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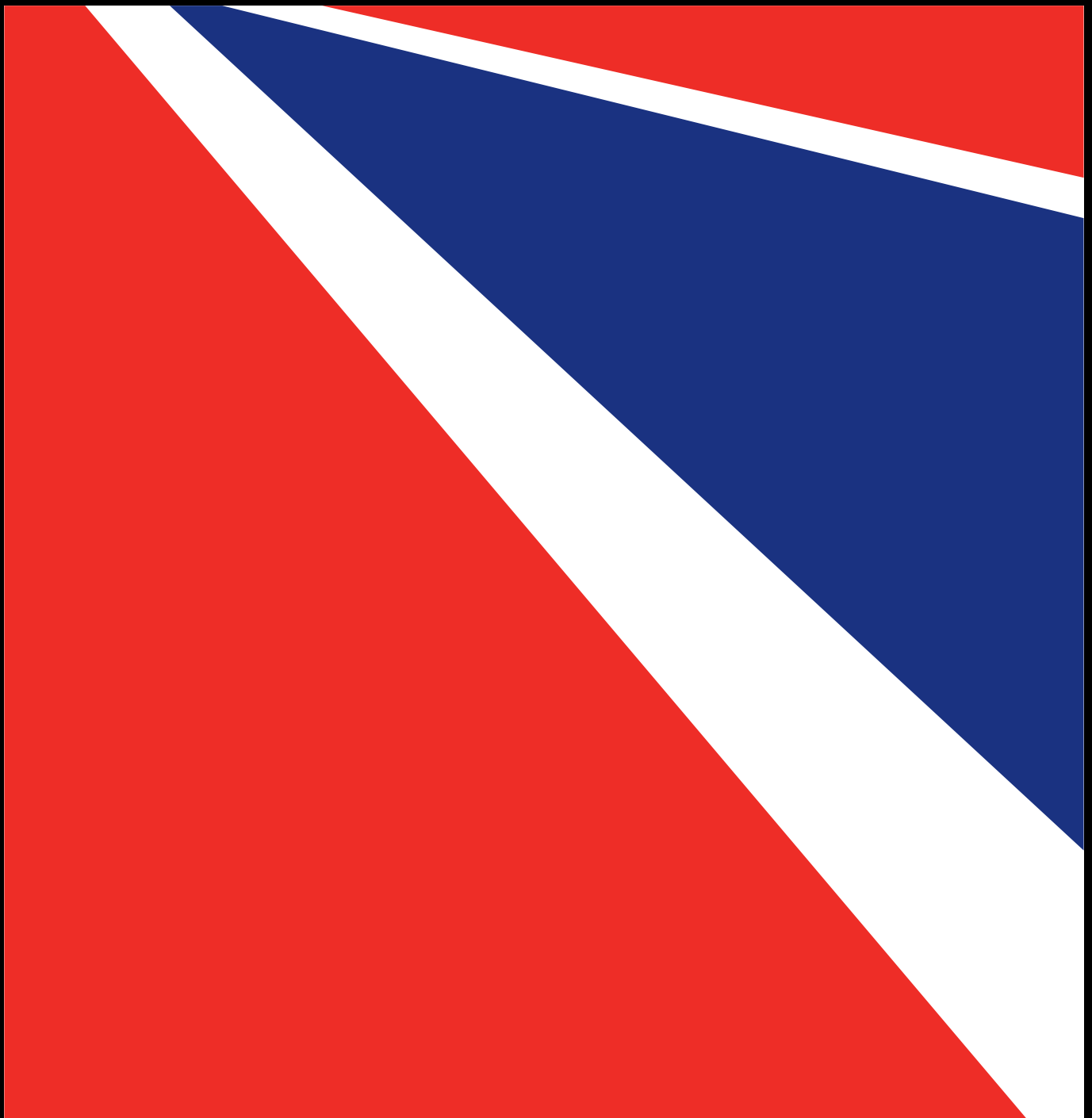


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The Governance of Britain

Review of the Executive Royal  
Prerogative Powers: Final Report

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## The Governance of Britain

### Review of the Executive Royal Prerogative Powers: Final Report

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## Introduction

1. Modernisation of the Royal prerogative has been a central theme of the Governance of Britain agenda. The 2007 Governance of Britain Green Paper said, 'A distinguishing feature of the British constitution is the extent to which the government continues to exercise a number of powers which were not granted to it by a written constitution, nor by Parliament, but are rather ancient prerogatives of the Crown. These powers derive from arrangements which preceded the 1689 Declaration of Rights and have been accumulated by the government without Parliament or the people having a say.'<sup>1</sup>
2. The Green Paper went on to say, 'The Government believes that in general the prerogative powers should be put onto a statutory basis and brought under stronger parliamentary scrutiny and control. This will ensure that government is more clearly subject to the mandate of the people's representatives.'
3. Proposals for reform of a number of prerogative executive powers were set out in that Green Paper and are now being taken forward in a variety of different ways. For the remaining powers, the Government undertook to conduct a wider review and to consider whether, in the longer term, they should be codified or put on a statutory basis. That review is now complete and the Government's conclusions and intentions are summarised in this report.
4. The review was concerned with the prerogative powers that are available to UK Government Ministers to be exercised, usually, either in relation to the United Kingdom as a whole or in relation to England (and Wales, where applicable - for example in relation to law and order). It did not – and this report does not – seek to cover the Royal prerogative as it relates to devolved matters that fall within the competence of the Ministers of the devolved administrations in Northern Ireland, Scotland and Wales.
5. This report is not intended primarily as a formal consultation paper, since it makes no new proposals for reforms to the prerogative. Comments are welcome, however, both on the contents of the report and on the scope for further reform in this complex area. Comments may be addressed to:

Constitutional Policy Branch  
Constitutional Settlement Division  
Ministry of Justice  
5th floor, 5.25  
102 Petty France  
London SW1H 9AJ

- or by email to [RoyalPrerogativeReview@justice.gsi.gov.uk](mailto:RoyalPrerogativeReview@justice.gsi.gov.uk).

It would be helpful if comments could reach the Ministry of Justice by no later than 8 January 2010, wherever possible.

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<sup>1</sup> *The Governance of Britain Cm 7170 p16*

## Chapter One: Origins, conduct and scope of the Review

6. In March 2004 the Public Administration Select Committee (PASC) published a report on the Royal prerogative<sup>2</sup> which noted that prerogative powers could be exercised without parliamentary approval and that restrictions on Ministers' prerogative powers were limited. The PASC report called for comprehensive legislation, which would require the Government to list the prerogative powers exercised by Ministers amongst other measures, and was accompanied by a draft Bill.
7. The effect of PASC's draft Bill would have been to require the Secretary of State, within six months, to lay before Parliament a list of all executive prerogative powers. It would then have fallen to a joint select committee of both Houses of Parliament to consider what changes should be made, observing certain principles (which were also set out in the draft Bill), and to prepare draft legislation to give effect to those changes. The draft Bill would also have provided for greater oversight by Parliament of three prerogative powers: the deployment of the armed forces; the ratification of treaties and the issue, refusal, revocation and withdrawal of passports. Powers in relation to the civil service, machinery of government changes and public appointments were also discussed in the report, although not covered in the draft Bill.
8. The Government responded in July 2004, acknowledging the importance of the subject matter and the useful work carried out by the Committee. The Government welcomed the Committee's recognition that the prerogative is a well-established part of the constitution, offering much-needed flexibility to govern, and that Ministers need executive powers in order to react quickly in possibly complex and dangerous circumstances. The Government's response also accepted, however, that in many respects the prerogative is a historical anachronism and agreed that it was possible, and sometimes desirable, that either statute or conventions on parliamentary scrutiny should replace it where circumstances made that appropriate.
9. At that time the Government was not persuaded, however, that replacing prerogative powers with a statutory framework would improve the present situation. It rejected the Committee's recommendation for a wide-ranging consultation exercise, in favour of continuing to consider changes on a case-by-case basis. Its response pointed out that Ministers are accountable to Parliament for all their actions including those taken under the prerogative powers and that the use of prerogative powers is subject to scrutiny by Departmental Select Committee. Additionally the Prime Minister is subject to twice-yearly questioning by the Liaison Committee.
10. Parliamentary interest in the Royal prerogative in its various guises - especially in relation to war powers, treaties, passports, the civil service, and the Royal Prerogative of Mercy – has continued since publication of the Government's response to PASC. In addition to periodic Parliamentary Questions as to the Government's intentions:
  - Lord Lester introduced a Private Member's Bill, the Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill on 17 January 2006. Its purpose was to 'place under the authority of Parliament executive powers exercisable by Ministers of the Crown by virtue of the Royal prerogative; to make provision relating to the appointment and conduct of, and general

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<sup>2</sup> *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, HC422

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duties relating to, civil servants and special advisers; to make provision about nationality requirements for persons employed or holding office in a civil capacity under the Crown; to establish a procedure for the making of certain public appointments; to make provisions about access to the Parliamentary Commissioner for Administration; and for connected purposes'. Aspects of this Bill were in turn based on Lord Lester's Executive Powers and Civil Service Bill (introduced on 18 December 2003). The later Bill passed through the Lords, but did not proceed further in the Commons.

