Government response to the Joint Committee on the Fixed-term Parliament Act Report

Presented to the House of Commons by the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, and the Minister for the Constitution and Devolution
Presented to the House of Lords by the Minister of State for the Cabinet Office
by Command of Her Majesty

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Foreword

In delivering on the Government's manifesto commitment to repeal the Fixed-term Parliaments Act ("FTPA") the Government has welcomed the valuable contributions of Parliament, noting in particular the work of the Public Administration and Constitutional Affairs Committee, the Lords Constitution Committee and the debates in the last Parliament.

It is in this context that the Joint Committee was appointed to fulfil the statutory duty to conduct a review of the operation of the FTPA, and also to conduct pre-legislative scrutiny of the Government's draft Bill and dissolution principles paper. The Government is particularly grateful to the Committee for how it has balanced its statutory responsibility to conduct a review of the current legislation alongside its scrutiny of the draft Bill, and its consideration of whether the Government's proposal will put in place constitutional arrangements that allow for the effective operation of our parliamentary democracy.

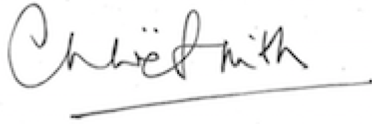
To put in place arrangements that deliver increased legal, constitutional and political certainty around the process for dissolving Parliament, the Government's Bill makes express legal provision to revive the royal prerogative powers relating to the dissolution of Parliament (and the calling of a new Parliament) that existed prior to the FTPA.

In returning to this tried-and-tested system (where the Prime Minister is able to request a dissolution from the Sovereign at the time of the Prime Minister's choosing), a core constitutional principle is that the Government of the day draws its authority by virtue of its ability to command the confidence of the House of Commons. The Government of the day is largely drawn from the membership of the House of Commons, and accordingly the House of Commons will continue to play a key role in our constitutional system.

Consensus and a common understanding of the principles that underpin the relationship between Parliament, Government, the Sovereign and the electorate is a fundamental part of our democracy. It is for this reason that, alongside the draft Bill, the Government published a draft statement of the constitutional principles that underpin the exercise of the prerogative powers to dissolve Parliament and call a new Parliament.

The Government has responded to each of the Committee's recommendations in turn and would welcome the opportunity to continue a constructive dialogue with members of this Committee, and of course, all Parliamentarians during the course of the debate on the Bill.

The Rt Hon Michael Gove MP
Chancellor of the Duchy of Lancaster Minister for the Cabinet Office



Chloe Smith MP
Minister for the Constitution and Devolution

Lord True
Minister of State, Cabinet Office

Review of the Fixed-term Parliaments Act 2011

1. Although there are subtle differences in their respective positions, the manifestos of the two major parties provide the democratic context for this Committee: while mindful of the need to conduct the statutory review, we have focussed more on how the Act should be replaced than how it might be amended. It is also clear that mere repeal of the Act, without any form of replacement, would create legislative uncertainty and a constitutional lacuna, as the only statutory provision regarding the holding of parliaments would then be the remaining elements of the Meeting of Parliament Act 1694. This would clearly be unacceptable. (Paragraph 5)

The Government is grateful to the Joint Committee, the Public Administration and Constitutional Affairs Committee, and the Lords Constitution Committee for its careful consideration of the operation of the Fixed-term Parliaments Act ("FTPA"). The operation of the FTPA (and its effect on the confidence convention) demonstrates the damaging effect uncertainty can have, and ambiguity is an undesirable feature of our constitutional arrangements. We agree that, in repealing the FTPA, we must put in place arrangements that deliver legal, constitutional and political certainty around the process for dissolving Parliament. That is the purpose of the Bill.

Consideration of the Government's repeal proposals

2. It is welcome that the Government has brought forward draft legislative proposals; it was profoundly unsatisfactory that the timing meant the major constitutional changes brought about by the original Act could not have pre-legislative scrutiny. We have accordingly taken both parts of our remit very seriously. The Committee has consciously sought to carry out its statutory duty to review the 2011 Act in its own right, and has not confined itself to the Government's specific proposals for its repeal and replacement. We have considered a range of ways the 2011 Act could plausibly be replaced in addition to the Government's own proposal, in order to inform the debates on legislation that are expected to follow in the next Parliamentary session. (Paragraph 8)

3. We strongly urge the Government not to repeat the mistakes made in not sufficiently scrutinising the Fixed-term Parliaments Act 2011. This means allowing sufficient time for Parliament (including its Select Committees) to explore the full implications of the legislation when it is introduced. It is important that such constitutional legislation secures as wide a degree of cross-party agreement as possible, so that it can stand a chance of lasting more than a single Parliament. (Paragraph 12)

The Government agrees with the Committee that Parliament must give sufficient consideration to the long-term effect of the Bill. The Government is committed to ensuring that Parliament is properly consulted on the policy proposals contained in the Bill. The work done by this Committee, the Public Administration and Constitutional Affairs Committee and the Lords Constitution Committee in reviewing the operation of the FTPA will be valuable in

informing Parliament's consideration of the Bill and dissolution principles paper. We look forward to Parliament giving these matters detailed scrutiny during the passage of the Bill.

