



Custodian of Good Governance

NEWS

OFFICIAL MAGAZINE OF THE PUBLIC SERVICE COMMISSION



Reflections
on an Ethical
Public Service
and Society

and society

Public Service

on an Ethical

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Vision

The Public Service Commission is an independent and impartial body created by the Constitution, 1996, to enhance excellence in governance within the Public Service by promoting a professional and ethical environment and adding value to a public administration that is accountable, equitable, efficient, effective, corruption-free and responsive to the needs of the people of South Africa.

Mission

The Public Service Commission aims to promote the constitutionally enshrined democratic principles and values of the Public Service by investigating, monitoring, evaluating, communicating and reporting on public administration. Through research processes, it will ensure the promotion of excellence in governance and the delivery of affordable and sustainable quality services.



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From the desk of the editor

Over the past two decades, the Public Service has gone through a remarkable transformation. The nation and the world has witnessed many changes in South Africa, such as the release of Nelson Mandela, the first democratic elections that ultimately ushered in the dawn of a new democracy and the birth of a new Public Service. Since then, Government has introduced a number of mechanisms aimed at promoting a culture of professional ethics within the Public Service, a sharp contrast from the apartheid regime that was characterised by secrecy and a lack of transparency. Such mechanisms include amongst others, the **Prevention and Combating of Corrupt Activities Act, Minimum Anti-Corruption Capability Requirements, the National Anti-Corruption Hotline and the National Anti-Corruption Forum.**

The Public Service Commission (PSC) has also made a significant contribution in the area of professional ethics in the Public Service, and its research work is widely used by a number of stakeholders including Parliament, the Executive, government departments and academia. Similarly, the PSC played a central role in the development of the **Code of Conduct for the Public Service** and went on to further propose a 'conflicts of interest' system in the Public Service, which not only provides standards but also promotes

integrity in government by preventing conflicts of interest before they occur. The PSC also developed the Public Service Pledge, which was signed by Directors-General as a commitment to serve with the highest standard of loyalty, respect, dignity and integrity.

It is on the basis of the above that the PSC deemed **"Reflections on an Ethical Public Service and Society"** an apt theme for this edition of the *PSC News*.

We kick start this packed edition of the *PSC News* by looking at the **State of Professional Ethics in the Public Service post 1994**, and touch on amongst others, different legislation and institutions that government established to promote integrity and anti-corruption.

The public has on several occasions posed the question: Should public servants be allowed to do business with government? Mr Kris Dobie of Ethics South Africa (ESA) responds to this question by looking at amongst others, **the rights of public servants and their spouses who are doing business with government.** Likewise, Mr Themba Godi, Member of Parliament and Chairperson of the Standing Committee on Public Accounts (SCOPA), which oversees public accounts, discusses some of the **legislation that government has introduced to manage conflicts of interest** within the Public Service.



Humphrey Ramafoko

Drawing on a report produced by the Auditor-General in 2008, Mr Godi illustrates the practical challenges around financial disclosures and financial misconduct, and he outlines the recommendations of SCOPA in this regard. While financial disclosures are a potentially useful integrity mechanism, their implementation needs strengthening, and they should be supported by other measures. Accordingly, we report on the **role of the Financial Disclosures in Managing Conflicts of Interest** and offer targeted recommendations towards improving implementation.

In its Report on Managing Conflicts of Interest in the Public Service published in 2006, one of the key considerations that the PSC identified in developing a conflicts of interest framework was the introduction of

post employment measures. In this issue, Dr Collette Schulz-Herzenberg of the Institute for Security Studies looks at one of the post employment mechanism called **the revolving door phenomenon**, which is commonly understood as movement of people between government and the business sector.

To conclude this edition, we put the **State of Professional Ethics**

in the Free State, KwaZulu-Natal and Limpopo provinces under the microscope. This article analyses the various anti-corruption instruments and mechanisms in the mentioned provinces, and makes recommendations aimed at strengthening implementation.

Also, the PSC gives its perspective with regard to the **Management of Gifts in the Public Service**.

We hope that you will find this edition reader-friendly, entertaining and informative. Likewise, we encourage all South Africans to use the available tools to report any acts of corruption in the Public Service.

The National Anti-Corruption Hotline for the Public Service is **(0800 701 701)**.

Happy reading!!

State of **professional ethics** in the public service post 1994

By Dr Ralph Mjijima, Chairperson,
Public Service Commission

Introduction

Government has a duty to proactively promote a culture of honesty and good governance, which will in turn lead to effective and efficient service delivery. This requires a Public Service that is professional, ethical and performs its duties and tasks with integrity. However, given the pressures that government departments are under, efforts to fight corruption are usually reactive. This is driven by the view that the visible fight against corruption is best appreciated in the reactive response to it.

Need for building integrity

To a degree, the reactive response to fighting corruption dilutes efforts at building national integrity¹. Not only does corruption undermine government institutions and their ability to deliver to society, but in the end, it is the poor that are severely affected. It is therefore not surprising that, as the significance of social values become more apparent in the fight against corruption, a strong call is emerging for the building of

national integrity systems through a consolidation of societal values.

This is especially true for South Africa. High levels of corruption and low integrity in the South African Public Service will negatively affect government's ability to meet the Millennium Development Goals (MDGs) which focus on critical areas such as halving poverty, achieving primary education, reversing the spread of HIV and AIDS and ensuring stability². It is therefore important to build integrity in the Public Service.

The need to build integrity derives from the Constitution which mandates the PSC to promote a high standard of professional ethics by amongst others, promoting and instilling values such as accountability and transparency. An example of where accountability and transparency were not exercised emerged when the Auditor-General reported on government employees who have entities that are doing business with government departments. In his report the Auditor-General points out that: "forty-nine (49) government employees are directors or members of companies or close corporations (CCs) that are doing business with national departments. The total amount paid



Dr Ralph Mjijima

to these companies and CCs during the period April 2005 to January 2007 was approximately R35,7 million. Most of these employees who are directors or members of companies or CCs that did business with national departments failed to disclose their interests and did not obtain approval from the Executive Authorities to perform work outside of the Public Service. The amount involved in terms of the non-disclosures is R30,6 million"³. It appears, therefore, that there is a link between the improper accumulation of wealth and the lack of transparency and accountability.

The PSC is of the view that any advantage gained improperly by public officials, such as in the above ex-

¹ Speech by Ms GJ Fraser-Moleketi at the Global Forum V held in Johannesburg, South Africa, April 2007.

² Guide to the Millennium Development Goals, European Commission to South Africa, 2005.

³ Republic of South Africa: Auditor-General: Report of the Auditor-General to Parliament on a Performance Audit of Entities that are connected with Government Employees and doing business with National Departments, 2008.

ample, leads to the breakdown in trust between public officials and the citizenry. Once citizens lose trust in public officials to deliver on the mandate of government accountability and transparency, government loses all credibility in the eyes of the public. This leads to fertile ground for corruption to occur which in turn will undermine the ability of government to deliver services fairly and equitably. Integrity is, therefore, the *sine-qua-non* for effective service delivery in a developmental state like South Africa. In being fully aware of this, government has initiated a range of policies and legislation to promote integrity in the Public Service.

Legislation developed to prevent and combat corruption post 1994

South Africa has developed an advanced framework of law, strategy and institutions with a mandate to combat corruption⁴. The supreme law of South Africa is the Constitution (Act No. 108 of 1996). It includes a Bill of Rights that forms the cornerstone of democracy in South Africa, which enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The Constitution also affirms institutions, which promote societal values and integrity in governance.

In order to entrench values such as transparency and accountability and to set the basis for the prevention and combating of corruption, various pieces of legislation were introduced, and these serve as another affirmation that government is committed to good governance.

Over and above these pieces of legislation, there are other institutions that have been established to help bolster the fight against corruption. State Institutions supporting democracy are the custodians of certain policies and procedures that must be observed by the South African Public Service. The Public Protector⁵, for example, receives and investigates complaints from the public against government or

Anti-Corruption Acts

- The Protected Disclosures Act, Act 26 of 2000
- Promotion of Administrative Justice Act, Act No. 3 of 2000
- The Promotion of Access to Information Act, Act No. 2 of 2000
- Promotion of Administrative Justice Act of 2000
- Prevention and Combatting of Corrupt Activities Act, Act No. 12 of 2004
- Financial Intelligence Centre Act, Act No. 38 of 2001
- Public Finance Management Act, 1995
- Public Service Act, Act No. 103 of 1994
- The Public Service Regulations (PSR), 2001
- Municipal Finance Management Act, Act 56 of 2003

its officials, and has the power to recommend corrective action. Such complaints may relate to suspected acts of corruption by public servants as well as members of the Executive. The Auditor-General⁶ on the other hand, audits and reports to Parliament on the financial statements and financial management of all national

and provincial state departments and municipalities. During such audits, corrupt activities in the financial management of departments are unearthed. Similarly, the PSC has a custodial oversight mandate over the Public Service. Collectively, these institutions play a pivotal role and contribute uniquely in the fight against corruption.

South Africa has also subscribed to regional and international conventions such as the United Nations Convention Against Corruption, the Southern African Development Community (SADC) Protocol Against Corruption and the African Union Convention of Preventing and Combating Corruption to ensure that its policies and practices can be benchmarked against international practice.

Multiple-Agency Approach in the Fight Against Corruption

Over the past sixteen years, government has established various investigative units to fight corruption head on. The *Special Investigating Unit*, located within the National Prosecuting Authority (NPA)⁷ has since its inception recorded a notable achievement in the fight against corruption, which includes amongst others, removal of over 81 000 fraudulent social claimant payments following investigation into social grant fraud at the Department of Social Development. Through this investigation and subsequent removal of the fraudulent claims, the Department of Social Development saved R4.9 billion.

