

# Best practices to regulate gifts in the South African public sector

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## ABSTRACT

Gift-giving and the acceptance of gifts in the South African public sector is a controversial issue. The bestowal of a gift may generate a negative public perception of corrupt behaviour. Gift-giving and the framework that governs it varies from country to country, together with what can be regarded as acceptable. There is a delicate balance between what is interpreted as a mere gift or donation, or whether the objective of the bestowal is to seek a benefit, create a relationship or to generate an understanding of *quid pro quo*, or sense of beholdenment, which will benefit the giver privately. This is deemed a bribe, irrespective of what it is called. As corruption is rife in the South African public sector the abuse of public power for private gain is a problematic issue that needs special attention. The current existing legislative framework in South Africa is fragmented and does not provide public servants with clear, comprehensive or adequate guidance relative to the acceptance of gifts. The multiple ambiguities in legislative instruments make it unfeasible and impossible for an auditor or enforcement agency to establish links between gifts and corrupt practices; the overlaps create loopholes, of which corrupt officials take advantage. It is therefore deemed imperative that the existing South African legislative instruments, which currently govern and manage the acceptance of gifts, be assessed and evaluated, in an endeavour to establish best practices in supervising gift-giving to public officials. It is crucial for South Africa to fight corruption, and an essential element of this is the necessity of strengthening the controls which prevent and identify

corrupt activities in the Public Service. Through comparisons drawn it is apparent that the legislative framework regarding the acceptance of gifts should be reviewed, and possibly consolidated into one guideline or code, then implemented nationally in the Government sector. This would result in clarification, with a single, consistent and universal set of rules across the government sector, with which public servants must comply. A possible solution has been proposed, whereby if an unsolicited gift is received it is shared or distributed between all employees; if everyone benefits equally, it may lessen the perception that the gift was intended to influence the action of a single employee.

## INTRODUCTION

Aeneid said “do not trust the horse, Trojans. Whatever it is, I fear the Greeks, even when they bring gifts” (Aeneid BK.2.148). Unfortunately, the fear of gifts, along with the frequently associated *quid pro quo*, is not shared by public sector employees. A recent example of this behaviour was highlighted in a trial against a former Commissioner of the South African Police Services (*S v Selebi* (25/2009) [2010] ZAGPJHC 58).

The principal issue with the bestowal and acceptance of gifts is frequently the unstated, but tacit, recognition that the recipient, through acceptance is thereby beholden to the giver, and may have to perform a ‘favour’, which may not be strictly legitimate, appropriate or customary. Certain basic values and principles governing public administration are considered very relevant to this particular discussion and are contained in Section 195 (1) of the *Constitution of the Republic of South Africa, 1996*:

- “1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
- a. A high standard of professional ethics must be promoted and maintained.*
  - b. Efficient, economic and effective use of resources must be promoted.*
  - c. Services must be provided impartially, fairly, equitably and without bias.*
  - d. Public administration must be accountable.*
  - e. Transparency must be fostered by providing the public with timely, accessible and accurate information.”*

Public sector employees succumbing to personal greed is behaviour contrary to, or the antithesis of, the principles proclaimed in Section 195(1). It is possible that certain individual employees may receive the occasional gift and continue to maintain and

exercise their duties in a way which is ethical, impartial, fair, unbiased and equitable, but the bestowal and acceptance of gifts may also create situations wherein employees contravene the principles stated in Section 195(1) of the Constitution Relative to enforcement and control of gift distribution, the initiation point must be the legislative framework governing the activities of public sector employees. Since the Constitution is the supreme law of the country, Section 195(1) is used as the starting point. The principles laid out in this particular section are uncomplicated and clear cut, however regarding the implementation and enforcement of gift acceptance policies, the receipt of donations or offerings by employees in the government service is deemed to be a controversial issue, with cultural and individual qualities, augmented by issues of self-interest, influencing diverse opinions as to whether these bequests should be accepted (PSC 2008:39). Allowing free interpretation of these principles, for instance instructing an administrator to act without bias, creates difficulties in implementing and enforcing policies; whereas if the rules are explicitly outlined, stating, for example, that an administrator may not receive gifts, such as overseas trips, invitations to golf days or weekends away, contraventions, violations, transgressions or infringements to the regulations are immediately apparent and corrective or remedial action may be imposed (PSC 2008:39).

This article comprises a descriptive study, which is conceptual in nature, providing a theoretical overview of the existing literature on current South African and international legislative instruments and guidelines dealing with the acceptance of gifts. To achieve the above objectives, the research relies on secondary data sources, inclusive of, *inter alia*, journals, conference papers, newspapers and text books.

The study will initially provide an overview on the existing South African legislative instruments, relative to the acceptance of gifts. This is succeeded with an overview of conceptual issues, which arise from the statutes. In order to create a more comprehensive and detailed overview comparisons will be drawn from international practices, to obtain insights from lessons learnt. The discourse includes an international study, which supplies contextualisation of the issues discussed, displaying, presenting and evaluating the way in which other countries manage the acceptance of gifts in the public sector. Utilisation and extraction of the insights provided therein, in conjunction with the collected data and review of the related literature, provided a foundation which facilitated interpretation, analysis, conclusions and recommendations to be delineated.

