



SUBMISSION FOR THE JSC INTERVIEWS OCTOBER 2023

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DGRU SUBMISSION FOR THE JSC OCTOBER 2023 INTERVIEWS

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DGRU SUBMISSION FOR THE JSC OCTOBER 2023 INTERVIEWS

A. Introduction

1. The Democratic Governance and Rights Unit (“**DGRU**”) is an applied research unit based in the Department of Public Law, at the University of Cape Town. DGRU’s vision is of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law.
2. The DGRU has established itself as one of Africa’s leading research centres in the area of judicial governance. The mission of the DGRU is to advance social justice and constitutional democracy across Africa by:
 - a. conducting applied and comparative research;
 - b. supporting the development of an independent, accountable and progressive judiciary;
 - c. promoting gender equality and diversity in the judiciary and in the legal profession; providing free access to law; and
 - d. enabling scholarship, advocacy and online access to legal information.
3. Judges Matter is a project of the DGRU with a dedicated focus on monitoring judiciary in South Africa. Through applied research and advocacy, Judges Matter monitors the appointment of judges, their discipline for misconduct, and how the judiciary is governed and administered. More information is available on www.judgesmatter.co.za
4. The DGRU has regularly made submissions to the Judicial Service Commission since we first began monitoring the judicial appointments process in 2009. Most of these submissions have included our analysis of the key issues affecting the judiciary. They also include research reports analysing candidates’ judicial track records. In order to reduce the size and improve accessibility, this submission does not include the profiles of the candidates as was done previously. However, profiles of the candidates will be uploaded onto our Judges Matter website: <https://www.judgesmatter.co.za/jsc-interviews/jsc-candidates-october-2023/>.

5. All our submissions in the past 5 years focused on the importance of the JSC developing more detailed criteria for selection of judges, plus a questioning guideline to assist commissioners in the interview process.
6. We commend the JSC's April 2023 decision to adopt revised criteria and question guidelines for judicial appointments. This is an important development that will improve the process of appointing judges in South Africa. It will strengthen judicial independence in the process.
7. This submission will comment on the improvements observed since the JSC adopted revised criteria, including the need to further strengthen these new criteria. It will also address the following issues:
 - a. The need to develop a code of conduct for commissioners
 - b. the failure to advertise the vacancy on the Constitutional Court
 - c. the need for the JSC to recognise its strategic 'HR function'
 - d. women in judicial leadership
 - e. problems with the JSC dealing with judicial misconduct.

B. The positive impact of new criteria and recommendations for improvement

8. Following a year-long revision led by the Rules Committee, in April 2023 the JSC adopted new criteria and guidelines for considering candidates for judicial appointment.¹ The new criteria significantly expanded on the 1994 guidelines (the so-called 'Mohamed Guidelines) and completely revised the 2010 supplementary criteria.
9. The new criteria clarified the requirements that the JSC considers when recommending candidates for judicial appointment. They provide what can easily be described as a mission statement for the JSC when undertaking its duties in terms of section 174 of the Constitution. Furthermore, the criteria provide important guidelines for what issues commissioners may legitimately take up with candidates during the interview and,

¹ Criteria and Guidelines used by the JSC for Judicial Appointment
<https://www.judiciary.org.za/index.php/judicial-service-commission/criteria-for-judicial-appointment>

significantly, those they may not. The criteria also prove significant powers to the Chairperson to overrule questions that are impermissible.

10. We welcome the new criteria. We encourage their regular revision to improve their effectiveness in strengthening judicial appointments.

