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Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill

Bill 29 of 2008-09

The line of succession follows the hereditary principle with certain restrictions. The Crown passes to males ahead of females, and the monarch can neither be nor marry a Roman Catholic.

This Private Members' Bill, introduced by Dr Evan Harris, intends to remove the religious requirement on the monarch's spouse and the preference for men in the line of succession. It would have no effect on the religion of the monarch, who would still be required to be in communion with the Church of England.

The Bill would also repeal the *Royal Marriages Act 1772* which places certain restrictions on members of the Royal Family marrying without consent of the monarch.

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Summary of main points

- The *Royal Marriages and Succession to the Throne (Prevention of Discrimination) Bill 2008-09* is a Private Members' Bill introduced by Dr Evan Harris. The purpose of the Bill is to remove existing legal restrictions on the monarch or heir to the throne marrying a Roman Catholic, and to end the preferment of men over women in the line of succession.

- According to common law, the rules of succession require the Crown to pass according to the hereditary principle with male heirs preceding female heirs, and the elder son preceding younger sons.

- The monarch is the head of the Church of England. There are various legal provisions which mean that 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 and must swear to maintain the established churches of England and Scotland. In addition, statute law requires that monarch may not retain their throne if they marry a Catholic, and that any heir that marries a Catholic is removed from the line of succession. The legal provisions are contained in statutes dating back to the Glorious Revolution, including *The Bill of Rights 1688* and the *Act of Settlement 1700.*

- It is argued that the effects of these provisions are discriminatory, and that such laws are at odds with modern society. However, some consider changing the laws relating to succession to be prohibitively complex. The preamble of the *Statute of Westminster 1931* is thought by some to require assent from the fifteen countries of the Commonwealth which retain the Queen as Head of State to any changes to the succession to the Crown. It is also suggested that amending old constitutional statutes might unravel the relationship between Church and State. Others, however, believe such issues would not be impediments to altering the laws of succession if the desire was there to do so.

- The *Royal Marriages Act 1772* requires the descendants of George II (other than the children of princesses married into 'foreign families') to seek consent of the monarch before marrying. If the person in question is over 25 they may marry without consent, as long as Parliament does not object. Dr Evan Harris's Private Member's Bill would repeal this legislation.

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I Introduction

When the reigning monarch dies, the title to the Crown of the British Monarch is passed on using the hereditary principle, with certain restrictions on faith and gender.

Common law places males ahead of females in the line of succession. Various statutes set requirements that the monarch must not be nor marry a Roman Catholic.[1] In addition, the *Royal Marriages Act 1772* requires the descendents of George II (other than princesses married into 'foreign families') to seek the consent of the monarch before marrying.

The *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill 2008-09* is a Private Members' Bill introduced by Dr Evan Harris. It was introduced in the House of Commons on 21 January 2009, as Bill 29 of 2008-09, and was published on 13 March 2009. The Bill is scheduled to have its second reading on 27 March 2009.

The Bill intends to alter the line of succession to the Throne by repealing provisions on the religious restrictions on consorts and ending the preference for men ahead of women. The Bill would also repeal the *Royal Marriages Act 1772.*

This Research Paper sets out the legal and historical background to the succession of the throne and the *Royal Marriages Act 1772* before considering the main issues raised by attempts to change the law. It outlines the main provisions of the *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill 2008-09.* The Appendix provides details of previous attempts to amend the Crown succession since 1997.

II Gender and the succession

The preference for males over females in the line of succession is derived from the common law rules of property. This is set out in Bradley and Ewing's *Constitutional and Administrative Law* as follows:

> The limitation to the heirs of the body, which has been described as a parliamentary entail, means that the Crown descends in principle as did real property under the law of inheritance before 1926. That law *inter alia* gave preference to males over females and recognised the right of primogeniture. The major exception to the common law rules of inheritance is that for practical reasons the right of two or more sisters to succeed to real property as co-parceners does not apply: as between sisters, the Crown passes to the first born.[2]

This common law requirement means that the current line of succession runs as follows:[3]

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1 All references in this Paper to 'Catholics' are to Roman Catholics.

2 Bradley and Ewing, *Constitutional and Administrative Law,* 14th Edition, 2006, p243

3 A list of the first forty members of the Royal Family in line to the throne is available on the British Monarchy's website at: http://www.royal.gov.uk/ThecurrentRoyalFamily/Successionandprecedence/Succession/Overview.aspx (last viewed 16 March 2009).

1. The Prince of Wales
2. Prince William of Wales
3. Prince Henry of Wales
4. The Duke of York
5. Princess Beatrice of York
6. Princess Eugenie of York
7. The Earl of Wessex
8. Viscount Severn
9. The Lady Louise Windsor
10. The Princess Royal
11. Mr. Peter Phillips
12. Miss Zara Phillips

If the gender requirements were removed, and the Crown followed a system of absolute primogeniture, the line would be as follows:

1. The Prince of Wales
2. Prince William of Wales
3. Prince Henry of Wales
4. Princess Anne
5. Mr. Peter Phillips
6. Miss Zara Phillips
7. The Duke of York
8. Princess Beatrice of York
9. Princess Eugenie of York
10. The Earl of Wessex
11. The Lady Louise Windsor
12. Viscount Severn

That is, Princess Anne would become fourth in line to the throne, with her children fifth and sixth, rather than being tenth, eleventh and twelfth as they are now. Lady Louise Windsor, the elder child of the Earl of Wessex, would also move above her younger brother, Viscount Severn.

In Sweden, the law was changed with effect from 1980 so that the succession passes to the eldest child of the sovereign, regardless of their gender.[4] This is also now the case for the monarchies of Belgium, the Netherlands and Norway.

[4] See *The Monarchy in Sweden* website at: http://www.royalcourt.se/royalcourt/themonarchytheroyalcourt/theswedishmonarchy/themonarchyinsweden.4.396160511584257f2180005799.html (last viewed 16 March 2009).

III Religion and the succession

Statute law places certain restrictions on the religion of the monarch and their spouse. Professor Robert Blackburn (King's College London) has stated that, together, the effect of these statutes is that the monarch:

- 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;
- must swear to maintain the established churches of England and Scotland.[5]

The statutory provisions contained in the *Bill of Rights 1688* were reinforced in the *Coronation Oath Act* of the same year, and then in a number of statutes which followed, including the *Act of Settlement 1700,* and the *Acts of Union* in 1706 and 1707.[6] The statutes were the outcome of the constitutional struggles between the monarch and Parliament, the restoration of the monarchy, the Glorious Revolution, and concerns about the future succession of the Crown. The legislation also confirmed that Parliament was able to alter the succession by statute.

There have been some recent examples where individuals have been removed from the line of succession because they have married a Catholic. The Earl of St Andrews and HRH Prince Michael of Kent both lost their right of succession through marriage to Roman Catholics.[7] Any children of these marriages would remain in the succession provided that they are in communion with the Church of England.

The Duke of Kent, however, has retained his place in the line of succession despite his wife converting to Catholicism in 1994 as she was not a Catholic when he married her in 1961.[8] The couple's youngest son, Lord Nicholas Windsor, has converted to Catholicism and therefore cannot inherit the throne.

In 2008 it was announced that Peter Phillips would marry his partner, Autumn Kelly. It emerged that she had been baptised as a Catholic. Ms Kelly was accepted into the Church of England before the marriage took place and Peter Phillips retains his place in the line of succession.[9]

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5 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p108

6 In England before 1752, 1 January was celebrated as the New Year festival, but 25 March was the start of the civil or legal year. The *Calendar (New Style) Act 1750* introduced the Gregorian Calendar and moved the start of the civil year to 1 January. Therefore the years given in dates for Acts preceding 1752 are often recorded differently – depending on whether the old or new style calendar is used. In this note, the dates used by the Office of Public Sector Information have been used.