- The House of Lords Constitution Committee published a report in July 2006, entitled *Waging War: Parliament's Role and Responsibility*, which called for a Parliamentary convention obliging Governments always to seek Parliament's approval when committing the Armed Forces to action in future conflicts.
11. It was against that background that the Governance of Britain agenda was launched by the Government in July 2007, with a Green Paper that set out commitments to reform of the main prerogative executive powers and to a further review of other executive functions based on the Royal prerogative.
12. The principal executive powers exercised by the Government identified in the Governance of Britain Green Paper were to:
- deploy and use the Armed Forces overseas
  - make and ratify treaties
  - issue, refuse, impound and revoke passports
  - acquire and cede territory
  - conduct diplomacy
  - send and receive ambassadors, and
  - organise the Civil Service
- together with powers exercised by the Government through Ministers' recommendations to the Monarch to:
- grant honours or decorations
  - grant mercy
  - grant peerages and
  - appoint Ministers.
- The document committed the Government to further consultation and/or reform of most of these powers, other than those relating to international relations, which were excluded pending further consideration.
13. Prerogative powers in relation to the following matters were also discussed in the Green Paper, with a view to further consultation and/or reform:
- dissolution of Parliament
  - the Attorney General and
  - the appointment of bishops
- and commitments were given to:
- review redundant powers with a view to their abolition
  - review the patronage exercised by the Crown and the Lord Chancellor over Church appointments other than to bishoprics
  - review other appointment powers exercised by Ministers under the Royal prerogative with a view to their limitation to a single nomination for each post
  - consult on the role of Government, Parliament and Ministers of the devolved administrations in judicial appointments

- involve Parliamentary Select Committees in pre-appointment hearings for key public appointments (or post-appointment hearings where appropriate, for example in the case of market-sensitive appointments)
  - review the arrangements for public appointments for consistency with best practice advice from the Commissioner for Public Appointments, and
  - commit to make no alterations to final nominations lists received from the Main Honours Committee.
14. Following the Green Paper, the Government carried out separate consultations on Parliament's role in decisions on the deployment of the Armed Forces in armed conflict and the ratification of treaties<sup>3</sup>; the role of the Attorney General<sup>4</sup>, and the government's role in judicial appointments<sup>5, 6</sup>. Together with the responses to the Government's 2004 consultation on the Civil Service, these consultations informed the draft Constitutional Renewal Bill and White Paper.
15. In March 2008 the Governance of Britain White Paper set out a route whereby key powers - including deployment of the Armed Forces, treaty ratification, judicial appointments and the running of the civil service – could be put onto a statutory footing or otherwise be made subject to increased Parliamentary scrutiny and control. The White Paper included a draft Constitutional Renewal Bill to 'repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005<sup>7</sup>; to make provision relating to the Attorney General and prosecutions; to make provision relating to judges and similar office-holders; to make provision relating to the ratification of treaties [and] to make provision relating to the civil service'.
16. The White Paper also committed the Government to a wider review of the prerogative. This report is published in fulfilment of the Government's obligation to report on the conduct and outcomes of that wider review and its conclusions.

### Conduct and scope of the Review

17. The extent of prerogative powers has never before been explored or codified on a systematic basis within Government. In order to determine the scope of such powers the Government conducted a survey across all central Government departments and agencies between November 2007 and May 2008. Sixty-four departments and agencies were asked to identify prerogative powers used to perform executive functions, the exercise of which had effectively been delegated to Ministers. The results of this survey are set out in the Annex to this report.
18. Although the survey involved wide internal consultation, the nature, range and complexity of the prerogative powers meant that the survey did not attempt to provide an exhaustive list of all those that may exist. However, departments were asked to identify all areas where such powers are currently used and any areas where it was thought the department may have relied upon a non-statutory power in the past and, while no longer relying on that power, had not

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<sup>3</sup> *War Powers and Treaties: Limiting Executive Powers 2007 Cm 7239*

<sup>4</sup> *A Consultation on the Role of the Attorney General 2007 CM7192*

<sup>5</sup> *Judicial Appointments 2007 CM7210*

<sup>6</sup> Additional consultations were carried out on two non-prerogative issues: *Flag Flying: Altering the current guidance on flying the Union Flag from UK Government buildings 2007 Cm 7342* and *Managing Protest Around Parliament 2007 Cm 7235*.

<sup>7</sup> Demonstrations in the vicinity of Parliament- the subject of Sections 132-138 of the Serious Organised Crime and Police Act 2005 – are not linked to prerogative powers and are not considered further in this report.

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formally abolished it. Prerogative powers that had been superseded wholly or partially by statute were to be included. The intention was to provide an overview of areas where prerogative powers are exercised, or have been exercised recently, in order to set out in one place an illustration of the contemporary prerogative.

19. The scoping exercise was intended to identify extant prerogative powers, whether or not they had fallen into disuse - for example because of lack of relevance in the modern world or because they had been superseded in whole or in part by statute. The resulting list of prerogative powers, appended as the Annex to this report, is divided into the following main categories:
  - a) prerogative powers exercised by Ministers;
  - b) executive constitutional / personal prerogative powers exercised by the Sovereign;
  - c) legal prerogatives of the Crown, such as Crown immunity (to the extent that it continues to exist in view of the Crown Proceedings Act 1947) and
  - d) archaic prerogative powers, most of which are either marginal (relating to small, specific issues or largely superseded by legislation), or no longer needed.
20. The inclusion of the fourth category has led the Government to classify some prerogative powers differently from PASC<sup>8</sup>. It has, however, followed PASC's example in excluding from consideration the legal prerogatives of the Crown since these powers are in no way exercised or influenced by Ministers.
21. PASC also excluded The Queen's constitutional prerogatives from its consideration, in order to focus solely on the powers of Ministers. Albeit with the same intention, the Government has taken a different line, in view of the constitutional obligation on The Queen to exercise almost all of her constitutional prerogatives in strict adherence to Ministerial advice and/or established constitutional law.
22. This report does not discuss the one remaining exercise that has been identified of the Monarch's truly personal, executive prerogative: that is, the conferment of certain honours that remain within her gift (the Orders of Merit, of the Garter, of the Thistle and the Royal Victorian Order).
23. The prerogative powers that have to do with international relations - territory, diplomacy and ambassadors - have also been excluded from the review. These powers have for centuries formed the basis for the conduct of UK foreign policy. They work well, in conjunction with legislation such as the Consular Relations Act 1968, the Territorial Sea Act 1987 and the International Organisations Act 1968, to provide the necessary flexibility over a very wide field. The conduct of diplomacy, for example, can cover matters including political and military issues, non-proliferation, human rights, terrorism, trade and commerce, consular protection and governance of the Overseas Territories, in each case within a bilateral or a multilateral context.
24. Parliament already exerts considerable oversight in the areas covered by these powers, for example through the Foreign Affairs Committee, the Intelligence and Security Committee and through calling Ministers to account. Change could only be contemplated after a lengthy and thorough review, which the Government does not believe to be an effective use of resources at present, given the extensive oversight of these powers already in place.

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<sup>8</sup> in its report *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (2003-04) HC422.

## Chapter Two: Definition, limits and controls

25. Originally the prerogative would have been exercised by the reigning Monarch. However, over time a distinction was drawn between the Monarch acting in his or her individual capacity and the powers possessed by the Monarch as an embodiment of the State. As the governance of the realm became more complex, power was devolved from the Monarch and exercised by his or her advisers. In modern times Government Ministers exercise the bulk of the prerogative powers, either in their own right or through the advice they provide to The Queen which she is constitutionally bound to follow.
26. A V Dicey defines the Royal prerogative as ‘The residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown’<sup>9</sup>. William Blackstone however describes the prerogative more tightly, as those powers that ‘the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subjects’<sup>10</sup>. Blackstone’s notion of the prerogative being those powers of an exclusive nature was favoured by Lord Parmoor in the *De Keyser’s Royal Hotel* case of 1920<sup>11</sup>, but Lord Reid in the *Burmah Oil* case of 1965 expressed some difficulty with this idea<sup>12</sup>. Case law exists to support both views, and a clear distinction has not been necessary in any relevant cases. The question may never need to be settled by the courts as there are few cases that deal directly with the prerogative itself.
27. The scope of the Royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, making the courts the final arbiter of whether or not a particular type of prerogative power exists<sup>13</sup>. The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all. In such circumstances, the Government, Parliament and the wider public are left relying on statements of previous Government practice and legal textbooks, the most comprehensive of which is now nearly 200 years old<sup>14</sup>.
28. This uncertainty has been criticised. Professor Rodney Brazier has written<sup>15</sup>, ‘...the demand for a statement of what may be done by virtue of [the Royal prerogative] is of practical importance. Yet it has been said judicially<sup>16</sup> that such a statement cannot be arrived at, because only through a process of piecemeal judicial decisions over the centuries have particular powers been seen to exist, or not to exist, as the case may be.’
29. This report sets out the Government’s understanding of the remaining executive Royal prerogative powers and its intentions with regard to those

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<sup>9</sup> A.V.Dicey, *Introduction to the Study of the Law of the Constitution*, 10<sup>th</sup> edn. (London: Macmillan, 1959), 424

<sup>10</sup> William Blackstone, *Commentaries on the Laws of England, a facsimile of the first edition of 1765-1769* (University of Chicago Press, 1979) introduced by S.N.Katz, 111.