4 African Peer Review Mechanism, Country Review Report No.5, Republic of South Africa. September 2007.

5 <http://www.publicprotector.org>

6 <http://www.agsa.co.za>

7 <http://www.npa.gov.za>

The *Asset Forfeiture Unit* on the other hand was established in the Office of the National Director of Public Prosecutions to focus on the implementation of Chapters 5 and 6 of the Prevention of Organised Crime Act, 1998 (Act No.121 of 1998). Furthermore, it ensures that the powers in the Act to seize criminal assets are used to their maximum effect in the fight against crime, and particularly, organised crime. In the last 5 years, approximately R700 million worth of assets have been recovered. Of this recovered money, over R100 million has been paid to suspected victims⁸.

The *Directorate of Special Operations (DSO, commonly known as the Scorpions)*⁹ was also established to tackle syndicated crime and complex corruption. During its existence, the Scorpions participated in major international corporate raiding in conjunction with the United States of America and the United Kingdom. It could well be argued that the Scorpions pierced the veil of grand corruption in South Africa through hard-earned convictions as evidenced by the conviction of key directors in the business world of organised boardroom corruption. The DSO has since been disbanded and has been replaced by the Directorate of Priority Crimes, commonly known as the Hawks.

In order to deal with complex commercial crime cases, the *Specialised Commercial Crimes Courts*, which house investigations, prosecutions and adjudication under one roof, were established in 1999. This model has proved to be successful and Specialised Commercial Crimes Courts have subsequently been established in Johannesburg, Port Elizabeth, Cape Town, Bloemfontein and East London. They are composed of specialist prosecutors and investigators of the NPA. These courts boast a 95% conviction rate.

Anti-Corruption Inter-Ministerial Committee

In supplementing the above-mentioned initiatives, Cabinet announced on 18 November 2009 the establishment of a new Anti-Corruption Inter-Ministerial Committee that will be responsible for rooting out public sector graft¹⁰. During the announcement, it was mentioned that this Ministerial Committee would look at the "PSC's report on corruption and other reports to ensure actions are taken against all persons involved in corrupt practices involving public funds".

Initiatives of the Public Service Commission

Whilst legislation has put the necessary framework in place to promote integrity, the PSC has taken on the responsibility to operationalise it within the Public Service. A *Code of Conduct for the Public Service* was developed by the PSC and has been incorporated as a Chapter in the Public Service Regulations. The Code forms the cornerstone of the Public Service's integrity framework as it sets standards for ethical conduct. Similarly, it exemplifies the spirit in which public officials should perform their duties, and points out what should be done to avoid conflicts of interest. It also indicates what is expected of public officials in terms of their personal conduct and in serving the public. In addition to the Code of Conduct for the public servants, the PSC has developed and administers a Financial Disclosure Framework for senior managers in the Public Service. This framework is aimed at preventing conflicts of interest by making it mandatory for senior managers to disclose their financial interests. The rate of compliance since the inception of the framework has mostly shown improvement over the years as indicated below.



In spite of the improvement, the PSC is of the view that only a 100% compliance rate would be acceptable. It is of concern that 15% of senior managers in the 2007/08 financial year did not comply with the regulatory requirement to disclose their registrable interests. This does not bode well for integrity in the Public Service. Furthermore, the PSC published a Report on the Management of Conflicts of Interest in the Public Service and one of the proposals in the Report is the

8 <http://www.npa.gov.za/> media statement

9 <http://www.npa.gov.za/>

10 <http://www.gcis.gov.za/newsroom/releases/cabstate/2009/091118.htm>

establishment of a Conflicts of Interest System, which will promote the perception of integrity in government by preventing conflicts of interest before they occur¹¹. Following the Report, the Department of Public Service and Administration submitted a conflicts of interest policy framework to Cabinet, which takes recommendations by the PSC on board.

The *National Anti-Corruption Hotline (NACH)* is another initiative managed by the PSC which is aimed at giving the citizens a facility through which to report acts of corruption in the Public Service. Through the NACH whistle blowers can report alleged cases of corruption without fear of victimisation as the Hotline offers anonymity. Such a mechanism empowers the silent majority to speak out in respect of unethical practices, and contributes in the fight against corruption. In terms of a Report published by the PSC on Measuring the Effectiveness of the National Anti-Corruption Hotline¹², some successes of the NACH include the recovery of R86 million, as a result of investigation of cases reported. There were 81 officials, who were found guilty of misconduct. Of these, 15 were suspended, 25 were given final written warnings, 29 were dismissed and 12 resigned. There are also challenges in running the NACH and these include amongst others, the lack of investigative capacity by departments who do not have appropriate structures or specialised units to deal with NACH cases.

The *National Anti-Corruption Forum (NACF)*¹³, which is a cross-sectoral forum comprising public, business

and civil society, was established in 2001 to fight corruption. The PSC was instrumental in the establishment of the NACF and serves as its secretariat. The NACF has experienced some challenges, which include amongst others balancing the diaries and agendas of three sectors and this led to a break in activities during 2002. Since then, the NACF has been revived and has held three National Anti-Corruption Summits and achieved the following:

- **An Integrity Pledge was adopted and signed by the leaders of the various sectors represented on the NACF.**
- **South Africa's Prevention and Combatting of Corrupt Activities Act, was popularised by simplifying it through a Guide, both in terms of language and with illustrations.**
- **The NACF completed research reports on ethics in schools and universities as well as a report on accountability by departments.**
- **Business also completed a study on corruption within the private sector, which will become the basis for its future anti-corruption efforts.**

In this regard the PSC would like to recommend that the NACF be strengthened with the necessary resources in order to be more effective. Consequently, it would need a dedicated human resource component, or secretariat functionaries, to carry out its various functions. Linked to this, is the need for a dedicated budget, both to hire said functionaries as well as to implement its projects. If this is lacking, the NACF will become an ineffective

body. The political will in the form of these resources need to be exercised by the various stakeholders if the Forum is to be sustained and become more impactful. A further impact will be felt if the NACF is to extend its reach to the level of local government, where service delivery takes place.

Own Accord Investigations

Having realised that incidents of financial mismanagement which includes supply chain management process remains prevalent in the Public Service, the PSC on own accord, investigated Supply Chain Management (SCM) Practices within the R200 000 Threshold. The investigation which focused on the national and provincial departments of Public Works and Human Settlement was aimed at amongst others, establishing whether government departments adhere to departmental procurement policies within the R200 000 threshold. The weaknesses that the PSC found in compliance to the prescribed SCM processes indicate that the application of the SCM process requires extensive improvement. Similarly, the identified weaknesses make the application of the SCM process susceptible to irregularities which include cover quoting whereby an official of a department colludes with an external service provider to submit multiple quotations under different entity names. In such instances only one service provider was submitting quotations thereby ensuring that it (service provider) will receive the contract. In addressing some of the weaknesses, the PSC recommended amongst others,

11 Republic of South Africa, Public Service Commission, Overview of the Implementation of the Financial Disclosure Framework, April 2007/08.

12 Republic of South Africa, Public Service Commission, Overview of the implementation of the Financial Disclosure Framework, April 2007/08.

13 Republic of South Africa, Public Service Commission, Overview of the implementation of the Financial Disclosure Framework, April 2007/08.

departments should ensure that the same officials should not be assigned the responsibility of requesting quotations, evaluating them and making recommendations on the appropriate entity to whom an order should be placed. Different steps in the SCM process should be assigned to different officials to ensure the segregation of duties and thus to strengthen control over the process.

The PSC has found, in a series of Reports on Financial Misconduct, that a sizeable number of offenders of financial misconduct in the Public Service are employed at operational levels, i.e. officials lower than level 13. These officials fall below the radar of having to declare their financial interests as the Financial Disclosure Framework puts this obligation only on members of the Senior Management Service (SMS). The PSC is, therefore, of the view that:

- a) The Financial Disclosure Framework be extended to all public servants;
- b) All public servants with business interests be prohibited from doing business with government;
- c) A public servant whose spouse, partner, business associate or close family member, who stand to acquire any direct benefit from a contract concluded with their department, must disclose in writing full particulars of the benefit and withdraw from participating in any manner whatsoever in the process relating to such contract; and
- d) All public servants should be required to disclose their interests every time there is a change of status as opposed to annually.

In its monitoring and evaluation research around the Constitutional Principle of Professional Ethics, which sampled 30 departments in Free State, Mpumalanga, North West and Western Cape, the PSC found that the overall average performance of 30 departments against this principle for the 2009/2010 evaluation cycle was good (61%). A mere six (20%) out of the 30 departments' performance was excellent (between 81% - 100%). These departments were the Free State Department of Human Settlements, the Mpumalanga Department of Human Settlements, the Northern Cape Provincial Treasury, the North West Department of Education, the Western Cape Department of Education and the Western Cape Provincial Treasury. The majority (17 out of 30) departments' performance fell between adequate (41% to 60%) and good (61 to 80%) performance, whilst seven (23%) of the 30 departments performance was poor (between 0% and 40%).

