



House of Commons  
Public Administration  
Select Committee

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**Taming the  
Prerogative:  
Strengthening  
Ministerial  
Accountability to  
Parliament**

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**Fourth Report of Session 2003–04**

*Report, together with formal minutes and  
appendices*

*Ordered by The House of Commons  
to be printed 4 March 2004*

**HC 422**  
**[Incorporating HC 642, Session 2002-03]**  
Published on 16 March 2004  
by authority of the House of Commons  
London: The Stationery Office Limited  
£13.50

## The Public Administration Select Committee

The Public Administration Select Committee is appointed by the House of Commons to examine the reports of the Parliamentary Commissioner for Administration, of the Health Service Commissioners for England, Scotland and Wales and of the Parliamentary Ombudsman for Northern Ireland, which are laid before this House, and matters in connection therewith and to consider matters relating to the quality and standards of administration provided by civil service departments, and other matters relating to the civil service; and the committee shall consist of eleven members.

### Current membership

Tony Wright MP (*Labour, Cannock Chase*) (Chairman)  
Mr Kevin Brennan MP (*Labour, Cardiff West*)  
Annette Brooke MP (*Liberal Democrat, Mid Dorset and Poole North*)  
Mrs Anne Campbell MP (*Labour, Cambridge*)  
Sir Sydney Chapman MP (*Conservative, Chipping Barnet*)  
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Mr Ian Liddell-Grainger MP (*Conservative, Bridgwater*)  
Mr Gordon Prentice MP (*Labour, Pendle*)  
Hon Michael Trend, CBE MP (*Conservative, Windsor*)  
Mr Brian White MP (*Labour, Milton Keynes North East*)

The following members were also members of the committee during the parliament.

Mr John Lyons MP (*Labour, Strathkelvin and Bearsden*)  
Mr Anthony Steen MP (*Conservative, Totnes*)  
Mr Anthony D Wright MP (*Labour, Great Yarmouth*)

### Powers

The committee is one of the select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 146. These are available on the Internet via [www.parliament.uk](http://www.parliament.uk).

### Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at [www.parliament.uk/parliamentary\\_committees/public\\_administration\\_select\\_committee.cfm](http://www.parliament.uk/parliamentary_committees/public_administration_select_committee.cfm). A list of Reports of the Committee in the present Parliament is at the back of this volume.

### Committee staff

The current staff of the Committee are Philip Aylett (Clerk), Clive Porro (Second Clerk), Chris Carrington (Committee Specialist), Jackie Recardo (Committee Assistant) and Jenny Pickard (Committee Secretary).

### Contacts

All correspondence should be addressed to the Clerk of the Public Administration Select Committee, Committee Office, First Floor, 7 Millbank, House of Commons, London SW1P 3JA. The telephone number for general enquiries is 020 7219 3284; the Committee's email address is [pubadmincom@parliament.uk](mailto:pubadmincom@parliament.uk)

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## Summary

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This Report considers the prerogative powers of Ministers. These include some of the most important functions of government, such as decisions on armed conflict and the conclusion of international treaties. The Report describes how such powers have, over many years, come to be delegated by Sovereigns to Ministers, and notes that they may be exercised without parliamentary approval or scrutiny. They are therefore best described as Ministerial executive powers.

While recognising that such powers are necessary for effective administration, especially in times of national emergency, the Report considers whether they should be subject to more systematic parliamentary oversight. It examines the arguments for scrutiny of some of the most significant prerogative powers, and concludes that the case for reform is unanswerable. There is discussion of the merits of various ways of dealing with this question, including a continuation of the current approach, by which individual prerogative powers are made subject to parliamentary control on a case-by-case basis as the necessity for such control is demonstrated.

The Report concludes that a different approach is needed, and that comprehensive legislation should be drawn up which would require government within six months to list the prerogative powers exercised by Ministers. The list would then be considered by a parliamentary committee and appropriate legislation would be framed to put in place statutory safeguards where necessary. A paper and draft Bill appended to the Report, prepared by Professor Rodney Brazier, the specialist adviser to the inquiry, contain these provisions as well as proposals for early legislative action in the case of three of the most important specific areas covered by prerogative powers: decisions on armed conflict, treaties and passports. The Report recommends that the Government should, before the end of the current session, initiate a public consultation exercise on the prerogative powers of Ministers.



# Report

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1. This report concerns an issue of the greatest constitutional importance: the prerogative powers of Ministers. These powers are among the most significant that governments possess, yet Ministers regularly use them without any parliamentary approval or scrutiny. The Committee has examined this situation and considered whether Parliament should play a more active role in the exercise of the prerogative.

2. Our inquiry has revealed a growing interest in this issue. Five oral evidence sessions have been held, and nine memoranda have been received. An informal expert seminar was held in April 2003, and we published an Issues and Questions Paper in May 2003.<sup>1</sup>

## Defining the Ministerial prerogative

3. The Ministerial powers we examined all flow from the ancient prerogatives of the Crown. The royal prerogative itself is a notoriously difficult concept to define adequately.<sup>2</sup> The classic definition was given by A.V. Dicey,<sup>3</sup> who described the royal prerogative as

“... the remaining portion of the Crown’s original authority, and it is therefore ... the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers”.

4. In preparing for our inquiry we identified three main groups of prerogative powers. This informal division allowed us to concentrate mainly on those prerogative powers which give executive authority to Ministers, and largely to exclude other areas of the prerogative from our consideration. The three areas are described in the following paragraphs.

5. **The Queen’s constitutional prerogatives** are the personal discretionary powers which remain in the Sovereign’s hands. They include the rights to advise, encourage and warn Ministers in private; to appoint the Prime Minister and other Ministers; to assent to legislation; to prorogue or to dissolve Parliament; and (in grave constitutional crisis) to act contrary to or without Ministerial advice. In ordinary circumstances The Queen, as a constitutional monarch, accepts Ministerial advice about the use of these powers if it is available, whether she personally agrees with that advice or not. That constitutional position ensures that Ministers take responsibility for the use of the powers.

6. Although we received some evidence about the merits or demerits of these prerogatives,<sup>4</sup> they are not the subject of our inquiry, which is solely concerned with the powers of Ministers. We are not considering any change in the constitutional position of The Queen.

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1 Unfinished Business? Ministerial Powers and the Prerogative: An Issues and Questions Paper (PASC Press Notice No 12, 20 May 2003).

2 Reasons for this are rehearsed by Sebastian Payne, “The Royal Prerogative” in S. Payne and M. Sunkin (eds.), *The Nature of the Crown* (1999), pp 77–110.

3 *Introduction to the Study of the Law of the Constitution* (10th ed., 1959), p 424. Dicey’s definition is similar to that of Blackstone and thus excludes ‘powers’ which derive from the principle that the Crown has all the capacities of an individual, eg the power to enter into a contract. Such a power is sometimes described as a ‘prerogative’ power.

4 HC 642–i

7. **The legal prerogatives of the Crown**, which The Queen possesses as the embodiment of the Crown. There are many such prerogatives which are legal (rather than constitutional) in character. Several are historical remnants, such as the Crown's rights to sturgeon, certain swans, and whales, and the right to impress men into the Royal Navy. But two legal prerogatives have more modern legal significance, namely, the principle that the Crown (or the state) can do no wrong, and that the Crown is not bound by statute save by express words or necessary implication. Many of these legal prerogatives have been amended by parliamentary legislation; others are in need of reform; some others may be obsolete. It has been suggested that the Law Commission should review this group of prerogatives.

8. **Prerogative executive powers** form the category of prerogatives which has been the main subject-matter of the Committee's inquiry. Historically, the Sovereign by constitutional convention came to act on Ministerial advice, so that prerogative powers came to be used by Ministers on the Sovereign's behalf. As Ministers took responsibility for actions done in the name of the Crown, so these prerogative powers were, in effect, delegated to responsible Ministers. But Parliament was not directly involved in that transfer of power. This constitutional position means that these prerogative powers are, in effect though not in strict law, in the hands of Ministers. Without these ancient powers Governments would have to take equivalent authority through primary legislation. As with the legal prerogatives just outlined, the connection between these powers and the Crown, or The Queen, is now tenuous and technical, and the label "royal prerogative" is apt to mislead. Indeed, Members have been prevented from raising certain matters in the House (such as honours) on the ground that these matters involve a royal connection, even though it may be merely formal. It makes more sense to refer to these powers not as 'royal prerogative' but as 'Ministerial executive'.

### Ministers' main executive powers

9. The principal royal prerogative, or Ministerial executive, powers exercised by Ministers include the following.

- a) The making and ratification of treaties.
- b) The conduct of diplomacy, including the recognition of states, the relations (if any) between the United Kingdom and particular Governments, and the appointment of ambassadors and High Commissioners.
- c) The governance of British overseas territories.
- d) The deployment and use of the armed forces overseas, including involvement in armed conflict, or the declaration of war. (The Royal Navy is still maintained by virtue of the prerogative; the Army and the RAF are maintained under statute.)
- e) The use of the armed forces within the United Kingdom to maintain the peace in support of the police.
- f) The Prime Minister's ability to appoint and remove Ministers, recommend dissolutions, peerages, and honours (save for the four Orders within The Queen's own gift), patronage appointments (e.g. in the Church of England), and the appointment of senior judges.

- g) Recommendations for honours by the Foreign and Commonwealth Secretary and the Defence Secretary.
- h) The organisation of the civil service.
- i) The grant and revocation of passports.
- j) The grant of pardons (subject to recommendations by the Criminal Cases Review Commission) and the Attorney-General's power to stop prosecutions.<sup>5</sup>

10. We recognise that Parliament is not powerless in the face of these weighty prerogatives. In the past, it has limited or abolished individual prerogative powers, and has also put some prerogatives on a statutory footing, as with the Interception of Communications Act 1985, the Security Service Act 1989, and the Intelligence Services Act 1994. Some non-legal rules have been adopted so as to provide procedural safeguards, for instance in relation to the ratification of treaties (the Ponsonby rule, which states that any treaty which requires ratification must be laid before Parliament 21 days before it is ratified) and over the revocation of passports.<sup>6</sup> Many public appointments, too, are now subject to regulation and monitoring by a Commissioner and are made in accordance with the Nolan rules.<sup>7</sup> The courts can also review the legality of the use of some prerogatives, although they do not have a remit over all of them, and the courts can only help the aggrieved citizen after the event.

11. This Committee has in recent years examined a number of specific prerogative powers, in some cases making recommendations to strengthen the ability of Parliament or certain independent bodies to hold Ministers to account for their exercise of them. This work has included several reports on Ministerial accountability and the Ministerial Code,<sup>8</sup> on patronage and public appointments,<sup>9</sup> and, most recently, on a draft Civil Service Bill.<sup>10</sup>

### Ministers' uncertain powers

12. But these restrictions on Ministers' prerogative powers are inevitably limited. Ministers still have very wide scope to act without Parliamentary approval. Perhaps more surprisingly in an era of increasing freedom of information, Parliament does not even have the right to know what these powers are. Ministers have repeatedly answered parliamentary questions about Ministers' prerogative powers by saying that records are not kept of the individual occasions on which those powers are used, and that it would not be practicable to do so.<sup>11</sup> Ministers have also said that it would be impossible to produce a precise list of these powers, and have asserted that, as Rt Hon John Major put it when he was Prime Minister "It is for individual Ministers to decide on a particular occasion

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5 Lord Williams of Mostyn, the then Leader of the House of Lords, produced a similar list after the Committee's issues and questions paper had been published: see his a parliamentary answer: 649 HL Deb 40 (WA) (11 June 2003).

6 These are considered further below: see respectively paragraphs [25] and [34].

7 See First Report of the Committee on Standards in Public Life, Cm 2850, May 1995

8 These include The Ministerial Code: Improving the Rule Book. HC 235-I (2000-01) and more recently Ministerial Accountability and Parliamentary Questions, 9<sup>th</sup> Report, HC 1086 (2001-02).

9 Government by Appointment: Opening Up the Patronage State, HC 165-I (2002-03).

10 A Draft Civil Service Bill: Completing the Reform, HC 128-I (2003-04)

11 HC Deb, 18 Nov 2002, Col 19W

whether and how to report to Parliament on the exercise of prerogative powers”.<sup>12</sup> Further uncertainty over the scope of Ministerial power is caused by the Ram doctrine,<sup>13</sup> which asserts that Governments have the power to do anything which is not prohibited by statute or the common law.

13. Ministers are certainly accountable to Parliament for the use of prerogative powers just as for things done under statutory or common law authority. But they are only accountable after the event. The United Kingdom is typical of states which permit Ministers to use certain powers without parliamentary approval, but it is highly unusual among democracies in having neither a codified constitution nor having made such express grants of power by the legislature.

### Opposition to executive powers

14. In opposition, the Labour Party complained that the situation regarding the Ministerial prerogative was unsatisfactory. In 1989 it said

“[The Labour Party recognises the need] to ensure that all actions of government are subject to political and parliamentary control, including those actions now governed by the arbitrary use of the Royal Prerogative to legitimise actions which would otherwise be contrary to law. [The party reaffirms its] intention to review the Royal Prerogative and to identify particular areas of government activity which should be regulated by statute or excluded from its protection”.<sup>14</sup>

15. In reviewing Ministerial powers in 1993 the party said:

“It is where power is exercised by government under cover of royal prerogative that our concerns are greatest... Here massive power is exercised by executive decree without accountability to Parliament and sometimes even without its knowledge”.<sup>15</sup>

16. The Labour Party highlighted the ratification of treaties and going to war as two key areas which raised special concerns. In 1994 Jack Straw MP went further, writing separately that:

“[t]he royal prerogative has no place in a modern western democracy... [The prerogative] has been used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable”.<sup>16</sup>

The Liberal Democrats, too, have made clear their support for reform.<sup>17</sup>

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12 HC Deb, 1 Mar 1993, Col 19W

13 HL Deb, 25 Feb 2003, Col WA12

14 Meet the Challenge: Make the Change, p56

15 A New Agenda for Democracy (Labour Party, 1993), p 33.

16 Jack Straw, MP, "Abolish the Royal Prerogative" in A. Barnett (ed.), *Power and the Throne: The Monarchy Debate* (1994), pp 125, 129.

17 Here We Stand (Liberal Democrats, 1993), pp 25–9.

## Parliamentary scrutiny of prerogative powers

17. Many of our witnesses told us that Ministers’ exercise of particular prerogative powers needed more rigorous parliamentary accountability and scrutiny. We now consider this evidence, examining the arguments in relation to some of the most important powers.

### *Going to war*

18. Several witnesses considered the power to go to war to be the most significant of the prerogative powers. Despite recent experience of parliamentary involvement in decisions on military action, they believed Parliament’s influence should be increased.

19. Rt Hon Lord Hurd of Westwell told us that he was “much exercised” by the approach taken by the Government to the war in Iraq. He believed that modern conditions demanded that any major military action should have explicit parliamentary approval:

“thinking of the position of individual members of our armed services going to war, we should only go into major conflict with a very strong measure of authority behind the government’s decision. In the case of Iraq, we tried and failed to get the obvious authority, which was that of the Security Council of the U.N. Obviously lots of people who normally go along with this did not and there was a strong body of public opinion which was also against it. Therefore, it seemed to me that in that case it was essential that your House should have a debate and vote”.<sup>18</sup>

20. Lord Hurd felt that “there should at least be a convention” that “where there is a substantial exercise involving sending people to kill and be killed on behalf of the country, then that should be with the consent, prior or at any rate immediate, of the House of Commons”. He believed that when it voted on the Iraq conflict “the House of Commons was actually doing its job”. He continued: “you could put that on a statutory basis”, although he identified possible difficulties in defining a “major conflict” in any legislation.<sup>19</sup>

21. Rt Hon Tony Benn was more strongly persuaded of the need for legislation, calling for a statutory requirement for Ministers to consult Parliament in cases of conflict and advocating a measure along the lines of the United States War Powers Act.<sup>20</sup>

22. Rt Hon William Hague MP concurred, sketching the recent parliamentary history of British military interventions. He saw the 2003 Iraq vote as “given to the House of Commons as a kind of act of generosity by the Government for which we had to be grateful at the time”. Pointing out that there was no such substantive vote over the Kosovo conflict, he suggested that, in these cases, government goodwill was not enough: “I think that actually should be laid down in an Act of Parliament or in the Standing Orders of the House ...the power to commit troops to action needs codifying, so that parliamentary approval is required before it takes place or as soon as possible thereafter if the circumstances do not permit such a vote to be taken beforehand”.<sup>21</sup>

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18 Q54

19 Ibid

20 Q1

21 Q2

23. He called for a measure that was “simple and flexible” to ensure that the House was able to discuss whether it should give its approval for military action. He was, however, concerned that a comprehensive War Powers Act on the American model would find itself “overtaken by events” because “an international situation will arise in the next 20 years that is entirely different from anything we have ever experienced—and we would find such an act did not cater for it”.<sup>22</sup>

### **Treaties**

24. Treaties are another important category of overseas commitments for which Ministers need no formal parliamentary approval. Under the Ponsonby rule the Government lays before Parliament any treaty requiring ratification at least 21 days before ratification is effected. Yet the rule does not require that either House should debate the measure. Treaties are no longer restricted just to high diplomacy and security. They can involve, for example, vital economic matters with profound effects on Britain and the world, including agreements between the United Kingdom and organisations such as the World Trade Organisation and the IMF.