<sup>11</sup> *Attorney-General v De Keyser’s Royal Hotel Limited* [1920] AC 508, p571.

<sup>12</sup> *Burmah Oil Company (Burma Trading) v Lord Advocate* [1965] AC 75, p105.

<sup>13</sup> “The King hath no prerogative, but that which the law of the land allows him”; see the *Proclamations Case* (1610) 12 Co Rep 74, 76.

<sup>14</sup> Joseph Chitty *A Treatise on the Law of the Prerogatives of the Crown* (1820)

<sup>15</sup> R Brazier, ‘Constitutional Reform and the Crown’ in M Sunkin and S Payne (eds), *The Nature of the Crown* (Oxford, OUP, 1999) p 339.

<sup>16</sup> *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB26, (CA) p56 (Nourse LJ).



powers. It should be noted that the common law also recognises that the Government is able to exercise powers derived from the Crown's status as a natural person – for example, to enter into contracts, convey property or make extra-statutory payments. Although such powers have sometimes been referred to (including by the courts) as prerogative powers, this report is not intended to cover them, because they give rise to significantly different considerations. This report focuses on powers which are peculiar to the executive and derived from the historic status of the monarch. The report's use of the word 'prerogative' is therefore closer to Blackstone's understanding: those powers which the Crown enjoys in contradistinction to others.

### Controls on the existence, extent and exercise of the Prerogative

30. The role of the courts in determining the existence and extent of the prerogative from time to time can be a significant control on the prerogative. In particular, the control is strengthened by the common law doctrine that courts cannot create new prerogatives; as Lord Diplock put it, 'it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative.'<sup>17</sup> Equally, however, the ban on creating new prerogatives can be undermined by courts recognising prerogatives which were previously of doubtful provenance, or adapting old prerogatives to modern circumstances. For example, the Secretary of State's prerogative power to act to maintain law and order where no emergency exists, discussed in section 4.7 of this report, was not widely recognised until defined by the Court of Appeal in 1989<sup>18</sup>.
31. As well as controlling the existence and extent of prerogative powers, the courts are nowadays able to scrutinise the manner in which such powers are exercised. One route is through an action under the Human Rights Act, which provides a mechanism whereby an aggrieved person may challenge an act or omission of the executive in the UK courts. The other main route is through the mechanism of judicial review<sup>19</sup>, which enables the actions of a Minister to be challenged on the basis that he or she did not have the power to act in such a way; that the action was unreasonable, or that the power was exercised in a procedurally unfair way.
32. In addition, as PASC put it, 'Parliament is not powerless in the face of these weighty prerogatives'<sup>20</sup> and there are a number of ways in which the exercise of prerogative powers can be controlled and examined by Parliament:
  - a) LegislationParliament can legislate to modify, abolish or simply put on a statutory footing any particular prerogative power. Prerogative powers are abolished by clear words in statute or where the abolition is necessarily implied. Since it is comparatively rare for statutes to abolish prerogatives explicitly, it is often a matter of legal judgement as to whether the prerogative is abolished by implication; lawyers look to see if the statute 'covers the field' of the prerogative, for example.

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<sup>17</sup> *British Broadcasting Corporation v Johns* [1965] Ch 32 CA

<sup>18</sup> *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 (CA)

<sup>19</sup> At one time, it was thought that exercises of the prerogative were immune from judicial review. This doctrine has now been overturned – see, in particular, *Council of Civil Service Unions v Minister for the Civil Service* ('the GCHQ case') [1984] 3 All E.R. 935 - although the courts continue to recognise that it may not be appropriate for them to review the exercise of the prerogative in certain, sensitive circumstances.

<sup>20</sup> *Taming the Prerogative*, paragraph 10 (HC422)

Some Acts passed in recent years, although not primarily aimed at reforming the Royal prerogative, have nevertheless brought about significant reforms. For example, historically there has been a prerogative power in times of emergency to enter upon, take and destroy private property. The Civil Contingencies Act 2004 - devised as a broad, flexible framework for dealing with emergencies - in practice covers the majority of situations where it might previously have been appropriate to use the Royal prerogative.

Whether that Act has wholly occupied the field of the emergency prerogative power, however, is a complex question<sup>21</sup> that – in the absence of specific legislative provision - can only be settled by the courts. The issue is discussed further in Chapter Four of this report (section 4.3). Similarly, the Inquiries Act 2005 reproduced or replaced much or all of the prerogative power to call public inquiries, as discussed in section 4.6. In neither case, however, were the existing powers under the prerogative specifically abolished.

### b) Accountability to Parliament

Ministers are accountable to Parliament for all their actions, including those taken under the prerogative powers, and this may include scrutiny by the Departmental Select Committees. The Prime Minister is also subject to twice-yearly questioning by the Liaison Committee.

### c) Parliamentary approval of expenditure

Additionally, Parliamentary approval is required where the use of the prerogative involves the incurring of expenditure, although the authority may be of a general rather than a specific nature.

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<sup>21</sup> In *De Keyser's Royal Hotel*<sup>11</sup>, where the Government had taken possession of the hotel purporting to exercise a prerogative power, it was held that the Government must act under the available statutory power and in accordance with its terms. Nevertheless it can reasonably be said that, although in most emergencies government would make use of the 2004 Act, a prerogative power subsists in a narrow range of circumstances.

### Chapter Three: Action taken or proposed in respect of prerogative powers

33. Through the Governance of Britain programme, the Government made commitments to surrender or limit numerous powers which it considered should not, in a modern democracy, be exercised exclusively by the executive. Some of these commitments are already in force, being piloted or being taken forward by other responsible bodies: specifically,
- the Government's commitment, in the Governance of Britain Green Paper, to make no alterations to the final list of names recommended by the Main Honours Committee, was implemented with immediate effect;
  - a number of senior public appointments have been the subject of pre-appointment scrutiny by the relevant Parliamentary Select Committee and a list of 60 suitable appointments has been agreed with the Liaison Committee, and
  - as reported in the White Paper, the General Synod of the Church of England agreed in February 2008 to forward to the Prime Minister only a single nomination for diocesan bishoprics in future, and to discuss further with the Government additional changes in relation to other Church appointments.
34. The majority of the Government's commitments, however, are intended to be implemented by means of the Constitutional Reform and Governance Bill. A draft 'Constitutional Renewal Bill', published in the Governance of Britain White Paper, contained important measures to strengthen Parliament and make government more accountable to the people it serves. It included measures to reform the role of the Attorney-General; remove the role played by the Prime Minister in judicial appointments; formalise the procedure for Parliament to scrutinise treaties prior to ratification, and enshrine in statute the core values of the Civil Service, as well as the historic principle of appointment on merit, and place the Civil Service Commissioners onto a statutory footing.
35. The Government remains strongly committed to constitutional renewal and has incorporated proposals on all of these matters, with the exception of the role of the Attorney General, in its Constitutional Reform and Governance Bill. That Bill was published and given its First Reading in the House of Commons on 20 July 2009 and will be taken forward when Parliament resumes after the summer recess. In his statement on the publication of the Bill, the Right Honourable Jack Straw MP, the Lord Chancellor and Secretary of State for Justice, explained that the necessary reforms to the role of the Attorney General were being achieved without the need for legislation.
36. The Bill also includes provisions to:
- phase out the hereditary principle from the House of Lords and make it possible for its members to resign or be disqualified, expelled or suspended in certain circumstances;
  - repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005, removing the requirement to give notice of demonstrations around Parliament, as well as the offence of holding a demonstration without the authorisation of the Metropolitan Police Commissioner. The Bill will instead enable the police to be given proportionate alternative powers to maintain access to Parliament;

- reconcile the time limit for human rights claims under the Northern Ireland Act 1998 and the Government of Wales Act 2006 with that in the Human Rights Act 1998;
  - provide a modern governance arrangement for the National Audit Office and change the tenure of the Comptroller and Auditor General;
  - protect the salaries of judicial office holders in certain tribunals and make provision for a new method of obtaining medical assessments for candidates for judicial office, and
  - align the spending mechanisms of non-departmental public bodies with the existing budgetary treatment.
37. As promised in the Constitutional Renewal White Paper, the Government is also preparing a draft of a detailed House of Commons resolution setting out processes the House of Commons should follow in order to approve any deployment of the Armed Forces in armed conflict overseas.
38. The issue of passports is another aspect of the prerogative where reforms have been proposed. The Government has decided in principle that it will introduce comprehensive legislation on the procedures for issuing passports and that draft legislation should be published for consultation before it is introduced to Parliament. The timetable for this has yet to be decided but is now unlikely to be until the next Parliament.
39. In other areas, also, work is under way to increase Parliamentary input into Ministerial recommendations on the Monarch's exercise of prerogative powers. The House of Commons Modernisation Committee is currently examining the conventions governing the dissolution and recall of Parliament. The Government has proposed that the Prime Minister should be required to seek the approval of the House of Commons before asking the Monarch for a dissolution. The Government's proposal in relation to recall is that the Standing Orders of the House be amended to provide for the Speaker to recall the House if he or she receives requests from over half of its membership.
40. Aside from the various strands of the *Governance of Britain* work, other recent reforms have come about as the result of the Civil Contingencies Act 2004, the Inquiries Act 2005 and the BBC Charter Review. Legislative changes and their implications for prerogative powers are discussed in Chapter Two (paragraph 32) and Chapter Four (sections 4.3, 4.5 and 4.6).
41. The most significant powers identified have been the subject of recent consideration which has led either to legislation or inclusion in the Government's existing programme of reform. The remaining powers, in respect of which no reforms are yet in train, may be described as the hinterland of the executive prerogative powers. They are discussed, and the Government's conclusions in relation to them are set out, in Chapter Four.