## **BACKGROUND**

Caille (2000:47) asserts that gift-giving may be defined as an action or allowance made without expectation, guarantee or certainty of return, and therefore, due to

this aspect, has a dimension of gratitude. Roy (2010:1) explains that, depending on the cultural customs of the country, they can also be called gifts and donations. However, if the objective of any of these acts of bestowal is to seek a benefit, create a relationship or generate an understanding of *quid pro quo* which will benefit the giver privately it is considered a bribe, irrespective of what it is called. Roy (2010:1) contends that, in evaluating whether a gift may be categorised as a bribe, three aspects need to be considered, *viz.* the extent, the nature and the intention behind the gift. The World Bank (1997:24) defines corruption as, “the abuse of public power for private gain”, and may include asking for, giving or taking a payment, gift or favour in exchange for the performance of a customary, legal or illegitimate task; “It is a price, reward, and gift or favour bestowed or promised with a view to perverting justice.”

Melgar, Rossi and Smith (2009:120) posit that high levels of corruption-perception may have a greater negative impact than corruption itself, generating a “culture of distrust” towards certain organisations or entities, potentially leading to a cultural tradition of gift giving and, therefore, raise corruption levels. Transparency International’s Corruption Perception Index (2012:3) ranked South Africa as the 69<sup>th</sup> least corrupt nation in 2012. A comparison of preceding years clearly demonstrates that South Africa’s rating is slowly declining, with the rankings in 2011 and 2010 placing the country in 64<sup>th</sup> and 54<sup>th</sup> positions, respectively. The Corruption Perception Index provides a ranking of countries according to their level of perceived public-sector corruption (Transparency International 2012:3). The index draws on different assessments, augmented by company opinion surveys, conducted by independent and highly regarded institutions. Questionnaires are used to obtain assessments and perceptions regarding the bribery of public officials, in relation to kickbacks, tender fraud, or embezzlement, in conjunction with queries designed to evaluate and test the effectiveness of the anti-bribe controls in place (Transparency International 2012:2). It is imperative for South Africa to fight corruption and to strengthen the current controls intended to prevent and identify unethical activities in the Public Service, therefore, making it crucial to scrutinise the statutes, in order to determine if these embody the values demarcated in Section 195(1) of the constitution and, additionally, establish whether they contain clear, comprehensive guidelines.

## **SOUTH AFRICAN LEGISLATIVE FRAMEWORK**

### ***Public Service Act 103 of 1994***

Section 31 of the *Public Service Act (PSA) 103 of 1994* (as amended) proclaims that if any remuneration, allowance or other reward is received by an officer or

employee in connection with the execution of their duties in the public service, such remuneration, allowance or reward, or the equivalent monetary value shall be paid into the National Revenue Fund, managed by National Treasury (Section 216(1) of the *Constitution of the Republic of South Africa*, 1996). Furthermore, it is decreed that the monetary value will be determined by the accounting officer of the relevant department; if a public servant does not concur with the outcome of the determined value, an application may be lodged with the relevant executing authority, which may then approve the recipient retaining the whole, or a portion, of said remuneration, allowance or reward.

Although the term reward is not explicitly described in Section 31, the *Oxford Dictionary* defines the term as an advantage, benefit or thing given in recognition of service, effort or achievement.

## **Public Service Regulations**

Chapter 2 of the Public Service Regulations (PSR) (2001), Regulation C.5.3 stipulates that public service employees must refrain from using their official position to obtain private benefits during the execution of their roles, and they may not accept any gifts or benefits when offered, as these may be construed as bribes. This particular section is in contradiction with Section 31 of the PSA, as the PSA indicates that remuneration, allowances or rewards may be received if approved by the relevant accounting officer. Despite this section specifically referencing and dictating the non-acceptance of gifts, the term private benefits is not clarified or defined, leaving it open for interpretation. Hypothetically, is it therefore permissible to accept benefits for the organisation as a whole, as long as the advantage is not personal or private? A theoretical instance could entail the sponsoring of soccer match tickets for the entire supply chain management team, raising the issue of whether accepting these tickets could create a negative perception of corruption in the public arena.

## **Treasury Regulations**

Paragraph 21.2.1 and 21.2.2 of the Treasury Regulations make provision for the accounting officers of departments to approve the acceptance of any gift, donation or sponsorship to the state, whether in cash or kind. It is stipulated that all cash gifts, donations or sponsorships must be paid into the relevant revenue fund. These regulations are in contradiction with Chapter 2 of the PSR, Paragraph C.5.3, which clearly indicates that public servants should refrain from accepting gifts.

## **Prevention and Combating of Corrupt Activities Act**

Section 3 of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004 (PRECCA) (2004:4) prohibits the offering and/or acceptance of any gratification

in broad terms. The term 'gratification' includes any gifts, rewards or benefits. However, it indicates that the offer or acceptance must constitute an illegal, dishonest, unauthorised, incomplete or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; or the abuse of a position of authority; or a breach of trust; or the violation of a legal duty or a set of rules; designed to achieve an unjustified result; or must amount to any other unauthorised or improper inducement to do or not to do anything. This demonstrates that the proviso contained in Section 31 of the PSA is not in line with the outlined stipulation contained in PRECCA.

## **Draft Public Administration Bill**

The proposed draft Public Administration Bill (draft Public Administration Management Bill of 2008) was developed to address some of the specific, identified inconsistencies, which could potentially lead to possible conflicts of interest. The proposed bill includes a provision that prohibits public servants involved in a procurement process, from accepting any gratification (including gifts) from a service provider within 12 months after the appointment of such service provider or individual. The proposed bill does not elucidate further with clarity or guidance regarding the acceptance of gifts by public sector employees. Moreover, it may be debated whether the 12 month window period for not accepting gifts or gratification is sufficient in the prevention of corrupt relationships between employees and service providers. The new Bill's proposed provision is in further contradiction with PRECCA, which indicates that employees are not allowed to receive any gratification in return for providing a service.