7 The Earl of St Andrews married Sylvana Tomaselli in January 1988. Prince Michael of Kent married Baroness Marie-Christine von Reibnitz in 1978.

8 The British Monarchy's website, *The Duchess of Kent – Public Role,* at: http://www.royal.gov.uk/ThecurrentRoyalFamily/TheDuchessofKent/Publicrole.aspx (last viewed 16 March 2009).

9 'Fiancée secures royal succession by abandoning her Catholic faith', *The Times,* 1 May 2008

A. The *Bill of Rights 1688*

The *Bill of Rights 1688* was the first statute to include provisions that effectively prevented the monarch from being, or marrying, a Roman Catholic. There had been a great deal of religious and political turmoil in preceding years, which created the circumstances in which James II fled to France, and the arrival of William of Orange who became King of England in 1688. On 12 February 1688 a declaration was drawn up affirming the rights and liberties of the people and conferring the crown upon William and Mary, then Mary's children, and failing any heirs, Princess Anne and her heirs; and also failing that, William's heirs. Once the declaration had been accepted by William and Mary, it was published as a proclamation. The declaration was subsequently enacted, with some additions, in the form of the *Bill of Rights 1688.*

The relevant section of the *Bill of Rights* states:

> And whereas it hath beene found by experience that it is inconsistent with the safety and welfaire of this protestant 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 professe 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 as should have inherited and enjoyed the same in case the said person or persons soe reconciled holding communion or professing or marrying as aforesaid were naturally dead [And that every King and Queene of this realme who at any time hereafter shall come to and succeede in the imperiall crowne of this kingdome shall on the first day of the meeting of the first Parlyament next after his or her comeing to the crowne sitting in his or her throne in the House of Peeres in the presence of the lords and commons therein assembled or at his or her coronation before such person or persons who shall administer the coronation oath to him or her at the time of his or her takeing the said oath (which shall first happen) make subscribe and audibly repeate the declaration mentioned in the Statute made in the thirtyeth yeare of the raigne of King Charles the Second entituled An Act for the more effectuall preserveing the Kings person and government by disableing papists from sitting in either House of Parlyament But if it shall happen that such King or Queene upon his or her succession to the crowne of this realme shall be under the age of twelve yeares then every such King or Queene shall make subscribe and audibly repeate the said declaration at his or her coronation or the first day of the meeting of the first Parlyament as aforesaid which shall first happen after such King or Queene shall have attained the said age of twelve yeares] All which their Majestyes are contented and pleased shall be declared enacted and established by authoritie of this present Parliament and shall stand remaine and be the law of this realme for ever And the same are by their said

[10] Annexed to the original Act in a separate schedule

> Majesties by and with the advice and consent of the lords spirituall and temporall and commons in Parlyament assembled and by the authoritie of the same declared enacted and established accordingly

As well as preventing the monarch from being or marrying a Catholic, the *Bill of Rights* requires that the sovereign must declare, at the first day of the meeting of the first parliament after his or her accession, or at the coronation, whichever occurs first, that he or she is a faithful Protestant. [11] The *Accession Declaration Act 1910* specified a new form of the declaration to be "made, subscribed and audibly repeated" by the monarch under the *Bill of Rights* and the *Act of Settlement* in preparation of the coronation of George V.[12]

B. The *Coronation Oath Act 1688*

The *Bill of Rights* required the monarch to be in communion with the Church of England. The only restriction on the monarch's wife would seem to be that she must not be a Catholic. The *Coronation Oath Act 1688,* however, appears to require both the King and Queen to swear during their coronation ceremony that they will, to the utmost of their power:

> maintaine the Laws of God the true profession of the Gospell and the Protestant reformed religion established by law [...] and [...] preserve unto the bishops and clergy of this realm and to the churches committed to their charge all such rights and privileges as by law do or shall appertain unto them or any of them.[13]

Section 4 of the Act appears to detract from this requirement:

> **4. Oath to be administered to all future Kings and Queens**
>
> And ... the said oath shall be in like manner administred to every King or Queene who shall succeede to the imperiall crowne of this realme at their respective coronations by one of the archbishops or bishops of this realme of England for

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11 The declaration was as follows:

> I *A: B* doe solemnely and sincerely in the presence of God professe testifie and declare that I do believe that in the sacrament of the Lords Supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of die Virgin Mary or any other saint, and the sacrifice of the masses as they are now used in the Church of Rome are superstitious and idolatrous, and I doe solenmely in the presence of God professe testifie and declare that I doe make this declaration and every part thereof in the plaine and ordinary sense of the words read unto me as they are commonly understood by English Protestants without any evasion, equivocation or mentall reservation whatsoever and without any dispensation already granted me for this purpose by the Pope or any other authority or person whatsoever or without any hope of any such dispensation from any person or authority whatsoever or without thinking that 1 am or can be acquitted before God or man or absolved of this declaration or any part thereof although the Pope or any other person or persons or power whatsoever should dispense with or annull the same, or declare that it was null and void from the beginning.

12 This was done in preparation for the coronation of George V. The declaration now 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.

13 *Coronation Oath Act 1688* (1 Will & Mar chap 6), s 3

> the time being to be thereunto appointed by such King or Queene respectively and in the presence of all persons that shall be attending assisting or otherwise present at such their respective coronations any law statute or usage to the contrary notwithstanding.

The 1688 Act included the Queen, since William and Mary ruled as joint monarchs. This joint monarchy was unprecedented in English history and came about as part of unique circumstances. Mary was the sister of James II and her husband was Dutch. As part of the negotiations leading to the Glorious Revolution, William was approached for his opinion. According to the *Oxford History of England* William made clear to those who sought to bring him to power that he would not be regent or accept a subordinate position to his wife. The history notes "Both William and Mary formally accepted the offer of the throne made to them jointly, and with it the Declaration of Rights".[14] Since the reign of William and Mary, there have not been other joint monarchs on the throne.

If it is the case that the monarch's spouse must also swear to maintain the established religion, there might be women of some Protestant denominations and non-Christian religions who would not wish to do so. However, the coronation oath was not administered to Prince Philip, who is the consort of the current monarch. Only Elizabeth II took the oath. In contrast, the Queen's parents, George VI and Queen Elizabeth both took the coronation oath.[15] It would not seem necessary to amend the *Coronation Oath Act* to change the law relating to Catholic consorts.

It is also worth noting that the oath Elizabeth II took was modified without statutory authority. The present Queen swore to govern the peoples of her realms and territories according to their respective laws and customs and to maintain the established Protestant religion in the United Kingdom.[16]

C. The *Act of Settlement 1700*

The *Act of Settlement* was deemed necessary to secure the Protestant succession following the death without heirs of Mary, the death of the then heir, Princess Anne's only surviving child, and the likelihood of William's death without heirs. The Stuarts still had claims to the throne and "it being absolutely necessary for the safety, peace and quiet of this realm to obviate all doubts and contentions in the same by reason of any pretended titles to the crown",[17] the *Act of Settlement* was passed, devolving the Protestant succession after Queen Anne (assuming no heir) to Princess Sophia the Electress of Hanover (granddaughter of James I of England) and her heirs, who were Protestants.

