The Royal Prerogative

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Originally prerogative powers would have been exercised by the reigning monarch. However, over time a distinction has emerged between the monarch acting on his or her own capacity, and the powers possessed by the Monarch as head of state. In modern times, Government Ministers exercise the majority of the prerogative powers either in their own right or through the advice they provide to the Queen which she is bound constitutionally to follow. There have been calls to reform prerogative powers, chiefly because they are exercised without any parliamentary authority.

The Governance of Britain Green Paper published in July 2007 included a number of proposals to reform the Royal Prerogative. The Government intended both to pass powers from the Government to Parliament and make powers exercised under the prerogative subject to greater scrutiny by Parliament. Specific proposals were made for certain elements of the prerogative, such as the deployment of Armed Forces overseas and placing the civil service on a statutory basis. The *Draft Constitutional Renewal Bill,* published in March 2008 included clauses to put some of these proposals into effect. The *Constitutional Reform and Governance Bill 2009-10* includes provisions to place the civil service and the current process for agreeing treaties on a statutory basis.

In October 2009 the Government published a review of Executive Royal Prerogative Powers which listed prerogative powers and assessed the case for further wide-scale reform. It concluded that it would be unnecessary and inappropriate to propose further major reform at present.

This note sets out the historical background to the Royal Prerogative before describing general prerogative powers and the Crown's personal prerogative powers. It then sets out recent proposals for reform. It does not provide detailed information on individual prerogative powers. These are considered in a number of other Standard Notes, for example:

- SN/IA/04335 *Parliamentary Approval for the Deployment of Armed Forces: An introduction to the issues*
- SN/IA/04693 *Parliamentary Scrutiny of Treaties*
- SN/PC/00831 *Fixed Term Parliaments*

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1 Historical background and definitions

Historically, the medieval monarchy was both feudal lord and head of the kingdom. As such, the King had powers accounted for by the need to preserve the realm against external foes and an 'undefined residue of power which he might use for the public good'. He could exercise the 'royal prerogative' and impose his will in respect of decision-making.

Moreover certain royal functions could be exercised only in certain ways. The common law courts were the King's courts and only through them could the King decide questions of title to land and punish felonies. Yet the King possessed a residual power of administering justice through his Council where the courts of common law were insufficient.

In the 17th century, disputes arose over the undefined residue of prerogative power claimed by the Stuart kings. The conflict was resolved only after the execution of one King and the expulsion of another in 1649 (Charles I) and 1688 (James II), culminating in the Bill of Rights 1689, which declared illegal certain specific uses and abuses of the prerogative.[1] The second stage was the growth of responsible government and the establishment of a constitutional monarchy, spurred on by the various electoral reform acts of the 19th century.[2]

It became established that the bulk of prerogative powers could be exercised only through and on the advice of ministers responsible to Parliament. Although the monarch retained formal power of appointment and removal of ministers and ministries, the development of collective ministerial responsibility made it increasingly difficult for the King or Queen to exercise such power freely against the wishes of the Prime Minister and Cabinet. However, the ability of ministers to rely on prerogative powers continues to give rise to problems of accountability.[3]

The October 2009 Government *Review of Executive Royal Prerogative Powers* explained that prerogative powers have been difficult to define in general terms:

> 26. A V Dicey defines the Royal prerogative as 'The residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown' [A. V. Dicey, *Introduction to the Study of the Law of the Constitution,*10th edn, 1959, p424]. William Blackstone however describes the prerogative more tightly, as those powers that 'the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subjects' [William Blackstone, *Commentaries on the Laws of England, a facsimile of the first edition of 1765-1769,* 1979, p111]. Blackstone's notion of the prerogative being those powers of an exclusive nature was favoured Lord Parmoor in the *De Keyser's Royal Hotel* case of 1920 [*Attoney-General v De Keyser's Royal Hotel Limited* [1920] AC 75, p105], but Lord Reid in the *Burmah Oil* case of 1965 expressed some difficulty with this idea [*Burhmah Oil Company (Burma Trading) v Lord Advocate* [1965] AC 75, p105]. Case law exists to support both views, and a clear distinction has not been necessary in any relevant cases. The question may never need to be settled by the courts as there are few cases that deal directly with the prerogative itself.
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> 27. The scope of the Royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, making the courts the final arbiter of whether or not a particular type of prerogative power exists ["the King hath no prerogative, but that which the law of the land allows him"; see the