These preceding illustrated inconsistencies in the relevant legislation may instigate or sanction opportunities for potential conflicts of interest, which may initiate instances of corruption or perceived corruption when accepting gifts. Compounding the issues and problems of overlaps, inconsistencies and ambiguities in primary legislation, subordinate legislation further defines the governing of gifts, which may create challenges from a monitoring and enforcement perspective.

## **Public Service Commission Initiatives**

The Public Service Commission (PSC), as the public administration's watchdog, is mandated to promote the values and principles contained in Section 195 of the *Constitution of the Republic of South Africa*, 1996. The PSC has, since its inception, developed and managed several initiatives aimed at addressing

conflicts of interest in the public sector, which includes the acceptance of gifts by public sector employees.

- *Code of Conduct*

The Code of Conduct for Public Servants (Chapter 2 of the PSR) has been incorporated as Chapter 2 of the PSR and is applicable to all public sector employees. The Code of Conduct acts as a guide to public servants as to what constitutes ethical conduct. Compliance with the Code is obligatory and transgressions can be viewed as misconduct and, as in the case of any misconduct, the transgressor is subject to the application of the Disciplinary Code and Procedures for the Public Service.

Extending the scope of the Code of Conduct for the Public Service, the PSC developed an explanatory manual in 2002. The manual advises that the issues surrounding the receipt and acceptance of gifts are very contentious, thereby making it impossible for the PSC to provide comprehensive guidelines, advocating that departments should approach the PSC when in doubt (PSC Manual 2002:54). Nevertheless, the manual does contain certain guidelines, which reconfirm that the acceptance of any gift or item of monetary value can only be accepted with the written approval of the head of the department and that all gifts and hospitality in excess of R350, by a source other than a family member, must be declared; and that employees may consult the PSC in instances of uncertainty (PSC Manual 2002:54). The PSC manual does not provide an interpretation of family members in the context of declaring gifts, leaving this open to interpretation. This lack of clarity may potentially lead to corruption or nepotism issues, whereby extended family members are awarded contracts in return for gifts or bribes or the inference may be taken that any extended family member who does business with government is allowed to reward their relative(s) in a particular department, without any requirement to disclose such rewards, ultimately eliminating the audit trail for possible corrupt transactions.

- *Senior Management Services Handbook*

In addition to the Code of Conduct and the auxiliary Manual, the PSC developed a Financial Disclosure Framework for senior managers in the government service, which has similarly been included as part of the PSR. The handbook requires Senior Management Service members to disclose (and register) consultancies, retainerships, sponsorships, gifts and hospitality from a source other than a family member (PSR 2001). *The Senior Management Service: Public Service Handbook* (SMS Handbook 2003:207) extends the stipulations, continuing that Senior Managers must not solicit or accept any bribe or other improper inducement, and that gifts can only be

accepted in exceptional circumstances where the gift is offered as part of a formal exchange of gifts. The SMS Handbook (2003:207) allows that senior officials may accept unsolicited gifts or moderate acts of hospitality, with the acceptance of these gifts or benefits essentially a matter of judgement for the individual concerned, advocating they must be satisfied that their position will not in any way be compromised through receipt of the bestowal. However, it is required that all gifts and hospitality with a value in excess of R350 be disclosed.

## **Concluding Remarks – Legislative Overview**

There is some reassurance the PSC having drafted the two aforementioned major instruments regarding the governance of gifts and bestowals, in conjunction with the potential posed as possible sources of conflicts of interest and to address possible misconduct, however the ambiguities and lack of comprehensive, detailed rules in the numerous acts, guidelines and frameworks leaves this area open to abuse.

Certain of the guidelines contained in the SMS handbook are open to interpretation, as evinced by the senior manager's prerogative to accept or not accept a gift. Descriptive terms, including 'exceptional circumstances' and 'moderate acts of hospitality', are not clearly defined and diverse inferences by public service senior managers are possible (*Senior Management Service: Public Service handbook* 2003:208). The extrapolation of the legislative meaning of 'hospitality of a traditional or cultural nature' could be a potential problem, as senior managers are not obliged to disclose such 'hospitality'. The definition of cultural gifts is not explicated, with no guidance provided as to which gifts should be classified under this item. The risks associated with the lack of clarity may result in difficulties in determining the monetary value of such hospitalities or gifts. Certain hospitalities not requiring disclosure could create opportunities for corrupt officials to abuse these benefits for their own personal gain, for instance the acceptance of free accommodation and weekends away, with no requisite disclosure, if the senior manager deems it to be of a traditional or cultural nature.

Rose-Ackerman (1999:213) maintains that gift-giving is a treasured aspect of African tradition, with gifts serving as informal symbols of expected gratitude for generosity received. The author continues that, while a culture of patronage and gift giving may be viewed as creating a favourable environment for corruption, generally traditional customary bestowals thereof do not create the wrong perception among people, as the public can distinguish between traditional behaviour and serious acts of bribery. Teachout (2012:37) contends that a gift, whether to an official or citizen, is only threatening if

it has the potential, power or control to shift the orientation of the receiver towards the giver and away from the interests of the institution. However, Verhezen (2003:1) asserts that in contemporary cultures, where the bestowal of gifts is highly valued, frequently the difficulty arises in distinguishing between gifts and bribes. The differences of opinion between the pundits, Rose-Ackerman, Teachout and Verhezen, substantiates the argument that gift giving is a highly contentious and subjective issue, emphasising that if clear guidelines are unavailable to employees as to the correct and ethical conduct in these circumstances it may instigate or result in corrupt behaviour or the perception thereof.

