



# **SUBMISSION FOR THE JSC INTERVIEWS APRIL 2025**

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# DGRU SUBMISSION FOR THE JSC APRIL 2025 INTERVIEWS

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## DGRU SUBMISSION FOR THE JSC APRIL 2025 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, constitutional democracy, and the rule of law 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](http://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 (see [here](#)). Most of these submissions have also included our analysis of the key issues affecting the judiciary. They also include research reports analysing candidates’ judicial track records. However, 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-april-2025/>

5. All our submissions since 2015 have focused on the importance of the JSC developing more detailed criteria for the selection of judges, plus a questioning guideline to assist commissioners in the interview process. We commend the JSC's April 2023 decision to adopt revised criteria and question guidelines for judicial appointments, which we believe improve the process of appointing judges in South Africa. It will strengthen judicial independence in the process.
6. In this submission will comment on the improvements observed since the JSC adopted revised criteria in April 2023, its implementation in the interviews since then, including the areas that still need to be strengthened in these new criteria.

The submission will also address the following issues:

- a. The need to develop a code of conduct for commissioners
- b. the failure to advertise vacancies on several courts
- c. the need for the JSC to recognise its strategic 'HR function'
- d. problems with the JSC dealing with judicial misconduct.

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

7. Following a year-long revision led by the JSC's Rules Committee, the JSC's adopted new criteria for judicial appointment<sup>1</sup> in April 2023. In the five JSC sessions since then, we have seen an overall improvement in how the JSC conducts interviews, largely as a result of these new criteria. Despite this, we urge the JSC to revise and improve the criteria and adhere to them more consistently.
8. 2023 criteria clarified the requirements that the JSC considers when recommending candidates for judicial appointment. The criteria provide what can easily be described as a 'mission statement' for the JSC when undertaking its judicial appointment function 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, significantly, those issues they may not venture into. The criteria also provide significant powers to the Chairperson to overrule questions that

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

are inappropriate or irrelevant

9. We welcome and support these criteria and are pleased to see their implementation during interviews in April and October of 2023 and 2024. We look forward to seeing their implementation for the April 2025 and future sessions. We encourage their regular revision to improve their effectiveness in ensuring quality judicial appointments.
10. We were pleased to observe the criteria being actively applied by commissioners at all the interview sessions in April and October 2023, and three interview sessions in April, May and October 2024. At most interviews during that period, each interview started with the chairperson reiterating the JSC's intention to be rigorous yet respectful of the candidate's dignity. This was important. The line of questioning also followed closely on the issues identified in the criteria, including a candidates' professional track record, their expertise in particular fields of the law, and their readiness for appointment in reference to their experience as acting judges. We were also pleased to see the JSC generally follow a standard interview duration for most candidates, as this improves the general fairness of the interview. Again, we commend the JSC for how it is implementing the criteria during the interviews and wish that this standard of rigour be maintained going forward.
11. We were however concerned by the glaring inconsistency that prevailed during the interviews for the SCA. While it is to be expected that candidates will be assessed at different levels to test their strength for elevation to one of our apex appellate courts, we were alarmed by the aggressive and hostile tone taken against some candidates by the Deputy President of the SCA, which jarringly contrasted with the more polite tone he took with other candidates. This tone was not restrained by the chairperson, and created the unfortunate impression that there were some favoured candidates and others who were not favoured. We would recommend that the chairperson pay closer attention to the line of questioning and intervene where unfairness is likely to result.
12. In our November 2022 submission<sup>2</sup> to the draft criteria, we emphasised that criteria need to be applied – in varying degrees – through all the stages of the judicial appointment process. This must start from shortlisting, through to the interviews and continue even

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<sup>2</sup> 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/>

during deliberations. This is in order to maintain consistently high standards throughout. We repeated this point ahead of the JSC's subsequent interview sessions.

