

**DGRU SUBMISSION FOR THE JSC
PROCEDURES FOR SHORTLISTING,
INTERVIEWING AND
RECOMMENDING CANDIDATES
FOR JUDICIAL APPOINTMENT AND
REGARDING BREACHES OF
MEMBERS' DUTIES OF
CONFIDENTIALITY**

September 2026



UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

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DGRU SUBMISSION FOR THE JSC PROCEDURES

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 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 and magistrates, 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 (JSC) 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. From 2015 submissions focused on the development of criteria by the JSC for the interview process. In April 2023 the JSC took the decision to adopt revised criteria and question guidelines for judicial appointments, which we believe has improved the process of appointing judges in South Africa. Judges Matter include a focus on the need for a Code of Conduct in its submissions since April 2022.

5. In this submission Judges Matter and the Democratic Governance and Rights Unit make a submission which welcomes and comments on the Judicial Service Commission Procedures for Shortlisting, Interviewing and Recommending Candidates for Judicial Appointment and Regarding Breaches of Members' Duties of Confidentiality, Law and Ethical Standards (JSC Procedures Document).
6. The submission will focus on the following sections of the JSC Procedures Document:
 - a. Vacancies and Nominations
 - b. Shortlisting by Screening Committee
 - c. Sub-committees of the JSC
 - d. Confidential Deliberations
 - e. The Voting Process
 - f. Public Announcement to the President
 - g. Transfer of Judges
 - h. Breach of Confidentiality and Ethical Standards
7. We discuss each topic in turn below.

B. Vacancies and Nominations

1. We welcome the codification of this process. However, we remain concerned that the procedures document does not specify when exactly a Head of Court should inform the JSC when the vacancy has arisen or will occur. It also does not distinguish between vacancies that arise due to retirement (which may be anticipated), and those that arise for any other reason. We think this distinction is important, especially for timing. Additionally, in the past, Judges Matter has raised concern about some vacancies being left artificially open due to the Head of Court not informing the JSC timeously. A key justification for this was that the Head of Court intended to appoint acting judges to the post, in order to build a pool of potential candidates. While this may be stated as a justified reason, we believe that the JSC should exercise some oversight over it.
2. Therefore, we would urge the JSC to amend the provision to state the following:
 - a. The Head of each Court shall inform the JSC when a vacancy occurs or will occur in his or her Court. Where a vacancy will arise due to retirement, the Head of Court must inform the JSC ahead of that retirement, to allow for the timely and seamless

filling of that vacancy. Where the vacancy arises due to any other reason (ie. a judge is promoted to an appellate court, a death, or medical boarding), the Head of Court must inform the JSC at the first available opportunity. The timing of such notice to the JSC should fall within the first of the two periods in which the JSC conducts its judicial appointments process (May – October, and November to April). That is, if a retirement is due to occur in November, the head of court must inform the JSC by May (i.e. ahead of the JSC sitting in October). Similarly, if a vacancy arises when a judge is promoted to an appellate court starting in June, the Head of Court must inform the JSC immediately, to allow for that vacancy to be advertised alongside other vacancies that will be filled in the JSC's October sitting.

- b. Should the Head of Court decide not to immediately fill the vacancy for reasons of building a pool of candidates, the Head of Court must nevertheless inform the JSC of this vacancy with full written reasons why they have decided not to fill it. Such reasons must refer to the context (including a history of not being able to fill such a vacancy after advertising), the needs of the court, the impact of leaving the vacancy unfilled (including mitigation measures), and the forward-looking plan for filling the vacancy with suitable candidates (i.e. whether candidates have been approached to act in the position).

C. Shortlisting by the Screening Committee

1. We welcome the codification of this process. However, we would urge that the Procedures document expressly state that the Screening process must be entirely guided by the JSC Criteria and Guidelines, and not just when the Screening Committee is considering drawing up the shortlist. This means that, in addition to paragraph 14, paragraph 11.2 must also state the JSC members wishing to have candidates included on the shortlist must refer to the criteria. Paragraph 11.2 should therefore state that “the recommendation is properly motivated, with reference to the Criteria”.

D. Establishing the Sub-Committees of the JSC

1. The JSC Procedures Document refers to at least one standing subcommittee of the JSC, being the Screening Committee, without adequately setting out how this committee is properly constituted. Paragraph 12 states only that the Screening Committee consists

of eight members of the JSC, one of whom is the convenor. It does not explain how these eight members are selected, for what period they serve, or whether the convenor performs the functions ordinarily expected of a chairperson.

