

Comments regarding the

Submissions on Guideline for The Compilation of a Mandatory Code of Practice for the Mitigation and Management of Covid-19 Outbreak

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A) Introduction

1. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. It does so in a way that makes creative use of the tools of research, advocacy and litigation, adopting an intersectional and gendered understanding of human rights violations.

2. Our submissions intend to highlight issues for consideration in the creation of the guidelines, responding not only to occupational health and safety issues but an unprecedented public health challenge extending to communities.

B) Background

3. CALS recently represented Mine-Affected Communities United in Action (MACUA) in the Labour Court case which resulted in the judgment requiring mining affected communities and other affected organisations to be consulted in crafting guidelines for combatting the spread of COVID within the mining industry.

4. The aforementioned consultation comprised of an electronic conference call in which CALS participated together with MACUA, Mining and Environmental Justice Community Network of South Africa (MEJCON-SA) and the Centre for Environmental Rights on 8 May 2020. MACUA gave the main presentation and we, as CALS, made



minor additions. Upon your request CALS also submitted additional follow-up comments that were submitted on the 8th of May 2020.

C) Adequacy of Public Participation Given the Importance of the Guideline for the Mitigation and Management of Covid-19 Outbreak

5. The importance of these guidelines cannot be over exaggerated, being the key intersecting document that directs action within the mining sector in relation to health and safety within a global pandemic. South Africa is also particularly vulnerable with significant levels of inequality and a lack of basic services putting mine-affected communities at particular risk.
6. The recognition of mining communities in the judgment paved the way for meaningful consultation. It was with excitement that CALS and MACUA as well as other organisations awaited the impending court mandated participation process.
7. The consultation and drafting of the Guideline for the Mitigation and Management of Covid-19 Outbreak was to occur within a truncated timeframe on an urgent basis. The urgency of the process would certainly have an impact on how inclusive and meaningful the consultation could be.
8. The consultation of the 8th of May 2020 gave space to mine-community representatives to ventilate their issues with regards to the Draft Guidelines, the most pressing being that communities were not at all mentioned or represented in the text of the Draft Guidelines. Numerous issues were raised by the MACUA submission, all of which CALS support whole-heartedly. The main areas raised by the MACUA submission was the context within which mine-communities live, the particular challenges faced by communities and the way in which the final Guidelines should reflect community interests and concerns.



9. The consultation on the 8th of May 2020 was overall a satisfactory engagement and the DMRE promised additional meetings the following day. During the consultation MACUA requested that civil society organisations be represented on the task team. The Chief Inspector of Mines consequently invited two community colleagues to represent the delegation at the negotiating deliberations on the 9th of May 2020.

10. On the 9th of May 2020 two representatives from MACUA and WAMUA were included in the DMRE negotiation meeting. The MACUA and WAMUA representatives, again, raised numerous issues which focused on the need of mining communities and the corresponding obligations of both the state and mining companies.

11. These consultations highlighted the significant barriers experienced by members of directly affected groups such as mine-affected communities in relation to resources, location and language, and the need for the Guideline to reflect their needs and priorities. For meaningful consultation to be achieved it is vital that more extensive public participation be undertaken than a mere 2 (two days) notice to attend a meeting and an additional 3 (three) days comment period on a finished draft.

12. There are a large number of active mine-based community organisations and movements around the country that need to be included in deliberations that impact their health and livelihoods. This urgent and truncated timeframe has the effect of directly excluding any of these organisations.



D) Weight Accorded to Community Comment in Draft Guideline

13. We had hoped that the guidelines and codes of practice would be developed in a manner that takes a mine-affected community-centred approach and not just focus on the mine staff. There is a high likelihood that communities will be affected directly by returning mineworkers transmitting communicable diseases and we had hoped that community input would not only be considered but would influence the final draft of the Guideline. This has unfortunately not been the case.

14. Multiple submissions have now been made by a variety of organisations, and from what we can see, none of these suggestions have made it into the Draft Guideline. Meaningful consultation requires decision-makers and the drafters of the Guideline to not merely pay lip-service to communities but rather ensure that viable comments be included in the final product. This has certainly not occurred in this case and it is unfortunate that communities are still not regarded as central stakeholders to this process despite a court order.

15. Any guideline that is genuinely inclusive cannot be presented to communities as a fait accompli, but must rather be the product of deliberation that includes these movements and the communities they represent as equals.

