



For attention: Ms Mbali Songca
The Secretariat of the JSC
Office of the Chief Justice

Per email: MSongca@judiciary.org.za; SMthombeni@judiciary.org.za;
JSC@judiciary.org.za

17 September 2026

Dear Ms Songca

The Helen Suzman Foundation is a Non-Profit Organisation that advocates for constitutional democracy and human rights in South Africa. We attach our written submission in response to the invitation for comments on the [Revised Procedures for Shortlisting, Interviewing and Recommending Candidates for Judicial Appointment and Regarding Breaches of Members' Duties of Confidentiality, Law and Ethical Standards](#).

We confirm our interest in making oral submissions.

Should you have any queries, it would be appreciated if you could contact me at the following email address: naseema@hsf.org.za

Yours Sincerely

Naseema Fakir
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Introduction

1. The Helen Suzman Foundation (HSF) an organisation that promotes constitutional democracy, the rule of law and human rights. HSF has a longstanding interest in matters regarding the judiciary as an independent, effective institution that protects and enforces the Constitution but also administration of justice. This essential to South Africa's constitutional democracy. HSF has previously litigated on judicial appointments, administration of justice, and judicial independence.
2. HSF welcomes the opportunity to comment on the [Revised Procedures for Shortlisting, Interviewing and Recommending Candidates for Judicial Appointment and Regarding Breaches of Members' Duties of Confidentiality, Law and Ethical Standards](#) (the revised Procedures) that are intended to review but also provide a "clear and transparent framework governing the Judicial Service Committee's (JSC) process".¹ HSF commends this as a necessary step to ensure that the integrity of the judiciary, and the courts, is protected and ensure that the institution performs its functions with independence.
3. This submission proceeds with the view that this is a step forward in implementing reforms that have been advocated for by members of the public, the legal profession and civil society organisations. It would be remiss not to acknowledge the implementations of reforms such as the adoption and implementation of criteria in the judicial appointment process (both in the shortlisting stage and the interviewing stage) because of this reform.² We have witnessed an improvement in the quality of questions being posed to the candidates, course correcting when commissioners are out of line by the Chairperson and earnestly considering objections that are levelled against candidates while giving said candidate an opportunity to respond publicly in the interview stage.³
4. HSF submits that the following concerns:
 - 4.1. A lack of proactive measures in the vacancies and nominations process;
 - 4.2. Adoption of a potentially over-bureaucratic system related to shortlisting;

¹ See the media statement here: https://static.pmg.org.za/280818Media_StatementJSC.pdf

² JSC revised document at 1.

³ Vuyani Ndzishe and Mbekezeli Benjamin "The JSC's new criteria and the prospects for the success of its reform agenda", *Daily Maverick*, 30 October 2022, available here: <https://www.dailymaverick.co.za/article/2022-10-30-the-jscs-new-criteria-and-the-prospects-for-the-success-of-its-reform-agenda/>.

- 4.3. Ambiguity of phrases;
- 4.4. Vagueness of concerning protection of information; and
- 4.5. Gaps in accountability and recalling mechanisms of Commissioners.

Anticipating Vacancies and Skills Gaps

- 5. Clause 7 of the JSC revised procedure requires that a Head of Court notify the JSC of an actual or impending vacancy is a useful minimum. It could be strengthened by encouraging Head(s) of Court to maintain an internal judicial establishment record, building on planning work the Office of the Chief Justice already undertakes, that tracks, per judge i.e. date of appointment, expected retirement date, and areas of expertise or specialisation currently held or being developed. This information could also be used to assist in judicial education a function of SAJEL to meet the demands, trends and changes in the law (and matters being litigated in courts).
- 6. The value of this intervention is that it would let a Head of Court identify skills gaps in the Court's current complement, anticipate which competencies will be lost on a coming retirement, and give the JSC earlier and more substantive notice than a bare statement that a seat will fall vacant.
- 7. This document can accompany the clause 7 notification to inform the JSC of additional contextual information. usefully accompany, rather than replace, the clause 7 notification in order to assist the JSC.
- 8. We submit that the JSC must consider whether this is best driven through the procedure itself, or through Heads of Court.

