Government response to the report of the Political and Constitutional Reform Committee on the Fixed-term Parliaments Bill

Presented to Parliament by the Minister for Political
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Introduction

1. The Government is grateful to the Political and Constitutional Reform Committee for scrutinising the proposals in the Fixed-term Parliaments Bill so quickly and making their Report available before Second Reading of the Bill on 13 September. We hope that the report, along with the Government's response, will help Members in their consideration of the Bill at Committee stage.

2. This Government response addresses the Committee's conclusions and recommendations point-by-point.

Background

3. The Bill has a single, clear purpose: to establish five-year fixed terms for the UK Parliament. The Bill will remove the right of a Prime Minister to seek the dissolution of Parliament for pure political gain, at a time of his or her choosing.

4. This is a significant and unprecedented surrender of Executive power.

5. A natural result of the introduction of fixed terms will be greater stability in the political system. As the Chairman has himself indicated, this will greatly facilitate the planning of parliamentary business and the scrutiny of Government proposals. It will also bring benefits to the wider country and economy, as there will not be uncertainty about the timing of polls, or concern that policies will only be introduced with short-term objectives. Governments will expect, and be expected, to stay in office for five years if they retain the confidence of the House of Commons, and will adopt a programme of business to reflect that expectation.

6. The Government has noted the concerns that have been raised about combining elections to the House of Commons and the devolved legislatures in May 2015. In principle the Government believes that combining elections reduces costs and increases interest and turnout. There are elections somewhere in the United Kingdom every year in May. Where elections run to different cycles, then sometimes they will coincide and sometimes they will not. Under our proposals, for example, elections to the devolved legislatures will only coincide with Westminster elections once in every 20 years. Nevertheless, as the Deputy Prime Minister indicated at Second Reading we are continuing to work with the interested parties to discuss how best to handle this issue.

7. Concerns were raised about a possible impact of the provisions of the Bill on parliamentary privilege. We do not share these concerns, and have published a note to explain why not, a copy of which is attached at Annex A.

Response to conclusions and recommendations

Principle and Process

8. **Recommendation 1: It is questionable whether a Prime Minister should be able to use his position in government to give him and his party an electoral advantage by choosing to hold the next general election to a schedule that best suits him. We therefore acknowledge the principle behind the Fixed-term Parliaments Bill. (Paragraph 1)**

9. The Government welcomes the Committee's support for the principle behind the Bill. This Prime Minister will be the first to give away the significant political advantage of being able to call a snap election. The Bill provides that the power to trigger an early general election will rest with Parliament.

10. **Recommendation 2: We expect to consider the prerogative powers and Executive power more generally in the course of our scrutiny of wider constitutional issues. (Paragraph 3)**

11. The Government will assist the Committee in any scrutiny it wishes to undertake. This Bill is, however, focussed on establishing fixed-term parliaments, and only changes necessary for the present purpose have been made to prerogative powers. The most obvious change is, of course, the abolition of the prerogative power to dissolve Parliament.

12. **Recommendation 3: While we understand the political impetus for making swift progress in this area, bills of such legal and constitutional sensitivity should be published in draft for full pre-legislative scrutiny, rather than proceeded with in haste. We intend to inquire very soon, in co-operation with the Procedure Committee if possible, into how proper pre-legislative scrutiny of such Bills can best be ensured in future, whether through the House's Standing Orders or otherwise. (Paragraph 7)**

13. A natural consequence of legislating at the beginning of the first term of a new Government is that there is insufficient time for full pre-legislative scrutiny of all Bills. However, we believe that the present Bill has had, and will continue to have, detailed and proper scrutiny in Parliament.

14. The Government have given a commitment that future constitutional legislation will receive pre-legislative scrutiny.

The length of the fixed-term

15. **Recommendation 4: The current five-year maximum term was introduced with the expectation that it would probably amount in practice to a four-year term. (Paragraph 11)**

16. **Recommendation 5: Precedent gives no clear answer as to whether Parliaments should last four years or five. (Paragraph 13)**

17. **Recommendation 6: In the limited period we have had to receive evidence, most of the opinion suggests that it would be better for general elections to be held every four years, rather than every five. This is an important point, but not one that we would wish to see obstruct the passage of the Bill through the House. We would, however, expect the Government to explain more fully to the House the advantages and disadvantages of four and five-year terms, and how it weighed these up in reaching its decision on the length of the fixed term. (Paragraph 20)**

18. **Recommendation 7: In any case, there is likely to be pressure to re-examine the timescales for elections across the country—including general elections—in the not too distant future. (Paragraph 21)**

19. We note the evidence presented to the Committee. We also note the Committee's opinion that this is not an issue that should obstruct the passage of the Bill.