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1 House of Commons Factsheet G4, *The Glorious Revolution*

2 See Library Research Paper 04/82 *The collective responsibility of ministers – an outline of the issues*

3 AW Bradley and KD Ewing, *Constitutional and Administrative Law,* 13th Ed, 2003, p105 & p246-247

Proclamations Cast (1610) 12 Co Rep 74, 76]. The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all. In such circumstances, the Government, Parliament and the wider public are left relying on statements of previous Government practice and legal textbooks, the most comprehensive of which is now nearly 200 years old [Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown,* 1820].

28. This uncertainty has been criticised. Professor Rodney Brazier has written [R Brazier, 'Constitutional Reform and the Crown' in M Sunkin and S Payne (eds), *The Nature of the Crown,* 1999, p229), '….the demand for a statement of what may be done by virtue of [the Royal prerogative] is of practical importance. Yet it has been said judicially [*R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB26, (CA) p56 (Nourse LJ) that such a statement cannot be arrived at, because only through a process of piecemeal judicial decisions over the centuries have [4]

2 General prerogative powers

Because of the diverse subjects covered by royal prerogative and because of the uncertainty of the law in many instances where an ancient power has not been used in modern times, it is difficult to give a comprehensive catalogue of prerogative powers. However, the constitutional lawyers Bradley and Ewing summarise the main areas where the prerogative is used today as follows:

- **Powers relating to the legislature,** e.g. - the summoning, proroguing and dissolution of parliament; the granting of royal assent to bills; legislating by Order in Council (e.g. in relation to civil service) or by letters patent; creating schemes for conferring benefits upon citizens where Parliament appropriates the necessary finance.

- **Powers relating to the judicial system,** e.g. - various functions carried out through the Attorney General and the Lord Advocate; pardoning of convicted offenders or remitting or reducing sentences; granting special leave for appeal to the Judicial Committee of the Privy Council.

- **Powers relating to foreign affairs,** e.g. – the making of treaties, the declaration of war and the making of peace; restraining aliens from entering the UK and the issue of passports.

- **Powers relating to the armed forces** e.g. – the Sovereign is commander in chief of the armed forces of the Crown and the control, organisation and disposition of the armed forces are within the prerogative.

- **Appointments and honours**, e.g. – appointment of ministers, judges and many other holders of public office; creation of peers and conferring of honours and decorations.

- **Immunities and privileges**, e.g. – the personal immunity of the Sovereign from being sued.

- **The prerogative in times of emergency**, e.g. – requisitioning of ships (where compensation would be payable).

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[4] Ministry of Justice, *The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report,* October 2009, paras 26-28

- **Miscellaneous prerogatives** - various other historic powers relating to such things as royal charters, mining precious metals, coinage, franchises for markets, treasure trove, printing, guardianship of infants.[5]

3 The Crown's personal prerogative powers

There are three main prerogative powers recognised under the common law which still reside in the jurisdiction of the Crown.

Firstly, the appointment of a Prime Minister; the sovereign must appoint that person who is in the best position to receive the support of the majority in the House of Commons. However, this does not involve the sovereign in making a personal assessment of leading politicians since no major party could fight a general election without a recognised leader.

However, if after an election no one party has an absolute majority in the House (as in 1923, 1929 and February 1974) then the Queen will send for the leader of the party with the largest number of seats (as in 1929 and 1974) or with the next largest number of seats (as in January 1924). Alternatively, the sovereign would have to initiate discussions with and between the parties to discover, for example, whether a government could be formed by a politician who was not a party leader or whether a coalition government could be formed.

