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Select Committee on the Constitution

11th Report of Session 2012–13

The Succession to the Crown Bill

Report

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The Succession to the Crown Bill

1. The Succession to the Crown Bill was introduced into the House of Commons on 13 December 2012. Both second reading and Committee of the Whole House have been scheduled for 22 January 2013. Given the subject matter of the bill, it is legislation of first-class constitutional importance. The Act of Settlement 1700 confirmed the fundamental constitutional principle that Parliament determines the title to the Crown.[1] In reference to the current bill, the Deputy Prime Minister has spoken of "a historic moment for our country and our Monarchy"—legislation "which will make our old fashioned rules fit for the 21st Century".[2]

2. On 9 January we took evidence on the bill from the Deputy Prime Minister, the Rt Hon. Nick Clegg MP, and the Minister for Political and Constitution Reform, Chloe Smith MP.[3] In particular, we raised the issue of the proposed use of fast-track legislation for this measure. **The principal object of this report is to advise the House of our conclusions on that matter.**

The Perth agreement

3. The bill follows the "Perth agreement" of 28 October 2011, made at the bi-annual Commonwealth Heads of Government Meeting. The 16 Commonwealth Realms[4] which currently recognise Her Majesty as Head of State all agreed to modernise the existing laws on succession to the Crown.[5] The system of male preference primogeniture would be abolished, together with one of the vestiges of a distinctively "Protestant constitution"[6]: the bar on those who marry Roman Catholics from succeeding to the Throne. Led by the government of New Zealand, the 16 Realms further agreed to work together to enable the necessary measures to be given effect simultaneously in their respective jurisdictions. The explanatory notes to the bill underwrite this: the Government expect to bring the substantive provisions into force "at the same time as the other Realms bring into force any changes to their legislation or other changes which are necessary for them to implement the Perth agreement".[7]

4. A third matter was referred to the other Realms by the Prime Minister: the requirement of the Monarch's consent to certain marriages. On 2 December 2012 the UK Government received final written agreement[8] from all the

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1 In order to secure the Protestant succession, section 1 of the Act of Settlement 1700 constructed the order of succession through Princess Sophia, Electress of Hanover.

2 Deputy Prime Minister, *Royal succession rules will be changed,* press release, 4 December 2012. See further, House of Commons Library, *Succession to the Crown Bill 2012–13*, Research Paper 12/81 (December 2012).

3 As part of our annual evidence session with the Deputy Prime Minister: the full transcript is available on the Committee's webpages.

4 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.

5 The text of the Perth agreement is in Annex 1 of the resulting report by the House of Commons Political and Constitutional Reform Committee, 11th report (2010–12): *Rules of Royal Succession* (HC 1615).

6 Originating in the realm of Henry VIII with statutes including the Act of Supremacy 1534.

7 Para 42.

8 *ibid.*, para 11.

other Realms regarding all three aspects of the proposed reform. The following day the Duchess of Cambridge's pregnancy was announced.

5. **We welcome the close consultation and co-ordination between the Realms.** Considerations of mutual respect and friendship among sovereign states, and of uniformity[9] and decorum, demand nothing less. More particularly, the approach accords with the clear expression of will in the preamble to the Statute of Westminster 1931 that "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".[10]

The provisions of the bill

6. Clause 1 of the bill removes the element of gender discrimination in the existing common law rules whereby an elder daughter is displaced by a younger son in the line of succession. It is thus provided that the gender of a person born after the making of the Perth agreement (i.e. 28 October 2011) "does not give that person, or that person's descendants, precedence over any other person (whenever born)".

7. Clause 2 removes an element of religious discrimination deriving from the Bill of Rights 1688 and section 2 of the Act of Settlement 1700. Clause 2(1) provides that "a person is not disqualified from succeeding to the Crown or from possessing it as a result of marrying a person of the Roman Catholic faith." Reflecting as it does a historical struggle between the forces of Protestantism and Catholicism in Europe, the existing disqualification is unique. In evidence, the Deputy Prime Minister said:[11]

> "Under the present provisions an heir to the throne can marry someone of another religious denomination—someone of the Hindu or Muslim faiths … What we are doing is simply removing a very specific act of discrimination against Catholics".