Whether the 2011 Act met its aims

4. It is possible that concerns over incumbency advantage will increase. There are likely to be hung Parliaments or confidence and supply arrangements in future. No Parliament can bind its successor, but an important aim of any constitutional arrangement, and therefore for this legislation, must be that it will be equally suitable for whatever the parliamentary arithmetic provided by the electorate. (Paragraph 29)

5. The Fixed-term Parliaments Act very clearly fulfilled its immediate political purpose. Not only did the Parliament last the full term, so did the Coalition Government that was formed at the beginning of it. (Paragraph 35)

As the Joint Committee notes, the FTPA was passed by the Coalition in unique circumstances. Since 2015 it has not had its intended effect as neither the 2015 Parliament nor the 2017 Parliament lasted for a full five-year term. The FTPA has also prevented the calling of necessary general elections and in 2019, Parliament had to introduce bespoke primary legislation to allow for an early general election, showing that the FTPA has not worked efficiently or effectively. The fact that an early general election was also called in 2017 illustrates that flexibility is an essential part of the parliamentary system.

The Government agrees with the Joint Committee that our constitutional arrangements must be able to support and sustain a range of different electoral outcomes. The Bill will return to the status quo ante, a tried and tested system which has delivered across successive Governments, including Governments formed after uncertain election outcomes. When the FTPA is repealed it will be vital that the link between confidence and dissolution is restored in order that the Government will once more be able to designate critical votes as matters of confidence which, if lost, would trigger an early election. This Bill removes the prescriptive constraints that the FTPA introduced and restores the previous system which was able to accommodate Parliament and Government of different configurations formed in response to the outcome of the election.

6. If there is to be a future replacement for the Fixed-term Parliaments Act consideration should be given to allowing the date of any early election to be stipulated in the motion triggering that election. (Paragraph 49)

The Government acknowledges that the Joint Committee, in fulfilling its statutory duty, has considered possible amendments of the FTPA. Rather than putting in place a new statutory scheme, we consider it preferable to return to the status quo ante where the Prime Minister is able to request an early dissolution of Parliament in order to break political gridlock. It is a long-standing principle of our constitution that the Prime Minister must be able to command the confidence of the House of Commons. When the Act is repealed it will be vital that the link between confidence and dissolution is restored in order that critical votes can be designated as matters of confidence which, if lost, would trigger an early election. So the House will continue to play a key role.

As Professor Vernon Bogdanor set out in his evidence to the Committee, 'the supposed power of Parliament to dissolve itself was the power of the party leaders to decide whether or not Parliament should be dissolved and to whip their followers accordingly. The Act altered the conditions under which a Prime Minister could obtain a dissolution, but hardly gave more power to backbench MPs nor did it noticeably strengthen Parliament.'[1]

7. The Early Parliamentary General Election Act 2019 demonstrated the fundamental limits on statutes that seek to regulate the holding of general elections. It is doubtful whether a supermajority requirement can, under our current constitutional arrangements, be enforced unless the House of Lords actively resists an early election Bill. So far as it can be said the Fixed-term Parliaments Act attempted to enforce a supermajority constraint, in practice it did not do so. Moreover, the requirement for an Act of Parliament to override the supermajority meant the decision making power no longer rested solely with the elected House. If there is ever a desire to replace the legislation, it should not contain supermajority provisions. (Paragraph 50)

8. We acknowledge the political events of 2019 were extreme, and the Fixed- term Parliaments Act was not the sole source of difficulty. There is a risk of gridlock in any system which does not guarantee that a Government can either get its business through or can be sure of securing an election. The extent to which the risk of gridlock is a price worth paying for the benefits of fixed-term Parliaments is a matter of political judgment Parliament itself must make if a future administration brings forward another piece of legislation to fix parliamentary terms. (Paragraph 60)

The Government agrees with the Committee's analysis on the limits of the supermajority provisions of the FTPA. The fact that Parliament had to introduce bespoke primary legislation in 2019 to allow for an early general election shows that the FTPA has not worked efficiently or effectively. This was a necessary but not ideal situation, given it required in effect the House of Commons and unelected House of Lords to approve an early election.