## **Chapter Four: Consideration of remaining prerogative powers**

42. The Government has already set out, as part of the Governance of Britain programme, its intentions with regard to the powers most clearly in need of limitation or reform. The case for limitation of the remaining powers – those that have been the subject of this wider Review - is less clear. These powers highlight a number of questions that would need to be addressed before any further change was initiated.
43. The examples that follow are intended to provide a focus for discussion – initially in Chapter Five - of the appropriateness of further reform.

## 4.1 The organisation and control of the Armed Forces

### Introduction

44. The Royal prerogative is central to the existence and organisation of the Armed Forces. The prerogative sits alongside a range of primary and secondary legislation, however, which regulates such matters as service discipline and certain functions of the Secretary of State for Defence. The prerogative is therefore one element of a sophisticated structure for the administration of the Armed Forces.
45. When considering these powers, it is important to note that perhaps the most significant prerogative power concerning the Armed Forces – their deployment into armed conflict overseas – is already the subject of significant reform proposals. The Governance of Britain White Paper<sup>22</sup> proposed that a detailed resolution should be established by which decisions by Government to commit forces to armed conflict should ordinarily be approved by the House of Commons. The Government arrived at this proposal after a detailed consultation exercise, initiated by the consultation paper, *War powers and treaties: limiting executive powers*, published in October 2007. That issue is being taken forward separately from this wider review of the executive Royal prerogative powers.

### Consideration

46. The Royal prerogative is the legal mechanism which allows the State to appoint people to carry arms in its service. Thus, the prerogative provides the authority for the Crown to:
  - recruit members of the Armed Forces;
  - appoint commanders and grant commissions to officers;
  - establish the Defence Council; and
  - make agreements with foreign states about stationing troops on their soil.Other matters, however – such as the enforcement of military discipline and the trial of offences under military law - are regulated by statute.
47. A significant feature of the mixture of prerogative and statutory powers relating to the Armed Forces is the statutory restriction on the existence of a standing army. The Bill of Rights 1689 prohibited the raising or maintenance of a standing army within the realm in times of peace without the consent of Parliament. This provision was an important element of the constitutional settlement reached between Parliament and the Monarch after the revolutionary wars of the 17th century. As an army was necessary, Acts were then passed on an annual basis to authorise it.
48. Recent statutory practice has been for Acts to be passed making provision for discipline and other aspects of the armed services on a five-yearly basis with annual Orders in Council being required to continue those Acts in force during the periods between each five yearly Act.
49. A Select Committee of the House of Commons, the Armed Forces Bill Committee, goes through each Bill formally, clause by clause, and makes amendments if it wishes; it may also take formal evidence, make visits and make a Special Report to the House of its findings and recommendations. By

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<sup>22</sup> *Governance of Britain - Constitutional Renewal White Paper* p 50

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the making of a new Act on a five-yearly basis, Parliament has the opportunity to examine, and possibly adjust, the balance between the prerogative and statutory powers. For example the Armed Forces Act 2006 provided a statutory framework for inquiries into naval incidents, amongst other things. Prior to this Act, the Royal Navy convened Boards of Inquiry under prerogative powers.

50. Aside from the statutory aspects of the administrative framework there are a number of other ways in which Parliament exercises control over the Armed Forces. Expenditure on defence is subject to the normal requirements of parliamentary approval through the annual Appropriation Acts. By this mechanism Parliament controls both defence expenditure and the size of the Armed Forces. The expenditure, administration and policies of the Ministry of Defence are also subject to scrutiny by the Defence Select Committee of the House of Commons.
51. The exercise of most prerogative and statutory functions in relation to defence is divided between the Defence Council and the Secretary of State. The Defence Council, chaired by the Secretary of State for Defence and including among its membership all the Defence Ministers and Service Chiefs, is appointed by Her Majesty by Letters Patent. By those Letters it is given responsibility for the command of the Armed Forces, for appointments within the Armed Forces and for such aspects of the administration of the Armed Forces as the Secretary of State may direct. The Defence Council also has statutory functions, for example in relation to the redress of complaints, the holding of service inquiries and the deployment of the Armed Forces within the United Kingdom in an emergency.

### Conclusion

52. Manifestations of the prerogative in relation to the Armed Forces are closely interwoven with statutory provisions. Developing proposals to remove the prerogative powers or make them more closely subject to the mandate of Parliament would be a highly complex and lengthy undertaking. The Government does not believe, particularly in view of the level of scrutiny Parliament already brings to bear, that the resources which would be required for this can be justified.

### 4.2 Royal Prerogative of Mercy

#### Introduction

53. The Royal Prerogative of Mercy has been exercised for many hundreds of years. It is the power of the Sovereign to show mercy towards an offender, by mitigating or removing the consequences that follow conviction for an offence. Its use - reflected in the coronation oath in which the Sovereign promises to administer justice 'in mercy' - arose in cases in which the Sovereign felt it necessary to intervene personally to ensure justice was done.
54. The power is exercised by the Sovereign on ministerial advice. The Secretary of State for Justice is now responsible for recommending the exercise of the Royal Prerogative of Mercy in England, Wales and the Channel Islands – except in relation to members of the Armed Forces convicted and sentenced under the Services justice system, where the responsibility is carried by the Secretary of State for Defence. In the Isle of Man, by constitutional convention, the responsibility rests with the Lieutenant Governor.
55. In Scotland, the responsibility for recommending the exercise of the Royal Prerogative of Mercy is devolved to Scottish Ministers by virtue of the Scotland Act 1998. In Northern Ireland, the responsibility currently lies with the Secretary of State for Northern Ireland but is expected to transfer to Northern Ireland Ministers following the devolution of policing and justice functions, except in relation to terrorist cases, which will remain with the Secretary of State.

#### Consideration

##### i) Free and Conditional Pardons

56. Free and conditional pardons were used to address miscarriages of justice. Free pardons were traditionally granted where new evidence came to light which demonstrated conclusively that no crime was committed or that the individual did not commit the offence. A free pardon does not, however, quash or overturn a conviction. Even where a free pardon was given, the conviction remained.
57. The granting of free pardons has declined as rights of appeal in the courts have expanded. The Criminal Appeal Act 1907 established the Court of Criminal Appeal.<sup>23</sup> This provided, for the first time, a right of appeal for those convicted following a jury trial. It also enabled the relevant Secretary of State, when considering an application for a free pardon (or any other application for mercy), to refer the case to the Court of Criminal Appeal, who would treat it as an appeal<sup>24</sup>. Since then, free pardons have rarely been granted for convictions which followed a jury trial.
58. Cases dealt with by magistrates, however, continued to attract free pardons – 66 in the first half of the 1990s – until the Criminal Appeal Act 1995 came into force in 1997. That Act created the Criminal Cases Review Commission, with powers to refer convictions in the Crown Court to the Court of Appeal (replacing the Secretary of State's power to do so) and to refer convictions in Magistrates' Courts to the relevant appellate courts, whether or not there was a guilty plea. Unless there are exceptional circumstances, the Commission will

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<sup>23</sup> Now the Court of Appeal Criminal Division.

<sup>24</sup> The Criminal Appeal Act 1968 broadened the power of the Secretary of State by allowing him to make a referral to the Court of Appeal whenever he thought fit, not just on application for mercy.



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only refer a case if an appeal has already been made or permission to appeal refused. To make a referral, the Commission must consider that there 'is a real possibility'<sup>25</sup> that the conviction would not be upheld if the referral was made.

