



For attention: Secretariat of the Judicial Service Commission
Per email: KMoretlwe@judiciary.org.za
TPhaahlamohlaka@judiciary.org.za
JSC@judiciary.org.za

27 November 2022

Dear Ms K Moretlwe

Submission in Response to the Criteria and Guidelines Used by the Judicial Service Commission When Considering Candidates for Judicial Appointment

Please find attached the submission of the Helen Suzman Foundation for your consideration.

I have also taken the liberty of attaching a copy of a report we have recently produced. *'In the Interests of Justice: Reform of the Judicial Service Commission'* is a report which explores the possibility of broader reform of the JSC, making eleven distinct proposals for doing so.

We would welcome the opportunity to engage on these or any other issues. Please don't hesitate to be in touch, should you seek any additional information.
(email: nicole@hsf.org.za)

Yours sincerely

Nicole Fritz
Director

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Trustees: Nick Binedell • Cecily Carmona • Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Kalim Rajab • Gary Ralfe • Phila Zulu
Patrons: Prof. Thuli Madonsela • Lord Robin Renwick



HELENSUZMAN
FOUNDATION

SUBMISSION TO THE JUDICIAL SERVICE COMMISSION

in respect of

**THE CRITERIA AND GUIDELINES USED BY THE JUDICIAL SERVICE
COMMISSION WHEN CONSIDERING CANDIDATES FOR JUDICIAL
APPOINTMENT**

made by

THE HELEN SUZMAN FOUNDATION

27 NOVEMBER 2022

Director: Nicole Fritz

Trustees: Nick Binedell • Cecily Carmona • Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Kalim Rajab • Gary Ralfe • Phila Zulu

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1. INTRODUCTION

When we refer to the judicial branch of government we mean judges. They are the key officers in upholding the Constitution and in ensuring that the principle of separation of powers is observed and that balance is struck. Judges perform this function through the adjudicative process and their judgments and orders. The independence of the courts is guaranteed in the Constitution.¹ Essential to maintaining independence and the effectiveness of the courts is employing a legitimate and transparent procedure for the appointment of judges.²

The Helen Suzman Foundation (“HSF”) is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, focusing on the rule of law, transparency and accountability.

The HSF welcomes the opportunity to comment on the Criteria and Guidelines used by the Judicial Service Commission When Considering Candidates for Judicial Appointment (“Criteria and Guidelines”). We believe this is as an occasion to enhance our engagement with the Judicial Service Commission (“JSC”).

2. Criteria & Guidelines

The HSF commends the JSC for formulating detailed criteria and disseminating them for public comment. Defined and objective criteria are essential as candidates will know what standards they are expected to meet before they accept nomination, and these will guide them in their preparation for the interview process.³ They will assist JSC commissioners in consistently and fairly assessing the candidates and guide their

¹ Constitution of the Republic of South Africa, 1996 section 165(2) provides that: ‘The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without, fear, favour or prejudice’.

² International Bar Association Human Rights Institute, ‘Beyond Polokwane: Safeguarding South Africa’s Judicial Independence’ *International Bar Association* (July 2008) (“Beyond Polokwane”) 37. See also Aldo Zammit Borda, ‘The Appointment, Tenure and Removal of Judges Under Commonwealth Principles: a Compendium and Analysis of Best Practice’ (2015) 41(3) *Commonwealth Law Bulletin* 347 (“Commonwealth Principles”) para 1.1.1;

³ Chris Oxtoby, ‘The Appointment of Judges: Reflections on the Performance of the South African Judicial Commission Service’ (2021) 56(1) *Journal of Asian and African Studies* 34, 39.

questioning. Finally, they will also be of value to the public. There is little to no public awareness of what qualities the JSC look for in a judge.⁴ Public awareness will enhance the legitimacy of the appointment procedure as in the absence of criteria, the appointment process can appear arbitrary and without reason.⁵

The courts rely on the public's trust and confidence in its judges and their judgments to function effectively as it has 'no constituency, no purse and sword', unlike the other arms of government.⁶ Not only does the procedure for appointment need to be seen as legitimate, but the judges themselves who are appointed must demonstrate the values of integrity and independence and have the requisite skills and knowledge. Justice Kate O'Regan recognised this importance when she stated that '[a]ppointing independent, competent and trusted judges is central to ensuring the rule of law in a democracy'.⁷

3. Code of Conduct

The Criteria and Guidelines should go a long way in improving the legitimacy, openness and accountability of the JSC interviews and the appointment process of judicial officers. However, on their own, they do not guarantee commissioners' compliance.

In conjunction, accountability mechanisms must be formulated for cases of non-compliance. The conduct and demeanour of JSC commissioners during the interview process can significantly impact the success, or failure, of a candidate's prospect for appointment to the bench. In addition, conduct like that witnessed in past interviews may deter candidates from accepting nominations as they are fearful of a gratuitously abusive process. This diminishes the pool from which judicial selection might be made.

⁴ Susannah Cowen, 'Judicial Selection in South Africa' (2010) *Democratic Governance Rights Unit*, 8.

⁵ Chris Oxtoby, 'Managing a Fraught Transition: The Practice of the South Africa JSC' in Hugh Corder & Jan van Zyl Smit (eds) *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (2017 Siber Ink), 160 and 174.

⁶ *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC) at para 16. See also Tabitha Masengu and Alison Tilley, 'Is the Appointment of Acting Judges Transparent?' (2015) 553 *De Rebus* 24.

⁷ 'Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges' (February 2016) *British Institute of International and Comparative Law* ("Cape Town Principles"), 1.

For this reason, the HSF submits that the JSC must also create a code of conduct by which commissioners' and the Chairperson's actions will be guided. Part of this code of conduct must include procedures to hold any commissioner accountable for their actions, whether by their nominating body or preferably by the JSC itself.

Different professions represented on the JSC will have differing accountability mechanisms and standards by which they judge and hold their members answerable. But the JSC commissioners' role is a constitutionally mandated one, requiring the assumption of particularly serious obligations.

The HSF maintains that it is the JSC itself — uniquely able to appreciate the demands and duties of those who constitute its number — that is best placed to assess whether conduct on the part of commissioners passes muster.

4. Conclusion

The Criteria and Guidelines are a significant step towards a JSC, and its proceedings, being worthy of the respect such an important constitutional body should command. The next step is creating a code of conduct and accountability mechanisms.

If the JSC applies the criteria fairly and consistently, and if the commissioners adhere to the guidelines during the interviews, previous candidates who were prejudiced by abusive questioning may re-apply, and new candidates who were fearful of an unnecessarily hostile process may now come forward so that we will have the best, most expansive, selection of judicial candidates with which to enrich our bench.