25. Lord Lester of Herne Hill was among those who believed that treaties should be given more systematic parliamentary scrutiny:

“treaties reach into every nook and cranny of our lives. It is, I think, anomalous that Parliament has almost no role in the process of ratification of important treaties and it is done entirely under the prerogative”.<sup>23</sup>

Where a treaty changes UK law (as with many European treaties<sup>24</sup>), parliamentary scrutiny is required, but Lord Lester lamented the absence of similar provisions for other treaties.

26. Mr Hague called for “an agreed system for parliamentary approval of international treaties”, suggesting that “a new parliamentary procedure needs to be devised, with hearings before a select committee or special standing committee followed by a vote on the floor of the House of Commons to approve or not approve a treaty, and with the possibility of reasoned amendment but not detailed amendment”.<sup>25</sup>

### **Civil service and machinery of government**

27. The management of the Civil Service is carried out by Ministers under prerogative powers, regulated by Orders in Council that can be amended, supplemented or withdrawn without parliamentary approval. We have recently published a Report explaining our view that this is no longer an appropriate state of affairs and containing a draft civil service Bill. We therefore see civil service issues as something of a special case among the prerogative powers we examined. The Government has regularly promised to consult on civil service legislation, and our inquiry found that there was widespread agreement that early action is

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22 Q27

23 Q51

24 In this case, a Bill is required to make the necessary changes to the list of Community treaties in the European Communities Act 1972

25 Q2

required to enshrine the values of the service in statutory form. Following the publication of our draft Civil Service Bill, the Government announced that a draft Bill would be published in the current Session of Parliament.<sup>26</sup> In this sense, our proposals for the civil service fall into the familiar category of pragmatic and gradual parliamentary encroachment on the scope of the prerogative.

28. Mr Hague went further, arguing that Parliament should, like the US Congress, be asked to approve all major Government reorganisations:

“the Wilson government, the Heath government, and the Blair government, more recently, have implemented major changes to the structure of Whitehall: abolishing some government departments, merging others. To my constituents in rural North Yorkshire, the creation of DEFRA in 2001 was as important an event in the way they are served by the government of the day as the passage of most legislation. I believe that should have parliamentary oversight, should require parliamentary approval, and that a bill should have to be passed through the whole of Parliament to reorganise the machinery of government”.<sup>27</sup>

29. Mr Hague recognised that lengthy debate (of the kind that occurred when the US administration created the new Department of Homeland Security) would thus be required. He was, however, entirely content with the prospect of such debate, explaining:

“It is a major disincentive to reorganise things, of course, creating such a rule, but that, I believe, would be no bad thing, since most such reorganisations are hugely expensive and a substitute for policy-making rather than an aid to it”.<sup>28</sup>

We also note that, in Canada, with a parliamentary system very close to our own, the approval of Parliament is required before government reorganisations.

### **Public appointments**

30. In previous reports, we have made clear our view that Parliament should play a much more effective role in the most important public appointments, which Ministers make using prerogative powers. In particular, we are attracted to the idea of hearings in which select committees could question successful candidates for major appointments as to their fitness for the post.<sup>29</sup> Included in a current Bill on executive powers introduced in the House of Lords by Lord Lester are proposals for a statutory public appointments commissioner and a public appointments committee.

### **Passports**

31. Passports are granted and revoked by Ministers using prerogative powers. Lord Lester saw this as having important implications for human rights:

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26 HC Deb

27 Q2

28 Ibid

29 HC 165, Session 2002/03, para 110

“it seems to me entirely anomalous that the right to freedom of movement, which is a fundamental right, should be subject, at least in theory, entirely to the prerogative, unregulated by Parliament”.<sup>30</sup>

### **The honours system**

32. Honours are currently awarded as a matter of prerogative. In view of the recent debate about the honours system (stimulated in part by the Committee’s publication of the papers which resulted from a Government review of 2001<sup>31</sup>) we have decided to undertake a separate, detailed inquiry into that system. A number of witnesses have already called for greater public involvement and independent scrutiny of the honours system, which would in itself reduce the scope of the Ministerial prerogative in that area. We intend to produce a separate report on this subject later in the year.

### **The Privy Council: “the cloak that covers”**

33. Mr Hague vividly described the Privy Council as “the cloak that covers” a variety of important activities. Mr Hague, himself a Privy Counsellor, told us that he believed that many of the prerogatives exercised through the Council “should be subject to the democratic control of Parliament”.<sup>32</sup>

34. He saw little point in using the Privy Council “cloak” in many cases, including the establishment of groups of privy counsellors to examine telephone tapping and other security matters: “I think those groups are groups of people with Executive responsibility who happen to be privy counsellors, rather than needing to be privy counsellors”. He said “it would make no practical difference” if such groups simply met as groups of Ministers without such cover.<sup>33</sup> Recent weeks have seen renewed interest in the powers, functions and status of Privy Counsellors.<sup>34</sup> We intend to return to this issue later.

### **Mechanisms for reform**

35. Our witnesses therefore produced a range of persuasive arguments for more systematic Parliamentary scrutiny of the Ministerial prerogative on a range of fronts. If we want to take Ministerial accountability to Parliament seriously, the case for reform is unanswerable.

36. The next question concerns the mechanism which might be adopted to bring about that reform. We have considered two broad options:

- a continuation, or possibly an acceleration, of the current approach, by which individual prerogative powers are made subject to Parliamentary (often statutory) control on a pragmatic case-by-case basis as the necessity for such control is demonstrated; and

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30 Q51

31 Press Notice 22, 2002/03

32 Q15

33 Q15

34 see HC Deb, 13 Mar 2003 Col 397W and 3 Jun 2003 Col 127/8W

- new comprehensive legislation. We consider below the various forms that this could take.

### The case for pragmatism

37. Lord Hurd put to us the case for continued piecemeal and pragmatic extension of Parliamentary control:

“I was brought up on a full diet of Edmund Burke and on the whole I believe the constitution evolves and is best looked at in the light of particular criticisms, particular mischiefs, that can be identified and then change made, rather than examining it on a philosophical basis, which rapidly turns artificial”.<sup>35</sup>

38. Lord Hurd suggested that the chief cause of the unchecked growth of Ministerial power was a failure of Parliament, rather than the existence of the Ministerial prerogative: “I do not myself for a moment believe this is because the public believes that prerogative powers exercised by Ministers are racing ahead out of the control of Parliament. I believe that our constituents hold that Parliament has ample powers but its constitution and conduct make it ineffective in using them”.<sup>36</sup>

39. He cited a number of individual examples in his own Ministerial experience where powerful practical and political considerations led government to subject the prerogative to much greater Parliamentary scrutiny.

“every now and then a reform, a change, becomes clearly necessary. ...two Acts of Parliament which put under statutory power or identity the three intelligence services: the Security Services Act 1989 and the Intelligence Services Act 1994. There were, if anyone is interested, very practical, cogent reasons which persuaded even the prime Ministers of the day, and certainly the heads of the services, that this was a good and necessary move”.<sup>37</sup>

40. Lord Hurd said that similar arguments now applied to the proposal for a Civil Service Act and war powers. He summarised his view by saying that: “there are issues all the time but in my view they are essentially practical rather than philosophical”.<sup>38</sup>

41. Those opposed to comprehensive legislation also make the practical point that Parliament could become overwhelmed by the task of overseeing such a wide range of actions and decisions.

42. Lord Hurd told us:

“I think that Lord Lester’s sketch of his 50 clauses—which, as I understand it, would only be a preliminary act—would occupy both Houses of Parliament for a very long time and would be followed by a whole series of discussions. I just wonder who in this country, outside of a fairly narrow but very talented and conscientious range,

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35 Q49

36 Ibid

37 Ibid

38 Ibid

would feel better off as a result of that; who would sleep more safely in their beds; and who would think the country was better governed”.<sup>39</sup>

43. The present Prime Minister, like his predecessors, is also in the camp of the pragmatists when it comes to the prerogative. When asked if he would introduce legislation to give statutory definition to the powers of the Prime Minister and list the occasions when the prerogative was used, Mr Blair told the House:

“The Prime Minister’s roles as Head of Her Majesty’s Government, her principal adviser and as Chairman of the Cabinet are not defined in legislation. These roles, including the exercise of powers under the royal prerogative, have evolved over many years, drawing on convention and usage, and it is not possible precisely to define them. The Government have no plans to introduce legislation in this area”.<sup>40</sup>

### Putting democratic structures in place

44. We saw some force in the arguments of Lord Hurd and others who advocate a case-by-case approach to improved parliamentary scrutiny of Ministerial actions. But we also heard convincing evidence in favour of more comprehensive legislation.

45. Lord Lester set the argument in a broad constitutional context:

“We were all brought up in our unwritten constitution to believe that there were two great principles to our constitution: one was parliamentary supremacy, that the executive was accountable to Parliament rather than to the king or queen; and, secondly, the principle of the rule of law, that public powers should be exercised according to the law. The difficulty about our unwritten, flexible, permeable, part monarchical and part parliamentary constitution is to make sure that those principles apply in practice”.<sup>41</sup>

46. Mr Hague also put the general case for a formal framework, telling us that “there is still a vast scope for extending parliamentary control of the royal prerogative”.<sup>42</sup> He cast doubt on the notion that a piecemeal approach to legislation was the most effective one, expressing his impatience “one problem with gradualism ... it may not actually be sufficient. The other problem with gradualism is that it is not moving at all in some areas”.<sup>43</sup>

47. Mark Fisher MP said that legislation could be one way forward:

“the Government ought to make clear and there ought to be a list of what the prerogative powers that presently exist are, and only then can one go on to look at both principles and the distinction between necessary and desirable powers and

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39 Q83

40 HC Deb, 15 Oct 2001, col 818W

41 Q51

42 Q2

43 Q6

those that are totally unnecessary for the conduct of government, and then possibly proceed to thinking about a Prerogative Powers Act”.<sup>44</sup>

48. Graham Allen MP argued for much clearer functional divisions between the constituent parts of the constitution, urging (Q 85): “Can we please, in law, define what Ministerial and Prime Ministerial prerogatives are so that we do know the person who exercises the power and the people who have power exercised over them are clear about where that power comes from and are clear about its authority”. Mr Allen made an important distinction between “a democratic culture” which he called “our greatest strength in the UK”, and “democratic structures” which were not, in his view, so firmly established. He urged the Committee to be “greedy and have the democratic culture and the democratic structures as well”. He believed that it was “very important that we consider whether we need an act which also states that the use of prerogative powers, the use of executive power, should in some way be totted up, should be listed”.<sup>45</sup>

49. Most of our witnesses, therefore, felt that serious consideration should be given to legislation on the prerogative. This is new constitutional territory, but it is being explored with increasing and welcome vigour.

### The options for legislation

50. We do not underestimate the size and delicacy of the task. The prerogative offers much-needed flexibility to government and is a well-established part of the constitution. Ministers need executive powers. They must be able to do most of the things set out in paragraph 9 above, and some of those things have to be done quickly in a complex and dangerous world. It would, therefore, be absurd to suggest that the prerogative should be abolished as an historical anachronism and not be replaced. Parliamentary scrutiny of prerogative powers must not unduly hamper the operation of government, and indeed of Parliament itself.

51. But in the last year or so there have been a number of practical proposals for reform, which have taken the debate on from the generalised 1990s expressions of concern. (paragraphs 14 and 15 above). In April 2003, Parliament First, an all-party group of Members, published proposals which would see “the majority of prerogatives... placed on a statutory footing”. A select committee would be set up to review the exercise of the prerogative, and “an official list of the prerogative powers... established and a code of practice developed for their exercise”. Only by such action, the group argued, would “the deficiencies in parliamentary scrutiny” be remedied. Urgent reforms were necessary, according to the group, to tackle “the great dangers in our present system and the evident disenchantment with Parliament and politics”.<sup>46</sup>

52. The debate has now reached the Upper House in the practical form of a Bill promoted by Lord Lester.<sup>47</sup> Professor Rodney Brazier, the specialist adviser to this inquiry, has also put forward proposals for comprehensive legislation. His paper containing a draft Bill

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44 Q55

45 Q85

46 ‘Parliament’s Last Chance’, Parliament First, April 2003

47 Executive Powers and Civil Service Bill

(which owes much to the Bill produced by Lord Lester) is at Appendix 1. It is a major contribution to the debate on the prerogative.

53. Professor Brazier outlines two possible approaches to legislation. In paragraph 28 of his paper he describes an Act that would contain a ‘sunset clause’ for outmoded powers. It would state that “any prerogative powers which were not expressly confirmed by subsequent primary legislation by a date specified in the act would be abolished”.

54. Like Professor Brazier, we are not attracted to this extreme option, because it runs the risk of leaving Ministers without important powers at times when urgent action is required. (See paragraph 30 of his paper) Because there would be a deadline for enacting the legislation, mistakes could be made which could have far-reaching consequences for the workings of government.

55. The alternative option for prerogative reform, set out in Professor Brazier’s draft Bill, is both more modest and more practical. It would require government to list the prerogative powers exercised by Ministers within six months of the Act’s passing. The list would then be considered by a committee (probably a joint committee of both Houses) and appropriate legislation would be framed to put in place statutory safeguards where these are required. It does not envisage that such safeguards will be needed in every area where the prerogative is used.

56. In a number of areas, and without prejudice to the case for a general act which would ensure that Ministers gave Parliament information about their prerogative powers, some specific early legislative action needs to be taken. Professor Brazier’s draft Bill makes provision for this, in three specific areas—the decisions on military conflict, treaties and passports. There are strong arguments in favour of making special provision for all three.

57. In particular, we believe that any decision to engage in armed conflict should be approved by Parliament, if not before military action then as soon as possible afterwards. In these most serious of cases, the decision whether or not to consult Parliament should never be dependent on the generosity or good will of government. A mere convention is not enough when lives are at stake. The increasing frequency of conflict in recent years is proof of the importance of ensuring that, when the country takes military action, Parliament supports the government in its decision. Professor Brazier also makes a powerful case for similar special requirements for early action on decisions on treaties and passports, and we commend it to the government.

58. The arguments for special treatment in other areas are rather more doubtful. For example, Mr Hague makes an interesting case, as we have seen, for obligatory parliamentary approval of changes to the machinery of government.<sup>48</sup> The events of June 2003, when the Government restructured several departments, including that of the Lord Chancellor, vividly illustrate the potential for confusion and controversy. Decisions on the size and functions of departments can have substantial effects on the lives of thousands of people, service users and employees alike. Reorganisations can mean the removal of civil servants from the Service. Governments must therefore explain very clearly the basis for major organisational changes, and account to Parliament for them. Nevertheless a

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<sup>48</sup> We note that the Ministers of the Crown Act 1975 requires an affirmative resolution of an order providing for the dissolution of a government department, but such formal dissolutions are rare.

statutory requirement could be cumbersome, potentially embroiling Parliament in questions of strategic management which are best left to Ministers, though we would wish to keep this option under review. In the meantime, our proposed civil service legislation will deal with the questions of most fundamental public interest.

## Parliament's right to know

59. A major argument in favour of the approach suggested by Professor Brazier is that Parliament should have a right to know what powers are being exercised by Ministers. As Professor Brazier says, in setting out an important principle, "Ministers should not have imprecise powers".<sup>49</sup> Although we have received from the Government a paper which contains a list of the prerogative powers (which deliberately does not attempt to be exhaustive) this is no substitute for full reporting to Parliament.<sup>50</sup> Above all, we believe that there can be no effective accountability without full information. Because Parliament does not know what Ministers are empowered to do until they have done it, Parliament cannot properly hold government to account.

