

COUNSELLORS OF STATE BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Counsellors of State Bill [HL] as introduced in the House of Lords on 15 November 2022 (HL Bill 66).

- These Explanatory Notes have been drafted by the Cabinet Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The Counsellors of State Bill will add His Royal Highness The Earl of Wessex and Her Royal Highness The Princess Royal to the persons to whom, as Counsellors of State, Royal functions can be delegated.

Policy background

- 2 The Sovereign performs a significant number of ceremonial and constitutional functions which form a key part of the machinery of government of the United Kingdom and the Devolved Administrations. The Sovereign also has a role in relation to the Channel Islands and the Isle of Man, as well as the British Overseas Territories.
- 3 It is essential to ensure that these functions can continue to be performed in a timely way if the Sovereign is unable to perform them personally, for example in the event of the Sovereign's illness or absence from the United Kingdom. In these circumstances, there is provision for Royal functions to be delegated to Counsellors of State. Counsellors of State consist of (and are currently restricted to) the spouse of the Sovereign and the four persons who are next in the line of succession to the Crown (excluding those who are disqualified, such as those not of full age).
- 4 As referenced in the King's Message to Parliament on 14 November 2022, the Bill modifies the Regency Act 1937 ('the 1937 Act') to add two specified members of the Royal Family to the pool of Counsellors of State: His Royal Highness The Earl of Wessex and Her Royal Highness The Princess Royal.

Legal background

- 5 The 1937 Act makes provision for when a Sovereign is unable to perform Royal functions by establishing when a Regency or Counsellors of State may be needed. Under the 1937 Act:
 - a. A Regency would occur where a Sovereign succeeds to the throne under the age of 18, or where a Sovereign is totally incapacitated ("by reason of infirmity of mind or body") or "is for some definite cause not available".
 - b. Counsellors of State can be delegated Royal functions in circumstances falling short of those giving rise to a Regency – namely if a Sovereign is ill (but not so ill as to warrant a Regency) or absent from the United Kingdom.
- 6 Section 6(1) of the 1937 Act confers a power on the Sovereign to delegate Royal functions to Counsellors of State "in order to prevent delay or difficulty in the dispatch of public business" in two circumstances. Those circumstances are: (1) "illness not amounting to such infirmity of mind or body as is mentioned in section two of this Act" (which deals with a Regency) and (2) "absence or intended absence from the United Kingdom". The delegation is made by the Sovereign by Letters Patent for the period of the illness or absence. The Sovereign may revoke or vary the delegation by Letters Patent.
- 7 Section 6(1) expressly places a restriction on the functions that may be delegated: "no power to dissolve Parliament otherwise than on the express instructions of the Sovereign or to grant any rank, title or dignity of the peerage may be delegated." Aside from this, the Sovereign can specify in the Letters Patent which functions are (and are not) delegated. For example, Letters Patent have previously stated that Counsellors of State cannot approve and sign Letters Patent that signify Royal Assent to Acts of Parliament which touch on the Act of Settlement or the Sovereign's style and titles. In practice, when Counsellors of State were appointed during Her

Majesty Queen Elizabeth's absence from the United Kingdom, the Letters Patent included separate schedules detailing those functions which were delegated and those which were not. In the case of the recent State Opening of Parliament by Counsellors of State, the Letters Patent simply delegated that particular function.