Section 2 of this Act reiterated the exclusion of Catholics or persons married to Catholics and the requirement for the Coronation Oath:

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14 Sir George Clark, *The Later Stuarts 1660-1714,* Second Edition, p145
15 See Halsbury's Laws of England Vol 12(1) The Crown, para 20
16 For further details see Library Note SN/PC/00435, *The Coronation Oath*
17 *Act of Settlement 1700* (12 & 13 Will 3 chap 2), in long title

> **2. The persons inheritable by this Act, holding communion with the church of Rome, incapacitated as by the former Act, to take the oath at their coronation, according to Stat 1 W & M c 6**
>
> Provided always and it is hereby enacted that all and every person and persons who shall or may take or inherit the said crown by vertue 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 as in such case or cases are by the said recited Act provided enacted and established. And that every King and Queen of this realm who shall come to and succeed in the imperiall crown of this kingdom by vertue of this Act shall have the coronation oath administered to him her or them at their respective coronations according to the Act of Parliament made in the first year of the reign of his Majesty and the said late Queen Mary intituled An Act for establishing the coronation oath and shall make subscribe and repeat the declaration in the Act first above recited mentioned or referred to in the manner and form thereby prescribed.

Section 3 of the *Act of Settlement* also requires active participation in the Church of England by the monarch:

> **3. Further provisions for securing the religion, laws, and liberties of these realms**
>
> And whereas it is requisite and necessary that some further provision be made for securing our religion laws and liberties from and after the death of his Majesty and the Princess Ann of Denmark and in default of issue of the body of the said princess and of his Majesty respectively Be it enacted by the Kings most excellent Majesty by and with the advice and consent of the lords spirituall and temporall and commons in Parliament assembled and by the authority of the same
>
> That whosoever shall hereafter come to the possession of this crown shall joyn in communion with the Church of England as by law established

At first the effect of this was to exclude all members of other churches. However, members of certain other Protestant churches may not now be debarred. Since 1972, by the Church of England's *Admission to Holy Communion Measure*[18], and the [Church of England] Canon (B15A) that followed it, "baptised persons who are communicant members of other churches which subscribe to the doctrine of the Holy Trinity, and who are in good standing in their own Church" shall without further process be admitted to Holy Communion in Church of England churches.

This means, for instance, that a Methodist, Congregationalist, Church of Scotland, or Baptist member can take Anglican Communion, though a Unitarian (who would reject the concept of the Trinity) and Quakers (who do not subscribe to the concept of the Lord's Supper) could not. Hence in the strict sense of the wording of the *Act of Settlement*, members of most Protestant churches would not now be excluded. Members of

[18] GSM no.2, 1972. The canon is reprinted in *Canons of the Church of England,* 5th ed 1993 (loose leaf publication)

Protestant denominations outside the Church of England do not generally object as a matter of faith to the established status of the Church of England and could thus subscribe to the requirements of the *Coronation Oath Act 1688*. Such a person could therefore "join in communion", as the words of the statute decree.

A Catholic would probably still be affected by this section, additionally to the specific disabilities quoted in s 2, since he or she could not remain "in good standing" in the Roman Catholic Church by taking communion from an Anglican minister.[19]

D. The *Acts of Union*

The Acts of Union which formed the United Kingdom reinforced the religious requirements placed on the holder of the Crown. Ireland had been in personal union with England since 1541, when the Irish Parliament passed the Crown of Ireland Act 1542, proclaiming King Henry VIII of England to be King of Ireland. Both Ireland and England had been in personal union with Scotland since the death of Queen Elizabeth I and the succession to the throne of James I of England (James VI of Scotland) in 1603. The Acts of Union with Scotland, and then the Union with Ireland, included provisions to ensure the common line of succession to the Crown across the nations.

The position of the established Protestant Presbyterian Church was safeguarded in the Acts of Union between England and Scotland. Article II of the Acts confirmed the provisions of the *Act of Settlement* and reiterated provisions relating to the Succession. They state:

> That the Succession to the Monarchy of the United Kingdom of Great Britain and of the Dominions thereto belonging after Her most Sacred Majesty and in default of Issue of Her Majesty be remain and continue to the most Excellent Princess Sophia Electoress and Dutchess Dowager of Hanover and the Heirs of her body being Protestants upon whom the Crown of England is settled by an Act of Parliament made in England in the Twelfth year of the reign of His late Majesty King William the Third intituled an Act for the further Limitation of the Crown and better securing the rights and Liberites of the Subject And that all Papists and persons marrying Papists shall be excluded from and for ever incapable to inherit possess or enjoy the Imperial Crown of Great Britain and the Dominions thereunto belonging or any part thereof and in every such Case the Crown and Government shall from time to time descend to and be enjoyed by such person being a Protestant as should have inherited and enjoyed the same in case such Papist or person marrying a Papist was naturally dead according to the Provision for the descent of the Crown of England made by another Act of Parliament in England in the first year of the reign of Their late Majesties King William and Queen Mary intituled an Act declaring the Rights and Liberites of the Subject and settling the Succession of the Crown.[20]

This would need amendment should the *Act of Settlement 1700* be amended or abolished.

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19 With certain minor exceptions, [RC] Canon 844; *Code of Canon Law*, 1997

20 *Union with Scotland Act 1706,* and, *Union with England Act 1707*

The second article of the *Union with Ireland Act 1800* stated that:

> **That the succession to the crown shall continue limited and settled as at present**
>
> That it be the Second Article of Union, that the succession to the imperial crown of the said United Kingdom, and of the dominions thereunto belonging, shall continue limited and settled in the same manner as the succession to the imperial crown of the said kingdoms of Great Britain and Ireland now stands limited and settled, according to the existing laws and to the terms of union between England and Scotland.[21]

IV Altering the Succession to the Crown: Main issues

The argument for changing the law on succession can be stated simply: the law as it stands is considered to discriminate against women and Catholics, and this has both a practical and symbolic effect.

The Government has said that it opposes discrimination in all forms, including against Catholics. However, attempts to alter the succession to remove such clauses through Private Members' bills have not been successful, and the Government has not brought forward its own legislation on the matter.

It is argued that to change the law would be a complex task, requiring the consent of the fifteen Commonwealth countries that have the Queen as their head of state under the preamble to the *Statute of Westminster 1931*. Amending old legislation which is fundamental to our constitution would be difficult to achieve, and might raise further questions about the nature of the established church and the Union between England and Scotland. Without a pressing reason to act, the Government has resisted calls to do so.