Secondly, the dissolution of Parliament, in the absence of a regular term for the life of Parliament fixed by statute, the Sovereign may by the prerogative dissolve Parliament and cause a general election to be held. The sovereign normally accepts the advice of the Prime Minister and grants dissolution when it is requested; a refusal would probably be treated by the Prime Minister as tantamount to a dismissal. These areas of the prerogative are the subject of continuing academic debate.[6]

Thirdly, the giving of royal assent to legislation, in 1708 Queen Anne was the last sovereign to refuse royal assent to a bill passed by Parliament. Additionally, no monarchs since the sixteenth century have signed Bills themselves and Queen Victoria was the last to give the Royal Assent in person in 1854.[7]

4 Proposals to reform ministerial prerogative powers

4.1 Public Administration Select Committee Report, *Taming the Prerogative,* 2004

The Public Administration Select Committee published an inquiry into the royal prerogative in March 2004. The Report, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament,* recognised that such powers are necessary for effective administration, especially in times of national emergency, however, it considered whether they should be subject to more systematic parliamentary oversight.[8] The report concluded that the case for reform was unanswerable.

The report concluded that comprehensive legislation should be drawn up which would require government within six months to list the prerogative powers exercised by Ministers.

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5 AW Bradley and KD Ewing, *Constitutional and Administrative Law,* 14th Ed, 2006, p258-26--3

6 For recent discussions see Robert Blackburn "Monarchy and the Personal Prerogatives" *Public Law,* Autumn 2004; Rodney Brazier "Monarchy and the Personal Prerogatives- A personal response to Professor Blackburn", *Public Law,* Spring 2005.

7 AW Bradley and KD Ewing, *Constitutional and Administrative Law,* 13th Ed, 2006, p238-244

8 Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament,* HC 422 2003-04

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, contained these provisions as well as proposals for early legislative action in the case of three specific areas covered by prerogative powers: decisions on armed conflict, treaties and passports. The Report recommended that the Government should, before the end of the then current session, initiate a public consultation exercise on the prerogative powers of Ministers.

The Government's response to this report, published in July 2004, was as follows:

> The Government acknowledges the useful work that the Committee has undertaken on this subject. The Government accepts and welcomes scrutiny of any of its actions, including those taken under the prerogative. However, it is not persuaded that the Committee's proposal to replace prerogative powers with a statutory framework would improve the present position.
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> Ministers are already accountable to Parliament for action taken under prerogative powers, as for anything else. The use of prerogative powers is subject to scrutiny by Departmental Select Committees. Additionally the Prime Minister is subject to twice yearly questioning by the Liaison Committee. It is for Ministers to account for and to justify their actions to Parliament and for Parliament to hold Ministers to account. Such accountability is in itself a form of control exercised by Parliament over the executive.
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> It is long established law that Parliament can override and replace the prerogative by statute, where the individual circumstances make that appropriate. There have been a number of examples in recent years where such a change has been made, for example in the Regulation of Investigatory Powers Act. Parliamentary scrutiny and accountability can also be increased without statutory provision. The rules on scrutiny of EU proposals and the recent developments in parliamentary debate on armed conflict are examples of this.
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> The Government therefore agrees that it is often possible to make out a case for either the transfer of prerogative powers to a statutory basis, or for an increase in the level of non-statutory parliamentary scrutiny. It continues to believe, however, that these changes are best made on a case-by-case basis, as circumstances change. It does not therefore agree with the recommendation for a wide-ranging consultation exercise. This could only result in a snapshot at a fixed moment of what is inevitably a fluid and evolving situation.[9]

4.2 The *Governance of Britain* Green Paper 2007

The *Governance of Britain* Green Paper was published in July 2007, a matter of days after Gordon Brown became Prime Minister.[10] The Green Paper set out plans for wide-reaching constitutional reforms. The prerogative powers held by ministers was the first area addressed in the Green Paper. It stated that:

> The flow of power from the people to government should be balanced by the ability of Parliament to hold government to account. However, then the executive relies on the powers of the royal prerogative … it is difficult for Parliament to scrutinise and challenge government's actions. If voters do not believe that government wields power

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9 http://www.dca.gov.uk/pubs/reports/prerogative.htm#part6

10 For more information see House of Commons Library Research Paper 07/72, *The Governance of Britain Green Paper*

> appropriately or that it is properly accountable then public confidence in the accountability of decision-making risks being lost.[11]

The Green Paper went on to say:

> The Government believes that in general the prerogative powers should be put onto a statutory basis and brought under stronger parliamentary scrutiny and control. [*Footnote:* No changes are proposed to either the legal prerogatives of the Crown on the Monarch's constitutional or personal prerogatives, although in some areas the Government proposes to change the mechanism by which Ministers arrive at their recommendations on the Monarch's exercise of those powers.] This will ensure that government is more clearly subject to the mandate of the people's representatives. Proposals in relation to certain specific powers are set out below and these can be addressed now. The Government also intends to undertake a wider review of the remaining prerogative powers and will consider whether in the longer term, all these powers should be codified or put on a statutory basis.[12]

The Government then outlined plans to reform the following aspects of the Royal prerogative:

- Deploying the Armed Forces abroad;[13]
- Ratifying treaties;[14]
- Dissolving Parliament;[15] and
- Placing the Civil Service on a statutory footing.[16]

The Government also announced that they would undertake a wider review of prerogative powers of ministers:

> The powers currently exercised under the royal prerogative must continue to be held by someone, with appropriate constraints on their use. The Government will consider whether all the executive prerogative powers should, in the long term, be codified or brought under statutory control. The Government will consult on whether:
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> - individual prerogatives, in addition to those discussed above, should be brought onto a statutory basis. Prerogatives to be examined will include the power to grant pardons and remission to prisoners and the power to issues, refuse to issue, revoke or withdraw passports. Both these prerogatives can have a profound effect on the lives of individuals and Parliament, as the representatives of the people, should be confident that it endorses the circumstances in which they are exercised;
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> - certain prerogative powers may now be considered archaic and might be transferred elsewhere or even abolished; and

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11 Ministry of Justice, *The Governance of Britain Green Paper,* Cm 7170, July 2007, para 15

12 *Ibid,* para 24

13 *Ibid,* paras 25-30; for more details see SN/IA/4335 *Parliamentary Approval for the Deployment of Armed Forces: An introduction to the issues*

14 Ministry of Justice, *The Governance of Britain Green Paper,* Cm 7170, July 2007, paras 31-33; for more details see SN/IA/04693 *Parliamentary Scrutiny of Treaties*

15 Ministry of Justice, *The Governance of Britain Green Paper,* Cm 7170, July 2007, paras 34-36; for more details see SN/PC/00831 *Fixed Term Parliaments*

16 Ministry of Justice, *The Governance of Britain Green Paper,* Cm 7170, July 2007, paras 40-48; for more details see SN/PC/02863 *Civil Service Legislation*

- there may be a case for abolishing certain prerogative powers which are now effectively redundant (either because they have been replaced by legislation, such as the guardianship of infants, or because they are not longer applicable, such as the Crown's right to impress men into the Royal Navy).

The process of consultation and review will take account of areas in which prerogative powers are now exercised by the devolved administrations. For instance, in Scotland the prerogative of mercy is exercised by the Scottish Executive as it has responsibility for criminal law and prisons.[17]

4.3 The *Draft Constitutional Renewal Bill* and *Constitutional Renewal* White Paper 2008

The Government set out more detailed proposals in a White Paper and draft Bill in March 2008, *The Governance of Britain – Constitutional Renewal.*[18] The draft Bill addressed some areas of the prerogative, including placing the civil service on a statutory basis. It also gave some more information about the more general review of the prerogative powers proposed in the Green Paper the preceding year. The Government explained:

> … The Government is conducting an internal scoping exercise of the executive prerogative powers – those which remain in use and those which have been superseded in whole or in part by statute, such as the power to grant pardons and remission to prisoners. The Government will consider the outcome of this work and will, in the coming months, launch a consultation on the next steps. …[19]

The Draft Bill and White Paper were scrutinised by a Joint Committee established for this purpose under the chairmanship of Michael Jabez Foster MP. The Public Administration Select Committee also published a report on the White Paper.[20]

The Joint Committee commented on the Government's wider review of prerogative powers as follows:

> The prerogative power to manage the civil service will be transferred to statute in the Draft Bill and we welcome this reform. We note, however, that the Green paper set out a number of prerogative powers that have not been addressed in the Draft Bill or White Paper, including the power to issue, refuse and revoke passports. The Government has now conducted a review across all Government departments to identify prerogative powers and intends to consider the results of this review before consulting in the Autumn. **We commend the Government for undertaking the cross-departmental review of prerogative powers. Like the Public Administration Select Committee, we trust that the results of the review will be published as soon as possible. This is an important element of constitutional reform. Ideally, reform of the prerogative should be approached in a coherent manner, not in a piecemeal fashion.**[21]

The Joint Committee also considered whether placing prerogative powers on the statute books would mean that decisions made under such powers would become justiciable, and whether this would be a positive or negative development. The Joint Committee explained that they had received evidence on both sides of the debate:

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17 Ministry of Justice, *The Governance of Britain Green Paper,* Cm 7170, July 2007*,* paras 50-51

18 Ministry of Justice, *The Governance of Britain – Constitutional Renewal,* Cm 7342, March 2008

19 *Ibid,* paras 245-246

20 Public Administration Select Committee, *Constitutional Renewal: Draft Bill and White Paper,* HC 499 2007-08

21 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill,* HL Paper 166-I HC Paper 551-I 2007-08, para 254

In its recent report, PASC concluded that "[a] perhaps unintended effect of placing prerogative power on the statute book without giving Parliament a role in how it is exercised is that it will become subject to scrutiny and decision, not by Parliament or the people, but by the courts". Professor Vernon Bogdanor, Professor of Politics and Government, Brasenose College, University of Oxford, was concerned about the "great danger that we are asking judges to resolve problems which have already been resolved at a political level". (Q 5) Sebastian Payne, from Kent Law School, University of Kent, told us "his concern about a statute is the impact of drawing the courts into adjudicating on these issues". (Q 146)

Other witnesses were unconcerned about the possible role of the courts. Professor Weir told us that "the point about putting this on a statutory basis is that you do make it justiciable and you do therefore have some kind of control over process which we do not have at the moment." (Q5) Professor Tomkins told us that "section one of the National Health Service Act is a good example: there shall be a duty on the Secretary of State to … provide for a National Health Service…That in itself is not a justiciable duty". (Q23) Graham Allen told us "I think the more we can frame things in statute, the more we can codify things in a written constitution, the clearer the framework for debate will be … So I say that is the strength of codification and statutory power rather than, necessarily, that you can run to the nearest judge to referee for you." (Q691) The Lord Chancellor told us that PASC were "wrong" about the unintended effect of putting the prerogative in statute. (Q 743)

The difference of opinion between witnesses underlines an uncertainty about the potential involvement of the courts in statutory provisions. As part of its current review of prerogative powers, the Government must seek to bring some clarity to this debate and should recognise that any move towards statutory solutions would inevitably risk greater involvement of the courts.[22]

4.4 The *Constitutional Reform and Governance Bill 2008-09*

The *Constitutional Reform and Governance Bill* was introduced to the House of Commons on 20 July 2009 and has been carried over to the 2009-10 session. Although the content of the Bill changed in some ways from the draft Bill as described above, it retains provisions to put the civil service on a statutory basis, and to place the current process for agreeing treaties – the Ponsonby Rule, on the statute book.[23]

4.5 Review of the Executive Royal Prerogative, October 2009

In October 2009 the Government published the review of prerogative powers first promised in the *Governance of Britain Green Paper* in July 2007. The paper discussed definitions of the prerogative and the uncertainty over its extent (see above). The Review went on to state that there are a number of ways in which the exercise of prerogative powers can be controlled and examined by Parliament, including through legislation, accountability to Parliament and Parliamentary approval of expenditure.