The fragmented legislation and guidelines with regards to the acceptance of gifts poses a risk of non-compliance by public servants. Not all public servants are trained legal professionals and the numerous fragmented sections in different acts makes it difficult for public servants to interpret and understand what should be complied with. It may be argued further whether it is constitutionally justifiable to have a different set of rules regarding the acceptance of gifts for senior management service staff in the public service, since all public servants should comply with one set of rules. Conversely, it could be appropriate due to the role profiles of senior managers and the requirements of building relationships with the public and service providers and, therefore, senior managers may be exposed to higher risks of corruption and therefore requires specific guidelines. However, as highlighted above, the requirements in the SMS handbook (2003) are vague and could be interpreted differently by senior managers. This area constitutes a control weakness and is not sufficient to address the corruption risk.

Consequential to the inconsistencies identified between the current primary and secondary legislation it can be deduced that existing legislative measures are confusing, contradictory and in need of reform. Kassam (2011:218) affirms that any ambiguity in legislation that creates incentives for corrupt behaviour should be removed.

In order to establish how best to rectify the ambiguities which have been identified in the current South African legislation, a study of international and local best practices in selected countries regarding their legislation and guidelines in place for the management of gifts in the public service was performed.

This was undertaken with the objective of evaluating possible weaknesses and best practices, in conjunction with lessons learnt and the amelioration of the South African statutes. Utilising Transparency International's Corruption Perception Index, countries ranked the least corrupt were selected to provide an overview of these policies and practices.

# INTERNATIONAL BENCHMARK OF GUIDELINES AND LEGISLATION

## New Zealand

New Zealand was ranked as the least corrupt country, number one on the Transparency International (TI) Corruption Perception Index (2012:2). The New Zealand Public Service Code of Conduct (2005:23) edicts that public servants must not abuse their official position for private gain, or solicit or accept gifts, rewards or benefits which might compromise, or be seen to compromise, their integrity and the integrity of their department and the Public Service. This is extended, stating that a public servant should not accept a gift (whatever its nature or value) if it could be seen by others as either an inducement or a reward, which might place the employee under an obligation to a third party. Where offers of gifts or inducements are made, they should be reported by the public servant to his or her manager or chief executive, who will determine the appropriate response. A public servant who accepts a gift should declare the gift to their manager or chief executive for a decision on the correct disposal or distribution thereof (New Zealand (NZ) Public Service Code of Conduct 2005:23). The ranking and perception of New Zealand as the least corrupt country is considered predictable, following the State Services Commission issuing a Statement of Intent (2012:22) which emphasised that they will be using the corruption index as a means of tracking the state sector's collective level of trustworthiness, together with the effectiveness of their integrity and conduct work programme. Additionally, the New Zealand Treasury (2011:1) commissioned an independent review by Deloitte relative to the Treasury's gift policy, stating that the recommendations presented in the report will be adopted accordingly.

The recommendations in the Deloitte (2011:1) report advocated that gifts should not be accepted, excluding instances where they have a value of less than \$50 (NZ) (R400), or where refusing them might cause embarrassment or offence. The report also counsels that all offers of gifts or hospitality with a value exceeding \$50 (NZ) should be recorded on a gift and hospitality register, irrespective of whether or not the gift is accepted. Deloitte further proposed that recording the business rationale for gifts and hospitality received should be a requisite (The Treasury 2011:1).

In comparison, South African guidelines do not necessitate recording the business rationale for accepting gifts and hospitality, the exclusive requirement entails the recording of the gift, if the value is in excess of R350. (PSC Manual 2002:54). To promote greater accountability and transparency, the NZ Treasury (2011:1) initiated the periodic publication of their gift register. In the South

African public sector there appears to be no requirement for departments to publicly disclose gifts and hospitality registers, except for the relevant departments' reporting of gifts and donations received by the state in their respective annual reports. The publication of a gift and hospitality registry to promote transparency, especially with regard to the principles espoused in Section 195 (1)(e) of the *Constitution of the Republic of South Africa, 1996* could be a good recommendation to explore.

## Sweden

The TI Corruption Perception Index (2012:3) ranks Sweden fourth in 2012. Despite Sweden and certain other European countries, including Denmark, Finland and the Netherlands, not having formal codes of conduct, these nations are among the least corrupt in the world, according to the Corruption Perception Index (Bossaert *et al.* 2001:235). Sweden recently reviewed the Swedish Penal Code (Linklaters 2012:1), which deals with bribery rules, and the code now specifically highlights that it is prohibited for an employee or agent to accept, agree to an offer, or request an undue reward for the performance of their duties and prohibits officials from accepting an offer or requesting an undue reward in order to influence another person's decision, if that decision involves the exercise of official authority or public procurement. This requirement is in line with the rules contained in South Africa's overall legislative framework.