The Government's position was recently summarised in an answer given by the Lord Chancellor, Jack Straw, on 12 January 2009:

> **Jo Swinson:** To ask the Secretary of State for Justice what plans he has to bring forward legislative proposals to amend those provisions of the Act of Settlement relating to the Royal Succession; and what recent representations he has received on the matter. [244129]
>
> **Mr. Straw:** The Government have always stood firmly against discrimination in all its forms, including against Roman Catholics, and we will continue to do so. To bring about changes to the law on succession would be a complex undertaking involving amendment or repeal of a number of items of related legislation, as well as requiring the consent of legislatures of member nations of the Commonwealth. We are examining this complex area although there are no immediate plans to legislate.[22]

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21 *Union with Ireland Act 1800,* article second

22 HC Deb 12 January 2009 c513W

The answer given by the then Prime Minister, Tony Blair, in December 1999, set out a similar line of argument:

> **Ms Roseanna Cunningham:** To ask the Prime Minister if he will make it his policy to seek to amend the law to *(a)* allow members of the Royal family to marry a Catholic without losing their right to inherit the throne and *(b)* allow Roman Catholics to inherit the throne; and if he will make a statement. [99658]
>
> **The Prime Minister** *[holding answer 26 November 1999]:* The Government have always stood firmly against discrimination in all its forms, including against Roman Catholics, and it will continue to do so.
>
> The Government have a heavy legislative programme aimed at delivering key manifesto commitments in areas such as health, education, crime and reform of the welfare system. To bring about change to the law on succession would be a complex undertaking involving amendment or repeal of a number of items of related legislation, as well as requiring the consent of legislatures of member nations of the Commonwealth. It would raise other major constitutional issues. The Government have no plans to legislate in this area.[23]

In March 2008, Jack Straw had seemed to indicate that there had been a slight shift in Government thinking on these matters. Answering a question from Jim Devine on the abolition of the *Act of Settlement 1700* Jack Straw stated:

> **Mr. Straw:** Let me say to my hon. Friend that I speak on behalf of the Prime Minister: because of the position that Her Majesty occupies as head of the Anglican Church, this is a rather more complicated matter than might be anticipated. We are certainly ready to consider it, and I fully understand that my hon. Friend, many on both sides of the House and thousands outside it, see that provision as antiquated.[24]

However, as Frank Cranmer has written:

> Two days later, however, in the No. 10 morning press briefing, the Prime Minister's spokesman seemed to dismiss the idea that any kind of reform was possible, since:
>
> > to bring about changes to the law on succession would be a very complex undertaking; it would involve the amendment or appeal [*sic*] of a number of items of related legislation, but it would also require the consent of the legislators of member nations of the Commonwealth. [Morning Press Briefing from 27 March 2008]
>
> So that looks like a 'no', then – at least for the moment.[25]

The issues raised are examined in more detail below.

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[23] HC Deb 13 December 1999 c57
[24] HC Deb 25 March 2008 c27
[25] Frank Cranmer, 'Parliamentary report', *Ecclesiastical Law Journal,* 2008, p352

A. Discrimination on the grounds of gender and religion

When Dr Evan Harris announced that he was to introduce a Bill on the Crown succession he stated that he intended:

> …to reverse centuries of discrimination against Catholics and women under the Act of Settlement and other enactments.
>
> Dr Harris said, "It is wrong that anti-Catholic discrimination is written into the UK's constitution"…
>
> "It is not acceptable that our law continues to relegate women down the success to the crown, at a time when no sane politician would argue in its favour"…
>
> "Although the current discrimination does not have a wide practical effect, because this is still part of our constitution, it is an ongoing symbol of the lingering 2nd class status of Roman Catholics and women."[26]

The Fabian Society's 2003 Commission on the Future of the Monarchy argued that it is difficult to align the current restrictions on religion and gender in relation to the succession with general concerns to end discrimination and promote equality:

> The current rules of succession raise a fundamental question for a modern democracy. In the context of increasing cultural diversity, and an expectation of civil and social equality, can institutionalised gender and religious discrimination any longer be acceptable? We believe it cannot, for symbolic and practical reasons, and reform is long overdue.[27]

Professor Blackburn has also commented, on the matter of gender, that:

> 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 statutes such as the Sex Discrimination Acts 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. [28]

John Gummer's ten-minute rule Bill, *Catholics (Prevention of Discrimination) Bill 2006-07* was the most recent attempt to change the rules on succession. Seeking leave to introduce the Bill he stated:

> In a civilised society there ought to be no reason to introduce this Bill. If we proposed a Bill on the Floor of the House of Commons that would make it illegal for the heir to the throne to marry a Muslim, a Methodist or a Mormon, that would be intolerable in a free society, yet the heir to the throne is still not allowed to

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26 Press notice issued by Dr Evan Harris MP, *MP seeks to end centuries of ingrained anti-Catholic and sexist prejudice in UK Constitution,* 21 January 2009

27 Fabian Society Commission, *The Future of the Monarchy,* 2003, p48

28 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p152

> marry a member of what is, on any Sunday, the largest worshipping community in this country. That is an insult to the Catholic community because it suggests that, somehow or other, being a Roman Catholic means being less of a citizen than someone belonging to any other religious denomination.[29]

The Scottish National Party have, in recent years, made a number of calls for the discriminatory provisions of the *Act of Settlement* to be repealed.[30] Under the *Scotland Act 1998* matters related to the Crown are reserved to the UK; the Scottish Parliament has no power to legislate in this area. However, the Scottish Parliament debated a motion on the *Act of Settlement* in December 1999 and resolved as follows:

> Resolved,
>
> That the Parliament 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, recognises that amendment or repeal raises complex constitutional issues, and that this is a matter reserved to UK Parliament.[31]

For further details of developments in Scotland, see *Scottish Parliament Information Centre Research Paper 99/17, The Act of Settlement*.[32]

The Government has repeatedly stated its opposition to discrimination in this context. However, the Government has also suggested that the effects of the restrictions placed on the religion of the monarch and their spouse have had limited effect in practice. Lord Falconer also stated during the debate on Lord Dubs's Bill that:

> … we should be clear that for all practical purposes, its effects are limited.
>
> There are 22 member of the Royal Family in line of succession after the Prince of Wales, all of whom are eligible to succeed and have been unaffected by the Act of Settlement. Only four living members of the Royal Family can be said to have been affected by the Act, but they come after the 22nd person in line to the throne. Therefore, to claim that the Act has a discriminatory impact is to ignore the improbability that any of those members of the Royal Family could, in practice, have succeeded.[33]

He went on to state that such legislation was:

> …not needed at the moment as there is no practical discriminatory effect on the current line of royal succession.[34]

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29 HC Deb 20 February 2007 cc154-156
30 See for example HC Deb 28 June 2006 c259
31 Scottish Parliament Official Report, 16 December 1999, c1633-1754
32 Scottish Parliament Research Centre, *The Act of Settlement,* RP99/17, http://www.scottish.parliament.uk/business/research/pdf_res_papers/rp99-17.pdf
33 *Ibid*
34 *Ibid,* c512

B. Assent of the Commonwealth

The *Statute of Westminster 1931* appears to require the United Kingdom to obtain the assent of all the Parliaments in the Commonwealth before altering the law of succession,[35] although the precise nature of this requirement is subject to some disagreement.

The preamble to the *Statute of Westminster* states:

> inasmuch as the Crown is the symbol of free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another 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.[36]

However, Professor Blackburn has argued that as these words are included in the preamble to the Act, rather than the Act itself, they have no legal basis, but a strong moral one:

> In British law, the nature of this obligation is moral or one of honour only, because the need for these assents is stipulated in the preamble rather than the actual text of the 1931 statute. But nonetheless, this obligation is a powerful political convention. Indeed, in international terms across those Commonwealth countries affected, it is equivalent to a treaty. Absence of consultation by the UK government before it brought forward legislation to reform the succession laws would be regarded as high handed and arrogant, and it would cause serious offence in Australia, Canada and the other Commonwealth states where the Queen reigns.[37]

In his book *Monarchy and the Constitution* Professor Vernon Bogdanor refers to the abdication crisis in 1936 where consent was sought from the nations in the Commonwealth for the *Declaration of Abdication Act 1936*. This Act gave statutory effect to the Instrument of Abdication which Edward VIII had signed. It also provided that the Duke of York (who was next in line to the throne) should succeed, barred any possible future claim to the throne by Edward VIII or his descendents, and declared that the *Royal Marriages Act 1772* should not apply to Edward VIII or his descendents. Professor Bogdanor states that:

> The provisions of this [the Declaration of Abdication] Act were required, by convention, first laid down in 1930 and confirmed in the preamble to the Statute of Westminster 1931, to be given the consent of the other members of the Commonwealth. Since today the sovereign is also the sovereign of fifteen other

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35 Sixteen countries, including the UK, retain the British Monarch as their head of state. The other fifteen are: Antigua and Barbuda, Australia, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, Mauritius, New Zealand, Papua New Guinea, Saint Christopher and Nevis, Saint Vincent and the Grenadines, The Soloman Islands, and Tuvalu.