## Recommendation

**60. Without prejudice to its response to the Executive Powers and Civil Service Bill now before the House of Lords, the Government should initiate before the end of the current session a public consultation exercise on Ministerial prerogative powers. This should contain proposals for legislation to provide greater parliamentary control over all the executive powers enjoyed by Ministers under the royal prerogative. This exercise should also include specific proposals for ensuring full parliamentary scrutiny of the following Ministerial prerogative actions: decisions on armed conflict; the conclusion and ratification of treaties; the issue and revocation of passports.**

61. This is unfinished constitutional business. The prerogative has allowed powers to move from Monarch to Ministers without Parliament having a say in how they are exercised. This should no longer be acceptable to Parliament or the people. We have shown how these powers can begin to be constitutionalised, and in particular how certain key powers can be anchored in the consent of Parliament for their exercise. It is now time for this unfinished business to be completed.

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49 Q2

50 Press Notice 19, 2002/03

## Formal minutes

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**Thursday 4 March 2004**

Members present:  
Tony Wright, in the Chair

Mr Kevin Brennan  
Annette Brooke  
Sir Sydney Chapman  
Mr David Heyes

Mr Kelvin Hopkins  
Mr Gordon Prentice  
Mr Brian White

The Committee deliberated.

Draft Report (Taming the Prerogative: Strengthening Ministerial Accountability to Parliament), proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 61 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Fourth Report of the Committee to the House.

*Ordered*, That the Chairman do make the Report to the House.

A Paper was ordered to be appended to the Report.

*Ordered*, That the Appendices to the Report be reported to the House.

[Adjourned till Thursday 11 March at 9.15am]

## Witnesses

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The minutes of evidence were published as HC 642-i-iv in Session 2002–03.

### Thursday 10 April 2003

**Rt Hon William Hague MP** and **Rt Hon Tony Benn**, former Member of Parliament

### Thursday 8 May 2003

**Rt Hon Lord Hurd of Westwell, CBE, Lord Lester of Herne Hill, QC** and **Mr Mark Fisher MP**

### Thursday 22 May 2003

**Mr Graham Allen MP** and **Mr Billy Bragg**, Musician

### Thursday 5 June 2003

**Mr Jon Snow**, Channel 4 News and **Mr Philip Collins**, Director, Social Market Foundation

### Monday 7 July 2003

**Sir Hayden Phillips, GCB**, Permanent Secretary, Department for Constitutional Affairs and **Mrs Gay Catto**, Ceremonial Officer, Cabinet Office

## List of written evidence

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Mr Peter Bradley	Ev 1
Mr David Gladstone	Ev 1
Mr Peter Browning	Ev 6
Roger Bramble, The Association of High Sheriffs of England and Wales	Ev 8
Sioned-Mair Richards	Ev 9
Association of Lord-Lieutenants	Ev 9
Sir Hayden Phillips, GCB, Permanent Secretary, Department for Constitutional Affairs	Ev 11
Treasury Solicitor's Department	Ev 13

## List of unprinted written evidence

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Additional papers have been received from the following and have been reported to the House but to save printing costs they have not been printed and copies have been placed in the House of Commons library where they may be inspected by members. Other copies are in the Record Office, House of Lords and are available to the public for inspection. Requests for inspection should be addressed to the Record Office, House of Lords, London SW1. (Tel 020 7219 3074) hours of inspection are from 9:30am to 5:00pm on Mondays to Fridays.

Michael English

# Reports from the Public Administration Select Committee since 2001

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## Session 2003–04

First Report	A Draft Civil Service Bill: Completing the Reform	HC 128–I
Second Report	The Work of the Committee	HC 229
Third Report	Ministerial Accountability and Parliamentary Questions	HC 355
Fourth Report	Taming the Prerogative: Strengthening Ministerial Accountability to Parliament	HC 422

## Session 2002–03

First Special Report	The Public Service Ethos: Government's Response to the Committee's Seventh Report of Session 2001–02	HC 61
First Report	Ministerial Accountability and Parliamentary Questions: The Government Response to the Ninth Report from the Committee (Session 2001–02)	HC 136
Second Report	The Work of the Committee in 2002	HC 447
Third Report	Ombudsman Issues	HC 448 ( <i>Cm 5890</i> )
Fourth Report	Government By Appointment: Opening up the Patronage State	HC 165–I
Fifth Report	On Target? Government By Measurement	HC 62–I ( <i>HC 1264</i> )
Sixth Report	On Target? Government By Measurement: the Government's Response to the Committee's Fifth Report	HC 1264

## Session 2001–02

First Report	Public Participation: Issues and Innovations: The Government Response to the Committee's Sixth Report of Session 2000–01	HC 334
Second Report	The Ministerial Code: Improving the Rule Book: The Government Response to the Committee's Third Report of Session 2000–01	HC 439
Third Report	Special Advisers: Boon or Bane: The Government Response to the Committee's Fourth Report of Session 2000–01	HC 463
Fourth Report	Ministerial Accountability and Parliamentary Questions: The Government Response to the Committee's Second Report of Session 2000–01	HC 464
Fifth Report	The Second Chamber: Continuing the Reform	HC 494–I ( <i>HC 794</i> )
Sixth Report	The Second Chamber: Continuing the Reform: The Government Response to the Committee's Fifth Report	HC 794
Seventh Report	The Public Service Ethos	HC 263–I ( <i>HC 61</i> )

Eighth Report	"These Unfortunate Events": Lessons of Recent Events at the Former DTLR	HC 303-I ( <i>Cm 5756</i> )
Ninth Report	Ministerial Accountability and Parliamentary Questions	HC 1086 ( <i>HC 136</i> )

The response to the report is printed in brackets after the HC printing number.

# Appendix 1

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## Paper by Rodney Brazier

### *Specialist Adviser to the Public Administration Select Committee*

February 2004

1. Governments should not have imprecise powers. As a matter of basic constitutional principle the user of a power should be able—and if asked should be obliged—to identify the source of that power and to describe its nature and extent. Ministers should be required to do just that. While constitutional writers have done their best to fill the gaps in our knowledge about executive powers, the burden should be on the Government to explain officially to Parliament and the public what prerogative powers it uses and how it uses them. It could be that there is rather less to worry about than is feared. But the lack of information which surrounds this area of governmental authority itself contributes to concern.

2. Sir Hayden Phillips, Permanent Secretary at the Department for Constitutional Affairs, has supplied the Committee with a note setting out the Government's policy on the prerogative and supplying a (non-exhaustive) list of such powers. But that is no substitute for a formal statement of Ministerial executive powers, formally presented to Parliament, and formally considered by Parliament. Because Ministers in the past have declined even to satisfy the first of those requirements, Parliament should act to insist that this information be produced. Parliament should also put in place a structured statutory mechanism through which it would consider and, if necessary, act on that information. Statutory rules to achieve all that appear in the draft Bill, cll 3 and 4.

### **Urgent action in three areas**

3. It is already clear that a number of executive powers, the general nature of which is well enough known, are unacceptable in the ways in which they can be used by Ministers. These powers concern the use of the armed forces, the ratification of treaties, and passports. Legislation is needed about them so that—at long last—fundamental constitutional principles can be asserted over their use, such as proper Ministerial responsibility and accountability, and appropriate safeguards for the citizen.

#### ***Use of the armed forces***

4. Committing the armed forces to military action is one of the gravest steps that any Government can take. Military action may be unavoidable and have general support, as in 1939; sometimes, however, it may be controversial, as with the war in Iraq in 2003. The disposition and engagement of the armed forces rest under the royal prerogative with The Queen as Commander in Chief. Her Majesty acts on Ministerial advice on these matters.

5. The Government must be able to deploy and engage the armed forces—sometimes very quickly—without having to comply with laborious legal rules. But in a parliamentary democracy such action ought to have the approval of Parliament at some stage. Of course,

no British Government is going to take the country into armed conflict unless it is unavoidable and unless Ministers are reasonably sure that they can carry Parliament with them. Yet parliamentary approval for military action is not required by law. Details of how Governments have actually consulted Parliament since 1939 about military conflicts have been given in a House of Commons Library note.<sup>1</sup>

6. It has been argued that, because the Government obtained prior parliamentary approval for the war in Iraq in 2003, a constitutional convention now requires any Government to obtain parliamentary consent for any future armed conflict, expressed through substantive motions in each House. As with any constitutional convention, however, such a rule would be open to interpretation, and there would, of course, be no legal obligation behind it. As Mr William Hague pointed out to the Committee, any such convention might not be followed by a future Government which faced a close vote, or more uncertain circumstances than existed early in 2003.<sup>2</sup> Witnesses before the Committee favoured new statutory rules.<sup>3</sup>

7. New rules should, indeed, be statutory. The basic rule should be that the armed forces can only participate in armed conflict with Parliament's consent. The Government should be able to act quickly, if necessary, without waiting for such approval, but Parliament's consent should then be obtained within a specified time. Those are the rules contained in cl 5 of the attached draft Bill.

8. War was last formally declared (under the prerogative) by the United Kingdom in 1939. The Attorney-General, Lord Goldsmith, has explained in a parliamentary answer that such a declaration is not necessary before the forces are committed (under the prerogative) to armed conflict.<sup>4</sup> This is because the existence or otherwise of a legal state of war is nowadays irrelevant for most international law purposes. What is important, he said, is the existence of an "armed conflict", which is a question of fact. The draft Bill reflects the Attorney-General's view by referring in cl 5 to Parliament's approval for armed conflict; for the sake of completeness, Parliament's consent would be required under cl 6 for any (however unlikely) formal declaration of war.

9. Provision is made in the Bill for cases when Parliament is prorogued or dissolved when such vital votes were needed: approval would then be required as soon as possible. If Parliament were in recess, it would be left to the usual procedures to cause it to be recalled.

10. How, if at all, should "armed conflict" be defined in the Bill? The definition could turn on whether a particular military engagement was such as to bring into play international law on the laws of war. Those laws displace ordinary national law when they apply. The Geneva Conventions on the laws of war (1949) apply (under article 2) in "all cases of declared war or of other armed conflict which may arise" between signatories to the Conventions. The laws also apply to all cases of partial or total occupation of the territory of a signatory, even if one of the countries in conflict is not a signatory (*ibid.*). The 1949

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1 Parliament and the Use of Force, Standard Note SN/IA/1218 (25 February 2003).

2 HC 642-i, Q 6.

3 For example, Mr Hague (HC 642-i, Qs 6, 27), Mr Tony Benn (HC 642-i, Q 1), and Lord Lester of Herne Hill (HC 642-ii, Q 51). But Lord Hurd of Westwell favoured codification in a constitutional convention (HC 642-iii, Q 54).

4 644 HL Deb 1139 (19 February 2003).

Conventions are supplemented by Additional Protocols (1977). The draft Bill, in cl 5(1), gives a definition of armed conflict as being any use of force which gives rise to a situation of armed conflict to which the Geneva Conventions or the Additional Protocols apply.<sup>5</sup> More information about this is given in the Explanatory Notes to cl 5.

11. It would, however, be possible to dispense with a definition and to leave the interpretation of the phrase “armed conflict” to common sense. It is unlikely that there would be any significant disagreement about whether in fact a given situation amounted, or would amount, to a state of armed conflict.

12. It is a matter of judgement whether the deployment of the forces in any international peacekeeping role should be covered by these new statutory rules. Such operations (which would normally fall outside a definition of armed conflict) would generally involve much less overall danger for the forces than would an armed conflict. No provision is made in the draft Bill for peacekeeping operations.

13. On a less dramatic, but nonetheless important level the armed forces can be committed if necessary by virtue of the prerogative to help the civil power—the police—to maintain or to restore public order. This has not been necessary in Great Britain for a long time, although it is well known in Northern Ireland. The procedure which would be followed in Great Britain has been described in a parliamentary answer.<sup>6</sup> A request would go from the police to the Ministry of Defence, which would liaise with the Home Office, and Ministerial authority would be sought for the deployment. Military support is also given for more routine matters, linked to police operations and investigations; the largest category in Great Britain concerns dealing with explosive devices.<sup>7</sup> The armed forces are occasionally deployed to deter acts of terrorism, as was seen with the reinforcement of the police at Heathrow by military personnel for a brief period in 2003.

14. These are necessary powers. But any use of the armed forces to support the police in maintaining or restoring public order or in public displays to counter terrorism are such serious matters that they should be reported to Parliament as a matter of legal duty as soon as possible. Ministers would surely want to do this, and there is no reason why they should oppose the adoption of a legal rule to that effect.

### **The ratification of treaties**

15. Treaties affect many areas of ordinary life. They are no longer confined to high diplomatic or defence matters. Yet parliamentary procedures have scarcely been altered to take account of the pervasive nature of modern treaties. Ministers conclude them in their discretion relying on the prerogative.<sup>8</sup> This gives Ministers a remarkably free hand to conclude international agreements. Parliament has no formal role in treaty-making, or in the approval of the text of treaties—unless a treaty would require a change in English law

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5 My thanks are due to Professor Vaughan Lowe of the University of Oxford for his help in arriving at that definition.

6 Mr Adam Ingram, MP, Minister of State, Ministry of Defence at 400 HC Deb 443–4 (WA) (25 February 2003). See also *R v. Secretary of State for the Home Department, ex p Northumbria Police Authority* [1988] 1 All ER 556.

7 Mr Ingram, *ibid*.

8 For a summary of the law and practice see House of Commons Select Committee on Procedure, “Parliamentary Scrutiny of Treaties”, 2nd Report, HC 210 (1999–2000).

or the grant of public money, when legislation is necessary. Save for such cases a Minister can bind the United Kingdom to most international agreements by simple signature, or by formal ratification under the prerogative for those treaties which require ratification. About a dozen treaties a year require such ratification.

16. Existing democratic safeguards amount to little more than Ministers taking account of parliamentary and public opinion when negotiating treaties, and Ministers being sure that legislation can be obtained for those treaties that require it. Under the Ponsonby rule the Government lays before Parliament any treaty requiring ratification at least 21 days before ratification is effected, so that there could be parliamentary debate about it. But that rule is non-statutory, and if speedy ratification is needed the rule will be waived; Ministers have declined to say how often that has happened.<sup>9</sup> In any event Parliament cannot amend the text of a treaty.

17. Given that treaties now affect so many aspects of life—including financial transactions, transport, police powers and social security—Parliament should assert itself more than it has to require adequate and timely information to be given to it about treaties and, for the most important types of treaty which require ratification, Parliament should have the legal power to accept or to reject them. Witnesses before the Committee in this inquiry advocated change.<sup>10</sup>

18. The draft Bill—which draws heavily on an earlier version of Lord Lester of Herne Hill's Executive Powers and Civil Service Bill—would put those ideas into practice. The Bill only applies to treaties which require ratification: most international agreements, which are often of a technical nature, would not be affected (cll 9, 10(1)). Perhaps a dozen or so would become subject to parliamentary scrutiny each year. The Bill requires the Government to lay each treaty requiring ratification before each House, together with a written explanation of what it would do, why the Government wants to ratify it, and what its costs and benefits would be (cl 10(2)). That would correct the current situation in which the Government merely lays the text of a treaty requiring ratification, which may be largely incomprehensible to the reader. Such treaties are divided into two groups by the Bill (cl 10(3), (4)). The more important group—including those which would require a change in the law—would need parliamentary approval by the affirmative procedure in each House. The other group would be subject to the negative procedure within 21 days of being laid. The Bill would permit ratification in exceptional cases without parliamentary approval, but subject to proper information being given (cl 11).

19. The impact on parliamentary time of these changes should be limited, but the acceptance of the principle that Parliament must accept important treaties on behalf of their constituents would be most significant. Simple, democratically sound and binding rules of law would replace more complex procedures which currently in effect leave Parliament's opinion on major treaties untested.

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9 See, e.g., Baroness Chalker at 566 HL Deb 159 (WA) (1 November 1995).

10 For example, Lord Lester of Herne Hill (HC 642–ii, Qs 51, 76), Mr William Hague, MP (HC 642–i, Qs 2, 31). Lord Hurd of Westwell was broadly satisfied with the status quo (HC 642–ii, Q 75).

## Passports

20. Passports are issued under the royal prerogative by or on behalf of the Secretary of State. There is no statutory right to a passport, which can be refused or withdrawn at any time.