20. The Government agrees with evidence provided by Professor Blackburn, that, while comparison with other legislatures can be illuminating, the best and most appropriate scheme for fixed parliamentary terms should be constructed with close attention to the details of our unique political and constitutional arrangements.

21. We also agree with the Committee, when they say that precedent gives no clear answer here. While five years is the current maximum length of a Parliament under the Septennial Act 1715, as amended by the Parliament Act 1911, most Parliaments since the Second World War have lasted between four and five years. Our proposals for fixed terms are therefore faced with a choice of setting the length of the term slightly above or slightly below the average length of Parliaments.

22. We are committed to bringing forward proposals to allow constituents to recall MPs guilty of serious wrongdoing to ensure that MPs remain accountable between elections.

23. We have also built mechanisms for early elections into our fixed-term Parliaments proposals, so that a Government can only carry on into its fifth year if – and only if – it continues to enjoy the confidence of the House of Commons, and so that the House of Commons can move to dissolve Parliament if it believes it is necessary to go to the electorate early.

24. Alongside the need for regular elections, the need for stability and good long-term decision making must also be considered. Most academics, commentators, politicians and the public would argue that Governments can be too short-term in their planning and decision making. This Government is determined to take decisions and plan for the long term, rather than seek short-term advantage. Most major decisions and investments take a significant amount of time for their consequences to appear. A Parliament limited to four years would mean that a Government's useful life would be closer to three. Our view is that this is not adequate to deliver effective governance of the UK. A Parliament limited to five years will allow a full four years for action, and the consequences to become clearer, allowing both better accountability, and a stronger incentive to sustainable long-term decision making.

25. On balance, we believe four years is too short, and five years (the current maximum), coupled with further changes to improve the accountability of both Governrments and MPs, is the right amount of time to ensure strong and stable leadership without allowing a Parliament or a Government to become stale.

Premature ending of a fixed term

26. Recommendation 8: The Government needs to respond to the concerns expressed by the Clerk of the House of Commons about the potential impact of clause 2 of the Bill on parliamentary privilege. (Paragraph 29)

27. Recommendation 9: The purpose of the Bill needs to be achieved without inviting the courts to question aspects of the House's own procedures or the actions of the Speaker, except where this is absolutely unavoidable and clearly justifiable. (Paragraph 33)

28. The Government agrees entirely with the Committee that the purpose of the Bill needs to be achieved without inviting the courts to question aspects of the House's own procedure or the actions of the Speaker. We do not, however, agree with the Clerk of the House that the Bill does invite the courts so to question.

29. Prior to the introduction of the Bill, the Minister for Political and Constitutional Reform and his officials had some productive discussions with the Clerk and his colleagues. As is clear from the Clerk's memorandum submitted to the Committee, there are matters on which ultimately we were not able to agree.

30. The Government's understanding of the privilege implications and the risks of legal challenge arising under the provisions of the Bill is presented in the attached note at Annex A. This note was placed in the House library for the Second Reading of the Bill.

31. The Government's view is that it is not realistic to expect that the courts would wish to start trespassing on such highly politicised issues and matters related to the internal workings of Parliament. There is no reason to believe that the Courts would not continue to regard matters relating to the internal operation of the House as "proceedings in Parliament" in which they cannot interfere.

32. In particular, Article 9 of the Bill of Rights 1689 provides that "proceedings in Parliament" cannot be "impeached or questioned in any court". This is reinforced by the fact that the Bill provides explicitly that the Speaker's certificate is to be "conclusive for all purposes". This means that the decision whether the conditions for an early election are satisfied is for the Speaker, not for the courts or the Executive.

33. A case will only be brought before the European Courts where European Union law or Convention rights are engaged. The subject matter of the Bill is not in any way related to European Union law. There is nothing in this Bill which would give rise to the risk of any parliamentary matters being referred to the European Court of Justice. Likewise, the functions of the Speaker under this Bill do not engage any Convention rights. The exercise of these functions could not therefore be challenged in the European Court of Human Rights.

34. Recommendation 10: Although a number of our witnesses believe that the current drafting of the Bill is already adequate to avoid unwarranted judicial challenge of this kind, the House would be wise to consider whether the approach suggested by the Clerk of the House could be made to work in practice without significantly altering or diluting the purpose of the Bill or opening the door to abuse by Government. His suggested approach is that those parts of the Government's proposals relating to proceedings in the House could be transplanted from the Bill to the House's Standing Orders, and entrenched in Standing Orders so that they could not be overturned by a simple majority. (Paragraph 34)

35. The Government agrees with the expert witnesses who gave evidence to the Committee that the Bill is already drafted in a way which would avoid unwarranted judicial challenge.