Strengths

The departments' average scores against the specific standards applied by the PSC under this principle are reflected in table 1 below:

Table 1: Departments' average scores against the specific standards of principle 1

| Standard | Policy guideline on managing cases of misconduct | Time to resolve cases | Management reporting | Capacity to handle misconduct cases | Training and awareness |
|----------------|--|-----------------------|----------------------|-------------------------------------|------------------------|
| Average | 88% | 56% | 47% | 48% | 63% |

The average performance of departments regarding the requirement that a policy guideline on managing cases of misconduct should be in place was 88%, which indicates excellent performance against the standard. Departments either do have their own policies or are utilising the Public Service Coordinating Bargaining Council (PSCBC) Resolution 1 of 2003 to guide them in dealing with cases of misconduct.

Weaknesses

Management reporting on the progress with finalising cases of misconduct (47%) and the capacity to handle

misconduct cases (48%) remain areas requiring improvement. Twenty (67%) out of the 30 departments have exceeded the range of 20-80 working days within which cases should be finalised – see Table 2. The delay in resolving cases of misconduct may send a wrong message that unethical behaviour is tolerated and could thus result in a breakdown in discipline. Furthermore, it was noted that a clear challenge is institutionalisation of management reporting on cases of misconduct, since 14 (70%) out of the 20 departments which did not adhere to the 20-80 working days standard, did in fact submit progress reports to management, whilst only two (10%) of the twenty departments provided feedback on these reports. This could be an indication that management does not always monitor progress or intervene, where necessary, in resolving cases of misconduct.

Table 2: Time frames for resolving cases of misconduct

| % of sampled misconduct cases finalised within the range of 20-80 working days | Number of departments which complied with standard | Number of departments submitting progress reports on misconduct cases | Number of departments providing feedback on progress reports |
|---|---|--|---|
| 80% – 100% | 10 | 8 | 3 |
| 60% – 79% | 5 | 3 | 1 |
| 40% – 59% | 4 | 3 | 1 |
| 20% – 39% | 3 | 3 | - |
| Less than 20% | 8 | 5 | - |
| Total | 30 | 24 | 5 |

Conclusion

From the overview provided it is evident that government has put in place a comprehensive legislative and regulatory framework to combat corruption. However, research by the PSC has consistently shown a weakness in the implementation of the framework. The next phase of the anti-corruption effort should be focused on the successful implementation of these regulations and mechanisms, especially at departmental level. Specialised units such as the SIU, AFU, DSO and Specialised Crime Courts have achieved most successes in the fight against corruption. From this, the following are apparent:

- The combating of corruption seems to be most effective where specialist skills are applied, as in the case of the SIU, AFU, Specialist Courts and the Hawks.
- Where government departments are involved in combating corruption through the Minimum Anti-Corruption Capabilities, there are challenges¹⁴. Based on research by the PSC, departments are vulnerable to corruption by crime syndicates, especially where systems are weak and there is a lack of specialist investigative skills.

The PSC would therefore propose that for departments to be effective in the fight against corruption, it would have to seriously increase its capability to combat corruption through dedicated budgets, human skills and capacity. Departments where there are huge tenders awarded and where direct services to the public are provided are particularly vulnerable. It would therefore be in the public interest to increase departmental capacity to combat corruption effectively in order to minimise its negative effects on service delivery. It also implies that these anti-corruption units in departments need to be sustainable, both in the medium and long term. Corruption perpetrators continue to target vulnerable institutions. This underscores the need for sustainable, effective, anti-corruption capabilities at both a national and provincial level. This will ensure trust in government by citizens who need to experience the positive dividends of our new democracy.

¹⁴ Anti-Corruption Capacity Requirements Guidelines for the Implementing the Minimum Anti-Corruption Capacity Requirements in the Departments and Organisational Components in the Public Service, January 2006.

Should **public servants** be allowed to **do business** with **government**?

By Kris Dobie, Manager:
Organisational Ethics Development,
Ethics South Africa

Introduction

The Auditor-General's August 2008 'Performance audit of entities that are connected with government employees and doing business with national departments' indicated that more than 2 000 government employees or their spouses had been involved in government contracts to the value of approximately R600 million. While some of these contracts might have been awarded fairly, the scale of the revelations, as well as the fact that most of these employees did not declare their interests, suggests that there was much impropriety, and subsequently damage to the public trust.

This begs the question – Should public servants or their spouses be allowed to do business with government?

Should all such contracts not just be banned?

The main damage to public trust is caused by the indication that there is corruption in public procurement processes. It is easy to have a knee-jerk reaction saying that all contracting between government and public servants or their spouses should be banned because of the high

corruption risk. We should however note that such contracts are not necessarily corrupt or unethical. It is quite easy to imagine such contracts, which are perfectly legitimate, for example:

- A public servant works at the Department of Labour, but has inherited a large share in a company that does business with the Department of Public Works. The public servant is in no way involved in the management of the company and has not sought to bring about any unfair influence in any procurement processes.
- A public servant works at the Department of Home Affairs, and her husband is a consultant to the Department of Correctional Services.

Even if we look at spouses contracting with the same department there are scenarios that would pose little conflicts of interest:

- The spouse of a teacher tenders for repair work to the Department of Education's buildings. The teacher works at a school and does not have much contact with the Department's head office where such decisions would be made.

One could even imagine scenarios where it would be detrimental to a department to exclude a spouse



Kris Dobie

from government work. For example, where scarce skills are at play (such as prohibiting a heart specialist from being contracted by the Department of Health), or where doing so would exclude competition among already limited service providers. Clearly, an outright ban would not be viable, as this would firstly infringe on the rights of the public servants and their spouses, and in many cases the interests of the government department and citizens in general.

What are the core issues?

The core question is how one balances the rights of the public servants and their spouses to do legitimate business with the rights of all South Africans to a fair procurement processes and fruitful government expenditure.

Three immediately apparent scenarios would bring these rights into conflict:

- Where procurement (or any other official process) is influenced unfairly to the benefit of the public servants or their spouses.
- Where the public servants have access to information, which could benefit their spouse's company unfairly.
- Where an external interest infringes on the public servant's ability or commitment to do their work. For example, using official time and resources to do private work.

In an ideal world, where everyone behaved ethically, one would simply say that each case has to be judged on its own merits to ensure that the above scenarios do not occur. It is however clear that such conflicts do occur, which begs the question – **do we not need more rules?**

More rules

Rules are in fact already in place to address each of these risks. According to the Public Service Code of Conduct:

An employee

“C4.5 – does not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties;

C.4.6 – will recuse himself or herself from any official action or decision-making process, which, may result in improper personal gain and this, should be properly declared by the employee;
C.5.4 – does not use or disclose official information for personal gain or the gain of others; and

C.5.5 – does not, without approval, undertake remunerative work outside his or her official duties, or use office equipment for such work”.

It is clear that, although the rules are in place, they are not being adhered to or enforced strictly enough. There is currently a requirement that staff should declare their external interests. The Auditor-General found that 46 of the 49 national government employees (or their spouses) who did business with government did not declare their external interests. Yet, it seems that the departments were not able to detect this, and furthermore did not institute appropriate disciplinary actions. While the rules can be revisited, it would not have much of an impact unless it is supported by a significant focus on creating institutional capacity to implement and monitor the rules.

Oversight

While senior managers are required to declare their interests annually, departments do little with the information they receive. Most seem to believe that their only function is to forward the information to the Public Service Commission. Departments should pro-actively assess the information to determine if there are any potential conflicts of interest and to manage these accordingly. It should however be made very clear that declaration of interests does not excuse conflicts of interests. The moral responsibility remains with the employees. Where employees would like the department to make a ruling on whether their interests are allowable, they should specify this. Such queries should be forwarded to an Ethics Committee who should be supported by an Ethics Officer. Without the capacity to manage

these and other ethics related risks the status quo will remain.

Proposed rules

While one would want to guard against making procurement processes unnecessarily arduous to prevent the misconduct of a few individuals, there might be some benefit in more specific and clearer rules. It would be difficult to briefly compile a set of rules, which addresses all situations, but the following are some ideas, which can be explored:

Outside remunerative work and other interests

Public servants may not have outside business interests (besides insignificant shares in listed entities) unless it is approved by an Ethics Committee. Currently, Accounting Officers have to decide on this, but it is doubtful that they have the capacity to do so.

Specific principles should be put in place to guide committees in their decisions. For example:

- The interest may not impact on the person's work/work time.
- There may not be a potential conflicts of interest with their current function.
- It may not negatively impact on the department.

One might require that spouses' interests are also declared, but this would simply be for increased transparency.

Doing business with government departments

- Public servants and their spouses may not deal with

their own departments, **unless** it is approved by the Ethics Committee.

- Public servants and their spouses may deal with other government departments, **but** they should still be required to raise potential conflicts of interest.

Where potential conflicts are not pro-actively raised, there should be a contractual penalty (for example, 15% of contract value) to the company if they are successful, and disciplinary and criminal action, as appropriate, against employees.

For Ministers, Deputy Ministers, Directors-General and Deputy Directors-General

The more senior a person involved in a corruption scandal, the more severe the impact on public trust. Politicians and very senior government officials have tremendous influence and stature. There will almost

invariably be the perception that they influenced processes where they benefit from government tenders and decisions. Where such senior politicians or officials (or their spouses) have a significant interest in a company tendering for a project at any government institution or state-owned entity:

- It should be raised pro-actively by the company and politician/official and referred to the Public Service Commission or any other independent agency.
- Where interests are not pro-actively raised, there should be a contractual penalty (for example 15% of contract value) to the company and disciplinary and criminal action, as appropriate, against the politician or official.
- Where the agency determines that they may continue, an independent external observer (preferably a registered auditor from a reputable firm) should observe the tender process,

and it should be flagged for external auditors or the Auditor-General to follow up. This would inevitably add costs to the process, but it would be preferable to deteriorated public trust. To justify the costs, it should perhaps be only for large contracts (for example, worth R5 million or more).