36 *Statute of Westminster 1931*

37 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p126

> Commonwealth countries, there must be a common rule of succession, and it would be unconstitutional, although not illegal, for the British government unilaterally to alter the rule of succession.[38]

Therefore, he explains, it remains "a convention that any alteration in [the rules of succession] must be agreed between all of the members of the Commonwealth which recognise the Queen as their head of state".

In 1952 the Commonwealth prime ministers had agreed that each of the monarchies in the Commonwealth should be free to adopt its own title in a form suitable to its own local circumstances.[39] Although the title of the monarch might be varied from country to country, the person to which the titles apply must be the same person across the Commonwealth.[40]

Professor Bogdanor explains that:

> When George, Elector of Hanover, became George I in 1714, he ruled over two kingdoms with different rules of succession – for Hanover prohibited the succession of a female to the throne. Accordingly, when Victoria became queen in 1837, the link with Hanover was broken, and Victoria's uncle, the Duke of Cumberland, became the Elector of Hanover. Clearly, it would not be in accordance with the relationship between the monarchies of the Commonwealth that there should be any differences in the rules of succession.[41]

The matter has been tested in the Canadian courts, by way of an action in the Superior Court of Ontario by a private individual, who was aggrieved by the attitude taken by the Act of Settlement and allied constitutional statutes to Roman Catholics. This case, *O'Donohue v. Canada,* was decided in June 2003.[42] The judge, Mr Justice Roleau, decided the case was non-justiciable. He dismissed the application. Some of the *obiter dicta* of the judge are however instructive.

> The office of the Queen is such a fundamental part of our constitutional structure that amendments to the Constitution in respect of that office require the unanimous consent of the federal and provincial governments (see s. 41(a) of the Constitution Act, 1982).[43]

He continued:

> Applying that reasoning to the present case, it is clear that Canada's structure as a constitutional monarchy and the principle of sharing the British monarch are fundamental to our constitutional framework. In light of the preamble's clear

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38 Vernon Bogdanor, *The Monarchy and the Constitution,* 1995, p45

39 *The Royal Titles Act 1953*

40 Vernon Bogdanor, *The Monarchy and the Constitution,* 1995, p269

41 *Ibid*

42 2003 CanLII 41404 (ON S.C.) and is reported at [2003] O.T.C 623 and (2003) 109 C.R.R., References are to the Internet version; http://www.canlii.org/on/cas/onsc/2003/2003onsc11019.html (last viewed 16 March 2009). Mr O'Donoghue appealed against the decision, but the appeal was summarily disallowed by the Ontario Court of Appeal ([2005] O.J. No.965, docket C40337).

43 *Ibid*, para 23

> statement that we are to share the Crown with the United Kingdom, it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry with those of the United Kingdom and other Commonwealth countries. One cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected.[44]

And most importantly, the judgment contained the following interpretation of the Statute of Westminster on the need for unanimity in the Commonwealth in order to change the "foundation documents":

> As a result of the Statute of Westminster it was recognized that any alterations in the rules of succession would no longer be imposed by Great Britain and, if symmetry among Commonwealth countries were to be maintained, any changes to the rules of succession would have to be agreed to by all members of the Commonwealth. This arrangement can be compared to a treaty among the Commonwealth countries to share the monarchy under the existing rules and not to change the rules without the agreement of all signatories.[45]

It is thus evident that any change in the succession provisions, according to this Canadian interpretation, would require legislation, at least in Canada, to validate its application there.

There are others, however, who believe that such obstacles should not, in practice, prevent any changes being made. The Fabian Commission argued that requirement of the Commonwealth nations must be sought is "unconvincing". The Commission argued stated that:

> It ignores the divisibility of the Commonwealth of the Crown in those states where the Queen is Head of State, as well as various amendments to the constitutions of these independent countries.[46]

The Fabian Commission stated that the concept of a divisible monarchy has been developed most clearly in Australia where, by 1973, the Australian Parliament was referring to Elizabeth II and Queen of Australia. In 1986 the *Australia Act* removed the residual powers of the British Government to intervene in the government of Australia or its individual states. The Act provides that:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or Territory as part of the law of the Commonwealth, of the State or of the Territory.[47]

The Fabian Commission quoted Peter Harry of the Commonwealth Institute as stating:

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44 *Ibid,* para 27
45 *Ibid,* para 33
46 *The Future of the Monarchy: The Report of the Fabian Commssion,* 2003, p90
47 As quoted in *The Future of the Monarchy: The Report of the Fabian Commission,* 2003, p89

> It is highly debatable whether the members of the Commonwealth would need to ratify any alterations or reforms of the British monarchy. When there was a referendum on the monarchy in Australia in November 1999 the Queen stated that it was a matter entirely for the Australians and kept out of the debate completely. Likewise, Britons would be entitled to expect the Commonwealth nations to refrain from interfering with British reforms of the monarchy. It is worth mentioning that the Commonwealth is a voluntary association of independent nations not bound by legal treaties of any kind. It would also be incredibly difficult if it were the case. The constitutions of Australia and New Zealand for instance can only be changed through national referendums resulting in a majority of voters in a majority of states voting for the change.[48]

In practice, the Fabian Commission argued, that:

> …With due consultation we believe it would not be difficult to obtain agreement among Commonwealth countries which retain the Queen as their Head of State on the kinds of reform proposed in this report. It looks very doubtful that any modern state would object to changes of the rules of succession removing discrimination on grounds of gender or religious affiliation. In this sense we do not believe that the position of the Queen as Head of State of other countries presents an obstacle to reforming the monarchy in the UK.[49]

C. The complexity argument

In order to change the rules of succession in relation to the religion of the monarch's spouse it would appear that the following statutes would need to be amended:

- the *Bill of Rights 1688*
- the *Act of Settlement 1700*
- the *Act of Union with Scotland 1706*
- the *Act of Union with England 1707*

If the prohibition against a Catholic monarch or if the position of the established church were to be affected, many other statutes would be included too. In a written answer in March 2008, Jack Straw, the Lord Chancellor and Secretary of State for Justice, identified nine provisions that would need amending if the Act of Settlement were amended:

> **Mr. Ingram:** To ask the Secretary of State for Justice which other Acts of Parliament would need to be amended if the Act of Settlement 1700 were amended to end the prohibitions on Roman Catholics within that Act.
>
> **Mr. Straw:** Legislation that would need to be reviewed includes the Bill of Rights 1688, the Coronation Oath Act 1688, the Union with Scotland Act 1707, the Union with England Act 1707, the Princess Sophia's Precedence Act 1711, the Royal Marriages Act 1772, the Union with Ireland Act 1800, the Accession Declaration

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[48] From written evidence to the Commission on the Future of the Monarchy from Peter Harry of the Commonwealth Institute, cited in *The Future of the Monarchy: The Report of the Fabian Commssion,* 2003, p90-91.