36. The Bill gives the House of Commons a fundamental constitutional power which it does not currently possess, the power to require there to be an early general election. It is appropriate that the conditions for the exercise of this new statutory power should be set out in statute.

37. It is essential that the two-thirds requirement be set out on the face of the legislation as opposed to Standing Orders. This is so that any change to the requirement would have to be made by a new Act, which would require extended debate in both Houses of Parliament.

38. As the Committee has noted, setting out the requirement in Standing Orders would not be satisfactory because Standing Orders can be amended, suspended or revoked by a single simple majority vote of the House of Commons only.

39. The Government is not aware of any precedent or other authority that it is possible that a Standing Order passed only by a simple majority could itself make provision for it to be revoked (or amended) only with the approval of a "super-majority". As a matter of principle this does not seem appropriate and reinforces the Government's view that the appropriate place for the two-thirds requirement is in primary legislation. Nor is it appropriate that some of the most significant detail of a reform affecting Parliament as a whole and the Royal Prerogative should be effected by amending Standing Orders of the House of Commons.

40. Recommendation 11: We recommend that the Government and the House should consider whether a Parliament following an early general election should last for only as long as the remainder of the term of the previous Parliament, and whether such a provision would make a super-majority for a dissolution unnecessary. (Paragraph 39)

41. It is entirely possible that a Government could be returned following an early general election with a large majority, in which case it would make little sense to ask the voters return to the polls in as little as a few months. Limiting the term of such a Government to the remainder of the five years since the last scheduled general election would seem unnecessary and unjust.

42. The people expect that when they go to the polls, they are being asked to elect a Government which will last for a full term with a full programme. The proposals in the Bill will provide certainty as to the length of a Parliament and minimise the possibility of multiple elections happening in quick succession.

43. Recommendation 12: The problem that some have identified with the existing situation is that general elections can be timed to partisan advantage. There is a simple and obvious solution to this problem, which deserves to be explored: the Bill could provide that the only situation in which an early general election could be called was where there was cross-party agreement that this was desirable. This could be achieved by amending clause 2 of the Bill to provide that an early general election should take place only where the House agreed by a simple majority to a motion in the name of the Prime Minister to this effect, tabled with the agreement of the Leader of the Opposition, and possibly also with the agreement of the leader of the third largest party in the House. (Paragraph 41)

44. The proposals set out in the Bill already require cross-party agreement for the passing of a dissolution motion, since the threshold has been set at a level which no post-war Government has been able to achieve on its own. A two-thirds majority is also consistent with the approach which was adopted by the UK Parliament for the devolved legislatures. The model proposed by the Committee would place considerable power in the leadership of the parties. The Government's proposal would also allow the involvement of backbenchers in a fuller way than the solution proposed by the Committee, and we therefore believe it is more able to reflect the will of the House of Commons as a whole.

45. Recommendation 13: If the Bill was to be amended in this way, it might avoid the need for separate provision for an early general election where no government could be formed that commanded the confidence of the House. This would be a considerable advantage, because the consequences of the current provisions for confidence motions contained in clause 2 (2) of the Bill are uncertain. (Paragraphs 42-43)

46. The Government believe the proposals in the current Bill are robust and transparent. We welcome the Committee's opinion that their aim is "laudable". We do not believe the case has been made for getting rid of the traditional mechanism of no confidence motions, which should play an important role in holding Governments to account.

47. The Committee raises some perceived uncertainties about the consequences of the current provisions for confidence motions, in paragraphs 47 and 48 of their report. We will clarify them in turn.

48. First, the Committee asks what would happen in an hypothetical situation where a Government formed after the passing of a motion of no confidence is itself unable to command the confidence of the House. In such circumstances, where it is likely that no-one would command the confidence of the House, the provisions of the Bill allow for a motion for dissolution to be put down. If, for whatever reason, no such motion is in fact put down or passed, the remainder of the 14-day government formation period would eventually expire, and a general election would be triggered.

49. Second, the Committee asks, in the context of clause 2(6) which states that the Prime Minister shall recommend to the monarch the date of an early general election, who the Prime Minister would be if no Government can command the confidence of the House. In our constitutional arrangements, the Prime Minister is the person appointed to that office who is asked to form a government until he or she is replaced, irrespective of the confidence of the House. Therefore, if no government is able to command the confidence of the House during the 14-day government formation period after a no confidence vote, the last person so appointed will recommend a date to the monarch.

