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AN EXPLORATORY STUDY ON PUBLIC SERVICE COMPLIANCE TO THE CODE OF CONDUCT AND RELATED ISSUES ON CONFLICT OF INTEREST IN SOUTH AFRICA; A LEADERSHIP PERSPECTIVE

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ABSTRACT

Leadership in many environments, micro or macro sets the tone of what is acceptable behaviour. Leaders should be exemplary in their conduct, as their conduct may be used as standards by those they lead. Being exemplary includes their compliance to various regulatory guides such as the Codes of Conduct. The authors argue that if leadership do not comply with the codes of conduct then employees will follow suit by disregarding various aspects of the Code. This will lead to indiscipline and institutionalise corruption in the South African public service hence; there should be zero tolerance for non-compliance of the codes, especially by leaders, but beyond that it should be about developing a new ethical culture more than just compliance. In the examining of the ethical conduct of employees, we will be looking specifically at the adherence to Codes of Conduct and issues related to conflict of interest, as financial disclosure is a requirement for public servants employed at senior management level. The purpose of this paper is to discuss the theoretical and legislative framework underpinning the ethical leadership in South Africa, and to reflect on the Code of Conduct and the impact on the ethical conduct of senior managers in the public service. This is with particular reference to managing conflict of interest within the stakeholders. It will also consider whether the disclosure and ethical provisions are adequate and or appropriate to promote appropriate levels of ethical conduct, and finally to assess the impact.

KEYWORDS: leadership, public servants, ethics, ethical code and compliance

1 INTRODUCTION AND BACKGROUND

Codes of Conduct are critical in managing people and in ensuring that there is a framework to establish behavioural norms and standards, with regard to how the expected universal behaviour of public servants worldwide. They are utilised as enforceable guides that promote the highest standards of ethical conduct, outline appropriate professional behaviour, demarcates prohibited behaviour, provide rules for the resolution of conflicts of interests and sets forth the requirements of the disclosure of financial interests. These provisions are intended to prevent corruption and are the basis of an integrity framework.

The South African government has indeed developed appropriate policies and framework to guide government activities including conduct of Officials. In 2008, Ms Geraldine Fraser-Moleketi, the then Minister of Public Service and Administration stated that 'In pursuing a development agenda the collaboration between government and business is critical, because information exchange is a prerequisite for effective policy formation and implementation. A professional meritocratic bureaucracy is a key condition for preventing collaboration from degenerating into collusion and corruption. But the bureaucracy must be steeped in a strong code of conduct and a code of ethics. These Codes need to be implemented and rigorously enforced' (keynote address, Third Anti-Corruption Summit, 2008)

This exploratory research assess the ethical requirements, the disclosure of financial interests by the senior management service in the Public Service; and the extent to which this level of management complies with the requirements of the disclosure of financial interests which forms a portion of the broader integrity framework. In the main, the disclosure of financial interests assists in the extracting of accountability from public servants and requiring openness regarding their private interests. The research will broadly reflect on the implementation this so far and reflect on issues related to non-compliance and the ethical culture.

2 METHODOLOGY

This research relies primarily on secondary data, including vital reports from various institutions including the Auditor General's office and the Public Service commission. The research will utilise time series data to measure the impact of the existing measures.