2. The Objections Committee, which is understood to evaluate objections raised against candidates and to determine whether such objections warrant discussion at interview, does not feature in the JSC Procedure Document at all. This is notwithstanding that its existence is confirmed in the JSC's own Criteria document¹, which records at paragraph 36.4 that "the JSC will receive input from the Objection Committee" when determining whether a disqualifying allegation should be raised with a candidate. This is a notable omission given the substantive role this committee plays in the appointments process, and it leaves candidates and the public with no clarity on how objections against a candidate are considered or determined prior to an interview.
3. Section 6 of the Magistrates Act² provides a valuable legislative example of how these gaps could be addressed. It requires that the composition of a committee be designated by the parent Commission, that a chairperson and, where necessary, a vice chairperson be designated for every committee, that the functions assigned to a committee be clearly specified, and that a committee report back to the Commission and automatically dissolve once those functions have been completed. It is recommended that the JSC ought to adopt a similar approach by formally constituting each of its subcommittees, including the Objections Committee, and by setting out how their composition, leadership are decided as well as their defined functions within the JSC Procedure Document itself.
4. The Mozambican regulations for the Superior Council of the Judiciary provide a useful comparative example of how committee structuring can be recorded transparently.³ The regulations set out, through Article 10, how standing committees and working groups are created, and through Article 8, how often such committees are required to meet. This level of detail allows the public to understand how the body functions and to hold it accountable accordingly. The current uncertainty surrounding the

¹ Summary and Explanation of the Criteria and Guidelines used by the Judicial Service Commission when considering Candidates for Judicial Appointment (April 2023).

² Magistrates Act 90 of 1993.

³ Further research on Mozambique can be found in Annexure A.

composition and functions of JSC subcommittees stands in contrast to this. Candidates and members of the public are left unable to establish who considers objections against a candidate, on what basis, or by what process, which undermines confidence in the fairness and transparency of the appointments process as a whole.

E. Confidential Deliberations

1. We welcome the codification of this process. However, we would urge that the Procedures document expressly state that the Confidential Deliberations stage must also be guided by the JSC Criteria and Guidelines. This means that, Commissioners must indicate their reasons for either supporting or not supporting/opposing a candidate with clear reference to the Criteria. This discipline would assist in ensuring that commissioners are focused on only those factors that are relevant for assessing suitability for judicial appointment and would naturally exclude extraneous reasons. This would also result in the Chairperson's distillation and summary of reasons including only material relevant to an assessment based on criteria.
2. In addition, we would encourage the JSC to consider the distillation and summary of reasons to follow after the voting process. The reason for this is simple: there is a chance that commissioners may express strong support for a candidate, yet that candidate does not ultimately garner the majority votes needed for appointment. The corollary is also true: a candidate may receive strong opposition during deliberations yet still garner the majority votes needed for appointment. In each case, the reasons that had been distilled and summarised before may not adequately explain – or even be irreconcilable with – the JSC's ultimate selection. In which case, the JSC's ultimate recommendation may not be rational.

F. The Voting Process

1. We welcome the clarity on the voting process. We would only urge that the Process document emphasize that the aim of the voting is to clearly indicate which candidates receive the JSC's support for judicial appointment. Therefore, commissioners should be urged to consider the election in the context of the entire process, but particularly with strong connection to the interviews and deliberations that would have preceded

their vote. This is essential to ensure that the entire process is rational.

2. Considering that the new voting procedure emphasises a strong link between the quorum and the majority votes needed for a successful recommendation, we would urge the JSC (and the Secretariat) ensure that quorum is carefully monitored. Prior to any sitting, the secretariat must confirm quorum (including screening any conflicts of interests that may disqualify a commissioner from sitting in part or all of the proceedings). Similarly, commissioners must be urged to indicate early their attendance and the reasons for their absence. In our observation over the years, Commissioners sometimes attend part of the proceedings and are absent for other parts. Others would attend in person but later attend online. Such attendance must also be carefully monitored to ensure that quorum is adequately maintained. It would be unfair on candidates if a commissioner is absent in large parts of the interview but only appears during deliberations or voting.

G. Public Announcement to the President

1. We welcome the codification of the public announcement and commend the JSC's commitment to transparency.

H. Transfer of Judges

1. We welcome the codification of the JSC's process for the transfer of judges. We would only add that the JSC Procedures Document should include a special regime for transfers based on medical conditions or other private and sensitive information. While Judges Matter supports full public participation of most of the JSC's judicial appointment process, we understand that there are parts of the process that would cause harm to the dignity of the judge (and their families) should they be fully disclosed publicly. This confidentiality regime should however exist for exceptional cases. In the ordinary course, the JSC should conduct transfer interviews publicly, and with the rigours that come with it. At the same time, the aim should be to protect the dignity and privacy of all candidates. The special regime would exist only where it would not be possible to achieve both aims in the same sitting.

I. Breach of Confidentiality and Ethical Standards

1. Welcome

- a. Judges Matter welcomes the introduction of ethical standards for commissioners, as well as a mechanism to hold commissioners accountable. However, it is found that this section does not adequately set out several considerations that are relevant to the processes of the JSC.

