



Financial disclosure requirements in South Africa 2004–2008

Holding elected politicians accountable

INTRODUCTION

To control potential conflicts of interest and ensure greater accountability many democracies, like South Africa, have introduced financial disclosure regulations, which set obligations on elected public officials to publicly declare their personal financial and non-financial interests. By making this information publicly available the conduct of public officials is made more transparent, thereby allowing democratic institutions and citizens to hold politicians accountable. At the same time, the demand for evidence on the effectiveness of these regulations is increasing. Have disclosure regulations been observed and do they help to promote integrity in public life?

This paper starts with a brief conceptual discussion of conflicts of interest and offers practical and concrete examples of conflicts of interest that have arisen in South African public life. It then provides a brief description of South Africa's formal regulatory framework for financial disclosure requirements before turning to its main objective, which is to provide a detailed critique of the practical implementation of disclosure practices in South Africa.

Drawing strongly on empirical data, the paper examines and evaluates the various aspects of the implementation process of financial disclosure for South Africa's elected officials. These include the scope and content of disclosure requirements, compliance by elected officials, institutional support and capacity for disclosure, monitoring and oversight mechanisms and public access to information. The paper is ordered by these issues and deals with both the legislature and executive at the three levels of government under each heading. This allows for substantive discussion of each issue and for comparison across spheres and levels of government. By highlighting best practice case studies, it provides models for the various institutions as they consolidate their roles and

functions within a young democracy. However, attention is also given to identifying the major weaknesses, especially where there is a departure from the objectives of the legislation. The report provides recommendations on steps to be taken to improve disclosure practice in South Africa.

In conclusion, despite South Africa's array of extensive and progressive disclosure laws, practical implementation was found to vary dramatically across the spheres and levels of government – making monitoring and oversight more difficult. Moreover, institutional support and capacity for disclosure was found to be sorely lacking, especially at the levels of provincial and local government. In addition, weak internal investigatory bodies undermine oversight and the enforcement of sanctions. Finally, the inability of citizens, in some cases, to exercise their right to access the disclosure documents severely curtails transparency and undermines the accountability of public decision-making.

CONFLICTS OF INTEREST IN PUBLIC LIFE

Serving the public interest is fundamental to public office. Public officials should always make decisions and give advice that benefits the public good, without thinking about their personal gain. Moreover, public duties should be conducted in a fair and impartial manner. Citizens expect public officials to serve the public interest with fairness and to manage public resources properly. Ethical conduct in public life builds trust between government officials and citizens. Citizens also expect officials to behave in a manner that minimises the potential for conflicts of interest.

If citizens believe that their elected officials do not act for the public good, or that they misuse their office to benefit themselves or others close to them, then public trust, vital to the well-being of democratic institutions, is eroded. Indeed, the mere appearance of conflict of

interest situations, where there is no actual wrongdoing, can often be sufficient to test the credibility of parliament and its members. When public trust in democratic institutions is lowered an indirect threat can be posed to the legitimacy of the entire democratic system. As such, public officials should be expected to act in a way that can bear the closest public scrutiny.

Modern democracies provide fertile environments for conflict of interest situations to take root. Integrity of government is an issue for all countries, from rich to poor. Often the conflicts of interest problems facing governments are remarkably similar.¹ Elected officials have extensive executive powers and often determine the spending of vast sums of public money. In addition, the increased financial value of transactions between the private and public sectors provides ample opportunity for officials to take advantage of their public positions for personal benefit. When public officials are placed in conflict of interest situations, opportunities for corruption present themselves. In other words, the nature of public office means that elected officials will continually face difficult ethical dilemmas. They must constantly decide between competing interests: national, constituency, political and personal. This challenge is amplified by the fact that many of them also hold positions in the private sector and are thus 'changing hats' from one position to the other.²

Modern democracies provide fertile environments for conflicts of interest

Transitional and maturing democracies, like South Africa, frequently face this challenge.

Poorer countries in general, or countries in transition from an authoritarian past or background of internal conflict tend to be characterised by stark inequality and a situation where the political elite and economic elite overlap to a considerable extent.³

The conflation of party and state also provides numerous opportunities for officials to take advantage of their public positions for personal benefit. Transgressions also occur in the grey areas where the boundaries between state and private business are not clearly defined.⁴ Here, it is easy for unscrupulous politicians to extend the privileges of their position to their families or friends, in the form of business tenders, transport, holidays or grants.

Black Economic Empowerment (BEE), the ANC's policy designed to promote black ownership of the economy, while relevant and necessary, has been criticised for its unintended consequences – namely nepotism, cronyism and the creation of a small, but wealthy, politically-connected empowerment elite. The ruling ANC has been accused by opposition parties, and also by their tripartite alliance (the Congress of South African Trade Unions and the South African Communist Party – SACP) partners, of allowing members to use the party as a means to business success.

Apart from eroding public trust, unmanaged conflicts of interest can have adverse consequences for economic growth and service delivery.⁵ Fair and reliable public services which inspire public trust create a favourable environment for businesses and contribute to well-functioning markets and economic growth. Conversely, when ethics laws are ineffective corrupt activities can levy a heavy cost on a country's economy by distorting competition and diverting the allocation of public resources.⁶ Corruption effectively severs the link between citizens and the fair delivery of public services.⁷ Public service activities may even be changed to activities which may benefit corrupt public officials.

In countries with high levels of poverty and inequality it is crucial that the state prioritises the efficient delivery of basic social services. However, when public officials are distracted from their jobs and the greater public interest, and corrupted by their private interests, resources are diverted away from service delivery, with the poorest and most marginalised citizens bearing the consequences. Diversion and misappropriation of funds from rigged tenders reduces the budget of governments and thwarts development. The Open Democracy Advice Centre (ODAC) reports that 43 municipalities across the Eastern Cape, KwaZulu-Natal (KZN) and Western Cape are currently under investigation for maladministration or corruption, with many of the affected communities being among the poorest.⁸ An example is irregular tenders for bus services to transport children to school in the Eastern Cape. Another example involves a contract between a service provider and a municipality in KZN for the provision of fresh water to a small rural village. Corruption is insidious and can ultimately have negative consequences for stability – in a community, a country or a region.⁹ Both community protests against local corruption and the widespread xenophobic violence during 2008 have been linked to the impact of corruption on service delivery.¹⁰ Sound ethics regulations can assist the fight against poverty by ensuring an enabling environment for service delivery. As van Dooren states:

The gap between a governance process such as ethics policies and a policy outcome such as poverty in society

is rather a grand canyon than a gap... Governance processes should in the first place improve the quality of governance, and enable others to govern effectively.¹¹

While the consequences of conflicts of interest in public life are easily identified, the job of conceptualising and defining 'conflicts of interests' is more elusive. A 'conflict of interest' is generally regarded as a situation in which a public official has a private interest which may influence, or appear to influence, a public decision. It can be thought of as an inconsistency or clash between a public official's duties and his or her private interests. As such, a conflict of interest may be defined as:

a conflict between the public duty and the private interest of a public official, in which a public official's private-capacity interest could improperly influence the performance of their official duties and responsibilities.¹²

However, several misconceptions surround the notion of 'conflicts of interest'. There is sometimes a tendency to confuse conflicts of interest with corrupt or unethical behaviour. Conflicts of interest should be understood situations, not actions, and it is clear that a public official may find himself in a conflict of interest situation without actually behaving corruptly. As Bruno Speck states:

the concept of conflict of interest does not refer to actual wrongdoing, but rather to the potential to engage in wrongdoing.¹³

In other words, being in a conflict of interest situation is not the same thing as using one's public office for private benefit. A public official, who finds himself in that situation, may choose not to allow the private interest which conflicts with the public interest to wrongly affect his or her conduct. Another misconception concerns what constitutes a conflict of interest. While bribes, kickbacks and extortion all involve conflicts of interest, so too do the abuses of influence, such as nepotism, favouritism and misuse of public property.¹⁴ These situations arise as an inevitable consequence of the fact that people generally occupy multiple social roles. Thus, the sources of conflict are numerous. Traditional sources of influence include jobs, gifts or hospitality offered to officials and their family members. However, increased cooperation with the private sector has also multiplied opportunities for conflicts of interest. These include:¹⁵

- a public official having private business interest in the form of partnerships, shareholdings, board memberships, investments and government contracts

- a public official having affiliations with other organisations
- a public official working for a private company, which has a relationship with his/her public institution

Little work has been done on the nature of conflicts of interest among elected officials in South Africa. However, plentiful examples offer insights into what is meant by a conflict of interest in South African public life. For instance, despite their public positions, many elected and non-elected officials have private business interests in the form of shares, directorships and partnerships. In a 2006 report, the Auditor-General (A-G) found a significant overlap between public life and private business interests with six out of ten civil servants holding private business interests. These situations create a huge potential for conflict of interest situations to arise. Consider the potential for public officials to award state tenders and procurement deals to private companies in which they, or their fellow employees, hold financial or other interests.

A number of situations involving elected representatives at the national level have also raised eyebrows. Some involve politicians who serve as company directors or those who join the private sector in the same field as their previous government occupation. Other situations concern the awarding of tenders by senior politicians to family and friends. Former KZN Provincial Health Minister, Neliswa 'Peggy' Nkonyeni, was arrested in December 2008 and faces charges under the Public Finance Management Act for corruption and fraud.¹⁶ She is accused of interfering in a health department procurement process for a cancer-screening machine (worth R425 000 but purchased for R1,5 million), which was awarded to Rowmoor Investments. It is alleged that Nkonyeni and the owner of Rowmoor are intimately involved.

The Minister of Water Affairs, Lindiwe Hendricks, was embroiled in a court battle between herself and Xstrata, a mining group listed on the London and Swiss stock exchanges.¹⁷ In 2005, when Hendricks was Minister of Minerals and Energy she oversaw the awarding of mineral prospecting rights, worth billions of rands, to her husband's company, Vuna Mining, in which Hendricks also owned shares. Xstrata applied to the High Court to have Vuna's mining rights retracted, claiming that the deputy director of Minerals and Energy, Jocinta Rocha, ensured that Vuna's application was fast-tracked because of Hendricks' connection to the company. Although Minister Hendricks sold her shares in Vuna Mining, her husband retained his stake.

Provincial officials have also placed themselves in precarious conflict of interest situations. The North West's Deputy Director General at the Department of Agriculture, Paul Mogotlhe, was suspended indefinitely

by the North West legislature after he authorised a grant to the value of R1,1 million to be awarded to the owner of Thathana Farms, near Zeerust.¹⁸ Mogotlhe and five family members own the farms. Thus, Mogotlhe had awarded the grant to himself.

Less publicised but most concerning are indications that positions of power in local councils are used for personal gain. This is more disturbing when one considers that only seven per cent of the country's budget is spent at national level, with the rest spent at provincial and local levels. Local government is also challenged by structural incapacity and a skills deficiency. One example concerns councillors at Bitou Municipality in Plettenberg Bay who stand accused of awarding four contracts to companies whose directors are employed at the municipality. In response, municipal officials conceded that there was a conflict of interest in the awarding of these tenders.¹⁹

FINANCIAL DISCLOSURE REGULATIONS

Countries have made significant efforts in the past decade to develop systems and mechanisms for promoting integrity and preventing corruption in public life.²⁰ The systematic disclosure by elected officials of their financial interests and assets is one of the most commonly applied and effective mechanisms for monitoring conflicts of interest and increasing transparency. By 2004, 23 per cent of the countries for which the Inter-Parliamentary Union data are available required disclosure of all economic and financial interests.²¹ In 2009, a study of 179 countries shows that 109 have disclosure laws.²² Disclosure regulations are regarded as a powerful tool for combating corruption and enhancing democratic principles such as accountability and transparency. Anti-corruption experts state that:

declarations of interests may be seen as the single most important component of a framework for tackling conflicts of interest: they are a fundamental instrument of transparency, they provide an incentive for officials to put their affairs in order, and serve as a necessary condition for other components of the regulatory framework to work – in particular, exclusion from decision-making and detection of conflict of interest situations.²³

Disclosure satisfies several important functions. It provides preventative measures for actual conflicts of interest by creating incentives to perform in an ethical manner.²⁴ It helps to protect public officials from unfair accusations. It promotes a system for managing conflicts of interest. Through greater transparency disclosure allows for public scrutiny and safeguards the public interest by allowing citizens and civil society to identify the

major influences behind policymaking and legislation. It also reveals information about the business interests of elected officials. As Transparency International argues, 'Disclosure is to politics what financial statements are to business'.²⁵ Public disclosure of elected officials' private interests can contribute towards a more informed electorate, media and civil society. Finally, it increases public trust and confidence in institutions, political parties and politicians.²⁶ The more transparent and open a nation's public and political finances, the more its citizens will trust the government. Opaque or hidden interests simply breed cynicism about democratic politics.

Financial disclosure is usually established and implemented through codes of conduct. These formal, but practical, documents regulate behaviour by establishing what is considered acceptable and what is not. They intend to promote a healthy political culture by placing considerable emphasis on propriety, correctness, transparency and honesty.²⁷ Under the United Nations Convention Against Corruption (UNCAC, Article 8.2) the establishment of codes of conduct is an obligation for member countries. South Africa ratified UNCAC in November 2004.²⁸

SOUTH AFRICA'S REGULATORY SYSTEM

South Africa has adopted a comprehensive approach to managing conflicts of interest through two key instruments – legislation and codes of conduct. These laws and codes apply to the executive and legislative branches of government at all three levels of government: national, provincial and local. The various codes aim to regulate conflicts of interest by requiring elected officials to declare their financial interests and obliging them to recuse themselves in official deliberations involving such interests. The codified approach to managing conflict of interest is popular in many other countries, including Canada, the US, the UK, Ireland, Ghana, Uganda and Tanzania.²⁹

Disclosure takes place on an annual basis. Declarations are usually recorded in a register of interests, which is divided into public and confidential sections. At the national level information relating to monetary values and the financial interests of spouses and dependent children is typically recorded in the confidential section. At provincial and municipal levels, however, this is not always the case. Citizens are legally entitled to view the public sections of disclosure forms.

National Parliament and provincial legislatures

The *Code of Conduct for Assembly and Permanent Council Members of 1997* requires all Members of

Parliament (MPs) to declare their financial interests to the Registrar of Members' Interests. This includes declarations of their personal financial interests as well as those of their spouses, business partners, dependent children or permanent companions.

If MPs are required to deliberate in matters in which they have a personal interest, they are required by the code to recuse themselves from these deliberations.³⁰ The code bans lobbying for remuneration and also prohibits salaried work outside Parliament unless it is sanctioned by the MP's political party and does not conflict with their public functions. If an MP makes representations to a member of cabinet, they are also obliged to disclose if personal or private financial interests are involved. The member must withdraw from the proceedings of that committee or forum when that matter is considered, unless that committee or forum decides that the member's interest is trivial.

The code is informed by the view that it would be impossible to ban MPs from engaging in private enterprise, but that, in return for this right, the parliamentarians regularly and fully disclose their interests and recuse themselves from proceedings where their interests are considered.

Each province has its own code of conduct. In seven of South Africa's nine provinces, the members of the parliamentary legislature disclose their financial interests to the provincial registrar of members' interests. Only in Gauteng and the North West are interests disclosed to integrity commissioners.³¹

National Executive and provincial executive councils

Executive members are subject to more stringent regulations. Ministerial positions include the power to disburse public funds and to authorise programmes. Ministers are also exposed to sensitive information.³² So a rise in position of power should be accompanied by a rise in transparency and accountability and greater demands for ethical leadership.³³ The Australian, Canadian and the UK are examples where additional restrictions are placed on ministers.

The South Africa Constitution outlines the additional restrictions and requirements for executive members. It states that executive members 'must act in accordance with a code of ethics prescribed by national legislation' and further states that members may not:

- a) undertake any other paid work;
- b) act in a way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities or private interests; or

- c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.³⁴

The Executive Members' Ethics Act (Act 82 of 1998) stipulates that all members of cabinet, deputy ministers, premiers and Members of Provincial Executive Councils (MECs) must declare their financial interests, to a designated official either in the Presidency or in the premier's office.³⁵ The Executive Ethics Code of 2000 and the *Handbook for Members of the Executive and Presiding Officers* provide detailed guidelines.³⁶ It requires cabinet members to disclose the financial interests of spouses, dependent children and permanent companions, including gifts and other material benefits.