Conclusion

Even though there is impropriety in business dealings between government officials, or their spouses, and government departments, it would not be viable to ban all such transactions. The rules that are in place however seem to be poorly implemented. These rules can be expanded to be more specific, but serious attention needs to be given to the institutional processes and capacity to manage the rules. Public trust depends on it.

Cases of conflicts of interest in departments - a concern for SCOPA

By Themba Godi, Chairperson:
Standing Committee on Public
Accounts, Parliament of South Africa

Introduction

Since its enactment, the Public Finance Management Act (PFMA) provided guidelines for improved financial management in the public sector and has served as an accountability mechanism for legislators in their oversight functions over the Executive. The PFMA further aims to reduce fraud, corruption, waste and to ensure effective and efficient use of public resources to maximise the capacity of government to deliver services.

Financial Disclosure Framework

In line with Section 41 (1) (d) of the Public Service Act, the Public Service Commission further introduced the Financial Disclosure Framework for senior managers in order to manage and prevent the conflicts of interest from occurring. In terms of the framework, all members of the SMS are required to disclose their financial interests to their Executive Authorities, copies of such forms must be submitted to the Public Service Commission who must then scrutinise the forms to identify any potential conflicts of interest and alert the authorities. However, since the inception of the framework in

March 2000, the disclosure forms by various members of the Senior Management Service have not been satisfactory. Although there has been a steady increase in the submission of financial disclosure forms, challenges surrounding financial disclosures remain a major concern for the Standing Committee on Public Accounts (SCOPA).

Linked with issues of financial disclosures, Section 85 (1) (a) and (e) of the PFMA provides for the process of reporting financial misconduct in the public sector. The Act requires the Accounting Officer of the department to report to the Executive Authority, Department of Public Service and Administration and the Public Service Commission on the outcome of the disciplinary proceedings. It is worth noting that despite the legislative provisions that promote sound financial management in the public sector, financial misconduct in the form of unauthorised, irregular, fruitless and wasteful expenditure largely contributes to departments getting a qualified, disclaimer or adverse audit opinions. Clearly, the public sector still has a major challenge of ensuring adherence to legislative provisions alluded to above.

Findings of the Auditor-General

In a report tabled in Parliament in August 2008, the Auditor-General



Themba Godi

indicated that designated employees (senior managers) and certain Ministers failed to declare their interests and that the majority of government employees did not have approval to perform remunerative work outside their employment in government, as prescribed by the relevant legislation and regulations. The report of the Auditor-General highlighted amongst other things:

Lack of approval to perform remunerative work

- 2 319 government officials had an interest in companies that did business with government departments
- The business conducted with government by these employee related entities for the 2005\2007 financial years

amounted to R615 million.

Excessive business with employee related entities

- In certain instances employees of the departments had approval to perform other remunerative work but did excessive business with government which could have an impact on their ability to effectively perform their respective duties
- The Auditor-General further found that 19 employees did business with national and provincial departments to the tune of R68 million.

Collusive tendering processes

- The Auditor-General also identified a total of 11 employees involved in collusive tendering and their activities amounted to R1.6 million.

Conflicts of interest

- Employees were involved in procurement processes at the departments and the entities in which they had an interest, these employees were appointed to deliver goods and services for government and their conflicts of interest transactions amounted to R14.2 million.

Lack of declaration and misrepresentation in the standard bidding documentation

- 59 government employees with transactions amounting to R172 million were found to have misrepresented the disclosure in the tender documents by

not declaring that they are related to companies and close corporations doing business with government.

Deviation from the supply chain management processes in the awarding of tenders and quotations

- National and provincial departments deviated without the necessary approval from the supply chain management process and awarded tenders or quotations to employee-related entities. This could be an indication of preferential treatment of such employee-related entities or fraudulent activities in the awarding of tenders or quotations.

Whilst the findings of the Auditor-General mainly paints a picture of serious conflicts of interest in government departments, there is a need for a collective will to resolve the matters and ensure that the Public Service functions are in line with the values set out in Chapter 10 of the Constitution namely:

- A high standard of professional ethics
- Efficient, economic and effective use of resources
- Services be provided impartially, fairly, equitably and without bias
- Accountability
- Transparency, etc.

Recommendations by SCOPA

In line with the aforementioned provisions, SCOPA made the following recommendations to Parliament:

- That national and provincial

departments must ensure that they develop effective monitoring and evaluation policies that will respond to any breaches in policy and deal with such cases immediately;

- In an event that some employees are found guilty, the respective national and provincial departments' Accounting Officers must ensure that they recover the money acquired through these fraudulent means;
- That the Accounting Officers of the relevant departments must take disciplinary action against designated employees who did not declare their interests in companies or close corporations that did business with national departments; and
- National departments who had employees performing remunerative work without approval, investigate these instances and that the relevant Accounting Officers take immediate and appropriate disciplinary actions against those who are found guilty of performing remunerative work without approval.

Conclusion

It is a concern of the Committee that collusive and corrupt practices of this nature are prevalent in government, even more so when one considers the social development challenges currently faced. We hope that the relevant departments will move swiftly to address these challenges and penalise the officials involved either by ensuring that the monies lost are recovered or by using alternative disciplinary measures that will lead to a corrupt free Public Service.

The role of **financial disclosures** in managing conflicts of interest

By Mashwahle Diphofa, Director-General, Office of the Public Service Commission

Introduction

South Africa has prioritised a comprehensive ethics and legislative infrastructure to meet the demands for an accountable and transparent government. Among the enabling frameworks and pieces of legislation introduced in this regard are the Code of Conduct for Public Servants, the Financial Disclosure Framework for members of the Senior Management Service, the *Prevention and Combating of Corrupt Activities Act*¹⁵ and the *Promotion to Access of Information Act*¹⁶. No one that advocates for the promotion of accountability and the eradication of corruption would argue against the fact that there is a need to maintain this co-ordinated and sustained response in promoting integrity.

Given the current climate where anti-corruption continues to enjoy pride of place among the priorities of government, and the evolutionary process that characterises the building of an ethics infrastructure,

the time is right to move towards a structured approach in the management of conflicts of interest. Such an approach would involve the implementation of various measures that complement each other.

It must be remembered that public officials are also private individuals. There will be occasions when a public official's own private interests come into conflict with his/her public duty. When this happens, a public official is expected to put the public interest first. Essentially, a conflicts of interest system promotes the perception and practice of integrity in government by preventing actual conflicts of interest before they occur. The PSC has always maintained that potential conflicts of interest is a reality that officials will face every once in a while in their career. Of importance is to be transparent about these conflicts and to ensure that they are managed timeously before they materialise into irregular and unethical conduct.

The Financial Disclosure Framework is an important enabling mechanism which is there to facilitate such a transparent process of identifying, declaring and managing conflicts of interest.



Mashwahle Diphofa

Managing Conflicts of Interest through Financial Disclosures

The Minister for Public Service and Administration (MPSA) during March 2000 approved, in terms of Section 41 (1) (d) of the *Public Service Act, 1994*¹⁷, as amended, a new Chapter 3 of the Public Service Regulations (the Financial Disclosure Framework) compelling officials on salary levels 15 and 16¹⁸ to disclose their financial interests. Implementation commenced during April 2000. This was in line with the mandate conferred upon the MPSA

¹⁵ Act 12 of 2004.

¹⁶ Act 2 of 2000.

¹⁷ Proclamation 103 of 1994.

¹⁸ Deputy Directors-General, Heads of Department and Directors-General.

by section 3 of the *Public Service Act*. During May 2001, the MPSA further extended the Financial Disclosure Framework to all members of the Senior Management Service¹⁹ in the Public Service. This amendment was published in Government Gazette No. 22308 of 25 May 2001. In terms of the Framework every designated employee should, not later than 30 April of each year, disclose to the relevant Executive Authority particulars of all their interests in respect of the period 1 April of the previous year to 31 March of a year in question. The Executive Authority must submit a copy of the disclosure form to the Public Service Commission by not later than 31 May of each year.

Why Financial Disclosures?

Designated officials (members of the SMS) are entrusted with public funds. As such, they need to maintain the highest standards of professional ethics. Their integrity and that of their departments must be beyond question. "The rationale behind annual disclosure is that it focuses the attention of officials at least once each year on where the potential conflicts of interest lie. If these records are easily accessible and publicly available, it may also alert the public, the media, the government and people who do business with government as to an official's private interest or possible conflicts of interest²⁰."

Overview on the implementation of the Financial Disclosure Framework

The Public Service Commission has since the 1999/2000 financial year

been responsible for the management of the Financial Disclosure Framework (FDF) for senior managers. The FDF was initially only applicable to Heads of Department but since 2000/2001 has applied to all senior managers. The objective of the FDF is to manage the potential conflicts that may exist between a senior manager's private interests and public responsibilities in order to ensure that actual conflicts of interest do not occur. The PSC has since the inception of the Framework placed major focus on ensuring compliance with the submission of financial disclosures, which is a regulatory requirement in terms of Chapter 3 of the Public Service Regulations.

The rate of compliance with the FDF for the last five years is indicated in the table below:

Table 3: Rate of compliance with the FDF

| Financial year | 2003/04 | 2004/05 | 2005/06 | 2006/07 | 2007/08 |
|-----------------|---------|---------|---------|---------|---------|
| Compliance rate | 66% | 72% | 80% | 87% | 85% |

Although this table shows that there has been some progressive improvement regarding compliance with the FDF, the PSC is of the view that only a 100% compliance rate would be acceptable.