13. However, events subsequent to the October 2023 interviews suggest that the deliberations become a free-for-all that is not constrained by any reference to the criteria or issues canvassed in the interview. A reading of the transcript supplied by the JSC in its litigation<sup>3</sup> with Freedom Under Law suggests that commissioners feel at latitude to raise whatever issue as disqualifying to any candidate, even when the issue is not related to criteria nor was it ever raised during the interview. This defeats the very purpose of having written criteria, and undermines the fairness and integrity of the appointment process. We therefore strongly urge the JSC to apply the criteria throughout the appointment process, including at the stage of deliberations and final recommendation.

### ***Supplements to existing criteria***

14. In our November 2022 submission on the draft criteria, and again in the April<sup>4</sup> and October<sup>5</sup> 2023 submissions, we urged the JSC to include additional questions on ethics and integrity of candidates. These questions test whether the candidate is fit and proper for judicial office. Similar questions are already asked in the questionnaire and interviews for magistrates.<sup>6</sup>
15. We were pleased to see, ahead of the October 2024 interviews, the JSC revise its judicial questionnaire for new judges and specifically include questions about a candidates' previous disciplinary proceedings, and/or other court proceedings. We have no doubt that this small amendment greatly improved the rigour of the judicial application process and ensured that only the best candidates applied. Indeed, it was unfortunate to see that a candidate who had previously successfully interviewed by the JSC in October 2022, fell short of appointment in October 2024

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<sup>3</sup> *Freedom Under Law v Judicial Service Commission and Others* (ZAGPPJHC Case No. 129593/2023), <https://www.freedomunderlaw.org/2023/12/07/freedom-under-law-v-jsc-and-others/>

<sup>4</sup> DGRU and Judges Matter, 'Submission for JSC Interviews April 2023' (3 March 2023) [https://www.judgesmatter.co.za/wp-content/uploads/2023/04/DGRU\\_submission\\_JSC\\_Apr-2023.pdf](https://www.judgesmatter.co.za/wp-content/uploads/2023/04/DGRU_submission_JSC_Apr-2023.pdf)

<sup>5</sup> DGRU and Judges Matter, 'Submission for JSC Interviews October 2023' (1 September 2023) [https://www.judgesmatter.co.za/wp-content/uploads/2023/09/Final\\_DGRU\\_submission\\_JSC\\_Oct-2023.pdf](https://www.judgesmatter.co.za/wp-content/uploads/2023/09/Final_DGRU_submission_JSC_Oct-2023.pdf)

<sup>6</sup> 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>

due to the disclosure of a court order against him.

16. Nevertheless, we still urge the JSC to make further amendments to the JSC questionnaire to also include questions that relate to disciplinary, criminal or civil proceedings against candidates, even when those proceedings had never been completed or the outcome was favourable to the candidate. In our view, it still poses an integrity risk to have candidates who have been credibly accused of unethical conduct but who had those proceedings not reach finality or been concluded favourably on sometimes technical grounds. At the very least, candidates should be required to disclose and explain the circumstances of those proceedings, as they may have some bearing on the assessment of their propriety for judicial office.
17. In that regard, we strongly urge the JSC to include a question asking:

“have you ever had disciplinary, criminal or civil proceedings proceedings against you? If so, please explain the circumstances and the outcome”.
18. We do not propose these additional questions to embarrass the candidates. We simply recognise the limitations of the current questionnaire. These questions could be included in the questionnaire that candidates submit as part of their application for appointment as judges. The candidate should be given an opportunity to elaborate on each question by explaining the circumstances of each entry, well ahead of the interview.
19. To protect the candidate’s reputation, the JSC’s Shortlisting Committee should collate a list of the candidates’ responses on the integrity questions. In anticipation of the interview, the Shortlisting Committee must circulate the list to commissioners for them to indicate if they would raise any questions about the candidates’ responses during the interview. The Chief Justice as chairperson should give commissioners clear guidance on the limitations of the questioning, and that it should not cause embarrassment or undermine the candidate’s reputation during the interview, which is broadcast on television and online.

### **C. Code of Conduct for commissioners**

20. 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.