The Government believes it is vital that there is a commonly understood mechanism for the resolution of political gridlock as a way out of uncertainty and it is for the electorate to judge on the merits and necessity of a Prime Ministerial decision to request a dissolution of Parliament. As Lord Butler stated in his evidence to the Lords Constitution Committee, the advantages to the country of the Government 'being able to secure an election if it cannot get its business through outweigh that very limited advantage that the Prime Minister's discretion gives the Government of the day.'[2] The core principle of our constitution should be that the Government of the day has the confidence of the House of Commons.

Impact of the 2011 Act on confidence conventions

[1] Professor Vernon Bogdanor (King's College London), written evidence to the Joint Committee on the Fixed-term Parliaments Act, December 2020.
[2] Q3, Lord Butler of Brockwell, oral evidence to Lords Constitution Committee inquiry on the Fixed-term Parliaments Act 2011, October 2019

9. Nothing in the Fixed-term Parliaments Act prevented the House of Commons from debating and voting on a motion of no confidence otherwise than in the terms provided for by the Act. Such a motion may even be more appropriate if it is the House's intention to change the Government rather than to trigger a General Election. But despite the Government's assertion that the Fixed-term Parliaments Act would not change the conventions on confidence, the events of 2019 show that it clearly did so, since confidence motions in the name of the Leader of the Official Opposition were not given time for debate. This removed the previously understood power wielded by the Official Opposition to bring to the floor of the House a motion of no confidence when it is judged one necessary to test the will of the House. In addition, the Government was not able to define votes on any of its key policies as confidence votes. (Paragraph 71)

The FTPA set out the form of confidence motions which would have statutory effect and if lost, could lead to a general election. What remained unchanged is that, were a motion of no confidence tabled by the Official Opposition, the convention set out in *Erskine May* would apply, meaning the Government would give time for a debate on that motion at the earliest opportunity. The FTPA, in codifying how confidence motions worked (and, by making provision for a 14-day period of Government formation, their consequences), limited the ability of the Official Opposition to bring forward a motion of no confidence which, if carried, would have political effect determined by the circumstances of the day.

10. Although the confidence provisions of the Fixed-term Parliaments Act were never fully tested, they are clearly deficient. Giving statutory effects to some confidence motions, but not others, had the effect of undermining a shared understanding of the conventions on confidence and what the consequences of a loss of confidence should be. (Paragraph 76)

11. A decision by the House of Commons to withdraw its confidence in the Government is one of major constitutional significance. A system which allows a Government formally to regain the confidence of the House after it has been lost diminishes the significance of that decision and fosters further uncertainty. The statutory fourteen day period in the FtPA serves no useful purpose and should not form part of any future arrangements for dissolving Parliament and calling elections. (Paragraph 77)

12. Parliament should in future avoid putting any confidence motions on a statutory footing, or giving them direct legal effects. Doing so is unnecessary and risks disrupting important conventions on the formation and resignation of governments under our wider constitutional arrangements. Those conventions otherwise benefit from flexibility and being able to respond to unusual or unexpected political circumstances. Nonetheless, we recommend that the Procedure Committee of the House of Commons review whether some conventions on this matter would benefit from being expressed in Standing Orders. (Paragraph 78)

The Government agrees with the Committee that, when the Act is repealed, it will be vital that the link between confidence and dissolution is restored in order that the Government will

once more be able to designate critical votes as matters of confidence which, if lost, would trigger an early election.

The events of the last Parliament demonstrated that codifying confidence motions and their effects in legislation has not worked. In doing so the FTPA gave legal force to confidence motions but created uncertainty and ambiguity over their political effect.

By returning to the long-standing constitutional norm that the Prime Minister can request a dissolution at the time of their choosing, the Act will restore the link between dissolution and confidence, making clear again the political effect and significance of confidence motions. While Standing Order changes would ultimately be a matter for the House, the Government does not think that regulation of the conventions surrounding confidence would be desirable. This is because flexibility in relation to government formation is an essential part of our parliamentary system and a constitution that provides flexibility in exceptional circumstances is necessary for a functioning and modern democracy. The Government would of course consider carefully any work undertaken by the Procedure Committee.

Whether the House of Commons should retain a say over dissolution

13. It would be possible to replace the Fixed-term Parliaments Act with a provision requiring a vote in the Commons before Parliament was dissolved. A minority of the Committee argues this would be the simplest and most obvious way of protecting the Monarch from being dragged into party political debate. The majority considers it a change which would only have a practical effect in a gridlocked Parliament, which could mean denying an election to a Government which was unable to function effectively, and which might therefore be counter to the public interest. (Paragraph 86)

The FTPA was a departure from the long-standing constitutional norm whereby the Prime Minister could request an early dissolution of Parliament in order to test the view of the electorate. It is the Government's view that the Bill, in making express provision to revive the prerogative power to dissolve Parliament, will restore a set of widely understood constitutional norms.