21. Ministers in successive Governments have pointed out, however, that there are non-statutory rules about denying a passport to a citizen.<sup>11</sup> A passport will be refused or denied only in four cases. In summary those cases are as follow.

- a) Certain minors, whose journey would be contrary to a court order or the wishes of a parent or to specified statutes.
- b) Anyone for whom an arrest warrant has been issued or who is wanted for a serious crime.
- c) Anyone whose activities would make the issue of a passport contrary to the public interest.
- d) Anyone who has been repatriated at public expense, until the debt is paid.

Refusal or withdrawal is considered on the individual merits of a particular case, and action taken by Ministers over passports is reviewable by the courts. Successive Governments have said that this non-statutory system works well.

22. The principal, and simple, objection to that situation is that the citizen's possession of a passport should not depend largely on the exercise of Ministerial discretion based on non-statutory rules devised by Ministers themselves—especially given that those rules have never been approved by Parliament. If the executive is to decide whether a citizen can enter and leave his or her own country then that must be on the basis of law approved by the legislature. The present situation simply looks bad.

23. As a minimum the refusal or withdrawal of a passport should be surrounded by statutory rules approved by Parliament. Such rules might reflect the four cases which have been used by successive Governments. Clause 13 of the draft Bill would give effect to such an approach.

24. It is hard to see why Ministers would resist such a legislative change. It builds on what Ministers say happens already. It would be designed to assert a matter of human rights. Ministers would continue to take action in certain cases, but they could point to parliamentary authority for doing so. The change would also build on the International Covenant on Civil and Political Rights, article 12 of which guarantees freedom of movement from and into this country for its citizens, and on the right of European Union citizens to have a national identification document to enable free movement between EU states. This change would be a further victory for the rule of law.

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<sup>11</sup> This paragraph is based on the answer given by Lord Filkin, then Minister of State, Home Office, at 638 HL Deb 106 (WA) (25 July 2002).

## Other prerogative powers: other legislation

25. Other Ministerial executive powers have been, or are being, earmarked for legislation or other action separately from this inquiry. The ten broad areas of prerogative power identified in paragraph 9 of the Committee's report will have been considered by this Committee or by others. The draft Bill will not duplicate (for example) the Committee's work on a Civil Service Bill.

## The scheme for a Bill

26. In its Issues and Questions Paper the Committee suggested two possible models for a general statute about Ministers' executive powers.

27. One model, Model A, would be an Act which expressly confirmed the prerogative powers listed in a schedule to the Act, and which expressly abolished all others. It would be for Parliament to decide which, if any, executive powers should be put in the schedule, and which should be left out of it and which would be abolished as a result of that deliberate omission. It would also be for Parliament to surround with any appropriate statutory safeguards the powers which were retained. The Queen's constitutional prerogatives would be among those to be preserved by the Act.

28. The alternative model, model B, would be much more radical. It would include a "sunset clause" for outmoded powers. Such an Act would state that any prerogative powers which were not expressly confirmed by subsequent primary legislation by a date specified in the Act would be abolished. Such subsequent legislation might confirm some powers as they now are; others might be continued but subject to new conditions to satisfy the principles of good government or the protection of the citizen.

29. Legislation along the lines just outlined would ensure that the representative Parliament provided authority for executive powers, rather than the royal prerogative. Any powers inappropriate in a modern democracy would be abrogated. Appropriate statutory safeguards for the future use of such powers would be enacted by Parliament.

30. On further reflection, however, a risk has become apparent in framing legislation in quite those terms. By legislating against a deadline, there would be the danger that errors might be made. It would be unfortunate if a power or powers were to be changed by legislation only for it to become clear later that the change was not quite right and that correcting legislation was necessary.

31. For that reason, therefore, it is suggested that reform should be achieved in two stages. In the first, clear and precise information would be obtained from the Government about executive powers within a time specified in the Bill (say six months), and that information would be considered in a structured fashion in Parliament. Appropriate legislation should then be framed. This would take longer than if an Act were passed which itself either continued or abrogated powers within a time limit set in the Act. But then the royal prerogative has existed for over a thousand years; Ministers have relied on it for executive authority for at least 150 years; taking a little extra time to get the new law right would be prudent and reasonable.

32. Legislation containing a sunset clause might well, in any event, commend itself less strongly to the Government than a Bill which aimed at the goals already adopted by the Committee but which reached them in a rather more cautious way.

33. Another factor to take into account is the desirability of achieving reform by the simplest legislative methods.<sup>12</sup> It would be possible to go to the trouble of converting the relevant prerogative powers into exclusively statutory powers. But it would be simpler to leave them on a prerogative basis while surrounding the use of them with appropriate legislative conditions and safeguards. What really matters is not the technical legal form of these powers but that Parliament's consent be obtained for the continuance of them, and that their exercise be subject to proper parliamentary scrutiny and authority and other safeguards. In establishing all that, Parliament's approval of the existence and use of the powers would be expressly granted. The democratic deficit would be expunged in the simplest way. We would arrive at much the same place as planned by the other forms of the Bill mentioned earlier, but by a different route. Indeed, what is now advocated builds on the idea floated in Model A of the Bill in the Issues and Questions Paper.

### The essence of the Bill

34. What, then, is suggested is a Bill which would do the following.

a) It would cause Parliament to be supplied with authoritative information in a statement by the Government about Ministers' executive powers; this would be required within six months of the passage of the Bill. This would be a new statutory duty cast on the Government.

b) The Bill would set out a statutory mechanism under which Parliament would consider that statement, initially through a committee. Given the importance of the project and the central role envisaged for Parliament in it, a joint select committee might be the appropriate means to do this. It was envisaged in the Issues and Questions Paper that principles should be enunciated to guide the use of Ministers' executive powers. Such principles would be included in the Bill for the guidance of the committee.

c) The Bill would provide for Parliament to consider the report (or reports) from the committee about the powers. Parliament would be advised by the committee about, for example, how some executive powers should be reformed. Draft legislation would be required from the committee.

d) The Bill would enact statutory safeguards, to take immediate effect, for the use of a number of the most important executive powers about which the most disquiet has been expressed. Those areas are the use of the armed forces, the ratification of treaties, and the issue or cancellation of passports. The techniques used in the Bill in relation to those three areas would provide a possible template for later parliamentary work on other executive powers.

e) That is the broad scheme of the draft Ministers of the Crown (Executive Powers) Bill which is set out below. The Bill is followed by Explanatory Notes.

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<sup>12</sup> There are technical legal problems involved in legislating about areas covered by the prerogative. See, for example, S.A. de Smith and R. Brazier, *Constitutional and Administrative Law* (8th ed., 1998), pp 254–5.

## THE DRAFT BILL

# MINISTERS OF THE CROWN (EXECUTIVE POWERS) BILL

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- 7 Armed forces in support of the police

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- 9 Ratification: general
- 10 Requirement of parliamentary approval
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# MINISTERS OF THE CROWN (EXECUTIVE POWERS) BILL

A

BILL

TO

Provide Parliament with information about royal prerogative powers which give Ministers of the Crown executive authority, to require Parliament's approval to be obtained for the exercise of certain of those powers, and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows: –

## PART 1

### INTERPRETATION AND PURPOSES

#### 1 General interpretation

(1) This Act must be construed according to this section.

(2) In this Act –

“executive powers” means those powers (and only those powers) which, by virtue of the royal prerogative, can be used by or on the advice of Ministers of the Crown and which enable them to act without other legal or parliamentary authority;

“Her Majesty's Government” means Her Majesty's Government in the United Kingdom;

“Minister of the Crown” means the holder of an office in Her Majesty's Government;

“Ministerial advice” means advice tendered to Her Majesty by Ministers of the Crown or any one or more of them;

“royal prerogative” means those powers and rights enjoyed uniquely by the Crown otherwise than by virtue of statute;

“Secretary of State” means one of Her Majesty's Principal Secretaries of State;

“United Kingdom” means Great Britain and Northern Ireland, and includes the Channel Islands and the Isle of Man.

- (3) This Act does not concern or affect royal prerogative powers that are personal to Her Majesty and which are exercised in Her Majesty's discretion, albeit usually on Ministerial advice, nor does the Act concern or affect appointment to the office of Prime Minister.
- (4) Examples of the powers referred to in section 1(3) include the powers –
  - (a) to appoint Ministers of the Crown;
  - (b) to grant Royal Assent to legislation; and
  - (c) to prorogue and to dissolve Parliament.

## 2 Purposes of the Act

- (1) The following are the main purposes of this Act.
  - (a) It ensures that Parliament is to be provided with information about the nature and extent of executive powers, and establishes a procedure through which Parliament can form a view about whether those powers are satisfactory.
  - (b) It requires that parliamentary authority be obtained for the exercise of specified executive powers.
  - (c) It requires Parliament to be informed when certain other of those powers have been used.
  - (d) As a result, it ensures that –
    - (i) Parliament can decide whether any changes are needed in relation to any of those powers;
    - (ii) the democratic basis for the use of specified powers is guaranteed; and
    - (iii) Ministerial responsibility and accountability to Parliament in relation to those powers are enhanced.
- (2) The ways in which those purposes are to be achieved are set out in Parts 2 and 3 of this Act.

## PART 2

### INFORMATION ABOUT AND CONSIDERATION OF EXECUTIVE POWERS

#### 3 Duty to provide information

- (1) The Secretary of State must lay before each House of Parliament a statement of all executive powers.
- (2) That statement must include for each power listed –
  - (a) a description of its nature and extent;
  - (b) any constitutional, legal or other safeguards which surround its use; and
  - (c) reference to the principal decisions of any court, and to any mention of it in any statute, which have helped such a description to be arrived at.
- (3) The statement must include the powers included in Part 3 of this Act (which governs the exercise of the powers specified in that Part).
- (4) The Secretary of State must lay that statement within six months of the passing of this Act.

#### 4 **Parliamentary consideration of information**

- (1) The statement laid under section 3 shall be considered by a joint select committee of both Houses of Parliament .
- (2) That committee shall consider whether changes should be made to the law or practice in relation to any of the powers listed in the statement, and shall report its conclusions to Parliament, along with draft legislation to give effect to such changes.
- (3) During that consideration the committee must have regard to principles which should apply to the exercise of those powers.
- (4) Those principles shall include the following.
  - (a) The necessity that, in exceptional circumstances, Ministers of the Crown should be able, by using executive powers, to act quickly in the national interest without prior parliamentary authority or approval.
  - (b) The desirability, in most circumstances, that parliamentary approval should be obtained before (or sometimes after) those powers are used.
  - (c) The requirement that Ministers of the Crown should account appropriately to Parliament for the use of those powers.
  - (d) The desirability that appropriate and adequate safeguards for the citizen should exist in relation to those powers.
  - (e) The desirability that any obsolete, unnecessary or inappropriate powers be abrogated.

### PART 3

#### EXERCISE OF SPECIFIED EXECUTIVE POWERS

##### *Use of the armed forces*

#### 5 **Armed conflict**

- (1) In this section –
  - (a) “armed conflict” means any use of force which gives rise, or may give rise, to a situation of armed conflict to which the Geneva Conventions of 1949 or the Additional Protocols of 1977 apply;
  - (b) “the Geneva Conventions” means the four Conventions on the laws of war concluded in Geneva on 12 August 1949, and “the Additional Protocols” means the two Protocols Additional to those Conventions, concluded at Geneva on 8 June 1977; and
  - (c) “Her Majesty’s armed forces” means any of Her Majesty’s forces, within the meaning of the Army Act 1955, section 225, a definition which also applies to clause 7 of this Bill.
- (2) Her Majesty’s armed forces shall take part in armed conflict only if participation in it is approved by resolution of each House of Parliament.
- (3) But section 5(2) shall not apply in case of action taken by those armed forces in their immediate and personal self-defence.
- (4) Resolutions under this section must be obtained –
  - (a) before those armed forces participate in armed conflict, or

- (b) if Her Majesty's Government is of the opinion that such participation is necessary as a matter of urgency before resolutions could be obtained, within seven days of the beginning of that participation.
- (5) If Parliament is prorogued or is dissolved when such resolutions are needed then resolutions under this section must be obtained as soon as practicable.

**6 Declaration of war**

No declaration of war shall be made on behalf of the United Kingdom unless that declaration has been approved by resolution of each House of Parliament.

**7 Armed forces in support of the police**

- (1) Any use of Her Majesty's armed forces in support of the police in cases specified in section 7(2) must be reported by the Secretary of State as soon as possible in a statement to both Houses of Parliament.
- (2) The cases are where –
  - (a) the armed forces are used in support of the police to preserve or to restore public order; or
  - (b) the armed forces are deployed in public to prevent acts of terrorism.
- (3) But section 7(1) does not apply to cases where the armed forces provide information or technical support to the police, or in which the armed forces deal with particular explosive devices.

*Ratification of treaties*

**8 Interpretation of sections 9 to 12**

In sections 9 to 12 –

“ratification” means the act by which the United Kingdom establishes its consent to be bound by a treaty; and  
 “treaty” means an international agreement (however called) concluded between States, or between States and intergovernmental organisations, which are governed by international law, and which is subject to ratification.

**9 Ratification: general**

Her Majesty's Government shall ratify on behalf of the United Kingdom treaties to which this Act applies only in accordance with sections 10 to 12.

**10 Requirement of parliamentary approval**

- (1) The Secretary of State must lay before each House of Parliament any treaty which Her Majesty's Government proposes to ratify on behalf of the United Kingdom.
- (2) The Secretary of State shall lay together with each such treaty an Explanatory Memorandum setting out –
  - (a) the purpose or purposes of the treaty;
  - (b) the reasons for the proposed ratification; and
  - (c) the likely costs and benefits for the United Kingdom of the treaty.
- (3) A treaty which would –

- (a) affect the existing laws of the United Kingdom, or the private rights of individuals or corporations in the United Kingdom; or
  - (b) lay a pecuniary burden on the inhabitants of the United Kingdom; or
  - (c) cede any part of the territory of the United Kingdom shall be ratified only following the approval of each House of Parliament signified by resolution.
- (4) A treaty which is not embraced by section 10(3) may be ratified unless a resolution praying that Her Majesty's Government refrain from doing so is passed by either House of Parliament within 21 sitting days beginning with the day on which the treaty was first laid before Parliament.
  - (5) The Secretary of State may by order direct that section 10(3) be amended so as to add to the class of treaties whose ratification must be approved by both Houses of Parliament.
  - (6) In this section –
    - (a) “sitting days” excludes any period during which Parliament either is adjourned for more than four days or is prorogued or dissolved;
    - (b) “order” means an order exercised by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament.

#### **11 Ratification in urgent cases**

- (1) Section 10 shall not apply to the ratification of any treaty if, due to exceptional circumstances, the Secretary of State decides that its ratification is urgently required.
- (2) In that case the Secretary of State shall as soon as possible notify each House of Parliament of his decision and of the reasons for it.

#### **12 Ratification: European Parliament's powers**

This Act does not affect section 12 of the European Parliamentary Elections Act 2002 (which prevents the ratification of any treaty providing for any increase in the powers of the European Parliament unless ratification is approved by Act of Parliament).

### *Passports*

#### **13 Issue, etc., of passports**

- (1) The Secretary of State shall refuse to issue a passport to a British citizen, and shall revoke or withdraw it, only in accordance with rules approved by Parliament.
- (2) The Secretary of State must lay before each House of Parliament, within three months of the passing of this Act, the draft of a statutory instrument setting out rules for that purpose.
- (3) That statutory instrument shall not come into force until it has been approved by resolution of each House of Parliament.
- (4) Until such a statutory instrument comes into force the Secretary of State shall continue to issue, refuse to issue, revoke and withdraw passports as if this section had not been enacted.

## PART 4

### MISCELLANEOUS

**14 Discharge of duty by the Prime Minister**

Any duty cast by this Act on the Secretary of State may be discharged by the Prime Minister.

**15 Savings in relation to Her Majesty**

Nothing in this Act shall be taken to derogate from any rights, privileges, dignities or immunities belonging to Her Majesty.

**16 Short title and extent**

- (1) This Act may be cited as the Ministers of the Crown (Executive Powers) Act 2004.
- (2) This Act extends to the whole of the United Kingdom.

## Explanatory notes on the bill

### General

A The Bill is in four Parts. Part 1 defines the terms used in the Bill and states its purposes. Part 2 sets out a statutory scheme under which Parliament will be informed of the principal executive powers enjoyed by Ministers and under which draft legislation will be produced about them. Part 3 surrounds three of those executive powers with immediate statutory safeguards. Those powers concern the use of the armed forces, the ratification of treaties, and passports. Part 4 deals with miscellaneous matters.