Private sector institutions in Sweden designed effective gift policies based on the newly updated legislation. In 2012, Riks Bank in Sweden updated the Ethical Regulations for bank employees, which require personnel to consider numerous factors before accepting gifts. This policy stipulates that when investigating cases of the acceptance of possibly unlawful gifts, consideration will be given to the strength of the connection between the benefit and the exercise of duties, the nature and value of the benefit, and the relationship between the parties concerned (Riks Bank 2013:9). Comparatively, in South Africa, such specifics and details are not provided in existing gift frameworks. The policy further outlines that employees should not accept gifts with a monetary value exceeding 400 Swedish Kronor (R618), unless the employee cannot refuse the gift for reasons of politeness; the policy then advocates that the gift should be accepted and handed over to the inventory manager to be included as part of the bank's inventory (Riks Bank 2013:9).

The Diplomatic Guide for Information on Gifts (states that within the current ethical guidelines for Government Office officials, gifts exceeding a value equivalent to 300-400 Swedish Kronor (R618) should not be kept by the receiving official, but must be handed over and placed into the Ministry's official gifts repository. In the Swedish public service, gifts consisting of alcoholic

beverages, gift tokens, vouchers or monetary gifts are not recommended and public officials are not allowed to accept them (Ministry for Foreign Affairs 2012:1). South African requirements are not in line with this, as individuals, with the approval of the head of the department, are only required to declare gifts, regardless of their nature, and these gifts do not form part of the department's gift repository, but remain the property of the official.

## **Singapore**

In Singapore, Teik (2008:1) reiterates an old saying, that *“there ain't no such thing as a free lunch”*, explaining that lavish business entertainment is the norm in many Asian countries if one wants to be successful in concluding a contract. The Prevention of Corruption Act, Chapter 24 stipulates that public officers in Singapore are not permitted to receive any present in money or in kind from people with whom they have official dealings. Furthermore, they are not permitted to accept any entertainment that will place them under any real or apparent obligation. Conversely to the policies laid out within South Africa's legislative framework, gifts or entertainment in Singapore may not be accepted, unless an official feels obligated to accept such a bestowal, it may then be accepted and retained by the department. Another interesting comparison is that, in Singapore, an official, who wishes to retain a gift, may do so if they pay for it, at a value determined by the Accountant General (Corrupt Practices Investigation Bureau 2006). Sweden Section 8 of PCA (2012:29) further stipulates that where, in any proceedings against a person, it is proved that any gratification has been paid, or given to and received, by an employee of the government from a person or agent of a person who has, or seeks to have, any dealings with state, the gratification shall be deemed to have been paid, or given and received, corruptly as an inducement or reward, ultimately placing the burden of proof on the recipient to demonstrate that the gift or reward was not received in return of a favour (PCA (2012:29)). In Singapore, the Corrupt Practices Investigation Bureau (CPIB) was established as an independent body that investigates and prevents acts of corruption. Cases of confirmed corruption are publicised on their website, which serves as a fraud awareness and prevention method (Teik 2008:1). This prevention technique is in accord with the South African Justice Minister's (Jeff Radebe) decision to publish the names of all officials found guilty of fraud and corruption (*Mail & Guardian* 2013:1)

## **Australia**

The Australian Public Service Code of Conduct (APS Code) (2012:1) decrees that when a public servant receives an offer of a gift or benefit, it is important

that they consider the ethical issues involved, together with advocating that an open and transparent process in the department for discussing such issues is established. The APS Code proposes that officials should consider every offer on its merits, taking into account the relationship of the organisation making the offer. The APS Code (2012:1) extends its advice, emphasising the risk that the acceptance of a gift or benefit could result in an actual or perceived conflict of interest and, in the worst case scenario, could be perceived as a bribe. The APS Code (2012:2) provides departments with freedom to develop policies relevant to the acceptance of gifts and benefits, but indicates that agencies should clarify in what circumstances accepting a bestowal may be appropriate, taking into account the agency's functions and objectives, the roles of employees within the agency and the types of relationships employees may have with the organisations and people who may offer gifts or benefits. The APS Code (2012:4) provides examples and indicates that bestowals may include offers of cash or shares; gifts, such as bottles of wine, manufacturer's samples or personal items; promotional materials; sponsored travel; benefits under loyalty schemes, for instance frequent flyer schemes; airline competition prizes; meals or other hospitality; accommodation and hire car discounts; entertainment, such as meals, seats at sporting or theatre events or golf days; discounts on commercial items; and free or discounted places on training and development courses.

The APS Code of Conduct (2012:4) stipulates that offers of hospitality from sources outside the Australian Public Service have the potential to cause perceived or actual conflicts of interest, indicating that offers of hospitality may be accepted if they genuinely assist the department to develop and maintain positive relationships with stakeholders. This section stipulates that officials should consider the scale of the hospitality offered, in conjunction with whether it is comparative to that which the department would provide under related circumstances. The APS Code of Conduct (2012:4) requires that offers of sponsored travel or entertainment be referred to the department head for consideration. The APS Code of Conduct (2012:4) stipulates that while it may be in the interests of the government for senior public servants to accept invitations to certain events, it is not suitable for them to accept offers of paid travel or accommodation in relation to their attendance and that offers that are accepted should be recorded and declared. The Treasury Department publishes their gifts and benefit register, which includes gifts and benefits valued at more than \$150 (AUS) (R1 370), which have been given and received by the Queensland Treasury and its employees. This register is updated each quarter and all items of cultural importance are reported, regardless of their value. Important information captured in the gift and benefits register includes the date received, the description of gift or benefit; the value, the recipient, the reason or rationale

for accepting the gift and the name of the person accountable for approving the retention of the gift (Australia, Queensland Treasury 2012:1).

