



House of Commons
Political and Constitutional
Reform Committee

**Rules of Royal
Succession**

Eleventh Report of Session 2010–12

*Report, together with formal minutes, oral and
written evidence*

*Ordered by the House of Commons
to be printed 1 December 2011*

The Political and Constitutional Reform Committee

The Political and Constitutional Reform Committee is appointed by the House of Commons to consider political and constitutional reform.

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Mr Christopher Chope MP (*Conservative, Christchurch*)
Sheila Gilmore MP (*Labour, Edinburgh East*)
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Powers

The Committee's powers are set out in House of Commons Standing Orders, principally in Temporary Standing Order (Political and Constitutional Reform Committee). These are available on the Internet via <http://www.publications.parliament.uk/pa/cm/cmstords.htm>.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/pcrc. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume.

Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Steven Mark (Clerk), Hannah Stewart (Legal Specialist), Lorna Horton (Inquiry Manager), Louise Glen (Senior Committee Assistant), Annabel Goddard (Committee Assistant), Rebecca Jones (Media Officer) and Claire Gilray (Hansard Society research scholar).

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Summary

This Report examines Government proposals to amend the rules of succession to the throne, in particular to end the system of male preference primogeniture under which a younger son comes before an elder daughter in the line of succession, and to remove the legal provision that anyone who marries a Roman Catholic becomes ineligible to succeed to the Crown. We welcome the changes, which aim to remove two elements of discrimination in determining the succession to the throne, while maintaining its traditional hereditary character.

We also draw attention to connected issues that may be raised when the proposals are debated, depending on the scope of the Bill, especially the future role of the Crown in the Church of England, and the continued ineligibility of women to succeed to the majority of hereditary peerages, which remains a matter of public interest for as long as it has an impact on gender balance in the House of Lords.

Report

Introduction

1. On 28 October 2011, the Prime Ministers of the sixteen Commonwealth Realms¹ announced that they had agreed to work together towards a common approach to amending the rules on the succession to the throne, with the aim of giving effect to the changes simultaneously in all sixteen countries.

2. The announcement, which was extensively trailed in the media earlier in the month,² described two areas in which all sixteen countries wished to see change:

- i. to end the system of male preference primogeniture under which a younger son can displace an elder daughter in the line of succession, and
- ii. to remove the legal provision that anyone who marries a Roman Catholic becomes ineligible to succeed to the Crown.

3. We understand—although this was not included in the announcement—that agreement has also been reached to reduce substantially the number of members of the extended royal family who currently require the Monarch’s permission, or parliamentary acquiescence, to marry under the Royal Marriages Act 1772.

4. On 10 November we took evidence from Robert Blackburn, Professor of Constitutional Law, King’s College London, and Dr Robert Morris, Constitution Unit, University College London, on the constitutional and practical implications of these changes. This short Report is intended to inform the House of the issues that emerged during our evidence, before legislation implementing the changes is introduced in the next Session. We are grateful to both of our witnesses, and to Professor Blackburn for his detailed written evidence.

Complexity and international impact

5. Changing the rules of succession is technically and logistically complicated, and will require close co-ordination between the Realms. Our witnesses did not think, however, that this complexity would obstruct the proposals. Dr Blackburn told us that the change was likely to be “straightforward”.³ Dr Morris agreed, saying that “with good will”, he was “sure” that “local complexities” could be “overcome”.⁴

6. Some of the Commonwealth Realms have republican movements. The process of implementing these changes is likely to lead to further questions in those countries about

1 The Realms are the 16 members of the Commonwealth that recognise the British Sovereign as Head of State: Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, the Solomon Islands, Tuvalu, and the United Kingdom.

2 Eg 22 October 2011: *The Times*, ‘Equality agreed for royal succession’, *Daily Telegraph*, ‘First-born daughter of Duke will take throne’

3 Q 4

4 Q 16

the Monarch's position as Head of State. Professor Blackburn told us that he was surprised at the lack of media coverage of the announcement in the Commonwealth Realms, but that "whether they [republicans] want to make something of this occasion remains to be seen".⁵

Religion and establishment

7. The Government intends to remove the legal provision that prevents anyone who marries a Roman Catholic from succeeding to the Crown. There are no current proposals to alter the other religious requirements that apply to anyone succeeding to the Crown. These have been summarised for us by Professor Blackburn as follows: the monarch "cannot be a Roman Catholic ... must make a public declaration that he or she is a Protestant, must join in communion with the Church of England, must swear to maintain the established Churches of England and Scotland".⁶

8. The provision relating to marriage to a Catholic dates back more than three hundred years to the Glorious Revolution and Bill of Rights of 1688–89. It serves little if any contemporary purpose, and is seen as an injustice, especially as there are no other restrictions on the religion of the spouse of a person in the line of succession. This lack of other restrictions is almost certainly because the provision is so antiquated that the marriage of a monarch to anyone of another religion was inconceivable when it was drafted.

9. There is one possible consequence of allowing a monarch to be married to a Catholic that might be considered of contemporary relevance. Catholics are normally obliged under canon law to bring up as Catholics any children from an inter-faith marriage.⁷ The proposal thus raises the prospect of the children of a monarch being brought up in a faith which would not allow them to be in communion with the Church of England. This would prevent them from acceding to the throne.

10. It is worth noting, however, that this requirement of canon law is occasionally waived through papal dispensation, and indeed has been waived for members of the royal family.⁸ An heir to the throne who was considering marrying a Catholic could seek this dispensation before proceeding with the marriage. The Monarch and Parliament could also prevent the marriage from going ahead if they so wished, as for any royal marriage.⁹ It is also perhaps worth noting that Catholicism is not the only religion to impose such a requirement.¹⁰

11. The scenario does, however, beg the question of whether it remains appropriate for the monarch to be required to be in communion with the Church of England. Dr Morris told us that "one of the problems about, for example, removing the ban on marriage to a

5 Q 16

6 Q 20

7 See, for example, Dr William Oddie, *Catholic Herald*, 2 November, "Why shouldn't there be a Catholic 'Supreme Governor' of the Church of England?"

8 for the children of HRH Prince Michael of Kent

9 Royal Marriages Act 1772

10 Islam, for example, requires that any children of a Muslim parent be raised Muslim.

Catholic is that you draw more attention to the existing bans”,¹¹ and there has already been comment on these bans from the Scottish First Minister and the leader of the Roman Catholic Church in Scotland, with the former referring to “the unjustifiable barrier on a Catholic becoming Monarch”.¹² The most obvious difficulty in having a Catholic monarch—beyond the purely statutory obstacles—is the Crown’s role as supreme governor of the Church of England.

12. Dr Morris’ point of view is that establishment of the church “is not an inseparable package”, and that the monarch’s role in it as supreme governor is essentially ceremonial:

One could argue that one must not touch that, otherwise the establishment will break down around our ears, or one could take the view that we can respond to the sort of society we have become and that we can re-interpret that as well, as we have re-interpreted so many other parts of the constitution, and make it possible, as one bishop at least thought some years ago, for even a Roman Catholic to be the supreme governor of the Church of England.¹³

13. The value of the oaths that a new monarch must swear is questionable if, as Dr Morris puts it, they “require the monarch to swear to do things that they are not in a position to fulfil”.¹⁴ The Queen at her Coronation promised, for example, to “maintain in the United Kingdom the Protestant Reformed Religion established by law” and to “maintain and preserve inviolably the settlement of the Church of England”.¹⁵ Such promises do not sit comfortably with the notion of a purely constitutional monarchy.

14. We welcome the proposal that would allow a member of the royal family to marry a Roman Catholic without losing their place in the line of succession. The existing provision is anomalous in discriminating solely against Roman Catholics and those who wish to marry them. The proposal does, however, raise questions about the future role of the Crown in the Church of England, which the House may wish to consider in due course.

Primogeniture and the aristocracy

15. The proposal to end the preferential treatment of men in the line of succession has been widely welcomed, and with good reason. It does, however, cast the spotlight on the hereditary aristocracy, to which women are for the most part ineligible to succeed, and, where they are eligible, male heirs take preference.

16. The Crowns of many other European monarchies, including Belgium, the Netherlands and Sweden, succeed without any male preference, while aristocratic titles in these countries continue to be inherited through the male line. In Spain, in contrast, the Crown for the moment continues to be inherited through male-preference primogeniture, while since 2006, succession within the Spanish nobility has become gender-blind.

11 Q 13

12 <http://www.scotland.gov.uk/News/Releases/2011/10/28122859>

13 Q 3

14 Q 2

15 Coronation Oath, 2 June 1953

17. In countries in which aristocratic titles no longer confer any particular rights, duties or privileges, there may be no compelling reason to alter an historic system of inheritance.¹⁶ In the United Kingdom, however, 92 seats in the House of Lords continue for now to be reserved to holders of hereditary aristocratic titles. Only two of these 92 seats are currently occupied by women. **While the holders of hereditary peerages continue to be eligible for membership of the House of Lords, the way in which their titles are inherited, and its effect on the gender balance in Parliament, remain matters of public interest.**

Royal Marriages Act

18. It has been written of the Royal Marriages Act that “there are, perhaps, few more absurd pieces of legislation on the statute book”.¹⁷ Under this statute, the marriage is void of any descendant of George II (other than the children of princesses married into ‘foreign families’) who fails to seek the monarch’s permission to marry. The Act is likely now to apply to thousands of people, many of whom have at most a tenuous connection to the extended royal family, let alone to the throne. **The Royal Marriages Act is overdue for reform. We look forward to seeing the detail of the Government’s proposals in this area.**

Conclusion

19. We welcome the changes agreed between the sixteen Commonwealth Realms. It would be wrong to present the changes as a major step towards modernisation. It is true, as Dr Morris told us, that it is hard “to infuse logic into a system that isn’t logical”.¹⁸ But people value having a hereditary head of state for the sake of history and tradition and because it is a system that has generally worked well, rather than because it is modern or fair. The changes being proposed are modest, but they will remove two elements of discrimination in determining the succession to the throne, while maintaining its traditional hereditary character.

16 Q 28 [Professor Blackburn]

17 Vernon Bogdanor, *The Monarchy and the Constitution* (1995), p 59

18 Q 12

Conclusions and recommendations

Religion and establishment

1. We welcome the proposal that would allow a member of the royal family to marry a Roman Catholic without losing their place in the line of succession. The existing provision is anomalous in discriminating solely against Roman Catholics and those who wish to marry them. The proposal does, however, raise questions about the future role of the Crown in the Church of England, which the House may wish to consider in due course. (Paragraph 14)

Primogeniture and the aristocracy

2. The proposal to end the preferential treatment of men in the line of succession has been widely welcomed, and with good reason. (Paragraph 15)
3. While the holders of hereditary peerages continue to be eligible for membership of the House of Lords, the way in which their titles are inherited, and its effect on the gender balance in Parliament, remain matters of public interest. (Paragraph 17)

Royal Marriages Act

4. The Royal Marriages Act is overdue for reform. We look forward to seeing the detail of the Government's proposals in this area. (Paragraph 18)

Annex 1: Statement of Friday 28 October 2011

issued at Perth following a meeting of the 16 Realms of HM Queen Elizabeth II

“The Prime Ministers of the sixteen Commonwealth nations of whom Her Majesty the Queen is Head of State have agreed in principle to work together towards a common approach to amending the rules on the succession to their respective Crowns. They will wish unanimously to advise The Queen of their views and seek her agreement.

“All countries wish to see change in two areas. First, they wish to end the system of male preference primogeniture under which a younger son can displace an elder daughter in the line of succession. Second, they wish to remove the legal provision that anyone who marries a Roman Catholic shall be ineligible to succeed to the Crown. There are no other restrictions in the rules about the religion of the spouse of a person in the line of succession and the Prime Ministers felt that this unique barrier could no longer be justified.

“The Prime Ministers have agreed that they will each work within their respective administrations to bring forward the necessary measures to enable all the realms to give effect to these changes simultaneously.”

Note: The 16 Realms are Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, Solomon Islands, Tuvalu and the United Kingdom.

Annex 2: Relevant statute law

Statutes relevant to succession to the throne include the following:

- i. Coronation Oath Act 1688
- ii. Bill of Rights 1689
- iii. Act of Settlement 1701
- iv. Act of Union 1707
- v. Princess Sophia's Precedence Act 1711
- vi. Royal Marriages Act 1772
- vii. Union with Ireland Act 1800
- viii. Accession Declaration Act 1910
- ix. Statute of Westminster 1931
- x. Regency Act 1937

Note: Some of the earlier statutes are sometimes cited as from a year earlier (eg Bill of Rights 1688), because of the old-style dating convention under which the new year began on 25 March.

Formal Minutes

Thursday 1 December 2011

Members present:

Mr Graham Allen, in the Chair

Sheila Gilmore
Andrew Griffiths

Mrs Eleanor Laing
Mr Andrew Turner

Draft Report (*Rules of Royal Succession*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 19 read and agreed to.

Annexes and Summary agreed to.