In addition to a ban on lobbying for remuneration, it is also mandatory for executive members to recuse themselves from official deliberations or proceedings in which they have a personal interest. Members must also dispose of, or place into administration, any financial or business interest in a corporate or profit-making entity, which might give rise to a conflict of interest. However, the President can take a decision that the recusal is unnecessary.³⁷

Local government

The code of conduct for local councillors is outlined in Schedule 1 of the Local Government Municipal Systems Act (Act 32 of 2000). The code requires that a councillor must perform the functions of office in good faith, honestly and in a transparent manner and must, at all times, act in the best interests of the municipality, in such a way that the credibility and integrity of the municipality are not compromised. Item 7 of Schedule 1 requires councillors to declare financial interests within 60 days of being elected to office and thereafter annually to the municipal manager. Again, the financial interests of a councillor's immediate family or life partner must be declared. Cape Town Metro went further by introducing its own comprehensive Procedural Code for Councillors in December 2003.³⁸ Members of the executive branch of local government, the Mayoral Committee, are required to disclose their financial interests in the same manner as that of councillors.

WHAT SOUTH AFRICAN POLITICIANS DISCLOSE

Most sound conflict of interest laws begin with the basic premise that the primary areas to be regulated are economic. Monitoring financial assets, income and liabilities can reveal not only potential conflicts of interest but also sudden wealth and enrichment that would warrant further enquiry.³⁹ Disclosure laws often also require information pertaining to the official's spouse

and other members of their household.⁴⁰ Other interests include membership of a business association, or any position or function that results in the officials being subjected to certain incentives. The more varied and accurate the contents, the more transparency and accountability are extended to any disclosure regime. However, the specific requirements of these rules vary greatly across countries. The Organisation of Economic Cooperation and Development (OECD) recommends that the following be disclosed:⁴¹

- Financial disclosure and assets declaration (to monitor illicit enrichment)
- Additional employment
- Inside information
- Contracts
- Gifts and other benefits
- Outside appointments
- Business or NGO activity upon leaving public office

Compared with other countries, and with what the OECD guidelines generally recommend, South Africa has achieved a broad approach to disclosure by requiring a wide range of assets and financial interests to be declared.⁴² Within South Africa, the various institutions at the three levels of government have also achieved reasonable conformity.

National and provincial legislatures

The national and the nine provincial legislatures require their elected officials to disclose the following:

- Shares and other financial interests in companies and other corporate entities. This includes any investment that provides a dividend (the value may be listed in the confidential section)
- Remunerated employment outside Parliament including benefits in cash or kind
- Directorships and partnerships, particularly if remuneration is a result of this association
- Consultancies, retainers and sponsorships
- Gifts, hospitalities and benefits greater than R1 500, recently raised from the original R350, from a source other than a family member or permanent companion (or those from a single source which cumulatively exceed R1 500 in a single year) and benefits of a material nature, such as discounts not available to the public
- Foreign travel paid by outside sources (those not paid for by government or the political party)
- Land and property interests (the address of a residence can be disclosed in the confidential section)
- Pensions, excluding contributions to pension funds (the value can be disclosed in the confidential section)

These categories are outlined in detail in the various parliamentary codes and include the relevant financial thresholds.

National and provincial executives

Cabinet members, deputy ministers, premiers and MECs are required to reveal any financial interests they had before assuming their current roles and those acquired after assuming public office. Executive disclosure requirements are similar to those of Parliament.⁴³

General requirements include:

- Shares and other financial interests, including number, nature and nominal value of shares and the name of the company
- Sponsorships, including the source, description and amount or value of the assistance
- Gifts and hospitality in excess of R500 or those from a single source which cumulatively exceed R500 in a single year. In addition, a member may not solicit or accept a gift or benefit in return for any benefit from the member in his or her official capacity, or that which constitutes an attempt to improperly influence the member
- Benefits, including the nature, source and value of that benefit
- Foreign travel paid by outside sources (excluding those paid for by government, by their party or personally)
- Ownership of land and immovable property: description, area, nature and value of land or property including that which is outside South Africa
- Pensions, including source and value of the pension

Although the requirements for executive disclosure are similar to MPs, there are additional, more onerous requirements. Firstly, financial liabilities must be declared in the confidential section. Secondly, if a gift has a value of more than R1 000 the MP must request permission from the President or premier to retain or accept the gift.⁴⁴ Thirdly, as executive members are not permitted to participate in remunerative activities they must place all their financial interests into a blind trust for the duration of their employment. This information is to be declared.

The *Ministerial Handbook* does not explicitly request that executive members disclose any remunerated employment outside their official position, or directorships, partnerships, consultancies and retainers. However, it does say that members are required to disclose their financial interest in terms of the rules of the relevant legislature, which suggests that these categories are not exempt from disclosure.⁴⁵

Information disclosed in the confidential part of the register includes the value of interests in a corporate entity other than a private or public company, details of foreign travel when the nature of the visit requires those details to be confidential, the address of private residences, the value of any pension, details of the financial interest of a member's spouse or dependent child and the member's liabilities.

It was difficult to confirm the exact requirements for MECs because we were unable to obtain their disclosure forms from the various provincial executives. We did however successfully obtain the MEC's forms for the Western Cape, which shows that these members are required to disclose the same interest as their respective Members of the Provincial Legislature (MPLs). Whether MECs are complying with the more onerous requirements, compared to MPLs, is therefore unknown.

Local councillors

All metros refer to the Local Government Municipal Systems Act, yet each metro's disclosure form is slightly different in terms of the contents to be declared, which information remains confidential and whether spousal information is included in the public or confidential sections. Since these variations are not based on codes of conduct they cannot be easily accounted for. Table 1 in Appendix 1 captures the exact contents of each metro's disclosure form.

The financial interests of elected politicians in South Africa

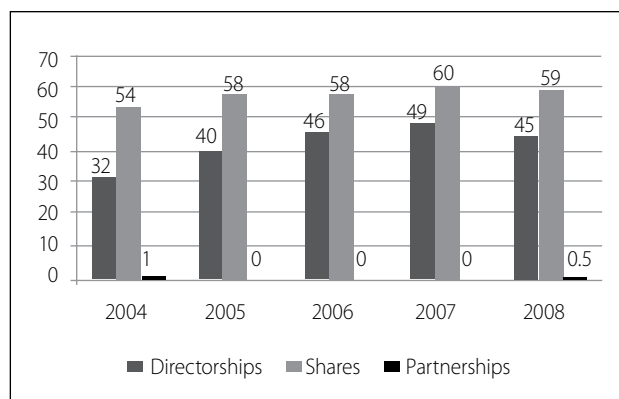
An analysis of disclosure records between 2004 and 2008 reveals that large numbers of elected officials have outside financial and other interests. These range from directorships to shares and in fewer cases, partnerships in corporate entities.

National MPs

Among national MPs the most popular financial interest is shares in companies and other corporate entities, followed by directorships. Very few members have partnerships. The proportion of members who have directorships and shares rises slightly between 2004 and 2008. By 2008, 59 per cent of members have shares in one or more companies, while 45 per cent have directorships. Partnerships remain very low at only one per cent of all members.

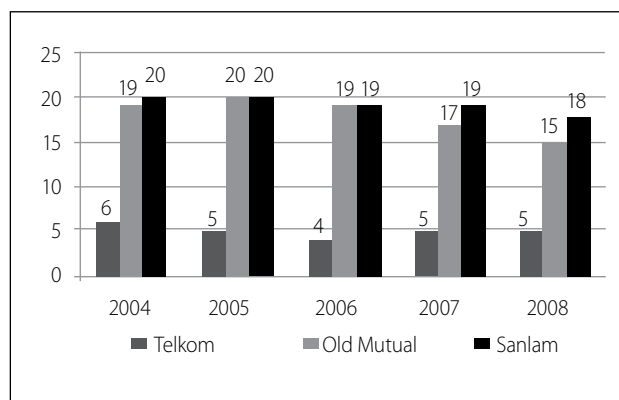
The most popular companies in which members have interests include Sanlam, Old Mutual and Telkom: on average, between 2004 and 2008 five per cent of members have interests in Telkom, 18 per cent in Old Mutual and 19 per cent in Sanlam. Other companies in which members have interests include MTN, ABSA, Investec

Figure 1: Financial interests for members of National Parliament 2004–2008



and Standard Bank – at between one and four per cent of members' interests in any given year. In terms of the business interests of elected officials, banking institutions thus lead the field at all three levels of government. A large percentage of our elected officials hold the same insurance policies as you or I might have in Old Mutual and Sanlam. Shares in telecommunications companies such as Telkom and MTN are also commonly found.

Figure 2: Common company interests for members of National Parliament 2004–2008



Provincial MPLs

According to figures 3 to 10, elected officials at provincial level have significant private business interests. The most noticeable pattern in the data is that, on average, at least a third to half the MPLs for whom data is available, have outside financial interests.⁴⁶ Across the provinces, the most common financial interests are directorships and shares. Very few MPLs have partnerships. A third of all MPLs in the Western Cape and Gauteng have outside interests in the form of directorships. Similarly, shares are on the increase among elected officials in KZN and Western Cape. Once again, the most popular types of shares are within the banking and telecommunications sectors. In the Western Cape, Sanlam and Old Mutual are popular. In KZN, Sanlam and Old Mutual are the favourites.

Figure 3: Eastern Cape

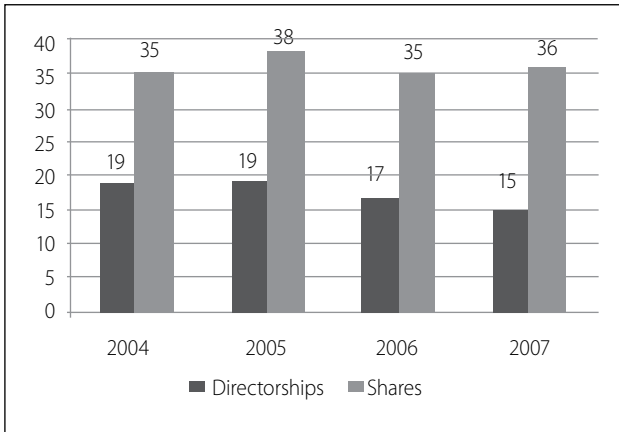


Figure 4: Free State

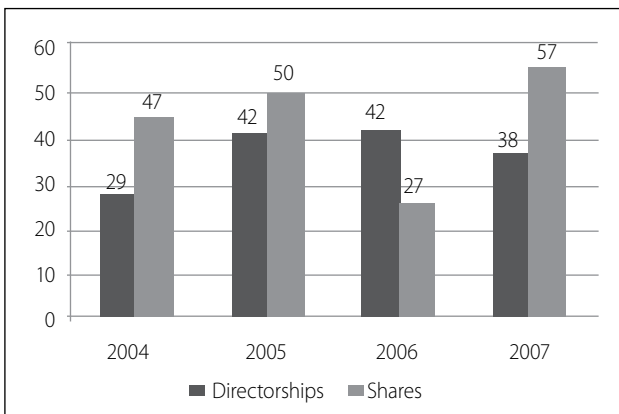


Figure 5: Gauteng

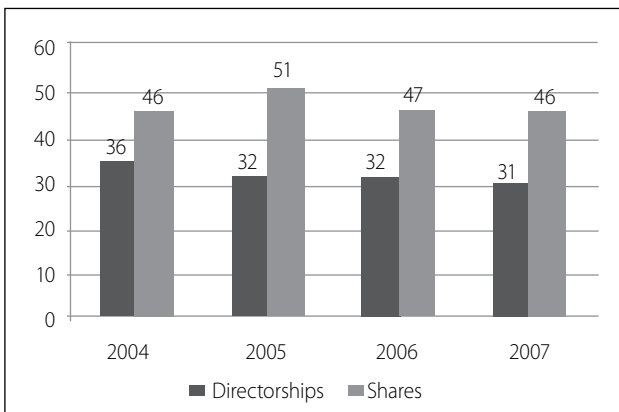


Figure 6: KwaZulu-Natal

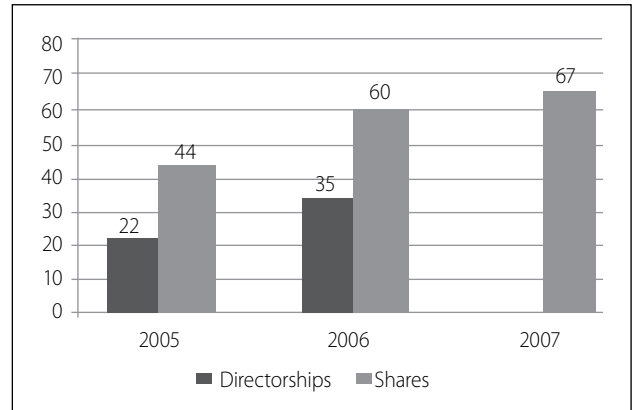


Figure 7: Limpopo⁴⁷

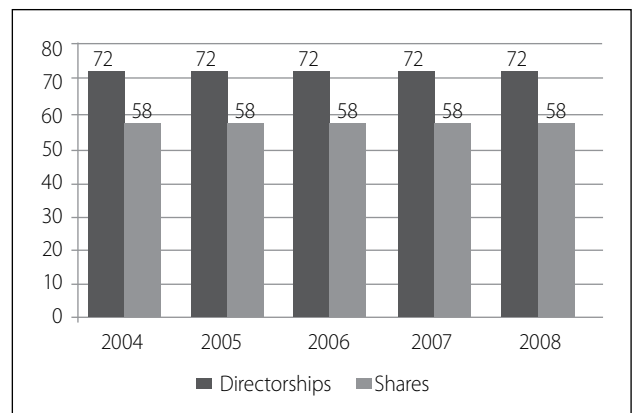


Figure 8: Mpumalanga

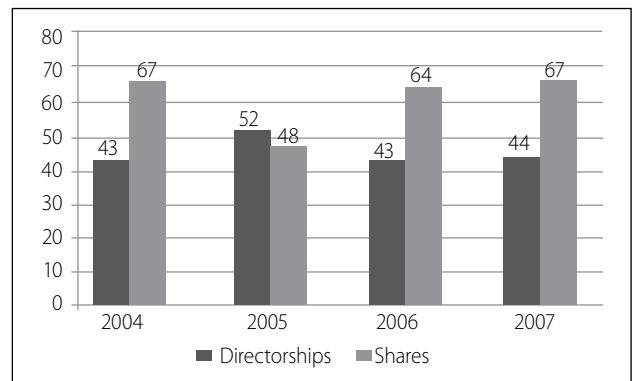


Figure 9: Northern Cape

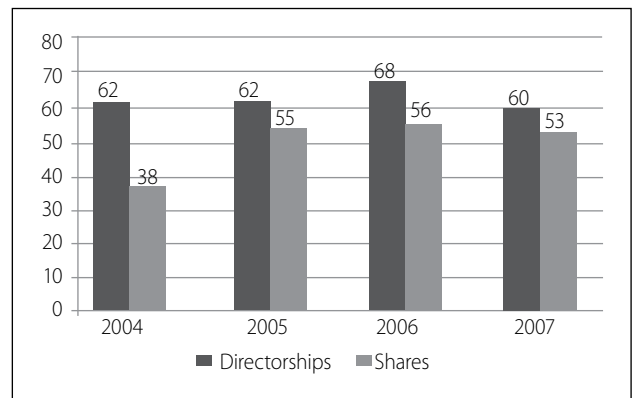
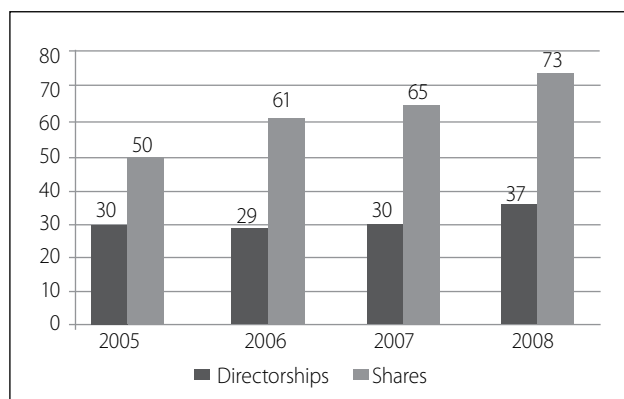


Figure 10: Western Cape



Local councillors

Similarly, data at the local level suggests that councillors also hold a range of financial interests. Using Johannesburg City Council as an example, in 2004, 15 per cent held directorships and 18 per cent held shares. In Ekurhuleni the proportion of councillors holding shares is on the increase, from two per cent in 2004 to 11 per cent in 2008.