### Part 1 Interpretation and Purposes

B Placing the interpretation section at the beginning of a statute helps the reader by providing definitions which can be recalled as the reader progresses through the Bill. Given the difficulties of definition inherent in the concept of the royal prerogative, cl 1 contains definitions used throughout the Bill.

C **Cl 1** is the interpretation clause.

- a) **Cl 1(1)** requires that the Act must be construed according to cl 1.
- b) **Cl 1(2)** contains the definitions of phrases used throughout the Bill. Two are of particular note.
  - i. “Executive powers”. This phrase is adopted in the Bill to cover the royal prerogative powers used by or on behalf of Ministers. The phrase is defined as meaning those powers (and only those powers) which, by virtue of the prerogative, can be used by or on the advice of Ministers and which enable Ministers to act without other authority. Cl 1(2) thus excludes from the ambit of the Bill any legal rights enjoyed by the Crown (and indirectly by Ministers) outside the governmental sphere. It excludes from the Bill statutory powers, and common-law powers. It seeks to exclude prerogatives which (for example) underpin the doctrine that the Crown is only bound by statute in certain circumstances.
  - ii. “Royal prerogative”. No all-embracing definition of this concept is offered in the Bill. Rather, cl 1(2) says that, in the Bill, the phrase “royal prerogative” means those powers and rights enjoyed *uniquely* by the Crown, and otherwise than by virtue of statute. That formulation seeks to cover only the powers etc. enjoyed in law by the Crown alone (“uniquely”), and thus excludes any powers etc. which the Crown may enjoy in common with any other citizen or legal personality (such as a corporation sole). The definition excludes powers etc. enjoyed under statute, which are not affected by the Bill.

Otherwise, the definitions in cl 1(2) are traditional (such as that of “Her Majesty’s Government”, or “Secretary of State”), or are borrowed from other statutes (such as that of “Ministers of the Crown”: Ministers of the Crown 1975, s. 8(1)).

c) **Cl 1(3)** The Bill is concerned with executive authority used by Ministers. It is not intended to disturb royal prerogative powers that are personal to The Queen and which are exercised in Her discretion, “albeit” (as cl 1(3) says) “usually on Ministerial advice”. Examples of them are given in **cl 1(4)**, such as the appointment of Ministers, the granting of Royal Assent to legislation, and the prorogation and dissolution of Parliament. Of course, in practice these prerogative powers do enhance the political position of the Prime Minister, and it would be possible to legislate about them. But this Bill does not attempt to do so. Nor does the Bill affect the appointment of the Prime Minister. The Queen’s rights are also confirmed in **cl 15**.

D **Cl 2(1)** sets out the purposes of the Bill. This is done in straightforward language, and no further explanation is offered here. **Cl 2(2)** states that the ways in which those purposes are to be achieved are set out in Parts 2 and 3 of the Bill.

### **Part 2 Information about and consideration of executive powers**

E Part 2 is an important Part of the Bill because it establishes, in law, how prerogative powers are to be reformed. The Bill requires in **cl 3** that information be provided by the Government about Ministers’ executive powers. It requires in **cl 4** that Parliament consider that information initially through a joint select committee, which will consider whether any changes should be made to those powers, applying a set of principles which are provided in **cl 4(4)**, and requires the drafting of any necessary legislation for the purpose.

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a) **Cl 3(1)** requires the Secretary of State to make a statement to each House of Parliament of all executive powers. (Any duty cast on the Secretary of State by the Bill may be discharged by the Prime Minister: cl. 14.)

b) **Cl 3(2)** explains what must be included in the statement. It will be for the Secretary of State to enumerate each executive power, describing its nature and extent, to outline any existing safeguards which already attach to them, and to refer to judicial decisions, and any statutory references, about them. Although the Bill, in the following Part, takes immediate action over a number of executive powers, they must nonetheless be included in the statement so as to make it comprehensive (**cl 3(3)**). The statement must be made within 6 months of the passing of the Act (**cl 3(4)**). Cl 3 aims to provide Parliament with enough information to help it to decide what (if anything) to do generally about executive powers.

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a) **Cl 4** explains what Parliament is to do with the statement.

b) **Cl 4(1)** provides that the statement would be considered by a joint select committee.

c) That committee will have the duty under **cl 4(2)** to consider what changes should be made to the law and practice relating to any of the powers in the statement, and must report conclusions to Parliament together with draft legislation. (Of course, no time limit can be sensibly specified for this stage. Nor—as a result of parliamentary sovereignty—can the Bill require Parliament to act on the committee’s report. )

d) **Cl 4(3)** and **(4)** set out principles—which are not meant to be exclusive—to which the committee must have regard when considering the Government’s statement. These are self-explanatory. They seek to ensure that the Government could continue, in exceptional circumstances, to act quickly using executive powers in the national interest without prior parliamentary authority,<sup>13</sup> but they also indicate safeguards which should apply more generally.

### **Part 3 Exercise of specified executive powers**

H Part 3 of the Bill deals with three executive powers. They are to be subjected immediately to new statutory rules ahead of the scheme described in Part 2. The rules in Part 3 would come into effect at Royal Assent. It would, of course, be possible for the operation of Part 3 to be delayed until the Part 2 process had been completed, but the powers embraced by Part 3 have raised concerns over many years and legislation may be considered to be urgent. The powers covered by Part 3 are the use of the armed forces (cl 5–7), the ratification of treaties (cl 8–12), and passports (cl 13).

I Armed conflict is governed by **cl 5**.

- a) **Cl 5(1)** sets out a definition of armed conflict. It does so by applying cl 5 to cases of action which will attract the international laws of war. Thus “armed conflict” is defined as any use of force which gives rise, or may give rise, to a situation of armed conflict to which the Geneva Conventions of 1949 or the Additional Protocols of 1977 apply. Those situations include:
- i. declared war or any other armed conflict which may arise between two or more signatories to the Conventions or Protocols (1949, article 2);
  - ii. partial or total occupation of a signatory’s territory (ibid.);
  - iii. armed conflicts which are fought against colonial domination or alien occupation (1977, Protocol I, article 4);
  - iv. a conflict between the armed forces of a signatory and dissident armed forces or other organised groups in its territory (1977, Protocol II, article 1).

Cl 5(1) defines the Conventions referred to, and also defines (for this cl and for cl 7) “Her Majesty’s armed forces” by reference to the Army Act 1955, s. 225. That section embraces all of Her Majesty’s regular air, military and naval forces, and excludes reserve and Commonwealth forces.

b) **Cl 5(2)** prevents any use of executive powers to commit the armed forces to armed conflict without the consent of each House of Parliament.

c) **Cl 5(3)**, however, disapples that rule so as to permit the armed forces to use force for their immediate and personal self-defence. Clearly, it would be absurd to impose a rule requiring parliamentary approval in such circumstances. This subclause is restricted to the

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<sup>13</sup> An example of that is set out in cl 5(4)(b).

personal self-defence of Service personnel. It is not intended to cover military action taken in the self-defence of the United Kingdom or any other State.

d) **Cl 5(4)(a)** sets out the general rule that resolutions for cl 5(2) purposes must be obtained before the forces participate in armed conflict. It would remain lawful to deploy the armed forces under executive powers anywhere in the world, but they could not be ordered into armed conflict without parliamentary resolutions approving it.

e) But military action might be urgently necessary before parliamentary resolutions could be obtained. Accordingly, **cl 5(4)(b)** provides that if it is the Government's opinion that participation in armed conflict action is necessary as a matter of urgency before the resolutions could be obtained, that participation may be authorised by the Government, but it must obtain the resolutions within seven days of the beginning of that action. That time limit should be sufficient, and it would allow Parliament to assemble if it were adjourned or to be recalled if it were in recess. If Parliament were prorogued or dissolved when resolutions were needed, then the rule under **cl 5(5)** is that they must be obtained as soon as possible.

f) **Cl 6** may be unnecessary. It is unlikely that the United Kingdom will formally declare war again, rather than engage in armed conflict.<sup>14</sup> But cl 6 is included for the sake of completeness. If the Government were contemplating recommending a formal declaration of war to be made under the royal prerogative (which was last done in 1939), cl 6 provides that such a declaration must be approved first by resolutions in both Houses. If a declaration were needed when Parliament was not sitting, the Government could make no declaration until Parliament reassembled and the resolutions were obtained. If Parliament were prorogued or dissolved, the Government would rely on cl 5(5) to commit the armed forces to participate in armed conflict and to obtain parliamentary authority for that as soon as practicable under cl 5(5).

g) **Cl 7(1)** places a statutory duty on the Secretary of State to make a statement to both Houses as soon as possible after the armed forces have been used in support of the police in order to preserve or restore the peace. **Cl 7(2)** explains that cl 7(1) is designed to bite only in cases where the armed forces are deployed on the ground to help the police in cases of feared or actual breakdown in public order which the police cannot deal with themselves unaided, or where action is taken in public to prevent terrorism (through, for example, deploying personnel and tanks at an airport). **Cl 7(3)** makes it clear that the duty to make a statement does not cover other cases of military support, namely giving information or technical assistance, or help in dealing with particular explosive devices.

J **Cl 8 to 12** place statutory safeguards on the ability of Ministers to ratify treaties.

a) **Cl 8** defines "ratification" and "treaty".

b) **Cl 9** establishes a general rule that Ministers can ratify treaties only in accordance with procedures set out in cll 10 to 12. Generally, those procedures require parliamentary approval for ratification, either by affirmative or negative procedure. This means that the current freedom of Ministers to ratify treaties using the royal prerogative will be limited by

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<sup>14</sup> See paragraph 8 for the Attorney-General's explanation.

the requirement that Parliament approve such ratification. Treaties which do not require ratification are unaffected by the Bill.

c) **Cl 10(1)** requires the Secretary of State to lay any treaty which the Government proposes to ratify before each House. **Cl 10(2)** requires the laying, at the same time, of an Explanatory Memorandum explaining the purpose of the treaty, the Government's reasons for wishing to ratify it, and the likely costs and benefits involved for the United Kingdom.

d) Cl 10 then distinguishes, in effect, between more important, and less important, treaties. The more important are dealt with in **cl 10(3)**. That clause permits the ratification of specified treaties only after that ratification has been approved by resolution in each House. The important types of treaty covered by cl 10(3) are those which would: affect existing law, or the private rights of people or corporations; lay a pecuniary burden on people in the United Kingdom; or cede any part of the territory of the United Kingdom. Other types of treaty could be added to cl 10(3) by statutory instrument (**cl 10(5), (6)(b)**).

e) **Cl 10(4)** deals with all other treaties which require ratification. Under cl 10(4) treaties not embraced by cl 10(3) (as a more important type of treaty) may be approved without a resolution of each House. But this may be prevented if a resolution praying that the Government refrain from doing so is passed by either House within 21 sitting days of the first laying of the treaty before Parliament. "Sitting days" is defined by **cl 10(6)(a)**. It is envisaged that, provided Parliament has had notice of such a treaty with the opportunity to move a prayer against ratification, most such treaties will be ratified by the Government after the twenty-one day period has elapsed without parliamentary action being necessary.

f) If the Government believes that, due to exceptional circumstances, ratification of a particular treaty is urgently required, then under **cl 11(1)** the rules in cl 10 will not apply. Ratification can be effected in that case without parliamentary approval. But this must be reported to each House, together with reasons, as soon as possible (**cl 11(2)**).

g) **Cl 12** expressly preserves the statutory rule in the European Parliamentary Elections Act 2002, s. 12, that any treaty which provides for any increase in the powers of the European Parliament can only be ratified if such ratification is first approved by Act of Parliament.

K **Cl 13** provides new rules about passports.

a) It keeps the issue and revocation of passports as a prerogative matter, but adds statutory safeguards.

b) Under **cl 13(1)** the Secretary of State can only refuse to issue, revoke or withdraw a passport in accordance with statutory rules. Such rules would be established in a statutory instrument which, under **cl 13(2)**, the Secretary of State must lay before each House within 3 months of the passing of the Bill into law, and it would come into force only following approval in a resolution by each House (**cl 13(3)**). Pending the adoption of those rules the Secretary of State would continue to act on present law and practice (**cl 13(4)**).

#### **Part 4 Miscellaneous**

L Part 4 deals with three miscellaneous matters.

- a) **Cl 14** provides that any duty cast on the Secretary of State by the Act may be discharged by the Prime Minister. (It may be, for example, that the Prime Minister would want to make the statement about executive powers required by cl 3.)
- b) **Cl 15** seeks to underline that the Bill is designed to affect Ministers, rather than the Crown or The Queen personally. The Bill leaves prerogative powers in place. It does not alter the legal basis of those powers. Cl 15 reinforces the point established in **cl 1(3)**. Thus **cl 15** states that nothing in the Bill is to be taken to derogate from any rights, privileges, dignities or immunities enjoyed by Her Majesty.
- c) **Cl 16** provides for the short title and extent (which is the whole of the United Kingdom, defined in **cl 1(2)**).

# Written evidence

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## Memorandum from Mr Peter Bradley MP (MPP 01)

I understand that the Public Administration Committee is to conduct an investigation of the honours system. I should like to make two submissions which I hope will be helpful.

First, I thought that you might be interested to see a copy of the Prime Minister's written reply to a question which I put last summer about the number of knighthoods awarded to Members of Parliament since 1979. I hope that you will agree that it makes interesting reading.

By my calculation, of the 163 MPs who were knighted in the period in question, 151 (93%) were Conservative, five Labour (3%), four Liberal or Liberal Democrat (2%), one UPUP and one UUP.

Since 1998 only four have been knighted (two Conservative, one Labour and one Liberal Democrat).

Secondly, I recall that we corresponded last summer about an aspect of my attempt to wrest information from the Cabinet Office about the awarding of Lord Ashcroft's peerage.

The business remains unfinished. I enclose copies<sup>1</sup> of what has become an extremely protracted correspondence purely because of the Cabinet Office's determination to ensure that the Honours system and its role in it remain opaque.

The affair may provide some useful insights into the secrecy and unaccountability which have been, in my view, a feature of the honours system, particularly with regard to political honours.

*Paul Bradley MP*

*February 2003*

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## Memorandum by Mr David Gladstone (MPP 04)

### THE ROYAL, OR CROWN, PREROGATIVE

#### *Introduction*

The Royal, or Crown, Prerogative is essentially the residue of the monarchy's medieval and absolute power. The extent of this residue has proved hard to identify because it has never been spelled out in any legal document. Lawyers therefore tend to define it in terms of what it is *not*, meaning those powers that Parliament has stripped away: dramatically in 1688 and progressively over the next 300 years. Simultaneously, most of the residual powers have been transferred or "delegated" to H. M. Governments (though it would be more accurate to say that they have been appropriated by successive Prime Ministers).

In the process "Crown" has for most purposes come to mean "government" rather than "monarch" and it is the delegated powers that matter to-day. They include most notably the power to declare war, to conduct foreign policy, to dissolve Parliament, to regulate the Civil Service and to make public appointments. The Queen's so-called "personal" prerogatives (which for purposes of this paper will be described as the "Royal Prerogatives") range from rights over sturgeon and swans at one end of the scale to the appointment of Prime Ministers and refusal to dissolve Parliament at the other.

All these prerogative powers survive in the form of gentlemen's agreements or, in legal parlance unwritten conventions. They are important elements in the wider unwritten constitution, helping to regulate the delicate balance of power between Monarch, Parliament and Government. Like all gentlemen's agreements, they depend ultimately on gentlemanly behaviour and good faith. That faith was maintained through two world wars, an abdication, the revolutionary introduction of the welfare state and accession to the EEC. It broke down only in the 1980's when the Prime Minister of the day grew impatient with unwritten conventions and began to test the bounds of government power, including delegated prerogative power. It was the realisation that an unwritten constitution provided no sure defence against a determined "elective dictator" that triggered the formation of Charter88 with its call for a written constitution. The declared desire of the present Prime Minister to follow in Mrs Thatcher's footsteps prompts a fresh look at the uses and abuses of the Prerogative.

While researching the Crown Prerogative for Charter88 I found that many leading authorities admitted to being baffled by it. Some regarded it as of only marginal importance, in that over the centuries Parliament had taken over most of the powers through legislation and the 1985 GCHQ case had established that the exercise of justiciable prerogative powers would be subject to judicial review.

