

CONSTITUTIONAL REFORM ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 Duty to Convene Commission: Special Rules

Selection commission for the Office of Judge

99. [Paragraph 14](#) provides that the duty on the Lord Chancellor to convene a selection commission for the office of Judge does not apply if a selection commission for the office of President or Deputy President has been convened or the Lord Chancellor is under a duty to convene such a selection commission. This means that if there is a vacancy or impending vacancy for the office of President or Deputy President these must be filled before any vacancy for the office of Judge which might arise at the same time.
100. [Paragraphs 13\(2\)](#) and [14\(2\)](#) state that the Lord Chancellor must convene a selection commission for the unfilled vacancies (in the office of Deputy President or Judge) as soon as practicable after the Lord Chancellor has selected a candidate put forward by the selection commission for the office of President or Deputy President.

Section 27: Selection process

101. This section sets out the overall process which must be undertaken by the selection commission (the composition of which is provided for in Schedule 8) before it makes a selection of one name (subsection 10) and puts this to the Lord Chancellor (under section 28). Subsection (1) sets out the duties of the commission with regard to the particular selection process to be applied to each vacancy under consideration.
102. As provided for in subsections (5) and (6) selection must be made solely on merit. The task of setting out the criteria or competences against which merit will be tested lies with the commission. The commission can only recommend those who meet the eligibility requirements set out in section 25. Under subsection (7) anyone who is a member of the commission cannot be selected (hence the provisions in Schedule 8 for identifying persons who wish to be considered for a particular vacancy and disqualifying them from membership of the commission).
103. Subsection (8) provides that the commission must, when making selections for the appointment of judges, also take into account the need for the Court to have among its judges those with knowledge and experience of practice in the law in every part of the United Kingdom. This is intended to maintain the convention that currently applies to the House of Lords that there should generally be at least 2 Scottish judges and usually 1 from Northern Ireland. The Lord Chancellor, as provided for by subsection (9), may issue non-binding guidance to the commission about the vacancy that has arisen, for example on the jurisdictional requirements of the Court, which the commission must have regard to.
104. Subsections (2) and (3) list the persons the commission must consult during the selection process (although it may consult others). They are (subsection (2)): senior

judges (as defined by Section 60) who are neither on the commission nor willing to be considered for selection, the Lord Chancellor, the First Minister in Scotland, the Assembly First Secretary in Wales and the Secretary of State for Northern Ireland. In addition (subsection (3)), the commission must, if all the “senior judges” for a part of the United Kingdom are not able to be consulted (because they are candidates or members of the commission), consult the next most senior judge in that part who is able to be consulted. This ensures that there will always be some senior judicial input from every part of the United Kingdom into every selection process.

Section 28: Report

105. This section sets out the stage after the commission has made a selection under the process set out in Section 27.
106. Subsection (1) provides that after a selection has been made the commission must submit a report to the Lord Chancellor stating who has been selected and containing the information set out in subsections (2), (3) and (4) (that information being essentially that which is required to enable the Lord Chancellor to exercise his options under section 29 on a properly informed basis).
107. Before choosing to exercise one of his options set out in section 29 the Lord Chancellor, having received the report, must (under subsection (5)) consult the senior judges (or other judges) who were consulted by the commission, the First Minister in Scotland, the Assembly First Secretary in Wales and the Secretary of State for Northern Ireland.