> Act 1910, and the Regency Act 1937. Any change in legislation would among other things require the consent of member nations of the Commonwealth.[50]

It is argued that drafting any piece of legislation to change the situation would not be straightforward. Dealing with amendments to legislation concerning the union of Scotland and England could open up extremely complex constitutional issues. Problems might also be encountered when attempting to disentangle matters of religion and politics, being, as they are, at the heart of core aspects of the British constitution.

However, the complexity argument has been challenged by Professor Blackburn who has written that:

> …this complication would hardly bother the government's legislative draftsmen, known as 'parliamentary counsel'. As a constitutional measure, the Constitutional Reform Act 2005, transforming the office of Lord Chancellor and position of the Law Lords, was far more complex. The annual Finance Acts, dealing with the inter-woven minutiae of mind-boggling taxation details, are arguably much worse in terms of detail and comprehension.[51]

More fundamental, he argues, is the relationship between the protestant succession and the establishment of the Church of England:

> There is no doubt that at the crux of the whole debate about reforming the Act of Settlement is whether the country, and the political elite of the country, wishes to maintain the established Church of England. These two issues – reform of the Act of Settlement and disestablishment of the Church of England are – in truth, two sides of the same coin. Reform of the Act of Settlement and its related statutes would set in train an inevitable momentum towards disestablishment; and disestablishing the Church of England would automatically remove the rationale for the religious provisions binding succession to the Crown.[52]

The Fabian Society's Commission on the Future of the Monarchy acknowledged this argument:

> …abolishing the religious discrimination within the rules of succession has wider implications, concerned with the monarch's role as Supreme Governor of the Church of England. Clearly such reform opens up the theoretical prospect of a non-Anglican taking on the leading role within the Church. Our view is that, rather than this being seen as a barrier to reform, it should raise questions about the nature of the relationship between the Head of State and the Church.[53]

D. Private Members' Bills on the Succession

Private Members' bills have been introduced in previous sessions which have intended to make alterations to the Crown succession. There have been eleven bills introduced with this purpose since 1997; some in the Commons and some in the Lords. During

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49 *The Future of the Monarchy: The Report of the Fabian Commission,* 2003, p91

50 HC Deb 31 March 2008 c554W. The difference in dates in the quote from those used in the rest of the Research Paper is due to the change in the Calendar explained in footnote 6 above.

51 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p126

52 *Ibid,* p128

53 *The Future of the Monarchy: The Report of the Fabian Commission,* 2003, p49

debates on such provisions it has been suggested that changes to the succession should not be brought forward through a Private Members' bill, because of the major constitutional nature of his proposals.

During the second reading debate on Lord Archer's *Succession to the Crown Bill [HL]* in February 1998, Lord Williams of Mostyn said:

> We [the Government] do not think that, whatever its merits, a Private Peer's Bill is an appropriate vehicle for so important a change as the one we have been debating. A major constitutional measure of this sort ought properly to be the subject of a government Bill. We shall be considering how best to carry this forward within government and in consultation with the Royal Family.[54]

Lord St John of Fawsley has previously argued that it was not appropriate that a change of this nature should be effected by a Private Member's bill:

> …this is a matter of extreme complexity. The status of the Sovereign's Coronation Oath, made in 1952, is brought into the issue. [It] involves the amending of not only one statute, but of many, including the Act of Union with Scotland of 1706. Under the Statute of Westminster 1931, if the Address were to lead to legislation, that legislation would have to be approved by all the relevant Commonwealth governments and by their parliaments. Therefore I ask your Lordships to draw the conclusion that surely such a major matter is best set in train--and should be set in train by the Government and Opposition parties officially acting together and not by a single Peer, even one so respected as my noble friend, whose intentions are beyond reproach. [55]

In 2004-05, Lord Dubs withdrew his *Succession to the Crown Bill* after its second reading debate in the Lords. Lord Dubs's intention had been to persuade Government to introduce its own measures. He said that he recognised the issue as a matter more appropriate for government to take forward.[56]

Frank Cranmer, John Lucas and Bob Morris have written that:

> In practice, however, both legislatures have accepted that, because of the complexity of the intertwined legislation involved, there are larger constitutional issues which would have to be weighed before any change could be brought about; and that, by the same token, such issues can be addressed only by government sponsored legislation rather than by private members of either House.[57]

E. The timing of legislation

There appear to be two sides to the argument over when the 'right time' to act on removing any discriminatory clauses should be. Some believe that the removal of

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54 HL Deb 27 February 1998 c917
55 *Ibid*, c918
56 HL Deb 14 January 2005 c516
57 Frank Cranmer, John Lucas and Bob Morris, *Church and State: A Mapping Exercise,* April 2006, p 16

provisions should be achieved sooner rather than later, and that it would be preferable to act whilst those directly in line to the throne are not affected (the first three people in the current line of succession are all male and currently there are no issues raised by the religious requirements).

The Fabian Society Commission on the Future of the Monarchy put forward this side of the argument as follows:

> While the question of gender discrimination might not be a practical issue for the foreseeable future – a change in the law will affect neither Charles nor William – the current settlement has enormous symbolic implications for gender politics and human rights… Now is in fact an excellent time to reform this aspect of the succession, precisely because the next three heirs in line to the throne are male, and reform will therefore not change anyone's existing priority.
>
> Similarly, although the foreseeable line of succession is Protestant, we believe the institutionalised religious discrimination of the current rules of succession should also be abolished…[58]

Chris Bryant has also argued that:

> …there is a strong argument for reform now, before Prince William or Harry has children. If William's first child were to be a girl and his second a boy, it would be inconceivable that the daughter should not inherit the crown. For that very reason, in Sweden the succession was changed when there was already a male presumptive heir who was replaced in favour of his sister.[59]

However, it can also be argued that without a pressing need to change the law, the complex legislation required could and should not take precedence over more pressing matters. Lord Strathclyde, then Conservative Spokesman on Constitutional Affairs, speaking during the Second Reading debate on Lord Dubs's Private Members Bill in January 2005, stated that:

> In the weeks that are left of this Parliament, I would prefer to attend to the crises in pensions and public services rather than change an institution which has given us unblemished public service for generations and which I pray will continue to do so for many years to come.[60]

F. The Queen's Consent

Bills which affect the prerogative powers of the monarch require the signification of Queen's consent in both Houses before they are passed. *Erskine May* explains that:

> Signification of Queen's consent is usually deferred until the third reading unless the interests involved, particularly those of the royal prerogative, are fundamental

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58 *The Future of the Monarchy: The Report of the Fabian Commission,* 2003, p48-49

59 Chris Bryant, 'A leaky barque – reforming the constitution', in Nathan Yeowell and Dennis Bates eds, *Powers to the People: Putting local people at the heart of constitutional reform,* LGA Labour Group, http://www.labourgroup.lga.gov.uk/lga/aio/965379 (last viewed 16 March 2009).