As indicated, the submission of financial disclosures is a regulatory requirement. The extent of non-compliance by senior managers and departments is unacceptable and does not bode well for integrity in the Public Service. The responsibility of ensuring that disclosures are submitted to the PSC ultimately rests with the Executive Authorities. Since the implementation of the FDF, the

PSC has consistently reminded the Executive Authorities to submit the outstanding financial disclosures of senior managers and advised them to institute disciplinary measures against defaulting senior managers. The Minister for Public Service and Administration also sent reminders on several occasions to the Executive Authorities at the request of the PSC. Despite such reminders, a 100% compliance rate has not yet been achieved and there has been no evidence of senior managers being charged with misconduct for failing to comply with the FDF.

Scrutiny of Financial Disclosures

Apart from compliance and monitoring, the PSC has shifted its focus to the scrutiny of the financial

disclosure forms in order to identify potential conflicts of interest. During the 2008/2009 financial year, the PSC scrutinised the financial disclosures of 30% (2 038) of all senior managers that submitted their disclosure forms. The sample included three provinces and ten national departments. The PSC's scrutiny of the disclosures included assessing whether the private interests declared by senior managers could pose a potential conflict with their official responsibilities. This was done by assessing whether:

- there is a link between the official duties of a senior

¹⁹ Directors and higher.

²⁰ Mark Davies. US Conflicts of Interest Board.

manager and the business activities of a company or consultancy in which the senior manager holds a Directorship or Partnership;

- a senior manager is involved in three or more companies, in which instance, he or she would not, in all probability, have the time to devote his/her full attention to his/her official responsibilities; and
- two or more officials from the same department are involved in the same company or companies as such officials could make decisions, on the awarding of contracts, for example, that favour one another.

(121) whilst the highest number at national level was identified at the Department of Social Development (20). The fact that 21% of all senior managers that formed part of the sample may experience potential conflicts of interest illustrates the importance of a system such as the Financial Disclosure Framework as a mechanism to prevent corruption. Through the identification of the potential conflicts of interest, departments are able to manage the risks associated with the conflicts of interest, and ensure that it does not become actual conflicts of interest.

Scrutiny of Heads of Department (HoDs)

The PSC found, in terms of its assessment of the disclosures of HoDs, that 44 HoDs may have potential conflicts of interest linked

their counterpart, the possibility is that these HoDs could make decisions that favour one another. Furthermore, the involvement of HoDs in too many companies (three or more) puts their ability to devote full attention to their official duties into question. The PSC is of the view that should the official be involved in three or more companies, he/she would not, in all probability, have the time to devote his/her attention to the requirements of the State in terms of his/her responsibilities. The PSC further found that 26 HoDs did not disclose their properties. This is in direct contravention of the Framework and calls for disciplinary action in terms of the Disciplinary Code and Procedures of the SMS Handbook.

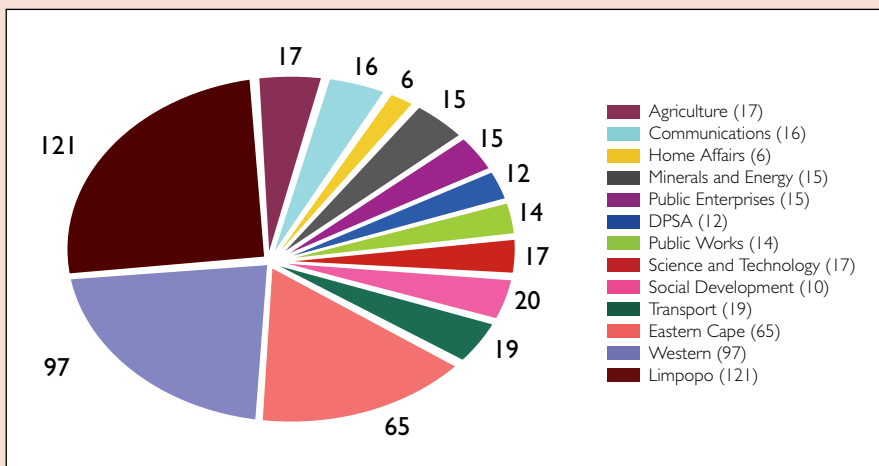
Recommendations by the Public Service Commission

The PSC made the following recommendations based on the findings of the study:

- Executive Authorities should charge transgressing Heads of Department with misconduct and ensure that other members of the SMS are also charged with misconduct for failing to disclose their private interest. The Heads of Department can charge members of the SMS with misconduct in terms of the Disciplinary Code and Procedures, as contained in the SMS Handbook. Instances where senior managers have been charged with misconduct must be reported to the PSC.
- Executive Authorities should assign the duty to manage the financial disclosure process and ensure that the forms are submitted timely to dedicated units within a department or

The results of the assessment by the PSC are indicated in the following figure:

Figure 1: Results of the assessment by the PSC



As indicated in the above graph, out of the 2 038 financial disclosure forms scrutinised, the PSC identified **434** senior managers that may have potential conflicts of interest between their private interests and their official duties. This total represents 21% of all senior managers that formed part of the sample. The highest number of potential conflicts of interest at provincial level was identified in the Limpopo Province

to the work of their departments. Forty one (41) are involved in too many companies and 11 HoDs share companies with their counterparts in other departments. In cases where the HoDs are involved in private companies and where the activities of the companies are linked to the work of the departments, they risk the danger of taking decisions that would favour their companies. Where HoDs share companies with

dedicated staff members. Such staff members may liaise with officials of the PSC to ensure the effective management of the Framework.

- Members of the SMS should be made aware of the fact that they need to disclose all companies, including dormant and non-profit making companies. Companies for which senior managers are performing work but are not receiving remuneration must also be declared. Instances where managers have been charged with misconduct must also be reported to the PSC.
- Executive Authorities should obtain the outstanding forms of repeat offenders and submit them to the PSC as soon as possible. This will enable the PSC to scrutinise the forms to establish if there was deliberate non-disclosure or actual conflicts of interest.
- Given their Legislative and Parliamentary oversight role, Portfolio Committees should call the departments and Executive Authorities to account where there has been non-compliance as well as low levels of compliance.

Conclusion

The management of potential conflicts of interest forms an integral part in the Public Service's initiatives to become integrity driven. Through the identification and management of potential conflicts of interest, honest public servants are kept honest and professional ethics is promoted within the workplace. Compliance to the Financial Disclosure Framework should, therefore, not be seen purely as a mandatory requirement but as an ethical obligation of each and every senior manager.

Trading public knowledge for private gain: is the revolving door spinning out of control?

By Dr Collette Schulz-Herzenberg, Senior Researcher in the Conflicts of Interest project, Institute for Security Studies (ISS) Corruption & Governance Programme in Cape Town.

Introduction

Current debates on ethics in public life tend to focus their energies on the disclosure of private business interests of politicians or the need to limit excessive spending of state funds on luxury items such as expensive cars and accommodation by senior public officials. Yet, closer scrutiny of South Africa's integrity management system reveals an important area of activity that provides numerous opportunities for unethical conduct by elected and unelected public officials. This concerns the 'revolving door' phenomenon, commonly understood as the rapid movement of people between government and the business sector. It involves both the appointment of corporate executive and business lobbyists to key posts within government, and alternatively, the recruitment of senior public officials into more lucrative private sector positions. It might also involve former lawmakers and executive members who become lobbyists, working to advance the special interests of the corporate clients paying them. In the two latter cases, these former public officials take up profitable jobs within the same corporate industries that

had business pending before them when they served in government and that they were often in charge of regulating. In all cases, instead of money exercising its influence, these individuals use their public-sector knowledge and contacts to exact benefits for the needs of business.

This rapid movement of public officials threatens the integrity of government in several important ways. Public officials may be influenced in their official actions by the promise of a job with a private company that desires a government contract or wants to shape public policy. Of course, private sector interests are cognisant of the fact that an effective way of shaping policy and the regulatory environment is to employ former government officials most familiar with its decision-making processes. Moreover, former public officials recently recruited into the private sector as lobbyists or senior executives have extra-ordinary access to lawmakers and can use their government connections to benefit themselves or the business interests they have come to represent after they leave office. This access provides certain government contractors with an unfair advantage over their competitors since they can use insider knowledge to the benefit of their new employer.

Public officials

Serving the public interest is



Dr Collette Schulz-Herzenberg

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. When undue influence is leveraged on behalf of a particular set of corporate interests, the decisions that ensue do not necessarily represent the public's best interest or may even be potentially detrimental to the public interest.

Finally, and perhaps most importantly, at a time when citizens' trust in public officials and politicians in particular, is in global decline the mere appearance of undue influence on decisions that affect the public interest is likely to damage the reputation of government further. 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 public 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 conflicts of interest situations, where there is no actual wrongdoing, can often be sufficient to test the credibility of democratic institutions. In addition, when public trust in democratic institutions is lowered, citizens tend to withdraw from participative democracy, such as elections, placing the legitimacy of the entire democratic system at stake.

Post employment restrictions in other countries

A number of countries like the United States and Canada have adopted post employment restrictions to manage the conflicts of interest that result from the revolving door between government and business. Most of the restrictions are imposed upon those who leave public office and are designed to ensure that they derive no unfair advantage for themselves or others. They include 'cooling off period' laws that specifically attempt to prevent abuses usually by restricting private appointments for a period of one year. It is hoped that the cooling off period will stem the abuse of confidential information to which they had access while holding public office, the misuse of their current positions to secure future personal advantage and generally

manage their former association with government.