59. The creation of a unified statutory system for bringing a case back before the courts when normal rights of appeal have been exhausted has significantly reduced the need for free pardons. Before the free pardon granted to Michael Shields in September 2009, none had been granted since 1996, shortly before the Commission came into being. The courts' powers to quash a conviction provide a more satisfactory means of rectifying miscarriages of justice. Once a conviction is quashed innocence is presumed.
60. Unlike the free pardon, which releases a person from the effect of a penalty or a consequence of a sentence, a conditional pardon substitutes one type of sentence for another. In the 20<sup>th</sup> century it was used almost exclusively to substitute a life sentence in place of the death penalty for murder. The last conditional pardon was granted to Derek Bentley, posthumously, in 1993. His conviction itself was later quashed by the Court of Appeal, following a reference by the Criminal Cases Review Commission. The abolition of the death penalty, together with the powers of the appeal courts to alter sentences, suggests that this form of pardon will rarely, if ever, be needed in future.
61. The High Court's ruling in the case of *R (Shields) v Secretary of State for Justice*<sup>26</sup> emphasised the breadth and flexibility of the Royal Prerogative of Mercy, together with the Secretary of State's right to formulate appropriate policies and criteria for its application. In the view of the Government it would be inappropriate to grant a free pardon where a statutory remedy is available. Only rare cases where no statutory remedy is available could be considered under the prerogative.
62. Section 16(1) of the Criminal Appeal Act 1995 provides for assistance on the Royal Prerogative of Mercy by the Criminal Cases Review Commission. It provides that the Commission must consider any matter referred to it by the Secretary of State in his consideration of whether to recommend the exercise of the Royal Prerogative of Mercy; that the Commission must provide a statement of its conclusions on that matter, and that in considering whether so to recommend, the Secretary of State must treat the Commission's statement as conclusive of the matter referred. The fact that the provision has never been used lends further support to the view that the Royal Prerogative of Mercy will only be used very rarely in this area.
63. In granting a free pardon to Michael Shields, the Justice Secretary questioned the appropriateness of his exercising the power over a conviction involving a finding of fact in an alleged miscarriage of justice case, particularly in relation to cases from abroad. He said that he would be exploring alternative options for dealing with any future cases which arise in relation to applications for free pardons.

### ii) Remission Pardons

64. A remission pardon is a means of reducing the effect of a sentence once it has been imposed, by releasing a prisoner from having to serve some or all of the remainder of his or her sentence in custody. It differs from a free or conditional pardon in that it does not bring the original sentence to an end, or replace the

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<sup>25</sup> Section 13, Criminal Appeal Act 1995.

<sup>26</sup> [2008] EWHC 3102 (Admin)

old sentence with a new one, but leaves it intact. Remission pardons have usually been granted in one of the following four sets of circumstances.

### **a) Compassionate grounds**

Early release on compassionate grounds was most commonly used where a prisoner had very serious or terminal health problems. In England and Wales statutory powers are now available, under section 248 of the Criminal Justice Act 2003 (replacing powers under section 36 of the Criminal Justice Act 1991), and section 30 of the Crime (Sentences) Act 1997<sup>27</sup>. These give the Secretary of State a broad power to release both determinate and life sentence prisoners on licence on compassionate grounds.

### **b) Information helping to bring others to justice**

It is a long-established practice to grant reductions in sentence to offenders who, prior to conviction, provide information that helps to bring other offenders to justice. Where such information is provided after sentence has been passed, there is a prerogative power to reduce the sentence through a remission pardon. In such cases the Secretary of State seeks reports from the relevant authorities on the credibility of the information, whether it has been acted upon and the outcome.

The scope for using prerogative powers for granting a remission pardon in these circumstances has been narrowed in recent times by section 74 of the Serious Organised Crime and Police Act 2005. This created a mechanism whereby a Court may review and reduce the sentence of a serving prisoner who has provided information that assists in the prosecution of another defendant. The statutory power covers most of the situations in which the prerogative might have been exercised. Only two applications have been received in the last 5 years. Both were HM Revenue & Customs cases, and both were refused.

### **c) Prevention of escape, injury or death**

The Royal Prerogative of Mercy has been exercised to grant remission pardons where a serving prisoner has intervened to assist the prison authorities in preventing escape, injury or death. The Secretary of State takes into account evidence from the prison authorities in deciding whether the conduct displayed merits a reduction in sentence.

This use of the prerogative power has not been supplemented or superseded by statute. Parole is available to prisoners who conduct themselves well, but paroled prisoners are released on licence, with their original sentences technically intact. The Royal Prerogative remains the only way of terminating a sentence early in recognition of remarkably good conduct in custody, and is still occasionally applied in such cases.

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<sup>27</sup> Similar provisions apply in Northern Ireland under Article 20 of the Criminal Justice (Northern Ireland) Order 2008 and Article 7 of the Life Sentences (Northern Ireland) Order 2001, although the 2008 provision in respect of determinate sentence prisoners has yet to come into force.

### **d) Mistakes surrounding a prisoner's release date**

A remission pardon may also be granted to mitigate the consequences of a legislative anomaly, in a mistake in calculating a prisoner's release date or informing the prisoner of that date. In those circumstances, the Secretary of State will decide whether there has been a pledge of public faith that he/she should honour by granting a remission pardon. In taking the decision, the Secretary of State will weigh his/her duty to enforce the sentence handed down by the court against the reasonable expectations of the prisoner and any family he may have. The Secretary of State will have regard to whether the prisoner deliberately concealed knowledge of the error. He/she will also take into account the length of time that the prisoner has been misled; the extent to which the prisoner has made plans for release on the incorrect date, and the length of time by which the sentence would be reduced if the remission pardon was granted.

This use of the prerogative power has not been made redundant by statute; the Royal Prerogative of Mercy remains the only current method of allowing early release where an error in sentence calculation is made.

### **Conclusion**

65. Use of the prerogative powers to grant free, conditional and remission pardons has been largely, but not entirely, superseded by statutory provisions. Residual prerogative powers may still be relied on, however, in exceptional cases. The Justice Secretary has announced that he is exploring other options for dealing with the exercise of the Royal prerogative in relation to applications for free pardons.

#### 4.3 Powers in the event of a grave national emergency including those to enter upon, take and destroy private property (emergency prerogative powers)

##### Introduction

66. The UK Government traditionally has had a range of non-statutory powers to enable it to respond to emergencies. Although their precise scope is unclear, they permit interference with private property rights in certain circumstances. For example, in the 1606 *Case of the King's prerogative in Saltpetre*<sup>28</sup>, the court noted that there was a power to enter private property for the purposes of making defences in time of peril. In 1965, in the case of *Burmah Oil Company (Burma Trading) Ltd v The Lord Advocate* [1965] AC 75, the House of Lords held that the prerogative permitted the Army to destroy private property to prevent it from falling into the hands of an advancing enemy. In the judgment Lord Reid stated that the Government has the power to do 'all those things in an emergency which are necessary for the conduct of war' and also that 'the prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute.'<sup>29</sup>
67. The Civil Contingencies Act 2004 replaced the emergency powers framework set out under the Emergency Powers Act 1920 and the Civil Defence Act 1948 with a wide range of powers, together with safeguards for the exercise of those powers. The Act was intended to make provisions for as nearly comprehensive a system as possible for dealing with most grave emergencies. It provides for the drawing up of emergency regulations if an event or situation threatening:
- serious damage to human welfare in the UK, a devolved territory or region;
  - serious damage to the environment of the UK, a devolved territory or region, or
  - the security of the UK, from war or terrorism
- has occurred, is occurring or is about to occur, and existing powers are insufficient. Emergency regulations may only be made in cases of urgency, when existing powers are insufficient, and must be proportionate to the aspect or effect of the emergency at which they are directed. They cannot override provisions in the Human Rights Act 1998 or EU legislation.
68. Prerogative powers can be abolished by legislation, either explicitly or by implication. Although the emergency prerogative powers have not been explicitly abridged by statute, it might be thought that the Civil Contingencies Act has 'covered the field', leaving no room for the continuation of the prerogative. An indication that the prerogative still exists, however, may be found in section 22(3) of the Act itself, which provides that emergency regulations may make any provision that could be made by either an Act of Parliament or the Royal prerogative.

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<sup>28</sup> (1606) 12 Co Rep 12.

<sup>29</sup> *Burmah Oil* p 101

### Consideration

69. The House of Lords Constitution Committee (contributing a memorandum to pre-legislative scrutiny on the 2004 Act) commented 'we find it difficult to see what could be done under the Royal Prerogative that could not be done under an Act of Parliament'<sup>30</sup>. The continuation of the prerogative in these circumstances, however, reflects the difficulty in defining, in advance, circumstances in which it may need to be used and how the Government would need to react. As one textbook puts it, 'Extensive emergency powers have now been granted by Parliament and these confer authority on ministers....But if, for example, an emergency arose in which it was necessary for the armed forces to take immediate steps against terrorist action within the United Kingdom, it is possible...that private property needed for this purpose could be occupied under prerogative'<sup>31</sup>.
70. The time needed to make emergency regulations under the 2004 Act could make compliance impractical in some emergency scenarios. Such regulations may be made by Order in Council or by a senior Minister when an emergency has occurred, is occurring or is about to occur and urgent provision is required to prevent, control or mitigate an aspect of the emergency. Cabinet Office guidance suggests that the length of time needed to bring emergency regulations into effect will vary, according to their complexity, between six hours and a number of days; the point is made, however, that it is extremely unlikely that emergency regulations could be put in place quickly enough to be of any use if the effects of the emergency are 'expected to be felt in a matter of minutes or to be over in just a few hours'.
71. Circumstances could also arise where the disablement of some part of the infrastructure or chain of command designed to deal with civil contingencies leaves no alternative but to rely on prerogative powers. For example, those powers might permit immediate action by officials where it is impossible, or there is insufficient time, to engage with Ministers. The *Carltona* principle<sup>32</sup> provides that decisions made on a Minister's behalf by one of his or her officials are to be treated as a decision of the Minister, under authority that flows from the nature of the official's work. There could be circumstances in which Government officials who were not able to contact a Minister to fulfil the requirements of the Civil Contingencies Act might need to take immediate action, in reliance on the prerogative, to combat an urgent threat.
72. In practice, therefore, the Royal prerogative might need to be relied on in place of the Civil Contingencies Act in particularly extreme and urgent circumstances and on a strictly time-limited basis; indeed these may be the only ways in which it can lawfully be used.
73. The use of prerogative powers in an emergency situation is also limited, to some extent, by the operation of the common law and the requirement that they be exercised compatibly with the European Convention on Human Rights. Rights that may be engaged by the exercise of such powers include Article 8 (right to respect for private and family life) and Article 1 of the First Protocol (protection of property), although there are circumstances in which states may derogate from obligations under the Convention. In particular, Article 15 deals with derogations 'in time of war or other public emergency threatening the life

