



## **Counsellors of State Bill [HL]**

### **HL Bill 66 of 2022–23**

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On 21 November 2022, the second reading of the [Counsellors of State Bill \[HL\]](#) is scheduled to take place in the House of Lords. The bill's remaining Lords stages are expected to take place on 23 November 2022.

The bill would add the Princess Royal (Princess Anne) and the Earl of Wessex (Prince Edward) to the pool of members of the royal family who can act as counsellors of state if the sovereign is absent from the UK or ill, but not to the extent that a regency is required. King Charles indicated his support for this change in a message to both Houses of Parliament on 14 November 2022. The bill would not make any other changes to the existing provisions on counsellors of state.

Current legislation specifies that the counsellors of state consist of the spouse of the sovereign and the four people next in the line of succession to the crown, not counting those who are disqualified, for example for not being of full age. There is no provision for making anyone else a counsellor of state. The current counsellors of state are the Queen Consort, the Prince of Wales (Prince William), the Duke of Sussex (Prince Harry), the Duke of York (Prince Andrew) and Princess Beatrice. Counsellors of state can be excused if they are absent from the UK during the period in which the sovereign is delegating royal functions, but no replacement can be appointed for someone who is absent.

All powers and authorities belonging to the crown, whether prerogative or statutory, can be delegated to the counsellors of state, except for dissolving Parliament otherwise than on the express instructions of the sovereign, and granting peerages. When the sovereign delegates royal functions, the letters patent that make the delegation specify what functions the counsellors of state may or may not perform. The letters patent usually specify that counsellors of state are required to act in pairs.

## 1. Purpose of the bill

The [Counsellors of State Bill \[HL\]](#) would add the Princess Royal (Princess Anne) and the Earl of Wessex (Prince Edward) to the pool of members of the royal family who can act as counsellors of state if the sovereign is ill or absent from the UK.

King Charles sent a message to both Houses of Parliament on 14 November 2022 indicating his support for this change:

To ensure continued efficiency of public business when I am unavailable, such as while I am undertaking official duties overseas, I confirm that I would be most content, should Parliament see fit, for the number of people who may be called upon to act as counsellors of state under the terms of the Regency Acts 1937 to 1953 to be increased to include my sister and brother, the Princess Royal and the Earl of Wessex and Forfar, both of whom have previously undertaken this role.<sup>1</sup>

The following day, each House of Parliament agreed, in the form of an humble address to be presented to the King, to “provide such measures as may appear necessary or expedient for securing the purpose set out by His Majesty”.<sup>2</sup>

The Counsellors of State Bill was introduced in the House of Lords later that day. Lord True, the Lord Privy Seal, confirmed to the House of Lords that the bill “constitutes the measure which gives effect to the purport of the King’s message”.<sup>3</sup> The bill is due to have its second reading on 21 November 2022 and its remaining Lords stages on 23 November 2022.

## 2. Background: The Regency Acts and counsellors of state

### 2.1 What are the Regency Acts?

The Regency Acts 1937 to 1953 make provision for:

- The appointment of a **regent** to act on the sovereign’s behalf if the sovereign is under 18 or is “by reason of infirmity of mind or body incapable of for the time being of performing the royal functions”. The regent is the heir to the throne unless they have not reached the age of 18. In such a case the regent is the next in the line of succession who has reached the age of 21.<sup>4</sup>
- Certain royal functions to be delegated to **counsellors of state** if the sovereign is ill but not to the extent that a regent would be required, or if the sovereign is absent from the UK.