Critique and analysis

The key point to note from this analysis is that most of the business interests held by elected officials are not problematic. They are, in fact, mostly very ordinary and differ little from those of other citizens. This is exemplified by the common type of shares held by elected officials at national parliament.

However, data also shows that many elected officials across government hold directorships and it is more difficult to assess whether these private interests are in conflict with matters of local or national public interest. The registrars have to have a thorough knowledge of an individual's outside interests and activities and have investigatory powers, before they can be expected to identify irregular activities. Weak internal oversight transfers the onus of this duty to the media and public investigatory bodies to follow up on leaks and allegations. We will return to these issues later.

Having outlined the formal disclosure requirements for South Africa's politicians, as well as the types of interests held, we now evaluate the various aspects of implementation of financial disclosure in South Africa. These include compliance by elected officials, institutional support and capacity for disclosure, monitoring and oversight mechanisms and public access to information. The paper follows the order of these issues and, under each heading, deals with both the legislature and executive at the three levels of government. This allows for substantive discussion of the issue at hand and for comparison across spheres and levels of government.

COMPLIANCE LEVELS AMONG ELECTED OFFICIALS

A first outcome measure for disclosure is compliance in reporting. Compliance is a necessary precondition for declarations to have an effect. Non-compliance can have a negative effect on integrity outcomes. Elected officials may conclude that their institutions do not take integrity seriously. Low reporting levels may be an indication of low awareness of codes of conduct or a lack of commitment to the value of the instrument. Under these conditions, the integrity of the system will quickly erode.⁴⁸

Satisfactory compliance partly relies on comprehensible disclosure provisions. If the regulations are too complicated to be easily understood, it will reduce their effectiveness and open the way to higher levels of error and non-compliance.

Generally, as the previous section illustrates, South Africa's disclosure provisions are readily accessible and outline clear guidelines for elected officials. Additional factors that aid satisfactory compliance are dealt with below.

Timing of submissions

To ensure that information is available for scrutiny, successful disclosure regimes require members to file records timeously. Compliance can thus be measured by the frequency and timing of submissions to the relevant authority, to a strict deadline.⁴⁹ In line with most countries South Africa's elected officials are required to disclose on an annual basis. Seventeen of the 30 OECD countries declare annually.⁵⁰ Others are less frequent, such as Ghana, which requires their officials to disclose every four years and at the beginning and end of the term of office.⁵¹

Apart from non-compliance, the authors note additional concerns relating to irregular and overdue submissions by members at provincial and local levels. Also, some members submitted more than one form in one year. Under- or over-disclosure by an individual creates further problems for effective oversight. Where officials submit late or submit multiple forms, they may be categorised in the wrong year, or miss inclusion in the institution's oversight process, or all their records may not be available for public scrutiny. Late submission creates an additional burden on administrative staff who have to chase them up.

Without accurate annual records the oversight bodies cannot properly fulfil their function. For the relevant institutional body and citizens to detect conflicts of interest there is a strong reliance on consistency in the disclosure process.

National level compliance

National Parliament has pioneered the way since its code of conduct was adopted in 1997. The Registrar of Members' Interests, Fazela Mahomed, successfully compiled and published a register of members' disclosure forms for several consecutive years, starting in 1996. To date, the general register reflects the full legislative membership: 400 members of the National Assembly and 54 permanent National Council of Provinces (NCOP) members. Full compliance is due to the efforts of the Registrar's office to institutionalise Parliament's code of conduct. As Mahomed stated in an interview:

The fundamental attitude must be accountability to the public. Close, proactive interaction with MPs has assisted us to entrench the declaration regime. We have not done badly. We've made mistakes. But we have institutionalised it [the code].⁵²

The Registrar has held the post since 1996 and this has helped develop institutional memory and entrench the code. As Registrar, Mahomed has also been closely involved with training new MPs on their disclosure obligations. Liaison with a number of provinces on their disclosure systems has also taken place. The assistance provided to MPs included officials from the Company Register working with them to verify and, when necessary, change their directorship details at the Companies and Intellectual Property Registration Office (CIPRO).

More must be done to entrench the public integrity management system at provincial level

At national executive level compliance appears almost complete: most ministers and deputy ministers have submitted their records since 2004. However, access to the records must be granted by the national executive and, to date, a second appointment to actually view the forms has not yet been permitted.

Provincial and local compliance

Some institutions work on the financial year cycle while others use the electoral calendar (Western Cape Provincial legislature requires its members to declare their interests one month after an election and annually thereafter). Interviews with various registrars or implementers suggest that obtaining 100 per cent compliance in provincial legislatures is more difficult. While Gauteng professes to reach 100 per cent compliance they often

have to send reminders to approximately ten per cent of their members.⁵³ The North West Province stated that they do not receive 100 per cent compliance. The Integrity Commissioner often contacts those individuals who have failed to submit their forms. However, since Advocate Jules Browde's appointment as Integrity Commissioner in the North West, compliance has improved considerably. Now members feel that they can approach him regarding what is expected of them in the disclosure process.⁵⁴ It appears in the Western Cape, at least, that the perception among MPLs that delays will be punished has encouraged annual submission. It also encourages members to approach the Registrar's office to gain clarity about the completion of forms out of a desire 'get the form right', according to the Registrar, Mr Williams.⁵⁵ The various ethics committees in the provincial legislatures must submit annual reports, which should indicate overall compliance levels.

While the metro councils have a system of annual declarations, compliance varies. Cape Town only secured full compliance in 2008 when they received all 210 councillors' records.⁵⁶ Ekurhuleni and Ethekwini note that they have achieved good compliance rates in recent years.⁵⁷

In terms of provincial executive councils, there appears to be significant variance in the interpretation of premiers' and MECs' statutory disclosure requirements – a strong sign that more needs to be done to entrench this public integrity management system at provincial level. It was difficult to establish the extent to which MECs make their declarations to their respective premiers' offices. Some provinces claim that their MECs do not make a second disclosure to the premier's office as they already declare to the legislature. This claim however, ignores obligations set out in the Executive Ethics Act and the Executive Ethics Code that stipulate that the premier and MECs have to separately declare and these disclosures must be kept with the secretary to the provincial council, not with the legislature. These executive declarations should also contain additional information relating to liabilities. A number of provinces, including the Eastern Cape, Mpumalanga and Limpopo, stated that the premier is exempted from this regime. In other provinces, such as Gauteng, identical disclosure information is kept in the director-general's office whereas Mpumalanga deems the disclosures confidential. There is clearly a need for greater standardisation of disclosure processes across provincial executive councils.

Incomplete disclosure records

The second area of concern relates to the poor quality of data that disclosure forms produce.⁵⁸ While compliance levels are generally satisfactory it is difficult to establish

whether members have fully disclosed their interests. Yet, accountability relies on full and accurate declarations of interests. To assess comprehensiveness when we physically examined available disclosure records from the three levels of government we found that many disclosure records are poorly completed or omit important information, are not dated, or have incomplete sections. In addition, the updating of forms is sometimes done by simply submitting a letter or sheet of paper and not completing a standard form.

National Parliament

There are several notable cases where members have not fully declared their interests. Among those who have fallen foul are ANC former chief whip Tony Yengeni and current President Jacob Zuma (see case study below), former defence minister Mosiuoa Lekota (who was fined seven days' salary and reprimanded in June 2003 for failing to disclose his interests in an oil company), and Winnie Madikizela-Mandela (who was fined 15 days' salary and severely reprimanded for failing to disclose a monthly extra-parliamentary income of around R50 000 from various donations).⁵⁹ Fourteen MPs came under scrutiny for failing to fully disclose their directorships in a September 2004 *Mail & Guardian* report.⁶⁰ A subsequent probe by the parliamentary ethics committee fined half of the 14 MPs R1 000 each for breaching the code by failing to disclose. They included the former ANC Chief Whip, Mbulelo Goniwe, and African Christian Democratic Party leader, Kenneth Meshoe. More recently, a probe in 2008 by the A-G and a subsequent follow-up by the parliamentary Ethics Committee found that at least five members of parliament failed to fully declare private business interests.⁶¹ However, most of these undisclosed interests were in dormant companies.

Accountability relies on full and accurate declaration of interests

Incomplete disclosure at other levels of government may point to a larger problem – that, despite clear guidelines, some public officials still appear uncertain about the process they need to follow when their financial situation changes and the subsequent need to update their disclosure records. Cape Town Metro has introduced the 'Declaration Amendment Form' to ensure a more effective monitoring process. It also provides guidelines on how to set about correctly completing and updating a disclosure form.⁶²

Case studies in National Parliament

As the ructions over South Africa's multi-billion dollar arms deal started, news emerged of a significant discount on a luxury car from one of the arms deal bidders for the former ANC Chief Whip, Tony Yengeni.⁶³ At the time, Yengeni chaired the joint defence committee. Although DA MP Douglas Gibson laid a complaint on 27 March 2001 (following the *Sunday Times* report of 25 March 2001), the parliamentary Ethics Committee 'finalised' its report only in March 2003. In its report the Committee said the complaint would no longer be pursued as Yengeni had resigned following a guilty plea under a sentencing agreement reached on 23 February 2003 during his fraud trial.

'The Committee is of the view that Mr Yengeni breached the Code of Conduct. Furthermore, the Committee deplores in the strongest terms possible the damage done to public trust in Parliament by Mr Yengeni,' said the report tabled in the National Assembly on 18 March 2003. 'The Committee re-iterates that Members of Parliament are expected not to take any improper advantage or benefit by virtue of the office they hold. On the basis of Mr Yengeni's admission in court, it is the Committee's view that his continued participation in Parliament would have been inappropriate. Mr Yengeni's resignation is therefore appropriate.'

Eight months later, in November 2003, the Ethics Committee tabled its report on the former Deputy President, Jacob Zuma. Zuma was embroiled in allegations of corruption and of lobbying arms deal bidders to obtain cash to maintain his expensive lifestyle.⁶⁴ At the heart of the complaint, laid by DA MP Douglas Gibson, were news reports that Zuma had benefited from interest-free loans totalling over one million rand. At the time the National Prosecuting Authority (NPA) was also investigating money flows to Zuma as part of its probe into his financial adviser, Schabir Shaik.

Following weeks of correspondence with Zuma, the Ethics Committee's report accepted his explanation that the loans were not free, but bore interest: 'As there is no evidence at hand that contradicts the authenticity of the loan agreements, it is recommended that the loan agreements submitted by the Deputy President be accepted as valid and correct.' The Code required that 'where any doubt exists as to the scope, application or meaning of any aspect of this Code, the good faith of the member must be the guiding principle.' The report tabled on 19 November 2003 said, 'In this matter the Deputy President provided documents to the Committee which verified his response that there was no benefit received. It is on this basis that the Committee finds that there is no breach to the code of conduct.'

Standardisation

Finally, there are significant variations across the legislative and executive institutions regarding the

contents of the different categories and the general layout of disclosure records. The lack of a standardised approach to disclosure 'content' presents opportunities for elected officials to omit important information and makes any comparative monitoring exercise difficult, with significant implications for accountability. It is hard to establish whether elected officials are hiding interests deliberately or as a result of poorly designed forms. We therefore advocate the introduction of a standardised process for disclosure at all levels of government, particularly with respect to the submission times and content categories of these important documents. Professor Richard Levin, formerly of the Public Service Commission (PSC) noted how an electronic disclosure facility for non-elected public officials would facilitate effective monitoring.⁶⁵ Perhaps a similar mechanism for elected officials is warranted. Not only would an on-line, electronic service enhance public access and monitoring, but it would also streamline the submission process and introduce uniformity across our democratic institutions. A simplified version would make the submission process more user-friendly for elected officials, thus encouraging compliance. Examples of poor efforts at standardisation are illustrated below.

National executive

As recently as 2006 there appears not to have been a standard disclosure record available for national executive members, leaving ministers and deputy ministers to make up their own mind about how to submit their declarations. Some used photocopies of the parliamentary register or affidavit-like statements. In other instances, ministers and deputy ministers submitted their own makeshift disclosure forms or simply referred

An on-line electronic submission
service would enhance
monitoring and streamline
the submission process

to the previous year and stated there was nothing else to declare. Others submitted as many as five variations of the disclosure forms in one year. In the 2006 declaration cycle however, the forms at national executive level were standardised, with the introduction of a form called 'The Presidency Register of Members' Interests'. However, use by ministers is inconsistent (many continue submitting Parliament's public disclosure form) while deputy ministers managed a far greater level of consistency.

Local level

The way in which disclosure forms differ fundamentally across one level of government is evident at the local level. Ekurhuleni Metro's disclosure record consists of a very condensed one-page document. In contrast, Johannesburg Metro's disclosure form is ten pages long (it includes four pages in the confidential section). While this is not necessarily a problem within institutions, the huge variation in the content and presentation of this information makes cross-institutional comparisons most challenging.

Poorly constructed forms were also found in the Limpopo records. This province furnished us with a single disclosure form reflecting members' financial interests covering the period 2004 to 2008. The problem with these disclosures is that the same record covers several years. The shares held by members do not change over the years, nor do the companies in which members have directorships or partnerships. It seems highly unlikely that the financial circumstances of all the members of the Limpopo legislature would be unchanged from 2004 right up to 2008. It is unclear, therefore, whether these forms have been updated and if so, in which year and whether previous information is saved or deleted.

Disclosure records were also identified where certain subheadings have been left out, such as members in the North West provincial legislature who simply removed the section entitled 'Remunerated Employment outside Parliament'. Again, when disclosure categories are omitted or labelled differently across the various forms, monitoring categories between multiple members or for one member over a number of years is most challenging.

For oversight to be truly effective disclosure records should be submitted timeously and always reflect a full, consistent account of a member's current financial information and status. Where compliance levels are inadequate it often appears to be due to institutional reluctance, or even failure, to implement regulations correctly and to raise awareness among members about the importance of disclosure and ethics in public life. This brings us to a key aspect of any successful disclosure regime, that of satisfactory institutional commitment to disclosure.

INSTITUTIONAL SUPPORT AND CAPACITY

An ethics regime requires a degree of institutionalisation for it to be truly effective.⁶⁶ It is therefore important that the body that is tasked with implementation has sufficient support and resource capacity.⁶⁷ Responsibility for receiving and processing declarations can be allocated to an external body (such as an anti-corruption bureau) or to a dedicated internal unit. In legislatures, the preferred approach is to allocate this responsibility to a parliamentary ethics committee, or a non-partisan, permanent

and senior staff member, such as an ethics officer or commissioner.⁶⁸ Experience suggests that the latter is most advisable. As the anti-corruption organisation, U4, argues:

Giving implementation responsibilities only to a parliamentary committee raises the risk that proceedings relating to violations of ethical standards will become politicised or perceived as politically motivated.⁶⁹

South Africa has followed the self-regulatory approach, with its institutions appointing non-partisan staff from within to process disclosure records. The process and staff compliment in national parliament is firmly established through the office of the Registrar for Members' Interests. At the executive level government members submit to the secretary to cabinet who is located in the Presidency. The secretaries to the provincial executive councils are required to keep a register of premiers' and MECs' financial disclosures.

At the local metro level the code stipulates that each councillor is required to declare to their municipal manager. However, those tasked with implementation differ across the six metros. In Ekurhuleni the Legal and Administrative Services Department is responsible, while Cape Town uses its Councillor Support Office.⁷⁰ In Johannesburg the Councillor Affairs Department, located within the Office of the Speaker, administers disclosure forms.⁷¹ Councillors in Ethekewini disclose their financial interests to the Municipal Council and it is the Office of the Speaker which accepts responsibility for the collection of these documents.⁷²

The institutional support given to the disclosure regime is weakest at the provincial and local levels

A key finding is that the actual institutional support given to the disclosure regime varies greatly and is weakest at the provincial and local levels. Several issues have been identified as major constraints, namely the lack of institutional commitment and priority, the lack of senior staff tasked with implementation and the general lack of knowledge about the processes. The result, in some cases, is that the capacity for oversight and accountability is diminished.