The Review explained that the Government had conducted a survey across all central government departments and agencies in order to identify prerogative powers used to perform executive functions, the exercise of which had effectively been delegated to ministers. A list is included as an annex to the report, and is not exhaustive but rather is an overview of areas where prerogative powers are exercised or have recently been exercised.

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22 *Ibid,* paras 355-357

23 For more information see the Library Research Paper 09/73 *Constitutional Reform and Governance Bill [Bill 142 of Session 2008-09]*

The Review considered action to be taken or proposed in respect of prerogative powers, first outlining the proposals to be taken forward in the *Constitutional Reform and Governance Bill* and reform of others underway through non-legislative means. For example, the Government stated that they were preparing a draft of a detailed House of Commons resolution setting out processes the House of Commons should follow in order to approve any deployment of the Armed Forces in conflict overseas. The Review included detailed consideration of a number of other prerogative powers, and whether any reforms would be desirable before summarising these considerations together in the following way:

a) Prerogative powers can provide flexibility in dealing with specific or exceptional circumstances that are not covered by statutory provisions. For example, they provide a basis on which it would be possible for a government to act outside the framework of the Civil Contingencies Act 2004 in circumstances of exceptional urgency or disruption... Enacting a statutory power to do this could result in either an undesirably broad statutory power or one that is insufficiently flexible.

b) Some of the powers are extremely difficult to disentangle from subsequent legislation, covering a wide area. For example... the Armed Forces operate through a complex mix of prerogative – which allows the State (personified by the Crown) to appoint people to carry aims in the service of the State – and statute. Disentangling the current framework to place it on a statutory basis would be a large-scale and complex exercise. The Home Secretary's power and duty to keep the peace, which underpins policing, raises similar questions...

c) Some powers are best described as "archaic" prerogative powers of little relevance in the modern age. These typically cover small, specific issues, like the Crown's right to sturgeon, wild and unmarked swans and whales. Legislating in these cases would be a questionable use of Parliamentary time.

d) In some cases it is not easy, in the absence of relevant judicial pronouncements, to tell whether the prerogative has already been wholly replaced by statute and effective abolished, or whether residual powers may subsist. To the extent that a residual prerogative power subsists, it may provide useful flexibility in unusual circumstances...

e) Some, best described as "residual" powers, are minor, but still possibly useful, legacies of a time before a specific power became statutory. For example, the Treasure Act 1996 applies to all objects found on or after 24 September 1997, but the prerogative remains relevant for a small number of objects found before that date that subsequently come to light. Other examples would be any residual powers that have survived the statutory provisions permitting the early release of prisoners... or the Civil Contingencies Act 2004...

f) Some recent reviews of specific subjects have resulted in decisions to preserve a prerogative power; this was the case with the BBC Charter Review... and the parliamentary proceedings leading to the Inquiries Act 2005... Although the principle that prerogative powers should be made statutory would not have been a primary consideration at the time, in either case, it is questionable whether decisions made carefully and after considerable debate should so soon be overturned.[24]

Lastly the Review summarises the Government's consideration of the prerogative powers, and sets out conclusions and next steps:

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[24] Ministry of Justice, *The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report,* October 2009, para 109

The changes now in train will deal with the most serious concerns about the remaining manifestations of the executive prerogative powers. The Government has concluded that it is unnecessary, and would be inappropriate, to propose further major reform at present. Our constitution has developed organically over many centuries and change should not be proposed for change's sake. Without ruling out further changes aimed at increasing Parliamentary oversight of the prerogative powers exercised by Ministers, the Government believes that any further reforms in this area should be considered on a case-by-case basis, in the light of changing circumstances.[25]

[25] *Ibid,* para 112