Resolved, That the Report be the Eleventh Report of the Committee to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Thursday 8 December at 9.45 am

Witnesses

Thursday 10 November 2011

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Professor Robert Blackburn, King's College London and **Dr Robert Morris**,
Constitution Unit, University College London

Ev 1

List of printed written evidence

1 Professor Robert Blackburn, King's College London

Ev 11

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

First Report	Parliamentary Voting System and Constituencies Bill	HC 422
Second Report	Fixed-term Parliaments Bill	HC 436 (Cm 7951)
Third Report	Parliamentary Voting System and Constituencies Bill	HC 437 (Cm 7997)
Fourth Report	Lessons from the process of Government formation after the 2010 General Election	HC 528 (HC 866)
Fifth Report	Voting by convicted prisoners: Summary of evidence	HC 776
Sixth Report	Constitutional implications of the Cabinet Manual	HC 734 (Cm 8213)
Seventh Report	Seminar on the House of Lords: Outcomes	HC 961
Eighth Report	Parliament's role in conflict decisions	HC 923 (HC 1477)
Ninth Report	Parliament's role in conflict decisions: Government Response to the Committee's Eighth Report of Session 2010-12	HC 1477 (HC 1673)
Tenth Report	Individual Electoral Registration and Electoral Administration	HC 1463
Eleventh Report	Rules of Royal Succession	HC 1615
Twelfth Report	Parliament's role in conflict decisions—further Government Response: Government Response to the Committee's Ninth Report of Session 2010-12	HC 1673

Oral evidence

Taken before the Political and Constitutional Reform Committee

on Thursday 10 November 2011

Members present:

Mr Graham Allen (Chair)

Mr Christopher Chope
Sheila Gilmore
Fabian Hamilton

Mrs Eleanor Laing
Mr Andrew Turner
Stephen Williams

Examination of Witnesses

Witnesses: **Professor Robert Blackburn**, Professor of Constitutional Law, King's College London, and **Dr Bob Morris**, Honorary Research Fellow, Constitution Unit, University College London, gave evidence.

Q1 Chair: Good morning, Robert and Bob. Thank you very much for coming in today to give evidence on the rules of royal succession. We are looking forward to hearing what you have to say. Members have some questions to ask you, but would you like to make an opening statement to point us in the right direction?

Professor Blackburn: Thank you, Mr Chairman. It is a great pleasure to be here today with my friend, Bob Morris.

I shall make a few opening observations, which might help to facilitate our discussion. As we all know, on 28 October it was announced from the Commonwealth Heads of Government meeting that various changes would be made in the royal succession laws. Those were that the male preference in line of succession would be removed, so that there was gender equality, and that the disqualification relating to the spouse of a monarch being Roman Catholic would be removed as well. That will apply to Prince William and the Duchess of Cambridge. It will not be retrospective.

The Prime Minister said that there would be a Bill in the 2012–13 Parliament, and a New Zealand working group has been set up to synchronise the arrangements. I think that that will be extremely important, because it is quite tricky, particularly with questions of timing and doing things in a particular order.

I think the reforms are welcome and long overdue. I presented the case for the changes more than 20 years ago in an article I wrote. At that time, of course, discussions on the monarchy were still fairly taboo, so I think it is worth reflecting that in attitudes to modernisation issues affecting the monarchy, the context has relaxed a lot. It is possible to discuss these issues now in a sensible manner, whereas, going back 20 years, it was quite difficult, because matters relating to the Crown were very sensitive.

The changes have almost universal support in the UK and across the Commonwealth realms, as those Commonwealth countries that retain the Queen as Head of State are commonly known. All three main UK party leaders support the changes, as do the Queen and the Prince of Wales. There is therefore no great heat or controversy about the reforms, though there can be sensitive knock-on issues over which

passions can be aroused, notably Church-State relations, the future of establishment, particularly in Scotland and, within the Catholic community, the Catholic disqualification of the monarch for their symbolic aspects, and also particularly perhaps in Canada's Quebec, among the separatist and republican movements, and in one or two other realms with a high level of republicanism, such as Jamaica and Barbados.

As a subject for discussion, the rules on royal succession are enjoyable for their curiosity value and because they are historically interesting. The whole subject raises deeper constitutional issues, such as how a Head of State should be selected and what qualities that person should possess to symbolise the nation.

The particular event that led to this evidence session—the agreement of the Commonwealth Heads of Government—shows once again how constitutional amendment in this country proceeds by way of ad hoc changes taken in response to some problematic event or occurrence. The event in this case is the marriage of the Duke and Duchess of Cambridge earlier this year and the likelihood that they will soon start a family. The argument of principle behind these changes was won years ago, but principle alone was insufficient to motivate the Major, Blair and Brown Governments to take the necessary actions. This whole episode therefore has something to tell us about the process of constitutional reform in the UK.

The proposed changes can be seen as part of a wider process of codification of the Crown, coming shortly after, for example, the codification of the prerogative power of treaty-making in the Constitutional Reform and Governance Act 2010. A new basis for financial support for the monarchy has been agreed. The Cabinet Manual has codified many understandings about the monarchy. The prerogative of dissolution of Parliament was superseded and codified in the Fixed-term Parliaments Act 2011. This subject raises the whole question of the process of constitutional development, whether some coherent set of principles should be driving the Government's constitutional reform programme and whether some established set of procedures governing constitutional amendment should be put in place.

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To summarise some of the range of issues that the Committee may wish to consider today, you may first want to look at the common law rules of royal succession and the Acts of Parliament regulating the royal succession. You may wish to look at whether the changes should be going further and whether, for example, the Royal Marriages Act 1772 should be repealed or amended and why that was not included in the Commonwealth agreement. Should there be an amendment removing the Catholic disqualification of the monarch? Then there is the application of the Statute of Westminster 1931, and the process of securing the other Commonwealth realms' agreement to the changes and their amendment processes. How is the position of the monarch's spouse affected by the proposed changes? What is the public position of the monarch's spouse? What should their title be? Should it be king, queen, prince or princess consort and so on? That has been discussed with monotonous regularity in the media.

What do these proposed changes have to say about the idea that a UK monarch may have a wish to retire or skip a generation? It has been suggested from time to time in the past that Prince Charles might wish to do that in respect of Prince William. Finally, should there be a more comprehensive codification of the law relating to the Crown, to bring it up to date with modern conditions? That could include, for example, the conventions relating to Prime Ministerial appointments and Royal Assent, regularising royal property and royal financial affairs, and laying down agreed principles supporting political neutrality of the monarch and the royal family.

Dr Morris: I agree very much with what Robert has just said. One of the outcomes of the recent discussions with the realms has been to put in place, for the first time, some kind of machinery for discussing these issues, which has not previously existed. There is a tendency for these matters to be discussed in government and then brought to Parliament as a *fait accompli*, because it has been agreed with everybody else already.

As Robert was saying, a number of issues arise on discrimination against not only Roman Catholics but everyone else who cannot be in communion with the Church of England. The changes in our society and the greater pluralisation of belief and non-belief would argue for revisiting the structure, which was mostly devised in the late 17th century when England was faced with the hostile Roman Catholic powers. The geopolitical situation has changed very considerably, but the apparatus that responded to that remains largely the same.

The problem is how one begins to initiate some sort of discussion on those issues. As Robert has said, in the past there has tended to be a blight on this. If you can only discuss it on demerit, it is too late to address these matters. Perhaps those are things that your Committee, Chairman, might wish to address at some point in order to have the public discussion, which is very difficult otherwise to initiate, and to locate it in Parliament, where perhaps it ought to be. For example, the coronation oaths have been altered over time without any statutory authority, and these are

really matters that Parliament should perhaps be given an opportunity to address.

I have one point to make about establishment, if I may. It is often presented as some *holus-bolus* thing. It is presented as an all-or-nothing problem, in that the Church is either established or it is not. In fact, it is not an inseparable package. We are perhaps looking at the remains of the confessional state, set up from the Reformation and gradually mitigated. One could remove bishops, for example, from the House of Lords without disestablishing the Church of England. Indeed, it is very difficult to see what the irreducible minimum of establishment actually is. For example, it is generally recognised that the thoroughly disestablished Church in Wales none the less retains some establishment characteristics? These are matters that one could perhaps examine in more detail.

Chair: Thank you. Okay, Eleanor, would you like to start us off?

Q2 Mrs Laing: It is great to be discussing this subject at last, and I am very grateful to hear you both say that it appears that there is widespread support for the changes. I remember on the day Prince William was born—I was then a forward-looking reformist new law student—that my reaction was, “Oh, what a pity. That means we won't have to discuss male primogeniture for 20 years.” I was wrong. It was 30 years. Nobody wanted to face up to it, and we are often told that the reason for that is not any feeling about the ability of a female to be monarch—after all, we have had a brilliant female monarch for over half a century—but the fallout, as it were, from beginning to tinker with the part of the constitution that this affects. I wonder if you could say a little bit more about, for example, the Act of Union 1707—the formation of the United Kingdom—and how that would be affected? What issues are opened up in that area by our beginning to look at this?

Dr Morris: The Act of Settlement is not entrenched. It can be altered by Parliament and has been effectively invaded in a number of ways—much to the dislike of the Scots. For example, clerical patronage was re-established in 1711, despite the fact that it was thought that it had been protected against by the Act of Settlement. One would have to revisit it because of the change in the descent rules and also perhaps because of the religious provisions. The very first oath that the new monarch swears is the Scottish oath in the Accession Privy Council the day after the death of the previous monarch. This text obliges the monarch to swear to uphold the Church of Scotland and the Presbyterian form of Church government in Scotland. A general point about the oaths is that they were devised at a time when the monarch was also the chief executive, and what they said went. That has not been the case for a very long time. One way of looking at this is that the oaths at present require the monarch to swear to do things that they are not in a position to fulfil. That is one reason, among others, why one might want to revise or revisit this material.

Professor Blackburn: One interesting aspect, looking to the future, is that Scottish independence might very well be on the horizon. Alex Salmond has said that he wishes to retain the Queen as Scotland's Head Of

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State, but how exactly would that work in practice? Would there be a Governor-General there such as in the Commonwealth realms? How would the principles of ministerial responsibility or giving advice to the Queen operate? So there are some interesting issues in relation to the Queen's position in Scotland.

Q3 Mrs Laing: That is precisely what I was exploring. We are opening a can of worms once we start to look at this, although I am very much in favour of doing so. Can I explore the established Church a little further? It is not just the Church of England; we are also looking at the bishops in the House of Lords, and it was interesting to hear what Dr Morris said a few moments ago about the ability to remove bishops from the House of Lords without disestablishing the Church. The argument currently used is that we cannot think of removing bishops from the House of Lords because that would affect the establishment of the Church. Can you say a little more about the establishment of the Church? I declare an interest, Mr Chairman, as a member of the Church of Scotland. I am in a small minority, but we have strong feeling about the matter.

Dr Morris: Those who do not wish to change the terms and arrangements in England are prone to argue that you cannot touch it without bringing down the whole structure. There is abundant room for another view, which is to regard the discrete provisions that remain from the confessional state as something that one can tackle individually. That includes, for example, the role of supreme governor. One could argue that one must not touch that, otherwise the establishment will break down around our ears, or one could take the view that we can respond to the sort of society we have become and that we can re-interpret that as well, as we have re-interpreted so many other parts of the constitution, and make it possible, as one bishop at least thought some years ago, for even a Roman Catholic to be the supreme governor of the Church of England.

The role of the monarch in regard to the Church of England is largely devoid of any real content now. The Church, for the purpose of appointing its own senior clergy—including the Archbishop—is autonomous. Bishops and other senior clergy are now appointed by a private, unelected, unaccountable committee of the Church of England, and that includes, of course, the bishops who appear in the House of Lords.

The removal of the Prime Minister from any active involvement in the process makes him now merely a post box for the recommendations that emerge from the Church of England committee. It means that the Church, for these purposes, is autonomous—as it wishes to be. One can perfectly respect that, but it does not suggest that one cannot contemplate discrete changes in the arrangements. The position of the bishops is merely one of those.

The Church of Scotland is in a different position. Some argue that it is established. Some wonder in what sense it is established. It has, of course, an entirely different relationship with the Crown—as you know better than me.

Professor Blackburn: You could argue that disestablishment will happen when the Church of England itself wishes to be disestablished. A fairly substantial body of opinion within the Church of England supports disestablishment. As I see it, from the state's point of view, the planks of establishment are basically the Queen being Supreme Governor of the Church of England, over which she acts very neutrally, of course, and the appointment of bishops, which has been taken out of the control of the Prime Minister in practice.

The bishops in the House of Lords look as though their days might well be numbered in the reform process that is going on now, and that just leaves the fact that ecclesiastical law has to pass through Parliament to come into effect. The planks of establishment are slowly one by one evaporating or changing. Disestablishment might happen anyway at some point in the future, but it might well be triggered from within the Church of England itself.

Dr Morris: I think that I would argue that that would be the best way for it to happen—if it were to happen. The Church would then be much more in control of the outcome. The danger in the present situation is that changes may occur, which have not been thought through in the sense of their effect on the Church, so it is perhaps better for the Church to take the control of the process. Of course, it has been very reluctant to do so, and has made no unforced changes by its own initiative.

Professor Blackburn: A great deal will change with the passing of Queen Elizabeth. With Prince Charles on the throne, if he becomes King—I have written a book about this: “King and Country: Monarchy and the Future King Charles III”—there will be a sea change in all sorts of different ways. It is well known that Prince Charles is interested in other faiths and wants to be regarded as “Defender of Faith” rather than “the Faiths”. Paddy Ashdown in his diaries referred to Prince Charles saying that he could see no reason why Catholics should not be on the throne. There will be a very different attitude towards these things after Queen Elizabeth.