The Regency Act 1937 was introduced following “difficulties which arose in relation to the exercise of

<sup>1</sup> [HL Hansard, 14 November 2022, col 691.](#)

<sup>2</sup> [HL Hansard, 15 November 2022, col 769](#) and [HC Hansard, 15 November 2022, col 524.](#)

<sup>3</sup> [HL Hansard, 15 November 2022, col 782.](#)

<sup>4</sup> See House of Commons Library, [‘Regency and counsellors of state’](#), 30 May 2022 for more information about the regency provisions of the Regency Acts.

the royal authority” when King George V was ill in 1928 and 1936.<sup>5</sup> Regency Acts were also passed in 1943 and 1953, modifying the terms of the 1937 act in light of the family circumstances of the royal family at the time.<sup>6</sup> The three pieces of legislation are to “be construed as one”, or read together.<sup>7</sup>

There were several Regency Acts prior to 1937 to cover occasions when a monarch was incapacitated or there was an infant heir.<sup>8</sup> The office of counsellor of state was established in statute by the 1937 act, although it was used four times on an ad hoc basis in the twentieth century before that.<sup>9</sup>

## 2.2 Who are the counsellors of state?

Section 6(2) of the Regency Act 1937 provides that the following people shall be counsellors of state:

- the wife or husband of the sovereign (if the sovereign is married)
- the next four people in the line of succession to the crown who are not disqualified from being a counsellor of state

Section 6(2A) disqualifies someone from being a counsellor of state if they would be disqualified from being regent. The disqualifying factors are:

- not being a British subject of full age and domiciled in some part of the UK
- being incapable of inheriting, possessing and enjoying the crown under section 2 of the Act of Settlement 1700 (as a result of Roman Catholicism)
- being disqualified from succeeding to the crown under section 3 of the Succession to the Crown Act 2013 (having married without the consent of the sovereign)

Being of “full age” means the age of 18 for the heir apparent or the heir presumptive to the crown, and 21 for anyone else.<sup>10</sup> On the subject of domicile, the explanatory notes to the bill state:

‘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

<sup>5</sup> Preamble to the Regency Act 1937.

<sup>6</sup> See Rodney Brazier, ‘[Royal incapacity and constitutional continuity: The regent and counsellors of state](#)’, Cambridge Law Journal, 64(2), July 2005, pp 357–60 for a full account.

<sup>7</sup> Regency Act 1953, section 4(1).

<sup>8</sup> Rodney Brazier, ‘[Royal incapacity and constitutional continuity: The regent and counsellors of state](#)’, Cambridge Law Journal, 64(2), July 2005, p 357; The Royal Household, ‘[Counsellors of State](#)’, accessed 16 November 2022; and House of Commons Library, ‘[Regency and counsellors of state](#)’, 30 May 2022, pp 7–9.

<sup>9</sup> House of Commons Library, ‘[Regency and counsellors of state](#)’, 30 May 2022, pp 9–10.

<sup>10</sup> [Explanatory notes](#), page 3. An heir apparent is one whose right to inherit is indefeasible as long as she or he outlives the holder. The heir presumptive is one whose right may be defeated by the birth of a nearer heir (Britannica, ‘[Heir](#)’, accessed 16 November 2022).’

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.<sup>11</sup>

If someone who qualifies as a counsellor of state is or intends to be absent from the UK during the period for which the sovereign is delegating royal functions, the letters patent that make the delegation can except that person from among the number of counsellors of state during their absence.<sup>12</sup> This temporarily reduces the number of counsellors of state, as there is no provision to appoint somebody else to replace them. This exception was added to the 1937 act by the Regency Act 1943.

The current counsellors of state are the Queen Consort, the Prince of Wales (Prince William), the Duke of Sussex (Prince Harry), the Duke of York (Prince Andrew) and Princess Beatrice.<sup>13</sup>

### 2.3 What functions can be delegated to counsellors of state?

Section 6(1) of the Regency Act 1937 (as amended) allows the sovereign to delegate certain royal functions to counsellors of state:

In the event of illness not amounting to such infirmity of mind or body as is mentioned in section 2 of this act, or of absence or intended absence from the United Kingdom, the sovereign may, in order to prevent delay or difficulty in the despatch of public business, by letters patent under the great seal, delegate, for the period of that illness or absence, to counsellors of state such of the royal functions as may be specified in the letters patent [...]