60 HL Deb 14 January 2005 c509

> to the bill. This distinction is, to a great extent at least, one of convenience. In ordinary cases the communication is deferred to the latest stage in order that account may be taken of any amendment of the bill before the Queen's consent in respect of the whole bill is given. But, if the matters affecting the royal interests form the main or a very important part of a bill, there is advantage in securing the permission of the Crown to proceed with the bill at the outset. In such cases, accordingly, the communication from the Queen is signified at the earliest practicable stage – usually the second reading. In the House of Lords, if a bill affects the prerogatives of the Crown, consent is normally signified at second reading. If a bill affects the interests of the Crown, but not the prerogative, the normal practice is to signify consent on third reading.[61]

It would appear that a bill to change the succession would need the signification of Queen's Consent at the earliest possible stage in the Commons. Queen's consent would probably need to be indicated at the second reading on the *Royal Marriages and the Succession to the Crown (Prevention of Discrimination) Bill.*

During the second reading on Lord Dubs's Bill *Succession to the Crown Bill [HL]* 2004-05, the Lord Chancellor, Lord Falconer of Thoroton, stated:

> My Lords, I have it in command from Her Majesty the Queen to acquaint the House that Her Majesty, having been informed of the purport of the Succession to the Crown Bill, has consented to place her Prerogative and Interest, so far as they are affected by the Bill, at the disposal of Parliament for the purposes of the Bill.[62]

Erskine May explains the procedure if the Queen's consent is withheld or not signified:

> If Queen's consent has not been obtained or is not signified, the question on the relevant stage of a bill for which consent is required cannot be put [at this point Erskine May refers to, *inter alia*, the *Military Action Against Iraq (Parliamentary Approval) Bill*]. Similarly, where a bill affecting the interests of the Crown has been allowed through inadvertence, to be read a third time and passed without the Queen's consent being signified, the proceedings have been declared null and void.
>
> The government's usual practice is to advise the granting of consent even to bills of which it disapproves. The understanding is that the grant of consent does not imply approval by the Crown or its advisers, but only that the Crown does not intend that, for lack of its consent, Parliament should be debarred from debating such provisions.[63]

It is possible for consent to be granted by the monarch, but for Royal Assent to be withheld. The consent of the monarch does not necessarily reflect the monarch's own personal view.

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61 Erskine May, 23rd Edition, p708-709
62 HL Deb 14 January 2005 c495
63 Erskine May, 23rd Edition, p710

During the debate on Lord Archer of Weston-Super-Mare's *Succession to the Crown Bill [HL] 1997-98*, Lord Williams told the House that the Queen had herself been consulted about the provisions, and on the gender issue, had indicated she had no objection:

> 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.[64]

In his book, *King and Country,* Professor Blackburn argues that it might be the case that Prince Charles is in favour of reform of the religious requirements on the monarch:

> It seems that the future Charles III is himself in favour of removing the religious provisions in the Act of Settlement… As he is famously known for saying, as King he would want to bee seen by the country as the 'defender of faith', not Defender of *the* Faith.[65]

Professor Blackburn goes on to quote former Liberal Democrat Leader Paddy Ashdown's account of a conversation between 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, "Charles looked at me, smiled broadly and said, "I really can't think why we can't have Catholics on the throne".[66]

V The *Royal Marriages Act 1772*

The *Royal Marriages Act 1772* requires the descendants of George II (other than the children of princesses married into 'foreign families') to seek consent of the monarch before marrying.[67] A descendant aged over 25 who persists in his or her wish to marry without consent, may marry one year after giving notice to the Privy Council of their intention to so marry, unless both Houses of Parliament expressly disapprove of the marriage. The Act applies also to marriages celebrated abroad and makes such marriages without consent void.[68]

There is no reference to the religion of the intended spouse. Professor Bogdanor explains that:

> Any 'marriage' contracted in defiance of these rules is void, although the person contracting the 'marriage' retains his or her right to succeed. Thus, when in 1785, the Prince of Wales 'married' Mrs Fitzherbert secretly and without obtaining

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64 HL Deb 27 February 1998 c916

65 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p118

66 *Ibid,* pp118-119

67 "The Royal Marriages Act 1772", *Modern Law Review,* Vol 14, Jan 1951 suggests that descendants of Queen Elizabeth II do not come within the Act, as she was a princess marrying into a foreign family

68 *Sussex Peerage Case* (1844) 11Cl and Fin 85

> permission, the 'marriage' was void. This was fortunate for the Prince of Wales, since, had the 'marriage' not been void, he could not have succeeded to the throne as George IV, Mrs Fitzherbert being a Catholic. The Act does, however, apply to Catholic descendents of George II, as much as to Protestants, even though Catholics are ineligible to succeed to the throne.[69]

Under the *His Majesty's Declaration of Abdication Act 1936* the 1772 Act was disapplied for any heirs of the Duke of Windsor.

Professor Blackburn has explained the idea of constitutional control over who becomes the spouse of the reigning of future monarch as follows:

> The logic behind this idea is that the personality and personal life of the individual who is or may become head of state is a matter of profound 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 not only has considerable de facto official, ceremonial and diplomatic functions to perform, but normally will be the father or mother 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.[70]

Professor Bogdanor has also argued in favour of repeal of the *Royal Marriages Act 1772:*

> Most urgent of all, however, is a reform of the Royal Marriages Act. There are, perhaps, few more absurd pieces of legislation on the statute book. The purpose of the Act, as stated in its preamble, that 'marriages in the Royal Family are of the highest importance to the state', can indeed easily be achieved without needing to invoke its complicated paraphernalia.
>
> …An obvious reform would be to make provision for the sovereign's approval to be required for the marriages, of the descendants not of George II, but of George VI, or better still, simply for the first five people in the line of succession… The second route provided for in the Royal Marriages Act, the declaration at the age of 25, is otiose and should be removed.[71]

The arguments in favour of changing *The Royal Marriages Act 1772* have been set out in an article by Dr Stephen Cretney, an emeritus fellow of All Souls College, Oxford, who quotes a 1955 civil service brief prepared for the Prime Minister in relation to a Parliamentary Question:

> 1. "It is inherently unsatisfactory that personal and constitutional questions of such high importance should still depend on the operation of an 18th Century Statute which was admittedly passed hurriedly, and in the face of considerable opposition, to deal with an *ad hoc* situation created largely by the unsatisfactory conduct of King George III's brothers."

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69 Vernon Bogdanor, *Monarchy and the Constitution,* p55
70 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p171
71 Vernon Bogdanor, *The Monarchy and the Constitution,* p60

> 2. The legal interpretation of the Act is uncertain; but it seems that "its ambit is now far too wide. It extends, or may extend to classes of persons whose connection with the Throne is very remote. Some think it should at least be confided to The Sovereign's children and grand-children and the Heir Presumptive."
>
> 3. "Although many approve in principle of control of marriages which are likely to affect the succession to the Throne, it can reasonably be argued that the sanctions against marriage without consent imposed by the Act of 1772 are too strong. A marriage without consent if void and the offspring of the union bastardised…"
>
> 4. "The provision of the Act which requires an applicant over the age of 25 who has been refused consent to give notice to the Privy Council and then wait a year, during which either [*sic*] House of Parliament may prevent the marriage by passing a resolution is contrary to modern ideas of propriety and fair-dealing".[72]

The *Legitimacy Act 1959* introduced the doctrine of the putative marriage into English law. As a result of that Act the child of a marriage void under the *Royal Marriages Act 1772* will usually be treated as the legitimate child of the parents.