50. Finally, the Committee notes that the retention of the prerogative power to prorogue Parliament may allow an incumbent Prime Minister to frustrate attempts to form an alternative Government during the 14-day period after a no confidence vote. As the Committee notes, the provisions of the Bill mean that proroguing Parliament in these circumstances would not stop the clock on the 14-day government formation period, and an election would therefore result. Political gamesmanship of the kind envisaged by the Committee would be a very public matter, and we believe it would result only in a damning verdict from the electorate at the subsequent general election. We therefore see no need legally to limit the prerogative further to deal with such an eventuality. The Government considers that such political safeguards in our constitution should not be underestimated.

51. Recommendation 14: We recommend that there should be clarity, before the Bill enters its remaining stages in the House, as to the circumstances in which a government losing the confidence of the House could trigger an early general election, and those circumstances, if any, in which it could not. (Paragraph 45)

52. We recognise that there are a variety of means by which the House may move that it does not have confidence in the Government. The Bill provides that it will be for the Speaker to certify what passing a motion of no-confidence in a Government is, thus leaving this matter within the exclusive cognisance of the House. If the House believes that part of the traditional mechanism of no confidence motions is not reflected in the Bill as presently drafted, we will be prepared to consider this matter during the passage of the Bill.

53. Recommendation 15: We will examine as part of a future inquiry the possibility of the House formally endorsing a new government, after a general election and in other circumstances. (Paragraph 49)

54. In the circumstances the Committee envisages, where a Government has been formed after a general election, or when a Prime Minister has been replaced mid-term, some form of motion which could be construed as a question of confidence will occur in the normal course of business. For example, the debates on the Queen's Speech act effectively as an endorsement of a Government's programme. The Bill does nothing to change this fact. Nevertheless, the Government will assist the Committee in any scrutiny it wishes to undertake.

55. Recommendation 16: We recommend that the Government should explain why the Bill contains no formal provision requiring a government to resign if it loses the confidence of the House. (Paragraph 50)

56. The Bill is focussed on establishing fixed terms and the procedures for calling extraordinary elections. The aim of the Bill is not otherwise to interfere with the

conventions which govern the position where the Government loses the confidence of the House. The Government considers that such matters are better left to convention.

57. In any event, having a provision requiring a Government to resign if it loses the confidence of the House does not reflect the current convention. A Government is able now, and would be able under the Bill, to remain in office after a no confidence motion and contest a general election. Requiring a Government to resign in those circumstances would offend the convention that the Queen is not to be left without a Government.

58. It is not easy to define precisely whether, after the passing of a motion of no confidence in it, a Government should resign or remain to contest a general election. This is the reason why this matter is best left to convention.

Conclusion

59. Recommendation 17: We acknowledge the Coalition's proposal that the current and future Prime Ministers should no longer have the power to call general elections at a time of their choosing, that general elections should be held to a fixed schedule, and that departures from that schedule should be rare, and decided by the House, not the Prime Minister. We regret, however, the rushed timetable that the Government has unnecessarily adopted for the Bill, and the incremental and piecemeal approach to constitutional change that the Bill seems to represent. We trust that the recommendations made in this Report will provide a context for the detailed examination of the Bill by the House at committee stage, if it decides to give the Bill a second reading. (Paragraph 51)

60. The Government welcomes the Committee's acknowledgement of the principle behind the present Bill.

61. As we have already stated, a natural consequence of legislating at the beginning of the first term of a new Government is that there is insufficient time for full pre-legislative scrutiny of all Bills. However, we believe that the present Bill has had, and will continue to have, detailed and proper scrutiny in Parliament. As this is a constitutional Bill, all stages will be taken on the floor of the House, ensuring all Members can take a part in proceedings; and, given that there is already a measure of cross-party support, we see no reason to slow the passage of the Bill artificially.

62. We note, but do not share, the Committee's concern about "the incremental and piecemeal approach to constitutional change". The Coalition Programme for Government sets out a coherent and ambitious plan for constitutional reform

in the UK. In order to achieve this plan the programme must be tackled by dealing with the various issues in an appropriate order.

Annex A: A note from the Minister for Political and Constitutional Reform, deposited in the House of Commons library on 13 September 2010.

FIXED-TERM PARLIAMENTS BILL: NOTE ON IMPLICATIONS FOR PARLIAMENTARY PRIVILEGE

The Clerk of the House of Commons has submitted a memorandum to the Select Committee on Political and Constitutional Reform ("the memorandum") dealing with the privilege aspects of the Fixed-term Parliaments Bill. Prior to the introduction of the Bill, my officials and I had some productive discussions with the Clerk and his colleagues. As is clear from the Clerk's memorandum, there are matters on which ultimately we were not able to agree. Given the importance of these issues I thought that it would be helpful if I provided an early explanation of the Government's view on these issues.