Clause 2 is retrospective in that those who have married Roman Catholics will regain their places in the current line of succession. However, in the words of the explanatory notes, "this does not affect anyone with a realistic prospect of succeeding to the Throne".[12]

8. Clause 3 will repeal the Royal Marriages Act 1772, which (subject to exceptions) renders void the "marriages" of descendants of George II who fail to obtain the Monarch's permission to marry. This is thought to apply to several hundred people, "many of whom will be unaware of the Act or its impact".[13] The requirement of the Sovereign's consent is not abolished entirely, however. Rather it is (a) narrowed so as to apply only to the first six in the line of succession and (b) softened, such that failure to comply is no longer a matter of invalidity but of disqualification of that person and of that person's descendants from succeeding to the Crown. As such, clause 3 better

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9 In face of the principle of divisibility of the Crown, whereby Her Majesty is Queen in each of the Realms separately.

10 Three of the present 16 Realms were dominions at that time: Australia, Canada and New Zealand.

11 Unrevised transcript of evidence, 9 January 2013, Q8.

12 Para 28.

13 *ibid.*, para 5.

respects the right to marry.[14] Clause 3(5) removes the broader effects of the 1772 Act retrospectively in most cases.

9. Clause 4 and the Schedule make consequential amendments. In particular, clause 4(3) provides that relevant Articles in the Union with Scotland Act 1706 and the Union with England Act 1707, and in the Union with Ireland Act 1800 and the Act of Union (Ireland) 1800, are subject to the provisions of the bill. The Regency Act 1937 is also amended, so that a person subject to, and failing to comply with, the reworked requirement of consent to royal marriages is disqualified from being Regent.

10. Clause 5 provides that the substantive provisions of the bill will come into force on such day and at such time as is specified by order made by the Lord President of the Council.[15]

Constitutional process

11. We began our 2011 report *The Process of Constitutional Change*[16] by observing that:[17]

> "the constitution is the foundation upon which law and government are built. The fundamental nature of our constitution means that it should be changed only with due care and consideration … Process is critical in terms of upholding, and being seen to uphold, constitutional values: particularly those of democratic involvement and transparency in the policy-making process."

We drew attention in that report to a number of weaknesses in the current practice of legislating for significant constitutional change, including the lack of constraints on the Government, failure to have regard to the wider constitutional settlement, changes being rushed and lack of consultation.[18]

12. While we fully recognise the need for a consensual approach among the 16 Realms, the bill relates to domestic constitutional arrangements in the UK, such as the position of the Church of England, in ways which are of little or no relevance to the other Commonwealth Realms. As regards consultation with the Royal Household, the Prime Minister told the Commons that "there has been very thorough contact between No. 10 Downing street and the palace, and all the issues are settled and agreed".[19] The Deputy Prime Minister further assured us that:[20]

> "there has been extensive consultation—not only between us and the other Commonwealth realms, but also, of course, between officials in the Cabinet Office and officials in the Royal Household—over a prolonged period of time."

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14 As provided for by Article 12 of the European Convention on Human Rights.

15 The bill has no provision on territorial extent; however, as well as extending to the whole United Kingdom, it will extend to the Crown Dependencies and British Overseas Territories by necessary implication. Para 13 of the explanatory notes records that "the Devolved Administrations, Crown Dependencies and British Overseas Territories have all been kept informed throughout the drafting process".

16 Constitution Committee, 15th report (2010–12): *The Process of Constitutional Change* (HL Paper177).

17 *ibid.*, para 1.

18 *ibid.*, para 51. The Government disagreed with our recommendations: *The Government Response to the House of Lords Constitution Committee Report "The Process of Constitutional Change"*, Cm 8181, 2011.

