are not limited to:

- The intervention has been effective in achieving its aims
- Community members have benefited from our involvement
- The partnership approach was the best and most appropriate choice
- There is some form of change in the system

#### **4.10. ENGAGING IN SELF-REFLECTION**

As stated above, the lawyer's role is infused with great amounts of power. It thus is imperative for CALS staff to continually re-assess whether it is exercising that power responsibly and to advance the shared vision of social justice. CALS commits itself to developing an internal practice of self-scrutiny and self-reflection, and to support each other in that process. We will invest the appropriate resources to build our cross-cultural competencies, to develop structures that facilitate self-reflection, such as staff training and mentorship, and to develop mechanisms whereby our community partners and clients can evaluate our lawyering. We will also invest in paying for psycho-social experts to support staff self-care and to process emotional responses to our work.

Self-awareness is an ongoing process, and each and every member of CALS staff must commit himself and herself to engaging in honest, sometimes painful, conversations about our privilege and positioning within the communities with whom we partner. We must recognise that this work is deeply personal, and that transformation of the repositories of power very integrally includes our own self-transformation.

CALS teams are required to engage in a team de-briefing upon their return from engagement with a client, where the visits are over a period of time, that these reflection sessions will occur daily. Where practicable, CALS will also encourage community members to join us in these reflection sessions to provide us with feedback on how to improve our engagement with them.

#### **4.11. FORGING BROADER PARTNERSHIPS**

CALS carefully engages in local and global partnerships with human rights entities that similarly adopt an intentional and critical approach to their work. In preparing for a community site visit of a partner, the partner must review and accept the terms of CALS' community engagement policy. CALS must provide a rigorous and thorough briefing to the partner before facilitating access to the community. The partner should not limit their understanding to desktop research but should also obtain information about customs and attitudes.

If, at any point, CALS feels that there may be potential for damage to its relationships with communities by allowing the partner access, it retains

discretion to limit or cancel community site visits. CALS will also visit the community before the proposed visit, explain the vision for the partnership, and obtain informed consent from community members who will be affected by the site visit.

Throughout the site visit, the partner will be accompanied by at least one CALS staff member at all times. Team size should be limited to avoid the appearance of “descending” upon the community, and to the extent possible, observation and minimal interference with daily activities should be preferred strategies. The partner must also agree not to objectify the individuals living in the community by capturing photographs or recording videos (unless otherwise agreed for filming/documentation purposes related to the legal strategy). CALS and the partner must also agree on what will occur with the information collected during the site visit. All of these agreements should be discussed and memorialized in a memorandum of understanding with the partner.