The criteria as applied at the April 2023 interviews

11. During the course of the week-long interviews in April 2023 we were pleased to observe JSC commissioners actively applying the criteria in their questioning of the candidates. Most pleasing was Chief Justice Zondo reiterating, at the start of each interview, the JSC's intention to be rigorous yet fair and respectful of a candidate's dignity. This is was an important reassurance. It put the candidates at ease and sent a powerful message to all those watching, including potential candidates and the public at large.
12. In our view, the April 2023 interviews were the most thorough interviews in many years. They gave a promising signal that the JSC is committed to its constitutional obligation. Many of the questions asked of the candidates related to their skills and experience in the law, and their understanding of the constitution and its underlying values. They asked candidates about their knowledge of broad areas of the law, and their judicial track record. Questions were even asked on the spelling, grammar and logic of written judgments. This is all the 'right stuff' that should dominate an interview for judicial appointment. Once again, we commend the JSC on this new approach. We wish for it continue on this path.
13. We are not alone in heaping praise on the JSC for these developments.² Many of the most experienced 'JSC watchers' share a similar sentiment. Writing in the Sunday Times, respected legal journalist Franny Rabkin observed that :-

'Without any attacks, ambushes or irrelevant questions, candidates were still grilled. Judgments were ruthlessly, albeit respectfully, dissected, sometimes

² See R. Davis 'Wanted — decent candidates to be SA's next judges' <https://www.dailymaverick.co.za/article/2023-04-20-wanted-decent-candidates-to-be-sas-next-judges> and Freedom Under Law 'Note on Judicial Service Commission Interviews' <https://www.freedomunderlaw.org/2023/05/03/note-on-the-judicial-service-commission-interviews/>

paragraph by paragraph. Questions were tough and commissioners did not mince their words,³

14. She went on to note that the rigour of the interviews that week revealed as a fallacy that the JSC's pursuit of transformation was to sacrifice presumably competent white men in favour of presumably incompetent black women. Still, she adds, the interviews revealed that several candidates had prematurely made themselves available for judicial appointment. The JSC therefore still had some work to do to improve the prestige and reputation of the interviews to attract the best candidates. We agree.

Criteria applied in the Shortlisting for October 2023

15. In our November 2022 submission, we emphasised that criteria needs to be applied – in varying degrees – through all the stages of the judicial appointment process.⁴ This must be from shortlisting, to the interviews and even during deliberations. This is in order to maintain consistently high standards throughout.
16. Again, we commend the JSC for the impressive manner it applied the new criteria at the April 2023 interviews. We are also pleased to learn that the JSC's Sifting Committee also applies criteria when considering nominations and drawing up the shortlist. We are also impressed by the calibre of candidates on the October 2023 shortlist. It is a rare sight to see five eminent senior counsel shortlisted for the same court at the same time. It is even more rare still to see a Rhodes Scholar apply for judicial appointment!
17. We are also aware that there are several candidates who were nominated but ultimately not on the October 2023 shortlist. This includes those who made it to the interview stage in previous rounds. We understand that in some courts, more than 40% of those who were nominated did not make the shortlist. That speaks to a gradual raising of the standards for judicial appointment. This is also a welcome development!
18. We commend the JSC for applying criteria to more parts of the appointment process.

³ F. Rabkin 'Judging the judges is a smoother task now' (30 April 2023) *Sunday Times* <https://www.timeslive.co.za/sunday-times/opinion-and-analysis/insight/2023-04-30-judging-the-judges-is-a-smoother-task-now/>

⁴ DGRU and Judges Matter, 'Submission on Criteria for Judicial Appointments in South Africa' (28 November 2022) para 14 – 18 <https://www.judgesmatter.co.za/opinions/judges-matter-dgru-submission-on-criteria-and-guidelines-for-judicial-appointment-in-south-africa/>

Supplements to existing criteria

19. In our November 2022 submission on the draft criteria we suggested the JSC include additional questions on ethics and integrity. These questions test whether the candidate is fit and proper for judicial office.⁵ Similar questions are already asked in the questionnaire and interviews for magistrates.⁶ We repeat our proposal that the JSC supplement the existing questionnaire and criteria with some of these questions
20. Importantly, we propose these additional questions not to embarrass the candidates. We simply recognise the limitations of the current questionnaire, which asks relatively vague and general questions. The questionnaire asks whether there are ‘any circumstances’ that might cause embarrassment, or ‘any relevant matter’ to be brought to the attention of the JSC. This does not go far enough.
21. As we have seen in past interviews, some candidates are failing to disclose serious issues relating to integrity. This poses a grave risk to the integrity of the judicial appointment process. If such candidates are appointed, it might also cause serious reputational harm to the judiciary. Indeed, on a few occasions the JSC has had to request candidates to withdraw their candidature until their integrity issues are resolved.⁷ Including detailed questions on this issue in the questionnaire helps prevent some of these risks.
22. The first set of additional questions we propose cover issues of integrity and ethics. They ask whether the candidate has ever been involved in disciplinary proceedings or whether there are any such disciplinary proceedings pending against them. Then they ask whether the candidate has ever appeared in criminal court as an accused. If they have appeared, whether they have ever been convicted, or have a criminal record. Alternatively,