South African law is yet to recognise that an unchecked revolving door between government and business threatens the integrity of government in the above-mentioned ways. There are inadequate measures to deal with the post-employment activities of elected politicians and former government officials. This is despite the numerous examples of Cabinet members who shift from their executive posts into senior positions within the private sectors often with companies that reside in the sector within which they previously operated.

Post employment debate in South Africa

Debate over, and subsequent calls for, post employment restrictions is not new in South Africa. In 2001, the Joint Investigative Team (JIT) report into allegations of corruption relating to the Strategic Defence procurement Package (aka Arms Deal) recommended that '*Parliament should take urgent steps to ensure that high ranking officials and office bearers, such as Ministers and Deputy Ministers, are not allowed to be involved, whether personally or as part of private enterprise, for a reasonable time after they leave office in contracts that are concluded with the state.*'

More recently, the 2006 Public Service Commission Report on *Managing Conflicts of Interest in the Public Service*, recognised the increasing movement between the public and private sector, and subsequently highlighted the need for a cooling off period and for the regulation of post employment activities generally in South Africa. **So why does this phenomenon remain**

unregulated? One fundamental reason relates to the uncertainty about what constitutes conflicts of interest in public life in the first place. Widespread agreement that bribes, kickbacks and extortion all involve conflicts of interest has given rise to a narrow interpretation. Yet, the mere abuse of influence, favouritism and the misuse of state information also constitute conflicts of interest.

Reasons for lack of post employment regulatory framework

The problem is one of definition and it highlights a critical underlying issue – that South Africa's body politic is uncertain about the nature and causes of conflicts of interest in public life. The ensuing confusion holds up regulatory efforts, and ultimately, the fight against corruption in the public sector. In addition, until broad consensus is reached about what should constitute minimum standards of ethical conduct for public officials, a number of activities that are ethically dubious will remain legal.

The second reason for the lack of a post employment regulatory framework is bound up in important contextual considerations that are particular to South Africa. The *cooling off periods* need to be balanced with the individual's legitimate and Constitutional rights to economic freedom and activity. However, the historically perverse nature of the relationship between business and government in South Africa is such that many who currently find themselves in public positions were previously denied opportunities to gain experience and skills in the private sector. This discrimination now makes the balancing effort between restrictions and rights more

complex and difficult to regulate. Consequently, general reluctance to control the post employment movements of government officials has ensued.

Yet, the fact remains that each year millions of rands are spent paying people to lobby on behalf of corporate interests whom the electorate had originally entrusted to regulate the same industries in the public interest. To promote citizen's trust and minimise unfair advantage government and the public sector will require a sound ethics infrastructure that deals with the revolving door, and South Africa can draw on numerous models from elsewhere when designing a system that suits its contextual needs.

Flexible regulatory approach

Future restrictions will need to be pragmatic, carefully balancing preventative measures against the individual's right to a livelihood. A flexible regulatory approach may want to consider restrictions on the type of activities that former public officials can play for their new private sector employee such as lobbying the department from which they came. Alternately, regulations can place limitations on companies employing former public servants from entering into contracts with departments who employed the former official for a period of one year. These restrictions are more binding on the

private sector entity rather than the individual and do not directly impede their ability to gain employment in the private sector. Most importantly, however, these restrictions still ensure that potential conflicts of interest and undue influence are checked for a time at least. They also act as an unmistakable reminder to all parties that the 'revolving door' is phenomenon that constantly requires ethical consideration.

Enforceability

Enforceability remains another challenge – the effectiveness of any regulatory framework relies in large measure on enforcement. Conflicts of interest posed by the revolving door have proved difficult to remedy in other countries. The weaknesses in the existing rules framework in the United States of America (USA) have sparked calls for significant policy reforms. They include the extension of the 'cooling off period' from one year to an entire federal term during which officials cannot engage in lobbying activities once they leave public office; expanding the scope of prohibited activities to include any lobbying related activities; and the increased monitoring and oversight of state rules that bar public officials from dealing with their former employees. Of course, the challenge is how government can best monitor the movements of officials once they have left the employ of the public sector. The Public Service

Commission in South Africa has suggested that one appropriate way to enforce these regulations is by placing the obligation with the private sector - by including provisions in contracts with service providers to government departments that legally prevents them from recruiting and appointing public officials that they work with.

Conclusion

The 'public ethics' debate in South Africa must go beyond existing measures such as financial disclosure to encompass a broader perspective on the different types of activities which remain unregulated but which serve to undermine public trust in government and its effectiveness and fairness in decision making. Any debate on public ethics should include all stakeholders and particularly private sector actors who must be equally accountable to existing norms and laws. The national debate on ethical conduct in public life can start by asking the following questions: What can citizens expect from their elected and non-elected officials? What constitutes ethical and fair conduct? In addition, despite the tug and pull of conflicting interests, should the elusive 'public interest' always prevail? Public officials, on the other hand, can begin to address this crucial regulatory gap by examining the best way to balance the individual right to economic activity with the public's right to ethical governance.

Assessment of the **state of professional ethics** in the Free State, KwaZulu-Natal and Limpopo provinces

By Commissioner Sellinah Nkosi, Public Service Commission

Introduction

The need to promote professional ethics and integrity applies universally in the Public Service. Recognising that public servants may be susceptible to unethical behaviour, Government has enacted a comprehensive array of legislation and policy frameworks.

In order to give effect to the promotion of professional conduct and anti-corruption strategies in all national and provincial departments, the Public Service Anti-Corruption Strategy (PSACS) was implemented. The PSC has adopted a provincial specific approach in assessing the extent to which departments are promoting professional ethics and integrity, which forms part of the PSACS. This includes an assessment of anti-corruption legislation and relevant policy frameworks.



Commissioner Sellinah Nkosi

During the past three years, the PSC has conducted studies on professional ethics initiatives in three provinces, namely Free State (2006), KwaZulu-natal (2007) and Limpopo (2008). The studies focused on the policy and legislative requirements for the implementation of anti-corruption initiatives. This included initiatives linked to legislation like the Protected Disclosures Act, Act No. 26 of 2000 (PDA); the Promotion of Access to Information Act, Act No. 2 of 2000 (PAIA) and the Promotion of Administrative Justice Act, Act No. 3 of 2000 (PAJA), amongst others.

Following, is a comparative table identifying some of the key findings of these respective studies.

Table 4: Comparison of ethics results study between the Free State, KwaZulu-Natal and Limpopo Provinces

| Ethical issue / Imperative | Free State | KwaZulu-Natal | Limpopo |
|--|---|---|--|
| Anti-Corruption Forum, a cross-sectoral body comprising public, business and civil society sectors | Free State had no Anti-Corruption Forum in place | KZN did not have participation from civil society and the Forum was therefore not fully represented | Limpopo did have a provincial Forum in place but this has become inactive in the last 12 months |
| Anti-Corruption Strategies | Free State only had a draft provincial strategy in place and this was found to be outdated in terms of recent anti-corruption developments such as the National Anti-Corruption | KZN only had a draft provincial strategy in place | Limpopo had an anti-corruption strategy in place, which had been cascaded down to departments in the form of fraud |

| Ethical issue / Imperative | Free State | KwaZulu-Natal | Limpopo |
|--|---|---|--|
| | Hotline and the development of a Generic Ethics Statement for the Public Service | | prevention plans. 9 out of 11 departments had fraud prevention plans |
| Promotion of the Code of Conduct | Promotion of the Code of Conduct was found to be uneven with only 5 departments being involved in training | Training on the Code of Conduct only took place during induction. No other awareness campaigns were evident | Although all officials had a copy of the Code of Conduct, 5 out of the 11 departments indicated that they did not conduct any training on the Code of Conduct |
| Minimum Anti-Corruption Capability, which requires departments to investigate corruption and implement whistle-blowing as well as the code of conduct for the Public Service | Only 4 departments demonstrated a Minimum Anti-Corruption Capability | 4 departments did not have a Minimum Anti-Corruption Capability. Many departments believed that the Provincial Treasury should investigate corruption and fraud according to the KwaZulu-Natal Internal Audit Act. This caused confusion with respect to investigations | 6 out of 11 departments had established anti-corruption units with competent staff members at middle management positions |
| Investigative procedures and protocols | Only 2 departments had formal investigative procedures in place | None of the departments could produce a procedural manual for the investigation of corruption, resulting in no standardised approach to investigations | Only 5 departments had investigative procedures in place. Furthermore, the PSC found that inconsistent training on these procedures had been provided |
| Agreements with Anti-Corruption Agencies to investigate complex crimes and corruption | Only 1 department had a formal agreement with the South African Police Service | Only 1 department had a formal arrangement with Anti-Corruption Agencies for assistance | Only the Office of the Premier had a formal agreement with the South African Police Services |
| Systematic monitoring of corruption | 5 departments demonstrated a coherent system to track and combat corruption | 1 third of departments had developed databases on allegations of corruption. In addition, there was no provincial-wide database on corruption incidents | 7 of the 11 departments had databases dealing with the allegation of corruption. 5 of those departments indicated that reporting to management takes place on a monthly basis |
| Compliance with Financial Disclosures | At the due date (31 May 2007), no department had submitted their financial disclosure forms to the PSC for the year in question | At the due date (31 May 2006), no department had submitted their financial disclosure forms to the PSC for the year in question | 73% of SMS managers in the province had complied by the 31 May 2007 due date to file their financial disclosure forms |
| Systematic management of National Anti-Corruption Hotline (NACH) cases | Out of 75 cases referred to the province, feedback was received in respect of only 19 cases, showing a poor capability to respond effectively to allegations of corruption cases received from the NACH | As at 30 September 2007, feedback had only been received in respect of, 6 out of 100 cases referred to the province, showing a poor capability to respond effectively to allegations of corruption cases received from the NACH | The PSC received feedback on 97 cases out of a total of 204 cases referred to the province, showing a better capability to respond effectively to allegations of corruption cases received from the NACH |

| Ethical issue / Imperative | Free State | KwaZulu-Natal | Limpopo |
|--|--|---|--|
| Implementation of Whistle blowing policies | 1 department could substantiate that an effective whistle blowing policy had been implemented | 6 departments did not have whistle blowing policies in place | 8 departments had whistle blowing policies in place |
| Implementation of Anti-Corruption laws | None of the departments could provide supporting documentation on the implementation of the PDA, PAIA and PAJA | 6 departments did not have policies on the PDA. Only 50% of departments had guidelines for access for the public in respect of PAIA. Only 1 department had a policy on PAJA | The majority of departments had sufficiently implemented the PDA and PAIA. None of the department had implemented PAJA |