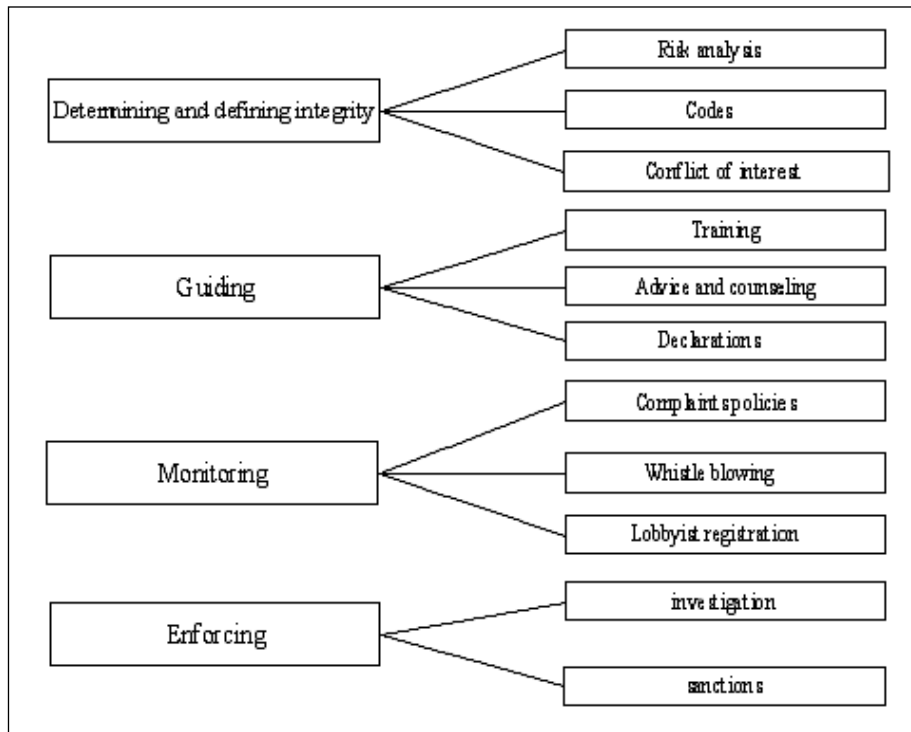
The research will compare the outcomes of the assessment of the state of professional ethics conducted by the Public Service Commission in two provinces, namely Limpopo and KwaZulu Natal and assess the extent to which data correlates with the Auditor General's 2008 report on Performance Audit of Entities. These explored the issue of government employees doing business with the departments of the Limpopo and KwaZulu Natal Provincial Administrations, while the Auditor General's reports focuses on issues of compliance to the Public Finance Management Act, compliance to the disclosure requirements of the Code of Conduct and Regulations of the Public Service Act. It also reflects on the inconsistent application of criteria in the award of tenders and the Departmental responses on corrective action. The Audit gives insight on the requirements relating to impartiality, substantive fairness and integrity of officials. This research will therefore seek to correlate the two separate sets of data from these two provinces as it relates to the issues of leadership, culture in the South African context.

3 THEORETICAL FRAMEWORK

The systems theory provides the theoretical basis of this paper. The research is based on the premise that ethical conduct and professional ethics are all influenced by the organisational culture, which could have been a product of the interaction of varied sub-systems in the Macro environment.

For the public service to be ethical, the interaction of the various sub-systems in the larger system must be taken into consideration. In this case, the researchers argue that compliance to the Codes of Conduct must be enforced, to support the drive for ethical conduct across all levels of government, as non-compliance in various sub-systems ultimately weaken the larger system. In other words, the large governance issues are shaped by the nature of the sub-systems. If there is unethical conduct due to non-compliance it will have an impact on other processes, as these all function and interact within a larger system. The drive for enforcement and compliance should be considered from a comprehensive systems perspective with a recognition of the role of that culture and attitudinal orientation can play. The integrity framework should therefore be viewed from a systems point of view and not from an isolated point of view.

The integrity framework (OECD, www.oecd.org/gov/ethics/integrity accessed 10 March 2013) consists of three key pillars which are the instruments that need to be in place to guide behaviour, processes and structures that support appropriate ethical conduct.



The research will consider the integrity framework and its various instruments including the Codes of Conduct, compliance and sanctions. It will assess these relationship and its relationship to good governance.

4 LEGISLATIVE FRAMEWORK

In assessing the ethical conduct for Public Servants, an overview of the provisions dealing with ethical conduct will be outlined; these include the relevant provisions from the Constitution, the Public Service Act and Public Service regulations. Consideration will be given to the Public Finance Management Act and the Prevention and Combating of Corruption Act in so far as it is relevant in terms of the integrity framework.

The Constitution of the Republic of South Africa.108 of 1996

The Constitution requires that the Public Service develop high standards of professional ethics, efficiency, economy and effectiveness; have a development-orientation; be impartial; fair, equitable and without bias. It calls for responsiveness and accountability to the public and requires transparency when a public servant performs his or her duty. The Constitution also establishes the Public Service Commission to promote the values and principles outlined above. As an independent institution to support democracy it reports directly to the National Assembly. The basis of ethical conduct for public servants in South Africa emanate from the Constitution, Paragraph 195(1) which require governance by democratic values and principles enshrined in the Constitution; and that high standards of professional ethics be promoted and maintained. The Constitutional requirements place an onus on the public service to not only maintain and promote high ethical conduct, but that the ethical conduct should be guided by the democratic values of accountability, responsiveness and openness as outlined in paragraph 1 (d) of the Constitution.