⁵ DGRU and Judges Matter, ‘*Submission on Criteria for Judicial Appointments in South Africa*’ (28 November 2022) para 24 - 26 <https://www.judgesmatter.co.za/opinions/judges-matter-dgru-submission-on-criteria-and-guidelines-for-judicial-appointment-in-south-africa/>

⁶ Magistrates Commission of SA, *Questionnaire for Judicial Appointment* <https://www.lssa.org.za/wp-content/uploads/2023/03/Form-1-Advert-1-of-2023.pdf>

⁷ See, for example, the interview of VRSN Nkosi (April 2022): <https://www.youtube.com/watch?v=Mmxt1N2UmxM>

whether there are any criminal proceedings – including investigations⁸ – pending against them.

23. The second set of additional questions we propose cover financial propriety. These questions ask whether the candidate has ever had a civil judgment entered against them. This includes whether they have maintenance orders, debt review orders, sequestration orders or other similar order against them. Alternatively, if the candidate has any civil lawsuits pending against them. These questions recognise the financial and economic reality legal professionals face, which may cause embarrassment if appointed to judicial office.⁹

C. Code of Conduct for commissioners

24. While the adoption of a clear criteria document is an important step to inspire public confidence in the judicial appointment process, this step is unlikely to achieve its aims without an enforcement mechanism. We therefore propose that, in addition to criteria and the questioning guidelines, the JSC adopt a code of conduct for commissioners.
25. Such a Code would list all the qualities expected from commissioners. It would generally include the kind of behaviour expected from commissioners during the public interview. It would remind commissioners of their solemn duty to uphold the Constitution and carry the important functions of the JSC with dignity. It would also be a public declaration of each commissioner's commitment to their duty.
26. The Code would also provide an enforcement mechanism for the criteria and question guidelines. It would allow the JSC chairperson to report an errant commissioner to their relevant nominating body for further action. Such a Code would also give additional assurance to the public that the JSC takes its work seriously.

⁸ For example, the case of a Free State High Court judge currently facing criminal trial for allegations that arose several years prior to their permanent appointment as a judge, while practising as an attorney. See, for example News24 'Free State judge to appear in court in R25 million Road Accident Fund fraud case' (20 February 2023) <https://www.news24.com/news24/southafrica/news/free-state-judge-to-appear-in-court-in-r25-million-road-accident-fund-fraud-case-20230220>

⁹ See, for example, *Mpumalanga Bar v Judicial Service Commission* (Case No: 55663/2021), a judicial review application currently pending in the Gauteng High Court where one of the key issues raised is a civil judgment entered against a candidate that had already been recommended for judicial appointment by the JSC.