19 HC Deb, 9 January 2013, col 310.

20 Unrevised transcript of evidence, 9 January 2013, Q8.

13. Notwithstanding the constitutional significance of the legislation, the explanatory notes record the Government's intention "to ask Parliament to expedite the parliamentary progress of this Bill".[21] The explanatory notes seek to give answers[22] according to a template of questions first set out in our 2009 report *Fast-track legislation: constitutional implications and safeguards*.[23] As such, they are part of an unbroken practice since the publication of the 2009 report.[24] **We note with approval the rapid emergence of a constitutional convention whereby, when ministers decide to promote fast-track legislation, a set of explanations is provided to Parliament.**

14. The definition of fast-track legislation is imprecise. The 2009 report described it as legislation which "passes through the stages of scrutiny in both Houses at a faster rate than normal."[25] "There is, in essence, a fast-track "spectrum", in terms of the degree to which the normal intervals between stages are departed from."[26] Situated at one end of this "spectrum", the Government's original plan for Commons scrutiny of the Succession to the Crown Bill certainly was abnormal. The notice of the programme motion which appeared before 9 January proposed all Commons stages on the bill in one day.

Is fast-track legislation justified?

15. The Committee recently argued that the use of fast-track legislation to address legal issues that have been known about for a long time should be avoided.[27] We note the argument in the explanatory notes for expedition in the light of the Perth agreement.[28] However we also note, first, that the procedural promises made to the other Realms—that the UK would be the first to draft and to introduce legislation[29]—have already been kept; and, secondly, that the legislation will in any event "not be commenced until the other Commonwealth Realms have put in place the changes which are necessary for them".[30] The explanatory notes record that, following the announcement of the Duchess of Cambridge's pregnancy, "the Government believes that there is a general consensus that the law should be changed as soon as possible".[31] Given that it was possible to publish the bill so soon after the announcement, it is hard to see the justification for highly attenuated legislative proceedings. It should also be observed that, technically speaking, the retrospective element of the provision obviates the particular need for fast-tracking.

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21 Para 15.

22 *ibid.*, paras 16–25.

23 Constitution Committee, 15th report (2008–09): *Fast-track legislation: constitutional implications and safeguards* (HL Paper116), para 186.

24 For details, see Constitution Committee, 8th Report (2012–13): *Police (Complaints and Conduct) Bill* (HL Paper 80), paras 4–5.

25 *Fast-track legislation, op. cit.*, para 12,

26 *ibid.*, para 26.

27 *Police (Complaints and Conduct) Bill* (HL Paper 80), op. cit., para 7.

28 Paras 16–18.

29 *ibid.*, paras 10, 16.

30 *ibid.*, para 18. The appendix to *Succession to the Crown Bill 2012–13, op. cit.*, gives an overview of the relevant constitutional arrangements in the other Realms.

31 *ibid.*, para 17.

16. From a constitutional standpoint, further points arise. We drew attention in our 2009 report to the deleterious consequences of fast-track legislation in terms of constrained parliamentary scrutiny, executive dominance, and limited public engagement and transparency.[32] We also recall in the present context the argument that "where there is consensus on the process to which a proposed constitutional change has been subjected, that change will be more widely acceptable, whether or not the merits of the change are universally agreed."[33] We made clear in the 2009 report that, in support of our constitutional system of representative democracy:[34]

> "it is imperative that such fast-tracking of normal parliamentary procedure should only occur where strictly necessary".

17. As regards the handling of the Succession to the Crown Bill, the Deputy Prime Minister said in evidence to us:[35]

> "I want to stress that there is nothing untoward about a rather pragmatic decision taken by the business managers. It is straightforward; it seemed to enjoy complete consensus. There have been no significant reservations raised by the other realms. We have a very congested legislative agenda. It was a pragmatic business-management decision … It was just a pragmatic assessment of how long it needed or, rather, how little time it needed."

18. The Minister, Chloe Smith MP, confirmed that:[36]

> "it is not any sense of doing it as an emergency … this has been in public and well-aired since the Commonwealth Heads of Government Meeting in 2011… we had not anticipated it to be fundamentally controversial—in the sense that it removes a very specific piece of discrimination and is very short."

19. We note that, following our meeting with the Deputy Prime Minister and the Minister for Political and Constitutional Reform, notice of a new programme motion was published proposing all stages in the Commons in two days.[37] In light of the undoubted constitutional significance of the Succession to the Crown Bill, the House will no doubt wish to reflect on whether a similar approach would allow for proper deliberation and scrutiny in the Lords.