- 8 The Counsellors of State consist of (and are restricted to) the spouse of the Sovereign and the four persons who (excluding those who are disqualified - see paragraph 9 below) are next in the line of succession to the Crown or, if there are less than four, all of those persons. Therefore, the current Counsellors of State are: the Queen Consort, the Prince of Wales, the Duke of Sussex, the Duke of York and Princess Beatrice of York.
- 9 Any person disqualified from acting as Regent is also disqualified from acting as a Counsellor of State. The disqualifying factors are: (1) not being a British subject of full age¹ and domiciled in some part of the United Kingdom²; (2) under section 2 of the Act of Settlement 1700, being incapable of inheriting, possessing and enjoying the Crown (as a result of Roman Catholicism), or (3) being disqualified under section 3(3) of the Succession to Crown Act 2013 from succeeding to the Crown as a result of marrying without the consent of His Majesty.
- 10 The Regency Act 1943 amended section 6(2) of the 1937 Act to allow any person who would be required to be a Counsellor of State to be excepted from among the number of Counsellors of State during their absence from the United Kingdom. There is, however, no provision for a substitute Counsellor of State to be appointed.
- 11 The Regency Act 1953 provided that Queen Elizabeth, the Queen Mother, be a Counsellor of State as she was otherwise no longer eligible following the death of King George VI in 1952.
- 12 When the Sovereign wishes to delegate Royal functions to Counsellors of State, the functions are required to be delegated to all Counsellors of State (unless any Counsellors of State are excepted for the period of any absence or intended absence from the United Kingdom during the whole or any part of the period of delegation). Section 6(3) provides that any delegated functions must be "exercised jointly by the Counsellors of State, or any such number of them as may be specified in the Letters Patent, and subject to such conditions, if any, as may be prescribed". In practice, therefore, a delegation of functions via Letters Patent creates a pool of Counsellors of State and then usually specifies that Counsellors of State are required to act in pairs. In the case of the recent State Opening of Parliament by Counsellors of State, the Letters Patent appointed three Counsellors of State (as the Duke of Sussex was excepted due to his absence from the United Kingdom) but then specified that the cause of summons (i.e. the Queen's speech) be "declared by one Counsellor of State in the presence of another".

¹ 'Full age' means the age of 21, except in the case of the heir apparent or heir presumptive to the Throne, in which case it means the age of 18, see: the Regency Act 1937, s.6(2A) and s.3(2) (as amended), the Regency Act 1953 s.2 and the Family Law Reform Act 1969, s.1(4) and Schedule 2).

² 'Domiciled in some part of the United Kingdom' refers to a concept of domicile derived from common law. Everyone receives a domicile at birth; this is known as a 'domicile of origin'. Every independent person can at any time change their domicile of origin and acquire a 'domicile of choice' by the fact of residing in a country other than that of their domicile of origin with the intention of continuing to reside there indefinitely. There is a strong presumption against a change from a domicile of origin to a domicile of choice.

Territorial extent and application

- 13 The Bill will extend and apply to the whole of the United Kingdom. The Bill has no provision on extent but it will extend to the Crown Dependencies and British Overseas Territories by necessary implication. This follows the precedent of other Acts affecting the Sovereign, such as the Accession Declaration Act 1910, the Regency Acts of 1937, 1943 and 1953, and the Succession to the Crown Act 2013.
- 14 The content of this Bill relates to reserved matters and does not need the consent of the devolved legislatures; nevertheless, the devolved administrations have been informed. The Crown Dependencies and British Overseas Territories have also been informed of the legislation in advance.
- 15 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Fast-track legislation

- 16 The Government has asked Parliament to expedite the parliamentary progress of the Bill. In their report on Fast-track Legislation: Constitutional Implications and Safeguards, the House of Lords Select Committee on the Constitution recommended that the Government should provide more information as to why a piece of legislation should be fast-tracked.³

Why is fast-tracking necessary?

- 17 The Bill is being fast-tracked because it is an expedient measure, allowing for additional Counsellors of State to be in place before a delegation to Counsellors is next required (for example should His Majesty need to travel overseas).

What is the justification for fast-tracking each element of the bill?

- 18 The Bill is short, simple and expedient; it offers more certainty and resilience to constitutional arrangements, providing for two new Counsellors of State to whom Royal functions can be delegated. The Bill has only one substantive clause and therefore it would not be possible for some elements of the Bill to be done at a slower pace than others.

What efforts were made to ensure the amount of time made available for parliamentary scrutiny was maximised?

- 19 It is a short Bill which is proposed to be debated in Committees of the Whole House in both Houses of Parliament.

To what extent were interested parties and outside groups given an opportunity to influence the policy proposal?