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<sup>1</sup> Ev. not printed

However, the more I learned the more convinced I became that the Prerogative remains central to the way Britain is governed to-day, both symbolically and practically. Most of the powers may have been chipped away over the centuries, but those which are left go to the heart of government and are regularly exercised. In the words of a leading barrister, “they remain a vital source of government power.”<sup>2</sup>

The paper I wrote in 1997 (Annex A) concluded that these powers were not just anachronistic but fundamentally anti-democratic and should be placed on a statutory footing. There is general agreement (outside government circles) that British governments are insufficiently accountable to Parliament in the exercise of their normal statutory powers (in the 1995 Fire Brigades’ Union case Lord Mustill justified the need for judicial supervision by reference to Parliament’s “falling short” in its oversight of the performance of the Executive<sup>3</sup>). The Executive’s attempts to avoid such oversight altogether through the exercise of prerogative powers point to an endemic unwillingness to address the issue.

Indeed, for those hoping that this hang-over from a pre-democratic age will wither on the vine, the omens are not good. In the course of failing to reform the House of Lords in his first term, Mr Blair used his prerogative powers to create dozens of new peers. The Human Rights Act, by putting discretionary Orders-in-Council on a par with primary legislation, has “blurred an established boundary concerning the legal sources of the British Constitution,<sup>4</sup> defying the “principle of abeyance” which has been accepted since 1920<sup>5</sup>. In preparation for the invasion of Iraq, Mr Blair deployed a large part of the armed forces to the Gulf without consulting, or needing to consult Parliament. The government has continued to regulate the Civil Service under prerogative Orders-in-Council, treating it as its personal fiefdom.

The courts may continue to clip the executive’s wings (in defiance of ministerial threats), but they cannot stop it passing new laws aimed at clawing back lost ground and many prerogative powers are “of a kind the courts will not concern themselves with”<sup>6</sup>.

### *What’s to be Done?*

There is a price to be paid for our habit of obfuscation. Our claim to be a fully-fledged modern democracy—like our right to impose democratic values on for example the Middle East—is undermined by reliance on an anti-democratic source of authority for ourselves. Governments which claim to be modernising every other aspect of British society and battling with the “forces of conservatism” will lack credibility so long as they go on “harking back to the clanking of medieval chains of the ghosts of the past” in Lord Roskill’s phrase<sup>7</sup>. If it secures no other British national interest, the Iraq “war” has awoken millions of British subjects to their powerlessness in the face of these ghosts.

There is an emerging cross party consensus in favour of abolishing prerogative power. Parliament now needs to consider the modalities and consequences of doing so. In the following section I list the principal powers, outline the problems associated with their exercise and suggest ways of dealing with the consequences of their abolition. In conclusion, I offer some thoughts on the thorny problems associated with the Human Rights Act and Sovereignty.

## 1. CONCLUSION OF TREATIES AND CONDUCT OF FOREIGN POLICY

**Problem.** The Foreign Secretary is empowered to negotiate agreements with other governments without Parliamentary scrutiny. Under the so-called “Ponsonby Rule”, the Foreign Secretary lays the concluded treaty in the Library of the House of Commons for 21 days after which it is automatically ratified by means of Order-in-Council. This avoidance of democratic scrutiny is peculiar to this country.

**Action.** Since the “Ponsonby Rule” is a convention, it could possibly be annulled by a simple announcement by the Foreign Secretary of the day. But devising and putting in place new procedures would presumably require legislation. A “Treaties Act” could be very short and uncontroversial. The government should publish a consultation document for Parliament to debate.

The Prerogative right to treat with foreign governments is not democratic, but it is not conspicuously anti-democratic and there is an argument for leaving well alone. Foreign affairs are a special case and many democratic countries, France for example, have arrived at similar arrangements. Our tradition of regular parliamentary foreign affairs debates ensures that the Prime Minister and Foreign Secretary are made well aware of Members’ views.

The continuing existence and use of prerogative powers does however have wider foreign policy implications which ought to concern MP’s (and indeed the government). The spreading of democratic values in the developing world has become a cardinal aim of British foreign policy. But, as noted above, such preaching smacks of hypocrisy so long as our own system of government is in part anti-democratic.

<sup>2</sup> D B Squires, (2000) 116 Law Quarterly Review, p. 572

<sup>3</sup> *R. v. Secretary of State for the Home Department, ex p. Fire Brigades Union* (1995) p. 567

<sup>4</sup> P Billings and B Pontin, (2001 Spring) Public Law, p. 21

<sup>5</sup> *Attorney-General v. De Keyser’s Royal Hotel*

<sup>6</sup> Wade and Forsyth, *Administrative Law* (8th ed, 2000) p. 349

<sup>7</sup> *Council of Civil Service Unions v. Minister for the Civil Services* (1985) p. 417

## 2. PUBLIC APPOINTMENT AND HONOURS

**The General Problem.** This is one of the most contentious pieces of business left over from the 17th century struggle between Crown and Parliament. The abuse of patronage which bedevilled 18th century politics has never gone away. The rise of the “Quangocracy” in the Thatcher and Major years gave political patronage a new lease of life as government Ministers admitted to selecting their political friends to run these unaccountable bodies. The then Opposition parties reacted with indignation, but the change of government in 1997 has led only to reversed charges of “cronism”. Prime Ministers of all stripes have continued to create peerages for political reasons.

### *Particular Problems*

(i) The biggest problem concerns Parliament itself. Nowhere else in the Western world does the Head of Government appoint members of the Legislature; indeed, in most democratic nations the idea would seem too fanciful to entertain. Proper reform of the Upper House will require democratising the method of choosing its members.

(ii) Honours. The British Honours system is hopelessly entangled with political patronage. In the case of peerages it is also anti-democratic. Having concluded that it is inherently wrong in the 21<sup>st</sup> century to enter Parliament through “taking the trouble to be born”, we ought equally to reject the notion that entry may be “earned” through subscription to party funds or long and faithful service to a party.

(iii) The Prime Minister’s role in appointing the Archbishop of Canterbury stands out as a particular curiosity. Its historical origins are clear enough and The Queen’s continuing position as Head of the Anglican Church ensures an intimate bond between Church and State. But in a secular and multi-faith society it is increasingly hard to justify political involvement in this—or any other—ecclesiastical appointment.

### *Action*

(i) There are a number of proposals in the field. The creation of one or more Public Appointments Commissions has been widely touted, but there would be no advantage in abolishing direct Prime Ministerial patronage only to replace it by patronage at one remove via his “cronies”, however Great and Good. The public will rightly feel they should have some say in the process. On the other hand, the public have also shown themselves allergic to elections, and the only alternative may be for Commission members to be indirectly elected from existing elected bodies. The Upper House should be largely elected and membership divorced from the Honours system.

(ii) An independent Honours Commission should advise The Queen. The government should propose names but not dispose.

(iii) The Church of England should be made responsible for its own appointments, seeking The Queen’s agreement as a matter of formality.

## 3. REGULATION OF THE CIVIL SERVICE

**Problem.** A vast amount of political capital has been invested by the present government in effective delivery of public services. But delivery depends ultimately on a well-trained, well-motivated and independent civil service working in partnership with teachers, doctors and other professionals. As it is, British civil servants—unlike their counterparts in France and Germany in particular—are not independent. The Civil Service is regulated by Orders-in-Council issued by a Minister under delegated prerogative powers. Its members consequently enjoy no statutory rights (or indeed existence), owe no allegiance to the public and answer solely to the government of the day. It is therefore very hard for them to resist Ministerial instructions to perform essentially political acts. Paradoxically this lack of independent standing actually makes it harder for them to command the confidence of their political masters. The Scott Report revealed them to be inadequate guardians of the public interest. A succession of administrative fiascos has exposed their lack of professional expertise. Government Ministers have blamed them, unscrupulously but without fear of riposte, for continuing restrictions on Freedom of Information.

The general problem has been compounded in recent years by the proliferation of Special Political Advisers with ill-defined roles and powers. There is widespread agreement that something needs to be done to regulate these irregulars, but insufficient appreciation that it is pointless to try to resolve the particular problem while failing to address the general one.

**Action.** Almost all interested parties agree that a Civil Service Act is long overdue. The Major government and two Blair governments have paid lip service to the idea. Most of the necessary preparatory work has been done and it only requires government commitment, so far sadly lacking. Apart from clarifying the status and role of civil servants, the Act should provide for the creation of an appeal Body; either a strengthened, statutory, Civil Service Commission or a new Standing Commission as proposed by Prof. Norman Lewis.

#### 4. DECLARATION OF WAR AND DEPLOYMENT OF THE ARMED FORCES

**Problem.** In the run-up to the invasion of Iraq, many British subjects were surprised to learn that their elected leader could take the country into war, declared or undeclared, defensive or pre-emptive, legitimate or unnecessary, without needing to consult Parliament. I pointed this out in a letter to *The Times* on 18 September 2002 (Annex B) and the Attorney-General subsequently confirmed, in reply to a Question by Lord Hooson on 19 February 2003, that “The decision to use military force is, and remains, a decision within the Royal Prerogative and as such does not, as a matter of law or constitutionality, require the prior approval of Parliament.” Similar powers to determine the national interest in extremis are vested in French Presidents, but in France they are set out in a written constitution. In no other western country does the head of government enjoy such a privilege. Like all prerogative powers, this one harks back to the medieval notion of the Crown as absolute sovereign. Contemplating the invasion of Iraq, Mr Blair will have felt like Henry V, musing on the burdens of Kingship on the eve of Agincourt. But many voters, if not MP’s, would nowadays like to share the burdens.

The “War prerogative” includes the power to prevent trade with the enemy and to intern enemy aliens. These powers have ramifications which could well be of interest to Parliament.

**Action.** Such was the strength of feeling over the invasion of Iraq that the Prime Minister was eventually forced to submit his decision to a vote in parliament. It may be that the precedent having been set, no future Prime Minister will feel able to go to war without first seeking Parliamentary approval. But Mr Blair deployed the armed forces to the Gulf without needing to consult anyone, and thereby made war almost inevitable. Creating yet another unwritten convention relating to the strict declaration of war would not be very helpful (in the Iraq case it is not even clear whether war was ever declared). This issue, perhaps above all, needs to be resolved in the context of a written constitution defining the extent of executive power.

#### 5. APPOINTMENT OF MINISTERS AND DISSOLUTION OF PARLIAMENT

**Problem.** The Prime Minister, both on his own account and through the Leader of the House and the Whips’ Office, exercises excessive control over the supposedly democratic half of the Legislature. The present Prime Minister has high-lighted the issue by barely concealing his lack of interest in Parliamentary affairs.

In the view of most constitutional experts, Government in the UK is more important than Parliament. The situation has evolved independently of prerogative issues, but it is thanks to the prerogative that the Prime Minister retains the initiative *vis-à-vis* Parliament. In particular he alone determines the date of General Elections. This anti-democratic power is taken for granted in this country, but is unique among Western nations. It epitomises the unequal relationship between Crown and Parliament, governors and governed, and signals that in the game of politics the dice are loaded in favour of the governing party, often at the expense of the national interest.

On the face of it, the Prime Minister’s unfettered choice of Ministers is not controversial: in virtually every democratic country it is the Head of Government who chooses his ministerial team. But in Britain the P.M. can and does appoint people who do not sit in the House of Commons and cannot therefore be called to account by the whole house. He also appoints many more junior ministers than are found in other countries, not because they are strictly necessary, but as a means of ensuring the loyalty of a significant number of his back-benchers. The practice is of relatively recent date and has become an important part of government patronage.

**Action.** It would be pointless, if not impossible, to deal with these anomalies on their own. Rather they need to be addressed in the context of root-and-branch reform of both Houses of Parliament to introduce real checks and balances, Committee structures etc. Fixed-term parliaments would be a central provision in a written constitution.

#### 6. ADMINISTRATION OF JUSTICE

**Problem.** It is a constitutional anomaly that the Executive, in the person of the Lord Chancellor, not only appoints judges but confers special privileges (“Silk”) on practising lawyers of his choosing (and can still, in theory, sit on the bench).

**Action.** An independent Commission should appoint judges. The Lord Chancellor appears minded to abandon the practice of government-appointed silks.

#### 7. THE ROYAL PREROGATIVES.

**Problem.** The monarch’s “personal prerogatives” are by convention limited to

- (i) the appointment of prime ministers
- (ii) the refusal to dissolve Parliament in certain circumstances and
- (iii) immunity from prosecution in the courts.

On the face of it, these prerogatives are as objectionable in terms of democracy as those delegated to the Prime Minister and his Ministers (following the Burrell trial there has indeed been some questioning of the monarch's continuing immunity). In fact they are different in kind and the problems associated with (i) at least can be turned on their head by asking whether if the power were abolished the resulting problems might not be less acceptable than the status quo. Whatever the constitutional arrangements, there has to be somebody above the fray who steps in when the game is suspended and the players are temporarily off the board.

**Action.** Until or unless there is overwhelming public or political demand for change, it would be best to leave things as they are. The position could most easily be regularised through a written constitution.

## CONCLUSION: SOVEREIGNTY AND HUMAN RIGHTS

### *The Human Rights Act*

In Section 21 (1) (f) (i) of the Human Rights Act 1998 (the HRA), Parliament defined primary legislation so as to include Orders-in-Council made in the exercise of Her Majesty's Prerogative, thus not just protecting but actually expanding the scope of what Lord Parmor described in 1920 as the government's "uncertain administrative discretion"<sup>8</sup>. The government's aim in framing the bill was clearly to limit the courts' ability to review the exercise of prerogative powers by giving Ministers discretion to ignore any declarations of incompatibility made by either the domestic courts or the European Court of Human Rights. If a declaration of incompatibility is made, even by the European Court, a Minister of the Crown "may" make such amendments to the offending piece of legislation as he considers necessary to remove the incompatibility (Section 10) if he considers that there are "compelling reasons" to do so. Under Section 5 the Crown has even reserved the right to intervene, where a court is considering whether to make a declaration of incompatibility and has the right to be joined as a party, thus hinting at a novel use of prerogative powers.

These victories over the courts may prove hollow. British courts appear to be precluded by the HRA from reviewing prerogative Orders-in-Council, but it is unclear how the ECHR will view such transparent attempts to circumvent judicial oversight of the human rights regime in this country, ie whether the executive's actions will be judged to fall within the "margin of appreciation" afforded to domestic bodies by the European Court in interpreting the rights set out in the HRA as they see fit. The absolute nature of certain rights set out in the HRA is circumscribed by carve-outs, phrased so that an ostensible breach of a right is rendered unoffensive to a reviewing court if carried out under the authority of "law" which is also "necessary in a democratic society". It is not clear whether a manifestation of a prerogative power would be construed as "law" in this sense. A successful case brought to Strasbourg by eg an aggrieved British civil servant against his employer, the "Crown", could call in question not just Section 21(1) (f) (i) of the HRA but the whole discretionary system on which it rests.

If the ECHR were to rule in such a case that the exercise of Crown Prerogative power is incompatible with fundamental human rights, Her Majesty's government would be confronted with an invidious choice: to try to argue that human rights law has nothing to do with the other activities of Her Majesty's government—a line intelligible no doubt to the Red Queen but not to many others—or to accept that unaccountable powers rooted in the concept of divine right have no place in a democratic society committed to upholding the rights of the individual.

However, it is hardly satisfactory to leave the resolution of such important constitutional matters to an unelected body outside the UK. In theory Parliament has the last word, by holding Ministers to account for any incompatibilities of their actions, but we have seen how difficult that will be in practice.

### *Sovereignty*

One of the most telling responses to Bagehot's *English Constitution* was delivered by Humpty-Dumpty. "The question is", he said, "which is to be master—that's all." 130 years on his question awaits an unequivocal answer. Bagehot divided the constitution into "dignified" and "efficient" parts but neither he nor anyone since has been able to say exactly where sovereignty lies. The "Crown (or Queen) in Parliament" has survived as a formula because rather than in spite of its ultimate meaninglessness: it has not so far been in anybody's interest to clarify it. There has been no constitutional crisis severe enough to test it (although the Abdication came near). But abolishing the Prerogative will force the issue into the open.

There are really two issues: who (or which) has the authority to abolish something that by definition pertains to or emanates from the Sovereign? And who (or which) will be master thereafter?