Public Service Act.103 of 1994

The Public Service Act, 103 of 1994, paragraph 3(1) places responsibility on the Minister of Public Service and Administration for establishing norms and standards relating to integrity, ethics, conduct and anti-corruption in the public service. Section 30, of the Public Service Act stipulates that no employee shall engage in remunerative work outside his or her employment except with the written permission of the Executive Authority of the department. The Executive Authority shall take into account whether the outside work could be expected to interfere or impede the efficiency or efficacy of the employees function or could contravene a provision of the Code of Conduct. Section 7(3) (b) places the duty on Heads of Department to ensure that employees conform to the basic values and principles governing public administration and the norms and standards prescribed by the Act.

Section 31(a)(l) states that if an employee receives any remuneration, allowance or other reward other than remuneration that the money or value thereof must be paid into the revenue account. The Head of Department may approve that the employee retain the remuneration, reward or allowance.

Public Service Regulations .R1 of 2001

Public Service Regulation chapter two outlines the Code of Conduct for the Public Service. It

contains the principles and values by which public servants are expected to act. In the paragraph on purpose, employees are urged to comply and utilise the Code as a guide to exemplary conduct. It requires public servants to abide by the Constitution, put the public interests first, and be loyal in the execution of policy. In the interaction with the public employees are expected to serve in an unbiased and impartial manner, be polite and helpful, not unfairly discriminate, not promote or prejudice any political party. Employees in their interaction with other employees are expected to refrain from favouring relatives, friends nor to abuse authority or influence.

Employees should not engage in any act which causes a conflict of interests, they should report inappropriate or unethical behaviour, honour confidentiality, give impartial advice, promote sound, accountable and transparent government. Should not disclose information for personal gain, nor use his position to solicit gifts or accept any gift which may be construed as a bribe. The public servant may not undertake remunerative work without permission or use official resources for that work.

Employees are required to disclose the following interests, shares and other financial interests, directorships and partnerships, gifts and hospitality from a source, sponsorships, remunerated work outside the public service, consultancies and retainerships, gifts and hospitality from a source other than a family member. Ownership and other interests in land and property. The forms are submitted to the Executing Authority and a copy is sent to the Public service Commission. Other access must be requested in terms of Section 11 of the Promotion of Access to information Act. The Code stipulates that failure to disclose or wilfully providing incorrect information constitutes misconduct.

Public Finance Management Act.1 of 1999

The Public Finance Management Act Section 81 states that the accounting officer for a department commits an act of financial misconduct if she/he does not take effective and appropriate disciplinary steps when any person makes or permits an unauthorized expenditure, an irregular expenditure or a fruitless and wasteful expenditure. This also (in terms of Sections 39, 40, 41) places further reporting requirements on the accounting officer in the interests of good governance.

The Prevention and Combating of Corruption Act requires that all cases where employees are found guilty of corruption and the value exceeds R100 000 must be reported for criminal investigation.

Other relevant documents include

- The Promotion of the Access to Information Act.2 of 2000.
- The Promotion of Administrative Justice Act.3 of 2000.
- The Protected Disclosures Act.26 of 2000.
- The Prevention and Combating of Corruption Act.12 of 2004.

The adherence to these is overseen by various institutions including the Parliament, which plays an oversight over the executive. This requires that Parliament ensure that departments and the

Executive Authorities act in terms of the prescribed legislative framework and to ensure that they implement the policies effectively.

5 A CRITICAL ANALYSIS OF SELECTED ELEMENTS RELATED TO THE INTEGRITY FRAMEWORK

An analysis of the entire integrity framework is a mammoth task. The researchers have focused primarily on issues related to the Code of Conduct and Conflict of Interest as way of delineating the study.

• The code of conduct

Effective ethics codes are not merely text. Rather, they exemplify the fundamental principles and values of a public service. These can include more legalistic precepts, such as restrictions on conflicts of interest. Codes can also contain values. But the critical elements in a code are the clear articulation of principles that are derived from values. This distinction has its clearest conceptualization in the 18 century writings of Jeremy Bentham in Gilman (2005). For him a principle was “a general law or rule that guides behaviour or decisions,” whereas values articulate “an aspiration of an ideal moral state”. A number of the key issues identified are reflected below.