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<sup>30</sup> Joint Committee on the Draft Civil Contingencies Bill (2002-03) HC 1074, <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtdcc/184/184.pdf>

<sup>31</sup> Bradley and Ewing *Constitutional and Administrative Law* (14<sup>th</sup> ed 2007) p 262

<sup>32</sup> *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560

of the nation'. Furthermore, in some circumstances - as in the *Burmah Oil* case - government may be obliged under common law to compensate, financially or otherwise, for interference with private property rights.

74. Apart from the Civil Contingencies Act, there are in existence some 1200 statutory powers of entry and seizure<sup>33</sup>, allowing a range of authorities to enter premises. They are currently the subject of a review by the Home Office, which is working with other Government Departments and agencies on assessing the continuing need for and application of these powers.

### Conclusion

75. Although it seems likely that the Civil Contingencies Act 2004 has covered much of the 'field' of the emergency prerogative powers, it appears that important aspects remain for use in cases of particular urgency or disruption where the statute may not operate effectively. These powers may provide a vital ability to act where there is insufficient time to put statutory provisions in place.
76. There is no higher duty on a Government than that to guarantee the safety and security of its citizens. This consideration leads the Government to the conclusion that - rarely though these residual powers may need to be used - they should be retained.

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<sup>33</sup> These statutory powers are listed at <http://police.homeoffice.gov.uk/operational-policing/power-pace-codes/powers-of-entry-review/>.

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### 4.4 Granting Charters

#### Introduction

77. There are a number of smaller powers that have fallen into disuse either because they have been replaced by a statutory scheme or because they no longer perform a relevant function. The power to grant or amend Royal Charters is one such power, and is described here with the intention of facilitating discussion of the wider category.

#### Consideration

78. The powers under discussion provide for the grant or amendment of Royal Charters by Letters Patent to create (a) joint stock companies or (b) other bodies formed for the purpose of carrying on business with the object of the acquisition or gain by the bodies or their individual members. Powers in relation to Charters of bodies operating within areas of devolved competence are exercised, as necessary, by Ministers of the devolved administrations. The conclusions that follow relate to the exercise of powers to the extent that they are available to be exercised by UK Government Ministers.
79. Royal Charters, granted by the sovereign on the advice of the Privy Council, have a history dating back to the 13th century. Their original purpose was to create public or private corporations (including towns and cities), and to define their privileges and purpose. Nowadays, though Charters are still occasionally granted to cities, new Charters are normally reserved for bodies that work in the public interest (such as professional institutions and charities) and which can demonstrate pre-eminence, stability and permanence in their particular fields.
80. The power to amend the Charters of companies created in this way prior to the 1862 Companies Act will need to be retained, as such companies still exist. Their number will, however, diminish over the years.

#### Conclusions

81. The power to issue Royal Charters in relation to joint stock companies is now redundant. The 1862 Companies Act and subsequent Companies Acts established a statutory framework for the creation and operation of registered companies. There is therefore no requirement for Royal Charters to be used as a means of creating joint stock companies and no advantage in doing so through this route.
82. The power to amend the Charters of companies created in this way prior to the 1862 Companies Act needs to be retained for the time being, however, as such companies still exist – although their numbers will gradually diminish.
83. The demand for Royal Charters for bodies working in the public interest that can demonstrate excellence in their particular fields persists, despite the introduction of other accolades such as the Government's Charter Mark and the Queen's Award for Enterprise. The distinction is granted only sparingly, on Ministerial advice and after thorough consideration. The Government is not persuaded that the power needs to be abolished or replaced.

### 4.5 BBC Royal Charter

#### Introduction

84. The BBC is maintained by Royal Charter which is renewable every 10 years. The current Royal Charter was granted to the BBC on 19 September 2006 and took full effect from 1 January 2007. The Charter was granted after a thorough review of the constitutional and governance structures of the BBC, in the course of which the Government consulted widely, responded to proposals from a Lords Select Committee on the Charter Review and published Green and White Papers setting out its plans.

#### Consideration

85. The Charter Review, which involved thousands of people in research and consultation, took three years. The Government's public consultation emphasised the importance of the BBC's independence from Government. The public supported this view: although the response to the consultation showed a general desire for the BBC to be more accountable, it was also clear that the public found the idea of greater parliamentary scrutiny and government involvement via statute unappealing. The public generally felt that the BBC's independence would be jeopardised if the organisation were put onto a statutory basis.
86. The constitutional basis and governance of the BBC were under consideration throughout the period of the Review, including by the Lords Select Committee on the Charter Review which published a number of reports. Its first report, published in October 2005, recommended that the BBC should be established by an Act of Parliament, as a statutory framework would provide a 'more transparent and democratic route than agreeing a Royal Charter through the Privy Council'.
87. The Government responded to the Lords Select Committee report in January 2006. The response explained that the Government had considered the Committee's proposals carefully but had decided that the best way of giving the BBC the necessary independence and stability was to renew its Royal Charter for ten more years. The alternative, an Act of Parliament, risked making the BBC more open to *ad hoc* government and parliamentary intervention and would remove flexibility to negotiate changes to the accompanying Agreement during the life of the Charter.
88. In response to the public's desire for greater accountability, the Government and the BBC have established the BBC Trust, in fulfilment of their agreement that functions relating to oversight should be separated from those relating to delivery. The Government has made clear that it wishes to provide for at least the same degree of parliamentary scrutiny during the lifetime of the present Charter as applied during the last one and that a further thorough review of the BBC's role and purpose will be needed before any decision is made on another Charter.

#### Conclusion

89. The decision to retain the BBC's Charter for the ten years to 2016 was reached recently, after thorough consultation and consideration. It has the support of both the BBC and the public. The Government sees no merit in reopening the question now; the issue will be thoroughly reassessed when the Charter comes up for renewal.



### 4.6 The Secretary of State's power to call independent Public Inquiries

#### Introduction

90. The power to call a Public Inquiry is an important tool governments can use to look at a particular problem, to develop recommendations aimed at lessening the likelihood of a recurrence and to increase public confidence that matters of concern are properly and impartially considered and dealt with. Governments have both statutory and non-statutory powers to call Inquiries. These powers were the focus of a report, *Government by Inquiry*, published in February 2004 by the Parliamentary Public Administration Select Committee (PASC). That report elicited a response from the Government in the form of a consultation document, *Effective Inquiries*, and ultimately new legislation in the form of the Inquiries Act 2005.
91. The Inquiries Act 2005 established a comprehensive new statutory framework for Inquiries set up by Ministers – including Ministers of the devolved administrations, where appropriate - to look into matters of public concern. Although it replaced over 30 different pieces of legislation on Inquiries, consolidated much of the previous legislation and codified past practice, it did not repeal the Secretary of State's non-statutory powers to set up Inquiries<sup>34</sup>. It is these, residual, non-statutory powers that have been considered in the course of this Review, to the extent that they are available to be exercised by UK Government Ministers.

#### Consideration

92. The Inquiries Act 2005 provides that a Minister may cause an Inquiry to be held if it appears to him that particular events have caused or are capable of causing public concern, or if there is public concern that particular events may have occurred. The Act sets out how the Inquiry should be set up, be carried out and report. It grants powers to compel witnesses and the production of documents and to conduct an Inquiry in private if necessary. It also includes provision for Inquiries set up under other powers to be brought within the framework of the Act.
93. The previous legislation was piecemeal. The Tribunals of Inquiry (Evidence) Act 1921, which provided for a tribunal that had the powers of a court for certain matters, was used for only the most serious matters of "urgent public importance". A collection of more modern Inquiry powers, which developed over the years, covered some subject areas such as policing and health, but not others such as prisons. Increasingly, governments had started to set up *ad hoc*, non-statutory Inquiries, often because no legislation existed to support a statutory one in a particular field of concern.
94. Royal Commissions, established by Royal Warrant under the prerogative, were also used in the past to inquire into specific instances that had caused great public concern. Modern Royal Commissions are not generally used for this purpose, however, but instead to focus on broader and longer-term issues. For example, the Royal Commission on Environmental Pollution describes itself as an independent, standing body established by Royal Warrant, which advises on environmental issues.
95. In recent years there have been several high profile Inquiries in response to public concerns over a wide variety of topics. For example, the Butler Inquiry

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<sup>34</sup> Section 44(4) of the Inquiries Act 2005

examined the reliability of the intelligence indicating that Iraq had weapons of mass destruction, prior to the involvement of UK armed forces; the Bichard Inquiry looked at the effectiveness of the intelligence sharing and record keeping leading up to the Soham murders, and the Hutton Inquiry looked into the circumstances surrounding the death of Dr David Kelly. All of these predated the Inquiries Act 2005.