Q4 Sheila Gilmore: Just to follow up on the Scottish dimension, is there any respect in which opening up the Act of Settlement now could constitutionally make it any easier to unpick the Act of Union and everything that goes with that? Is there any relationship between the two?

Professor Blackburn: I will have to think further about that, and possibly get in touch with you. My instinct is to say no, I do not think it would create any great difficulties.

Dr Morris: I support that view. One is not talking about the core areas of the political union.

Professor Blackburn: If you are looking for difficulties in this area, including implementing the change across the Commonwealth, you can come across an awful lot of theoretical problems, discrepancies and inconsistencies. I think the change that has been agreed by the Commonwealth Heads of State will be straightforward, despite those theoretical difficulties, as long as there is genuinely political agreement across the 16 realms.

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Dr Morris: It is characteristic for people, if they do not wish to see change, to exaggerate the difficulties, saying that it is impossibly difficult to legislate or that it will upset the Union of 1707 and so on. I noticed that an Honorable Member put this point as to the difficulties in a debate last year: “Popycock. Absolute tosh. Posh tosh, maybe, but absolute tosh.”

Q5 Sheila Gilmore: Obviously, once we open up the question of succession to the throne in terms of primogeniture, the question will be asked, “Why not do that for other titles?”

Dr Morris: Titles of honour?

Q6 Sheila Gilmore: Is there any reason why we should not be looking further?

Professor Blackburn: To remove the disqualification relating to the monarch?

Q7 Sheila Gilmore: If we say that a woman, the first-born child, is the one to inherit the throne, should that not be applied to titles?

Professor Blackburn: To the aristocracy generally?

Q8 Sheila Gilmore: Yes, earldoms, dukedoms, the whole lot.

Professor Blackburn: Well, there is some principle and consistency there, I agree. As I understand it, the Government have been asked about that in the House of Lords, and a Minister firmly rejected it and said there would be no change in the law relating to the aristocracy. I can see that would cause an upset to a very large number of families, of course.

The whole subject is an area of how in this country we live with inconsistencies of principle all the time. It will raise difficulties. With regard to the hereditary principle itself, I felt it was extraordinary in the early 1980s that Mrs Thatcher suddenly resurrected the hereditary principle. Both William Whitelaw, when he ceased to be Home Secretary to become Leader of the House of Lords, and George Thomas, the retiring Speaker of the House of Commons, were given hereditary viscountcies. That was an extraordinary resurrection of the hereditary principle after about 18 years. What was particularly extraordinary was that George Thomas did not have any children, so why do that? William Whitelaw had four daughters, none of whom could inherit. You can by letters patent allow for a title to go through the male heir, but that is a very special procedure. I think it might have been done in respect of Earl Mountbatten, or one or two very special people. I remember hearing that William Whitelaw had wondered about getting the letters patent changed, but it seemed a bit too much. He himself expressed some curiosity as to why the hereditary principle had been raised at all. I don't know whether Mrs Thatcher was thinking of her future. Of course, as to the future, although no hereditary peerage was conferred on her, an hereditary knighthood was conferred on her husband, so her son is now Sir Mark Thatcher—and a baronetcy hadn't been created for even longer than a life peerage.

Dr Morris: To return to the point that Mrs Laing was making about cans of worms, this is an example of

the fact that one cannot half-open a can of worms, because all the worms will come out.

Q9 Fabian Hamilton: Professor Blackburn, I would like to clarify something. Does that mean that if Willie Whitelaw's eldest daughter had a son or any of the other daughters had a son, they could inherit? No?

Professor Blackburn: As I understand it, the title is defunct because it can't pass on to the daughters.

Dr Morris: There would have to be a special remainder were it to go through a daughter.

Q10 Fabian Hamilton: So the daughter couldn't inherit the title, but the daughter's son could?

Dr Morris: No, there has to be a special remainder in the creation of the peerage.

Sheila Gilmore: How does that affect “Downton Abbey”? I thought the whole point of that was that the title went to a cousin.

Q11 Mrs Laing: Wasn't that the clever thing about those two viscountcies? They were safe because neither of the gentlemen had a son and therefore, although technically they were hereditary, in practice they weren't?

Dr Morris: Yes.

Q12 Mr Turner: In fact, we have opened a can of worms and we are told that some bits are within the can of worms and some bits are outside it. An example is what Lord Strathclyde has said. I'm going to have lunch shortly, so I'll watch the truth of this—I say that because my Conservative Association is coming here today. Why did Lord Strathclyde, presumably having done some homework before he answered the question, say that we can intervene and change the royal line, but we cannot or we don't wish to change the peerage? It's got to be barmy—not necessarily a bad thing, but barmy. Can we have a system that is pure? Answer, no.

Dr Morris: Do we have to have a system that's pure? Perhaps the answer's no there, too. A columnist in the *Financial Times* was arguing that one of the effects, or apparent intentions, of the change to the primogeniture rule is to infuse logic into a system that isn't logical. Monarchy, in that sense, isn't logical.

Q13 Mr Turner: No, exactly. So why are we worried about this?

Professor Blackburn: Some worry and some don't. It's really a theoretical issue, isn't it? As I said earlier, the constitution of this country appears to change on an ad hoc basis in response to a particular event or problem that arises. We don't go in for laying down some underlying guiding principles upon which we then create our political and constitutional system. There's a good argument to say that perhaps we should. It's the symbolic aspect of the hereditary principle that clearly worries some people, and that certainly worries republicans. That's the aspect that causes worry, but for those people who are quite happy living with the inconsistencies from our historical traditions, there's no particular problem.

Dr Morris: Inconsistency doesn't matter of itself, but if it has some larger resonance, perhaps it is relevant.

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One of the problems about, for example, removing the ban on marriage to a Catholic is that you draw more attention to the existing bans. You will have noticed, perhaps, the very different language with which the Cardinal in England and the Cardinal in Scotland greeted this change. The Cardinal in Scotland has always been much more outspoken on this matter, whereas the Cardinal in England has always been rather more reserved in his responses to the situation.

Professor Blackburn: The problems and inconsistencies are most damaging in a sociological context, republicans would argue. It is about the symbolic aspect of an hereditary monarch. Some would say that the symbolic aspect of having someone who is not allowed to be Catholic on the throne is offensive as well. In the world of politics, any problems like this tend to be ironed out relatively smoothly.

Another conundrum comes to mind. The law relating to primogeniture is a common law principle emanating from feudal property law. For the first time ever, a situation arose in 1952 of a monarch dying with two daughters and no sons. Under the old, feudal law, strictly speaking, the Princesses Elizabeth and Margaret should have taken the throne jointly, because that is how mediaeval property law worked, but of course, that would have been a nonsense. When the Privy Council convened itself as an accession council, it simply declared the common-sense solution, which was that the elder daughter should become sole monarch.

Q14 Mr Turner: So let us imagine—it's always great fun imagining—that the Jamaicans have an election and someone gets in who does not want to change the rules between now and the death of the Duke of Cambridge, which, I assume, will be about 60 or 70 years away. Presumably, they can change or not have to change the realms, so one might be different. That is allowed isn't it?

Dr Morris: There are difficulties here. The essential one is that other realms can change their constitutions in any way they wish, but the United Kingdom is not allowed to do so without their consent. That is partly because of the 1931 Act, whose status is a bit uncertain in the sense in which it survives. The provision was only in the preamble, anyway; it had no direct legal effect, which Robert has pointed out. But it is much more to do with the practical matter. You want only one monarch throughout the realms; you do not want different monarchs because of different succession rules. One of the smaller realms—Tuvalu, for example, which has a population of 11,000, 97% of whom are Congregationalists—might decide to go on a different furrow. There also might be a problem, too, with states like Canada and Australia, which have large Roman Catholic majorities. If they contemplate this situation, they might not be too happy that there are still rules that would persist against Roman Catholic preference. The Australians might pass legislation that entertains the idea that succession provide that there is no hostility to Roman Catholics or whatever. What its effect might be, I cannot foresee.

Q15 Mr Turner: Dr Oddie says the glitch in the scheme is that, under canon law, the children of a Roman Catholic who is married to the Crown would have to be brought up as Catholics, so presumably they would automatically be removed. Is that accurate?

Dr Morris: Well, this is a matter for Roman Catholic canon law. I understand that that might be one of the effects. One might therefore have to confront a situation in which one of the closest heirs—he or she—wished to take up the Roman Catholic religion and was barred under the—

Q16 Mr Turner: But is it a question of having to take it up, or is it the automaticity of your being a Roman Catholic from birth, when one—

Dr Morris: The only possible authority on this is papal—it is certainly not me. It is a matter of election, perhaps, in the sense of whether you take this up or not.

Professor Blackburn: It may be worth while being clear about the application of the Statute of Westminster 1931 to all this and the extent to which there will be synchronisation across all the realms. The 1931 Act, which was declaratory of what were regarded as existing principles at that time, laid down two particular rules that are relevant here. First, by convention, before any Act of the Westminster Parliament can come into legal effect in the UK or elsewhere to change royal succession, a procedure is imposed for the prior agreement by the other Commonwealth realms. Under that procedure, all the Parliaments of the realms must give their assent. I have updated that principle because the phraseology of the 1931 Act refers to the "dominions," which at that time were Canada, Australia, South Africa, New Zealand and so on. Newfoundland has now merged with Canada, so that is out of date.

Dr Morris: And Ireland.

Professor Blackburn: Yes, and Ireland—the Irish Free State at the time.

The general understanding is that the same principle would extend to the Commonwealth realms. This is a constitutional convention, and there is an issue: could the UK ignore the convention and regulate for itself and/or other Commonwealth realms, if it wanted to do so? I think it probably could proceed to do so. If there were one or two realms that created a difficulty, that could go back to the Commonwealth Heads of Government meeting and they could determine by agreement among themselves whether this convention needed to be slightly updated to allow for majority support, or whatever, but I do not think that anything here could, in practice, hold the UK up in this respect. The other rule is that an Act of the UK Parliament will not extend to any Commonwealth country unless that country has requested and agreed to it. This is both a convention and a law—it is specified in section 4 of the statute. Additionally, each of these independent countries has to go through their own constitutional processes. In just about every case they are slightly different.

This is, in theory anyway, quite a major undertaking. The New Zealand working group is going to have its work cut out to synchronise and harmonise all of this,

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but it will be very interesting. I think it will go through without any particular difficulties.

Dr Morris: Of course there have been changes since the 1931 Act. The Australians, the Canadians and the New Zealanders have all legislated to remove any possibility of the United Kingdom Parliament legislating in their case, so things have moved on. The essential thing is to get agreement between all the realms so that a single person's succession is agreed on. How that is dealt with will vary between the states. There is an argument in Australia, for example, about whether it will be necessary for the Commonwealth Government to secure the agreement of the individual Australian states, which, being former colonies, have a rather different relationship with the Crown than the provinces in, for example, Canada. These are all local complexities that may give rise to some political difficulties, but, as Robert has said, with good will I am sure it can be overcome.

Professor Blackburn: The day before last, I trawled through the internet to look at local media organisations in some of the Commonwealth realms, and I was surprised that there appears to be very little discussion about this subject. It does not seem to have ignited or excited any public opinion in the realms, yet anyway, so far as I could see.

The only difficulties that I can foresee would be some people—some individuals or groups—within the countries concerned creating some difficulties. I do not think that will be the case in Australia, interestingly, even though it is well known to have a strong republican movement. Although at the moment there is a small majority in favour of retaining the monarchy, there is a widespread expectation that, after Queen Elizabeth, they will create their own republic and Head of State. That will be the appropriate moment, and on the current reform proposals on the royal succession rules Julia Gillard has said that she regards the matter as being straightforward. There is a procedure in the Australian constitution for a form of co-operative federalism, whereby the Australian Parliament can legislate at the request of, or with the concurrence of, each of the state Parliaments. That is probably the procedure they will use there.

In Canada it is a bit more tricky because, while theoretically there are powers under sections 44 and 91 of the Canadian constitution, which I think will be used, giving them the power to change matters relating to the executive Government of Canada, there is a possible procedural problem elsewhere in the constitution. The constitution stipulates that constitutional amendments to the office of the Queen can be made only by proclamation of the Governor-General when authorised by resolution of the Senate, Commons and legislative assemblies of all the provinces. The better view is that that provision does not affect the office holder, it affects the office. That might not be applicable, but I can see that legal challenges could be mounted in Canada on that basis. They probably would not succeed, but they would be a vehicle for creating some problems—it would probably be Quebec separatists or anti-monarchists who would wish to use those arguments.

Otherwise, in Jamaica and Barbados, there have been indications by Prime Ministers or former Prime

Ministers that they wish to move to a republic, so whether they want to make something of this occasion remains to be seen. And, of course, when the legislation goes through this Parliament, it remains to be seen whether parliamentarians in either House use the occasion to raise other issues relating to the monarchy as well.

Q17 Fabian Hamilton: Going on from that, is it theoretically possible for any of these Commonwealth nations, notwithstanding the 1931 Act, because they disagree with some provisions that are being discussed some time in the future, to say, “We don't recognise that inheritor of the monarchy. We don't recognise that heir to the throne. We recognise somebody else as the heir to the throne.”? In other words would it be possible in 50, 70 or 100 years' time for some nation, if they still remained part of the Commonwealth and saw the monarch of Great Britain as their Head of State as well, to have a different monarch, somebody else in the family? Is that at all possible in theory?