Firstly, the requirement for obtaining permission from the Executive Authority before undertaking paid work. The extent to which this is observed is questionable. Although the rationale for this may be clear, what is evident is that officials in the lower levels of the Public Service have very limited proximity and access to Executive Members, thus making this provision very impractical. Secondly, despite the requirement of the Code of Conduct that Heads of Department ensure that employees conform to the requirements of the Code, particularly with regard to Senior Management Services disclosures directly to the Executive Authority, (who submit the disclosures directly to the Public Service Commission) there has been difficulties with implementation as this causes problems in three respects,

- Firstly the onus to ensure compliance to the disclosure requirements does not lie with the Head of Department, thus weakening the line of hierarchical accountability.
- Secondly, conflicts of interests related directly to the line function of the employee are better assessed by the Head of Department who is responsible for allocating work within the Department. Executive Authorities and the Public Service Commission may be too far from the employee's actual work to correctly assess conflict of interests.
- Lastly, limiting access of the disclosure to the Executive Authority and the Public Service Commission undermines transparency and limits accountability.

Thirdly, in assessing the disclosure requirements, the disclosure requirements relating to shares are not properly defined. A definition of a share is self-evident, however, a financial interest is not defined, and to assist with compliance further elaboration of what constitutes financial interests must be defined and explained. For example does this include trusts, which are often used to hide financial interests?

Fourthly, the Auditor General has interpreted the directorships and business interests as remunerated employment outside the state which requires permission (Auditor General Limpopo Report, 2008). This is not evident from the disclosure requirements, as remunerated employment is listed in a separate category and at face value refers to paid employment. This inconsistency causes confusions and creates excuses for non-compliance. Consultancies and retainerships also constitutes paid work that requires permission from the Executive Authority, this is also not explicitly stated in the requirements of the Code.

Fifthly, the categories of sponsorships and gifts are also contradictory. This is a cause of concern. The Report on the Management of Gifts in the Public Service (2010), states 'The Code of Conduct for the Public Service places a prohibition on the receiving of gifts in the Public Service. However, irrespective of the prohibition by the Code of Conduct, it is a fact of life that public servants are constantly being showered with gifts, sometimes even without the public servant having the opportunity of refusal, e.g. it is argued that in some cultures, it is deemed unacceptable not to accept a gift. Therefore, the receipt of gifts could be regarded as a highly emotive issue. Notwithstanding the fact that it could be regarded as an emotive issue, the point that stands out very clearly is that the receipt of gifts by public servants tend to weaken the citizens' trust in the Public Service, as well as destroying the fibre of integrity and good corporate governance within the Public Service. Moreover, it compromises the idea of having an ethically sound Public Service as espoused by our Constitution and which the Public Service Commission (PSC) seeks to promote.

Lastly, other areas of concern for the Public Service relates

- To post tenure employment by senior offices, where in preparation for their departure contracts are awarded to companies by whom they will be employed.
- Employees in the Public Service doing business with government. As these relate to conflict of interests.
- The limited access of the public disclosure. The lack of access to the public negates the value of disclosure, as there is no opportunity for public scrutiny.

Emphasis must be made that while legislative guides are important, they need to be clear, explicit, enforceable and implemented. Gilman 2008 states that 'Statutory and regulatory devices will sometimes add "weight" to a code in the sense that it will be taken seriously. However, that weight has less to do with the law as much as it is related to the implementation of the code. Institutions that both interpret and enforce the code are essential ingredients. A good legal foundation is important if it is clear, concise and enforceable. Missing any of these ingredients can actually make the code less effective, as in the case of the Philippines. Philippine law provides capital punishment for "public plundering." However, no one has ever been convicted, much less executed under the law. The impact is that it has lessened respect for any ethics rules or laws.'

For codes to be effective they must be understood by public servants, the provisions must be unambiguous and there must be sanctions for non-compliance. In South Africa, the existing disclosure requirements are not clear, and be captured in a manner that ensures uniform interpretation.

Conflict of Interests

The practise of Public Servants doing business with the state remains a concern because it undermines the key principles of the public service. It undermines the requirement of impartiality and fairness. It compromises just administrative action by unfairly advantaging the public servant who usually has utilised inside information, or compromised internal controls. In some cases the spouses of public servants who are awarded contracts to attempt to conceal the direct conflict of interests.

To illustrate this point, reference is made to the Auditor General's reports (2008), where performance audits pointed to entities that are connected with government employees and are doing business with departments of Limpopo and KwaZulu Natal Provincial Administrations. The structure of selected provinces is detailed in table 1 and table 2 below.