16. We are in full support of MACUA when they say, "Our submissions were detailed and reasonable and placed the interests of the community alongside those of workers and argued mining affected communities are particularly vulnerable to severe and even fatal cases of Covid-19 so as to warrant special protection. Unless targeted prevention measures are put in place and health facilities are scaled-up in mining affected communities, Black working class and poor women in communities are likely to suffer the worst of this pandemic."



E) Connection Between Mining Company Responsibility and Mine Community Health

17. The connection between mining company responsibility and mine community health and well-being is well established. The SLP system has a dedicated section that focuses on communicable diseases. The Minister has also clearly stated that rehabilitation provisions and SLP funds can be directed to COVID-19 response measures. SLPs also have a dedicated section dedicated to Local Economic Development (LED) projects that are meant to benefit local mine communities. These LED projects, moreover, have health related obligations in that clinics and medical staff are often a core part of the SLP project obligations. The link between mine responsibility and community health is thus well-established.

F) Comments Directly Linked to Provisions in the Draft Guideline

18. **Clause 5.** - Where a coordinated approach is employed involving other mine obligations towards communities, mines could be mandated to include/account for surrounding communities as part of general information.

19. **Clause 5.6** - Risk assessments should include health due diligence on the impact a mine's activities has and could have on the surrounding communities as well.

20. **Clause 8.** – Needs to include community concerns under 'Key Elements to be Addressed in COP'

21. **Clause 8.1.6/7** – the Guideline needs to identify the level of risk of exposure for vulnerable communities who interact with employees, not just that of employees.



22. Clause **8.3.1.2** – Mines should be assisting the state in helping with screening of community members, this would require that they extend or open up screening points for communities outside the mine.

23. **Clause 8.3.3.9** – While we appreciate medical masks are to be reserved for medical staff in light of the shortage, we don't think cloth masks are appropriate for congested underground spaces where social distancing cannot be implemented. The distinction on masks to be used under those circumstance should be articulated in the guideline.

24. **Clause 8.3.5.3** – In light of the deadly and highly contagious nature of COVID 19 measures aimed at prevention and early detection are crucial as opposed to focussing on just containing the spread of the pandemic. It is thus inadequate to only test individuals presenting with symptoms. It might be more prudent to test everyone returning to work as a starting point and from there conduct screening and targeted testing. On raising this concern we were informed that this was prohibited under health guidelines. On further scrutiny we don't find support for this defence.

25. **Clause 8.3.7.1 (iii)** - We link our comment on this section with the concern expressed above as they were addressed simultaneously. We remain concerned that there is no mention of facilities for quarantine. Mines had undertaken to assist in this regard. While we appreciate that not all mining operations are able to provide quarantine facilities, bigger mines should be required to assist communities in this regard. This was an undertaking they made not to mention they contribute to the overcrowding and densified conditions of mining communities which make it near impossible to self-isolate. Mines need to shoulder some of the burden and cost on communities in handling infected miners at the very least.



26. **Clause 8.3.9.6** – Using Biometrics given the highly contagious and easily transmittable nature of the virus is not ideal. With concerns from employees that employers don't always have sanitisers at hand we recommend that there be appropriate sanctions where mines are reckless in this regard.

27. **Clause 8.5** – While compensation is more applicable in an employer-employee relationship where an employee contracts COVID 19 at the work place, it might be more apt to think of a support fund where families are infected by miners but do not stand to benefit directly from the miner receiving compensation.

28. **Implementation Plan**

Clause 3 provides for access to the code of practice and related documents. We submit that in order to ensure they are accessible to communities during a time where mobility is limited, the best way to ensure accessibility is to ensure they are published on company websites and not confined to inspection at the physical premises at mines.

G) Conclusion

29. Mining affected communities are a critical part of the commercial mining dynamic. Not only does the community provide and receive mine workers but it supports the entire social fabric of the broader community. The entire environmental, mineral and constitutional framework supports the community role in development, particularly in invasive and highly impactful developments. The Labour Court Judgement has reaffirmed mining affected communities` rights and their critical role within policy and regulatory processes that impact their constituents.



30. Miners are a central part of the community and separating the two due to political or economic reasons is not only legally questionable, but further marginalises already excluded members of the community. The manner in which community and civil society inputs have *not* been taken into consideration calls into question the respect and bona fides of the department. This would be a perfect opportunity to chart a new course in mine-community and civil society relations. We hope that the final Guidelines have considered and included a community centred approach to the COVID-19 pandemic, in particular the vulnerabilities and lived-realities that exist in communities surrounded by mining developments.

We avail ourselves for any further assistance or clarity.

Sincerely,

The Centre for Applied Legal Studies

ENDS.