2. Behavioral Standards for the Chairperson:

- a. The JSC Procedure Document is silent on the standard of conduct expected of the JSC Chairperson in the exercise of that role. While paragraphs 21 to 23 describe the Chairperson's function in facilitating deliberations and distilling reasons for the Commission's decisions, and paragraph 24 confirms that voting is conducted by secret ballot, nowhere does the document articulate the behavioural standard against which the Chairperson's conduct of proceedings ought to be measured. This is a significant omission given the influence the Chairperson exercises over the fairness, orderliness and efficiency of the entire interview and deliberation process.
- b. This gap can be directly addressed by the JSC Procedures Document setting out that the Chairperson is expected to facilitate a fair, orderly and efficient meeting, to ensure that the meeting is quorate, to allow all commissioners a reasonable opportunity to ask questions while retaining the authority to limit their number of questions, to ensure that the Criteria are consistently applied as the basis for questioning and throughout all stages of the appointment process, to handle disagreements between commissioners fairly, to treat commissioners and candidates alike with dignity and respect, to ensure that rulings are adhered to, to keep proceedings to the agreed agenda and to ensure that conflicts of interest are properly declared. It is submitted that the JSC ought to incorporate a comparable standard into the JSC Procedures Document, so that the Chairperson's conduct is measured against a clear and enforceable benchmark rather than left to convention.

3. Legal, Ethical and Professional Standards for Commissioners:

- a. Four existing instruments are listed in paragraph 40.2 – 40.5 of the JSC Procedures

Document to govern the ethical standards of commissioners, being the Code of Judicial Conduct, the Executive Members Ethics Act, the Code of Ethical Conduct for MPs, the Code of Ethical Conduct and Disclosure of Members' Interests, and the LPC Code of Conduct. We recognise the value of anchoring commissioner conduct in instruments that already carry institutional weight and enforcement mechanisms. However, each of these instruments attaches to the commissioner by virtue of their primary office, not their membership of the JSC, and none was drafted with the JSC's function in mind. We recommend that the JSC close this gap by explicitly including uniform standards in the JSC Procedures Document that apply to all commissioners such as paragraph 40.1 which imposes the duty of confidentiality.

- b. This gap is most apparent in respect of the teacher of law designated under section 178(1)(g), who belongs to none of the professions or institutions covered by these four instruments. This commissioner is consequently bound by no named ethical standard while performing JSC functions despite that of confidentiality in paragraph 40.1.
- c. Comparing the four instruments confirms that certain standards are already well covered across the five instruments and need not be duplicated in the JSC Procedure Document. All instruments address; conflicts of interest and the avoidance of conduct that brings the relevant institution into disrepute, and the confidentiality of the JSC's own deliberations is already addressed for all commissioners through paragraphs 21 to 23 of the Procedure document, read with section 38(3)(b) of the JSC Act in paragraph 40.1. These areas can accordingly be left as they stand.
- d. We recommend that the Procedure document instead focus on the standards that fall outside any existing instrument, or that apply unevenly across them. These include honesty and integrity, named explicitly rather than left to be inferred, since only two of the five instruments name it directly. Other standards to be included are that commissioners perform their functions diligently and competently.
- e. In addition to the standards sourced from the four instruments, it is recommended

that there are qualifying criteria for commissioners to join the JSC, such as not having been found guilty of misconduct by their nominating body or any other professional organization or institution. It is essential that the commissioners appointed to the JSC to appoint judges are fit and proper themselves.

4. Accountability Mechanism for JSC Commissioners:

- a. The JSC Procedures Document provides in paragraph 41 that where the JSC has a reasonable basis to consider that a commissioner's conduct may be in breach of their duties of confidentiality, legal obligations, or ethical standards, it "shall request the relevant designating body or appointing power to remove, replace or discipline the member." This is currently the entirety of the JSC's accountability mechanism for commissioner misconduct, and it is submitted that this provision requires substantial development based on comparative research conducted by Judges Matter.
- b. The main comparator to be discussed is that of Guyana⁴, which is considerably more developed and is submitted to be the most useful point of reference for paragraph 41. Part VIII of the Guyana Judicial Service Commission Rules⁵, dealing with the discipline of officers, vests the power to discipline in the Commission itself, it sets out the conditions under which disciplinary action may be taken, and establishes a graduated misconduct process that begins with a warning and escalates through separate procedures for minor misconduct, serious inefficiency, and misconduct serious enough to warrant dismissal. It further sets out rules governing the disciplinary proceedings themselves and provides for suspension from the Commission pending the outcome.
- c. The current mechanism introduced by the JSC in paragraph 41 does not stipulate the process that will be followed if the nominating body fails to remove, replace or discipline the member. For this reason, it is recommended that the JSC set out their own internal processes to deal with this type of situation to ensure that that commissioners who are in breach of the legal and ethical standards are held accountable. It is essential to ensure that the JSC is capacitated with members

⁴ Further research can be found in Annexure A.

⁵ Judicial Service Commission Rules: 2010, Available at:
http://www.oas.org/juridico/pdfs/mesicic4_guy_rules2010.pdf

who bring legitimacy to the appointment process. Paragraph 41, by requesting action from an external designating body without prescribing any internal process of its own, does not achieve this.