Strengthening Shortlisting and Screening Process

- 9. HSF welcomes the revised shortlisting process in clause 9, however having separate committees for screening and shortlisting with different constituted commissioners would create coordination difficulties and inconsistencies.
- 10. HSF supports two committees, screening and shortlisting but with the same members for each interview cycle. This is to ensure continuity across successive interviews within the year.⁴ Since the screening committee is reconstituted by the JSC "from time to time", there is need for consistency in application of shortlisting

⁴ The standard April and October interviews.

criteria through overlap of membership, or a published record of the committee's shortlisting guidelines that carries forward between cycles regardless of who sits on the committee.⁵

11. We submit that the JSC consider a similar model as recommended in the *Report to the Minister of Finance on the Appointment of the Commissioner of the South African Revenue Service*, with the same panel members in the screening and shortlisting stage.⁶ The Department of Labour's Recruitment and Selection Policy follows the same model.⁷
12. The proposed screening panel was supported by a dedicated administrative function responsible for, *inter alia*, processing all applications to the panel. Applied here, this would mean the Head/Director of Human Resources at the Office of the Chief Justice, or a designated equivalent, providing:
 - 12.1. Administrative and secretarial support to the screening committee;
 - 12.2. Managing the intake and verification of nominations;
 - 12.3. Conducting preliminary background and documentation checks; and
 - 12.4. Ensuring the committee's process follows its published guidelines.
13. The above-mentioned model will strengthen procedural consistency and administrative accountability at the screening stage, so as not to substitute for the Commission members' own judgement on suitability. This enables the JSC to have access to state and government machinery in the verification process to prevent any surprises when candidates are appointed by the President such as impropriety or misconduct before judicial appointment.⁸ Previous examples demonstrates the

⁵ Clause 14 of the JSC revised document.

⁶ Report to Minister of Finance for SARS Commissioner Appointment, 12 March 2019 at 10, available

here: https://www.treasury.gov.za/comm_media/press/2019/2019032701%20Report%20of%20the%20Selection%20Panel%20for%20Commissioner%20of%20SARS.pdf.

⁷ Recruitment and Selection Policy, Department of Labour at para 6.3.3.1.7 in 19, available here: https://www.psa.co.za/docs/default-source/psa-documents/media-statements/recruitment_and_selection_policy.pdf?sfvrsn=d9a191ef_6.

⁸ Such as police clearances, authentication of qualifications and other related checks that are required for these high-level appointments in line with what other institutions in the state do i.e. South African Revenue Services appointment of high level officials, South African Reserve Bank appointment processes and high level government positions right to Director-General

impact on the integrity of the judiciary and burden on the judicial conduct process when these issues could have been flagged earlier before appointment.⁹

14. We also submit that disclosure of conflicts of interest should be an express, recorded step at both the screening and shortlisting stages - not only assumed as part of general ethical practice. This could take the form of a standard disclosure by each screening committee member before shortlisting deliberations begin and recorded in the committee's minutes.¹⁰

Candidates that “may” be proposed by Commissioners

level in departments to pick up any issues that might compromise the integrity of the judiciary when candidates are recommended and appointed. Judicial appointment is a very important constitutional function and those who are successful need to be above reproach.

⁹ The following examples drive the point stated in the paragraph:

Adv Roelofse was first appointed as an acting judge in 2008 and was subsequently interviewed by the JSC on three occasions without being recommended for permanent appointment. When he was interviewed again in 2020, the Mpumalanga Society of Advocates objected to his candidacy on allegations that he owed Bar fees and lacked judicial temperament. See GroundUp, “SCA rules ‘ill-tempered’ advocate can’t be a judge”, *The Citizen*, 11 July 2026, available here: <https://www.citizen.co.za/news/south-africa/courts/sca-jsc-advocate-johannes-roelofse/>. Judge Makhubele was found guilty of gross misconduct arising from her tenure as chairperson of PRASA. See Tania Broughton, “Judge Nana Makhubele found guilty of gross misconduct by judicial tribunal”, *Mail & Guardian*, 13 January 2025, available here: <https://mg.co.za/news/south-africa/2025-01-13-judge-nana-makhubele-found-guilty-of-gross-misconduct-by-judicial-tribunal/>. More recently, allegations that Judge Makamu accepted a R5 000 bribe in exchange for granting leave to appeal against an eviction order, while serving as an acting judge of the South Gauteng High Court, were referred to a judicial tribunal. See Sipho Mabena, “Acting high court judge hauled before tribunal over alleged R5 000 bribe”, *The Citizen*, 31 May 2026, available here: <https://www.citizen.co.za/news/acting-high-court-judge-tribunal-alleged-r5-000-bribe/>. These examples demonstrate the value of strengthening the JSC's screening process through thorough background and integrity checks. A useful model is the verification process followed in the appointment of the SARS Commissioner. See *Report to the Minister of Finance: Appointment of Commissioner of the South African Revenue Service* at 5, available here: https://www.treasury.gov.za/comm_media/press/2019/2019032701%20Report%20of%20the%20Selection%20Panel%20for%20Commissioner%20of%20SARS.pdf. Unlike that process, where verification followed the interviews, HSF recommends that such verification be undertaken once nominees are shortlisted and before they are interviewed, alongside the consideration of public comments on candidates.

¹⁰ And further any Head of Court or Premier participating under clause 12 of the JSC revised document.

15. Clause 11 requires that a candidate proposed by a commissioner for inclusion in the shortlist be supported by a properly motivated recommendation and sufficient consensus within the screening committee.¹¹
16. HSF suggests this could be bolstered by expressly stating what properly motivated entails in practice and how the motivation/justification should be expressed with reference to the JSC's published shortlisting or appointment criteria. This should be recorded in the screening committee's minutes in the same way as other decisions are recorded.
17. HSF recommends amending clause 11, especially the use of "may" and "must". The reason for this is to provide clarity on how the discretion of the commissioners should be exercised and whether the screening committee, upon receiving motivation from the commissioner, has no choice but to shortlist such candidate.

Protection of personal information of candidates

18. The revised procedure is silent on how personal information of all candidates is processed and preserved under the Protection of Personal Information Act (POPIA) - especially sensitive information that might be disclosed by the nominees.¹² As stated in the revised document, the JSC questionnaire includes other relevant documents such as the nominees' CV and further supporting material, which will ordinarily include very sensitive personal information or even special personal information as defined in POPIA.¹³

¹¹ Clauses 11.2 and 11.3 respectively.

¹² Act 3 of 2013.

¹³ Personal information is defined, in section 1 of Act 3 of 2013, as:

"... information relating to an identifiable, living, natural person, and where it is applicable an identifiable, existing juristic person including, but not limited to—

- (a) information relating to the race gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- (d) the biometric information of the person;
- (e) the personal opinions, views or preferences of the person;
- (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the person; and

19. We submit that the revised procedure should:

- 19.1. Clearly identify the responsible party for the purposes of POPIA;
- 19.2. Clarify whether the processing of nominee and candidate information is governed by an existing OCJ POPIA policy, a JSC policy, or neither;
- 19.3. Prescribe an appropriate duration of retention of the personal information of unsuccessful nominees, shortlisted candidates, recommended candidates who are not appointed, and successful appointees; and ¹⁴
- 19.4. Specify the process for the destruction or de-identification of information once it is no longer required.

20. Clarifying this would also assist the JSC in responding consistently to data subject access requests from candidates regarding their own nomination and interview records.

Ensuring Continuity and Participation of Commissioners

21. Clause 28 addresses where a member seeks the Chairperson's permission to be excused from a particular sitting and provides that the JSC may proceed provided it "is quorate". Neither the JSC Act, nor the Constitution, specifies a numerical quorum for the Commission.

22. A related oversight is the position of a member or a category of designated member(s) who is/are repeatedly unavailable over several interviews, even where each individual absence is properly excused. This could be an issue to certain categories. For example - a law teacher nominated under section 178(1)(i) of the Constitution, where the designating body may from time to time rotate or be unable to consistently release its nominee.¹⁵

23. HSF submits that the procedure should:

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- (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person."

Special personal information is defined in section 26 of the Act, and the processing of such information is stated in Part B of the Act.

¹⁴ Section 14 of Act 4 of 2013.