D. Failure to advertise the Constitutional Court vacancy and withdrawal of SCA vacancy

27. For the April 2023 sitting, the JSC did not interview any candidates for the Constitutional Court. This was due to the JSC's failure to attract the minimum of 4 candidates to interview.¹⁰ That was the second successive time it occurs, after the JSC similarly failed to attract the minimum number of candidates in October 2022.
28. Noting the strident criticism that has been levelled against the JSC in recent years, our April 2023 submission urged the JSC to use that sitting to reflect and introspect. We are concerned that the Commission is causing a crisis in public confidence in the judicial appointment process. We fear this deters suitable candidates from putting themselves forward for judicial appointment.¹¹
29. To our dismay, the JSC decided not to advertise the Constitutional Court vacancy in its 18 May 2023 advert. Most worrying, no explanation was given on why the JSC did not advertise this vacancy. We therefore wrote to the JSC on 24 May 2023 requesting an explanation of why this was the case.¹²
30. In a written response dated 30 June 2023, the Chief Justice noted that the decision to advertise the vacancy is at the discretion of the head of court concerned. As head of the the Constitutional Court, he had decided not to advertise vacancy until the April 2024 sitting of the JSC. The reasons given were that, since the JSC had failed to attract candidates for the April 2024 sitting, it was unlikely it would do so for the October 2023 sitting. Further, that a new approach was needed to enhance the prospects of attracting a sufficient number of candidates. Finally, that such an approach would take several months to implement.¹³
31. We are encouraged by the Chief Justice's concern about the constant failure to attract sufficient candidates. However, we are worried that a longstanding vacancy will still not be advertised. It is hard to imagine a reasonable reading of the Constitution that permits

¹⁰ In terms of section 174(4)(a) of the Constitution.

¹¹ DGRU and Judges Matter, '*Submission on Criteria for Judicial Appointments in South Africa*' (28 November 2022) <https://www.judgesmatter.co.za/opinions/judges-matter-dgru-submission-on-criteria-and-guidelines-for-judicial-appointment-in-south-africa/>

¹² Judges Matter and CASAC letter to JSC (18 May 2023) – on file.

¹³ Letter from JSC Secretary (o.b.o Chief Justice) (30 June 2023) – on file.

a head of court to unilaterally and artificially maintain a vacancy at a superior court for any reason, let alone a reason of convenience. And certainly not at the highest court in the land.

32. Section 237 of the Constitution requires that all constitutional obligations to be performed without delay. The Judicial Service Commission has a constitutional obligation to advise the President on the appointment of judges to existing vacancies in the superior courts. It troubles us that heads of court can circumvent the JSC's constitutional duties by artificially leaving the vacancies open. We therefore urge the JSC to consider this matter and develop guidelines on when and how vacancies must be declared and advertised.
33. We would also have preferred a public disclosure of the details of the new approach to encouraging Constitutional Court applications. We therefore urge the JSC to request an explanation of the new approach, and why it requires that the vacancy not be advertised while it is being implemented.
34. It's worth noting that, by April 2024, the Constitutional Court would have operated without its full complement of 11 permanent judges for nearly a decade (since 2016). We recommend that the JSC still reflect on why candidates are reluctant to make themselves available for appointment to what should be the pinnacle of a legal career in South Africa.
35. Similar considerations apply to a vacancy on the Supreme Court of Appeal. Five vacancies were advertised to be filled in the October 2023 sitting, however the shortlist only has four vacancies. It is vital for public confidence to explain why this was done. Without an explanation, it creates the unfortunate impression that vacancies are withdrawn based on the candidates received, and reopened when preferred candidates appear on the applicants list.

E. Women in Judicial Leadership

36. We have long lauded the JSC for the strides it has made in the gender transformation of the judiciary. Indeed, as at 2023, over 40% of South Africa's judiciary is comprised of

women.¹⁴ However, the same progress has not yet been achieved regarding appointing women to top judicial leadership positions, specifically heads of court.

37. While we believe diverse representivity is important for the legitimacy of the judiciary, there is another reason why we believe it is important to include more women in judicial leadership. The Heads of Court forum is an important consultative and judicial policymaking structure that inputs into significant policy decisions on behalf of the judiciary. This includes decisions on judges salaries, the judicial wellness programme, and any policies on sexual harassment, acting judges and other issues . The quality and rigour of such policy decisions is likely to be poorer if it excludes the voices of half of the members of the judiciary.
38. There are currently 16 heads of court positions in the judiciary.¹⁵ At the end of 2022, only one such position was held by a woman – Acting Judge President Yasmin Meer of the Land Claims Court. With the welcome appointment in 2023 of President Mahube Molemela, KwaZulu-Natal Judge President Thoba Poyo-Dlwati and Mpumalanga Judge President Segopotje Mphahlele, there are now 5 women heads of court including Justice Lebogang Modiba, president of the Special Tribunal.¹⁶ The picture looks even better if we expand it to general judicial leadership positions (i.e. the head of court and their deputy), where additional posts are held by women.¹⁷ This is tremendous progress achieved in the last 5 years, yet more work remains still.
39. As we stated in our April 2023 submission, the phenomenon of women judges not putting themselves forward for appointment to judicial leadership speaks directly to the work that the JSC must do in attracting suitable candidates for appointment. This includes taking proactive steps to encourage women to put themselves forward. Afterall, section 174(2) of the Constitution instructs the JSC to consider the broad racial and gender