Comparatively, within the South African framework, it is not required to declare any hospitality of a cultural and traditional nature. There is evinced a clear lack of coherence when the South African requirements are compared with those of Australia and New Zealand, where both Antipodean governments require all items of cultural significance to be reported, regardless of their value.

A significant aspect mentioned in Directive 22/09, (Australian Public Service Commission 2010:1) relates to the frequency of gift giving, highlighting the negative perception-risk of receiving multiple gifts from one source. It is required that departments should take into account previous gifts given by an individual or organisation to a public service employee and all gifts, with a cumulative value in excess of \$100 (AUS) must be reported. Furthermore, it is advocated that there is mandatory reporting of all gifts or benefits tendered to public service employees in sensitive roles, for example, providing advice or making decisions about, *inter alia*, granting licences; inspecting and regulating businesses or giving approvals; internal audit; tendering; and purchasing. It could be debated further whether it is ethical for officials performing these functions to accept any gifts, due to the nature of their work and the possible risk of perceived bribery. If, for example, a supply chain officer accepts a trip to a lodge that belongs to a supplier recently awarded a tender, with which the officer was involved. An additional condition stipulates that if public service employees attend sporting events, theatre or recreation attractions as part of a gift or benefit, they must ensure it occurs outside their normal working hours or should take place during approved leave (Directive 22/09, Public Service Commission, Queensland government, 2009:1). In South Africa, there is a lack of clarity regarding the frequency of accepting gifts, as well as the declaration of hospitality of a traditional or cultural nature, which creates loopholes in the system for corrupt officials to abuse to their advantage, and which could occasion an official accepting excessive gifts from a supplier or suppliers. Section 195 (1) (b) of the *Constitution of the Republic of South Africa, 1996* which requires that public resources must be used efficiently, effectively and economically, also demarcates that South Africa explore the option of providing guidelines which indicate that the attendance of sporting events and other benefits takes place outside the employee's normal working hours.

Although there are lessons to be learnt from the developed economies' guidelines, assessed above, it is both useful and necessary to draw comparisons with countries that experience similar challenges and have comparable economies.

## **BRICS**

South Africa forms part of BRICS, which consists of Brazil, Russia, India, and China. The agenda of BRICS meetings encompass topical global issues, inclusive of political developments of relevance; institutions of global governance (inclusive of the UN; IMF; World Bank Group); international terrorism; climate change; food and energy security; and the international economic and financial situation (Fifth BRICS Summit 2013). It is considered worthwhile to compare the guidelines of India and China. Brazil and Russia were not selected due to the limitations in translating the applicable legislation. Qobo (2013:1) highlights that corruption is a major threat to the rise of BRICS, due to underlying pervasive public service corruption. Qobo (2013:1) contends that BRICS countries fall horribly short of Organisation for Economic Co-operation and Development standards, due to weak institutional mechanisms to combat graft. Qobo (2013:2) further argues that companies from western countries are prone to bribery in order to facilitate access to large-scale procurement contracts, and that if BRICS countries are to maximise their potential as global leaders, they should demonstrate seriousness in tackling corruption. The author continues, suggesting that this should be one of the main areas of cooperation between these countries, because, as the levels of co-operation between the BRICS countries grow, so might cross-border corruption.

## **China**

Steidlmeier (1999:121) describes gift giving as a common social custom in China, and asserts that, from a governance perspective, it is difficult to know when it is appropriate to give or receive a gift, in conjunction with determining which gifts are deemed suitable in a social setup. The Code of Ethical Conduct for leading officials in China (2005:1) requires officials to be honest and faithful in performing their duties, and specifying that officials are prohibited from seeking unlawful benefits through abuse of their power. Officials are not allowed to insist on money or any items of value from entities who deal with government; accept gifts or attend events that may affect judicious performance of duties; accept money or any kind of negotiable securities provided as gifts in official activities; or accept credit cards or other payment instruments from subordinate units, other enterprises, institutions or individuals. The guidelines in the People's Republic of China are in accord with those within South African legislation, however China's guidelines are more specific and comprehensive, providing examples of gifts that may not be accepted.

## India

In India, the Guidelines of Corporate Governance for Central Public Enterprises (2007:78) state that executive management shall not, directly or indirectly through their family or other connections, solicit any personal fee, commission or other form of remuneration arising out of transactions involving a company. This includes gifts or other benefits of significant value, which might be extended at times to influence business for the organisation or awarding a contract to an agency (Guidelines of Corporate Governance for Central Public Enterprises 2003:1). The Commission in India highlighted the risk of gift giving practices to government officials during festive occasions, for instance Diwali, Christmas and New Year, and is of the view that this practice should be discouraged (Acceptance of Gifts by Government Servants 2003:1). The Government Employees Conduct Rules (2009:11) stipulate that no Government employee shall accept, or permit any member of the family or any other person acting on his behalf to accept, any gift, except on certain occasions, for example weddings, anniversaries or religious functions. Additional guidance is provided to businesses, highlighting that gifts are to be provided only to promote commercial interests and that businesses should refrain in sending gifts to government officials who are merely doing their duty to serve the people and businesses of India (The Government Employees Conduct Rules 2009:12). The spirit of India's model is comparative with the South African framework, however, it differs in that the practice of gift giving is discouraged; as it is the Commission's view that government officials get paid to render services to the public and should not receive gifts in this regard.