“Royal functions” are defined as including “all powers and authorities belonging to the crown, whether prerogative or statutory, together with the receiving of any homage required to be done to his majesty”.<sup>14</sup> However, section 6(1) expressly prohibits the following royal functions from being delegated to counsellors of state:

- dissolving Parliament otherwise than on the express instructions of the sovereign
- granting any rank, title or dignity of the peerage

The scope of the royal prerogative has evolved over time. The Cabinet manual notes that “ministers now exercise the bulk of the prerogative powers, either in their own right or through advice they provide the sovereign, which he or she is constitutionally obliged to follow”.<sup>15</sup>

Writing in 2005, Rodney Brazier, then professor of constitutional law at the University of Manchester, listed the functions that are customarily delegated in the letters patent as follows:

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<sup>11</sup> [Explanatory notes](#), page 3.

<sup>12</sup> Regency Act 1937, section 6(2), as amended by the Regency Act 1943.

<sup>13</sup> Royal Household, [‘Counsellors of state’](#), accessed 16 November 2022. For details of the line of succession, see: Royal Household, [‘Succession’](#).

<sup>14</sup> Regency Act 1937, section 8(2).

<sup>15</sup> Cabinet Office, [‘The Cabinet manual’](#), October 2011, p 8. For more on the royal prerogative, see: House of Commons Library, [‘The royal prerogative’](#), 17 August 2017.

[...] to conduct Privy Council business; to sign letters patent signifying royal assent to acts of Parliament (except any bill touching any of the matters covered by the Act of Settlement, or the royal style and titles), and signifying royal assent to bills passed by the Scottish Parliament and Northern Ireland Assembly; to sign on the monarch's behalf any document relating to the affairs of the United Kingdom, and to do anything which the monarch is authorised to do for the safety or good government of the United Kingdom or overseas territories.<sup>16</sup>

He notes that the letters patent also customarily set out functions that the counsellors of state may not perform:

The letters patent deny the counsellors authority to receive any homage due to the monarch, and also state that if the monarch signifies, or if it appears to the counsellors, that they should not act in any matter or for any purpose without the monarch's previous special approval, they should not act in that matter. The letters patent also specify, in a second schedule, matters which require the monarch's signature but concerning which the counsellors may not sign for the monarch. The list covers awards of honours and decorations, precedence, the use by British subjects of foreign titles, determination of peerage claims, reorganisation of army units, matters relating to the General Assembly of the Church of Scotland, and the amendment of statutes of orders of chivalry.<sup>17</sup>

The royal family states on its website that Commonwealth matters and appointing a prime minister are functions that may not be delegated.<sup>18</sup> The Regency Acts do not explicitly specify that these functions may not be delegated. In contrast, academics Rodney Brazier and Craig Prescott both believe that a counsellor of state could appoint a new prime minister.<sup>19</sup>

Counsellors of state have in the past appointed ministers and established or appointed the chair of royal commissions.<sup>20</sup> In 1974, the Queen Mother and Princess Margaret, acting as counsellors of state, declared a state of emergency and, with the express permission of Queen Elizabeth II, dissolved Parliament.<sup>21</sup>

The sovereign can also use letters patent to revoke or vary any delegation of royal functions.<sup>22</sup> Any delegation automatically ceases on the demise of the crown or on the occurrence of any events necessitating a regency or a change of regent.<sup>23</sup>

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<sup>16</sup> Rodney Brazier, '[Royal incapacity and constitutional continuity: The regent and counsellors of state](#)', Cambridge Law Journal, 64(2), July 2005, p 383.

<sup>17</sup> Rodney Brazier, '[Royal incapacity and constitutional continuity: The regent and counsellors of state](#)', Cambridge Law Journal, 64(2), July 2005, p 383.

<sup>18</sup> Royal Household, '[Counsellors of state](#)', accessed 16 November 2022.

<sup>19</sup> Rodney Brazier, '[Royal incapacity and constitutional continuity: The regent and counsellors of state](#)', Cambridge Law Journal, 64(2), July 2005, p 383; and Craig Prescott, '[Harry and Meghan, regency, counsellors of state and a 'slimmed down' royal family](#)', UK Constitutional Law Association Blog, 21 January 2020.