¹⁴ Judiciary Annual Report 2021/22

¹⁵ This includes the head of the Constitutional Court, SCA, Competition Appeal Court, Electoral Court, Labour Court, Land Claims Court, the Special Tribunal, and 9 high court divisions.

¹⁶ Although Judge Yasmin Meer has ably led the Land Claims Court for well over a decade, she has done so in an acting capacity.

¹⁷ This includes Deputy Chief Justice Mandisa Maya, Free State Deputy Judge President Martha Mbhele, Limpopo Deputy Judge President Matsaro Semenya, Northern Cape Deputy Judge President Violet Phatshoane, North West Deputy Judge President Tebogo Djaje, and Western Cape Deputy Judge President Patricia Goliath.

composition of South Africa ,when recommending candidates for judicial appointment. It's notable that South Africa is a majority black and majority woman country.

F. The JSC's strategic "Human Resources" function

40. As the body responsible for the appointment function, the JSC plays a crucial role in determining the shape, size and competence of South Africa's judiciary. In this regard, the JSC needs to be strategic in the judicial appointments it recommends at each round of interviews. Put simply, the JSC needs to take seriously its 'human resources' function.
41. We understand the JSC's practice to be that, at the start of the deliberations stage at each interview session, the head of that specific court provides commissioners with their view of how the candidates fared. They then comment on which candidates are suitable for appointment based on the needs of that specific court.¹⁸ However, we believe that this is far too little and far too late.
42. In our respectful view, commissioners must be armed with information much earlier – at the Sifting Stage of the judicial appointments. That means the Sifting Committee must approach the shortlisting with the needs of the court firmly at the front of mind. The Committee must firstly review the candidates technical skills and experiences, then assess the individual candidate's suitability based on the needs of the court at that particular time. They should then assess this against the other candidates in that pool.
43. The Committee must try its utmost to match the needs of the court with the skills of the candidates. Other considerations may include demographics, age and expected tenure on the bench. Later, when the process moves to the interview stage, the Commission must also question the candidates' qualities, and test them against the needs of the court, the broader judiciary and South African society in general, in line with section 174(2) of the Constitution.

¹⁸ Evidence of the JSC's practice can be gleaned from the records filed by the JSC in the matter of *Council for the Advancement of the SA Constitution v Judicial Service Commission* (Case No: 2021/26886) and *Mpumalanga Bar v Judicial Service Commission* (Case No: 55663/2021).

44. In fulfilling this strategic HR role, both the Sifting Committee and the full Commission must receive comprehensive reports on the needs of specific courts and the judiciary in general. These reports must detail the caseloads and nature of cases the specific courts deal with, the skills needed to handle these cases, and the skills currently available at the specific court. For example, while virtually all high court divisions deal with RAF and rape matters, the Mpumalanga High Court deals with wildlife crimes while the Pretoria High Court deals with complex commercial and administrative law cases due to it being the seat of government. The JSC must also receive reserved judgments and case backlog reports.
45. The ages of all the judges stationed at a specific court at a particular time is also a metric that the JSC must monitor closely. Older, more senior judges are generally more productive and can boost a court's productivity. However, older judges are also vulnerable to illness and too many of them retiring at once can completely wipe out a court's productivity and institutional memory, leaving junior judges without the guidance and mentorship necessary for optimal function. For example, in the 5 years between 2018 and 2023 the SCA has 'lost', through retirement and promotions, over 200 collective years of appellate judicial experience. While this might not always be bad, the risks associated must be mitigated through well-considered appointments.
46. The JSC must constantly keep in mind considerations like the pipeline of skilled judges to appoint to leadership positions; to specialist courts; and to appellate courts like the CAC, SCA and the Constitutional Court. The Commission must also consider the pipeline of women judges available, in order to maintain the levels of representivity required by section 174(2) of the Constitution. Even at the sifting stage the JSC must be acutely aware of these tensions and try to balance them in each successive round of interviews.
47. Where will the JSC source this information? This information must primarily come from the heads of courts. However, they may also retrieve it from the OCJ's Statistics Unit and Judicial Support Unit. Even external bodies like the Department of Justice (which monitors rationalisation of the court's jurisdiction, as well as the SA Police Service (for crime trends) and StatsSA (for demographic and economic trends).