Professor Blackburn: Well, you can separate up the Crowns, yes.

Dr Morris: If the rules diverge that could happen and that is why it is so important to get agreement among all the 16 realms.

Q18 Mr Turner: In the declaration it says that there are no other restrictions in the rules about the religion of the spouse of a person in line of succession and the Prime Ministers felt that this unique barrier—that is, marrying a Roman Catholic—could no longer be justified. Does that mean that if the heir to throne married a Jewish or Muslim spouse, as long as they agreed to attend Anglican services or did not insist on the conversion of their spouse to their own faith, that would be okay?

Professor Blackburn: There are no special provisions relating to the public office of the spouse of a monarch, apart from not being a Papist, as we have been discussing now. They don't have to be part of the coronation ceremony. They don't have to undertake any oaths. Whether there should be some greater formalisation of their position is a moot point—sort of equivalent to First Lady in America.

Q19 Fabian Hamilton: But presumably their children have to be brought up within the Anglican communion?

Dr Morris: There is no provision as such. But down the lane, as it were, is a requirement that the monarch must be in communion with the Church of England. His spouse may, as you say, be of any faith or none. There may be effects, as you raise, for example. Of course, one of the issues the Church of England itself raises is that these arrangements should remain, among other things, because it is not its fault that Roman Catholics cannot be in communion with the Church of England. This is a requirement of the Roman Catholic Church. This is a private grief, which I am not sure that should extend, perhaps, to public policy.

Professor Blackburn: As I understand it, Catholics are under some form of obligation to bring up their children as Catholics, or there is a heavier weight of

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obligation than there is with Anglican members, which is a theoretical problem.

Q20 Fabian Hamilton: If the heir to the throne was male and married a Jewish woman, the Jewish line goes through the mother, so even if the child of that union was brought up in the Anglican communion, theoretically that child would still be technically Jewish under Jewish law. Does that matter?

Professor Blackburn: So long as that person can satisfy the requirements of being a monarch, the child, in summary, cannot be a Roman Catholic, cannot marry a Roman Catholic at the moment, must make a public declaration that he or she is a Protestant, must join communion with the Church of England, must swear to maintain the established Churches of England and Scotland, then that is all right. But if they can't do that, then they are disqualified from being a monarch.

Q21 Fabian Hamilton: Why is it not time now, then, when we are making these reforms, to disestablish the Church of England? Would that be such a shocking thing to do now, because it seems nonsensical for the monarch to have to adhere to any particular faith, surely?

Dr Morris: As a thought experiment, if we moved from the virtual republic we are to an explicit republic, would one for a moment contemplate imposing religious tests on the president? The answer is no. On the other hand, one could alter these rules without necessarily disestablishing the Church of England. For example, as Robert has explained, the Church of England has a special right of initiative in legislation that passes through this House, and there are other features that could remain.

One of the crucial ones is in the hands of the Church of England itself, which is whether it wishes to retain parochial coverage throughout the whole of England. That is a matter of discussion in the Church of Scotland at the moment, simply because of resource pressures. These issues are in the hands of the Church of England and do not necessarily have to be addressed if one is addressing the religious rules.

Q22 Fabian Hamilton: On the occasions that I have been to, for example, Iran or Pakistan, which are explicitly religious republics—or in their cases, Islamic republics—they always point to the fact that, “You may be a monarchy but you are a religious monarchy; you have a state religion, just as we have a state religion, so what is the difference?”

Professor Blackburn: There is no appetite within the political establishment to tackle this issue, although I think I am right in saying that Tony Blair, John Reid and quite a number of other senior politicians have expressed that, in principle, they favour removing the Catholic disqualification relating to the Head of State.

Dr Morris: There is some support also, of course, from other religions for the continuation of certain aspects of establishment. They regard, for example, the very special position of the Archbishop of Canterbury and the fact that there are bishops in the House of Lords—the legislature—as ways of extending some sort of umbrella of protection or

patronage over religion more generally. These views have perhaps grown in some respects, simply because of changes in the patterns of belief—not only pluralisation, but the fact that religious belief has declined very sharply in this country.

Q23 Fabian Hamilton: So you do not think the French system, where expressions of faith within any sort of public institution or public life are expressly discouraged, if not forbidden, will ever will ever happen in the United Kingdom—is it not time to dispense with the outmoded idea that we have an official state religion?

Dr Morris: One can be secular without necessarily being secularist. The French system is secularist, but, even there, there are compromises—it gives substantial subsidies to Roman Catholic schools, for example, and the arrangement in 1905 was that the state would pick up the responsibility for maintaining religious buildings built before then. So it is a mixed economy, rather more than it says, but the state attitude is secularist. I do not think anybody has suggested that what is now a secular arrangement in Britain should move in that direction.

Professor Blackburn: Disestablishment is a very difficult, sensitive and complex issue, which is some steps removed from the major issue that we are talking about today. I am an Anglican. I can see in principle the arguments for disestablishment, but I can also see the pragmatic advantages of having an established Church.

Q24 Stephen Williams: I am getting to the point now where I am struggling to find any more worms in this can to try to hook. As a Welshman—Mrs Laing's Celtic heritage is rather more obvious than mine—is this really an English problem? Everyone keeps saying it is so complicated. The English love to think their built-up traditions are so complicated that no one else can possibly unravel them, unless you are from outside them, in which case you think they are ludicrous—as Lloyd George did, or even James VI and I for that matter. The Queen manages to be Queen of Wales, Queen of Northern Ireland and Queen of Scotland without being head of any religion in those parts of the United Kingdom, so why could she not be Queen of England without being head of a particular denomination of a particular faith?

Dr Morris: It is one of the questions of logicity which were raised earlier. For example, when the Queen crosses the border into Scotland she ceases to believe in bishops, and when she comes back she believes in them again. One can imagine, as one crosses the border, that some synapses of the brain open and some close—one lives with these kinds of inconsistencies.

I suppose the point is that the Church of England comprehends, theoretically at least, 85% of the UK's population. There is a sense in which the Church of England operates in a UK mode—for example, when it crowns the monarch and so on—whereas you could say that the Church in Wales, which is a disestablished Church since 1920, occupies a not dissimilar position in some respects in Wales, certainly in civic duties,

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civic ceremonies and so on and so forth. But I share that perspective, coming from Wales myself.

Professor Blackburn: I will simply observe that we have an historical constitution and so we have this rag-bag of ancient statutes, many of which still apply and have created a large number of inconsistencies, many of which we have got around by creating new political conventions in their political application.

Q25 Stephen Williams: What I am trying to get at is that the Church of Ireland was disestablished in 1869, you have just said that the Church was disestablished in Wales in the 1920s, and I am not such an expert on Scotland but I do not think it has ever been properly established there, but the sky hasn't fallen in on any of those countries and no one thinks the Queen is any less the Queen. Those Churches, as you say, have a community role in Cardiff, St David's or wherever, so why is it complicated in England? It's not really, is it, if we're honest? People just like to keep these things and therefore say that it is complicated to change them. I am not sure that it is any more complicated than it was in 1920 or 1869.

Dr Morris: I would agree, yes. It is "posh tosh" to say that, as Chris Bryant says. There are lots of legal theoretical difficulties, but the only issue otherwise is securing political acceptance for the various changes where they apply. So here, the complexity is getting agreement across the Commonwealth.

Q26 Stephen Williams: Perhaps we need another Welsh Prime Minister.

May I go on to the aristocracy? One of you said, and certainly Lord Strathclyde has said, that it is complicated to change so that you can have a Marchioness rather than a Marquis, or a Duchess rather than a Duke. Why is it complicated? It's quite straightforward, surely.

Professor Blackburn: It will unsettle the expectations of a large number of aristocratic families, and that is the difficulty. It would probably take a lot of thought and time for parliamentary counsel and consultations to take place to think through the implications of all the changes. It might well be unpopular among the aristocracy, so one would have to take opinion about that as well. So, are you doing this because there is a steam of heat behind the issue within the aristocracy, who want to change their own succession rules, or are you doing it simply as a matter of symbolism? There are all sorts of symbolic things that might be objectionable in principle that we put up with because changing them might create practical difficulties.

Dr Morris: Would we want to intrude into private spheres? These families will have made all sorts of private dispositions and settlements and so on, which presumably would have to be revisited.

Q27 Stephen Williams: Perhaps this is an area of law that I am not particularly competent in, but it is not the property but the title that we are talking about. The title currently gives political rights, until we eventually reform the House of Lords—even the most basic sense of removing hereditaries. Until we do that, the nearest top aristocrat to my seat would be the

Duke of Beaufort. I do not happen to know who his children are, but let us just suppose there was a daughter. Why then should a Duchess of Beaufort not be able to sit in the House of Lords any more than the Duke of Beaufort? You would not say that a woman could not be the MP for Bristol West because that would be outrageous.

Professor Blackburn: Well, another way of looking at this is: does it really matter? Do these titles really matter any longer?

Q28 Stephen Williams: They do in the House of Lords, don't they? There's still 92 of them.

Professor Blackburn: Yes, but the hereditaries will be cleared out very soon.

Stephen Williams: Will they?

Professor Blackburn: But unless there is some large landed estate involved, and that is becoming increasingly rare with death duties, does it really matter how much you really want to be called a viscount or whatever? I think that the social status of this is in decline, although some people might still love it.

Incidentally, this also says something about the position of the King and Queen today, because some people look at the fairness or unfairness with respect to the person who has to be King or Queen, but the situation has changed vastly. The position of King or Queen is not as enjoyable as it used to be, to put it mildly, and the disqualifications do not mean that they cannot be a Catholic or whatever, just that they will not be King or Queen. That might not be such a bad prospect for some people these days. The job of a head of state is extremely laborious. There is no retirement as such, and, as we have seen over the last few days, the levels of intrusion from the mass media can be quite horrendous.

Q29 Stephen Williams: Conservative Members and fellow members of the coalition may want to put their fingers in their ears at this point. For the aristocracy, not the head of state, does it comply with the Human Rights Act 1998 to say that a woman cannot become the Duchess of Beaufort and sit in the House of Lords?

Dr Morris: I believe that it does, because the relevant provision applies only to the rights that are in the legislation itself and not more widely. But I think, as Robert has pointed out, some of these points do collide with the tendency for equality in other legislation that Parliament has passed. Classically, I think these are matters for Parliament to decide.

Professor Blackburn: There is the embryo of a legal argument there. It is a better one than suggesting that the Catholic—or possibly gender—disqualifications relating to the monarch are in breach of the Human Rights Act. I think the religious ones in particular could be justified upon the basis of the established Church, and you have to bear in it mind that there is a margin of appreciation. The European Court of Human Rights will take into account indigenous circumstances and the political system as it operates, and, of course, the Government at the moment are trying to widen the margin of appreciation. So there is the embryo of an argument there about

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discrimination in holding a public office, but I would not be confident about whether it would succeed.

Chair: Eleanor, you wanted to come back briefly before I call Chris.

Q30 Mrs Laing: Would it be practical simply to remove any legal requirement for the way in which a title was passed by primogeniture and allow a particular aristocrat to decide who should be his heir? Would that get around the problem of families having, at this point, made plans that are difficult to unravel and give them the choice? There are some enlightened dukes.

Professor Blackburn: This would relate to the title?

Q31 Mrs Laing: Yes. No, actually it could not relate to the title only, because it may also have to relate to the passing on of property.

Dr Morris: Passing on a property is not governed by the passage of a title.

Professor Blackburn: Unless there is an entailed interest or something like that.

Mrs Laing: Unless there is an entail. That is what I meant.

Dr Morris: But that would be a matter for the private resolution of the family not for the public law quality of the title.

Professor Blackburn: I think you could possibly legislate with respect to the title, but you are entering the area of trust law and property law otherwise.

Mrs Laing: I think that answers my question. It is complicated.

Q32 Fabian Hamilton: But if, as Stephen says, the title confers the right—in 10% of cases—to sit in the House of Lords and therefore have a say in the legislation in this place, that actually might be very relevant, and I think your solution is probably extremely good. Remove the barriers and let the families decide.

Mrs Laing: Exactly. And there are some enlightened dukes.

Professor Blackburn: Should that happen to the royal family as well?

Mrs Laing: Exactly. Thank you.

Q33 Mr Chope: None of these changes will actually make any difference in substance for 50 or 60 years at the earliest, so I come to this thinking that this is just a cynical exercise in gesture politics.

First, is it correct that the Cook Islands and Nauru are realms that were not consulted about this? Secondly, does this whole proposal not avoid the big issue, which is one of potential abdications, because abdications require the consent of all the realms? It is probably more likely that a scenario may arise where the monarch wishes to retire because of age or ill health, or a successor wishes not to take on the crown because he wishes to embrace the Roman Catholic faith, or a daughter entitled to the succession might say: “No, I think it is right that my brother should be able to take over, because I believe in male succession.” There are a whole range of different

scenarios that may result in an abdication. Since an abdication is potentially much more of an issue in the next 50 years, why are we not addressing the issue of abdication? Why are we not introducing more freedom of choice into this whole concept?