- d. It is submitted that the JSC ought to adopt a defined internal enforcement process and that such a process should form the basis of any revision to paragraph 41. Such a process would establish a dedicated Enforcement Committee of the legal and ethical standards, made up of a small number of members elected by the JSC, with any member implicated in a complaint required to recuse themselves. It would define what constitutes a breach of the applicable standards, require complaints to be submitted in a sworn or affirmed form, and provide for an initial sifting process, conducted by a designated Chair, to determine whether a complaint should proceed further. Where a complaint is substantive, the commissioner concerned should be entitled to submit a written response before any decision is taken on whether a hearing is necessary, and any adverse finding should be put to the full JSC for a vote, excluding the commissioner concerned, requiring the same majority already used for other JSC decisions. Sanctions available under such a process could include a public apology and referral back to the nominating body for replacement, achieving the same outcome already contemplated by paragraph 41, but arrived at through a defined and internally accountable process rather than through a bare request to an external body.

J. Conclusion

1. This submission has sought to engage constructively with the JSC Procedures Document across each of the areas it addresses, from the process for reporting vacancies through to the mechanisms for holding commissioners accountable for their own conduct. Judges Matter and the DGRU welcome the JSC's initiative in codifying processes that were previously unwritten or unclear, including the vacancy and nomination process, the shortlisting process, confidential deliberations, the revised voting process, the public announcement to the President, and the process for the transfer of judges. This codification represents a meaningful step towards the transparency and accountability that section 178(6) of the Constitution requires of the Commission.
2. At the same time, we have identified a number of areas where the current draft would

benefit from further development. These include the need to formally constitute the JSC's subcommittees, including the Objections Committee, the need for named and uniform ethical standards that apply to all commissioners regardless of their nominating body, and the need for a defined internal enforcement process to give practical effect to paragraph 41. We have drawn on comparative material, including the Magistrates Act, the Mozambican regulations for the Superior Council of the Judiciary, and the Guyana Judicial Service Commission Rules, to illustrate how these gaps might be addressed.

3. Judges Matter has called for a Code of Conduct for the JSC since April 2022, and we commend the JSC for producing this draft. We hope that the recommendations made in this submission are of assistance in its finalisation, and we remain available to engage further with the JSC on any of the matters raised.

Annexure A

Judges Matter Comparative Research on Codes of Conduct for Commissioners responsible for the Appointment of Judges

Introduction

Since its inception, the Judicial Service Commission (JSC) has made large strides in creating a legitimate and transparent judicial appointment process. Over the years, several aspects of the

JSC process have been enhanced. The introduction of comprehensive criteria for appointment, interviews held in public and accessible online, and the amendment of the JSC questionnaire to bolster integrity and increase due diligence in the process are prime examples of how the JSC has strengthened its functions and performance. However, a lacuna exists for the rules and ethical standards to be abided by for JSC commissioners.

The criteria and guidelines⁶ used to consider candidates for judicial appointment introduced in 2023 go to some lengths to address concerns about the inappropriate behaviour of commissioners. The ‘Guidelines regarding the JSC’s approach to the interviews’ is the first clear attempt to fill the gap of regulating commissioner behaviour. The guidelines clearly explain which type of questions are appropriate to be asked based on the interview process being governed by the principles of fairness and respect for candidate’s dignity.

With several important considerations relating to the ethical standards set for commissioners, accountability mechanisms for misconduct, and the processes for the general functions not set out elsewhere, the establishment of a Code of Conduct for the JSC is essential and we commend the draft document that has been circulated in this regard.

Motivation for a Code of Conduct

The judiciary is a vitally important structure in South Africa’s constitutional democracy and in order for it to continue to fulfil its important functions it needs to carry public confidence and support.⁷ The appointment process is a vital component that aids to the public perception of the judiciary. The strength of the judiciary’s support lies in large measure on ensuring that the judicial appointment process is able to result in the appointment of the best possible candidates to the judiciary.⁸

Judges Matter has called for a Code of Conduct several times, both in direct submissions to the JSC as well as in several articles.⁹ A comprehensive Code of Conduct which sets out rules on

⁶ Summary and Explanation of the Criteria and Guidelines used by the Judicial Service Commission when considering Candidates for Judicial Appointment (April 2023).

⁷ *Helen Suzman Foundation v the Judicial Service Commission* [2018] ZACC 8 at para 32 – 33.

⁸ *Ibid* at para 34.

⁹ **Submissions:** April 2024 (https://www.judgesmatter.co.za/wp-content/uploads/2024/03/DGRU_submission_JSC_Apr-2024.pdf), October 2023 (https://www.judgesmatter.co.za/wp-content/uploads/2023/09/Final_DGRU_submission_JSC_Oct-2023.pdf), April 2023 (https://www.judgesmatter.co.za/wp-content/uploads/2023/04/DGRU_submission_JSC_Apr-2023.pdf).

Articles: October 2024 (<https://www.judgesmatter.co.za/opinions/october-jsc-interviews-set-to-shape-south->

how commissioners act throughout the interview process and the expected standard for the performance of their duties is required. The Code of Conduct should act as a mechanism for the criteria and guidelines for appointments so that the JSC chairperson is able to report an errant commissioner to their relevant nominating body for further action. This will assure the public that the JSC takes its responsibility seriously and sanctions those who do not.