21. 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.
22. 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, and sanctions those who do not.
23. Accompanying this submission, is a comprehensive submission based on comparative research on ethical codes of judicial appointment commissions in different countries around the world. We hope that the JSC will seriously consider this submission in order to draw its own Code of Conduct for Commissioners.

#### **D. Failure to advertise vacancies**

24. In the past, we have raised a concern about the non-advertisement of some vacancies and withdrawal of others, particularly on the Constitutional Court and Supreme Court of Appeal. In each case, no explanation was given for this decision, which is worrying.
25. We understand that sometimes Heads of Court do not declare vacancies to the JSC in order to allow a 'window period' where a pool of candidates with acting experience can be drawn. While this reason may seem plausible, we do not believe that it is entirely borne out by the evidence, as some courts have attracted exceptional candidates without allowing any window period. The Labour Court is a case in point. At the same time, for several successive years the Constitutional Court has allowed this window period but to no success, as not enough candidates applied at the end of it.
26. For the April 2025 session, the JSC advertised only vacancies at three superior courts:



the Competition Appeal Court, the Electoral Court, and the Labour Court. While we understand that this session was mainly to deal with specialist courts, we are concerned that the JSC did not also advertise vacancies that were left unfilled after the October 2024 session, including at the Eastern Cape, KZN and Western Cape divisions. Leaving these vacancies unfilled until October 2024 means that courts operate below capacity and rely on acting judges. This is unfair to the litigating public.

27. We are also concerned that the JSC will convene commissioners from all over the country for only one days' worth of interviews. We do not believe that this is the most prudent use of scarce resources in the current economic climate.
28. We find it hard to imagine a reasonable reading of the Constitution that permits a head of court to unilaterally and artificially maintain a vacancy at a superior court for any reason, let alone a reason of convenience. 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 vacancies are left open for extended periods of time without their prompt advertising and filling. As we have stated in previous submissions, we urge the JSC to seriously consider developing guidelines for heads of courts on when and how vacancies must be declared by and advertised.

#### **E. The JSC's strategic 'Human Resources' function**

29. 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. We made a similar argument in our October 2023 submission and reiterate now.
30. 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.<sup>18</sup> However, we believe that this is far too little and far too late.

31. In our 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.
32. 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.
33. 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.
34. 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 may 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.
35. 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.

36. 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 courts' jurisdiction, as well as the SA Police Service (for crime trends) and StatsSA (for demographic and economic trends).
37. 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.

#### **F. How the JSC deals with judicial misconduct complaints**

38. 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.
39. We remain concerned at the slow pace at which the JSC deals with judicial misconduct complaints. The current process is too complex and too slow for it to properly discharge the JSC's constitutional function in terms of section 165(4) and section 178(4)-(5) of the Constitution.
40. While we understand that the structural causes of the delays, including a complex, multi-stage disciplinary process, coupled with the Judicial Conduct Committee being largely comprised of sitting judges, we believe that the JSC should not be a contributor to those delays. There have been several instances where the small JSC has take an inordinate delay in making crucial decisions at key points in the process, such as at the point of appointing (or not) of a Judicial Conduct Tribunal. In two cases in recent years

(i.e. the Hlophe/Goliath complaint and the Maumela/Mnqibisa-Thusi complaints), the JSC delayed in taking decisions due to simple issues of quorum. These kinds of delays for these sorts of reasons causes a loss of confidence in the JSC's ability to uphold the judiciary's integrity.

41. We reiterate our call for the JSC to act swiftly on these matters. We also call on the JSC to invest more human and other 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.
42. 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 the Constitution.

## **G. Conclusion**

43. Once again, we commend the JSC for the important progress in relation to implementation of criteria. We also applaud the JSC's general improvement in the quality of its appointment processes. 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 Judicial Conduct and Judicial Conduct Appeal committees. All of this will sustain and entrench the important successes that have been gained so far.

## **H. Acknowledgments**

44. This submission was made possible by the diligent team of researchers led by Mbekezeli Benjamin, and the generous support of the Millennium Trust, both of which we gratefully acknowledge.

**DGRU and Judges Matter**  
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