As Professor Blackburn was just saying, it is not necessarily an easy job to take on the job of being the constitutional head of state of a large number of countries. Why can we not say to the royal family that they can sort out who will take over among themselves, rather than having these very rigid rules about primogeniture? Although it is not male primogeniture, it is retained. Why can we not have a lot more flexibility about which member of the royal family should take over from his mother or his father?

Professor Blackburn: That is an interesting point. It is a good example of how this change might throw up other issues that should be discussed during the passage of the parliamentary Bill. In a sense, the royal family have a system that they agree among themselves, which is male primogeniture. But now this is what they are changing, and the Queen has indicated that she agrees with the change.

One important aspect of the change that is taking place and for the working group led by New Zealand is that they will create a useful precedent for the future in how you go about any changes to royal succession. This could handle or deal with a retirement or an abdication.

Q34 Mr Chope: So the terms of reference of the working group enable it to go into issues of abdication.

Professor Blackburn: No. No one politically wants to contemplate abdication or retirement, because it would create difficulties and raise other things that would make this reform more controversial. At the moment the move seems non-controversial, and I do not think that they will want to take on board any issues that will broaden the debate and make it more controversial and therefore more problematic.

Q35 Mr Chope: But surely the counter-argument to that is that the reason that this has been brought forward at this stage is because nobody knows whether the latest royal couple will have children and, if so, whether the first-born will be a male or a female. We can discuss this in neutral terms. At the moment, there is no suggestion that anybody wants to abdicate or retire, so surely it is better, therefore, to discuss those issues in a neutral situation, rather than have them thrust upon the realms if they should suddenly arise.

Professor Blackburn: I absolutely agree. Making major constitutional reforms is best done when temperatures are cool and you can be rational and non-emotive about it. On that basis, you can probably get cross-party support. Unfortunately, that it is not how constitutional change happens in this country. I wish it did. There is a strong argument for agreeing a set of underlying principles for our political and constitutional arrangements and agreeing an established procedure for constitutional amendments, as opposed to the ad hoc way some are pushed

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through, because of an emergency, however important they are. Others may be subject to a referendum, where there are no established procedures.

I very much favour a change. It may come, because there are increasing numbers of people who support the viewpoint that it is better to make constitutional changes on principle. There are some developments towards codification and tying up loose ends, but it is painfully slow, and most of them still take place on an ad hoc basis and that is still the approach of this Government.

Dr Morris: And without any existing machinery. There is no machinery to do this. These issues in the past have been considered only on the death of the sovereign. Then, the Scottish oath has been sworn before anyone has turned around. The muddle over altering the coronation oath in 1936–37 is awful to read about. In the end, it produced something that made the monarch swear that they supported establishment throughout the United Kingdom, which was not intended, but it was what the oath said. Happily, that was not repeated in the oath in the Regency Act 1937. I strongly support what Robert has said and what you are hinting at. One of the good things to emerge from the current round of discussions is that it might precipitate now some more continuous machinery. At the moment, this group of officials has no remit other than to address the two proposals that the Prime Minister tabled on 28 October.

Professor Blackburn: It might be worth adding that this is the type of thing that university departments

do as well. There are quite a few—some written by myself!—sensible articles envisaging these types of situation and how retirement and abdication might be handled.

Q36 Mr Chope: Have you got an answer about Nauru and the Cook Islands?

Dr Morris: They are not realms in themselves; they are dependencies of realms.

Professor Blackburn: I believe that there is a recognition that whoever will be regarded as the head of state in New Zealand will also be regarded as such in the Cook Islands. I do not think that any political difficulties will emanate from the Cook Islands.

Chair: Does anyone else want to come back at all? In that case, unless you want to make some final summation, we would like to thank you for—

Mrs Laing: Of course, there might be something that you have missed in this can of worms. There are undoubtedly some hiding down there that we have not thought of yet.

Q37 Chair: No doubt you will have a chance to have a little think once you have left the Committee, so feel free to send in additional information.

Professor Blackburn: I was intending to send you a written memorandum by next Monday. I will do so if you would still like that.

Chair: That would be helpful. Thank you very much, Robert and Bob, for coming along this morning. Thank you colleagues.

Written evidence

Written evidence submitted by Professor Robert Blackburn, PhD, LL.D, Professor of Constitutional Law, King's College London

THE RULES ON ROYAL SUCCESSION: THEIR NATURE, APPLICATION, AND REFORM

I have been requested by the Committee to provide it with a written report, presenting a discussion and analysis of:

- the proposed changes to the rules on royal succession announced at the Commonwealth Heads of Government meeting;
- the present rules on succession to the Crown explained;
- the provisions of the Royal Marriages Act, and framing their reform;
- the process of implementing the proposed reforms in the UK and across the Commonwealth realms; and
- the wider public implications of the Government's proposed changes, and related areas where opinion on reform has been expressed in recent times.

1. THE PROPOSED CHANGES TO THE RULES ON ROYAL SUCCESSION ANNOUNCED AT THE COMMONWEALTH HEADS OF GOVERNMENT MEETING

The reforms agreed in principle between the Heads of Government of the Commonwealth realms (as the countries retaining the Queen as their Head of State are known), as issued in their joint statement at Perth in October 2011, were to remove the male preference in line to the throne; and to remove the disqualification applicable to a monarch or person in line to the throne if they marry a Roman Catholic.

The official statement read:

Statement of Friday 28 October issued at Perth following a meeting of the 16 Realms of HM Queen Elizabeth II

The Prime Ministers of the 16 Commonwealth nations of whom Her Majesty the Queen is Head of State have agreed in principle to work together towards a common approach to amending the rules on the succession to their respective Crowns. They will wish unanimously to advise The Queen of their views and seek her agreement.

All countries wish to see change in two areas. First, they wish to end the system of male preference primogeniture under which a younger son can displace an elder daughter in the line of succession. Second, they wish to remove the legal provision that anyone who marries a Roman Catholic shall be ineligible to succeed to the Crown. There are no other restrictions in the rules about the religion of the spouse of a person in the line of succession and the Prime Ministers felt that this unique barrier could no longer be justified.

The Prime Ministers have agreed that they will each work within their respective administrations to bring forward the necessary measures to enable all the realms to give effect to these changes simultaneously.

Additionally, the UK Government has let it be known that it intends to amend the Royal Marriages Act 1772 which requires members of the royal family to obtain the consent of the monarch before they may enter into any marriage.¹

As there is a need to coordinate the necessary legal work across the 16 Commonwealth realms, the New Zealand Government is leading a working group on the preparation and implementation of the necessary legislation and procedures to be followed. It is expected that for historic reasons, the UK will publish its legislation in advance of the other realms, and David Cameron said that this would take place in the next parliamentary session, 2012–13.

The public statements of key participants at the Commonwealth meeting were upbeat about the reforms and about there being no difficulties about the processes involved. Australia's Prime Minister, Julia Gillard, said, "I am very enthusiastic about it—you would expect the first Australian woman Prime Minister to be very enthusiastic about a change which equals equality for women in a new area", adding that the changes appeared to be straightforward.² Mr Cameron was similarly enthusiastic, saying, "If the Duke and Duchess of Cambridge were to have a little girl, that girl would one day be our Queen. The idea that a younger son should become monarch instead of an elder daughter simply because he is a man, or that a future monarch can marry someone of any faith except a Catholic, this way of thinking is at odds with the modern countries that we have become".³

¹ Confirmed to the Committee by Cabinet Office spokesperson, 21 November 2011.

² BBC, 28 October 2011.

³ BBC, 28 October 2011.

2. THE PRESENT RULES ON SUCCESSION TO THE CROWN EXPLAINED

The rules on who becomes monarch, and how succession to the throne and therefore Head of State takes place, are derived from a mixture of feudal common law principle, ancient parliamentary statutes, and constitutional custom.⁴

Accession practice

In ancient legal theory “the monarch never dies”. To use the more popular expression, “The King is dead, long live the King!” At the very moment George VI died in his sleep at Sandringham during the early hours of 6 February 1952, his eldest daughter Princess Elizabeth, then visiting Kenya with her husband, the Duke of Edinburgh, instantly and automatically became Queen Elizabeth II. The same simultaneous process will occur at the death of Queen Elizabeth and assumption of the throne by King Charles III.

Contrary to popular imagination, envisaging grandiose, long-drawn-out ceremonial occasions through which the heir to the throne is acclaimed and crowned King, a coronation is not actually required before a person becomes King or Queen. Edward VIII reigned for 10 months as Head of State, without ever being crowned at a coronation ceremony. Royal books and articles discussing succession to the throne tend to dwell on the elaborate details of the assorted ceremonies that have accompanied the accession of a new monarch in the past. These are often written about as though there is some mandatory force to the traditions and customs of earlier accessions. In truth, however, most of the events accompanying or following accessions in the modern era, including in 1952, have simply followed what had happened the last time as a matter of habit, or resolution upon “how these things are done”—not a set of procedures prescribed by law.

Clearly some political process needs to supervise the change-over, so as to intervene in cases of difficulty. Most immediately, the Privy Council constitutes itself as an Accession Council, under the direction of the Government, represented by the President of the Council and the Lord Privy Seal, both of whom are Cabinet members and usually Leaders of the House of Lords and House of Commons respectively. Arrangements are made for the presence of high commissioners from the Commonwealth countries where the monarch is retained as Head of State, senior clergymen of the Church of England and ceremonial officers from the City of London, the Palace of Westminster and elsewhere. The traditional method of publishing the council’s proclamation recognising the new monarch is by way of it being physically read out in various places, notably at St James’s Palace in London by the Garter King of Arms, and being published in *The London Gazette*.

In 1952, the meeting of the Accession Council took place at St James’ Palace within two days of George VI’s death. On that occasion, as previously, the aristocratic peers of the realm were invited and played a high-profile role. Today, by contrast, the hereditary peerage has no role to play in the political processes of the country and since 1999 has lost its automatic right to membership of Parliament. It is impossible to imagine an identical procedure to 1952 being followed when the Queen dies, for both practical reasons and ones of constitutional modernity. It will be 10 Downing Street, not any aristocratic cabal, that is the political force for determining any dispute about royal lineage or suitability to succeed in the future.

The ultimate legal authority on matters relating to succession to the throne is Parliament. It has been a fundamental constitutional principle since 1689 that the common law of inheritance to the Crown is subject to parliamentary modification. As discussed below, two historic statutes, the Act of Settlement 1701 and Act of Union 1707, exclude Roman Catholics and persons marrying Roman Catholics from the succession. The monarch must be in communion with the Church of England, of which he or she is Supreme Governor, and must swear to uphold the established Church.

Common law male primogeniture

The hereditary principles of monarchy are ones of primogeniture: eldest preferred, sons before daughters. If the heir apparent (Prince Charles) predeceases his parent on the throne (Queen Elizabeth), then the heir of the heir apparent (Prince William) takes in preference to the next remaining child (Prince Andrew) of the reigning King or Queen. The order of succession among the Queen’s issue at the time of writing is therefore Prince Charles, then in turn his sons Prince William and Prince Harry; Prince Andrew, then his daughters Princess Beatrice and Princess Eugenie; Prince Edward, then his son Viscount James Severn and daughter Lady Louise Windsor; then the Princess Royal, and her children Peter Phillips and Zara Phillips.

One theoretical legal conundrum arose in 1952 upon the death of George VI. Strictly speaking, according to the feudal property law of primogeniture, if there are no sons and more than one daughter of the departing monarch, then the daughters are considered equal in law, regardless of age, and succeed to their father’s estate jointly. This combination arose for the first time ever in 1952, when King George left two daughters, the Princesses Elizabeth and Margaret. However, no claim was made by Princess Margaret, or others on her behalf, for joint sovereignty. The Accession Council avoided the practical nonsense of having two sisters as joint Heads of State by simply proclaiming Elizabeth the sole Queen, and Parliament then confirmed this royal succession.

⁴ What follows is drawn from Robert Blackburn, *King and Country*, Politico’s 2006.

Gender equality: removing the sex discrimination

Today, the practice is condemned of treating some people less favourably than others on grounds of their gender or sexuality in virtually all matters of a public nature, especially in holding public office. The principle is enshrined in post-war UK statutes, most recently the Equality Act 2010, and in western international human rights treaties such as the European Convention on Human Rights. Clearly, in this context, the present male preference in the law of succession to royal and aristocratic titles looks an anomaly.

Furthermore, most of the other European monarchies have corrected their law to implement gender equality in their royal succession. In 1980 Sweden became the first of the European constitutional monarchies to do so, and this was followed shortly afterwards by the Netherlands in 1983. This was followed shortly afterwards by Norway in 1990 and Belgium in 1991. Most recently, Denmark followed suit in 2006 after a referendum on the matter. A similar reform for the Spanish monarchy has the support of the main political parties, but has not yet been introduced.

Unsurprisingly, therefore, there have been numerous calls to remove this item of sex discrimination, including from parliamentarians in both Houses of Parliament, so that it would become simply the eldest child of the monarch who succeeds to the throne. I myself argued this case in 1992 in an article on “The Future of the British Monarchy”.⁵ So too has my friend and colleague Professor Vernon Bogdanor.⁶ Several Private Members’ Bills have been presented to Parliament on this matter since, such as by Lord Dubs⁷ and Keith Vaz.⁸ Of special interest is that on one such occasion, where consideration was given by the House of Lords to a Bill presented by Lord Archer, the minister responding on behalf of the Government made it known that the Queen personally approved of the reform. Lord Williams told the House:⁹

I should make it clear straight away that before reaching a view the Government of course consulted the Queen. Her Majesty had no objection to the Government’s view that in determining the line of succession to the throne daughters and sons should be treated in the same way. There can be no real reason for not giving equal treatment to men and women in this respect.