It is also necessary that the Code of Conduct list all the qualities expected from commissioners, this will include the expected ethical standards of persons that become part of the JSC. Several cases have spoken to this point and fleshed out what type of qualities can be expected from commissioners. Commissioners should perform their appointment function impartially¹⁰ and should not act as gatekeepers that prevent eligible candidates from being interviewed and considered for appointment.¹¹ The *Helen Suzman Foundation v the Judicial Service Commission* case¹² further expects that commissioners should perform their duties transparently and have candour and robustness in their opinions without making inappropriate comments. These are all qualities which are needed from commissioners that are selected to make judicial appointments, however they do not serve as a closed list of what is required. The comparative analysis informs further qualities that should be demanded of candidates being considered to form part of the JSC. This point was reaffirmed by the Western Cape High Court in *Democratic Alliance v Hlophe and Others*, which considered the standard of fitness required of a person designated to serve on the JSC. The Court held that those responsible for designating members of the JSC bear a responsibility to take that task seriously and to identify individuals who are suitably qualified for the position — a standard that requires substantive fitness for office, not mere formal eligibility to be nominated.¹³ Designating a person who is not fit and proper to serve on the JSC was found to undermine the constitutional imperative in section 165(4) to protect the courts, eroding public confidence in the independence and dignity of the judiciary and compromising the JSC's own integrity and credibility.¹⁴ The Court further held that the participation of an unsuitable commissioner in the judicial appointments process risks eroding public confidence in the

[africas-judiciary-amid-political-tensions/](https://www.judgesmatter.co.za/opinions/womens-month-2024/)), August 2024 (<https://www.judgesmatter.co.za/opinions/womens-month-2024/>), September 2023 (<https://www.judgesmatter.co.za/opinions/judges-matter-and-dgru-submission-to-the-jsc-great-progress-but-more-needs-to-be-done/>).

¹⁰ *Amos v The Minister of Justice* [2019] ZAWCHC 130.

¹¹ *Lawrence v Magistrates Commission & Others* 2020 (2) SA 526 (FB).

¹² [2018] ZACC 8 at para 37, 38.

¹³ *Democratic Alliance v Hlophe and Others* (16170/24 ; 16463/2024 ; 16771/2024) [2025] ZAWCHC 234; [2025] 3 All SA 447 (WCC); 2025 (5) SA 166 (WCC); 2025 (10) BCLR 1206 (WCC) (2 June 2025) at paras 69–70.

¹⁴ *Ibid* at para 71.

judiciary and undermining its legitimacy, and that a commissioner's unfitness may arise not only from misconduct in their own right but from a persistent failure to respect the credibility of the JSC and its processes.¹⁵ This judgment lends further judicial support to the need for a Code of Conduct that clearly articulates the standard of fitness and conduct expected of commissioners, and that provides a mechanism to hold them accountable when that standard is not met.

Comparative analysis on Codes of Conduct

The appointment of judges takes place globally with a variety of processes being relied on dependent on the prevailing social, economic and political climate of the country. In making recommendations towards the JSC Procedures Document, international research has been conducted, to have a holistic view on what is essential to be included in a Code of Conduct. The comparative research process was initiated by narrowing down which countries or states have a Code of Conduct for the body responsible for appointing judges.

The initial phase of the research was completed by answering three questions for each country/state: firstly, is there a body that appoints judges? Secondly, is this body responsible for the interview process? And finally, whether rules exist that govern this process and the commissioners? If all three questions were answered positively further research was done to determine what aspects of the rules, regulations or codes of conduct would be beneficial for the creation of a Code of Conduct for the South African JSC.

Research results concluded that there five states or countries stood out that have a set of rules or regulations that regulate the behaviour of commissioners, these are New York, North Macedonia, Serbia, Guyana and Mozambique.

New York

In New York the Commission on Judicial Nomination is entrusted with the responsibility to critically evaluate and recommend candidates to the Governor for judicial appointment. In the first step of the two-step process in place, candidates apply and are considered by the Commission through an interview process. Once this part of the process has been conducted by the Commission, a written report of nominations will be given to the Governor to make the final decision¹⁶ to or not to appoint the candidate.

¹⁵ Ibid at paras 116, 118.

¹⁶ Rules of the Commission on Judicial Nomination, available at: <https://cjn.ny.gov/system/files/documents/2021/05/cjnfinalrules.pdf>.

In the Rules for the Commission on Judicial Nomination, the most helpful section for South Africa would be found in the second rule concerning the members of the Commission:

“(a) Consistent with section 64(6) of the Judiciary Law, the commission may appoint, and at its pleasure remove, a counsel and such other staff as may be required from time to time, and prescribe their powers and duties. The commission shall fix the compensation of its staff and provide for reimbursement of their expenses within the amounts appropriated by law.