All legal authorities agree that Statute Law (which can be seen as the legal expression of the democratic will) trumps the Prerogative (the "unreasonable survival of despotism" as one authority describes it<sup>9</sup>) when the two conflict. But cutting ever finer slices off a piece of salami, as Parliament has been doing for 300 years in the case of the Prerogative, is one thing; throwing the last scrap into the bin is another.

<sup>8</sup> *Attorney-General v. de Keyser's Royal Hotel*, p. 568

<sup>9</sup> H V Evatt, *The Royal Prerogative* (1987) p. 9

MPs and lawyers will need to designate and empower the new sovereign authority which would take over the prerogative powers listed above. It will be no straightforward task. The “Crown” is an ambiguous term meaning the monarch, the government, the state or the public interest depending on context. It harks backwards when what is needed is a completely new approach.

Only a written constitution can square all the circles. It would put an end to the uncertain administrative discretion which threatens to embroil the UK in fruitless arguments with Strasbourg; it would provide for the checks, balances and separation of powers we lack at present; it would define the relationships between executive, legislature and judiciary which, partly through being ill-defined, are becoming mired in bad-tempered bickering; it would provide in itself a focus, if not bedrock, of uncontested sovereignty and national solidarity, as the American Constitution and the German Basic Law have succeeded in doing. It would also be the best way of dealing with the Monarch’s personal prerogatives—if Parliament decided to preserve them in something like their present form.

*David Gladstone*

*May 2003*

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### **Memorandum by Mr Peter Browning (MPP 05)**

#### 1. INTRODUCTION

The Public Administration Select Committee (PASC) invites replies to a list of questions, which in the accompanying paper it says is not exhaustive. Thank goodness. For opportunities to discuss the royal prerogative are rare indeed. This chance must be seized. The issues paper which precedes the four questions provides a useful basis for that discussion.

#### 2. THE ISSUES PAPER

##### 2.1 What are prerogative powers?

The paper begins by stating that “no authoritative definition exists of what is known as the ‘royal prerogative’”. How amazing. So it is not high time that parliament and the monarchy agreed on such a definition?

##### 2.2 *The Queen’s constitutional powers (3.1)*

The statement that “the queen’s constitutional prerogatives are the personal discretionary powers which remain in the Queen’s hands” is most misleading. I know that the reality—that the monarch accepts ministerial advice—is stated later in 3.1. Even so, it is qualified by the phrase “in ordinary circumstances”. This is another example of the hazy nature of the British Constitution. Should not the extraordinary circumstances in which the monarch might exercise some or all of her discretionary powers be defined? After all, some of them are potentially of great political significance.

##### 2.3 *Ministerial prerogative or executive powers*

2.3.1 The most amazing statements in the whole paper are found in the first and second sentences of section 5 of the issues paper. The first surprise, a small one, comes in the first sentence: “Ministerial executive powers do not require, either by law *or convention* (emphasis added) parliamentary approval before or after they are used”. The second, bigger surprise comes in the first part of the second sentence: “Parliament does not even have to be told that they have been exercised”. Then comes a double bomb shell: “indeed, Ministers have said that no record is kept of their use and that it would not be practicable to do so.”

2.3.2 To an outsider, this last statement is incredible. It means that at the heart of British government there is a kind of constitutional black hole. Why is recording the use of the prerogative impractical? Two possible explanations come to mind: either it is used too frequently or it is hard to distinguish prerogative powers from statutory powers. At the very least, further clarification is essential. More desirable would be the quantification of ministerial use of the prerogative. The ideal would be ministerial accountability to parliament for the exercise of these powers.

2.3.3 Having taken in section 5, the reader is then faced with an inconsistency of argument. Section 6 begins with the statement “Ministers are accountable to parliament for the use of prerogative powers”. Hang on. Section 5 states that no record is kept of the use of the ministerial prerogatives. So how can ministers be accountable for something they have no record of? Only by some Alice-in-Wonderland logic, I suspect. Are there examples of ministers being accountable for their prerogative powers? The statement at the end of section 3.3, that “MPs have been prevented from raising certain matters . . . on the ground that these matters involve a royal connection”, suggests that in practice ministers are rarely accountable for their prerogative powers. Playing the prerogative card enables a minister to trump any calls for accountability.

2.3.4 Section 7 of the issues paper begins by stating that the PASC recognises that “ministerial executive powers . . . are subject to a number of checks and balances”. Note the verb: “are” not “should be”. This is a statement of fact. It only provokes the retort “but how can they subject to checks and balances if no record is kept of their use and ministers avoid accounting for them to parliament?” However, the examples quoted in section 6 talk of non-legal rules, eg the Ponsonby rule. So there is a rule and it has been around since 1924. Surely there is some record of the number of treaties laid before parliament under the rule? If so, then the statement that no record is kept of the use of the ministerial power is, in one case at least, incorrect.

2.3.5 If not parliament, which bodies might act as a check on ministerial prerogative? The judiciary is mentioned as having authority over “some” ministerial prerogative powers. Again, clarification of exactly which would be desirable. How about Ministerial self-restraint in the form of the Ministerial Code? It is hard to imagine. I have another suspicion, that the reality of most prerogative powers is that they are exercised free of restraint, formal or informal.

2.3.6 In general, the issues paper contains a number of assertions about ministerial prerogative powers which cannot stand too close a scrutiny. Let us hope that the PASC, when it writes its final report on this matter, resolves some of these inconsistencies.

2.3.7 The paper also contains little or no information about the “principal” ministerial powers which it lists in section 4. Presumably, it could be argued that this is because no record has been kept of the use of these powers. Incredulity comes sweeping in again. Take another example, royal pardons. Does the Home Office (presumably) really not know how many royal pardons have been granted? Of course, not. Thus it would be helpful if the final PASC report contained more detail on the ten prerogative powers it lists in section 4. If it really is the case that no information is available, then it becomes essential that information is collected and made available to parliament, say on an annual basis.

### 3. THE FOUR QUESTIONS

3.1 *Is it the case that the current checks and balances relating to ministerial executive powers are adequate in a modern parliamentary democracy?*

The short answer is “no”. Section 6 identifies only a few checks and even then rarely links them to particular prerogative powers.

3.2 *Is a fresh statement of principles needed upon which Ministers' executive powers should be exercised and, if so, what should they be?*

The short answer is “yes”. Why not something which builds on the Ministerial Code (which itself should be given greater publicity and prominence)?

3.3 *Do we need an honours system? If an honours system is needed, what reform, if any, are needed? What is the effect of the operation of the honours system on the civil service and on public services and public administration in general?*

What a radical first question! I suspect societies do need an honours system of some kind or other, to give public reward for those who have served the public in some way or other. As for reforms, where do we start? The subject needs a special study of its own. Certainly, all references in honours to the empire should be removed, eg no more MBEs. Why not a parliamentary medal of some kind or other? Let's start to highlight the importance of parliament to the UK. Ideally, no honours would be granted on the recommendation of government ministers. Who would make the recommendations? How about a cross-party group of experienced backbenchers from both houses of parliament? I have little idea of the effect of the honours system on the civil service and public services. I suspect that it has a deadening effect at the higher levels, encouraging conformity. In terms of the place in the wider national culture, I believe it reinforces the already-excessive power of deference.

3.4 *Is placing ministerial executive powers on a statutory basis the right approach? If so, which of the suggested models for the statute—or which other model—is preferable? What might be the demands made by such legislation on parliamentary time and how could such demands be minimised?*

The short answer to the first question must be “yes”. What alternative is there? Of the two models put forward, Model B is preferable. At least then all prerogative powers would have a statutory basis. And it is not sufficient to say, as does the issue paper, that “statutory safeguards . . . could be added”. They must be added. Not to do so would be a missed opportunity of great significance. As for the third question, I have neither the knowledge nor the understanding to answer adequately. My own thought is to question whether the demands would be that great. I see parliamentary oversight of ministerial powers being exercised by the appropriate departmental select committee, which might issue an annual report on the matter.

#### 4. IN CONCLUSION

4.1 The first and most important point is to welcome the PASC's Issues and Questions Paper. The Issues paper provides much useful information about the royal prerogative in its various forms. The Questions provide an opportunity to widen discussion and debate about the royal prerogative.

4.2 The second point is to ask that the PASC's final report on the subject both provides more information about the practical exercise of the royal prerogative and also resolves some of the apparent contradictions in the Issues Paper.

4.3 The third point is to ask that, if and when it comes to considering a bill on the exercise of the royal prerogative, the subject be given the widest possible publicity. People need to know how the prerogative works in practice. The reality is that, in a representative democracy, the royal prerogative is an anomaly. Its existence might not matter if it were a marginal matter. However, it is an anomaly at the heart of government. It legitimises the exercise of ministerial power, enabling that power to escape effective parliamentary scrutiny and thus weakening responsible and representative government. It is high time that the royal prerogative in all its forms was brought under parliamentary control.

*July 2003*

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#### **Memorandum from Roger Bramble, The Association of High Sheriffs of England and Wales (MPP 06)**

The Association has been asked for its views on four questions. In the light of the fact that these are posed against the background of an inquiry into the Royal Prerogative it should perhaps be stated at the outset that the appointment of High Sheriffs is not an exercise of the Prerogative. Appointments are made under an Act of Parliament, the Sheriffs Act 1887.

Although, clearly, this Act predates many of the principles that underlie modern appointments practice, the process strives to ensure as open and inclusive an approach as is possible within the constraints imposed by the Act, and taking account of the special factors that apply to High Sheriffs. Of these perhaps the most significant is the fact that the office is unpaid, so that the holder must have the means to sustain all expenses from his or her own pocket. It should also be noted that the Government have announced that the last surviving significant function, the enforcement of High Court writs, will be removed by legislation in the current session of Parliament.

The "sponsoring" Department for the High Sheriffs is the Privy Council Office (PCO). The Association has worked closely with the PCO over the last few years to ensure that the appointments process is as fair and open as it can be. The Association is a voluntary body. It comprises all serving High Sheriffs, most of those nominated to serve as High Sheriff in future years and a strong representation from among those who have held office in the past. Its role can only be advisory; but it has played a major part in modernising the appointments process, particularly through encouraging the establishment of consultative panels in every Bailiwick (the geographical area, usually corresponding to a County, which the High Sheriff represents). The panels ensure a consistency and continuity in the appointments process, since they involve the serving High Sheriff and the immediate past and future Sheriffs, as well as other representatives of the local community. This means that new Sheriffs are brought into the process in advance of their own year of service, and their expertise is not immediately lost when their term of office ends. This is a natural corollary of the Association's wider educational aim of ensuring that all High Sheriffs take up office properly prepared.

The Association also ensures that the Bailiwick Committees are aware of the Nolan principles and the need to ensure (so far as is possible given the constraints already mentioned) that the pool from which candidates are drawn is a wide one, taking account of gender, ethnicity and social background. The Association has a continuing dialogue with the Commissioner for Public Appointments and her office.

With no substantive statutory functions remaining the focus of Sheriffs' activities is on voluntary work and on initiatives linked to the historical role of the office, namely law and order, debt enforcement and social harmony. The Council of the Association sponsors schemes such as National Crimebeat, DebtCred and Interfaith, which are educational and awareness campaigns aimed primarily at young people to try, respectively, to keep them away from crime, to avoid problems arising from taking on too much debt and to encourage a positive attitude to religious differences. High Sheriffs are non-political and not associated with any formal national or local authority, and are ideally placed to give a high profile to such initiatives from a neutral, non-partisan position.

Against this background it will be recognised that the Association, as a non-political organisation, cannot offer view on the Committee's questions (1), (2) and (4). On the honours system it would comment only that it would not regard appointment as High Sheriff as an honour. Indeed, taking a sabbatical year from a career to devote oneself to a gruelling programme of work in the community without reward or the covering of expenses is certainly not an "honour" in the normal sense. Rather it demonstrates a remarkable commitment to the public service, which most High Sheriffs find more than enough compensation for the considerable pressure put on their time and financial resources by their year in office.

*July 2003*

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**Memorandum by Sioned-Mair Richards (MPP 07)**

My name is Sioned-Mair Richards. I was the Mayor of Carmarthen in West Wales for the year 1998–99. During my year of office I met the High Sheriff of Dyfed on many occasions. Not having really known about this post before my year of office or having met one, I wondered how you got to be appointed to this post and asked what the process was. It appeared that a name was given to the Queen who made the appointment. This name was given by the incumbent High Sheriff ie the new Sheriff is proposed by a previous Sheriff. In effect this means that a group of people who know each other, appoint each other.

I was invited to a lunch hosted by the High Sheriff in honour of the High Court Judge who had come to Carmarthen. The lunch was full of either previous High Sheriffs or those to be—they knew up to three years in advance who it would be. Although the High Sheriff was an elected councillor in Pembrokeshire this did not have any bearing on his taking the post and was a matter of coincidence. I felt that the fact that he was an old Etonian and moved in the same social circles as the other people at the lunch had more to do with his appointment than the fact that he was a holder of elected office elsewhere. I sat there wondering whether we really had an elected democracy as these people were continuing to run things between them as they always had and, while they were very nice people, they were not part of an open, democratic process.

As well as needing to be known by the right people, being the High Sheriff requires you to be fairly wealthy as the High Sheriff “uniform” of velvet breeches, jacket, sword etc can cost several thousand pounds—unless you can get them second hand from a previous sheriff who is the same size. You attend all sorts of functions around the county—and Dyfed is very large—but have to finance this from your own pocket.

The question is, does this matter? I believe that it does. While the post does not wield direct power, there is enormous influence which is used by a self-perpetuating group of people. It is unclear how one arrives in this post, there is no “job description” and it appears that the post is not open for anyone to apply for.

I assume that this process is similar all around England and Wales, not just in Dyfed. You have had evidence to the Committee before Christmas from Mr John Savage, High Sheriff of Bristol who has described the process as he sees it which appears to agree with what I found out about the role. You have also received evidence from Mr Jon Snow, Channel 4 News and Mr Philip Collins, Director of the Social Market Foundation who have come to a similar conclusion.

It seems to me that breaking down class barriers and encouraging all people to take roles in public life will continue to be hard while there is still a layer which is appointed mysteriously, which appears to be self-perpetuating and depends on who you know rather than on what you can offer. I am not convinced that there is any need for High Sheriffs but if the Committee believes that there is then surely a new system of appointment is called for which is open, transparent and fair.

I would also raise the question of Lord Lieutenants who I understand are appointed by the Queen. Again I realise that this is an honorary post but, for example, the Lord Lieutenant of Dyfed chairs the committee which selects JPs. This seems to give a large piece of influence over the lay judiciary for someone who again is from that class or layer of people who appoint each other.

Clarification of the roles of Lords Lieutenants and High Sheriffs, how they are appointed and the extent of their powers is needed if we are to understand how our society is run and by who. It may appear to be “Ruritanian” and not to matter but while it continues to play what can be a very influential role—in rural areas in particular—then it should be open to Scrutiny and the public should feel confidence that an unfair appointment system is not being perpetuated.

I would ask the Committee to enquire about these appointments and to consider making recommendations to reform this system.

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**Memorandum by the Association of Lord-Lieutenants (MPP 08)**

**QUESTION 3—THE HONOURS SYSTEM**

*Background*

1. Lord-Lieutenants are not appointed under the Royal Prerogative but under the powers confirmed to The Queen by the Lieutenancies Act 1997. The Queen appoints a Lord-Lieutenant on the basis of a recommendation made by the Prime Minister, following extensive consultations carried out in the lieutenancy where a vacancy has occurred. Lord-Lieutenants, unlike High Sheriffs who are appointed by a different system for one year only, may serve until they are 75.

2. Lord-Lieutenants are The Queen’s representatives in their counties and areas. Their duties are those that The Queen gives them. Lord-Lieutenants have responsibilities in relationship to Royal visits, the presentation of medals and awards, the armed forces and the lay magistracy (usually including chairmanship

of the committees which recommend magistrates for appointment). As leaders in their counties, involved in civic, business, industrial, social and community life, in practice Lord-Lieutenants are primarily involved with a very wide range of voluntary activity, for instance

- (a) encouraging the many people who are committed to work in and for their communities & making connections between different voluntary activities; and
- (b) where achievement in this sector has been recognised officially—e.g. by the grant of an honour, by an award under The Queen's Golden Jubilee Award or in the form of a Queen's Award for Industry etc.—often making the presentation of the honour or award locally on behalf of The Queen.

3. Lord-Lieutenants also occasionally become involved in presenting gallantry awards and, more frequently, long service awards to the armed forces and the emergency services.