In addition to the lessons learnt from the aforementioned guidelines of the least corrupt counties assessed, as well as evaluating those of comparable economies, it is deemed both useful and requisite to draw a comparison with a South African state owned entity, to determine if its frameworks are aligned to the overall parameters prescribed by the nation's legislation. For the purpose of this study, Eskom's policies were selected to be utilised as a benchmark, as they award large scale contracts, and may be subject to the risks associated with the acceptance of gifts and hospitality from service providers, which could potentially be construed as bribery, graft or nepotism.

## ESKOM

Eskom's Code of Ethics (2009:4) emphasises a culture of transparency, specifically stipulating that their objectivity will not be compromised through the acceptance of inappropriate gifts and entertainment.

Eskom's Conflict of Interest Policy (2008:5) provides detailed guidelines as to how employees should act; a clear definition of what constitutes immediate family; and provides detailed examples of the composition of acceptable or inappropriate business courtesies. Business courtesies, as defined by the company's Conflict of Interest Policy, comprise a gift or favour from an individual or supplier, regardless of whether a business relationship exists between Eskom and that entity, for which fair market value is not paid by the recipient. The policy extends the definition, elaborating that the business courtesy may consist of either a tangible or intangible benefit, with examples of quantifiable or tangible benefits incorporating, *inter alia*, meals; drinks; entertainment; hospitality; recreation; attendance prizes; transportation; discounts; tickets; and promotional items; while less definable or intangible examples include the use of a donor's time; materials; property; or equipment (Eskom's Conflict of Interest Policy (2008:5).

Employees are prohibited from accepting gifts deemed excessive, which may create an impression that their objectivity is impaired. Furthermore, the policy implements the mandatory disclosure of all bestowals in a gift register, which is then required to be assessed and signed off by the head of the department every three months. In an endeavour to prevent the risk that gifts could be construed as improper, guidelines are provided advocating that suppliers include their business logo or trademark on gifts. However, while this requirement could potentially negate or minimise the risk of misconstruing the gift, it could also be open to abuse, depending on the magnitude or type of gift bestowed. For example, if an employee is offered an expensive Mont Blanc pen engraved with a company's logo, it would be considered improper due to of the value of the gift.

## **MAIN FINDINGS**

Spahn (2012:298) contends that global traders need to develop relationships with local officials abroad, often through gifts and hospitality, and continues, emphasising that diverse cultural elements factor into the practice and it is important to distinguish between legitimate gifts or hospitality and criminal bribes under contemporary, global anti-bribery laws, further stressing the significance of, and necessity for, transparency. In addition, Kassahun (2011:221) asserts that the most effective approach in dealing with corruption in Africa is for each nation to develop, and effectively enforce, constitutional provisions for the accountability of public officials; in conjunction with guaranteeing participatory democracy, which promotes the widespread participation of civilians, in order to safeguard accountability and transparency in governance. The author extends his advice, maintaining that good governance is not a

luxury, but a basic requirement for development in Africa. A study performed by the Organisation for Economic Co-operation and Development (OECD) determined that, irrespective of the differences amongst countries, cultural, political and administrative, it appears that there is an increasing convergence in what is seen as 'good, correct and proper' behaviour.

## **Legislative Framework**

The research suggests that the South African legislative frameworks regarding the acceptance of gifts are fragmented, ambiguous and not comprehensive enough. There are several unaligned and contradictory acts and guidelines, which can create opportunities for corrupt officials to abuse the situation to their advantage. Despite the legislation being fragmented and in some instances indefinite, the framework is predominantly in accord with the overall practices followed within the benchmarked countries and entities.

## **Guidelines Relative to the Accepting of Gifts**

The primary tenet, consistent in all the reviewed frameworks, is that public servants should not solicit gifts in return for a favour. Lessons can be learnt from Singapore, Australia, New Zealand, India and China. Overall, the legislation in these countries was more specific and detailed in providing guidelines to public servants, as to the circumstances which dictate whether the acceptance of a bestowal is suitable or inappropriate.

## **Hospitality**

South African guidelines lack clarity regarding the declaration of hospitality of a traditional or cultural nature by senior management members. In Australia all cultural gifts are disclosed, irrespective of the value and enumerated with in register, with public disclosure to promote transparency. Similarly, in New Zealand, all gifts are disclosed, regardless of whether or not they are accepted, with the rationale for accepting the gift or hospitality recorded within a gift register, which is published periodically to promote greater accountability. South Africa, comparatively, currently has no requirement to publicly disclose gift and hospitality registers, and the establishing of guidelines to promote transparency, in terms of Section 195(1) (e) of the *Constitution of the Republic of South Africa, 1996* are deemed a good recommendation.

In Singapore, if a bestowal must be accepted due to a cultural custom, the gift should be handed over to the relevant department, becoming part of the gift repository. Alternatively, if a public servant wants to retain the

gift, it may be purchased from the department at a value determined by the accountant general.

## **Acceptance of Invitations to Sporting Events**

Smith (2010:1) maintains that sporting events, entertainment and gifts have always been used to leverage business relationships in South Africa. The review of the current guidelines established that there is no requisite specified that, after acceptance, attendance of these events should take place outside of normal working hours, compared to Australia, where it is stipulated that attendance must occur after hours or during official leave periods. Relative to Section 195 (1)(b), which requires that public resources must be used efficiently, effectively and economically, additional guidelines in this respect could be considered by the Public Service Commission when updating the gift frameworks, indicating that the attendance of sporting or cultural events (if accepted) should occur outside the employee's normal working hours.