(b) The commission's counsel will assist the chairperson; supervise the implementation of the commission's rules and resolutions; organize, oversee and report to the commission on the investigation of candidates; supervise any other commission staff; serve (when present) as secretary of commission meetings; and fulfill such other duties as may be delegated by the commission or chairperson.

(c) The commission's counsel will conduct orientation sessions for newly-appointed commissioners concerning the functions of the commission and the duties of commissioners, including recruiting, evaluating and nominating candidates for the Court of Appeals. All commissioners will be invited to participate in such sessions.”¹⁷

Despite the clear difference that this Commission is not established in the Constitution like the JSC, it introduces the idea of removing members when it is required to do so, for inappropriate conduct etc., and also formalises the requirement that new commissioners receive training on their duties. This is an important requirement that equips new commissioners to perform their duty well which is not currently present in the JSC Act or criteria and guidelines.

North Macedonia

The Judicial Council is responsible for the appointment of judges in North Macedonia. They are an autonomous and independent judicial body consisting of 15 members chosen by all three branches of government. Despite there being no mention of an interview component in the appointment process, a Code of Conduct for the members exists which is referred to as the Law on Judicial Council.¹⁸

¹⁷ Rules of the Commission on Judicial Nomination, available at: <https://cjn.ny.gov/system/files/documents/2021/05/cjnfinalrules.pdf>.

¹⁸ Law on the Judicial Council, Available at: <https://rai-see.org/wp-content/uploads/2015/08/Law->

There are several sections that would be relevant for the creation of a Code of Conduct in South Africa. Article 12 concerns the election of a member of the council from Judicial ranks, this would be specifically helpful in setting out criteria for the selection of members of the JSC in ss 178 (e)(f)(g)(h)(i)(j) of the Constitution.

Article 12: Candidacy

‘The candidates shall submit their candidacy to the Council in writing.

The candidates shall enclose to their application the following:

- proof of years of service in a judicial office;
- biographical data about their professional and expert development;
- assessments of the results in their work for the last three years, issued by the Council;
- data about participation in expert and professional education, issued by the Academy for training of judges and public prosecutors;
- statement about which list they are applying for.’

Despite the Constitution setting out the powers of the JSC in ss 178 (4) – (6), the competence of the Commission are not elaborated on in the JSC Act. Article 31 of the Law on Judicial Council sets out the Competence of the Judicial Council as follows:

Article 31: Competence

‘The Council shall be competent:

- to elect and dismiss judges;
- to elect and dismiss presidents of courts;
- to establish the termination of the judicial office;
- to elect and dismiss lay judges;
- to monitor and evaluate the work of the judges;
- to decide on the disciplinary accountability of the judges;
- to decide on termination of the judicial office due to permanent inability - to work as a judge;
- to decide on revoking the immunity of a judge;
- to decide upon requests for approving detention for a judge;
- to nominate two judges in the Constitutional Court of the Republic of Macedonia

from the ranks of judges;

- to decide on the temporary suspension of a judge from the judicial office;
- to establish the number of necessary judicial positions for the courts;
- to review and assess the quarterly and annual reports on the work of the courts;
- to care for the reputation of the judges and the trust of the citizens in the judiciary;
- to act upon complaints by citizens and legal entities on the work of the judges and the courts;
- to submit a work report;
- to adopt the Rules of Procedure and other general acts regulating the - work in its competence; and
- to conduct other business determined by law.'

Similarly to the operation of the JSC, the public may be excluded from the discussions of the Judicial Council. However the default position for the Judicial Council is that the sessions of the Council are public. All of the decisions taken by the JSC and meetings that are held are done in private which provides no transparency in the functioning and decision-making of this body. For this reason Article 33 would assist in improving this.

Article 33: Transparency in the work

'The sessions of the Council shall be public.

The public may be excluded by a decision of the Council due to protection of the reputation and integrity of a judge or candidate for a judge. For exclusion of the public from the sessions, the Council shall decide with two thirds majority of votes from the total number of members of the Council. Minutes and short-hand notes shall be kept for the work of the sessions of the Council.'

Lastly, the Judicial Council adopts Rules of Procedure that determine the operation of the Council which are published in an official Gazette. With many of the rules of procedure of the JSC being unwritten, including this type of section would be invaluable for the JSC going forward and would enhance the transparency of the body. The Rules of Procedure read as follows:

Article 37: The Rules of Procedure

'The Council shall adopt the Rules of Procedure with a two-thirds majority of votes of the total number of members.

The Rules of Procedure of the Council shall stipulate the procedure and the manner of operation of the Council, and other issues within the competence of the Council.

The Rules of Procedure shall be published in the “Official Gazette of the Republic of Macedonia”.’

