

Submission

to the

Department of Justice and Constitutional Development

on the

**DRAFT CODE OF GOOD ADMINISTRATIVE CONDUCT: THE PROMOTION OF
ADMINISTRATIVE JUSTICE ACT, 2000**

February 2017

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A) INTRODUCTION

About the Centre for Applied Legal Studies and its Rule of Law Programme

1. The Centre for Applied Legal Studies ('CALs') welcomes the opportunity to submit comments on the Draft Code of Good Administrative Conduct: The Promotion of Administrative Justice Act, 2000 ("the Draft Code") in response to a call by the Department of Justice and Constitutional Development ("the Department").
2. In the event that the Department hosts public hearings or consultative meetings on the Draft Code, CALs hereby requests an invitation to the same and the opportunity to be heard at such hearing or meeting.
3. 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.
4. Our vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. In aspiring towards this vision, our mission is to:
 - Deconstruct the legacy of apartheid;
 - Challenge and hold to account systems that perpetuate harm, poverty, inequality and human rights violations; and
 - Reconstruct an inclusive and equal society.
5. In order to achieve this, we do research, advocacy and strategic litigation. CALs operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law. The Rule of Law Programme was established in around 2009. The aim of the Programme is to

protect the systems of democracy, challenge structural violence, protect civil and political rights, and challenge discrimination against people living in poverty.

6. In addition, the work done in the Programme is to entrench the supremacy of the constitution and the rule of law in the various branches of government and in the private sector. In addition, and across all programmes, CALS often submits comments on regulations, laws and policies. Some of CALS' Rule of Law submissions can be found [here](#) .

CALS' Submissions in Brief

7. In summation, CALS submits that the Department amend the Draft Code to:
 - 7.1. Enable more extensive public consultations on the Draft Code itself and to enable more extensive public consultations by administrators on their decision making, subject to clearer guidelines for consultation processes;
 - 7.2. Promote transparency and access to information on the functions and decisions of the administrators; and
 - 7.3. Incorporate a number of practical suggestions for the daily public functions of administrators in their various offices.

B) CONSULTATION

The Need for Broad Consultation on the Draft Code of Good Administrative Conduct

8. Consultation is a requirement in terms of South African law. The founding provisions of the South African Constitution state that our democracy is founded on the values of accountability, responsiveness and openness.¹
9. Given the significant role played by administrators in the daily business of government, the final version of the Draft Code will impact the method of operation of not only administrators but also the public in general. It follows therefore that all interested parties should be given the opportunity to engage with and comment on the document. The Draft Code should not only have been made available online but should also be made available in other more accessible platforms to the public such as television, radio and print media in the public's home languages.
10. It appears that the Draft Code is only available for public comment through an electronic portal. It also appears to only be available in English despite the fact that English is only the mother tongue of 9.6% of the South African population.² This makes the formulation of the Notice contrary to sections 195(1)(e), (f) and (g) of the Constitution which provide the following;
 - 10.1 That the public must be encouraged to participate in policy making;
 - 10.2 That public administration must be accountable; and
 - 10.3 That transparency must be fostered by providing the public with timely, accessible and accurate information.

Methodologies of Community Consultation

11. We are appreciative that public administrators engage regularly with various stakeholders. Because CALS has almost 40 years' experience of engaging with

¹ Constitution, section 1(d).

² *The Languages of South Africa*, available at <http://www.southafrica.info/about/people/language.htm#.VzLsldL5jGg>.

large community groups, we thought it may be helpful to share some of this institutional knowledge with the Department.

12. We have attempted to capture some of this knowledge and experience in our 'Community Engagement Policy' which serves as a guide to navigate our consultations and engagements with communities in a manner that facilitates meaningful representation and mitigates power imbalances. CALS recommends that the Department (and/or administrators) incorporate the numerous guidelines and methodologies captured in the CALS Community Engagement Policy into the Draft Code. CALS' Community Engagement Policy can be accessed [here](#).
13. CALS is keen on providing hard copies of the Engagement Policy if that would assist. We would also welcome the opportunity to discuss some of the challenges inherent in community consultation and some ideas for how to overcome those.

Recommendations on Consultation

14. Below are a number of recommendations on the Draft Code that CALS makes in respect of consultations by administrators with individuals and communities.
 - 14.1 Throughout Chapter 6 (consultation procedures where the public is affected), there are suggested additional steps and or special steps that may be taken by administrators where the persons affected are unlikely or unable to submit written comments, most likely due to illiteracy. The concern CALS has with these provisions is how one tells whether a particular community is unable to make written comments and/or whether members of a particular community are unable to read and write? It is rare to find a homogenous community where everyone is either able to read and write, or not. In most communities, there will be a combination of people who can and cannot read and write. CALS therefore recommends that the special and additional steps referred to in Chapter 6 be mandatory steps, in order for there to be as much inclusivity as possible in consultations.

14.2 CALS recommends that whilst administrators take comprehensive notes on the public consultations, instead of merely submitting a signed register of people that attended a public inquiry for example, that administrators encourage community members to also contribute to the record taking of the consultations. CALS is keen on further elaborating on how this may work out practically and why it is important that communities contribute to the record taking of the consultations.