## **Frequency of Gift Acceptance**

There is lack of clarity in the South African frameworks regarding the frequency of accepting gifts, although there is a proviso that a bestowal must be declared if it has a value in excess of R350. Conversely, in Australia, guidelines are provided that departments should take into account previous gifts given by an individual or organisation to a public service employee, arising from the perception that one gift may not be considered sufficient to cause a public service employee to act outside their official duty, but the aggregate sum of multiple gifts may result in corrupt behaviour. The frequency of accepting gifts should be considered by the Public Service commission when revising the relevant guidelines.

Smith (2010:3) suggests that where unsolicited gifts are shared with all employees and if everyone benefits equally, it may lessen the perception that the gift was intended to influence the action of an individual employee. Within the frameworks of China, Australia, Singapore and New Zealand detailed examples are presented as to what may be classified as gifts and hospitality; contrarily, South African legislation provides no description, or categorisation and, therefore, the principles and guidelines could be expanded to prevent ambiguity and uncertainty regarding what constitutes gifts and hospitality.

Gilman (2005:25) asserts that there are fundamental values, closely associated with democracy, the market economy and professional bureaucracy; political values, incorporating freedom and justice; and administrative values, comprising efficiency, effectiveness and responsiveness. The author continues that, no matter what those values are, however, it appears the most imperative

factor is how they are operationalised into the routine, daily work of public servants. This is significant, as if detailed guidelines are not provided to public servants, there arise potential loopholes which may result in possible corrupt practices. Additionally, certain experts contend that codes of conduct, a system of disclosure of financial interests, and training courses all constitute crucial mechanisms in an effective ethics programme, which should be instituted with enforcement and monitoring procedures to ensure efficacy (Balía, Sangweni and Mavuso 1999:8). Qobo (2012:2) advocates that the South African Government should identify alternatives, learn from other countries and show commitment in fighting corruption, in order change the perception of taxpayers.

## RECOMMENDATIONS

The existing, current legislative framework in South Africa is fragmented, not comprehensive enough and has multiple ambiguities, resulting in inadequate guidance for public servants relative to the acceptance of gifts. The ambiguities identified in legislative instruments make it virtually impossible for an auditor or enforcement agency to establish connexions between gifts and corrupt practices; the multiple overlaps create loopholes of which corrupt officials may take advantage. The confusing volume of seemingly unrelated statutory provisions makes it difficult to train public servants and to monitor compliance. The identified inconsistencies may create further issues, wherein initiating proceedings against corrupt officials may be perceived as problematic, ineffective or useless, as establishing corrupt practices linked to the acceptance of gifts is impractical, unachievable or unfeasible due to flawed and tenuous policies. The aims of Section 195(1) of the *Constitution of the Republic of South Africa, 1996* may ultimately be undermined, if corrupt officials are not found guilty of bribery due to the inconsistencies identified in legislation. The current legislative framework regarding the acceptance of gifts should be reviewed, and possibly consolidated into one guideline or code, then implemented nationally in the Government sector. This would result in clarification, with a single, consistent and universal set of rules across the government sector, with which public servants must comply.

The following options could be explored to expand on South Africa's framework for accepting gifts in the public service:

- The appointment of ethics officers, who are empowered to decide on the suitability of accepting a proffered gift. The Public Service Commission could explore the creation of ethics committees within National and Provincial Government Departments, with the responsibility of reviewing and monitoring departmental gift registers.

- The Public Service Commission could develop a template of a gift register, to be circulated to all government departments for implementation. The gift register could include the date of when the gift was received or offered; the value of the gift; the name of the company or individual proffering the gift; the relationship with the gift giver; the rationale for accepting the gift, and the name of the person accountable for approving the retention of the gift.
- The Public Service Commission could consider amending the guidelines, clarifying and detailing, as comprehensively as possible, what may be categorised as hospitality of a cultural or traditional nature, in conjunction with ensuring that these, accepted or not, be declared within the departmental gift registers, irrespective of their value.
- The PSC could further investigate the possibility of amending the guidelines to require all government departments to publicly disclose their gift registers annually, in the required format, to ensure compliance and accord with the stipulation of transparency in Section 195(e) of the *Constitution of the Republic of South Africa, 1996*.
- Regarding the mitigation of reputational risks, for instance ‘perceived corruption’, the PSC should consider developing a policy which mandates that all gifts received by public servants are donated to non-profit organisations; or, alternatively, that unsolicited gifts are shared between all employees, as if everyone benefits equally, it may lessen the perception that the gift was intended to influence the action of a single employee. The PSC could consider informing suppliers that acceptable gifts should include the logo or trademark of the company.

The implementation of the best practices advocated above could assist the government in mitigating the risks of non-compliance with legislation and perceived corruption. It is imperative that once the revised guideline or code is compiled, with the proposed amendments incorporated, that proper monitoring and enforcement mechanisms are implemented. This could be achieved through developing a training and awareness programme for government employees relative to the acceptance of gifts, as well as providing oversight regarding the implementation of the gift frameworks by instituting specific reporting requirements.

## CONCLUSION

Gift-giving and the acceptance of gifts in the South African public sector is a controversial issue. The bestowal of a gift may generate a negative public perception of corrupt behaviour. If proper preventative controls are implemented, and the transparency of the process enhanced as suggested in

this study it would assist it reducing the risk of perceived corruption when gifts are accepted by public servants.

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