Dr Cretney writes:

> Materials now in the public domain demonstrate that there were two main options for reform of the Royal Marriages Act. [*Footnote: In 1955 (when it had been thought that Princess Margaret might renounce her rights of succession on marrying Group Captain Peter Townsend) draft documents were prepared…*] The first was to amend the Act by confining its application to a comparatively narrow class (for example, the current Monarch's descendants). The second was to repeal the 1772 Act, and substitute an Act retaining the need for the Sovereign's consent to the marriage of those close to the throne, but restricting the sanction for failure to obtain that consent to disqualification from the line of succession and from any financial provision from the Civil List. Bills were drafted by counsel to give effect to these alternatives. But by 1964 all enthusiasm for reform seems to have evaporated. Approval of those Commonwealth countries which were monarchies seems to have been an especially weighty factor, and on July 13 1964 Home Secretary Henry Brooke decided "not to proceed with legislation… at the moment". Forty years later, there has still been no Government action to introduce the legislation…"[73]

Lord Falconer indicated the Government's position on the *Royal Marriages Act* during the second reading debate on Lord Dubs's Bill in 2005:

> There is an argument for amending the Act to remove the need for all descendants of George II having to obtain the Queen's consent before marrying. The longer the current provisions remain on the statute book, the more couples there will be who are covered by the requirements of the Act. Noble Lords should draw their own conclusions from the procedural description that I have just given. However, given the Government's current legislative programme, the issue

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[72] Dr S Cretney QC, 'Royal Marriages: Some Legal and Constitutional Issues', *Law Quarterly Review,* April 2008, pp235-237

[73] *Ibid,* pp238-239

> cannot be seen as urgent and would, again, have to be part of any larger examination of constitutional issues, such as the Act of Settlement.[74]

VI The Bill

Dr Evan Harris came fifth in the ballot for Private Members' Bills in the 2008-09 Session. He introduced the *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill* on 21 January 2009 as Bill 29 of 2008-09. The Bill was published on 13 March 2009. The second reading is due to take place on 27 March 2009.

Clause 1 of the Bill removes the preference for men ahead of women in the line of succession.

Clause 2 of the Bill addresses the matter of the religion of the consort to allow those in line to the throne to marry a Catholic and retain their place in the line of succession, and to allow the monarch to marry a Catholic. Its provisions amend the *Bill of Rights 1688,* the *Act of Settlement 1700,* the *Union with Scotland Act 1706* and the *Union with England Act 1707.* The Bill does not seek to amend the *Coronation Oath Act 1688,* as it would appear that the monarch's consort would not need to take the Oath.

Clause 3 of the Bill repeals the *Royal Marriages Act 1772* in full.

Clause 4 (1) states that the Act would come into force on a date which would be set by the Secretary of State by order. However, no order could come into effect unless the Secretary of State has consulted the government of every Commonwealth country on the provisions of the Act (**Clause 4 (2)**). It would appear that the intention of this clause was to overcome any dispute about the requirements of the preamble to the *Statute of Westminster 1931*. The Bill does not appear to require assent to be sought from other Commonwealth nations, just for them to have been consulted.

Clause 4 (3) states that the provisions of the Act will have no effect on the succession to the Crown before the date on which the Act comes into force. This would prevent claims to the throne from those whose ancestors had been affected by the provisions relating to gender or religion.

Clause 4 (4) states that the Bill would affect the order of succession to the Crown in the event of the death of Her present Majesty. However, Clause 4 (1) indicates that the Act would come into force on such a day as the Secretary of State "may by order appoint". When the monarch dies, the throne passes immediately and automatically on to the heir to the throne. It is therefore possible for the Monarch to die before any order having been made under this legislation.

Clause 4 (1) and (2) state that the Secretary of State may by order appoint a day on which the Act will come into force, and this cannot occur without first consulting the Commonwealth. However, it is worth noting that there does not appear to be a duty for the Secretary of State to consult or to lay such an order. A similar clause was contained

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[74] HC Deb 14 January 2005 c512

in the *Easter Act 1928* which sought to fix the date of Easter from year to year. That Act stated that:

> This Act shall commence and come into operation on such date as may be fixed by Order of His Majesty in Council, provided that, before any such Order in Council is made, a draft thereof shall be laid before both Houses of Parliament, and the Order shall not be made unless both Houses by resolution approve the draft either without modification or with modifications to which both Houses agree, but upon such approval being given the order may be made in the form in which it has been so approved: Provided further that, before making such draft order, regard shall be had to any opinion officially expressed by any Church or other Christian body.…[75]

The *Easter Act* placed no duty on the Secretary of State. This recent Parliamentary Question showed the outcome of this legislation:

> **Mr. Greg Knight**: To ask the Minister of State, Department for Business, Enterprise and Regulatory Reform if he will bring into force the principal provision of the Easter Act 1928 fixing the date of Easter. [261801]
>
> **Mr. McFadden**: We have no plans to implement the Easter Act 1928. It remains on the Statute Book but the Act requires that before a draft order is laid before Parliament
>
> > "regard shall be had to any opinion officially expressed by any Church or other Christian Body."
>
> At this time, the churches have not all expressed a desire or willingness to move to a fixed Easter.[76]

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[75] *Easter Act 1928,* c2(2)
[76] HC Deb 10 March 2009 c395W

Attempts to Amend Crown Succession since 1979*

Bill Title	Summary	Member	Stage	Date	Hansard reference
Session 1981/82					
Succession to the Crown Bill 1981/82	To amend the law with respect to the succession to the Crown.	Michael English (Labour)	1st reading	02/12/1981	14 c270
Session 1990/91					
Constitutional Reform Bill 1990/91	To amend the law relating to the succession, rights and responsibilities of the Crown.	Simon Hughes (Liberal Democrats)	1st reading	03/07/1991	194 c340-2
Session 1996/97					
Succession to the Crown Bill (HL) 1996/97	To remove any distinction between sexes in determining the succession to the Crown.	Lord Archer of Weston-super-Mare	1st reading	18/02/1997	578 c555
Session 1997/98					
Succession to the Crown Bill (HL) 1997/98	To remove any distinction between sexes in determining the succession to the Crown.	Lord Archer of Weston-super-Mare	1st reading	31/07/1997	582 c313
			2nd reading (withdrawn)	27/02/1998	586 c909-18
Session 1998/99					
Succession to the Crown (Amendment) motion	To remove the bar on a person who is not, or who is married to a person who is not, a Protestant to succeed to the Crown.	Rt Hon Lord Forsyth of Drumlean	Motion disagreed to	02/12/1999	607 c917-9
Session 2001/02					
Treason Felony, Act of Settlement and Parliamentary Oath Bill 2001/02	To provide that persons in communion with the Roman Catholic church are able to succeed to the Crown.	Kevin McNamara (Labour)	1st reading	19/12/2001	377 c319-25

Session 2004/5					
Succession to the Crown Bill (HL) 2004/05	To make provision about succession to the Crown and about Royal marriages.	Lord Dubs	1st reading	08/12/2004	667 c903
			2nd reading (withdrawn)	14/01/2005	668 c495-515
Succession to the Crown (No. 2) Bill 2004/05	To make provision about succession to the Crown and about Royal marriages.	Rt Hon Ann Taylor (Labour)	1st reading	12/01/2005	429 c314
Succession to the Crown and Retirement of the Sovereign 2004/05	To provide for Sovereigns to be chosen by the House of Commons from among the immediate family of the preceding Sovereign; to provide that all Sovereigns so chosen shall cease to be Sovereign upon reaching the age of 75.	Jonathan Sayeed (Conservative)	Motion negatived	25/01/2005	430 c161-3
Royal Marriages (Freedom of Religion) Bill 2004/05	To allow any member of the Royal Family to marry a person of any religion or none.	Edward Leigh (Conservative)	1st reading	08/03/2005	431 c1392-4
Session 2006/07					
Catholics (Prevention of Discrimination) Bill 2006/07	To remove remaining legislative discrimination against Catholics.	Rt Hon John Gummer (Conservative)	1st reading	20/02/2007	457 c154-6

* Also published as House of Commons Library Standard Note, SN/PC/4663, *Parliamentary Information List: Attempts to Amend Crown Succession*