The Government notes that a minority of the Committee has argued that the House of Commons should retain a role in approving a dissolution. It is a long standing principle of our constitution that the Prime Minister must be able to command the confidence of the House of Commons. The FTPA attached confidence - and the decision of the Prime Minister to call an election - to statutory motions which gave the Commons a direct say in dissolution, arrangements which could hinder the function of representative democracy by making it harder to have necessary elections.

When the Act is repealed the vital link between confidence and dissolution will be restored in order that critical votes can be designated as matters of confidence which, if lost, would trigger an early election. The House of Commons will therefore continue to play a key role. When the FTPA is repealed, Parliament will no longer have a direct statutory role in approving a dissolution and the Government's decision to request a dissolution. Instead the Government will request that the Sovereign dissolve Parliament, a request which would

usually be granted. Only in exceptional circumstances would a dissolution request be refused because as the Joint Committee has concluded a dissolution request is a request to place a matter 'in the hands of the electorate'[3]. The electorate are 'the ultimate authority in a democratic system'[4] and should be given the opportunity at the ballot box to exercise its judgement on the Government's decision to request a dissolution.

The Government's draft legislation

14. The Government should adopt a title—and in particular a short title—that more fully encapsulates the subject matter and future function of the legislation. We recommend the Bill should be entitled the Dissolution and Summoning of Parliament Act. The draft legislation would not, after all, simply repeal the Fixed Term Parliaments Act (that is achieved by clause 1 alone), but replace its provisions. (Paragraph 101)

The Government agrees that a Bill of constitutional significance which seeks to put in place arrangements that deliver legal, constitutional and political certainty around the process for dissolving Parliament, should be titled accordingly. We have reflected on whether an alternative title, such as that suggested by the Committee, would more accurately reflect the purpose of this legislation. To ensure the purpose of the Bill is clearly understood, and that successive Parliaments and future generations are able to discern the intended effect of this legislation, we have amended the short title.

15. Although the relevant prerogative powers of the Monarch are not expressly stated in the Government's draft Bill, their legal nature and scope are widely accepted and straightforward to explain. As long as there is clarity about what these rules are, and how the exercise of prerogative powers is governed by constitutional conventions to do with dissolution, calling of Parliaments, confidence, and government formation, this statutory approach is likely to be effective. We accept that, if the Government wants to return to the status quo ante, doing so by historical reference may aid certainty as to its legal intentions. (Paragraph 118)

16. The evidence we have heard suggests that the drafting of clause 2 of the draft Bill is sufficiently clear to give effect to the Government's intention of returning to the constitutional position, in substance if not necessarily in form, before the passing of the Fixed-term Parliaments Act 2011. The potential legal uncertainty created by passing the Bill as currently drafted, as to the source of the power to dissolve parliament, would only become relevant for practical purposes if the question of dissolution was considered by the courts. (Paragraph 119)

The Government welcomes the Joint Committee's careful consideration of this issue, and its conclusion that the Bill provides legal, constitutional and political certainty to the process for the calling of elections. We recognise that there is a legal and academic debate about the revival of prerogative powers. In recognition of this, to provide increased certainty around the process for dissolving Parliament, clause 2 makes express provision to reinstate the

[3] Paragraph 19 of the Joint Committee's report on the Fixed-term Parliaments Act.
[4] Paragraph 123 of the Joint Committee's report on the Fixed-term Parliaments Act.

prerogative powers relating to the dissolution of Parliament and the calling of a new Parliament.

In relation to dissolution being considered by the Courts, the long-standing and generally understood position is that questions relating to the dissolution of Parliament are not reviewable by the courts, and clause 3 of the Bill (the non-justiciability clause) confirms this.[5]

17. The Government's draft Bill transfers the power to determine whether or not there should be an early election from the House of Commons to the Crown. The Prime Minister will choose the time at which he or she will request a dissolution and the Monarch will decide whether to grant that request. But ultimately elections ensure the electorate—the ultimate authority in a democratic system—has the opportunity to exercise its judgment. (Paragraph 123)

The Bill seeks to restore the status quo ante and position where the Prime Minister (by virtue of having demonstrated that they can command the confidence of the House of Commons), can request a dissolution of Parliament at a time of their choosing. As the historical record has shown, Prime Ministers have been both rewarded and punished by the electorate and Sir Stephen Laws has remarked it is 'wholly proper' that the electorate is able to determine whether they are 'being consulted properly and in the right circumstances.'[6] We agree with the Joint Committee that the public is the ultimate judge on a Government's decision to call a general election.