Knowledge of the disclosure process

In some provincial and local institutions there appears to be a significant lack of knowledge of the disclosure

process among staff members. It proved extremely difficult to identify the officials tasked with administering the disclosure forms and to identify the formal procedures in place for elected representatives. It was also a challenge trying to find out who was responsible for the oversight function. It suggests that little is being done by provincial legislatures and councils to raise the profile and status of the Office of the Registrar and to inform staff and citizens about the role of disclosure in the ethical conduct of public officials.

Staff in Gauteng, KZN, the Western Cape, the North West and the Northern Cape proved to be the most knowledgeable about the disclosure processes, while staff in the Eastern Cape, Limpopo and the Free State were particularly ill-informed. Generally, requests for information were met with some suspicion. Some staff members were of the opinion that disclosure records are for government use only. Many were also unaware of the existence of ethics committees or the Register of Members' Interests.

Again, it was difficult to establish the procedure for disclosure for MECs. In many provinces, for example the Free State and Limpopo, finding the office responsible for collating this information was almost impossible. This general lack of knowledge about disclosure suggests that the process is not yet fully established, or that it is cloaked in secrecy by these executive institutions.

Junior status of staff

It is important that staff members at an appropriate level of seniority deal with declarations. Designating the head of a state's institution as the recipient of declarations is not a good idea as it will overwhelm him or her. Likewise, designating a person with too low a rank may also be difficult if that person is not sufficiently well trained or has too little authority.⁷³ As U4 states, 'the recipient of declarations should be a superior who is not too far removed from the official yet holds sufficient authority ...'⁷⁴

In many cases, though, the function of administering the disclosure process has been left to administrative staff, often of junior rank. A lack of available senior staff may impact on the monitoring and enforcement process, as junior officials struggle to get records from representatives who are perceived to be their seniors. If disclosure records are to be a valuable tool in the prevention and exposure of conflicts of interests, those involved in the administration and oversight of this process ought to be regarded as senior officials, who are trained and well versed in the regulatory framework and who have genuine institutional capacity and authority to sanction those who breach their codes of conduct. In other words, disclosure officials must be sure of their role within

the institution and must be able to insist on compliance without fear of reprisal. Where staff are well resourced and are of senior status we found that the quality and scope of monitoring and oversight is noticeably improved.

MONITORING AND OVERSIGHT

The objectives of disclosure systems are to increase public confidence in government, to demonstrate a high level of integrity among elected officials, to deter conflicts of interest from arising and to better enable the public to judge performance.⁷⁵ These objectives create two roles for the reviewing official: one, as the protector of the public and its government from conflicts of interest; and the other, as a counsellor to employees. As a counsellor, the financial disclosure reviewer works to protect the employee from invasions of privacy and undeserved scandal. As an ethics official, a reviewer must ensure that reports comply with the legal requirements. When these two roles are in conflict, reviewers must remember that their first loyalty is to the public and its government, not to the person filing.⁷⁶ Ethics officials and reviewers therefore have multiple roles and functions: advisor, administrator, investigator and educator.

A model that depends on legislators to investigate and sanction their fellow members is problematic

This section examines how the various institutions and their staff use disclosure records to monitor conflicts of interests among elected officials.

Monitoring and review procedures

There is debate as to whether monitoring and enforcement is more effective when carried out by independent bodies outside or within the legislature. Some argue that the nature of parliamentary sovereignty implies that such responsibilities should be given to an internal body.⁷⁷ Others argue that a model that depends on legislators to investigate and sanction their fellow members is problematic.⁷⁸ Instead, self-regulation should be accompanied by some degree of external enforcement, such as an independent Integrity Commissioner.⁷⁹ Experience from India and Latvia suggests that a commission external to, and independent from, the legislature is most effective.⁸⁰ In South Africa, monitoring and enforcement remains

largely the responsibility of staff within the various institutions.

Rudimentary monitoring ensures that compliance is met. However, effective oversight requires more rigorous monitoring. A reviewer should be able and motivated to identify potential conflicts of interest, to flag irregularities in disclosure documents and to institute investigative proceedings on his or her own accord. A systematic approach requires an annual review process where reviewers analyse reports by checking them against the filer's previous reports. Additional information should be asked for when the form is incomplete, when an entry is inconsistent with another entry on the current or previous report, when an entry is omitted (and the reviewer knows it should be included), or when the information is limited or unclear. The reviewer should always exercise their discretion, especially when two consecutive reports do not reconcile or when gaps are apparent. This approach to monitoring requires that the reviewer be granted specific investigatory powers which are detailed in the regulations.

The South African case falls short in this regard. The lack of a comprehensive monitoring system and proactive investigatory powers for registrars remains a fundamental obstacle to sound oversight of disclosure practice. Instead, oversight relies largely on the principle of public access to the information. Scrutiny by the public or, indeed, another elected official is therefore deemed sufficient. Only once a complaint is lodged are registrars entitled to launch an investigation. Without an official complaint, there is little cause or incentive for registrars to check a member's interests. In other words, registrars do not actively investigate, through scrutiny of disclosure forms, whether conflicts of interest exist among their members. There is also no legal requirement to audit reports to determine whether disclosures are accurate. Reviewers tend to take the disclosures as correct at face value until it is suggested otherwise. A comprehensive monitoring approach into each and every member's declarations year on year is probably not viable due to the time-consuming nature of such investigations but also because it is inherently difficult to establish conflicts of interest without all relevant information about a member's activities. However, we argue that strengthening the investigatory capacities of registrars and their equivalents counterparts will go a long way towards addressing the currently weak state of monitoring and oversight. Some of the registrars interviewed stated that they believe that current oversight mechanisms are insufficient. A particular concern is that it is very difficult to initiate investigations into suspected breaches when no complaint is filed by another member or a public citizen. So, while registrars may suspect that a conflict of interest exists, their lack of investigatory powers means that they cannot undertake proactive investigations into the true

nature of members' financial interests. This is in contrast to the situation in Gauteng and the North West legislatures, which are unique in that they have an external integrity commissioner instead of an internal registrar.

The integrity commissioners have more extensive authority and investigatory powers than registrars do. These inconsistencies in the investigatory powers of disclosure officials raise a further dilemma – the need to clarify the role of registrars. Should it be limited to ensuring full compliance and timely public access to information or should their powers be extended to include an investigative aspect? It may be useful for these key personnel to be given greater investigative powers since they are non-partisan, independent and well placed to judge whether a member is in a conflict of interest situation. However, if greater investigatory powers are extended to registrars they will require additional capacity in the form of staff and resources to carry out extensive searches of directorships, shareholdings and acquisitions of property and luxury vehicles.

Perhaps the solution lies in a combination of two actors – a registrar's office which focuses on compliance and which is supported by an external, independent actor such as an integrity commissioner, with proactive powers to institute investigations.

Several additional factors also appear to limit oversight. Firstly, the lack of uniformity in the disclosure process has serious implications for monitoring and oversight by the institution, in particular, and citizens,

Should registrars' role be limited to ensuring compliance or should their powers be extended to include an investigative aspect?

in general. Late submissions may slip through unnoticed and thus be unavailable when asked for. Poorly completed submissions may omit important information. In addition, frequently unavailable forms for the current or past financial year simply undermine any attempt to obtain information on a representative's current financial or other interests.

Secondly, the general lack of knowledge around disclosure and related processes among support staff undermines monitoring and oversight. Finally, the assumption that it is the accessibility of these forms that effectively holds MPs accountable is flawed. The signifi-

cant challenges for public access are outlined in the next section.

National Parliament

Investigations by the Joint Committee on Ethics and Members' Interests have started only once the media or another MP has raised a complaint or suspicion. The parliamentary code allows for a complaints procedure before the multiparty committee and although complaints hearings are held behind closed doors, the findings and reasons for them must be made public. National Parliament has processed nearly 60 complaints over the past ten years.⁸¹ The Registrar has further facilitated oversight by inviting CIPRO to Parliament to check MPs' records. Over 300 members voluntarily agreed to have their records checked.

The Presidency and executive members

The Public Protector (PP) investigates alleged breaches of the code after a complaint has been lodged. The PP will then submit a report on the complaint to the President if the member involved is a cabinet member, premier or deputy minister. In the case of an MEC, the PP submits a report to the premier of the respective province. The President then presents the PP's report, together with the action to be taken, to the National Assembly. With respect to premiers, the President presents the PP's report and suggested sanctions to the NCOP. If a complaint is made against an MEC, the premier presents the PP's report, together with sanctions, to the NCOP, the second chamber of national parliament which represents the provinces.

Until 2006 the Presidency's legal affairs section was in charge of collecting, verifying and maintaining the ministerial and presidential disclosures. Since then the Secretary to the Presidency, led by Reverend Frank Chikane's office, assumed this role. Following the 2009 national elections Mr Vusi Mavimbela took over the position of Secretary to Cabinet.

Provincial legislatures

The Registrar of Members' Interests is the person responsible for monitoring and review in all provinces, except for Gauteng and the North West where an integrity commissioner undertakes this function. Reviewers have differing roles and powers at provincial level. All registrars lack proactive investigatory powers in the sense that they are not permitted to institute investigatory proceedings of their own accord. However, some registrars, in Mpumalanga, Northern Cape and Western Cape, pursue the actual formal investigation but only after being instructed to by their respective ethics committees. In the rest of the provinces the ethics committee becomes

the investigatory body. These provinces do not permit their registrars to undertake any investigation at all.

The second difference relates to formal complaints. Some provincial legislatures can initiate investigations without requiring a formal complaint, while others must first receive a formal complaint before they can proceed with investigations. In these cases, the respective ethics committees and registrars cannot respond to evident suspicious activity by a member until a complaint is lodged.

The lack of investigatory powers for registrars creates a disincentive for effective monitoring and oversight. Instead, their role is limited to establishing compliance. In addition, where ethics committees are highly politicised or the composition allows for bias, the power given to decide whether to institute an investigation against a member is problematic.

Perhaps an independent non-partisan registrar should have the final decision about whether or not to institute investigations into a member. After all, they have readily available access to the disclosure documents and are best placed to notice irregularities in the economic lives of their members.

Table 1 outlines the differences in investigatory agency and power at provincial level.

Table 1: Provinces: Investigatory agency

Province	Registrar	Committees
Eastern Cape		House Ethics Committee
Free State		Committee on Ethics and Members' Interests
Gauteng		Integrity Commissioner
KZN		Disciplinary Committee
Limpopo		Committee on Ethics and Members' Interests
Mpumalanga	√	Ethics Committee
Northern Cape	√	
North West		Privileges and Ethics Committee
Western Cape	√	

√ – Registrar carries out investigation after instruction by ethics committee

Finally, as discussed previously, the poor quality of data hampers any systematic monitoring of potential conflicts of interests in financial disclosure reports. Effective oversight requires the reviewer to examine and compare the filer's current report and previous report. When institutions allow a single form to reflect a period of more than one year, as in Limpopo where forms cover five years, it is impossible for any annualised comparison of wealth accumulation or interests to take place.

Essentially, when an MPL's financial circumstances appear to remain static from 2004 to 2008 then the masking of changes or conflicts of interest situations could very easily occur.

Case study – Western Cape Legislature

The Western Cape Legislature has implemented an oversight process that constitutes good practice in the South African context. The Code of Conduct Act 2002 states that the registrar must investigate breaches on receipt of a complaint from an elected official or a member of the public and must then submit a report to the Committee on Conduct and Members' Interests, a multi-party committee requiring majority consent on all issues. The committee then makes the findings available to the legislature. The registrar can elect another person to assist with the investigation. In this case, the office of the Secretary to Parliament in the Western Cape has designated an official to assist with complaints. The provincial A-G also plays an oversight role by examining the declared interests of members who sit on the procurement committee to ensure that no conflict of interest situations arose during procurement and tendering processes.⁸²

Metros

Again, monitoring and review differ across the metros. Cape Town and Johannesburg metros have independent review mechanisms in place. Johannesburg is yet to appoint an integrity commissioner to review councillors' disclosures but has produced terms of reference with an emphasis on independence and impartiality.⁸³ Cape Town's legal department is responsible for review and oversight. In 2007 the city completed a once-off forensic audit of its councillors' declarations.⁸⁴ Ekurhuleni has an internal Chief Audit Executive Office for monitoring. The A-G also reviews their disclosure forms. It appears that Ethekwini does not have a monitoring or compliance unit or agency.⁸⁵ It was difficult to establish the situation in the Tshwane and Nelson Mandela Bay metros because the councils were not forthcoming with information.

Where proactive and close working relations exist between the various institutions and their oversight officers, monitoring and review is significantly enhanced. The working relationship between Gauteng's integrity commissioner, the provincial legislature's registrar and the MPLs acts as a quasi-monitoring process. Both the commissioner and registrar indicated that members feel confident and comfortable enough to approach them with declaration queries ahead of time and this helps to avoid pitfalls later.⁸⁶ Gauteng's integrity commissioner also plays a key role in interacting one-on-one with MPLs and by hosting training workshops.⁸⁷

Finally, the important role of external actors, with respect to oversight and accountability of elected members' interests in South Africa, must be noted.

- The A-G plays as important role in ensuring that the Code of Conduct for MPLs and councillors is

observed.⁸⁸ Examples include an investigation by the Western Cape Provincial A-G into the disclosure records of one Western Cape MPL for failing to disclose certain directorships (which had been previously resigned).⁸⁹ However the role of the A-G in Parliament is more controversial since the office cannot access confidential sections of the register.

- The monitoring and oversight role of the office of the PP is largely limited to executive members. Only in the Western Cape's Code of Conduct does it state that the PP is able to investigate any complaint raised by a member of the public in accordance with the Public Protector Act 1994.⁹⁰
- The disclosure records show that the now-defunct Directorate of Special Operations (the Scorpions) had on occasion requested disclosure forms from various legislatures to establish the economic status of certain individuals. It remains to be seen whether the newly formed replacement unit, the Directorate of Priority Crime Investigations, will use this avenue for its investigations.
- The media and civil society groups, particularly investigatory journalists and researchers, play a vital role in holding elected members accountable. Their role is made more important by the fact that South Africa's disclosure regime relies largely on identifying conflicts of interest through public accessibility and the ability of media and citizens to raise concerns about the conduct of elected officials. Those wishing to investigate conflict of interest situations can compare members' disclosure forms to the CIPRO database to establish whether discrepancies exist. Undisclosed financial interests and hidden conflict of interest situations among public officials have been revealed in this way. It remains one of the most effective methods to hold public officials to account, with many of the so-called monitoring bodies only responding once the media have published a story. However, journalists and researchers wishing to obtain disclosure forms have a number of 'access to information' challenges facing them. This is discussed more in the following section.

The role of the media raises the related issue of 'responsible reporting', a matter of concern noted by several respondents. It is essential that the public be correctly informed about how disclosure processes work as a mechanism to curb the potential for conflicts of interest in modern public life. When reporting, however well-intentioned, is misinformed or sensationalised, the result can be detrimental to the fight against corruption. Over time, the public may even become dismissive of conflicts of interest regulations as a way to combat corruption. For example, it is important that the media do not automati-

cally equate non-compliance with conflict of interest. Where elected representatives fail to disclose their interests it is appropriate that they are publicly chastised for failure to comply with the regulations. However, media reports that suggest that non-compliance implies hiding actual conflicts of interests or corrupt behaviour inappropriately focuses public attention. It is therefore important that media coverage of such issues differentiates between non-compliance and genuine conflicts of interest. Secondly, when a potential conflict of interest situation is sensationalised or equated with corrupt activity without sound reason, it adds to the unnecessary destruction of public trust in democratic institutions, especially when ethics mechanisms are working. Finally, irresponsible coverage of innocuous cases diverts attention away from the really serious conflict of interest cases.

- Finally, the courts can play a role in exposing conflicts of interest and non-compliance. Madikizela-Mandela's failure to disclose arose during her fraud trial,⁹¹ while Tony Yengeni's fraud conviction and Zuma's corruption trial have shown that non-disclosure can lead to criminal charges.

Enforcement and penalties

When people breach disclosure regulations there must be sufficient scope to enforce penalties. It is also important that sanctions are commensurate with the scale of the violation. In South Africa, breaches of the codes of conduct are subject to various penalties. These include reprimands, fines, suspension from office and, in some instances, the removal of an official from their office. Sanctions vary across all levels of government and between institutions within the same level. Therefore, sanctions at the executive level can differ from those found at the provincial level, with each of the provinces having their own lists of sanctions.