#### *Justification for the honours system*

4. Lord-Lieutenants uniformly believe in the value of the honours system. An honour represents to those who receive it, to their relations and to their colleagues, recognition from the highest level in the State of service and achievement, much of which—as Lord-Lieutenants frequently observe—is carried out for little financial reward and often out of sight. One of the improvements in recent years has been the opening up of the nomination system, so that members of the public may nominate people who work voluntarily for others for an honour. We understand that at present about half of the nominations in each Honours List are of this sort. This development has allowed the system to identify people working for others who might not have previously been recognised.

5. If the Lord-Lieutenant is asked to present the decoration he/she is only too aware of the delight of all those associated with the recipient. On such occasions and in the normal course of their duties Lord-Lieutenants are frequently astounded by the levels of commitment shown by all sorts of people to their communities as one after another piece of unsung voluntary activity comes to light. Without the extraordinary voluntary commitment of many people to the needs of their fellows many individuals would suffer and many communities dissolve. As it is currently targeted the honours system gives much encouragement to such activity.

#### *Lord-Lieutenants' role in the Honours operation*

6. Lord-Lieutenants are available in their counties and areas to advise those who wish to put forward nominations for honour; and are regularly consulted by the central Honours Secretariat and by Government departments about proposals that have come from other sources to honour someone for local service. In some cases the nominee may not be known to the Lord-Lieutenant, but in many cases Lord-Lieutenants are able to use their local sources of information, including their Deputy Lieutenants, to be able to give well-founded advice to government. They also take an active role in the selection process for The Queen's Jubilee Award. In general Lord-Lieutenants do not themselves originate recommendations for honour. This allows their advice both locally and to the centre to be impartial. The Cabinet Office Ceremonial Branch is happy to give feedback on nominations to Lord-Lieutenants. This enables Lord-Lieutenants to, for example, recommend meritorious but unsuccessful candidates for invitations to Her Majesty's Garden Parties.

7. It has sometimes been suggested that Lord-Lieutenants might strengthen the degree of local recognition of service to the community by themselves giving an award, such as a "Lord-Lieutenant's certificate." In association with the volunteer reserve forces many Lord-Lieutenants do award members of such forces Lord-Lieutenant's Certificates and may appoint young people from the Cadet Forces as Lord-Lieutenant's Cadets. But these are given in very specific circumstances. In general Lord-Lieutenants take the view that, to give their own certificates for attainment outside the reserve forces would be a wrong use of their role; would be an attempt to second guess or override the central Honours system; and such local awards would be seen as very much second-best (or worse) to an honour from The Queen.

#### *Reforms?*

8. The reforms made in the premiership of the Rt Hon. John Major MP, particularly the opening up of the nomination system, have had a powerful effect, an effect which is still working its way through as more people become familiar with the process, helped by the information provided locally and from the central Secretariat. While some—both nationally and locally—might want to question particular decisions that come out in each Honours List, it is important that this should not be done for mischievous reasons, remembering that on each occasion a person could readily get hurt. We are aware that some who do not receive and honour might themselves feel hurt. But that is a problem with any system that aims to select people worthy of honour and grants only a limited number of awards in order to maintain the value of each award.

9. An important feature of the honours system is that it should be applicable to as wide a range of communities and varieties of service and achievement as possible. It is essential that the system must be accessible and open enough to encourage the public to nominate prospective recipients of honours. Lord-Lieutenants would welcome any further reform in this direction.

10. As to whether the name of the main Order—that of the British Empire—should be changed—clearly if a good and acceptable alternative could be agreed on (including by those British Overseas Territories which make recommendations) then a change to recognise the end of empire might well be useful. But, in the experience of Lord-Lieutenants, the title of the Order they receive—whether it be the Empire or the Bath or St Michael and St George—is not an issue for the vast majority of recipients.

*Sir Thomas Dunne*  
Chairman

*August 2003*

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**Memorandum by Sir Hayden Phillips GCB Permanent Secretary, The Department for Constitutional Affairs (MPP 09)**

When I gave evidence to the Public Administration Select Committee on 7 July, I promised to let the Committee have short notes on a number of detailed points raised by Committee members during the hearing. These are now enclosed<sup>10</sup>, together with a paper on the Royal Prerogative prepared by the Treasury Solicitor's Department<sup>11</sup>.

**ATTACHMENT A**

**The Forfeiture of Honours**

1. Since 1965 a sub-committee of the Main Honours Committee has been responsible for considering whether individual honours recipients should be required to forfeit their awards because of their misconduct. The sub-committee is chaired by the Chairman of the Main Honours Committee, at present Sir Hayden Phillips.

2. Forfeiture would be considered in all cases where someone who had been honoured was subsequently convicted of a crime and sentenced to a significant term of imprisonment (usually taken to be three months or more), provided that the offence:-

- (i) involved disloyalty to the State, or
- (ii) was committed by a civil servant and involved serious dereliction of duty; or
- (iii) involved such disgraceful conduct that public opinion would be likely to consider it wrong for the offender to hold an honour.

3. Forfeiture can also be considered where there has been a conviction but no sentence of imprisonment, or even where there has been no conviction (as, for example, with [Sir] Anthony Blunt). In particular, where someone had behaved in his or her professional life in a way which was incompatible with being honoured in respect of a professional contribution—for example, a doctor or solicitor who had been struck off the register or a local councillor who had been found to be in flagrant breach of the relevant code of conduct (provided that the original award had been made for services to medicine/the law/local government). The basic principle is that honours should be forfeited where not to do this would bring the honours system into disrepute.

4. What has been said above applies only to awards in the various Orders of Chivalry, and to appointments or Knight Bachelor. Peerages can only be removed by Act of Parliament.

Ceremonial Secretariat

*July 2003*

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<sup>10</sup> Attachments A—D.

<sup>11</sup> MPP 09(a).

**ATTACHMENT B**

**Honours Statistics 1994–2003**

Per cent

	<i>NY94</i>	<i>BD94</i>	<i>NY95</i>	<i>BD95</i>	<i>NY96</i>	<i>BD96</i>	<i>NY97</i>	<i>BD97</i>	<i>NY98</i>	<i>BD98</i>	<i>NY99</i>	<i>BD99</i>	<i>NY00</i>	<i>BD00</i>	<i>NY01</i>	<i>BD01</i>	<i>NY02</i>	<i>BD02</i>	<i>NY03</i>	<i>BD03</i>
Women	27.2	29.2	33.7	32.8	31.2	30.2	32.2	33.1	33.7	33.9	32	33.7	31	40.3	37.8	37.0	37.5	38	32	37.4
Women at CBE and above	7.3	8.2	11.2	11.8	10.5	11.5	11.1	10.2	10.3	20.3	17.0	18.7	26.5	25.3	19.4	18.7	22.6	20.0	20.1	20.3
Black & minority ethnic candidates	N/a	N/a	N/a	2.2	2.2	2.7	2.5	2.5	2.6	4.0	5.3	4.2	5.1	5.9	5.5	5.6	5.4	5.6	6.5	6.8
Black & minority ethnic candidates at CBE & above	N/a	3.3	4.0	4.8	1.3	2.6	5.2	4.0	3.8	1.9	3.5									
Public support	N/a	N/a	37	35	36	40	45	42	44	40	43	44	44	42	45	46	46	47	42	51
Voluntary service	N/a	33	39	43	38	45	47	49	46	50	57	55	53	47	48	46	49	46	N/a	45
Refusals	N/a	N/a	2.2	1.7	1.6	2.0	2.1	1.9	2.0	2.2	2.3	2.9	N/a	2.8	2.1	2.9	1.7	1.2	1.7	2.0

## ATTACHMENT C

**The Lord Mayor of London**

1. When John Major announced, in 1993, that holders of certain posts would no longer be honoured automatically, it was made clear that this applied to future Lord Mayors of London. Every Lord Mayor had in the past been knighted either shortly before or shortly after coming into office. Future office holders would however be considered for awards strictly on merit.

2. Since 1993 Lord Mayors have been considered for an award towards the end of their term of office and all but two have in fact been knighted, normally in the New Year Honours List appearing shortly after they have left office. But there have been two recent exceptions—Lord Levene of Portsoken, Lord Mayor from 1998–99 and Sir David Howard Bt, who served from 2000 to 2001. All future contenders will continue to be assessed on merit.

Ceremonial Secretariat  
*July 2003*

## ATTACHMENT D

**Staff involved in honours work**

There are 16 staff in the Ceremonial Secretariat, three of whom work part-time. The attached organisation chart shows how their duties are allocated, not printed.

A few Departments have staff working full time on honours, but for most honours work is undertaken as only part of an overall job. It is not possible to give a precise figure for the amount of effort involved, but it is broadly equivalent to between 30 and 35 full time staff, almost all at relatively junior grades. Senior staff in each Department come into the process at the later stages when final decisions are taken on which candidates to put forward, but this takes up only a few hours of their time in all.

Ceremonial Secretariat  
*July 2003*

**Memorandum from the Treasury Solicitor's Department (MPP 09(a))****THE ROYAL PREROGATIVE****A. WHAT IS THE PREROGATIVE?**

1. This note seeks to describe as fully as possible the extent of the prerogative. However, as will become clear, the exact limits of the prerogative cannot be categorically defined. The note goes on to describe the way in which the exercise of prerogative power is controlled by Parliament and the Courts.

2. There is no single accepted definition of the prerogative. It is sometimes defined to mean all the common law, ie non-statutory powers, of the Crown. An alternative definition is that the prerogative consists of those common law powers and immunities which are peculiar to the Crown and go beyond the powers of a private individual eg the power to declare war as opposed to the normal common law power to enter a contract.

3. Whichever definition is used there is no exhaustive list of prerogative powers. Some have fallen out of use altogether, probably forever—such as the power to press men into the Navy. It may be of more practical assistance to identify those powers which have been consistently recognised by the courts in the past, mindful of the encroachment into the prerogative as a result of the control exercised by Parliament and the courts.

*Domestic Affairs*

4. Although this is the area in which legislation has increasingly been introduced thereby limiting the extent of the prerogative, some significant aspects of the prerogative survive in the area of domestic affairs. These include:

- the appointment and dismissal of Ministers;
- the summoning, prorogation and dissolution of Parliament;
- royal assent to Bills;
- the appointment and regulation of the civil service;
- the commissioning of officers in the armed forces;
- directing the disposition of the armed forces in the UK;
- the appointment of Queen's Counsel;

- the prerogative of mercy. (This no longer saves condemned men from the scaffold but it is still used eg to remedy errors in sentence calculation);
- the issue and withdrawal of UK passports;
- the granting of honours;
- the creation of corporations by Charter;
- the King (and Queen) can do no wrong (for example the Queen cannot be prosecuted in her own courts)

#### *Foreign Affairs*

5. The conduct of foreign affairs remains very reliant on the exercise of prerogative powers. Parliament and the courts have perhaps tended to accept that this is an area where the Crown needs flexibility in order to act effectively and handle novel situations.

6. The main prerogative powers in this area include:

- the making of treaties;
- the declaration of war;
- the deployment of the armed forces on operations overseas;
- the recognition of foreign states;
- the accreditation and reception of diplomats.

#### *Can the prerogative powers be extended?*

7. The Crown cannot invent new prerogative powers. This is consistent with the residual nature of the prerogative. However, because the prerogative is not codified or frozen at a particular point of time, it can still to some extent adapt to changed circumstances. The Lord Privy Seal, in written answer in the House of Lords on 1st February 1996 to the question “what are the categories of powers exercised by ministers exclusively under the royal prerogative” said “the government shares the view of Wade and Bradley, in their work *Constitutional and Administrative Law* (11th Ed. 1993), that it is not possible to give a comprehensive catalogue of prerogative powers”. This government also shares that view.

8. So there is scope for the courts to identify prerogative powers which had little previous recognition. In *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] 1 QB 26 (CA), the Court of Appeal examined the interaction between known prerogative powers and prerogative powers that might exist. The facts concerned the Home Secretary’s power to issue baton rounds to a chief constable without the consent of the police authority. The Court held that the 1964 Police Act gave the Home Secretary the power to do this but went on to hold that in any event the Crown had a prerogative power to keep the peace within the realm, which was not displaced by the 1964 Act, and the Home Secretary could therefore have acted even if the Act had not provided him with one. Nourse LJ commented that “the scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does”.

9. It is likely that the courts would be willing to recognise a wide range of necessary responses by the Executive to an emergency as authorised under the prerogative in the absence of a clear statutory basis. Indeed in *Constitutional and Administrative Law* (7th Ed. 1994) De Smith and Brazier comment that it is clear that the Crown still has certain prerogative powers in time of grave national emergency to enter upon, take and destroy private property, though the conditions under which these powers are exercisable are far from clear, partly because the powers were never precisely defined, partly because the scope in time of war was not considered in general terms by the courts for nearly three hundred years, and partly because of the encroachment of various statutory provisions made over the years.

## B. CONTROL OF THE PREROGATIVE

### *Limitation of the Prerogative by Parliament*

10. It is long established law that Parliament can override and displace the prerogative by statute. Where the Crown is empowered by statute to do something that it could previously do under the prerogative, it can no longer act under the prerogative but must act within the statutory scheme. The statute can, however, expressly preserve the prerogative. For example the Crown Proceedings Act 1947 contains an express saving at section 11 that the provisions of the Act shall not extinguish or abridge pre-existing prerogative powers (as well as powers conferred on the Crown by statute).

11. It is not altogether clear what happens where a prerogative power has been superseded by statute and the statutory provision is later repealed but it is likely to be the case that the prerogative will not revive unless the repealing enactment makes specific provision to that effect. And in practical terms, it seems virtually unthinkable that the Government would seek to rely on the prerogative to replace an Act of Parliament, except perhaps in a grave national emergency.

12. As the prerogative is a residual power it cannot be used to amend the general law. This is of particular interest in relation to international treaties. Although the Executive can commit the United Kingdom to obligations under international law, if a change to domestic law is required, it will only take effect if Parliament passes the necessary legislation.

13. Parliament also controls the exercise of the prerogative through its control of supply. The Executive has no practical ability to act unless it can fund its activities. What has become known as the Ram doctrine was set out in a memorandum by the then First Parliamentary Counsel, Sir Glanville Ram in 1945. This explains that as a matter of law a Minister of the Crown may exercise any powers that the Crown has power to exercise, except to the extent to which the Minister is precluded by statute either expressly or by necessary implication. The ability of the Minister to spend money to exercise those powers will however depend on whether Parliament votes him the funds to do so.

14. Ministers exercising prerogative powers remain accountable to Parliament as they are for the exercise of power from any other source. The recent proceedings of the foreign affairs select committee demonstrate the scrutiny to which the exercise of the prerogative power can be put. Such accountability in itself is a form of control exercised by Parliament over the Executive.

#### *Judicial Intervention*

15. If challenged, the prerogative must be recognised by the courts. They therefore define its limits and have jurisdiction to inquire into the existence and extent of any alleged prerogative. Whether powers derive from the prerogative or from statute, the courts recognise the limits of justiciability. In *Judicial Review of Administrative Action* (5th Ed. 1995) Lord Woolf and Jeffrey Jowell describe those limits as follows: "Yet there are some decisions that the courts are ill-equipped to review; those which are not justiciable, either because they admit of no objective justification or because the issues they determine are polycentric in effect. Such decisions include those that necessitate the evaluation of social and economic policy, or the allocation of scarce resources among competing claims. Courts are institutionally unsuited to resolving these kinds of problem, which are best left to be decided in the political arena."

16. Until relatively recently the courts would not inquire into the way in which a prerogative power had been exercised. But, as judicial review has developed, this attitude has changed and the courts have become more willing to review the exercise of any discretionary power whatever its source. The courts are still reluctant to interfere with the exercise of the prerogative where this relates to "high policy". In *R v. Secretary of State for Foreign Affairs ex p Everett* [1989] 1 QB 811 Taylor LJ differentiated between acts involving matters of "high policy" at "the top of the scale of executive functions under the prerogative", and matters of administrative decision, affecting the rights of individuals and their freedom to travel, where we can expect more judicial scrutiny. The former category would include making war and mobilising troops; the latter the refusal to grant or renew a passport.

#### *Summary*

17. It remains impossible to define the exact limits of the prerogative. It is hoped that this note assists understanding by describing the main prerogative powers and the way in which their exercise is subject to checks and balances by Parliament and the courts.