96. Inquiries held under the Inquiries Act 2005 enjoy some important benefits such as the statutory powers of the Chairman to require the attendance of witnesses, which may be necessary in controversial cases. The *Effective Inquiries* consultation document identified a number of advantages attached to the non-statutory route, however. In particular, it was suggested that non-statutory Inquiries may be especially suitable where all relevant parties are willing to co-operate with an investigation. In such circumstances a non-statutory Inquiry may be convened and concluded more quickly and perhaps more cheaply than a statutory Inquiry, because witnesses are less likely to need legal representation. It was suggested that localised or smaller Inquiries might also fare better on a non-statutory basis.

### Conclusion

97. The purpose of any reform of a prerogative power is to increase scrutiny by Parliament. As recently as 2005, however, Parliament legislated to provide a new statutory framework for Inquiries, but left intact the Secretary of State's non-statutory power to call an Inquiry. Given Parliament's endorsement of the Government's conclusion that the abolition of non-statutory Inquiries would risk increasing procedural and cost burdens and that the option should be retained, the Government sees no need at present to revisit this question.

### 4.7 Powers to keep the peace where no emergency exists

#### Introduction

98. In *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 (CA), the Court of Appeal confirmed that the Secretary of State has a prerogative power to act at all times (not only in times of actual emergency) to maintain the Queen's peace and to keep law and order, unless any such action would be incompatible with statute. In the *Northumbria* case, this meant that the Secretary of State could supply equipment (CS gas and plastic batons) from a central store to chief police officers for use in the event of serious public disorder, without the need for police authorities' approval.
99. In this case it was held that the statutory provisions for the maintenance of law and order through police forces and local authorities did not abrogate the existence of a central government power and that the prerogative powers to take all reasonable steps to preserve the Queen's Peace were unaffected by modern statutes setting up independent police forces..
100. In this area the sources of governmental power are complex. In England and Wales, some of the functions of the Secretary of State with regard to law and order are set out in the Police Acts. The statutory framework grants various powers to the police for maintaining the peace, and separates the roles of the Secretary of State and the police. The consideration and conclusions that follow relate mainly to the exercise of prerogative powers in England and Wales.

#### Consideration

101. The *Northumbria* case goes to the heart of the issue about the respective powers of police forces and the Government and how they should be exercised. The duties of the police to prevent crime and keep the peace are set out in common law.<sup>35</sup> Individual statutes set out specific powers which the police need in order to fulfil these general functions. In particular, the Police and Criminal Evidence Act 1984 sets out a statutory framework of powers to investigate and tackle crime and bring offenders to justice, including stop and search, arrest and detention powers. Legislation does not actually assign to the police the general, underlying function of maintaining the peace, however.
102. The underlying prerogative power has been relied upon more recently than in the *Northumbria* case: for example, it enabled the supply of search, detection and surveillance equipment for the G8 summit in Scotland in 2005. The Home Office Scientific Development Branch continues to develop and provide equipment to the police and it is conceivable that the prerogative power could be used in this context.
103. Similarly, the Police Act 1996 provides for the maintenance of police forces and gives the Secretary of State various powers to intervene 'in the interests of efficiency or effectiveness', where police forces or police authorities are failing. However, nowhere is the function of those forces set out nor the basis on which the Secretary of State may take action. It appears implicit that the Secretary of State has a prerogative function of maintaining the Queen's peace, delivered through police forces, with statutory provisions enabling him or her to take action against forces which are failing.

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<sup>35</sup> *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118.

### Conclusions

104. Any change in this area would have to be considered very carefully, in the light of the complex constitutional relationship between the Secretary of State, police forces and local authorities which is necessary to maintain a proper separation of powers. The issue relevant to this report, however, is whether a general power to keep the peace is a proper function for the executive.
105. Defining this prerogative as a power may be too simplistic. A Government may have the power to keep the peace, but it also has a duty to do so. In some, rare, cases, an official has been charged with a failure to keep the peace: for example, in *R v Pinney*<sup>36</sup> the Mayor of Bristol was charged with failing to suppress the serious 1832 Bristol Riots.
106. Statutes set out how this function of keeping the peace is to be carried out - through the agencies of police forces - but not the general responsibility to make the necessary provision to enforce law and order should the established systems fail in some way - for example in the event of an illegal strike by police forces, or some other form of incapacity. That responsibility, combining power and duty, is enshrined in the Royal prerogative.
107. The Government believes that it is vital for the State to have sufficient powers to authorise measures needed to combat crime and violent disorder and ensure that law and order are maintained. It would therefore be undesirable to abolish the Royal prerogative in this area without replacing it with a similar statutory power. To do so would present significant problems, however. It might be possible to express the concept in statute, but the need to ensure sufficient flexibility would be likely to lead to an extremely broad and unattractive form of legislation. A more tightly constructed provision, on the other hand, would risk leaving government without the precise power needed in some unforeseen situation.
108. In view of these considerations, the Government has concluded that the time and effort that would be needed to replicate these powers cannot be justified at present.

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<sup>36</sup> [1832] 3 B & Ad 947.

## Chapter Five: Summary of consideration

109. Almost all of the powers identified in the current Review have thrown up one or more of the issues discussed in the previous chapter.
- a) Prerogative powers can provide flexibility in dealing with specific or exceptional circumstances that are not covered by statutory provisions. For example, they provide a basis on which it would be possible for a government to act outside the framework of the Civil Contingencies Act 2004 in circumstances of exceptional urgency or disruption, as discussed in section 4.3. Enacting a statutory power to do this could result in either an undesirably broad statutory power or one that is insufficiently flexible.
  - b) Some of the powers are extremely difficult to disentangle from subsequent legislation, covering a wide area. For example, as discussed in section 4.1, the Armed Forces operate through a complex mix of prerogative - which allows the State (personified by the Crown) to appoint people to carry arms in the service of the State - and statute. Disentangling the current framework to place it on a statutory basis would be a large-scale and complex exercise. The Home Secretary's power and duty to keep the peace, which underpins policing, raises similar questions, as discussed in section 4.7.
  - c) Some powers are best described as "archaic" prerogative powers of little relevance in the modern age. These typically cover small, specific issues, like the Crown's right to sturgeon, wild and unmarked swans and whales. Legislating in these cases would be a questionable use of Parliamentary time.
  - d) In some cases it is not easy, in the absence of relevant judicial pronouncements, to tell whether the prerogative has already been wholly replaced by statute and effectively abolished, or whether residual powers subsist. To the extent that a residual prerogative power subsists, it may provide useful flexibility in unusual circumstances, as discussed in the next paragraph.
  - e) Some, best described as "residual" powers, are minor, but still possibly useful, legacies of a time before a specific power became statutory. For example, the Treasure Act 1996 applies to all objects found on or after 24 September 1997, but the prerogative remains relevant for a small number of objects found before that date that subsequently come to light. Other examples would be any residual powers that have survived the statutory provisions permitting the early release of prisoners, as discussed in section 4.2, or the Civil Contingencies Act 2004, as discussed in section 4.3.
  - f) Some recent reviews of specific subjects have resulted in decisions to preserve a prerogative power; this was the case with the BBC Charter Review, discussed in section 4.5, and the parliamentary proceedings leading to the Inquiries Act 2005, discussed in section 4.6. Although the principle that prerogative powers should be made statutory would not have been a primary consideration at the time, in either case, it is questionable whether decisions made carefully and after considerable debate should so soon be overturned.

## Chapter Six: Conclusions and next steps

110. The Governance of Britain programme has initiated reform of those manifestations of the executive Royal prerogative powers that have attracted most attention and criticism in recent years. The Government is resolved to increase Parliamentary oversight or control in relation to treaties, war powers, senior appointments and the management of the civil service. Discussions aimed at allowing MPs to decide whether Parliament should be dissolved and recalled are under way. These developments have taken place against a background of continuing incremental reform brought about by legislation such as the Civil Contingencies Act 2004 and the Inquiries Act 2005 and by other processes such as the BBC Charter Review.
111. The current Review has provided an opportunity for Government to examine the current state of the prerogative and, in this report, to provide for the first time a consolidated list of prerogative powers and to assess the case for further, wide-scale reform of those powers. The previous chapter summarised the difficulties – exemplified in the cases discussed in Chapter Four – to which any further narrowing of the prerogative could give rise. As also mentioned in Chapter Four, the Justice Secretary has said that he will explore alternative options for dealing with the exercise of the Royal prerogative in relation to applications for free pardons. Some of the remaining prerogative powers could be candidates for abolition or reform, but their continued existence has – at the minimum - no significant negative effects. In many cases it is positively useful. Legislation to replace some of them could itself give rise to new risks: of unnecessary incursions into civil liberties on the one hand, or of dangerously weakening the state's ability to respond to unforeseen circumstances on the other.
112. The changes now in train will deal with the most serious concerns about the remaining manifestations of the executive prerogative powers. The Government has concluded that it is unnecessary, and would be inappropriate, to propose further major reform at present. Our constitution has developed organically over many centuries and change should not be proposed for change's sake. Without ruling out further changes aimed at increasing Parliamentary oversight of the prerogative powers exercised by Ministers, the Government believes that any further reforms in this area should be considered on a case-by-case basis, in the light of changing circumstances.