Given the smaller number of elected officials compared with the thousands employed in the public sector, oversight and enforcement will always be easier in legislatures and executives. But how willing are these political institutions to punish their wrongdoers? With very little available information on the enforcement of penalties, questions remain about institutional commitment to actively enforcing punishment for violations. Key concerns relate to the lack of stiff penalties handed out in past cases and to the fact that committee deliberations are usually held behind closed doors. Noting that the multi-party composition of committees acts as an important check and balance against partisan bias, the fact remains that elected officials are required to take punitive measures against each other. The challenge for ensuring enforcement lies with those who hold the power to take action against those who fail to comply.

Finally, the lack of uniformity in sanctions does not facilitate the development of a national culture of ethical behaviour. Provincial sanctions differ from each other and from those prescribed and implemented at both the local and national levels of government. This can lead to a situation where unethical conduct is taken more seriously in some government institutions than in others. Bearing in mind that executive members should be subject to harsher penalties, it is suggested here that greater uniformity with regards to the kinds of sanctions that exist and the situations in which they are implemented be achieved across all three levels of government.

National Parliament

Disclosure requirements are part of the Rules of Parliament and are thus enforceable. However, the fact that legislatures tend to regulate conflicts of interest internally tends to limit the range of sanctions that can be applied.⁹² For instance, the Constitution does not allow parliament to expel its members. If members are found to be corrupt then they will be tried in the courts. However, the Joint Committee on Ethics and Members' Interests may call upon MPs to present their financial disclosures if it believes that the code has been breached. Breaching of the parliamentary code may result in the following penalties: a reprimand, a fine of no more than 30 days' salary, reducing a member's salary by 15 days, or suspending privileges and the right to take his or her seat in Parliament for a period of no more than 15 days.

Given that each provincial legislature has its own code of conduct, the penalties and enforcement also differ

Questions remain about some of the punishments decided by the Joint Ethics Committee. For instance, how does it arrive at an amount for the fines that MPs must pay? Some have criticised the lax penalties imposed on those who have contravened the disclosure requirements on shares, directorships, gifts, benefits and other interests.⁹³ There is also an ethical obligation on political parties to act against their members who contravene the code. The ANC subsequently fined Lekota R5 000, while Madikizela-Mandela was expelled and Yengeni was fined and suspended for five years, although his suspension was suspended.

National executive

International experience suggests that the enforcement of regulations among executive members should rely largely on transparency and political accountability rather than entrusting the enforcement role to an external body that is subordinate to the executive.⁹⁴ The question of who decides on sanctions and what the sanctions should be is unclear and is not spelled out in the relevant legislation or codes.

As far as we can ascertain, the declarations of executive members have come under scrutiny twice: by the PP and the A-G in 2006. The two investigations are linked as the PP followed up on the A-G's report on 'The Declarations of Interests by Ministers, Deputy Ministers and Government Employees', which found 14 ministers and deputy ministers out of 20 had not strictly complied with the disclosure requirements. Eight spouses were also said to have submitted incomplete information.⁹⁵ The PP's report highlights how some of the alleged failures to disclose were linked to long delays in updating the database of director resignations at the Company Register.⁹⁶ This was the reason for the PP dismissing the potential failures to fully declare. The PP said he could not verify spouses' details as these are in the confidential section of the register.

It is not clear whether there is sufficient clarity on how to deal with the declarations of deceased ministers and deputy ministers (such as the late Stella Sigcau) or those who leave cabinet. In the latter scenario, the Jacob Zuma case has raised additional dilemmas: the issue of his alleged failure to disclose interest-free loans from a number of people was before the court as part of the fraud and corruption trial by the NPA. It is understood that various pieces of correspondence and documentation were part of Zuma's disclosure file, but these were not released as they were considered *sub judice*. Thus, the only document provided is a 2004 letter requesting the president's permission to accept gifts, including a cow.⁹⁷ Jacob Zuma apparently did not disclose in 2005 as his sacking as the country's deputy president in June 2005 coincided with the start of the new reporting cycle.

Provincial and local levels

Given that each provincial legislature has its own code of conduct, the penalties and enforcement also differ. While Limpopo and Mpumalanga have a similar system to the national Parliament, other provinces have adopted their own versions. The fines levied against MPLs differ, as do the number of days for which they may be suspended.⁹⁸ While Limpopo allows for a reprimand or a fine not exceeding 30 days' salary, Mpumalanga caps the fine at R5,000 and allows for suspension for up to 20 days.

In all provinces the various committees are responsible for recommending suitable penalties, as illustrated in

Table 2. Yet, they do not have the final say. They make recommendations to the legislature's plenary, which has the final decision.

Table 2: Ethics committees in provincial legislatures

Province	Recommending penalties
Western Cape	Conduct Committee
Northern Cape	Committee on Ethics and Conduct
Mpumalanga	Ethics Committee
Limpopo	Committee on Ethics and Members' Interests
KZN	Disciplinary Committee
Gauteng	Integrity Commissioner makes recommendations to the Privileges and Ethics Committee for consideration
Free State	Committee on Ethics and Members' Interests
Eastern Cape	House Ethics Committee
North West	Ethics Committee

Councillors who fail to disclose their financial interests face sanctions as laid out in the Municipal Systems Act 2000, schedule 1 (14)(2), which states:

If the council or a special committee finds that a councillor has breached a provision of this Code, the council may

- a) Issue a formal warning to the councillor;
- b) Reprimand the councillor;
- c) Request the MEC for local government in the province to suspend the councillor for a period;
- d) Fine the councillor; and
- e) Request the MEC to remove the councillor from office.

It proved difficult to obtain and verify information about the number of complaints that have been laid at provincial and local levels. Most interviewees stated that they had not received many complaints. Again, due to a lack of information, it was difficult to establish the effectiveness of the enforcement of penalties.

ACCESS TO INFORMATION

At the heart of disclosure is the principle of transparency. Through public disclosure these records act as public statements against which officials can be held to account.⁹⁹ If the interests of elected officials remain hidden from public view after disclosure the process serves little purpose. Especially in countries like South Africa, where monitoring and oversight relies in large measure on public accessibility, secret disclosure does not do much for accountability. It is therefore imperative that citizens can regularly access these records.¹⁰⁰

However, publication of financial records raises important, but controversial, right-to-privacy issues. While it is important to secure the benefits associated

with transparency it must be balanced against the member's right to privacy. At stake is the personal integrity of officials and their families, whose financial interests might be exposed for all to see.¹⁰¹

Balancing transparency and privacy

Striking the right balance between transparency and privacy is difficult. However, the less we can rely on the integrity of internal regulation and oversight, the stronger the case for public disclosure as a mechanism for detecting conflicts of interest becomes. And the inherent difficulties of monitoring, as already discussed, imply that the role of the media and public in scrutinising declarations is crucial. Many countries, including South Africa, therefore choose to split the information contained in declarations into public and non-public parts.

In South Africa, the confidential part of the register contains the following entries at both parliamentary and executive levels of government:

- The value of financial interest in a corporate entity other than a private or public company
- Details of foreign travel when the nature of the visit requires those details to be confidential
- Details of private residences
- The value of any pensions
- The details of all financial interests of a member's spouse, dependent child, or permanent companion

Parliamentary members are also asked to declare the amount of any remuneration for any employment outside Parliament and for any directorship or partnership, while only executive members are asked to declare their financial liabilities.

Access to the confidential section of the Parliamentary Register is restricted to a member of the Ethics Committee, the Registrar and staff assigned to the Committee. Similarly, at the executive level access is limited to the President or relevant premier, the secretary and his or her staff.

While the need for confidentiality and privacy is in keeping with other disclosure regimes, the pressing concern is whether the confidential section of a register provides a loophole through which members can hide financial interests and assets and thereby conceal conflict of interest situations. Members may be tempted to declare questionable interests in the confidential section, knowing that without proactive monitoring and investigative capacity, it is unlikely to be discovered. Indeed, one registrar at provincial level confirmed that MPLs do try to hide financial interests in the confidential section of the register.

A related concern is whether or not the financial interests of a member's spouse, dependent child, or

permanent companion should be included in the public or confidential section of the register, or indeed whether they should be disclosed at all. Since spouses and children are not public office holders some argue that it is an invasion of their privacy to ask for such information. However, advocates argue that the financial interests of spouses and immediate family should be treated as if the filer holds them personally. The possibility exists that officials could circumvent financial disclosure rules by transferring wealth to other members of their family. Many countries require their elected officials to disclose the finances of their spouses and children to prevent such evasion. Australia, Taiwan and the US impose strong requirements on family members. The US system requires that executive members must list all reportable assets and investment income, transactions and liabilities of their spouses and dependent children.¹⁰² As the US Office of Government Ethics states on disclosure:

On a common-sense level, the law identifies these interests with the filer to avoid creating loopholes. Without this rule, a filer could simply transfer any questionable interest to a spouse or close associate and avoid the law.¹⁰³

The US legal system also found it constitutional to publicly disclose a spouse's financial interests, arguing that the financial disclosure law did not unconstitutionally invade personal privacy of its executive members, their spouses or children.¹⁰⁴ Canada only requires disclosure of ministers' families, not legislators, while Italy has a voluntary approach for family members.¹⁰⁵

An elected official in South Africa is required to declare their spouse's and immediate family's interests but only in the confidential section. This has raised

Officials could circumvent financial disclosure rules by transferring wealth to other family members

concerns that, due to limited access to the confidential section, some elected officials can hide or conceal company and other financial interests or assets in the name of their children, spouse and other relatives. When company holdings and related interests are hidden under spouse's details it is more difficult to show if there were any benefits accrued to the member personally. The *Business Times* recently maintained that many of the new

and current members of the ANC's National Executive Committee (NEC) (post-Polokwane) stand to benefit indirectly from empowerment through their spouses.¹⁰⁶ Furthermore, clear conflict of interest situations arise when companies that spouses are involved with benefit from state-related tender and procurement deals. For instance, NEC member and SACP deputy chairperson, Ncumisa Kondlo, was last year embroiled in controversy after it emerged that her late husband, Thobile Mtwazi, had substantial interests in a company called Africa Strategic Asset Protection, which was awarded a R32 million contract to provide security to Parliament.¹⁰⁷ In another instance, Thoko Mashiane, former Nelspruit Municipal Manager, allegedly purchased T-shirts with municipal money from Mdeni Business Enterprises, a company owned by her husband, Vusi Mashiane. She failed to disclose these business interests.¹⁰⁸

Without public access to information of spouses, immediate family or lifetime partners, it is extremely difficult for citizens and the media to exercise complete oversight in order to establish potential conflicts of interest. This has raised a number of concerns about how to deal with the confidential section of the register and whether the right to privacy should, in fact, be subdued by introducing greater transparency of these interests. The counter-argument is that accountability is upheld by the existence of other avenues for investigation. In the instance of a person suspecting that an executive member is party to a conflict of interest situation through their spouse's financial interests, they are able to search CIPRO, using the spouse's name. Where interests appear on CIPRO that present an actual or even perceived conflict of interest situation for the executive member in question, that member would be immediately obliged by the Executive Ethics Act to recuse themselves. This, it is argued, is sufficient to ensure that executive members are unwilling to hide dubious financial interests among their spouse's and immediate family members' financial dealings. Furthermore, the same tactic could be used by working through a member of the extended family, or a friend, who is not subject to the disclosure rules.

Whether the solution to this conundrum involves the public disclosure of spouses' interests is a subject for wider debate. However, a worthy interim measure should include stronger internal oversight and monitoring of these sections of the registers particularly at the executive level, where members hold senior positions and exercise a great deal of decision-making power. The Ethics Committee in Parliament has recognised a potential loophole whereby Parliament cannot compel its member's spouses to declare their interests. The committee should therefore decide whether stronger obligations should be set for spousal declarations in the future. South Africa is not alone in this regard. Experience in other

African countries shows that some public officials also use relatives to hide personal financial interests. It has been noted that one of the weaknesses of the Ghanaian system is the lack of disclosure for family members. The Leadership Code of Uganda was recently under review in order to give it wider coverage by extending the declaration requirement to members of the immediate family.¹⁰⁹

The inclusion of financial liabilities of executive members in the confidential section has raised concerns. Liabilities present an equally likely area for conflicts of interest as assets and other financial interests. As such, there should be greater public access to this information. Moreover, several parliamentary registrars remarked that significant liabilities are common among their members and, as such, argued that disclosure requirements for liabilities should be extended to legislative members at all spheres. Only in Australia, Canada and the United States are legislators required to disclose liabilities.¹¹⁰ This requirement is uncommon because liabilities are perceived as a particularly sensitive and private issue. However, experts argue that excluding liabilities from a declaration is tantamount to providing a distorted picture of the financial situation of an individual. Indebtedness can easily give rise to conflicts of interest and even corruption.¹¹¹ Although Carl Niehaus was not an elected official, the recent allegations that the former ANC spokesperson abused his position of influence to pay off substantial debts suggests that high levels of indebtedness can make

Liabilities present an equally likely area for conflicts of interest as assets and other financial interests

public officials more susceptible to abuse of office. Finally, the research found that a public official's right to privacy could inadvertently infringe on a citizen's right of access to the public section of the register. When institutions are confused about how to interpret their respective Codes of Conduct in conjunction with the relevant access to information legislation, or when they are simply reluctant to make their records available, the right to privacy can be abused. Nelson Mandela Bay Metro's refusal to make records available depends largely on their claim that the confidentiality principle relates to the entire disclosure form. This has meant that no part of any of their councillors' disclosure forms is publicly accessible. We assume that their reluctance may be due, in part, to confusion about how best to interpret those sections of the Municipal Systems Act which relate to public access, but which are ambiguous. Schedule 1,

which contains the Code of Conduct for local government, states in Section 7(4):

The municipal council must determine which of the financial interests referred in sub item (1) must be made public having regard to the need for confidentiality and the public interest for disclosure.

Clearly, in the Nelson Mandela Bay case, the councillors in question determined that the entire form should remain confidential, thus disregarding totally the need to balance privacy against the public interest. While the confidentiality of some information is important, legislators and the relevant institutions should act swiftly to clarify the rationale behind partial confidentiality to prevent abuse and uphold the need for accountability and transparency.

With these issues in mind, it is worth reflecting on the monitoring and oversight mechanisms to which the confidential sections of the registers are subject. The confidential sections are not audited or scrutinised by any independent body situated outside of Parliament or the executive, apart from the PP who has access to the confidential section of executive members' forms. At the executive level, most confidential sections of registers have never been subjected to public scrutiny because only a court order can give authority to access them.¹¹² The PP can access the confidential section to investigate breaches and can give an order for greater public access.

In Parliament the Ethics Committee is the only body with access to the confidential section of the register. However, it is unclear whether this committee has the political will, expertise and resources to actually perform a proper audit of potential irregularities by MPs and their spouses who use the confidential section incorrectly. The A-G has been unable to easily access the confidential sections of Parliament's records. In 2008 the A-G's office attempted to investigate, for the first time, the confidential section of the register of MPs private interests.¹¹³ However, Parliament's legal unit blocked attempts by the A-G's office to obtain these records, arguing that the A-G, like the public, has no right to access the confidential register. Under conditions where Parliament is responsible for holding its own members accountable, the independence and integrity of oversight is diminished. As the A-G's legal advisor, Ashok Pundit, asked: 'How else will the public interest be satisfied if Parliament (itself) will test the validity of the declaration therein?'¹¹⁴ The confidential section is designed to protect the privacy of immediate family members, while ensuring that elected representatives cannot benefit indirectly through family's hidden financial interests. However, a conundrum remains. The need to protect the privacy of elected officials and their families must be weighed up against the costs of transparency and accountability.

Testing the right to access information

A citizen's right of access to information is enshrined in Section 32 of the Constitution. The Promotion of Access to Information Act 2000 (Act 2 of 2000) (PAIA) gives effect to Section 32 of the Constitution subject to justifiable limitations, including limitations aimed at the reasonable protection of privacy, commercial confidentiality and good governance and in a manner which balances the right of access to information with any other right.¹¹⁵ The PAIA establishes mechanisms or procedures to give effect to this right in a manner that enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as is reasonably possible. Part 2 of PAIA is relevant to the conduct of public officials as it sets out the basis upon which information must be supplied by a public body, on the request of a member of the public. Although enshrined in law access to information is often notoriously difficult to gain.