Serbia

In Serbia the High Judicial Council evaluate, select and propose candidates to the Serbian National Assembly for appointment. The Council is made up of eleven members, seven are from the judiciary, one is a Minister of the judiciary, one member from the National Assembly, one attorney and one Law professor. There is no Code of Conduct for the council members however, similarly to North Macedonia, the Law on the High Judicial Council contains provisions regarding member conduct and terms of office.¹⁹

Similarly to North Macedonia, Articles relating to Competence and Rules of Procedure are the most useful when considering a Code of Conduct for the JSC for the reasons stated above. The sections in Serbia differ slightly from those in North Macedonia:

Article 13: Competence

‘The Council shall:

- elect judges to permanent judge's office
- rule on the termination of judges' office
- propose candidates to the National Assembly for the first judicial tenure
- propose the election and dismissal of the President of the Supreme Court of Cassation and Court Presidents to the National Assembly
- propose candidates for the Constitutional Court Judges to the Supreme Court of Cassation;
- appoint lay judges;
- decide on the transfer, assignment, and objection to the suspension of judges;
- rule on incompatibility of other services and jobs with judge's office;
- rule in the process of the performance evaluation of a judge and president of the court;

¹⁹ Law on High Judicial Council, Available at:

https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://mpravde.gov.rs/files/Law%2520on%2520High%2520Judicial%2520Council_180411.doc&ved=2ahUKEwicwMih3veLAXU1cPEDHdzlErYQFnoECDwQAQ&usg=AOvVaw2nDdkOi1kCGNyH4uXvaR1x.

- determine the composition, duration and the termination of the mandate of the members of disciplinary bodies, appoint the members of disciplinary bodies and regulate the manner of operation and decision making in disciplinary bodies;
- rule on legal remedies in disciplinary proceedings;
- approve the curriculum for continuous training of judges and court staff, and monitor the training programme implementation;
- defines curricula for the initial training of judges;
- pass the Code of Ethics
- determine the number of judges and lay judges for each court;
- perform affairs of the judicial administration within its remit;
- rule on issues of immunity of judges and Members of the Council;
- propose the volume and structure of budgetary funds necessary for the work of the courts for overhead expenses, and oversee disbursement of funds in accordance with law;
- rule on objections in the process of the election of Members of the Council from the ranks of judges;
- form its Working Bodies and permanent and *ad hoc* Commissions, and elect their Members;
- provide opinions on amendments to the existing laws or on the passing of new laws which set out the status of judges, organisation and functioning of the courts, as well as other systemic laws applied by courts or of importance for exercising judge's office;
- rule on the existence of conditions for compensation for damages due to unlawful and erroneous actions of a judge;
- submit annual reports on its work to the National Assembly;
- perform tasks in respect of the implementation of the National Strategy for the Reform of Judiciary within its remit;
- inform the public on its work;
- cooperate with Court Councils from other countries and with international organisations;
- pass acts provided for by law;
- perform other duties as specified by law;'

The article setting out the competence of the Serbian High Judicial Council is very extensive and encompasses several important points that could be valuable to the JSC. The Rules of Procedure

read as follows:

Article 18: Rules of Procedure

'The Council shall pass the Rules of Procedure regulating in more detail the manner of operation and the decision making of the Council.

The Rules of Procedure and other general acts of the Council shall be published in the "Official Gazette of the Republic of Serbia".'

Guyana

For most judges in Guyana, the JSC advises the President in making appointments. The JSC is made up of several members including the Chancellor, Chief Justice, Chairman of the Public Service Commission and two to three other members appointed by the President.²⁰ The JSC Rules set out how the Commission should exercise its powers.²¹ Of particular interest are the following Rules:

Rule 6: Conduct of officers generally

Subject to the Constitution, all officers appointed by the Commission shall conduct themselves in such a way as not to:

- a) place themselves in positions in which they have or could have a conflict of interest;
- b) compromise the fair exercise of their official functions and duties;
- c) use their office for private gain;
- d) demean their office or position;
- e) allow their integrity to be called into question; nor
- f) endanger or diminish respect for, or confidence in, the integrity of the Judicial Service.

Rule 7: Standard of behaviour

All officers shall therefore:

- a) demonstrate the highest level of professional conduct and personal integrity in the performance of their duties and in serving the public;

²⁰ Constitution of the Co-operative Republic of Guyana (2012) at s198
(<https://www.parliament.gov.gy/Constitution%20of%20the%20Cooperative%20Republic%20of%20Guyana.pdf>)

²¹ Judicial Service Commission Rules: 2010, Available at:
http://www.oas.org/juridico/pdfs/mesicic4_guy_rules2010.pdf

- b) treat everyone, including public officers, clients and members of the general public with courtesy, respect, fairness and impartiality,
- c) display a positive attitude and be pro-active in the exercise of their duties; seek to understand and to satisfy the real needs of members of the public;
- d) in the exercise of their official duties, not confer any special benefit and/or give preferential treatment to anyone on the basis of any special relationship; and render service in a timely, efficient and effective manner

Part VIII: Discipline of officers

This section spans several pages but in summary sets out:

- The power to discipline officers is vested in the Commission.
- Conditions for disciplinary action.
- Misconduct process to be followed, these generally start with a warning and different procedures are set out for minor misconduct, serious inefficiency or misconduct for which dismissal may be considered appropriate. These sections also provide for what steps are taken dependent on which type of finding is made.
- Rules for the disciplinary proceedings.
- Suspension from the Commission.