One point which it is important to make at the outset is that the Government continues to consider that it is absolutely right to set out matters of such constitutional importance in primary legislation. The Bill would give the House of Commons a fundamental constitutional power which it does not currently possess, the power to require there to be an early general election. This would involve a significant transfer of power from the Queen, as advised by the Prime Minister, to the House of Commons. Primary legislation is the only appropriate place for both this provision and the safeguards for its exercise.

The Government is not persuaded that placing the safeguards – in particular, the two-thirds requirement – in Standing Orders, as the memorandum suggests, would be satisfactory. Normally, Standing Orders can be overridden by a single simple majority vote of the House of Commons. Paragraph 28 of the memorandum suggests (without citing any precedent or other authority) that it is possible for a Standing Order to provide "for its staying in effect unless repealed by a specified majority". In other words, the memorandum appears to be contemplating that a Standing Order passed only by a simple majority could itself make provision for it to be revoked (or amended) only with the approval of a "super-majority". As a matter of principle this does not seem appropriate and reinforces the Government's view that the appropriate place for the two-thirds requirement is in primary legislation. Nor is it appropriate that some of the most significant detail of a reform affecting Parliament as a whole and the Royal Prerogative should be effected by amending Standing Orders of the House of Commons.

Naturally the view that constitutional reform should be dealt with in primary legislation needs to be balanced against undesirable outcomes, for example, the rebalancing of the relationship between Parliament and the courts. But the Government considers that this Bill would cause no such rebalancing and that the Bill will not in any way open up parliamentary proceedings to the jurisdiction of the courts.

Turning to the specific points raised by the memorandum: it contains a fundamental misunderstanding about the effect of the Bill on the rules and principles that normally apply to protect internal parliamentary proceedings from the scrutiny of the courts, in particular, Article 9 of the Bill of Rights 1689 which provides that "proceedings in Parliament" cannot be "impeached or questioned in any court". The Bill is not intended to override these normal rules and principles and does not say anything about overriding them. The Government sees no reason why the courts would not continue to defer to them.

This position is reinforced by the role which the Bill gives to the Speaker in certifying whether certain events have occurred. In other words, these are matters to be decided by the presiding officer of the House of Commons and not the courts.

The memorandum seeks to raise doubts about the efficacy of such certificates stating that courts might take the view that "what appeared to be a certificate was not a 'certificate' because in making it the Speaker had made an error of law". The memorandum cites the case of *Anisminic v Foreign Compensation Commission* [1969]. Although the *Anisminic* case is authority that courts are suspicious of attempts to oust their jurisdiction, the context of this Bill is entirely different from the circumstances of that case. Crucially, in relation to internal parliamentary proceedings which are already regarded as "off limits", there will be no motivation for courts to interpret the effect of the Speaker's certificate narrowly.

I should make a separate point about the position of the European courts. There is a suggestion in the memorandum that the Bill could bring parliamentary matters before the European Court of Justice or the European Court of Human Rights. This suggestion is wholly without foundation. These courts have jurisdiction only on matters within, respectively, EU law and the European Convention on Human Rights. The subject matter of the Bill is not in any way related to EU law. Nor would any of the functions of the Speaker in issuing a certificate engage any Convention rights.

The memorandum also cites the Hunting Act case, *R (Jackson) v Attorney General* [2005], as authority that courts will interfere in parliamentary proceedings. This case was concerned with the validity of the Parliament Act 1949 (an Act which amended the Parliament Act 1911 in reliance on the procedure set out in the 1911 Act). The important point however is that the House of Lords (sitting in a judicial capacity) reiterated that courts cannot interfere in internal proceedings of Parliament. Far from being authority that courts may intervene in the provisions under this Bill, the case in fact confirms the authority for the reverse – that courts will not involve themselves in internal parliamentary proceedings.

Another consideration in this is the question of the prospect of any of the matters which the Speaker has to certify being, in practice, in doubt. The memorandum refers to circumstances being "highly charged" but appears to confuse political controversy with legal risk. Naturally the question of whether there should be an early election may

indeed be a highly charged political issue, but the mechanism for the trigger – whether a motion has been passed and by how many votes – should be clear-cut. The House of Commons is easily able to deal with such matters every parliamentary sitting day. It is hard to believe that the House would have difficulties with the application of the same procedures in exercising their powers under this Bill.

At the heart of this issue then is whether safeguards for an important new constitutional power for the House of Commons should be set out in primary legislation. The Government considers that it is clear that they should be.

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