20. **In our view, the use of fast-track legislation, while it may be necessary for reasons of emergency and overriding public interest, will rarely, if ever, be appropriate for significant constitutional matters. It is never appropriate for reasons of, in the Deputy Prime Minister's words, "pragmatic business management".**

21. **The fact that legislation is short or that the executive does not anticipate it being controversial are not in themselves reasons to set aside the usual parliamentary scrutiny of a bill. In parliamentary scrutiny there can emerge issues which had been previously overlooked or hidden.**

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32 *Fast-track legislation, op. cit.*, chapter 3.

33 *The Process of Constitutional Change, op. cit.*, para 2.

34 *Fast-track legislation, op. cit*., para 152.

35 Unrevised transcript of evidence, 9 January 2013, Q13.

36 *ibid.*, Q10.

37 HC Deb, 10 January 2013, col 465.

Unintended consequences?

22. Questions may be raised about possible unintended consequences of the bill.[38] In the light of an often conflicted history stretching back to the English Reformation in the 16th century, the concern expressed is first and foremost about the relationship between the monarchy, the Established Church in England and the Roman Catholic Church. As rehearsed in the Preface to the 39 Articles of the Established Church, this more particularly involves the constitutional place and role of the Monarch as "Defender of the Faith[39] … and Supreme Governor[40] of the Church in England".

23. The particular sensitivities in the relationship between Church and State are illustrated in an array of statutory provisions regarding the Monarch and the monarchy. Section 1 of the Act of Settlement 1700[41] refers to "the Heirs …, being Protestants"; section 2 excludes persons who "shall profess the Popish Religion" from the Throne; and section 3 states that the Monarch "shall joyn in communion with the Church of England as by Law established". There is detailed provision about the declarations and oaths to be made by a new Monarch. The Accession Declaration Act 1910 requires that he or she "profess, testify and declare that I am a faithful Protestant" and will "uphold and maintain" the enactments "which secure the Protestant succession to the Throne of my Realm". Likewise, together with the Act of Union 1707, the Coronation Oath Act 1688 largely framed the oath sworn by Her Majesty in Westminster Abbey in 1953:

> "to the utmost of [her] power maintain in the United Kingdom the Protestant Reformed Religion established by law … 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".

24. The Government consider that "the relationship between the Church and State in England is an important part of our constitutional framework that has evolved over the centuries" and have "no current intention of changing this position".[42] Further, the Government are "committed to the Church of England as the Established Church in England, with the Sovereign as its Supreme Governor".[43] As regards the Succession to the Crown Bill, the existing bar on a Roman Catholic Monarch will remain. With reference to removal of the bar on the Monarch being married to a Roman Catholic, the Government do "not believe that this raises questions about the future role of the Sovereign in the Church of England".[44]

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38 As allegedly by the Prince of Wales in a private meeting with the Permanent Secretary of the Cabinet Office: first reported in *Mail Online*, 7 January 2013, and subsequently covered by a number of newspapers (for example, *The Sunday Telegraph*, 13 January 2013).

39 A royal title first bestowed on Henry VIII by Pope Leo X. It has been suggested that Prince Charles, should he succeed to the Throne, might instead take the title "Defender of the Faiths" or "Defender of Faith", better to reflect a multi-faith society.

40 For discussion of the contemporary role of the Monarch as "Supreme Governor", see *Rules of Royal Succession*, *op. cit.*, oral evidence, Q 3.

41 The provisions in the Act of Settlement 1700 build on the Bill of Rights1688.

42 Unless so requested by the Church of England: House of Commons Political and Constitutional Reform Committee, 1st Special Report (2012–13): *Rules of Royal Succession: Government Response to the Committee's Eleventh Report of Session 2010–12* (HC 586), p 2.

43 *ibid.*

44 *ibid.*

25. An issue has been raised concerning the religious upbringing of a royal heir. It was pointed out by the House of Commons Political and Constitutional Reform Committee in the wake of the Perth agreement:[45]

> "Catholics are normally obliged under canon law to bring up as Catholics any children from an inter-faith marriage.[46] 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."