### ANNEX

#### Survey of Royal Prerogative Powers

113. The prerogative powers have never been systematically surveyed by Government before. In the Constitutional Renewal White Paper, the Government stated that it was conducting an internal scoping exercise of the executive prerogative powers – those prerogative powers devolved from the Monarch to Ministers. What follows is an outline of the results of that exercise.
114. The scoping exercise proceeded by way of a survey of all central Government departments. Departments were asked to identify all areas where prerogative powers are currently relied upon, and any areas where the department may have relied upon prerogative powers in the past and, while no longer relying on that power, had not formally abolished it.
115. The intention is to provide an overview of areas where ministerial prerogative powers are exercised, or have been exercised recently. It is thus an exercise in setting out in one place an illustration of the contemporary prerogative. Although the internal survey has involved a wide level of internal consultation, the nature and complexity of the power means that this survey does not attempt to provide an exhaustive list of all of the ministerial prerogative powers that may exist. Additionally, while the survey describes each power, it does not purport to give a legal definition of those powers.
116. This review is limited to prerogative powers that are exercised by Ministers on a UK-wide basis or, where responsibility for their use is devolved, in England alone (or England and Wales where applicable).

## Ministerial prerogative powers

### Government and the Civil Service

- Powers concerning the machinery of Government including the power to set up a department or a non-departmental public body
- Powers concerning the civil service, including the power to appoint and regulate most civil servants
- Power to prohibit civil servants and certain other crown servants from issuing election addresses or announcing themselves, or being announced as, a Parliamentary candidate or a Prospective Parliamentary candidate
- Power to set nationality rules for 'non-aliens' – British, Irish and Commonwealth citizens – concerning eligibility for employment in the civil service
- Power to require security vetting of contractors working alongside civil servants on sensitive projects
- Powers concerning the Office of the Civil Service Commissioners, the Security Vetting Appeals Panel, the Office of the Commissioner for Public Appointments, the Advisory Committee on Business, the Civil Service Appeal Board and the House of Lords Appointments Commission, including the power to establish those bodies, to appoint members of those bodies and the powers of those bodies

### Justice system and law and order

- Powers to appoint Queen's Counsel
- The power to make provisional and full order extradition requests to countries not covered by Part 1 of the Extradition Act 2003
- The prerogative of Mercy
- Power to keep the peace

### Powers relating to foreign affairs

- Power to send ambassadors abroad and receive and accredit ambassadors from foreign states
- Recognition of states
- Governance of British Overseas Territories
- Power to make and ratify treaties
- Power to conduct diplomacy
- Power to acquire and cede territory
- Power to issue, refuse or withdraw passport facilities
- Responsibility for the Channel Islands and Isle of Man
- Granting diplomatic protection to British citizens abroad



## The Governance of Britain

### Powers relating to armed forces, war and times of emergency

- Right to make war or peace or institute hostilities falling short of war
- Deployment and use of armed forces overseas
- Maintenance of the Royal Navy
- Use of the armed forces within the UK to maintain the peace in support of the police or otherwise in support of civilian authorities (eg to maintain essential services during a strike)
- The government and command of the armed forces is vested in Her Majesty
- Control, organisation and disposition of armed forces
- Requisition of British ships in times of urgent national necessity
- Commissioning of officers in all three armed forces
- Armed forces pay
- Certain armed forces pensions which are now closed to new members
- War pensions for death or disablement due to service before 6 April 2005 (section 12 of the Social Security (Miscellaneous Provisions) Act 1977 provides that the prerogative may be exercised by Order in Council)
- Crown's right to claim Prize (enemy ships or goods captured at sea)
- Regulation of trade with the enemy
- Crown's right of angary, in time of war, to appropriate the property of a neutral which is within the realm, where necessity requires
- Powers in the event of a grave national emergency, including those to enter upon, take and destroy private property

### Miscellaneous

- Power to establish corporations by Royal Charter and to amend existing Charters (for example that of the British Broadcasting Corporation, last amended in July 2006)
- The right of the Crown to ownership of treasure trove (replaced for finds made on or after 24 September 1997 by a statutory scheme for treasure under the Treasure Act 1996)
- Power to hold public inquiries (where not covered by the Inquiries Act)
- Controller of Her Majesty's Stationery Office as Queen's Printer:
  - the power to appoint the Controller
  - the power to hold and exercise all rights and privileges in connection with prerogative copyright
- Sole right of printing or licensing the printing of the Authorised Version of the Bible, the Book of Common Prayer, state papers and Acts of Parliament
- Power to issue certificates of eligibility in respect of prospective inter-country adopters (in non-Hague Convention cases)
- Powers connected with prepaid postage stamps
- Powers concerning the visitatorial function of the Crown

## Other prerogative powers

In the Governance of Britain Green Paper, the Government confirmed that no changes would be proposed to the majority of either the legal prerogatives of the Crown or the Monarch's constitutional or personal prerogatives. In some areas the Government proposes to change the mechanism by which Ministers arrive at their recommendations for the Monarch's exercise of the power. These prerogatives are listed below. Also listed are certain prerogatives of a largely historical nature.

### Constitutional/personal prerogatives

Powers within the constitutional/personal prerogative category of powers include:

- Appointment and removal of Ministers
- Appointment of Prime Minister
- Power to dismiss government
- Power to summon, prorogue and dissolve Parliament
- Assent to legislation
- The appointment of privy counsellors
- Granting of honours, decorations, arms and regulating matters of precedence.
- Queen's honours – Order of the Garter, Order of the Thistle, Royal Victorian Order and the Order of Merit
- A power to appoint judges in a residual category of posts which are not statutory and other holders of public office where that office is non-statutory
- A power to legislate under the prerogative by Order in Council or by letters patent in a few residual areas, such as Orders in Council for British Overseas Territories
- Grant of special leave to appeal from certain non-UK courts to the Privy Council
- May require the personal services of subjects in case of imminent danger
- Grant of civic honours and civic dignities
- Grant of approval for certain uses of Royal names and titles

### Powers exercised by the Attorney General

The Attorney General's Office consulted on the role of the Attorney General in 2007. That consultation set out the functions of the Attorney General. A number of those functions are non-statutory and have been described as prerogative powers. These functions include:

- Functions in relation to charities
- Functions in relation to criminal proceedings – including the power to enter a *nolle prosequi*
- Functions in relation to civil proceedings – including the ability to institute legal proceedings to protect a public right at the relation of a person who would otherwise lack standing (relator proceedings)

### Archaic prerogative powers

The nature of the prerogative has changed over time. Historically the Royal prerogative has been described as residual powers of the Crown. In particular there are some powers which can be described as residual powers relating to small, specific issues or which are a legacy of a time before legislation was enacted in that area. It is unclear whether some of these prerogative powers continue to exist.

- Guardianship of infants and those suffering certain mental disorders
- Right to *bona vacantia*
- Right to sturgeon, (wild and unmarked) swans and whales as casual revenue
- Right to wreck as casual revenue
- Right to construct and supervise harbours
- By prerogative right the Crown is *prima facie* the owner of all land covered by the narrow seas adjoining the coast, or by arms of the sea or public navigable rivers, and also of the foreshore, or land between high and low water mark
- Right to waifs & strays
- Right to impress men into the Royal Navy
- Right to mint coinage
- Right to mine precious metals (Royal Mines); also to dig for saltpetre
- Grant of franchises, e.g. for markets, ferries and fisheries; pontage & murage.
- Restraining a person from leaving the realm when the interests of state demand it by means of the writ *ne exeat regno*
- The power of the Crown in time of war to intern, expel or otherwise control an enemy alien

### Legal Prerogatives of the Crown

The legal prerogatives of the Crown are powers that the Monarch possesses as an embodiment of the Crown. Sometimes described as Crown “privileges or immunities”, these prerogatives have been significantly affected by statute - in particular, the Crown Proceedings Act 1947.

- Crown is not bound by statute save by express words or necessary implication
- Crown immunities in litigation, including that the Crown is not directly subject to the contempt jurisdiction and the Sovereign has personal immunity from prosecution or being sued for a wrongful act
- Tax not payable on income received by the Sovereign
- Crown is a preferred creditor in a debtor’s insolvency
- Time does not run against the Crown (ie no prescriptive rights run)
- Priority of property rights of the Crown in certain circumstances

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October 2009

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