Section 29: The Lord Chancellor’s options

108. This section sets out the Lord Chancellor’s options after he has received a name from the commission and carried out further consultation under section 28. It works in conjunction with section 30 which sets out the grounds on which the Lord Chancellor can exercise two of his options – to reject the selection commission’s recommendation or to ask the selection commission to reconsider its recommendation. It outlines the three possible stages of the process and the options the Lord Chancellor has at those stages.
109. Subsection (1) outlines the three possible stages. The first stage is where a person has been selected under section 27. The second stage is where a person has been selected following a rejection or reconsideration at stage 1. The third and final stage is where a person has been selected following a rejection or reconsideration at stage 2.
110. Subsection (2) provides the Lord Chancellor with his options in dealing with stage 1 of the process. He may (a) notify the selection (which is to say, notify the Prime Minister of the selection for the Prime Minister to recommend that person to Her Majesty for appointment), (b) reject the selection or (c) require the commission to reconsider the selection. Should the Lord Chancellor exercise options (b) or (c) the process enters stage 2.
111. Subsection (3) provides that during the second stage the Lord Chancellor can (a) notify the selection to the Prime Minister (as above), having exercised either option b) or c) in stage 1; (b) reject the selection if it was made following reconsideration at the first stage; or (c) require the commission to reconsider the selection, but only if it was made following a rejection at stage 1. Should the Lord Chancellor exercise option (b) or (c) the process enters stage 3.
112. At the third stage, as provided for in subsection (4), the Lord Chancellor must notify the selection although, as provided for in subsection (5), he may notify a candidate who was reconsidered at stage one or two but not rejected.
113. The Lord Chancellor’s options as set out in this section can be summarised as follows:
He can:

*These notes refer to the Constitutional Reform Act 2005
(c.4) which received Royal Assent on 24 March 2005*

- a) accept the recommendation;
 - b) ask the commission to reconsider; or
 - c) reject the recommendation.
114. If the Lord Chancellor selects option b) first, he would ask the selection commission to reconsider. After reconsideration the commission, under section 31, can still put forward the same name with further reasons or recommend an alternative. The Lord Chancellor can then put forward either of the recommended candidates (unless he chooses to reject the second candidate put forward).
115. Under option c) the Lord Chancellor can reject the name provided by the selection commission.
116. If rejection follows reconsideration, under section 31 the selection commission must submit an alternative candidate. At this point the Lord Chancellor can either:
- a) accept this candidate; or
 - b) accept the candidate originally put forward before reconsideration.
117. If the Lord Chancellor rejects the original name provided by the selection commission, under section 31 it must submit an alternative candidate giving reasons for their choice. At this point the Lord Chancellor can either:
- a) accept the second candidate; or
 - b) ask the selection commission to reconsider – The selection commission, under section 31, can then either resubmit the second candidate or an alternative candidate. If an alternative candidate is put forward the Lord Chancellor can then choose between the first name following rejection or the new name following reconsideration.

Section 30: Exercise of powers to reject or require reconsideration

118. This section details the grounds upon which the Lord Chancellor can exercise his powers to reject or require reconsideration of a selection, as provided for in section 29.
119. The right of rejection is only exercisable according to subsection (1) when in the Lord Chancellor's opinion the person selected is not suitable for the office concerned.
120. The right to require reconsideration, as stated in subsection (2), is exercisable under three conditions subject to the Lord Chancellor's opinion. The Lord Chancellor can ask for reconsideration if he feels there is not enough evidence that the person is suitable for office; if he feels there is not enough evidence that person is the best candidate on merit; or if there is not enough evidence that the judges of the Court will between them have enough knowledge of, and experience in the laws of each parts of the United Kingdom, following the new appointment.
121. Should the Lord Chancellor exercise either of these options, under subsection (3) the Lord Chancellor must provide his reasons in writing.

Section 31: Selection following rejection or requirement to reconsider

122. This section makes provision for the process that the selection commission must follow if the Lord Chancellor requests reconsideration of a selection, or rejects a selection, under section 29.
123. As provided by subsections (2) and (3) the commission can never put forward a candidate whose selection has been rejected at any stage of the process.

*These notes refer to the Constitutional Reform Act 2005
(c.4) which received Royal Assent on 24 March 2005*

124. Subsection (3) provides that the commission can reselect a candidate whose selection the Lord Chancellor has requested be reconsidered or provide another candidate, but not a candidate whose selection has already been rejected.
125. Subsection (4) states that the commission must inform the Lord Chancellor of the person selected following rejection or requirement for reconsideration.