The right to access information contained in disclosure records is specifically outlined in the various legislation and codes of conduct across the different branches and spheres of government. According to Section 7(4) of the Executive Members' Ethics Act, the Secretary is required to furnish the public with access to the public section of these disclosure forms during office hours. Section 11 of the Parliament's Code of Conduct for Assembly and Permanent Council Members states that 'any person has access to the public part of the Register on a working day during office hours'. The provincial codes vary but all refer to the public section of the register, with some explicitly acknowledging public access during office hours, as shown in Appendix 2 Table 1.

The Local Government Municipal Systems Act 2000 (Act 32 of 2000) states in Schedule 1 s. 7 (4) that:

The municipal council must determine which of the financial interests referred in sub item (1) must be made public having regard to the need for confidentiality and the public interest for disclosure'. Section 70(2)(b) of the same act also states that the municipal manager must 'communicate sections of the Code of Conduct that affect the public to the local community.

South Africa's disclosure regime is therefore strongly characterised by access to information and in this respect is more open than many disclosure regimes globally. There is tremendous variation among countries in whether disclosure is made public and how much is made public. Only a third of 175 countries surveyed in a 2009 World Bank study allow public access to disclosure.¹¹⁶ For instance, while Tanzania and Uganda make disclosure information public, one must still apply for access to this information. In the UK it is more freely available.¹¹⁷ Eight

of the 18 countries surveyed by the National Democratic Institute that require disclosure routinely publicise financial statements.¹¹⁸ These include Australia, the Czech Republic, Ireland, Italy, Spain and the UK. In contrast, Germany prohibits any public inspection while French and Taiwanese rules dictate that only those financial statements found to be in violation of the rules be made public. Interestingly, studies show that the greater the public disclosure the lesser the perception of corruption.¹¹⁹

Through the exercise of collecting all available disclosure records from the legislatures and executives at all levels of government between 2004 and 2008 we effectively tested the right to access the information held in the public sections of the declaration forms. Written requests to obtain copies of declarations commenced in mid-November 2007. Numerous follow-up communications were required as the requests made their way – mostly at snail's pace – through various bureaucracies. By September 2008 the last forms were made available, with some notable exceptions. Despite the sluggish responses, most legislatures and councils demonstrated a sound grasp of access to information laws and responded positively by facilitating access to the disclosure forms. However, executives at national and, especially, at provincial levels of government were less forthcoming.

To get access to the disclosure records of elected officials involves a lot of time, patience and resources. Officials seldom respond to enquiries without repeated prompting. Almost never was information shared without an official written request. Often the request was met with suspicion, or seen as yet another cumbersome task, increasing the administrative burden. It was seldom easy to identify the official who could facilitate public access to this information.

These are major concerns and can be interpreted as obstacles to effective oversight and monitoring. As such, there appears to be little opportunity for ordinary citizens to hold their elected officials accountable and to detect conflict of interest situations using disclosure records. A much greater commitment to transparency is necessary if the credibility of the disclosure regime is to be enhanced.

We also found that the lack of understanding about the need for public disclosure impedes our right to access this information. The result is that there is a huge variation in accessibility of disclosure forms in the various branches and levels of government. Although public access is a pillar of the South African Constitution, many institutions do not make disclosure records available to the public in practice. Sometimes when records are made available, the information is limited. Obviously, without ease of public access to information, accountability is limited and the practice of disclosure becomes a hollow exercise.

National Parliament

The register of the disclosures of all members of the National Assembly and the NCOP is compiled and published annually. Copies are made available at the registrar's office. It is also publicly accessible online via Parliament's website at <http://www.parliament.gov.za>. The first register of members' interests was published in February 1997.

Provincial legislatures

Collecting disclosure records from all nine provincial legislatures was completed with relative ease. While the Western Cape responded promptly, other provincial officials said they needed to consult with the chairpersons of their ethics committees (Northern Cape and Limpopo) before making the registers available. The Western Cape practices an open information policy to

citizens. One simply has to submit a request in writing to the Registrar in order to access the members' registers. Moreover, Gauteng and the Northern Cape legislatures also keep copies of their registers of members' interests accessible for ordinary members of the public at their respective libraries.

The metro councils

Although the metro councils of Johannesburg, Cape Town, Tshwane, Ethekekwini and Ekurhuleni made their declarations available, at times a measure of suspicion greeted our requests. Some disclosure records for certain years were substantially delayed. Johannesburg supplied requested documents for only 2004/05. The 2006/07 declarations are still unavailable to the public because they need to be reviewed by an integrity commissioner. While it is laudable that the metros have established appropri-

The case of Nelson Mandela Bay Metro

Standing alone is Nelson Mandela Bay Metro where councillor declarations remain inaccessible – in stark contrast to even the declarations by the President of the country. After a delay of several months, the request for councillors' disclosure forms was met with refusal after the Council resolved, following a decision in March 2008, not to make any part of their financial declarations public.¹²⁰ A second request that the Council review its decision not to make their disclosure records available in order to bring it into line with the other metros was met with silence.

We believe that the Council has misinterpreted the confidentiality clauses set out in the Local Government Municipal Systems Act, and that parts of the information pertaining to the financial and other interests of councillors should remain publicly accessible. The act states in Schedule 1 s. 7(4) that 'the municipal council must determine which of the financial interests referred in sub item (1) must be made public having regard to the need for confidentiality and the public interest for disclosure'. It appears that the council's decision to keep confidential the full contents of their disclosure records may place too much emphasis on the need for confidentiality while the act intends for, and indeed is supportive of, some degree of public disclosure.

The act also points out in Schedule 1 s. 10(3) that the non-disclosure of information as deemed confidential by the municipal council should not 'derogate from the right of any person to access information in terms of national legislation', namely the Promotion of Access to Information Act [PAIA] 2000. When a request for information of this nature is being considered, the constitutional right to information and the PAIA should be the bedrock upon

which such decisions are based. The PAIA states that the public's constitutional right to know overrides any other legislation that limits this right. It reads: 'This Act applies to the exclusion of any provision of other legislation that – (a) prohibits or restricts the disclosure of a record of a public body or private body; and (b) is materially inconsistent with an object, or a specific provision, of this Act.' It therefore appears that a request of this nature is supported by the Constitutional 'right to know' and complimentary legislation. Matters relating to access to councillors' records should be guided by mutual consideration of the Municipal Systems Act 2000 and the PAIA. Consideration should also be given to established best practice by other legislatures. Across other legislatures members' declarations are divided into a public section and a confidential section. The confidential sections are usually limited to information relating to spousal or immediate family interest, addresses of private residences, and liabilities at the executive level. This now constitutes best practice and is set out as such in the various Codes of Conduct across all spheres and branches of government. Otherwise, the rest of the private interests held by a representative are deemed to be public information. Nelson Mandela Bay Metro has thus clearly disregarded best practice.

This refusal is particularly disturbing when one considers the number of conflict of interest situations that have arisen at the Nelson Mandela Bay Metro. One case concerns irregular municipal tenders where high-ranking officials created two fictitious companies and got them to tender high to justify awarding a contract to another company of their choice. Although the municipality's internal audit division highlighted the fraud in a report it was not made clear who stood to benefit from such misrepresentation.¹²¹ Another case involves the award of a R3 million road tarring contract to a company whose director was a councillor at the metro.¹²²

ate oversight and monitoring mechanisms the delay in release raises questions about timeous public access. In the interests of holding councillors accountable, it is nonsensical for citizens or the media to monitor potential conflict of interest situations during the 2006/07 reporting period only in 2009, or possibly later.

The Presidency

The Presidency appears to have quite complex bureaucratic processes that must be adhered to before access is granted. According to Section 7(4) of the Executive Ethics Members' Act the public part of the register is accessible to 'any person...during office hours of the secretary concerned'. After several months of communications the Presidency's Legal and Executive Services section indicated that the documentation could be inspected at the Office of the Secretary during normal office hours.¹²³ Access to photocopies of the public sections of the declarations of interest by the President, his deputy, the ministers and deputy ministers were successfully obtained at the Union Buildings in Pretoria in March 2008. Access was unqualified and all documents were scanned.

Provincial executive councils

All nine provincial executive committees were approached for copies of the declarations of the premiers and MECs. Copies were only obtained from the Western Cape, two weeks after the initial request was made. In this case it appears, however, that most MECs simply file the same declaration they file for the provincial legislature, despite the more detailed requirements for executive members. The majority of the other provincial executive councils dismissed the request on the grounds that these members already declare to their provincial legislatures. In most cases we were redirected back to the legislatures' records. Interestingly, Mpumalanga

Regulations are important
because they act as deterrents

dismissed the request on the grounds that executive declarations made to the Premier are strictly confidential. They then directed the request back to the legislature. However, the Free State and KZN tabled the request at their executive council meetings. The Free State executive council initially agreed to supply copies of declarations. Email correspondence indicated that Premier Beatrice Marshoff 'will be signing a letter to all MECs today requesting the submission of information by Wednesday 5 March 2008.'¹²⁴ However, this deadline was not met

and the Free State has yet to make available copies of the declarations. KZN responded favourably, stating that documents could be perused under the supervision of the provincial director-general himself during office hours.¹²⁵ Yet, the KZN Office of the Director-General failed to provide a date on which records could be inspected, despite repeated requests. The significance of disclosure for accountability at the provincial executive level appears to be misunderstood. The rationale for more onerous disclosure requirements among executive officials is based on their extensive decision-making powers. In turn, public access to disclosure records to ensure a greater degree of accountability is therefore most critical to this level of government.

REVISITING ETHICS IN PUBLIC LIFE: BUILDING A CULTURE OF ACCOUNTABILITY

Enforcing disclosure regulations is only one part of the solution towards reducing conflicts of interest and corruption in government. Regulations are important because they act as deterrents by 'naming and shaming' those involved in corrupt activities and, importantly, they help to guide the behaviour of public officials to make the right choices in the first instance, so as to avoid potential conflict of interest situations.

However, a less tangible factor crucial to realising cleaner government involves self-regulation. The success of South Africa's democratic institutions in meeting their obligations to citizens also depends on a dedicated and incorruptible team of officials who embrace the spirit of public service. This involves placing the public interest before narrow self-interest, regulating your own behaviour and removing yourself from conflict of interest situations as soon as they arise. The values that inform the spirit of public service are those of integrity, honesty and selflessness.

Compliance versus values-based approach

In South Africa, the establishment of ethics in public life has been guided by codes of conduct that focus largely on compliance to a set of rules and limitations, such as disclosure of financial interests. Yet, this 'top-down' compliance-based approach places little emphasis on the over-arching values that ought to guide the behaviour of people in public positions. If public officials do not own these values they come to view conflicts of interest regulations, like disclosure, as an imposition on their individual freedoms, or simply as cumbersome bureaucratic necessities of public life. A top-down approach, which simply imposes rules and enforces compliance,

may encourage an instrumental attitude to the rules themselves ('I will ignore or circumvent this regulation unless the risk of getting caught is too high').¹²⁶ Instead, a values-based approach can play an important role in the moral life of institutions by laying the foundations for ethical conduct. Disclosure regimes should avoid being perceived as a set of reactive rules designed to punish unsuspecting officials. Instead, they should provide guidelines to encourage proper behaviour.¹²⁷

The compliance-based approach has constituted the first step towards deepening ethics in public life. And, to a large extent, it has been successful in its implementation. However, as democratic institutions mature it becomes increasingly important that broad consensus about societal values is reached – especially with respect to our expectations of people in public positions. In particular, we need to clearly define limitations for people who enter public life. In the South African Constitution, Section 22 states that citizens are free to pursue economic activity. Yet, public life has inherent limitations and values attached to it that demand a particular standard of behaviour and probity which may involve personal sacrifices and self-regulation. Thus, beyond the procedural formality of simply disclosing one's financial interests, there remains a deeper and more important need to establish minimum standards of ethical conduct for public officials. Public officials must embrace the spirit of public service and adapt their behaviour accord-

Public officials must embrace the spirit of public service and adapt their behaviour accordingly

ingly. A procedural approach to conflicts of interests in public life does not sufficiently help officials to internalise the rationale for ethical behaviour. It has been proven that a mix of value- and rule-based approaches has the highest impact.¹²⁸ As van Dooren states, 'sustained behaviour will only occur when both hearts and minds are convinced.'¹²⁹

The shift from rule-based to value-based instruments is a gradual process. And while integrity standards remain low, rule-based instruments will remain important.¹³⁰ Yet renewed effort to define public values is required, especially regarding what constitutes acceptable behaviour by public officials regarding their private economic interests. Common agreement will rely on a rich exchange of ideas and debate between citizens and political parties. Civil society groups also play a vital role in developing and facilitating the discussion. The values

have to be generated by the participants themselves. Values are best developed through a round of dialogue exercises that allows for an exchange of views, a development of solutions to conflicts of interest dilemmas and then the development of a common institutional culture. Public representatives themselves must agree on a common set of values and principles that they are willing to be subjected to and then adhere to them. As conflict of interest situations arise, without consensus as to what constitutes principled and ethical behaviour, there is little to guide public officials. However, when a core set of values is established, these questions are more easily addressed and a suitable pattern of behaviour becomes entrenched. Rather than officials complying as a result of a cost benefit assessment, value-driven integrity will ensure that people behave ethically because they want to, not because they have to.¹³¹

Closing the loopholes

The overlap of public and private life in South Africa ensures that conflict of interest situations will continue to emerge. The political and economic elite overlap to a considerable extent and this can be a source of widespread nepotism or corruption. Policies designed to redress historical socioeconomic inequalities, such as BEE, can also become a source of conflicts of interest. However, the larger contextual environment, which gives rise to so many questionable situations, is not sufficiently dealt with by the existing ethics regulation. Specific examples include the revolving door between government and business and the interconnectedness between the incumbent ANC party and the BEE businesses that tender, often successfully, for public contracts. While these examples highlight the need for tighter regulations, the context makes the purpose and design of conflict of interest regulations more complex. Where ministers and their families hold key positions in a country's business sector severe prohibitions on holding external company interests are unrealistic since executive members simply become more likely to circumvent and undermine regulations. In these contexts, it may be more realistic to allow for significant overlapping of elites while ensuring that regulations increase transparency by insisting on full disclosure of business interests and the recusal or withdrawal from decision-making when conflicts arise.¹³² As Reed states, 'openly acknowledging their right to have outside interests may indeed encourage the disclosure of such interests.'¹³³ International experience tells us that successful regulations are those that are tailored to the country's specific context.

Another cause for concern relates to a potential loophole around the giving of gifts. Gifts for political leaders are a time-honoured practice, intended as an expression

of respect. In some countries gifts are of symbolic importance. On occasion, however, gifts represent compensation for political favours.¹³⁴ Although gifts and hospitality above R1 500 should be disclosed, Parliament currently has no upper limit or threshold on the value of accepted gifts by MPs. An MP can accept any gift as long as it is disclosed.¹³⁵ A telling example concerns an MP who accepted a Mercedes Benz in 2008.¹³⁶ This highlights not only the need for tighter regulations for the giving of gifts but suggests greater emphasis should be placed on what constitutes ethical behaviour on the part of elected officials. The US imposes the most severe gift restrictions – members and staff may not accept any gift valued at greater than \$50.¹³⁷

Setting a precedent: S'bu Ndebele and the Mercedes Benz s500

On 16 May 2009 S'bu Ndebele, Minister of Transport, received a Mercedes Benz s500 valued at R1.1 million from Vukuzakhe contractors, a road construction company. This gift was allegedly given in honour of the work that he did, as Premier of KZN, to provide small contractors with a platform to grow. After much media hype, Ndebele stated that he had had no knowledge, while working with Vukuzakhe, that he would receive this gift from them. Furthermore, he noted that Vukuzakhe had no prior knowledge of his future ministerial position. After receiving the car, Ndebele asked President Zuma for advice on whether he should retain the gift or not. Zuma gave him permission to keep the car. However, Ndebele opted to return it.

While Ndebele should be commended for refusing this luxury gift, cabinet sent out a misleading message when they granted him permission to keep the gift if he decided he wanted to do so. In terms of the Executive Members' Ethics Act, Ndebele was required to refuse the gift outright. The Act states that, should a member receive or be offered a gift worth more than R1 000, he or she is required to obtain the President's permission to retain or receive the gift, which he did. However, it also reads that gifts which are given in return for a benefit received from the member in the execution of their duties, may not be received or retained. Admittedly, the word 'benefit' is not defined. However, it does seem to suggest that executive members should not be rewarded for doing what is their job. That there was much debate at the time over the correct course of action to be taken does suggest, however, that executive members and indeed the Presidency are not always familiar with requirements in legislation and in the Code of Conduct that directly affect them.