TABLE 1 Auditor General's report on Kwazulu Natal

KWAZULU NATAL	NO OF EMPLOYEES	NO OF COMPANIES	Amount Paid
Employee related companies or CCs Doing business with own department	308	349	25 897 217
Employees spouses related companies or CCs. Doing business with own department	69	70	34 859 085
Employee related companies or CCs Doing business with other departments in KWAZULU NATAL	539	538	74 477 525

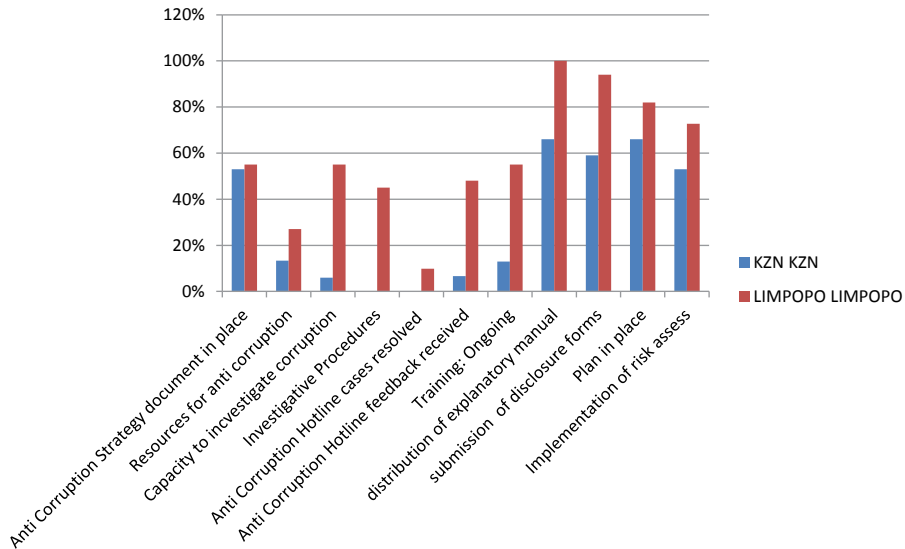
Source: 2008, Auditor General's Report

TABLE 2 Auditor General's Report on Limpopo

LIMPOPO	NO OF EMPLOYEES	NO OF COMPANIES	Amount Paid
Employee related companies or CCs Doing business with own department	304	316	171 811 525
Employees spouses related companies or CCs. Doing business with own department	89	95	24 687 570
Employee related companies or CCs Doing business with other departments in LIMPOPO	625	624	* 474 449

Furthermore, a comparison of the assessments of the State of Provincial Ethics in Limpopo Provincial Government (2009) and the Assessment of the State of Provincial Ethics in KwaZulu Natal Provincial Government published (2007) is reflected in figure 1 below.

FIGURE 1 Comparison of the auditor's reports of Limpopo and KwaZulu Natal



Source; results of synthesising the two provinces

* The percentages are based on the number of department who comply with the requirements within the province. Limpopo has 11 departments, and Kwazulu Natal has 15.

Lastly, the 2008-2009 Overview of the Implementation of the Financial Disclosure Framework found the following (based on a sample of 2628 senior SMS Members)

- 21% of the sample may have conflict of interests.
- 22% of the sample did not disclose directorships in companies
- 276 Members did not disclose their properties
- 101 senior members received gifts to the total value of R740 000.
- of 150 Heads of Department 28 did not submit disclosure.
- 33% of Heads of Department present a conflict of Interest to their Department.
- 32% of Heads of Department did not disclose directorships
- 26 Heads of Department did not disclose their properties

The above information, suggests that there are serious weaknesses in the Framework around the anti- corruption implementation mechanisms. It does also show us that despite reasonable levels of compliance within the integrity framework the extent of non-compliance to ethics in terms of the Auditor General report remains a concern. However, the statistics from the Public Service Commission shows that large percentages of cases against public servants remain unresolved.