<sup>20</sup> House of Commons Library, '[Regency and counsellors of state](#)', 30 May 2022, p 28.

<sup>21</sup> House of Commons Library, '[Regency and counsellors of state](#)', 30 May 2022, p 35.

<sup>22</sup> Regency Act 1937, section 6(1).

<sup>23</sup> Regency Act 1937, section 6(5).

## 2.4 How do the counsellors of state exercise their functions?

Section 6(3) of the Regency Act 1937 provides that delegated functions “shall be exercised jointly by the counsellors of state, or by such number of them as may be specified in the letters patent, and subject to such conditions, if any, as may be therein prescribed”. The explanatory notes to the bill explain that “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”.<sup>24</sup>

An example of this was seen in May 2022, when Buckingham Palace announced that the Queen would be unable to attend the state opening of Parliament as she was experiencing mobility problems.<sup>25</sup> By letters patent, the Queen delegated the authority to open Parliament. The letters patent noted that under the Regency Acts, the counsellors of state at that time were the then Prince of Wales (Prince Charles), the Duke of Cambridge (Prince William), the Duke of Sussex (Prince Harry) and the Duke of York (Prince Andrew). The letters patent then specified that:

[...] by virtue of the said enactments we do hereby delegate to the said counsellors of state (excepting the Duke of Sussex while absent from the United Kingdom) full power and authority to open the new session of Parliament on the tenth day of May in the seventy-first year of our reign with the cause of summons [the Queen’s Speech] being declared by one counsellor of state in the presence of another.<sup>26</sup>

The then Prince of Wales (Prince Charles) read the Queen’s Speech in the presence of Prince William. This was the only example during Queen Elizabeth II’s reign of her delegating functions to the counsellors of state because of illness. Before this, she had delegated her royal functions only in advance of overseas travel.

The explanatory notes to the bill emphasise that “functions are required to be delegated to all counsellors of state”, apart from those counsellors excepted because they are or intend to be absent from the UK, and that it is the practice for the letters patent then to require them to act in pairs.<sup>27</sup> Rodney Brazier agrees that the delegation is made to all counsellors of state,<sup>28</sup> but he suggests there is a “perfectly tenable” interpretation of section 6(3) of the 1937 act that would allow letters patent to enable a counsellor of state to act alone:

[...] just reading the words of the act, it is arguable that the alternative contained in the phrase “or such number as may be specified” could embrace the number “one”, just one counsellor, as opposed to any greater number of counsellors acting jointly.<sup>29</sup>

However, he conceded that if a single counsellor were to exercise functions that had legal

<sup>24</sup> [Explanatory notes](#), page 3.

<sup>25</sup> Caroline Davies, [‘Queen to miss state opening of Parliament, says Buckingham Palace’](#), Guardian, 9 May 2022.

<sup>26</sup> [‘Warrants under the royal sign manual: Regency Acts’](#), London Gazette, dated 10 May 2022, published 27 May 2022.

<sup>27</sup> [Explanatory notes](#), page 3.

<sup>28</sup> Rodney Brazier, [‘Royal incapacity and constitutional continuity: The regent and counsellors of state’](#), Cambridge Law Journal, 64(2), July 2005, p 377.

<sup>29</sup> Rodney Brazier, [‘Royal incapacity and constitutional continuity: The regent and counsellors of state’](#), Cambridge Law Journal, 64(2), July 2005, p 379.

consequences, such as signifying royal assent to legislation, there could be risk of legal challenge to the validity of such actions.<sup>30</sup>

## 2.5 Does the pool of counsellors of state need changing?

Commentators have suggested that the provisions of the Regency Acts may be too prescriptive about who and how many people can be counsellors of state. Writing in 2005, Rodney Brazier identified ways in which the acts might be thought “deficient” in relation to counsellors of state, including that “exemption is allowed on the ground of absence from the United Kingdom, but not otherwise; no substitution is allowed for any exempted person, which will result in a smaller pool of counsellors”.<sup>31</sup>

Writing in 2020, Craig Prescott, then director of the Centre for Parliament and Public Law at the University of Winchester, identified that once Prince Charles became King, “the only full working member of the royal family who will be appointed as counsellor of state will be Prince William, at least until his children reach 21 in the 2030s”.<sup>32</sup> Dr Prescott was writing on the assumption that if King Charles was abroad, he would usually be accompanied by his wife, meaning that she would be unavailable to act as a counsellor of state.