When challenged by a peer that it was constitutionally improper for the views of the monarch to be made public on legislation before the House, Lord William replied that the text of his speech “has been specifically cleared with those to whom reference has been made”.

The disqualification of Roman Catholics from the Throne

The law on royal succession demands of a monarch active participation in the Anglican Protestant faith, of which he or she is *ex officio* Supreme Governor and Head, and it disqualifies from the royal office of Head of State anyone who is a Roman Catholic or who marries a Roman Catholic. Succinctly stated, the provisions imposed by law on the person who would be monarch are that he or she:

- cannot be a Roman Catholic;
- cannot marry a Roman Catholic;
- must make a public declaration that he or she is a Protestant;
- must join in communion with the Church of England; and
- must swear to maintain the established Churches of England and Scotland.

The sources of these limitations lie in a number of ancient statutes, the most important of which are the Bill of Rights 1689, the Act of Settlement 1701, the Act of Union 1707 and the Accession Declaration Act 1910.

The exclusion of Roman Catholics from the throne was first laid down in the Bill of Rights in the following terms:

Whereas it hath beene found by experience that it is inconsistent with the safety and wellfaire of this protestaant kingdome to be governed by a popish prince or by any King or Queene marrying a papist the said lords spirituall and temporall and commons doe further pray that it may be enacted that all and every person and persons that is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall profess the popish religion or shall marry a papist shall be excluded and be for ever uncapeable to inherit possesse or enjoy the crowne and government of this realme and Ireland and the dominions thereunto belonging or any part of the same or to have use or exercise any regall power authoritie or jurisdiction within the same [And in all and every such case or cases the people of these realmes shall be and are hereby absolved of their allegiance]¹⁰ and the said crowne and government shall from time to time descend to and be enjoyed by such person or persons being protestants...

⁵ Robert Blackburn (ed), *Constitutional Studies*, Mansell 1992, chapter 1.

⁶ *Monarchy and the Constitution* (OUP, 1995), pages 59–60, in which he also advocates repeal of the Catholic disqualifications on the monarch and spouse and reform of the Royal Marriages Act.

⁷ Succession to the Crown Bill, 2004–05, HL11.

⁸ Succession to the Crown Bill, 2010–12, HC133.

⁹ *Lords Hansard*, 27 February 1998, cols. 916–17.

¹⁰ Added by way of an appendix to the Act.

The same disqualification was reiterated 12 years later in the Act of Settlement 1701, a statute with a generally much wider remit over the succession.

The principal purposes of the Act of Settlement were to combat the claims of the Catholic Jacobites to the throne and to secure a long-term Protestant succession. The problem Parliament faced was that neither William III and Mary II, nor their prospective successor, Princess Anne of Denmark, who subsequently became Queen Anne, had any heirs. In the 1701 Act, therefore, Parliament re-routed the prospective succession back through James I's daughter Elizabeth, who had married Elector Palatine Frederick V, then through Elizabeth and Frederick's daughter Sophia, who had married Ernest Augustus, first Elector of Hanover. In 1714, on Anne's demise, Sophia and Ernest Augustus's son duly became King George I.

Were it not for the Act of Settlement, there would naturally have been a very different line of succession, ending up today very far removed from Elizabeth, Charles and William Windsor. After Queen Anne would have come James II's son the Old Pretender, as "James III", then Bonnie Prince Charlie as "Charles III". The line of descent would eventually have merged with the aristocratic rulers of Saxony and the doomed 20th-century Italian monarchy. Research by Hugh Peskett of Burke's Peerage in 2005¹¹ showed that the present monarch of the United Kingdom would have been "Queen Mary III", an Italian countess. Her son and heir to the throne, in Prince Charles's place, would succeed her as "King Umberto I", whose actual name is Umberto Omar Gasche; he was born in 1951 and works in Rome as a dog breeder and photographer.

The royal declaration of Protestant faith

The Bill of Rights in 1689, in addition to its prohibition of Catholics from the throne, also laid down the requirement for a solemn public declaration of non-belief in the Roman Catholic faith to be made by a new monarch. This could be on the first day of the meeting of the first Parliament of his reign, the King or Queen speaking from the Throne in the chamber of the House of Lords, with members of the Commons and Lords assembled there. Or alternatively, it could be during the new monarch's coronation ceremony, traditionally held in Westminster Abbey.

In 1910 the royal declaration of faith was re-phrased by the Liberal Government under Herbert Asquith, in preparation for George V's coronation. The object was to remove unnecessary offence given to Catholics by the phraseology of the 1689 declaration, and to put the question of the King's faith in positive terms by simply expressing adherence to the established Protestant religion. As now required by the Accession Declaration Act 1910, the royal declaration reads:

I [monarch's name] do solemnly and sincerely in the presence of God profess, testify and declare that I am a faithful Protestant, and that I will, according to the true intent of the enactments which secure the Protestant succession to the Throne of my Realm, uphold and maintain the said enactments to the best of my powers according to law.

Elizabeth II duly made and signed this declaration from the throne in the House of Lords, attended by both Houses of Parliament, on Tuesday 4 November 1952, in the period between her accession and her coronation. In due course, under the existing legislation, the future King Charles III will in similar manner have to testify and declare before Parliament that he too is "a faithful Protestant".

The monarch must be in communion with the Church of England

It is a requirement of the Act of Settlement 1701 "that whosoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established". This means that the King must not only profess the Protestant faith (as required by the Bill of Rights), but he must actively participate and join in Anglican communion and worship.

In testimony of the requirement, Elizabeth II in 1953, and both her parents before her when they were crowned King George VI and Queen Elizabeth in 1937, received communion from the Archbishop of Canterbury as an integral part of their coronation services. However, whilst it has certainly been customary for monarchs to take communion in this way, the wording of the Act of Settlement does not actually stipulate that it is an act which must be performed as part of the coronation ceremony.

The oath to uphold the established English and Scottish Churches

Later in the same year as the Bill of Rights, Parliament enacted the Coronation Oath Act 1689. This required, and still does, a separate declaration to be made by a monarch during his coronation ceremony, which is to maintain the established Anglican Protestant Church. In 1707, the Act of Union with Scotland modified the oath by adding a requirement with respect to Scotland, namely that the new monarch will swear to "inviolably maintain and preserve" the established Presbyterian Church government in Scotland.¹² The content of the

¹¹ *Times*, 14 February 2005.

¹² The terms of this coronation oath, which also embraces the duty to govern according to law, have been slightly modified five times to reflect territorial developments including the Act of Union with Ireland, the disestablishment of the Irish Church, the Statute of Westminster and the Indian Independence Act 1947.

coronation oath, then, as will apply to the monarch succeeding Queen Elizabeth II, under existing law is as follows:¹³

The Archbishop standing before him shall administer the Coronation Oath, first asking the King,

“Sir, is your Majesty willing to take the Oath?”

And the King answering,

“I am willing.”

The Archbishop shall minister these questions; and the King, having a book in his hands, shall answer each question severally as follows:

Archbishop: “Will you solemnly promise and swear to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand ... and of your Possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs?”

King: “I solemnly promise so to do.”

Archbishop: “Will you to your power cause Law and Justice, in Mercy, to be executed in all your judgements?”

King: “I will.”

Archbishop: “Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel? Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law? Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England? And will you preserve unto the Bishops and Clergy of England, and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them?”

King: “All this I promise to do.”

Then the King arising out of his Chair, supported as before, the Sword of State being carried before him, shall go to the Altar, and make his solemn Oath in the sight of all the people to observe the premisses: laying his right hand upon the Holy Gospel in the great Bible (which was before carried in the procession and is now brought from the Altar by the Archbishop, and tendered to him as he kneels upon the steps), and saying these words:

“The things which I have here before promised, I will perform and keep. So help me God.”

Then the King shall kiss the Book and sign the Oath.

The exclusion of those marrying a “papist”: the case of Mrs Parker Bowles

The Bill of Rights 1689, as cited above, declares that “all and every person and persons that is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall professe the popish religion or shall marry a papist shall be excluded” (emphasis added). The Act of Settlement 1701 repeated the same Catholic disqualification in broadly similar terms:

All and every person and persons, who shall or may take or inherit the said Crown, by virtue of the limitation of this present act, and is, are or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the popish religion, *or shall marry a papist*, shall be subject to such incapacities... (emphasis added)

A question of the possible application of these provisions to the royal marriage of Prince Charles on 9 April 2005 arose from Camilla Parker Bowles’ (now the Duchess of Cornwall’s) first marriage to Brigadier Andrew Parker Bowles, a Roman Catholic. Many thought that the two children of this marriage were brought up in the Roman Catholic faith, and that as a family the Parker Bowles’s often participated in Catholic church services together. Indeed, many seemed to think, or simply assume, that Mrs Parker Bowles was herself a Catholic. For example, in December 2004 a leading article in the Spectator, under the editorship at that time of Boris Johnson MP, now Conservative Mayor of London, baldly stated as a matter of fact that “Camilla is a Catholic”.¹⁴

However, it is important to note that the exclusionary provision that a monarch’s spouse must not be a Catholic does not extend to satisfying the other various requirements that apply to the monarch. In particular, a monarch’s spouse does not have to profess her or his Protestant faith, she or he does not have to join in communion with the Anglican Church, and she or he does not have to swear to uphold the established churches. The sole exclusion is that she or he must not be a “papist”.

The issue then is how one ever determines what faith a particular person subscribes to, or to what church they belong as a member. There are no general legal tests or criteria by which to ascertain a person’s religious affiliation under British civil law. Arguably an individual can nominate his faith perfectly freely, be it Anglican, Muslim, Catholic or Buddhist, from one day to the next. On this basis, national survey questionnaires often simply ask people what their religion is, without verifying it against any external legal test. And, more

¹³ From the official edition of *The Coronation of Her Most Excellent Majesty Queen Elizabeth II*, By Order of Her Majesty’s Stationary Office, 1953, pp 14–15, adapted to substitute masculine terminology.

¹⁴ “Let Them Marry”, *Spectator*, 18–25 December 2004.

important, the Bill of Rights and Act of Settlement themselves fail to define or set any test for determining who is, and who is not, to be regarded as a “papist”.

As regards the former Mrs Parker Bowles, now the Duchess of Cornwall, the official position is that she is a member of the Church of England. This was pronounced by Buckingham Palace in 2005 when asked to clarify the issue. The Archbishop of Canterbury will have established this, having agreed to give the royal union his blessing in an Anglican church service. The Prime Minister, the custodian of constitutional advice on the matter, will have done so too. All four quarters of the rectangle concerned, therefore—Clarence House, Buckingham Palace, Lambeth Palace, and 10 Downing Street—concurred that there is no problem arising from Mrs Parker Bowles’s earlier marriage to a Roman Catholic. This, then, is a closed question, but it is a useful illustration of how the disqualifying provisions apply or not. And even if the Duchess of Cornwall were regarded as a Catholic, the pending reforms to be implemented by the Commonwealth realms will remove this bar to Prince Charles becoming King.¹⁵

A remaining observation is to point out that the present religious restriction on the spouse is limited only to the Roman Catholic faith. No such bar exists if the monarch marries a believer in any other faith, such as Islam or Buddhism.

3. THE PROVISIONS OF THE ROYAL MARRIAGES ACT, AND FRAMING THEIR REFORM

The Royal Marriages Act 1772 disqualifies members of the royal family, and indeed all the descendants of King George II which now runs into hundreds of people, from the line of royal succession if they enter into a marriage without first obtaining the reigning monarch’s consent.

The ancestry of this rule is that under the ancient common law, the monarch has a duty and right of care over the upbringing of his or her close relatives, particularly children, grandchildren, nephews and nieces. This general authority over the royal family in times past tended to be exercised with regard to matters of education and tutors, choice of servants and the approval of marriages. The clarity and degree of seriousness with which the monarch could, if he or she wished, control the marital unions of his or her close relatives was buttressed by passage of the Royal Marriages Act in 1772. This statute, declaratory in effect of the existing law, was prompted directly as the result of George III’s outrage at the unsuitable matches, in his eyes, of his two brothers: the Duke of Cumberland to Mrs Horton, and the Duke of Gloucester to Lady Waldegrave.

The provisions of the 1772 statute commence with a preamble declaring the principle that “marriages in the royal family are of the highest importance to the state, and that therefore the Kings of this realm have ever been entrusted with the care and approbation thereof”. The way in which the statute was drafted was that after 1772, any member of the royal family, defined as any descendant of the then King’s father, George II, had to obtain the formal written consent of the monarch in council before entering into matrimony. Without such consent, a ceremony of marriage entered into by a royal descendant of George II would be invalid:

No descendant of the body of his late majesty King George the Second, male or female, (other than the issue of princesses who have married, or may hereafter marry, into foreign families) shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs, or successors, signified under the great seal, and declared in council, (which consent, to preserve the memory thereof is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the privy council); and that every marriage, or matrimonial contract, of any such descendant, without such consent first had and obtained, shall be null and void, to all intents and purposes whatsoever.