48. Ultimately, the JSC must have at its disposal a full grasp of all the information before it arrives at a decision to select one candidate over another. It must also be able to competently predict the pool(s) from where it would appoint all of these judges in future. The JSC must seriously grapple with its 'HR' function.

G. How the JSC deals with judicial misconduct complaints

49. While issues of judicial misconduct do not strictly relate to the JSC's judicial appointment function, we raise them in this submission because these issues are often dealt with a JSC sittings in April and October each year.
50. In April 2023, the Small JSC was scheduled to consider the appointment of Judicial Conduct Tribunals to deal with two high-profile cases. The Judicial Conduct Committee recommended that such tribunals be appointed to investigate the complaints. In both cases, the JCC recommendations came several months prior to the April 2023 meeting. The JSC secretariat must have arranged for all the relevant and necessary people to be present at that meeting. One complaint was dealt with at the April meeting and a tribunal was appointed.
51. However, in relation to the second complaint, the Small JSC announced that it could not proceed due to issues that were officially described as 'administrative'. However, we later learnt that they were quite substantive, as they related to oft-litigated issue of quorum when the Small JSC takes decisions. We understand that, on the day, key members of the Small JSC meeting had decided to recuse themselves and this threw the quorum of the meeting into tailspin. How such a small administrative issue could not have been anticipated and the necessary arrangements made is concerning to us. Unfortunately, this creates the impression of the JSC not paying attention and lacking proper oversight when it deals with judicial misconduct complaints. This impacts the judiciary's reputation and esteem.
52. However, what concerns us most is that the Small JSC would not reconvene once again from the April meeting until September 2023. This means that, in a period of six-months, the JSC could not take a decision it was already poised to take (i.e. appointment of a tribunal). Nor could it move to drawing up terms of reference and selecting members of

such envisaged tribunal. We are not aware of what steps have been taken to remedy the quorum problem but even if there had been steps taken, the fact that the decision is not yet finalised – six months later – is a shocking indictment on the functionality of the JSC.

53. We urge the full Commission to act swiftly on these matters. We also call on the JSC to invest more resources in ensuring the Judicial Conduct Committee and the Judicial Conduct Appeal Committee are properly capacitated to avoid the extremely long delays in how complaints and appeals are adjudicated.
54. We raise these concerns in the hope that the JSC will self-correct and invest the necessary resources and attention to fulfil its disciplinary mandate. This will also be fulfilling the JSC's mandate to assist and protect the courts and ensure their independence, impartiality, dignity, accessibility, and effectiveness in terms of section 165(3) of the Constitution.

H. CONCLUSION

55. Once again, we commend the JSC for the important progress in relation to adoption and implementation of criteria. We also applaud the appointment of several women to judicial leadership positions. We nevertheless urge the JSC to proceed with adopting a code of conduct for commissioners; to supplement the questions in the questionnaire; to provide transparency in relation to the non-advertisement of superior court vacancies; and to seriously consider the JSC's strategic 'HR function' in relation to judicial appointments. We also urge the JSC to capacitate the Small JSC, and also the Judicial Conduct and Judicial Conduct Appeal Committees. All of this will sustain and entrench the important successes that have been gained so far.

I. ACKNOWLEDGMENTS

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