**TABLE 3: Cases from the National Anti-corruption hotline
(period 01 September 2004 to 31 August 2010)**

Departments	2004/ 2005	2005/ 2006	2006/ 2007	2007/ 2008	2008/ 2009	2009/ 2010	2010/ 2011	TOTAL	Feedback received	Cases closed
Provincial Departments	390	498	566	747	868	744	198	4 011 (51%)	1 547 (39%)	904 (23%)
National Departments	207	540	542	653	877	612	114	3 545 (45%)	1 321 (37%)	854 (24%)
Public Entities	3	8	19	69	112	74	81	366 (4%)	80 (22%)	63 (17%)
Total	600	1 046	1 127	1 469	1 857	1 430	393	7 922 (100%)	2 948 (37%)	1 821 (23%)

Source: National Anti-corruption hotline

These statistics from the National Anti-Corruption hotline indicate that on average only 23% of cases emanating from the National Anti-Corruption Hotline are finalised. The fact that these cases are not finalised adds to the numbers of people who are immune to the consequence of wrongdoing. The Public Service Commission also reports that the sums received from debt recovery has declined. In 2005/2006 financial year the debt recovery was 90.5%, in 2006/2007 the debt recovery rate was reduced to 78%, In 2007/2008 only 48% of was recovered from employees. In 2008/2009 this declined to 13%.

6 SOME EMERGING INSIGHTS AND TRENDS

Firstly, the data clearly illustrate the lack of accountability at multiple levels. The legislation, regulations require accountability from the management of the public service to the Executive Authority and Parliament. The legislative framework to extract accountability is in place, but there appears to be problems with effective implementation or perhaps the commitment or will to deal with corruption decisively. The poor accountability reflects abdication of responsibility by the leadership in the public sector.

Secondly, there may be capacity challenges. This may be linked to political deployment in the public service, what is referred to in South Africa as cadre deployment. The principle in itself is common across various governments across the world, as political deployment within the public service may be necessary to ensure that the political imperatives of the majority party are implemented. However, there are concerns that this may have compromised effectiveness levels as it permeates across levels instead of being at the strategic level. It is further argued that the lack of rules related to the deployment often sometimes results in appointments at leadership levels which can weaken norms and controls within the organisation.

Thirdly, quality of ethical leadership is paramount as it is assumed that the leaders tone sets the standard within the organisation, and the leaders attitude to ethics will influence and shape behaviour of those public servants who report to them. The compliance to the disclosure of financial interests by SMS is an important test for the behaviour of the leadership in the Public Service. The SMS level in the public service is constituted from level constitutes 1.2% of the public Service. The SMS is constituted of all employees from the salary band 13-16.

Fourthly, Senior Management must ensure compliance to all existing frameworks. Section 38 (1) (c) of the PFMA requires that the Head of Department must take step to recover money due to the Department as a result of criminal activity, in 2008/2009 87% of money was not recovered, and 87.2% of money was not recovered. Only 26% of finalised cases were referred for criminal investigation. It is evident from the information that Heads Department are not compiling with the minimum requirements of the legal framework. Sole (2010) states that an absence of pre-emptive monitoring will promote corrupt behaviour and this will increasingly get worse with greater abuse over time. Arguing that while South Africa's efforts to roll back corruption has been significant, and while the framework of individual accountability has been tightened up considerably, a general level of institutional 'immunity' in the political sphere risks in the long run undoing the progress that has been made.

In light of the above, Edwards(2010), Caldwell et al. (2002) as well Schein in Spangenberg and Thomas (2004) list the following roles the ethical leaders should fulfil:

- place the institutions interests over personal and self-interests;
- establish written codes;
- create formal mechanisms to enforce ethical conduct as well formal mechanisms how to deal with ethical problems;
- show commitment to ethical principles and codes through an influence on corporate culture;
- establish an ethical culture by how managers monitor and control activities, how they react to critical events, and what criteria they use for recruiting, selecting, rewarding and dismissing institutional employees;
- act as role models in establishing a positive ethical culture;
- articulate and embody the purposes and ethical values of the institution;
- promote ethical decision making;
- create a living conversation about ethics and values among subordinates;
- create mechanisms of dissent;
- create a system of shared values in the institutions by emphasising the core values of the institution; and
- frame action in ethical terms.

CONCLUSION

In considering the assessments of the integrity framework, the authors reflected on the instruments governing the conduct of officials' as well current practice. Two key areas were identified and focused on, namely code of conduct and conflict of interest. It can be said that while government has made some progress especially with regard to developing frameworks,

the compliance needs to be significantly improved with vigour, improved monitoring and improved evaluation strategies at various levels to ensure the system derives the intended objective, which is best placed to serve South Africa. Furthermore, the researchers note that while compliance is important, it should be a means to an end and not an end in itself. Meaning it should not be just compliance of the integrity framework but developing a value system and creating a climate for appropriate ethical behaviour. The development of this new culture falls on leadership who are required to be exemplary, promote integrity, ethics, fairness and honesty in their conduct.

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