- 20 The Government did not deem it necessary to give other parties or outside groups an opportunity to influence the policy proposal given the limited impact of the Bill and that it will not trigger any financial provisions. The Devolved Administrations, Overseas Territories and Crown Dependencies were informed of the Bill in advance. Although the provisions do not affect the Realms they have also been notified.⁴

³ House of Lords Constitution Committee, 15th report of session 2008–09, HL Paper 116-I, para. 186.

⁴ The Realms where the Sovereign is Head of State in addition to the UK are Antigua and Barbuda, Australia, the Bahamas, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, the Solomon Islands, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, and Tuvalu.

Does the Bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why does the Government judge that their inclusion is not appropriate?

- 21 The Bill does not include a sunset clause. The Bill provides for two additional Counsellors of State for their lifetimes and so its provisions will cease to have a practical effect at that point.

Are mechanisms for effective post-legislative scrutiny and review in place? If not, why does the Government judge that their inclusion is not appropriate?

- 22 There are no mechanisms in place for post-legislative scrutiny and review. This is a simple and expedient provision that allows for Royal functions to be delegated to two additional Counsellors of State; the provisions only last for their lifetimes. This Bill does not affect the underlying Regency Act 1937. Furthermore, it will have a limited impact on any external stakeholders.

Was an assessment made as to whether existing legislation was sufficient to deal with any or all of the issues in question?

- 23 Yes, an assessment was made and it was clear that the existing legislation did not provide the requisite mechanism to expand the number of Counsellors of State.

Has the relevant parliamentary committee been given the opportunity to scrutinise the legislation?

- 24 Parliamentary committees have not been scrutinising the legislation. It is a simple and expedient provision that allows for Royal functions to be delegated to two additional Counsellors of State.

Commentary on provisions of Bill

Clause 1: Additional Counsellors of State

- 25 Subsection (1) provides that His Royal Highness The Earl of Wessex and Her Royal Highness The Princess Royal can be delegated Royal functions as Counsellors of State during his or her lifetime respectively.
- 26 Subsection (2) provides that His Royal Highness The Earl of Wessex and Her Royal Highness The Princess Royal are subject to the proviso and disqualifications from acting as a Counsellor of State as set out in subsection 6(2) and (2A) of the 1937 Act.

Clause 2: Short title and commencement

- 27 Subsection (1) establishes the short title as the Counsellors of State Act 2022.
- 28 Subsection (2) provides that the Bill comes into force on the day after it receives Royal Assent.

Commencement

29 This Act comes into force on the day after it receives Royal Assent.

Financial implications of the Bill

30 The Bill will not trigger any financial expenditure.

Compatibility with the European Convention on Human Rights

31 The Government considers that the Bill is compatible with the European Convention on Human Rights (“ECHR”). Accordingly, the Rt Hon Lord True CBE, Leader of the House of Lords and Lord Privy Seal, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

Duty under section 20 of the Environment Act 2021

32 The Rt Hon Lord True CBE is of the view that the Bill as introduced into the House of Lords does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

Related documents

33 The following documents are relevant to the Bill and can be read at the stated locations:

- Act of Settlement (1700), <https://www.legislation.gov.uk/aep/Will3/12-13/2>.
- Regency Act 1937, <https://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/16>.
- Regency Act 1943, <https://www.legislation.gov.uk/ukpga/Geo6/6-7/42>.
- Regency Act 1953, <https://www.legislation.gov.uk/ukpga/Eliz2/2-3/1>.
- Succession to the Crown Act 2013, <https://www.legislation.gov.uk/ukpga/2013/20>.
- London Gazette, 27 May 2022, Issue Number 63710, Warrants Under the Royal Sign Manual, <https://www.thegazette.co.uk/notice/4082146>

Annex A – Territorial extent and application in the United Kingdom

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 1	Yes	Yes	N/A	Yes	N/A	Yes	N/A
Clause 2	Yes	Yes	N/A	Yes	N/A	Yes	N/A

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