However, there is a proviso to this control by the reigning monarch over the marriages of his or her relatives. In the case of members of the royal family who are aged twenty-five or more, in the event of a refusal by the monarch they can effectively appeal over the head of the sovereign to the Houses of Parliament. Such a procedure under the Act operates by way of the royal member giving notice to the Privy Council of his or her intention to marry, and then waiting twelve months before going ahead and doing so, during which time it is open to Parliament to express its disapproval. If both Houses of Parliament do express their disagreement with the marriage, then again, any such ceremony entered into would be invalid. As worded, if a royal descendant,

... above the age of 25 years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from, by the King, his heirs, or successors; that then such descendant, upon giving notice to the King’s privy council ... may, at any time from the expiration of 12 calendar months after such notice given to the privy council as aforesaid, contract such marriage; and his or her marriage with the person before proposed, and rejected, may be duly solemnized, without the previous consent of his Majesty, his heirs, or successors; and such marriage shall be good, as if this act had never been made, unless both houses of parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage.

It is worth noting that there is no system of approval of a monarch’s marriage or re-marriage, so an heir apparent whose proposed partner is deemed unsuitable by his or her royal parent and Parliament can await accession and then go ahead. However, in such a situation, the monarch is always constitutionally subordinate

¹⁵ In 2008 Autumn Kelly, the fiancée of Peter Phillips (son of Princess Anne), renounced her Roman Catholicism to preserve Peter Phillips’ place in the line of royal succession.

to the opinion of the Prime Minister, and in 1936 King Edward VIII was obliged to abdicate in order to marry Mrs Wallis Simpson who was deemed unsuitable by the then premier Stanley Baldwin and dominion governments.

Over time, the literal state of the Royal Marriages Act, as regards its extent and the number of royal relatives affected, has become ridiculous. The proliferation of issue in descent from George II has become a veritable multitude, the great mass of whom the monarch can have no concern with. The Act's reach of control over royal relatives has gone far further than the common law, of which the Act in 1772 was intended to be confirmatory, ever contemplated.

Some people maintain that, as a piece of legal machinery applicable to today's monarchy, the Act as a whole has become an anachronism. A Private Member's Bill was presented to Parliament by Lord Dubs in the House of Lords and Ann (now Lady) Taylor in the House of Commons during the 2004–05 session, which sought to repeal the Royal Marriages Act in its entirety.¹⁶ During the debate on his Bill in the Lords, Lord Dubs referred to the 1772 Act as “archaic”, “badly drafted”, “complicated” and “bizarre”.¹⁷

The idea that there should be some form of constitutional control over who becomes the spouse of the reigning Head of State is self-evidently a prevalent one. It drove Edward VIII into abdication and exile in 1936, and it effectively prohibited Princess Margaret from marrying the divorcee Captain Peter Townsend in the mid-1950s. More recently, the same notion was the underlying assumption driving the extensive public debate and controversy on whether Prince Charles should marry Mrs Parker Bowles, which was eventually resolved with support from the Prime Minister and Archbishop of Canterbury. The logic behind this idea is that the partnership of the individual who is Head of State is a matter of public interest to the well-being of the Government and the country. The Head of State's consort is inter-woven into this public interest in good governance, for he or she has considerable de facto official, ceremonial and diplomatic functions to perform, and is likely to be the parent of the subsequent heir apparent. A comparative glance at monarchies elsewhere in the world indicates that similar notions often operate there too. Both Spain and Sweden, for example, have constitutional provisions debarring from the throne those who proceed with a royal marriage which is not approved by the Government.

There is no question but that the Royal Marriages Act is in need of some modernisation. Obviously there is no need for the hundreds of descendants of George II now covered by the Act's requirement to have the suitability of each and every one of their marriages to go through a formal legal process involving the Head of State and the Privy Council. The issue for the UK Government¹⁸ in preparing its legislation on the matter is whether the Act should be repealed altogether, or whether it should be replaced by a new formal procedure, which might also apply to the monarch, with the body responsible for giving permission moving to the government of the day. If replaced, its scope over other members of the royal family could be limited simply to the children of the reigning monarch and those of the heir apparent. Alternatively, the limitation could be by reference to a specific number of persons who are at the top end of the line of succession to the throne at the time in question. If this revisionary approach to reform were adopted, it would make sense for refusal of permission to have the effect of disqualifying that person from the Throne and line of royal succession, rather than nullifying the marriage itself.

4. THE PROCESS OF IMPLEMENTING THE PROPOSED REFORMS IN THE UK AND ACROSS THE COMMONWEALTH REALMS

In theory each of the Commonwealth realms could have their own indigenous laws governing the royal succession, which would eventually lead to different persons being the royal Head of State in different parts of the globe, but in practice this would be nonsensical and undermine other forms of association that exist between the UK Government and the realms, however limited or symbolic in nature they may be. Such divergence and fragmentation of the Crown has in fact happened before, in 1837 concerning the kingdom of Hanover, from where King George I had come to the British throne. Under its national Salic law, which excluded females from the dynastic succession altogether, upon the death of William IV it was Queen Victoria's uncle, rather than Victoria herself, who succeeded to the Hanoverian throne.

From a UK's perspective, it is the Statute of Westminster 1931 which represents the key possible constraint upon its freedom of action in legislating for the changes announced in October. This Act of the Westminster Parliament codified the principles agreed in the Imperial Conference declarations of 1926 and 1930, about the relationship between the UK and the dominions,¹⁹ being the self-governing nations retaining the UK monarch as their Head of State.

¹⁶ Succession to the Crown Bill, 2004–05, HL 11; Succession to the Crown Bill (No 2) Bill, 2004–05, HC 36.

¹⁷ *Lords Hansard*, 14 January 2005, col 497.

¹⁸ As the Act deals with the validity of a marriage, it does not directly affect royal succession rules, so may be regarded as free from the constitutional requirements in the Statute of Westminster 1931, discussed below. Nonetheless, as it affects all heirs apparent and those close to the line of royal succession, the Commonwealth realms clearly have an interest in the matter and it would be diplomatic for them to be consulted and signify their agreement.

¹⁹ In 1931 there were six dominions: Australia, Canada, New Zealand, South Africa, Irish Free State, Newfoundland. Since then, Newfoundland has become part of Canada, and South Africa and the Republic of Ireland has ceased to have the UK monarch as its Head of State.

Since then, the British Empire continued to unfold, with former colonies gaining independence, and the Commonwealth of Nations was formed following the London Declaration in 1949 as a more formal body to maintain links between those countries which had formerly been part of the British Empire. There are now 53 member states, almost all of which were formerly subject to UK Government, with 15 having Queen Elizabeth as their Head of State along with the UK.

The effect of the 1931 Act is to stipulate a procedure for prior agreement by the other Commonwealth realms before any Act of the Westminster Parliament can come into legal effect in the UK or elsewhere to change the royal succession. This procedure is that all the Parliaments of the realms must give their assent. Thus paragraph 1 in the preamble states:

Any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

As this provision is in the preamble, rather than the text, of the Act, the rule or procedure it dictates is in the nature of a constitutional convention, and was expressed in 1931 to be “in accordance with the established constitutional position of all the members of the Commonwealth in relation to one another”. Insofar as more countries have gained independence since then, and dominion status has been replaced by that of membership of the Commonwealth since 1949, the construction and evolution of this convention today is generally accepted as requiring the consent of all the Commonwealth realms, ie the countries that retain the UK monarch as Head of State.

The nature of any constitutional convention is that it is non-legal in nature and binding in a political sense only. So could the UK ignore the convention and legislate for itself if other Commonwealth realms for any reason will not give their consent? The answer to this is legally, yes. The political consequences of the breach of convention would depend on the extent of the disagreement. If there was substantial disagreement—which in appearance at least is clearly not the case following the 2011 agreement by the Heads of Government of the realms—it would precipitate an international crisis for the continuation of the Commonwealth. If the disagreement came from only one or two members, the constitutionality of the UK going ahead anyway could be politically settled at another Heads of Government meeting to resolve the matter, if needs be by an agreed declaration that the convention did not require unanimity in the particular circumstances arising (for example, if one country not in agreement was intending to set itself up as a republic in the near future).

On legislating for the change in each of the Commonwealth realms, for historic reasons it would be good practice for the United Kingdom Bill to state that its provisions have been requested and agreed by the other Commonwealth realms. This is because some of the national constitutions of the realms refer back to UK law in its provisions on royal succession, and both in the Preamble to the 1931 Act and in its section 4 it is a requirement that no Act of the UK Parliament shall become part of the law of a Dominion unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment. However, all the realms are independent, self-governing states, with their own national constitution, and to effect the changes in each of those countries each of the realms will have to prepare their own national legislation and go through its own constitutional amendment procedures in order to implement the reforms within their own country.

Constitutional amendment procedures in the realms

The 16 Realms are the UK, Canada, Australia, New Zealand, Jamaica, Antigua and Barbuda, Bahamas, Barbados, Grenada, Belize, St Kitts and Nevis, St Lucia, Solomon Islands, Tuvalu, St Vincent and the Grenadines and Papua New Guinea. Because so many different countries and constitutions are involved, implementing the change will be organisationally challenging, mainly in terms of timing when all the various necessary steps are taken so a common commencement date is worked to. Not only does the UK need to harmonise its timing with the national legislatures of the realms, but any realm with a federal system of government may need to obtain the formal assents of its state legislatures. In some cases, a referendum may be necessary. If the Duke and Duchess of Cambridge are thinking of starting a family in the near future, which seems likely, some fairly swift work by the New Zealand working group and parliamentary counsel in the realms is needed.

The three major realms are Canada, Australia, and New Zealand.²⁰ In Canada, the necessary legislation may be enacted under the authority of either or both section 44 of the Constitution Act 1982 which provides that the Canadian Parliament “may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons”, and the residual power in section 91 for Parliament to legislate for the peace, order and good government of Canada. A possible procedural problem exists in section 41 which stipulates that constitutional amendments to “the office of the Queen” can only be made by proclamation of the Governor-General where authorised by resolutions of the Senate, House of Commons, and legislative assembly of all the Provinces. However, the view can be taken that a change in the royal succession laws affects the office-holder rather than the office, and therefore the section 41 procedure does not apply: in which case, a simple Act of the Canadian Parliament is required.

How these provisions are to be construed and applied by the Canadian Government in preparing its legislation will largely be dictated by the attitude of the party leaders. Nonetheless it is not unlikely that some

²⁰ See also Anne Twomey, “Changing the Rules of Succession to the Throne”, *Public Law* (2011), p 378.

individuals in Quebec might seek judicial review of the constitutionality of any Canadian statute that does not go through the section 41 procedure of securing the express consent of all the provincial assemblies.²¹ It would be a political opportunity for them to cause difficulties for the Government, using the occasion to provoke a wider debate about monarchy and the case for Quebec separatism. So far, no one appears to have raised this issue in Canada. Apart from the Quebec issue, there appears to be little interest in the royal succession laws in Canadian public opinion, and the changes are regarded as long overdue in most people's minds.

In Australian public opinion, there is currently a small majority supporting retention of the monarchy, coupled by an acceptance that it would be appropriate to move to a republic after Queen Elizabeth II. Republicans are unlikely to use the occasion to cause political difficulties, particularly as one of their key arguments has been criticism of the sexist and anti-Catholic selection process for the Head of State. There are a number of theoretical problems in the historical provisions of Australia's constitutional law, such as that section 2 of the Constitution appears to dictate that a UK monarch will automatically be monarch of Australia (contradictory to other constitutional provisions securing its self-governance), and that in theory the Queen could be regarded as the head of each state government as well as of the federal one. However, these difficulties are unlikely to be pursued outside the realms of academe.

The legislative procedure is therefore likely to be straightforward. Section 51 (xxxviii) of the Constitution of the Commonwealth of Australia 1900 and section 15 of the Australia Acts 1986 provide for an Act of the Australian Parliament to be passed "at the request or with the concurrence of" each of the state Parliaments, a form of cooperative federalism, and it is this provision that is likely to be relied upon for implementing the changes in royal succession. In practice, this concurrence might take the form of a similarly drafted bill being expressly passed in each of the state legislatures.

As a unitary state, the position in New Zealand is simpler. The terms of the Act of Settlement have been incorporated into New Zealand law by the Imperial Laws Application Act 1988, and may be amended by a simple Act of the New Zealand Parliament. There are a number of self-governing islands associated with New Zealand, such as the Cook Islands, with their own constitutional structures, but each in effect recognises whosoever is the New Zealand Head of State as being their own.

Across the other, much smaller, twelve realms there appears to be very little being said by party leaders and in the local news, and this might well be because they do not wish to stir the pot of monarchic rule in case it flairs up into a republican debate and causes political difficulties for them in their relations with the rest of the Commonwealth. There are strong republican movements, most notably, in Barbados and Jamaica. In 2005 the then Prime Minister of Barbados, Owen Arthur, announced plans to turn his country into a republic at the earliest opportunity, following a referendum which was to be held in 2008 but was deferred. Jamaica has a new Prime Minister, Andrew Holness, who has only been in office since October 2011, but his predecessor, Bruce Golding, promised to promote a cross-party plan to usher in a republic in time for the country's 50th anniversary celebrations of independence in 2012. In order to smooth the passage of the change in the royal succession laws, the UK and Commonwealth realms will need to take care not to excite or provoke republican sentiment generally.