Discussion on the findings of the professional ethics assessments on the three provinces:

During 2005, all provinces were requested to each establish a Provincial Anti-Corruption Forum to enhance the fight against corruption through a coalition of business, government and civil society. The findings of these assessments revealed that the Free State had no Anti-Corruption Forum whilst in KwaZulu-Natal (KZN) the Forum was not fully representative due to lack of participation from civil society. Limpopo had a functional Provincial Forum, however in 2008 the Forum became inactive.

With regards to the Code of Conduct (CoC), the PSC found that training and promotion of the CoC is uneven across all three provinces. The assessment further uncovered that Minimum Anti-Corruption Capabilities (MACC) are not applied in all the departments, and where this is applied, is in KZN and Free State provinces, it is poorly implemented. The policy for the MACC was instituted to provide for a minimum standard of response to corruption at departmental level. Instituted in 2002, the implementation of the MACC is still a challenge for most departments with either poor budgeting for it or

poorly trained officials. None of the provinces have procedure manuals for investigation of corruption in their departments as required and this is inexplicable as such manuals prescribe certain standards for investigation to ensure a credible outcome. The implication is that corruption may be undetectable or poorly investigated with no certainty of prosecuting perpetrators.

The PSC found that only one department in each of the mentioned provinces has formal agreements with other anti-corruption agencies to assist with complex cases of investigation. This makes it difficult for such departments or provinces to prosecute complex or sophisticated syndicated crime. In a time of almost total globalisation, the deliberate ignoring of specialised anti-corruption agencies makes these provinces vulnerable to deliberate penetration by experienced criminal elements.

The PSC found that the systematic monitoring of corruption is done unevenly across all three provinces. This is a concern as the systematic monitoring can provide provinces with instant trends on corruption, which can in turn inform their fraud prevention plans to be more specific in addressing identified risks. Sadly, this is not done by all departments.

In terms of compliance with disclosing financial interests by senior managers, the assessment revealed that only Limpopo province complied with the due date of 31 May, and this at 71% of their senior managers. This implies that departments cannot identify potential conflicts of interest of all senior managers. The integrity of such managers may be called into question without their financial disclosure forms having been submitted to their respective Executive Authorities.

In response to feedback provided to the NACH of cases of corruption referred, the PSC found that KZN and the Free State showed very low response rates, while Limpopo responded only in 48% of the cases. Without proper feedback, the NACH cannot operate optimally as people will lose faith in the NACH if they do not receive feedback on their allegations. When whistle blowers are seen to be disregarded by an institution such as the NACH, it undermines Government's ability to deliver services even further.

The uneven implementation of whistle blowing policies within the three provinces is also pointed out in the assessment. The Protected Disclosures Act, Act No. 26 of 2000 (PDA) makes provision for whistle blowers who act in good faith to be protected from any

form of victimisation. This requires departments to implement whistle blowing policies to protect such potential whistle blowers. In the case of Free State, only one department could show proof of an effective whistle blowing policy having been implemented, thus such poor practices make it difficult for potential whistle blowers to come forth with allegations, which could probably save departments from potential damage or loss.

In terms of the implementation of Anti-Corruption Legislation, there is unevenness across all three provinces

with respect to its implementation and this does not auger well for the culture of transparency (PAIA) or accountability (PAJA). If these constitutional principles are not upheld and implemented by departments it may well lead to a regime of impunity and secrecy so well condemned of the apartheid political dispensation.

Conclusion

This snapshot, based on detailed research is evidence of a poor preparedness to deal with corruption in a coherent and systematic manner.

It further points to a systemic vulnerability to risk and to possible penetration by criminal syndicates. Given that corruption often leads to poor service delivery, these provinces will, become examples of endemic poor service delivery, if they do not identify concerns. If professional ethics and anti-corruption strategies are to succeed, then well-resourced and well-trained anti-corruption capabilities have to be developed at departmental level in these provinces. Only then will good governance become the basis for successful service delivery for those who deserve nothing less.

Management of gifts in the public service

By John Mentoor, Chief Director:
Professional Ethics, Office of the
Public Service Commission

Introduction

The Public Service is continuously under scrutiny by the public and the media. Such scrutiny is necessary, as public servants are the agents through which the various mandates of government are executed, and in performing their duties are entrusted with public resources, and as such, their actions must never be suspect. The reality, however, is that public servants are human beings with weaknesses that may be exploited. One measure through which they may be exploited is by accepting gifts, either in a personal capacity or for services rendered.

The issue of gifts in South Africa is an emotive issue because South Africa is a country characterised by diverse communities with diverse cultures²¹. Because of such diversity, the acceptance and non-acceptance of gifts is not always a straight forward matter.

While, the Code of Conduct for the Public Service places a prohibition on the acceptance of gifts in the Public Service, public servants are constantly being showered with gifts, sometimes even without the public

servant having the opportunity of refusal. Notwithstanding, the point that stands out very clearly is that the receipt of gifts by public servants tends to weaken the citizens' trust in the Public Service, as well as run the risk of destroying the fibre of integrity and good corporate governance within the Public Service.

A compounding factor is that there appears to be contradictions, inconsistencies and ambiguities with regard to the current regulatory provisions on the acceptance of gifts in the Public Service. These ambiguities and inconsistencies give rise to interpretational issues as far as its implementation is concerned. Given the consequences of breaching regulatory provisions, it is important that such regulatory provisions are clear and that public servants know and understand them. If the regulatory provisions are not clear and are broken by public servants, it would be difficult to hold them accountable. It was against this backdrop that the PSC conducted a survey on the manner in which government departments manage the acceptance of gifts received by public servants.

Key Findings

A survey was conducted amongst public servants at randomly selected national and



John Mentoor

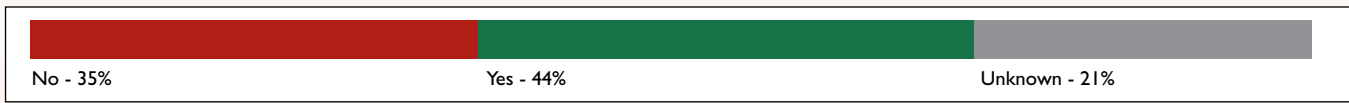
provincial departments and 1 172 officials from 13 national departments and 24 provincial departments responded to the survey questionnaire. Moreover, open-ended interviews were conducted with 64 officials from selected national and provincial departments.

The Report revealed that 65% of the departments visited did not have a gift policy and gift register. The analysis of the gift policy received (from those that did have policies) further revealed that although most policies cater for the same situations, the policies vary in both comprehensiveness and in content. The current legal framework is clearly in need of amendment. The Public Service Act, 1994 as amended

21 Republic of South Africa, Public Service Commission, Report on the Management of Gifts in the Public Service, March 2008.

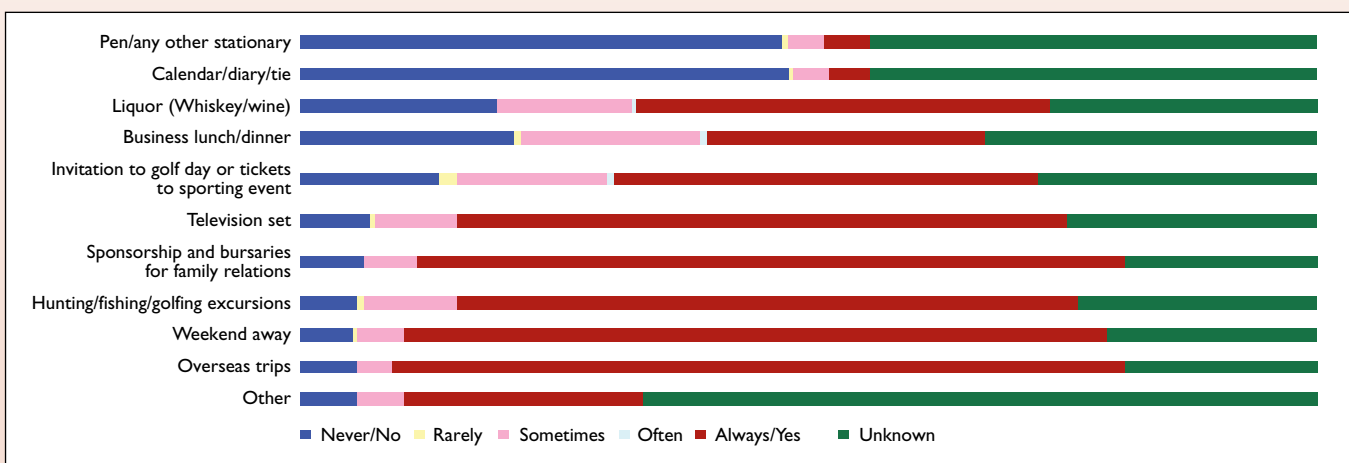
will go a long way in eliminating the current apparent ambiguities and inconsistencies, levelling the proverbial 'playing field', as well as adding real value to the national anti-corruption strategies.