¹⁵ This could also extend to lawyers designated by law bodies, as another example too.

- 23.1. Provide greater clarity on the quorum required;¹⁶
- 23.2. Clarify whether a designating body may appoint a standing alternate where a member is regularly unavailable, rather than appointing an alternate for each sitting, and prescribe the process for doing so; and
- 23.3. Set out the steps to be taken by the JSC or the relevant designating body where a member's repeated unavailability affects the Commission's ability to function, recognising that responsibility for participation rests with both the member and the body that designated them.

Notification of Judicial Transfers

- 24. HSF submits that the inclusion of defined transfer process is welcomed, however we submit the current provisions are incomplete in two respects.
- 25. First, clauses 35-7 do not address whether, or when, the Head of Court from which the judge seeks to transfer is informed of the application. This matters operationally. A successful transfer affects the sending court's judicial complement, and its Head of Court will need to source an acting appointment in the interim and, per clause 7, notify the JSC of a possible vacancy.
- 26. Second, clause 36 requires the transferring judge to complete the standard JSC questionnaire. However, we submit that a transfer application should require the judge to state the reasons for seeking transfer, ideally through a (dedicated) transfer questionnaire or a supplementary section of the existing one. Without such disclosure, the transfer process could allow unsuccessful candidates to secure appointment to another court and later seek transfer to their preferred court. This is an example of gaming the system and such conduct should be discouraged.
- 27. We submit the revised procedure should specify at which point the sending Head of Court is notified of the transfer request, including taking into account any requests for non-disclosure of the application.

Breach of confidentiality and ethical standards

- 28. HSF welcomes the inclusion of a code of conduct that touches on breach of confidentiality and ethical standards for members of the Commission which is

¹⁶ Clause 28 of the JSC revised document.

consistent with section 165(4) of the Constitution.¹⁷ This obligation on the Commission is required by the JSC's rules and procedures, in line with section 174 of the Constitution which stipulates the standard of fitness and propriety demanded of judicial candidates has limited force if it is not matched by an equivalent standard among those who sit in judgement of candidate for judicial appointment.¹⁸

29. Clause 39 correctly places responsibility on each designating, nominating or electing authority to ensure its representative on the JSC complies with that authority's own legal, ethical and professional standards, and clause 40 usefully sets those standards out per category of member. Clause 41 then allows the JSC to refer a member to the relevant designating body, where there is a reasonable basis to consider the member in breach.
30. HSF is currently litigating against the Speaker of the National Assembly on the scope of Parliament's continuing responsibility for the members it designates to the JSC.¹⁹ HSF's case is that sections 165(4) and 178 of the Constitution, read together require the National Assembly not only to consider the suitability where subsequent conduct raises concerns about their ability to serve on the JSC. Section 178(3) Constitution empowers the National Assembly to replace its designees, while section 165(4) requires organs of state to assist and protect the courts to secure their independence, impartiality, dignity, accessibility and effectiveness. HSF, therefore, contends that the power to replace a designee carries a corresponding obligation to consider its exercise where circumstances reasonably call that member's continued suitability into question.²⁰
31. This litigation provides a practical example of why designating bodies should retain responsibility for monitoring the performance and conduct of their representatives on the JSC. Designation should not bring the designating body's responsibility to an end. Where concerns subsequently arise, there should be clear mechanism(s) through which the body considers whether its representative remains suitable to

¹⁷ This provision obliges organs of state to assist and protect the courts in securing the independence, impartiality, dignity, accessibility and effectiveness of the judiciary.

¹⁸ Read with section 178 of the Constitution and the JSC Act.

¹⁹ Sinesipho Schriber "Is Julius Malema 'fit and proper' for his JSC post?" *Business Day*, 2 August 2026, available at: <https://www.businessday.co.za/news/law/2026-08-02-malema-fights-to-keep-jsc-post-as-court-challenge-looms/>. Also see, Nonkululeko Njilo "Helen Suzman Foundation heads to court over Malema's participation on the JSC", *Daily Maverick*, 15 May 2026, available here: <https://www.dailymaverick.co.za/article/2026-05-15-helen-suzman-foundation-heads-to-court-over-malemas-participation-on-the-jsc/>.