Another precarious relationship concerns members who sit on committees that have oversight over companies that those same members may have interests in. For

example, should MPs who sit on the Communication Committee in Parliament be eligible to buy BEE shares in telecommunication companies (such as MTN and Vodacom) over whom they have indirect oversight through ICASA, the regulator for the South African communications sector (which, in turn, is responsible for the issuing of licenses to these companies)?

Finally, it seems that there is a gap in the regulations regarding the participation by elected representatives in government contracts. At local level restrictions on elected officials tendering for municipal contracts is controlled through the Municipal Finance Management Act. At the national and provincial levels, however, the Public Finance Management Act fails to regulate the same activity.

Of course, few parliamentarians condone corruption and abuse of public office. But, in the grey areas of conflict of interest, consensus on what constitutes ethical behaviour or what is tolerable will begin to unravel and it is precisely in these areas that MPs are most likely to face dilemmas in their personal conduct.¹³⁸

FINDINGS AND RECOMMENDATIONS

Disclosure should be regarded as part of a larger effort to regulate conflict of interest situations in public life. While it is a crucial tool for preventing and controlling abuse of public office it cannot deal with the full range of conflict of interest situations that emerge in South African public life. However, disclosure has helped to raise awareness among citizens and elected representatives about the need for those in public life to be more cautious in their conduct, especially with their links to the private sector.

It is commendable that the South African system provides elected officials with clear guidelines for disclosure. Members have clarity on what they should declare and on which items are publicly accessible or confidential. It is also admirable that the scope and range of disclosure is as wide as it is – wider, in fact, than that of many other countries.

However, disclosure is no simple matter. Regulations need to be continually sensitive to the context within which they operate. Professor Kader Asmal, among others championing for strengthening ethics in public life, argues that the disclosure system, including the Executive Ethics Act and various codes of conduct, require substantive updating and revision, mainly because they disregard the current political and socio-economic environment within which politicians operate. Several weaknesses have been identified in the current disclosure regime. Key recommendations for future regulatory revisions include the following:

- In the interests of monitoring and accountability it is vital that records are complete, consistent and regularly submitted. After all, a complete register is an effective register.
- Accessibility, monitoring and oversight will be greatly enhanced by the harmonisation of disclosure processes across similar institutions, particularly with respect to the codes of conduct, the layout and content of disclosure forms, the monitoring of these records, and penalties and sanctions for breaches. Increased standardisation will ensure that all elected officials are subject to a similar set of ethical principles and required to comply with a similar basic set of requirements. Standardisation should also serve the purpose of communicating to elected representatives and citizens that government demands minimum standards of ethical behaviour from its office bearers.
- A properly resourced disclosure process is key. It is advisable to establish and give sufficient capacity to a permanent official responsible for overseeing the register of members' interests within each legislature and executive: one who can provide advice and guidance to its members, deal with complaints, manage public access and report to the relevant parliamentary committee.
- The credibility of the disclosure regime relies on suitable monitoring and oversight. On the face of it, the provisions for disclosure appear adequate. However, weak investigative capacity, coupled with difficulties in accessing information in some cases, may combine to undermine the overarching objectives of the disclosure regime – the transparency and accountability of elected officials. Much more should be done to increase the investigatory powers of those tasked with monitoring conflicts of interest among elected representatives. A decision needs to be taken on whether registrars should be able to initiate investigations on their own, or whether an external investigatory agent should be introduced to support their work. Any revisions must ensure stringent monitoring of both the public and confidential sections of the forms.
- Conflict of interest laws are only as effective as the penalty provisions specified within them and their enforcement. Sanctions against non-disclosure must be applied in all cases and should be severe enough to encourage disclosure. Moreover, the lack of uniformity around the kinds of sanctions to be imposed and when to impose them does not facilitate the development of a national culture of ethical behaviour.
- A crucial observation of our analysis is the large-scale differences across institutions in the ability of citizens to access disclosure records. Mandating public disclosure by law is no guarantee that the public can obtain this information. Public access is key to an

effective disclosure regime. By allowing public access to disclosure records government demonstrates its commitment to accountability and transparency. It increases opportunities for identifying and preventing potential conflict of interest situations (and corrupt activities) by a wider audience, rather than relying on the limited capacity of internal reviewers. A campaign among officials to raise awareness about the rationale for disclosure as a tool for good governance may help dispel some of the fears as to why information is sought and, in turn, should promote ease of access to information. An education campaign for the general public would also be beneficial, especially at local government level where councillors' interests in companies doing business with the municipalities may have a very significant impact on the lives of residents. Grassroots politics are, anecdotally, rife with rumours of, for example, how this councillor got that tender to remove rubbish in a section of a township. Knowledge of the declarations – preferably linked to easy access – would provide a way for local organisations and residents to check information and thus end rumour-mongering. This, again, could be a positive development at municipal level where tempers have flared across the country due to real and/or perceived bias among councillors.

- To curb corruption facilitated by the revolving door that exists between the corporate and public sectors, it is necessary for South Africa to adopt a US-style statutory cooling-off period. Those resigning from public office and wishing to enter the corporate sphere in a related business must be made to wait for at least one year. By the same token, those wanting to leave corporate posts and to be employed in public sector positions that involve the adjudication of tenders in the same sector must also be made to wait one year before assuming their duties.
- Loopholes create opportunities for conflicts of interest to go undetected. In this regard, the confidential section of the register remains a weakness. At the very least, internal monitoring and oversight mechanisms of the confidential section should be improved if public access and external auditing remains prohibited. In addition, the current loophole of gift-giving, where there is no upper value threshold, needs revision. While it may be perfectly legal to accept expensive gifts it is ethically dubious and creates the perception that politicians can be bought.
- Finally, the report highlights the need to revisit the issue of ethics in public life. As the fourth democratically elected government and parliaments commence their work in 2009 it provides an opportunity to initiate a national conversation to further define our public values and what constitutes acceptable standards of behaviour for those in public life. Such a

debate on values and ethics should also reflect on how best to deal with the precarious relationships that are not currently managed by codes of conduct, but continue to pervade public life. While South African solutions should be mindful of international bench-

marking, they should be tailored to deal with specific problems that arise within the national context. An explicit focus on public ethics in democratic institutions should also go some way towards regaining the confidence and trust of the South African public.

APPENDIX 1: CONTENTS OF DISCLOSURE AT THE LOCAL (METRO) LEVEL

Table 1: Contents of disclosure forms at metro level

Metropolitan council	Public section	Confidential section	Spousal information
Cape Town	Companies; close corporations; partnerships; shares or securities; other financial interests	Outside employment; financial income or benefits	Public section
Ekurhuleni	Companies; partnerships	No reference to confidential information	Public section
Ethekwini	Shares; financial interests in public or private companies and other corporate entities; directorships and partnerships; ownership of and other interests in land and immovable property; pension; other material benefits; outside employment; consultancies and retainerships; sponsorships; gifts and hospitality, foreign travel	No reference to confidential information	No reference to spousal information
Johannesburg	Shares and securities in any company; membership of close corporations; interests in trusts; directorships; partnerships; employment; interest in property; pension; subsidies, grants and sponsorships by any organisation	Value of financial interests; the amount of remuneration for outside employment or directorship or for membership of close corporation, partnership; details of foreign travel when the nature of the visit requires those details to be confidential; details of private residences; name of pension fund and monthly payment; details of all financial interests of a councillor's spouse, dependent child or permanent companion to the extent that the councillor is aware of	Confidential section
Nelson Mandela Bay Metro *		Shares and securities in any company; membership of close corporations; interests in trusts; directorships; partnerships; other financial interests in businesses; employment and remuneration; interest in property; pension; subsidies, grants and sponsorships by any organisation; gifts	Confidential section
Tshwane	Shares and securities in any company; membership of any close corporation; interest in any trust; directorships; partnership; other financial interests in any business undertaking; employment and remuneration; financial interest in property; pensions; subsidiaries, grants and sponsorships by an organisation; gift registry	No reference to confidential information	No reference to spousal information

* Schedule 1 of the Municipal Systems Act, which contains the Code of Conduct for local government, in Section 7(4) states: 'The municipal council must determine which of the financial interests referred in sub item (1) must be made public having regard to the need for confidentiality and the public interest for disclosure.' In the case of Nelson Mandela Bay Metro, the Municipal Council has determined that the entire disclosure form should remain confidential.

APPENDIX 2: PROVINCIAL CODES OF CONDUCT: ACCESS TO INFORMATION CLAUSES

Table 1: Provincial codes of conduct: Access to information clauses

Eastern Cape	No specific heading, 'access to information' but does say the following: Part 3 of the code, number 12.2(a) – 'Members' interests which are not confidential in terms of clause 11 are entered in the Public Part of the Register'; and 12.2(b) 'Members' interests which are confidential in terms of clause 11 are entered in the Confidential Part of the Register'.
Free State	(Part 2:17.1) 'Any person has access to the public part of the Register on a working day during office hours'.
Gauteng	(Part 4:20) 'A member or members of the public shall gain access to information on matters already decided upon by the committee or as prescribed by the South Africa Constitution Act 108 of 1996, the Promotion of Access to Information Act 2 of 2000 or as provided by any other law.'
KwaZulu-Natal	(17.1) 'Any person has access to the public part of the Register on a working day during office hours, by appointment with the Registrar.'
Limpopo	(19.1) 'Any person has access the public part of the Register on a working day during office hours'
Mpumalanga	(Part 3:17.1) 'Members of the public shall have access to the public part of the Register on working days and at times prescribed by the Speaker.'
Northern Cape	(Chapter 6, 6.1.1) 'The Public Part of the Register will be published and distributed to the media, libraries and other stakeholders annually. The Public Part of the Register can at any stage be inspected at the Office of the Registrar.'
Western Cape	Section 4.2(d) 'Prescribe that the financial interests to be disclosed in terms of paragraph (c) must at least include the information and be under the same conditions of public access thereto, as determined by the Conduct Committee from time to time, but may prescribe the disclosure of additional information.'
North West	(22.4) 'Members of the public shall have access to the public part of the Register on working days and at times prescribed by the Speaker.'

NOTES

- 1 Dr W. Van Dooren, Integrity in Government: Towards Output and Outcome Measurement, Organisation for Economic Co-operation and Development (OECD), 5 May 2009, 2. [http://www.oilis.oecd.org/oilis/2009doc.nsf/ENGDIRCORPLOOK/NT00002AEA/\\$FILE/JT03263628.PDF](http://www.oilis.oecd.org/oilis/2009doc.nsf/ENGDIRCORPLOOK/NT00002AEA/$FILE/JT03263628.PDF)
- 2 National Democratic Institute for International Affairs, Legislative ethics: A comparative analysis, *National legislative research series* (4), (1999), 3.
- 3 Q Reed, Sitting on the fence: Conflicts of interest and how to regulate them, *Anti-Corruption Resource Centre U4* (6), (2008), 25.
- 4 F Malan and B Smit, *Ethics and leadership in business and politics*, Lansdowne: Juta and Co, 2001, 9.
- 5 M E Warren, What does corruption mean in democracy? *American Journal of Political Science* 48(2), (2004), 328–343.
- 6 OEDC, Guidelines for managing conflict of interest in the public service, *Policy brief*, (September 2005), 1.
- 7 Warren, What does corruption mean in democracy?, 328.
- 8 L Martin, Whistleblowing legal advisor, ODAC presentation at the ISS corruption in service delivery conference, 26–27 November 2008, Pretoria.
- 9 Bertram I Spector (ed), *Fighting corruption in developing countries: Strategies and analysis*, USA: Kumarian Press, 2005, 7.
- 10 Presentations by panel discussants on ‘Corruption, service delivery and community protests’, at the ISS corruption in service delivery conference, 26–27 November 2008, Pretoria.
- 11 Van Dooren, Integrity in Government, 10.
- 12 Malan and Smit, *Ethics and leadership*, 9.
- 13 Reed, Sitting on the fence, 8.
- 14 Spector, *Fighting corruption in developing countries*, 5.
- 15 OEDC, Guidelines for managing conflict of interest, 2.
- 16 Health MEC in court for corruption, *The Times*, 11 December 2008, <http://www.thetimes.co.za/PrintArticle.aspx?ID=902895> (accessed 13 December 2008); KZN health minister faces corruption charges, *Mail & Guardian*, 10 December 2008, <http://www.mg.co.za/printformat/single/2008-12-10-kzn-health-minister-faces-corruption-charges> (accessed 13 December 2008).
- 17 Xstrata in rights row with former minister, *Business Day*, 28 November 2008, <http://www.businessday.co.za/articles/frontpage.aspx?ID=BD4A894345> (accessed 1 December 2008); Xstrata PLC, <http://www.xstrata.com/> (accessed 1 December 2008); Water: Minister implicated in mining rights case, *Legalbrief Environmental*, 2 December 2008, http://www.legalbrief.co.za/index.php?page=Legalbrief_Enviro (accessed 2 December 2008).
- 18 North West agriculture head suspended, *SABC News*, 19 November 2008, http://196.35.74.234/south_africa/general/0.2172,180080,00.html (accessed 19 November 2008); North West suspends agriculture boss, *Legalbrief Forensic*, 20 November 2008, <http://www.legalbrief.co.za/article.php?story=20081120082951571> (accessed 20 November 2008); An open cookie jar, *Mail & Guardian*, 07 November 2008, <http://www.mg.co.za/article/2008-11-07-an-open-cookie-jar> (accessed 08 November 2008); Official suspended for R1.1m grant, *Mail & Guardian*, 30 November 2008, <http://www.mg.co.za/article/2008-11-30-official-suspended-for-r11m-grant>. (accessed 08 November 2008)
- 19 Bitou admits to conflict of interest, *Independent Online*, 8 December 2008, http://www.iol.co.za/index.php?set_id=1&click_id=2934&art_id=vn20081208055355545C901093 (accessed 9 December 2008); Uys asked to intervene in Bitou council saga, *Independent Online*, 21 October 2008, http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20081021062156302C761370 (accessed 8 November 2008); Bitou Manager accused of fraud, *News 24*, 11 May 2005, http://www.news24.com/News24/South_Africa/News/0,2-7-1442_1703615,00.html (accessed 9 November 2008).
- 20 Van Dooren, Integrity in government, 7.
- 21 R Stapenhurst and R Pelizzo, Legislative ethics and codes of conduct, *World Bank Institute working papers* (2004), 10.
- 22 S Djankov, R La Porta, F Lopez-de-Silanes *et al*, Disclosure by politicians, Third draft (January 2009), 3.
- 23 Q Reed, Sitting on the fence, 14.
- 24 E Yi Armstrong, Increasing transparency: Conflicts of interest disclosures, United Nations department of economic and social affairs, paper presented at workshop on ethics in the public service (29 September–1 October 2003).
- 25 G Ward, The role of disclosure in combating corruption in political finance: Disclosure and enforcement, January 2004. Transparency International. Available at http://www.transparency.org/publications/gcr/gcr_2004#download (accessed April 2009)
- 26 Stapenhurst *et al*, Legislative ethics and codes of conduct, 18.
- 27 Ibid, 9.
- 28 U4: Anti corruption resource centre, UNCAC in Africa, <http://www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query115.pdf> (accessed 9 November 2008).
- 29 G Larbi, Between spin and reality: Examining disclosure practices in three African countries. *Journal of public administration and development* (27), (2007), 207.
- 30 Ibid.
- 31 See provincial Codes of Conduct at: http://www.ipocafrika.org/index3.php?option=com_content&task=view&id=65&Itemid=128
- 32 National Democratic Institute for International Affairs, Legislative ethics: A comparative analysis, 9.
- 33 M Saner and C von Baeyer, Public service ethics in the new millennium: The evolving Canadian system, *Policy brief* (23) (October 2005); Building public trust: Ethics measures in OECD countries, *PUMA policy brief* (7) (September 2000).
- 34 Constitution of the Republic of South Africa 1996 (Act 108 of 1996).
- 35 Executive Members’ Ethics Act 1998 (Act 82 of 1998), South Africa.
- 36 Executive Ethics Code 2000; *Handbook for Members of the Executive and Presiding Officers 2007*.