Figure 2: Should public servants receive any gifts?



The findings of the study showed that while 21% of the respondents were undecided, 44% of the respondents were of the view that public servants should in principle be permitted to receive gifts. Although a significant number was in favour of receiving gifts, 35% were of the view that public servants should not receive gifts. This is based on the opinion that the receipt of gifts could create a situation for potential conflicts of interest to occur. Moreover, the danger of accepting gifts is that public servants open themselves to possible corrupt practices.

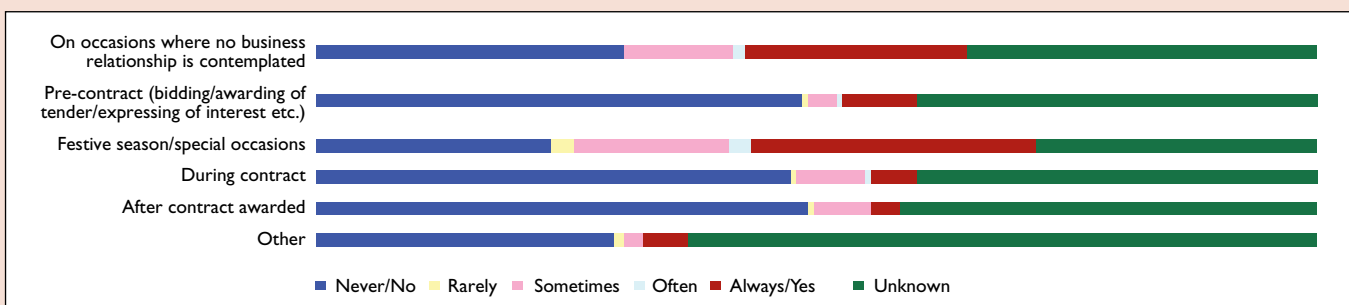
Figure 3: Gifts that pose the greatest threats



The types of gifts that pose the greatest threat, according to the respondents, were, in descending order, as follows:

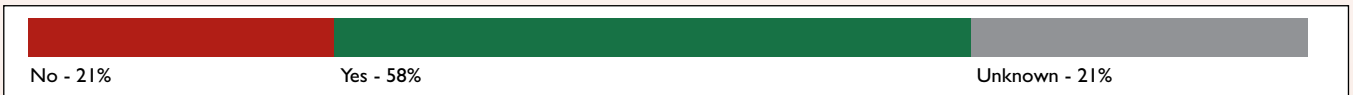
- overseas trips (72%);
- sponsorships and bursaries for family relations (70%);
- weekend away (68%);
- hunting or fishing or golfing excursions (61%);
- a television set (59%);
- invitation to golf days and sporting events (41%);
- liquor (41%);
- lunch or dinner (27%);
- pens and stationery (5%); and
- calendars, diaries and ties (4%).

Figure 4: Occasions on which gifts are offered



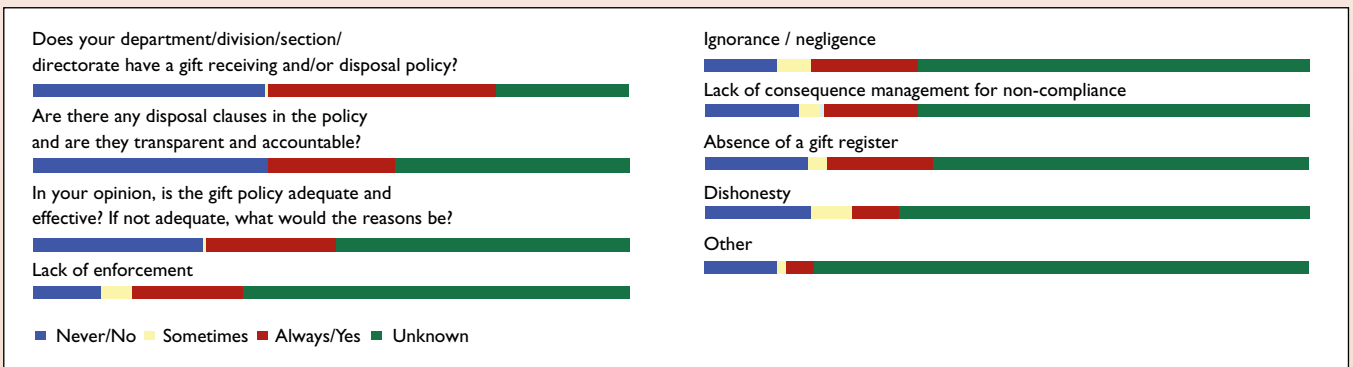
With regard to occasions under which public servants should be allowed to receive gifts, the survey revealed that 66% of the respondents were not in favour of public servants receiving gifts at a pre-contract stage, i.e. before tenders were awarded. Furthermore, 62% of the respondents were of the view that public servants should not receive gifts directly after the awarding of a contract to a service provider, and 63% were of the view that public servants should not receive gifts during a stage when a contract with a department is contemplated. Regardless, during the interviews it came to light that it is an open secret in some departments that service providers offer gifts before and after tenders are being awarded.

Figure 5: Monetary limits on gifts



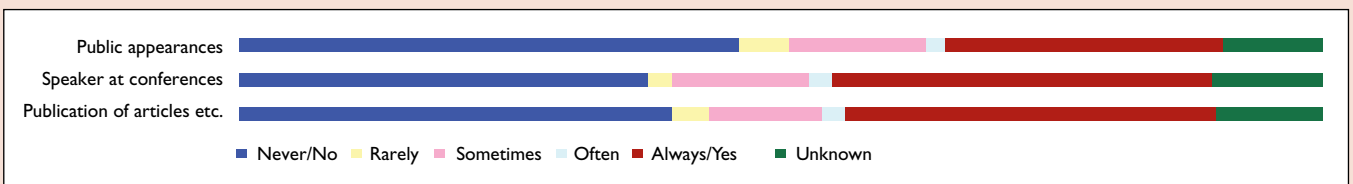
The survey also discovered that 58% of public servants were in favour of a monetary limit on gifts, if such were allowed, as opposed to 21% who were against a monetary limit, while 21% of respondents were undecided. The monetary limits proposed by the respondents ranged from R10.00 (ten rand) to R5 000.00 (five thousand rand).

Figure 6: Policies regarding gifts



The Report further points out that there is a persistent argument that gifts from an Afro-centric perspective has grey areas as in most cultures it is deemed unacceptable not to accept a gift. However, respondents were of the view that when a policy is formulated on the receipt of gifts, there should be clear guidelines as to how and when to refuse such gifts gracefully. The policy should incorporate all cultures and be fair. In this regard, 56% of public servants were in favour of the view that a gift policy should cater for Afro-centric and other cultural practices. It was for this reason that 60% of the respondents indicated that if a gift of a cultural nature is offered to them they would accept it. Twenty nine percent (29%) of the respondents held the opposite view, with the remaining 11% being undecided.

Figure 7: Remuneration and honorarium



It also came to light that, 45% of public servants were not in favour of remuneration or honoraria for public appearances. In addition, 33% of the respondents were of the opinion that gifts 'always' compromise objectivity, integrity and independence. Again, 45% of the respondents were in favour of reporting gifts to an independent body, which should also monitor the management of gifts in departments. Sixty nine percent (69%) of the participants were in favour of legal prescripts compelling public servants to report gifts accepted by other officials.

In terms of the open-ended interviews, some of the notable issues that came to light included the following:

- Sixty five percent (65%) of the departments assessed did not have a gift policy and or a gift register.
- Twenty two percent (22%) of respondents to the questionnaire indicated that they did not know whether their department had a gift policy and register.
- It appeared as a general observation of all the interviews held, that the receiving and accepting of gifts by public servants is a common occurrence and that not all gifts received are disclosed.

Conclusion

One of the critical recommendations of the Report on gifts is that consideration should be given to strengthening the current legal

regime to such an extent that the unauthorised offering and accepting of gifts, benefits or any other form of gratification be prohibited with a concomitant criminal sanction. It is further recommended that the criminal prohibition should not only be in respect of persons or entities who contract with government, but must be wide enough to include any person who 'deals' with government.

The Report also noted that exceptions based on traditional or cultural considerations are difficult to define, very difficult to police and virtually impossible to prove or disprove. Such exceptions may create further confusion, lead to unequal treatment before the law and may even create opportunities for unscrupulous public servants and others to offer and accept gifts with impunity. However, it is acknowledged that most traditional or cultural gifts are not translatable into monetary value as they are regarded as symbolic. Therefore, it is

recommended that should a public servant receive a gift based on a cultural tradition, it should be treated and managed in a culturally sensitive manner without compromising the standards of accountability and transparency.

If the regulatory provisions permit the receipt of gifts, the PSC recommends that consideration be given to the appointment of an Ethics Officer in each department to administer and generally oversee the policy and administration of gifts. With the appointment of Ethics Officers it is recommended that a simple electronic process for declaring gifts be implemented in terms whereof a public servant seeking approval to accept and retain a gift or other benefit or gratification, completes a prescribed form electronically and submits it to the Ethics Officer, who after consideration, submits it directly into a database administered by the PSC.

Notes

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