²⁰ The JSC notes this in its revised document in clause 41.

serve and, where necessary, recall or replaces that member. This approach recognises that JSC membership carries responsibilities directed towards protecting the integrity of the judicial appointment process and the judiciary itself. Therefore, designating bodies must exercise their powers consistently with constitutional obligations imposed by sections 165(4) and 178.

32. HSF submits that the revised document could go one step further. The revised procedure already recognises the Constitutional Court's judgment in *Helen Suzman Foundation v Judicial Service Commission*²¹ and the Western Cape High Court's judgment in *Democratic Alliance v Hlophe*²² as informing clause 39. These judgments speak to the JSC's own institutional responsibility for safeguarding the integrity of the appointments process and, by extension, public confidence in the judiciary.
33. We welcome the insertion of clause 41, which provides a process for addressing complaints against designated member of the JSC. However, HSF is of the view that there should also be greater transparency around how these members are designated by their respective bodies.
34. This is particularly important given the public and transparent nature of the judicial appointment process itself. Clear processes for the designation and, where necessary, recall or replacement of members would provide an additional safeguard for the JSC.²³
35. We submit that greater clarity is required on the criteria applied by the legislature and legal and academic professions when designating their representatives to the JSC. This includes whether these criteria bear any relationship to the fitness and propriety standards applied to judicial candidates.
36. The procedure should also clarify whether designating bodies have mechanisms to recall or replace a designated member where concerns arise regarding their conduct, short of the clause 41 referral process. As well as whether the JSC has an established channel to raise concerns regarding a member's conduct or performance directly with the relevant designating body, as HSF submits that the JSC is well placed to do so.

²¹ 2018 (7) BCLR 763 (CC) at para 37.

²² [2025] ZAWHCH 234 at 71-2.

²³ This will help protect the integrity of the judicial appointments process and the judiciary more broadly.

37. **Role of Parliamentary Representatives on the JSC**

38. A related and distinct point concerns the six members from the National Assembly and four from the National Council of Provinces. When designated to the JSC, these members are not performing the ordinary oversight function that Parliament exercises over the executive under section 55 of the Constitution, and through which the JSC itself separately reports annually to the Portfolio Committee on Justice under section 6 of the JSC Act.²⁴

39. Rather, they are exercising a distinct constitutional function under section 178, participating as members of an independent body responsible to the Constitution rather than to Parliament. As such, they are expected to place the public interest above sectional or constituency interests when doing so.²⁵

40. We submit that if the process by which Parliament designates these members under its own Rules does not clearly reflect this distinction, that is a matter the JSC is well positioned to raise with Parliament directly, given its constitutional interest in the integrity of its own composition.

41. Finally, we submit that commissioners must be obligated to disclose conflict of interest in the screening and shortlisting stages.

Conclusion

42. The JSC performs constitutional functions that are central to the independence and integrity of the judiciary and in upholding the Rule of Law. HSF therefore welcomes the Revised Procedures and the steps taken toward more transparent, consistent, and accountable processes.

43. HSF therefore submits that the Revised Procedures can be strengthened by:

- 43.1. Requiring Heads of Court to maintain a judicial skills and succession record that identifies appointments, expected retirements, and areas of expertise to anticipate any gaps;
- 43.2. Creation of one panel for screening and shortlisting processes to ensure continuity and administrative support at the screening stage;

²⁴ Act 9 of 1994.

²⁵ As per the Code of Ethical Conduct referenced at clause 40.4 of the JSC revised document.

- 43.3. Requiring clearer motivation and disclosure at the shortlisting stage;
- 43.4. Clarity on the handling of personal information under POPIA;
- 43.5. Defining quorum and requiring provision of standing alternates;
- 43.6. Clarifying notification and disclosure processes around judicial transfers,
- 43.7. Provision of standards applicable to JSC members in relation to their designation;
- 43.8. Providing clarity on circumstances in which members may be recalled; and
- 43.9. Clarifying the distinction between members designated by parliament to perform functions of the JSC and ordinary parliamentary oversight functions, and if unable to provide this clarification, commence discussions with parliament as necessary.