The Duke of York and the Duke of Sussex have both withdrawn from public duties as senior members of the royal family:

- The Duke of York announced in November 2019 that the Queen had given him permission to step back from public duties for the foreseeable future.<sup>33</sup> In January 2022, Buckingham Palace announced that, with the Queen’s approval and agreement, the Duke of York’s military affiliations and royal patronages had been returned to the Queen. The statement confirmed that the Duke of York would continue not to undertake any public duties.<sup>34</sup>
- The Duke and Duchess of Sussex announced in January 2020 that they intended to “step back as ‘senior’ members of the royal family, and work to become financially independent, while continuing to fully support Her Majesty the Queen”.<sup>35</sup> They said they would balance their time between the UK and the US. In February 2021, they confirmed to the Queen that they would not be returning as working members of the royal family.<sup>36</sup> The Queen confirmed to the Duke that “in stepping away from the work of the royal family it is not possible to continue with the responsibilities and duties that come with a life of public service”. The Duke and Duchess’s honorary military appointments and royal patronages were returned to the Queen.

<sup>30</sup> Rodney Brazier, [‘Royal incapacity and constitutional continuity: The regent and counsellors of state’](#), Cambridge Law Journal, 64(2), July 2005, pp 379–80.

<sup>31</sup> Rodney Brazier, [‘Royal incapacity and constitutional continuity: The regent and counsellors of state’](#), Cambridge Law Journal, 64(2), July 2005, p 385.

<sup>32</sup> Craig Prescott, [‘Harry and Meghan, regency, counsellors of state and a ‘slimmed down’ royal family’](#), UK Constitutional Law Association Blog, 21 January 2020. Prince George would reach full age at 18 if he were the heir apparent at that point.

<sup>33</sup> Royal Household, [‘A statement by his Royal Highness the Duke of York’](#), 20 November 2019.

<sup>34</sup> Royal Household, [‘A statement from Buckingham Palace regarding the Duke of York’](#), 13 January 2022.

<sup>35</sup> Sussex Royal, [‘About’](#), accessed 15 November 2022.

<sup>36</sup> Royal Household, [‘Buckingham Palace statement on the Duke and Duchess of Sussex’](#), 19 February 2021.

As noted above, the Duke of Sussex was excepted from receiving delegated functions as a counsellor of state at the state opening of Parliament in May 2022 as he was in the US. Craig Prescott noted that Prince Harry would be disqualified as a counsellor of state if his “new life led to him becoming permanently based overseas to the point that he is no longer a British subject **and domiciled** in the United Kingdom”.<sup>37</sup> In that case, he would be replaced by the next person of full age in the line of succession, currently Princess Eugenie. She is also a non-working member of the royal family, like her sister Princess Beatrice. Dr Prescott suggested that it might be “thought to be unfortunate” for the duties of counsellor of state to be undertaken by members of the royal family who do not otherwise fulfil public duties.

This question was also raised in October 2022 in the House of Lords by Viscount Stansgate (Labour). He suggested it was time to consider reform of the Regency Acts in light of a situation where the counsellors of state included the Duke of York and the Duke of Sussex, “one of whom has left public life and the other of whom has left the country”.<sup>38</sup> Lord True, the Lord Privy Seal, said he could not comment on specific circumstances.<sup>39</sup> However, he noted that “in the past we have seen that the point of accession has proved a useful opportunity to consider the arrangements in place”.