There is currently no written internal mechanism that exists to remove members of the JSC that are not performing as they are expected to or to be removed for misconduct. Introducing these procedures and mechanisms to enforce them is essential in ensuring that the JSC is capacitated with members that will bring legitimacy to the appointment process.

Mozambique

The Superior Council of the Judiciary (CSMJ), established in Art 220 of the Constitution is responsible for the appointment of judges in the lower courts and proposes a list to the President for the appointments in the Supreme Court.²² The Council is made up of 16 members consisting of the President and Deputy-President of the Supreme Court, two members nominated by the President, five members appointed by Parliament and seven judges selected by their peers.

Regulations for the CSMJ were passed in 2014 which regulate various aspects of this body starting

²² Mozambiquan Constitution at Art 223(2), 227(1) and 224(1).

with general provisions, the functioning of the council which canvases when and how different type of meetings take place, how working groups and committees are selected, and what constitutes a conflict of interest. The relevant provisions read as follows:

Chapter II: The functioning of the Council

This Chapter details the procedures for meetings as follows:

Article 5: Date and place of the meeting

Article 6: Regular meetings

Sets out when the Council is set to meet annually.

Article 7: Extraordinary meetings

Sets out when these type of meetings are allowed to take place.

Article 8: Standing Committee meetings

Sets out how often these committees should meet throughout the year.

Article 9: Agenda

The agenda is to be proposed by the President of the committee in collaboration with the other members of the committee. Agenda items by members must be proposed 15 days in advance.

Article 10: Standing Committees and working groups

Sets out briefly how these committees or groups are created.

Article 11: Quorum and voting method

The bodies of the Council may only function validly if at least two thirds of its members are present.

Article 12: Course of sessions and participation of third parties

The sessions of the Council are held privately but it may appoint a spokesperson who will transmit the deliberations of the body to the public when necessary.

Article 13: Sequence of acts

Sets out the rules and process to be followed within the meetings.

Article 14: Point of order

Explains which circumstances allow for the President to request a point of order.

Article 15: Summary of meetings

Minutes of the meeting must be prepared for every meeting that takes place.

The Mozambican regulations provide a good example of how the rules of procedure can be recorded to ensure that the body continues to function the way that it was envisioned to. By being transparent about the rules of procedure it provides the public an opportunity to hold the council accountable when they do not act in accordance.

Comparative analysis recommendations

Each of the states or countries provide valuable insight into the way that practices of appointment committees have been captured. In the current practice of the JSC, rules of procedure which prescribe the manner of operation and decision-making do not exist. In North Macedonia, Serbia and Mozambique each country has committed to establishing rules of procedure to be abided by and gazetted. Having established rules of procedure will ensure that the JSC processes are carried out consistently, fairly and efficiently.

Guyana provides examples of two vitally important sections needed in the Code of Conduct, first being the expected conduct of officers generally, and secondly being the expected standard of behaviour. It is evident from the discussion under 'Motivation for a Code of Conduct' above that there are very few requirements that have been articulated by the courts and nowhere else are any specific standards set out for commissioners. These need to be set out to ensure that the very best candidates are selected to form part of the JSC.

Several of the countries or states clearly set out the competence of the commission or council which clearly outlines the extent of its powers. This is an important component of a Code of Conduct as it makes its members aware of the broad responsibilities they have by virtue of being a member of the JSC. These are the powers and functions assigned to the JSC in both the Constitution and the JSC Act.

Finally, Guyana provides a valuable example of how a Code of Conduct should be enforced through the disciplining of commissioners that do not meet the standards that have been set out. Enforcement mechanisms are essential in the effectiveness of the Code of Conduct as they ensure that what is stipulated within the Code is upheld.

Conclusion

The JSC Appointment Criteria set out the JSC's approach to interviews. These Criteria contain rules which set out the conduct expected of Commissioners in relation to the type of questions that they ask but does not go further than this. Due to the powerful position held by JSC members, their conduct throughout the process is vital as disruptions and loud behaviour can derail candidates being interviewed. For this reason setting out the conduct expected of them and a standard of behaviour in a Code of Conduct is vital to clarify what standard of performance is expected of them.

The comparative analysis discussed above will not be directly applicable due to the specific Constitutional framework, the JSC Act and the social, economic and political context of South Africa. However, it provides a valuable example of how the Code of Conduct can be envisioned.

The first interview session where the criteria were applied has been described as; “the April 2024 sitting might be best remembered as a JSC session where the focus was almost exclusively on the candidates’ qualities and suitability, without the dreaded political sideshows.”. The noticeable improvement in the performance of the JSC after the introduction of the criteria demonstrates how beneficial guidelines can be. The introduction of a Code of Conduct will certainly have a similar impact.

In order to continue to have a legitimate and independent judiciary that is capacitated with judges that are capable of performing their judicial functions, it is vital that the JSC is constituted with members that take their positions seriously. The JSC Procedures Document will fill the current gap that exists as it will embody an important enforcement mechanism for the commissioners to be held against.