C) ACCESS TO INFORMATION AND TRANSPARENCY

15. In our experience as a law clinic and as noted in Chapter 1 of the Draft Code, the right to just administrative action is often dependent on and indivisible from, other rights. It may therefore be difficult or impossible, in certain circumstances for individuals and community members to exercise their right to just administrative action if they do not have the knowledge or information on the decisions that are being debated, or the processes that administrators ought to be taking in order to make those decisions.
16. It is imperative for individuals and community members to have access to information and thus knowledge of the different processes used by administrators in administrative decision-making. If people are informed of such processes and decisions, this creates transparency. Transparency consequently promotes meaningful participation, engagement and accountability.

Recommendations on Transparency and Access to Information

17. Below are a number of recommendations on the Draft Code that CALS makes on how administrators can promote transparency and access to information for individuals and community members.

17.1 Chapter 9 of the Draft Code details how administrators should communicate decisions to individuals and community members. CALS recommends that reports on decisions, particularly where an administrator

compiled a written report following a public inquiry, should be easily accessible for the public at large. CALS recommends that such reports and all other relevant documentation, be classified as automatically available information from the relevant public body, without individuals or community members having to request for the record in terms of the Promotion of Access to Information Act.

17.2 CALS further recommends that such reports, in addition to being distributed to the affected people, be posted on the websites of the relevant public bodies.

17.3 In some chapters of the Draft Code, there is flow chart that summarises for the administrator, the steps to take at every stage of the administrative decision/action. These flow charts will be very useful for the administrator. CALS recommends that the same flow charts be shared (and explained to) individuals and community members that will be affected by the decision as soon as possible. The flow charts coupled with the explanation of the charts should be made available by the administrator at the very first point of contact between an administrator and an applicant/or a person who is seeking an administrative decision. The purpose of providing the flow charts and explanation is for the applicant or the person who is seeking an administrative decision, to be made aware of the administrative process that is about to unfold, in great detail. In addition or as an alternative, CALS recommends that where possible, individuals and community members be provided with a toolkit or a manual or a brief guideline that sets out the similar information to that of the flow chart.

17.4 Paragraph 9.9 of the Draft Code outlines what an administrator ought to do after compiling a report that will inform the affected persons of the decision. The paragraph states that the administrator should publish the report in the Government Gazette and convey the report by other means of communication which the administrator considers effective. This is inadequate and should be more prescriptive. CALS recommends that the additional referred to under paragraphs 6.29 (holding of public meetings and other methods of publicity such as press releases, press conferences,

internet, radio, notices, etc.) be taken by administrators, as a mandatory requirement, when decisions are reported.

17.5 Finally, chapter 1 of the Draft Code sets out the regulatory framework that shapes the requirements of good administrative conduct. In particular, Chapter 1 takes a closer look at specifically sections 33 and 195 of the Constitution. In light of the fact that the right to just administrative action is often dependent on and indivisible from, other constitutional rights, CALS recommends that Chapter 1 also recognise the rights to access to information, access to justice and other relevant rights as the other rights set out in the Constitution.

D) OTHER RECOMMENDATIONS FOR ADMINISTRATORS

18. Below, are three additional recommendations pertaining to the daily tasks of public administrators.

18.1 CALS recommends that administrators attend training and/or specialised courses that cover the following content:

18.1.1 Discrimination in the work place in order for administrators to combat sexism, racism, homophobia, xenophobia and other forms of discrimination and bias in the workplace. Such anti-discrimination training is essential in order for administrators to make decisions which are procedurally fair and void of any bias – see paragraph 4.2 of the Draft Code.

18.1.2 Short legal courses on the substantive and procedural aspects of the area of public law that each administrator works in. It is essential that administrators are not only well averse with their daily administrative tasks procedurally, but that they are well averse with law that is applicable to their office. For example, an administrator who works at the Department of Home Affairs should attend short courses on the Refugee Act 130 of 1998. Such legal courses will also minimize the chances of administrators acting outside the scope

of their powers. The Draft Code cautions administrators to not act outside the powers that have been conferred on them – see paragraph 3.1 of the Draft Code.

18.2 CALS recommends that public administrators place, in their offices and/or workspaces at their offices, boxes for suggestions and/or complaints where individuals and community members may leave suggestion notes or complaints. Such a measure would create a system where the public can express their concerns and suggestions. The suggestions and concerns should then be assessed by administrators with the view of resolving the concerns or responding to people's needs as is required by s 195 (1)(e) of the Constitution. Further, the implementation of such a measure will promote redress, as required by the 7th Batho Pele Principle.

18.3 CALS recommends that the Draft Code be workshopped (explained to and/or discussed with) to as many administrators as possible. Considering the importance of the Draft Code, mere circulation of the Code is insufficient and will not achieve the purpose of the drafting of the Code.

E) CONCLUSION

19. CALS commends the Department of Justice and Constitutional Development for drafting a well-considered Code of Good Administrative Conduct. We thank the Department again for the opportunity to input into this process and look forward to engaging with further.