5. THE WIDER PUBLIC IMPLICATIONS OF THE GOVERNMENT'S PROPOSED CHANGES, AND RELATED AREAS WHERE OPINION ON REFORM HAS BEEN EXPRESSED IN RECENT TIMES

The Catholic disqualification of a monarch

There will be those in Parliament who will wish the Catholic disqualification legislation in the rules on royal succession to go further. A widespread view is that the reform on Catholic disqualification is half-baked, applying only to the monarch's spouse, and it should apply also to the person who is monarch. There has been considerable support in recent times for the proposition that the ancient prohibition on Roman Catholics becoming royal Head of State should be abolished.²² This view has emerged as part of the wider historical context in which Roman Catholicism is no longer viewed as a threat to the political security of the state, as it was at the time three centuries ago when the Bill of Rights and Act of Settlement were passed.

It has been argued that leaving these antique statutory provisions in force is offensive in terms of freedom of expression, religion and belief, and that the proper role of the monarchy should be to symbolise and represent the country as a whole. Indeed, according to this view, it is as symbolically offensive to discriminate in the royal succession law against a particular religious faith as it is upon grounds of female gender.

The case for retention of the existing prohibition is the formal position of the monarch as head of the Church of England as its Supreme Governor, and Anglican establishment. There is a high correlation between those who advocate repeal of the religious provisions in the Act of Settlement and those who favour disestablishment of the Church of England. Some have openly advocated disestablishment, and indeed this has been a Liberal

²¹ The line of reasoning behind section 41 being the legal process for reforming the royal succession law is supported by a judicial dicta in the Ontario Superior Court in the case of *O'Donahue v Canada* (2003) Can LII 41404 (ON SC) involving an unsuccessful challenge to the succession laws being in violation of the Canadian Charter of Rights and Freedoms: Justice Rouleau said that a change to the rules of royal succession would "bring about a fundamental change in the office of the Queen without securing the authorisations required pursuant to s.41 of the Constitution Act 1982", para 33.

²² For an account, see Robert Blackburn, *King and Country* (2006), chapter 4.

Democrat general election manifesto commitment for some time. Their 2001 manifesto said that under their proposals “the Head of State will be able to be a member of any faith or none”.

Others have simply remarked on the offensiveness of the discrimination, such as on the Conservative side Michael Howard (“it is an anachronism that Catholicism should be singled out”) and Michael Forsyth (“the British constitution’s grubby secret and nobody wants to tackle it”); and on the Labour side Tony Blair (who converted to Roman Catholicism shortly after resigning as Prime Minister in 2007) and John Reid (“as a Roman Catholic myself, I am only too well aware of the very deep feelings and passions which surround this issue”). Some attempted Private Members’ Bills have been presented to Parliament to repeal the Catholic bar on a monarch, such as Kevin McNamara’s Treason Felony, Act of Settlement and Parliamentary Oath Bill in 2001.²³

The Scottish Parliament has passed resolutions calling for repeal of the anti-Catholic provision in the Act of Settlement, for example in 1999 resolving that it “believes that the discrimination contained in the Act of Settlement has no place in our modern society, expresses its wish that those discriminatory aspects of the Act be repealed, and affirms its view that Scottish society must not disbar participation in any aspect of our national life on the grounds of religion”. In response to the Commonwealth statement on reform in October 2011, the Scottish First Minister Alex Salmond welcomed the news, but added it was “deeply disappointing” that Catholics were still barred from the throne. He said, “It surely would have been possible to find a mechanism which would have protected the status of the Church of England without keeping in place an unjustifiable barrier on the grounds of religion in terms of the monarchy... It is a missed opportunity not to ensure equality of all faiths when it comes to the issue of who can be Head of State”.²⁴ Naturally, senior members of the Catholic church in the UK have often protested publicly on the subject too.²⁵

Disestablishment of the Church of England would automatically bring to an end the religious requirements and Catholic disqualification applicable to a British monarch. This is an especially problematic subject for the present monarch, Queen Elizabeth. She has sworn in her coronation service to uphold and maintain the Church. She has shown every indication of being a totally committed Anglican, dedicated to her position as Supreme Governor of the Church, highly conscious of its hugely important historical background. Formal breaches of the oath by previous monarchs have occurred before, such as when the Church of England was disestablished in Wales in 1920, and when the sister Church of Ireland was disestablished in 1871. But disestablishment of the Church of England in England—and in its entirety—strikes at the very heart of the monarch’s solemn oath on taking office. It may well be that any move towards either or both reform of the Act of Settlement and disestablishment of the Anglican Church would be subject to considerable institutional resistance from the Queen and the Royal Household.

Interestingly, it seems that the future monarch, Prince Charles, is in favour of removing the relevant discriminatory provisions in the Act of Settlement. He may even support the case for disestablishment of the Church of England, or at least for transferring the headship and supreme governorship of the Church from the monarch to some other body. As he is famously known for saying, as King he wants to be seen by the country as the “defender of faith”, not “Defender of the Faith”. He expressed this view publicly in a BBC television interview with Jonathan Dimbleby. Of his future position as head of the Church of England, he said,²⁶

I personally would much rather see it as “defender of faith”, not “the Faith”, because it means just one particular interpretation of the faith, which, I think, is sometimes something that causes a great deal of a problem. People have fought each other to death over these things, which seem to me a peculiar waste of people’s energy when we are all actually aiming for the same ultimate goal.

A further expression of the future King’s opinion on the matter has been given to us by Paddy (now Lord) Ashdown, the former leader of the Liberal Democrats, in his diaries published in 2000. In these, Mr Ashdown recounts travelling back on a flight from Israel five years earlier, where he and others had attended the funeral of the former Israeli Prime Minister Yitzhak Rabin. On board and engaging in the discussion with Lord Ashdown were Prince Charles, Tony Blair and Jonathan Sacks, the Chief Rabbi. The conversation turned to religious matters in the UK and the question of disestablishment of the Church of England, which Mr Ashdown expressed his support for. In response, Mr Ashdown records,²⁷ “Charles looked at me, smiled broadly and said, ‘I really can’t think why we can’t have Catholics on the throne’.”

A full analysis of church-state relations and disestablishment would require a separate, much longer memorandum. It is sufficient for present purposes to note that removing the Catholic disqualification for a monarch raises more immediate and deeper complexities than the proposed Commonwealth reform limited to the spouse of a monarch entail.

The hereditary principle in society

The proposed changes in the rules on royal succession raise the whole issue of how we select our Head of State in the UK, and whether an hereditary system is still appropriate in contemporary conditions. However,

²³ *Commons Hansard*, 19 December 2001, Col 377.

²⁴ BBC, 28 October 2011.

²⁵ These are discussed in *King and Country*, p 121–22.

²⁶ BBC, 29 June 1994, “Charles: The Private Man, the Public Role”.

²⁷ *The Ashdown Diaries*, vol 1: 1988–97 (Allen Lane, 2000), p 351.

popular support for the monarchy in the UK under Queen Elizabeth II is strong, and republicanism is at a lower level even than what it was towards the end of the 19th century.²⁸ Even if republicanism is espoused quietly in principle by a significant number of Labour parliamentarians, such views are likely to remain tepid and pragmatic so long as the monarch retains strict political neutrality, does not misuse their position of influence, and avoids public controversy.²⁹

Similarly, the proposed reforms raise the operation of the hereditary principle, and whether removal of male preference in succession to the throne should equally apply to the rest of the aristocracy in the UK. However, this has been firmly ruled out by the UK Government. The government leader in the House of Lords, Lord Strathclyde, responded to a question on this by saying,³⁰

The Government have no current plans to change the laws of succession with regard to hereditary peerages. Changes to the law on succession to the throne can be effected without any change to the legitimate expectations of those in the line of succession. Changes to the rules governing succession to hereditary titles would be far more complicated to implement ... The Government believe that it is time to deal with the issue of succession to the Crown, and there is no simple read-across to succession to the hereditary peerage, which is infinitely more complicated and affects many more families.

Lord Strathclyde's point that such a change would affect a large number of families is well-taken, particularly as it is likely to be unwelcome in many of the families concerned, if they are of a conservative disposition and attached to family historical traditions. This issue in any event will diminish in importance when the hereditary peerage is removed altogether from the parliamentary second chamber, as is proposed in the Government's present draft Bill on House of Lords reform.³¹ The status and social importance of an hereditary aristocratic title in society generally is diminishing too, and ownership of the title of earl, viscount, etc, is poised to become an historical curiosity, with family squabbles over entitlement reserved to a few cranks. On the continuing creation of peerages as a form of honour for distinguished service to society, despite the then Prime Minister Margaret Thatcher's extraordinary revival of the hereditary principle when she created two hereditary viscountcies and an earldom in 1983³² (for William Whitelaw, George Thomas, and Harold Macmillan respectively), newly-created titles today and in the future are certain to remain lifetime ones only under the Life Peerages Act 1958.

Retirement, abdication, and skipping a generation in royal succession

The manner in which the proposed changes are put into effect across the Commonwealth realms will provide a useful precedent for any situation arising in the future, when a monarch or heir apparent might wish to retire, allowing the royal succession to pass to the next in line to the Throne. It has often been suggested, for example, that as time passes Prince Charles might wish to do this, allowing his son, Prince William, to become King in his place. If the scheme of constitutional amendment in the UK and in the realms proves successful, as it looks almost certain to be, it can be repeated to carry out the wish of any monarch to retire as Head of State and/or the heir apparent to relinquish their place in royal succession.

On the possibility of this happening in the UK, it is worth clarifying the constitutional context today. It is true that the weight of tradition and custom rests heavily against the idea of changing the person who is next in line to the throne, unless there are circumstances of disqualification, legal or constitutional. Automatic succession from one generation to the next has been regarded as fixed practice. The official line from Buckingham Palace or any other official royal source has so far not departed from this doctrine or entered into any discussion on matters of retirement or passing the Throne onto the second in line in succession, when the heir apparent has become elderly or otherwise has no wish to perform the onerous duties and functions of Head of State. By contrast, such a procedure is regarded as normal in the Netherlands, where Queen Beatrix in 1980 succeeded her mother Queen Juliana when she voluntarily abdicated at the age of 70, and earlier in 1948 when Juliana became Queen after her own mother abdicated.

The weight of constitutional tradition today is of a far lighter nature than when Queen Elizabeth ascended the throne. In the immediate aftermath of the Second World War, as before it going back into the Victorian era, the British constitution operated as a hugely inert set of processes, almost entirely upon the basis of historical precedents that were universally praised and regarded as of near-biblical authority. Such veneration for the political ways of our past began to be seriously questioned in the 1960s, and over the period since has gone into a state of gradual decline. In short, many actions affecting the composition and working of our political system which would have been unthinkable fifty years ago are now to be evaluated upon the basis of existing circumstances, exigencies or advantage. There would certainly be nothing "unconstitutional" in putting into effect any future wish of Prince Charles that Prince William succeeds Queen Elizabeth, rather than he himself.

The detailed content and manner of the formalities would be relatively simple and straightforward. First, there would be a public declaration by the monarch or heir apparent, as the case may be, stipulating their intent

²⁸ The latest Ipsos-Mori poll of UK opinion shows that 75% favour a monarchy, and only 18% a republic, April 2011.

²⁹ See Robert Blackburn, "Monarchy and the Personal Prerogatives", *Public Law* (2004), p 546.

³⁰ *Lords Hansard*, 20 October 2011, col 380.

³¹ *House of Lords Reform Draft Bill*, Cm 8077, 2011.

³² See Robert Blackburn, "Citizenship and the Honours System", in Blackburn (ed), *Rights of Citizenship* (Mansell, 1993), p 299.

and desire to retire or step aside, combined with their reasoning for doing so. Then, an Instrument of Renunciation—perhaps a better term than “abdication” with its negative historical overtones—would be signed by that person, witnessed by signatures of the closest members of the royal family. The necessary legislation could then be agreed and prepared by the UK Government and Commonwealth realms in similar manner to that being conducted at present.

Constitutional codification and the Crown

An ad hoc process of constitutional codification is currently taking place with respect to the Crown. In 2011 alone, the Cabinet Manual has sought to codify the conventions or understandings on the royal power of prime ministerial appointment, the Sovereign Grant Act has rationalised royal finances, and the Fixed-term Parliaments Act has codified general election timing and replaced the earlier royal power of dissolution of Parliament. In 2010 the Constitutional Reform and Governance Act put the royal prerogative power of treaty-making onto a statutory footing, requiring parliamentary consent. And now the rules on royal succession are partly to be rationalised, following the changes agreed by the Commonwealth realm heads of government last month.

These developments suggest that there is an appetite and readiness within government to embrace measures that rationalise the position of the Crown. It raises the question whether a more overarching codification of our constitutional law and conventions might be desirable, removing anachronistic provisions and updating our rules, practices and “grey areas” of convention in a coherent manner in tune with social mores today as well as political common sense. Certainly, the parliamentary passage of the Government Bill on royal succession in 2012–13 will be an historically significant event, as well as an opportunity for members in both Houses of Parliament to raise related constitutional issues and express their opinion on whether further measures of modernisation might be desirable in the near future.

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