One possible response in this scenario would be to seek papal dispensation in respect of a child's upbringing, either before or after proceeding with the marriage.[47] The question of whether possible reliance on discussions with the Vatican represents a satisfactory and convincing response is a relevant matter for debate in relation to clause 2.

26. In evidence, the Deputy Prime Minister said:[48]

> "The Catholic Church itself has not had a doctrine for many years obliging people who are of a mixed religious denomination to educate their children as Catholics. That has been made clear ... There is a lot of flexibility and the Catholic Church has been very clear about that."

27. The further question arises in this context of the relationship between clauses 2 and 3 of the bill. The Deputy Prime Minister warned against:[49]

> "mixing two things here. The restriction of who must seek the permission of the monarch to marry to six individuals is separate from the issue of whether the heir to the throne can marry a Catholic just as he or she can marry someone of other faiths."

However, conceivably the Monarch could be expected to decide whether or not a person high in the line of succession should be allowed to marry a Roman Catholic.

28. There is a lack of explanation in the explanatory notes for retaining a requirement of consent to certain royal marriages. On whether clause 3 is compatible with Convention rights (the right to marry), it is simply stated that "in the Government's view there is a public interest in having special provisions"; that the clause has "a legitimate aim" and is "proportionate"; and that "other European monarchies also have requirements of consent" to royal marriages.[50] Presumably the status of divorcees is no longer a matter of contention.[51]

29. An issue arises with the Duchy of Cornwall, which provides the source of revenue for the heir apparent to the throne. When the Duke of Cornwall

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45 *Rules of Royal Succession, op cit.*, para 9.

46 Other religions, for example Islam, have similar precepts on the upbringing of children.

47 The canon law requirement was waived in respect of the children of HRH Prince Michael of Kent.

48 Unrevised transcript of evidence, 9 January 2013, Q8. See further, William Oddie, "Why shouldn't there be a Catholic 'Supreme Governor' of the Church of England?" *Catholic Herald*, 31 October 2011.

49 *ibid.*, Q9.

50 Paras 53–54.

51 As it famously was earlier in Her Majesty's reign regarding Princess Margaret. In 2005, Prince Charles married Camilla Parker Bowles (now the Duchess of Cornwall) in a civil ceremony, both being divorcees; see further, HL Deb, 24 February 2005, cols WS 87–88.

succeeds to the throne, the Duchy automatically transfers to the new heir. At present, however, the Duchy can only be held by a male. If it is to continue to be held by the heir apparent to the throne, the Letters Patent for the Duchy will need to be altered. The explanatory notes to the Succession to the Crown Bill are silent on the matter.[52]

30. As with the Duchy of Cornwall, most hereditary peerages involve male primogeniture according to letters patent. Since 92 seats are still reserved for hereditary peers in the House of Lords,[53] this has constitutional significance in terms of gender representation in Parliament. Although the Succession to the Crown Bill may be said "to cast the spotlight on the hereditary aristocracy"[54] in this respect, the Government believe that "the laws of succession with regard to hereditary peerages … is quite a separate issue", one which ministers have "no plans" to address.[55]

31. **Whilst we do not here seek to resolve the points raised about possible unintended consequences, they demonstrate the need to provide the opportunity for full debate in Parliament.**

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52 On 31 December 2012 Her Majesty issued letters patent "to declare that all the children of the eldest son of the Prince of Wales should have and enjoy the style, title and attribute of Royal Highness with the titular dignity of Prince or Princess". Previously, under letters patent made by George V in 1917, the style "HRH" and titles "prince" and "princess" were restricted to the sovereign's children, the children of the sovereign's sons, and the eldest son of the eldest son of the Prince of Wales. The new letters patent sit more comfortably with clause 1 of the bill.

53 Under the House of Lords Act 1999.

54 *Rules of Royal Succession, op. cit.*, para 15.

55 *op. cit.*, note 42, p 2. See also unrevised transcript of evidence, 9 January 2013, Q13.