- 37 Ibid.
- 38 Procedural code for councillors 2003, City of Cape Town.
- 39 P Bigelow, From norms to rules: Regulating the outside interests of public officials, in Frank J Mauro and Gerald Benjamin (eds), *Restructuring New York City Government: The reemergence of municipal reform*, New York: Academy of political science, 1989, 141–57.
- 40 Ibid, 142.
- 41 OEDC, Guidelines for managing conflict of interest.
- 4 Djankov et al, Disclosure by politicians, 12.
- 43 Executive Members' Ethics Act 1998.
- 44 Ministerial Handbook 2007, S 4.2.
- 45 Ministerial Handbook 2007, 6.1.
- 46 The percentages are based on the number of forms made available for each year by the respective institutions. Therefore, they do not amount to the same number of forms in each year. Therefore, discrepancies in overall patterns across time are possible.
- 47 The data for Limpopo directorships and shares is the same across years due to the same form being submitted by the legislature for the five consecutive years. See discussion in section 6.3 Standardisation.
- 48 Van Dooren, Integrity in government, 18, 35.
- 49 National Democratic Institute for International Affairs, Legislative ethics: A comparative analysis, 11.
- 50 Organization for Economic Co-operation and Development (OECD). *Delivering a sound ethics infrastructure in the OECD's Trust in governance: Ethics measures in OECD countries*. Paris: Organization for Economic Co-operation and Development, 2000, 49–53.
- 51 Larbi, Between spin and reality, 209.
- 52 As stated by Fazela Mahomed (National Parliament's Registrar of Members' Interests: Cape Town) on 22 January 2008 in a face-to-face interview.
- 53 As stated by Jenny Singh (Assistant to Integrity Commissioner: Gauteng) on the 20th January 2009 in telephonic discussion.
- 54 As stated by Machel Van der Berg (Assistant Legal Advisor: North West) on 20th January 2009 at 10h00 in a telephonic discussion.
- 55 As stated by Peter Williams (Registrar: Western Cape) on 22nd October 2008 in face-to-face interview
- 56 As stated by James Van As (Manager-Councillor Support: Cape Town) on 20th January 2009 at 10h24 in a telephonic discussion.
- 57 As stated by Bernadette Govender (Speaker's Office: Ethekwini) on 20th January 2009 at 10h30 in a telephonic discussion.
- 58 Transparency International, The role of disclosure, 42.
- 59 *National Assembly Hansard* No 69 – 2003, Breach of parliament's code of conduct: Reprimand of Defence Minister M Lekota by Speaker Frene Ginwala (10 June 2003).
- 60 *National Assembly Hansard* No 104 – 2004, Report of the Joint Committee on ethics and members' interests on the Allegations of non-disclosure by Members of Parliament (8 November 2004).
- 61 M Mkhabela, Five MPs face fines over code of conduct, *Sunday Times*, 12 October 2008.
- 62 Information supplied by James Van As, Manager of Councillor Support at Cape Town Metro.
- 63 National Assembly Hansard, *Report of the Joint Committee on Ethics and Members' Interests on the Breach of Parliament's Code of Conduct by the Hon Mr Yengeni, MP*, 14 March 2003, No 28.
- 64 National Assembly Hansard, *Report of the Joint Committee on Ethics and Members' Interests on the Alleged Receipt of Benefits by the Deputy President Mr J G Zuma, MP*, 19 November 2003, No 145.
- 65 Richard Levin, *Financial disclosure and conflicts of interest: Strengthening and amending the current regulatory regime*, Public Service Commission (2003), <http://www.dpsa.gov.za/documents/networks/sms2003/Financial%20Disclosure%20and%20Conflict%20of%20Interest%20PSC%20Wkshop%20October%202003.pdf> (accessed 15 October 2008).
- 66 Saner and von Baeyer, Public service ethics in the new millennium, 4.
- 67 Reed, Sitting on the fence, 22.
- 68 Ibid, 20–21.
- 69 Ibid, 21.
- 70 Makwela, D. Disclosure of members' interests. Email message to R F Vickerman (rcct@issafrica.org). Received Tuesday, 7 October 2008, 16h51.
- 71 Van Greunen, J. Untitled. Email message to R F Vickerman (rcct@issafrica.org). Received Monday, 6 October 2008.
- 72 Govender, B. Disclosure of councillors' interests. Email message to R F Vickerman (rcct@issafrica.org). Received Friday, 17 October 2008, confirmed again 20 October 2008.
- 73 Reed, Sitting on the fence, 20.
- 74 Ibid.
- 75 *Public financial disclosure: A reviewer's reference*, Washington DC: US Office of Government Ethics, 1992, 4–1.
- 76 Ibid.
- 77 Reed, Sitting on the fence, 20.
- 78 National Democratic Institute for International Affairs, *Legislative ethics*, 20.
- 79 Larbi, Between spin and reality, 211.
- 80 Reed, Sitting on the fence.
- 81 As stated by Fazela Mahomed (National Parliament's Registrar of Members' Interests: Cape Town) on 22 January 2008 in a face-to-face interview.
- 82 Interview with Mr Williams, Registrar of the Western Cape Provincial Legislature, 22 October 2008.
- 83 Letter from office of the Speaker, City of Johannesburg to author, 11 March 2008.
- 84 Conversation with City of Cape Town official, January 2008.

- 85 Executive Secretary, in the office of the Speaker, confirmed in correspondence that no monitoring and compliance body exists, 17 October 2008, confirmed 20 October 2008.
- 86 As stated by Advocate Jules Browde (Integrity Commissioner: Gauteng) on 25 January 2008 in a telephonic discussion. As stated by Fazela Mahomed (National Parliament's Registrar of Members' Interests: Cape Town) on 22 January 2008 in a face-to-face interview.
- 87 Advocate Jules Browde, telephonic interview.
- 88 Ibid.
- 89 Interview with Western Cape MPL (confidential source) January 2008.
- 90 Members of the Western Cape Provincial Parliament Code of Conduct Act 2002, S 5(3).
- 91 *National Assembly Hansard* No 114 – 2003, Report of the joint committee on ethics and members' interests on the breach of the code of conduct by the Hon. Mrs N W Madikizela-Mandela, (21 August 2002).
- 92 Reed, *Sitting on the fence*, 22.
- 93 Five MPs face fines over code of conduct.
- 94 Reed, *Sitting on the fence*, 23.
- 95 Auditor-General 2006.
- 96 Public Protector Report 2006.
- 97 Letter from Deputy President Jacob Zuma to President Thabo Mbeki, 18 October 2004. This is part of the disclosure documents available on the ISS online database.
- 98 Limpopo: Code of conduct for members of the legislature 2000; Mpumalanga: Code of conduct and ethics for members of the Mpumalanga Provincial Legislature 2004.
- 99 Saner and von Baeyer, *Public service ethics in the new millennium*, 4.
- 100 National Democratic Institute for International Affairs, *Legislative ethics*, 13; Larbi, *Between spin and reality*, 213.
- 101 National Democratic Institute for International Affairs, *Legislative ethics*, 13.
- 102 For details on US disclosure for executive members see: Part I, Section III in *Public Financial Disclosure: A Reviewer's Reference*, Washington DC: US Office of Government Ethics, 1992, 3–7.
- 103 Ibid.
- 104 Ibid.
- 105 National Democratic Institute for International Affairs, *Legislative ethics*, 13.
- 106 S Piliso, *Grave Train on Track*, *Business Times*, 13 July 2008, 1.
- 107 N Dawes, *Graft row company can snoop*, *Mail & Guardian*, 14 September 2007, <http://www.mg.co.za/article/2007-09-14-graft-row-company-can-snoop> (accessed 7 October 2008); SAPA, *Pikoli asks Scorpions for fraud probe*, *Independent Online*, 13 September 2007, http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=nw20070912222042369C771859 (accessed 07 October 2008).
- 108 H Van Vuuren, A Sokomani, P Gaushe et al (Editorial team), *Umqol'uphandle*, Institute for Security Studies, Issue No 025 – Dec 2005–Jan 2006, <http://www.iss.co.za/pubs/Newsletters/Umqol/Issue25.htm> (accessed 10 December 2008); H Van Vuuren, M Marawu and P Gaushe (editorial team), *Umqol'uphandle*, Institute for Security Studies, Issue No 010 – 25 November 2003, <http://www.issafrica.org.Pubs/Newsletters/Umqol/issue1003.html> (accessed 15 December 2008); Sizwe samaYende, *Clean-sweep man gets top job*, *News24*, 20 April 2006, http://www.news24.com/News24v2/Components/Generic/News24v2_Print_PopUp_Article/0,,2-7-1442_1919941,00.html (Accessed 10 November 2008); Sizwe samaYende, *BuaNews Online*, 20 April 2006, <http://www.buanews.gov.za/view.php?ID=06042016451006&coll=buanew06> (accessed 15 December 2008).
- 109 Larbi, *Between spin and reality*, 209.
- 110 National Democratic Institute for International Affairs, *Legislative ethics*, 12.
- 111 Ibid.
- 112 Code of conduct for members of parliament 10 (2).
- 113 Five MPs face fines over code of conduct.
- 114 Ibid.
- 115 Report on measuring the efficacy of the code of conduct for public officials, Public Service Commission, 2006, 7.
- 116 Djankov et al, *Disclosure by politicians*, 23.
- 117 Larbi, *Between spin and reality*, 209.
- 118 National Democratic Institute for International Affairs, *Legislative ethics*, 14.
- 119 Djankov et al, *Disclosure by politicians*, 24.
- 120 Faxes from Nelson Mandela Bay Municipal Manager Advocate J G Richards to author, 6 March 2008 and 28 March 2008. The full section 7(4) cited reads as follows: 'The municipal council must determine which of the financial interests referred in subitem (1) must be made public having regard to the need for confidentiality and the public interest for disclosure'.
- 121 *The Herald* online, 16 September 2005, *Damning report exposes fake municipal tenders*, http://www.theherald.co.za/herald/2005/09/16/news/n01_16092005.htm
- 122 *The Herald* online, 14 December 2005, *Breaches of rules found after R3m roads deal awarded*, http://www.theherald.co.za/herald/2005/12/14/news/n07_14122005.htm
- 123 Fax from Presidency Head: Legal and Executive Services/ Deputy Information Officer, Sibongile Sigodi to author, 15 February 2008.
- 124 Email from Free State official to author, 29 February 2008.
- 125 Email for KwaZulu-Natal Director: Director General's Support Nhlanhla Mndaweni, 7 March 2008.
- 126 Reed, *Sitting on the fence*, 11.
- 127 National Democratic Institute for International Affairs, *Legislative ethics*, 23.
- 128 Van Dooren, *Integrity in government*, 18.
- 129 Ibid.
- 130 Ibid, 20.
- 131 Ibid, 25.
- 132 Reed, *Sitting on the fence*, 25.
- 133 Ibid.

134 Ibid, 15.

135 Fazela Mahomed (Registrar: National Parliament) raised this on 22 October 2008 in a telephonic discussion.

136 Ibid.

137 National Democratic Institute for International Affairs, Legislative ethics, 15.

138 Stapenhurst and Pelizzo, Legislative ethics and codes of conduct, 17.



SUBSCRIPTIONS TO ISS PUBLICATIONS

If you would like to subscribe to ISS publications, please complete the form below and return it to the ISS with a cheque, or a postal/money order for the correct amount, made payable to the Institute for Security Studies (marked not transferable). Please note that credit card payments are also welcome. You can also deposit your payment into the following bank account, quoting the reference: **PUBSPAY**.

ISS bank details: ABSA, Brooklyn Court, Branch Code: 632005, Account number: 405 749 8921

Please mail, fax or email this form to:

ISS Publication Subscriptions, PO Box 1787, Brooklyn Square, 0075, Pretoria, South Africa.

ISS contact details: (Tel) +27 12 346 9500, (Fax) +27 12 460 0998, Email: pubs@issafrica.org

Website: www.issafrica.org

▶ PERSONAL DETAILS

Title: Surname:..... Initials:

Organisation: Position:

Postal Address:

Postal Code:

Country:

Tel: Fax: Email:

Method of Payment: Visa Master Card Other Specify:

Card Number: Expiry Date:/.....

Cardholder Name:

Signature:

▶ PUBLICATIONS

	South Africa	African Countries*	International
African Security Review (4 issues per year)	R 200,00	US\$ 40,00	US\$ 55,00
ISS Monographs (Approx. 15 per year)	R 370,00	US\$ 75,00	US\$ 95,00
ISS Papers (Approx. 12 per year)	R 150,00	US\$ 30,00	US\$ 40,00
SA Crime Quarterly (4 issues per year)	R 115,00	US\$ 25,00	US\$ 35,00
Comprehensive subscription (African Security Review, Monographs, Papers and SA Crime Quarterly)	R 800,00	US\$ 160,00	US\$ 210,00

▶ SUBSCRIPTIONS

	Indicate Cost
African Security Review only	
ISS Monographs only	
ISS Papers only	
SA Crime Quarterly only	
Comprehensive subscription	
TOTAL	

**Knowledge
empowers Africa**

**La savoir
émancipe l'Afrique**

* Angola; Botswana; Burundi; Congo-Brazzaville; Democratic Republic of Congo; Gabon, Kenya, Lesotho, Madagascar; Malawi, Mauritius; Mozambique; Namibia; Reunion; Rwanda; Seychelles; Swaziland; Tanzania; Uganda; Zambia; Zimbabwe (formerly African Postal Union countries).

ABOUT THIS PAPER

To control potential conflicts of interest and ensure greater accountability many democracies, like South Africa, have introduced financial disclosure regulations, which set obligations on elected public officials to publicly declare their personal financial and non-financial interests. By making this information publicly available the conduct of public officials is made more transparent, thereby allowing democratic institutions and citizens to hold politicians accountable. Drawing strongly on empirical data, the paper examines and evaluates the various aspects of the implementation process of financial disclosure for South Africa's elected officials. These include the scope and content of disclosure requirements, compliance by elected officials, institutional support and capacity for disclosure, monitoring and oversight mechanisms and public access to information. The paper is a product of a three-year research project undertaken by the ISS Corruption and Governance Programme.

ABOUT THE AUTHORS

Collette Schulz-Herzenberg is a senior researcher in the Institute for Security Studies (ISS) Corruption & Governance Programme in Cape Town. She is currently leading a project on conflicts of interest in public life. She holds a Doctorate specialising in South African voting behaviour and an MSc in Democratic Governance from the University of Cape Town. She also holds a BA Honours in the Politics of Africa and Asia from the University of London. She has worked as an elections analyst for the South African Broadcasting Corporation during elections and as a researcher on governance issues with the Institute for Democracy in South Africa. She has also worked in Parliament and lectured on South African politics.

Rosemary Vickerman worked as a commissioned researcher in the Corruption and Governance Programme at the ISS in Cape Town. She has an MSc and Honours in South African and Comparative Politics from the University of Cape Town.

FUNDER

This publication was made possible through funding provided by the Open Society Foundation for South Africa. In addition general Institute funding is provided by the Governments of Denmark, the Netherlands, Norway and Sweden.



As a leading African human security research institution, the Institute for Security Studies (ISS) works towards a stable and peaceful Africa characterised by sustainable development, human rights, the rule of law, democracy, collaborative security and gender mainstreaming. The ISS realises this vision by:

- Undertaking applied research, training and capacity building
- Working collaboratively with others
- Facilitating and supporting policy formulation
- Monitoring trends and policy implementation
- Collecting, interpreting and disseminating information
- Networking on national, regional and international levels

© 2009, Institute for Security Studies

Copyright in the volume as a whole is vested in the Institute for Security Studies, and no part may be reproduced in whole or in part without the express permission, in writing, of both the authors and the publishers.

The opinions expressed do not necessarily reflect those of the Institute, its trustees, members of the Council or donors. Authors contribute to ISS publications in their personal capacity.

Published by the Institute for Security Studies,
P O Box 1787, Brooklyn Square 0075
Pretoria, South Africa
Tel: (27-12) 346 9500 Fax: (27-12) 460 0998
iss@issafrica.org

www.issafrica.org

Design Marketing Support Services +27 12 346-2168
Layout Page Arts cc +27 21 686-0171
Printing Tandym Press, Cape Town