### 3. Bill provisions

Clause 1 of the bill would create additional counsellors of state. Clause 1(1) provides that section 6 of the Regency Act 1937 should have effect as if the persons required to be counsellors of state included:

- the Earl of Wessex, during his lifetime
- the Princess Royal, during her lifetime

Clause 1(2) would make this subject to the existing provisions in section 6 about disqualification and powers to except a person who is absent from the UK.

Both these members of the royal family have previously been counsellors of state: the Princess Royal until Prince William turned 21 in June 2003, and the Earl of Wessex until Prince Harry turned 21 in September 2005.<sup>40</sup>

The bill does not make any other amendments to the existing provision in the Regency Acts 1937 to 1953 about who is required to be a counsellor of state. It does not provide for any of the existing counsellors of state to be replaced, but rather adds Princess Anne and Prince Edward to their number. As this clause would make them counsellors of state for the rest of their lives, they might remain in the role when some of the current counsellors of state are replaced: as the children of the

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<sup>37</sup> Craig Prescott, ‘[Harry and Meghan, regency, counsellors of state and a ‘slimmed down’ royal family](#)’, UK Constitutional Law Association Blog, 21 January 2020 (emphasis in original). The Duke and Duchess of Sussex reportedly maintain Frogmore Cottage as their UK residence (‘[Everything we know about Frogmore Cottage, Harry and Meghan’s UK home](#)’, House and Garden, 5 September 2022).

<sup>38</sup> [HL Hansard, 24 October 2022, cols 1285–6.](#)

<sup>39</sup> [HL Hansard, 24 October 2022, col 1286.](#)

<sup>40</sup> House of Commons Library, ‘[Regency and counsellors of state](#)’, 30 May 2022, p 25.



Prince and Princess of Wales (Prince George, Princess Charlotte and Prince Louis) reach full age, they will replace the counsellors of state who are further down the line of succession than them.

Clause 2 of the bill gives its short title and provides that it would come into force on the day after it is passed.

The bill does not contain any provision on territorial extent. The explanatory notes state that the bill would extend and apply to the whole of the UK and, by necessary implication, would extend to the crown dependencies and British overseas territories.<sup>41</sup> The explanatory notes state that the bill would not affect the Realms.<sup>42</sup>

#### 4. Fast-tracking the bill

The government has asked Parliament to expedite the passage of the bill.<sup>43</sup> The ‘Companion to the standing orders and guide to the proceedings of the House of Lords’ states that for any legislation subject to expedited procedures (‘fast-tracked’) the explanatory notes will contain a full explanation of the reasons for using a fast-track procedure.<sup>44</sup> The explanatory notes for this bill state it 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)”.<sup>45</sup> The explanatory notes describe the bill as offering “more certainty and resilience to constitutional arrangements”. They state it was “clear that the existing legislation did not provide the requisite mechanism to expand the number of counsellors of state”.<sup>46</sup> In terms of the amount of time available for parliamentary scrutiny, the explanatory notes state that the bill is short, and that it is proposed it will be debated in committee of the whole House in both Houses of Parliament.<sup>47</sup>

#### 5. Read more

- House of Commons Library, ‘[Regency and counsellors of state](#)’, 30 May 2022
- House of Commons Library, ‘[Creating more counsellors of state](#)’, 15 November 2022
- Rodney Brazier, ‘[Royal incapacity and constitutional continuity: The regent and counsellors of state](#)’, *Cambridge Law Journal*, 64(2), July 2005, pp 352–87
- Craig Prescott, ‘[Harry and Meghan, regency, counsellors of state and a ‘slimmed down’ royal family](#)’, UK Constitutional Law Association Blog, 21 January 2020

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<sup>41</sup> [Explanatory notes](#), page 4.

<sup>42</sup> 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.

<sup>43</sup> [Explanatory notes](#), p 4.

<sup>44</sup> House of Lords, ‘[Companion to the standing orders and guide to the proceedings of the House of Lords](#)’, 28 October 2022, para 8.6.

<sup>45</sup> [Explanatory notes](#), p 4.

<sup>46</sup> [Explanatory notes](#), p 5.

<sup>47</sup> [Explanatory notes](#), p 4.

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