The role of the Monarch under a revived prerogative system

18. The Dissolution Principles document describes both the powers to dissolve and to summon a Parliament as "personal" prerogatives. We understand the Government's position to be that the Monarch's power to refuse a dissolution would be a real one. If this is the case we believe that although it is unlikely that a Prime Minister's request for a dissolution would be refused, the powers of the Prime Minister to fix the time of an election should not be unlimited and there would be some check on Executive power. If the Government wishes to restore the Monarch's personal prerogative fully, it needs to revise the language in its dissolution principles, so that it is clear the Prime Minister has no power to advise a dissolution, but only to request one. The Government should replace references to "advice" on dissolution with "requests" for dissolution since the Monarch must accept Prime Ministerial advice. (Paragraph 142)

19. In almost every case, a Prime Minister's request for a dissolution would be granted. It is after all a request to put the matter in the hands of the electorate. Nevertheless, it is conceivable that there are some extreme circumstances in which such a request would be inappropriate. One such instance might be where a Prime Minister, having lost a majority in the Commons in a general election, sought a further

[5] This is a point recognised in the Independent Review of Administrative Law report at paragraph 2.84 which sets out that 'It could be argued that clause 3 therefore simply restates the position that everyone understood obtained before the Fixed-term Parliaments Act 2011 was passed, and cannot be sensibly described as an "ouster clause".'

[6] Q11, Sir Stephen Laws oral evidence to the Joint Committee on the Fixed-term Parliaments Act 2011, December 2020.

election before an alternative government could be formed. If the Monarch's role in dissolution is indeed to be more than purely ceremonial, there should be clarity about at least some of the circumstances where exercising a veto would, or at least could, be constitutionally appropriate. Although some uncertainty is inevitable, because of the very nature of a prerogative system and our constitutional monarchy, Parliament and the public should have a clear sense of why a Prime Minister cannot always expect to be granted a dissolution. Any situation in which the Monarch feels it is necessary to refuse a dissolution would place both the person and institution of the Monarch at the centre of an issue of political controversy. This is a serious and central responsibility of the Monarch that should not be lightly used or shied away from. (Paragraph 144)

20. The Government should consider further how best to articulate the role of the Monarch in this process, to build trust in the prerogative system they wish to implement. At the least, any revision of the Cabinet Manual should, unlike the initial Dissolution Principles document, address much more directly how the Monarch's veto operates in practice. (Paragraph 145)

In repealing the FTPA, we are returning to a position whereby the power to dissolve Parliament is exercised solely by the Sovereign as a 'personal prerogative power'. We are grateful to the Committee for its scrutiny of how this is described in the dissolution principles paper, and agree that the better description is that the Prime Minister "requests" a dissolution.

In returning to the position where the Prime Minister is able to request a dissolution, there remains a role for the Sovereign to in certain circumstances refuse a dissolution request. It is not possible to predict every scenario and challenge that a country might face. That is why a constitution that provides flexibility in exceptional circumstances is necessary for a functioning and modern democracy.

It is incumbent on those involved in the political process to ensure that the Sovereign is not drawn into party politics and not involved in the negotiations that follow in a period of Government formation (whether after the withdrawal of confidence or an uncertain election outcome). As the Crown's principal adviser this responsibility falls especially on the incumbent Prime Minister.

The first edition of the Cabinet Manual which was published in 2011, reflected how the dissolution of Parliament operates under the FTPA. As is recognised in the Cabinet Manual, conventions continue to evolve over time. Once the FTPA has been repealed the Government will need to revisit these sections of the Cabinet Manual.

The ouster clause (clause 3) and the role of the courts

21. The Committee recognises that views differ as to whether the Government's approach on justiciability is the best one. A minority of Members on the Committee, for example, believe that a House of Commons vote on dissolution would be a protection against impeaching and questioning by the courts because of Article 9 of

the Bill of Rights 1688. Such a vote would, in their view, give a better guarantee than an ouster clause against unwarranted judicial involvement and would avoid setting a precedent for ouster clauses in future legislation. (Paragraph 160)

22. Some on the Committee have expressed doubts as to whether the "belt-and-braces" or "sledgehammer" approach of an ouster clause is really necessary if the courts Report 69 will not, in practice, entertain legal challenges to dissolution. Provided it is clear that dissolution and calling of Parliaments are personal prerogatives, and that the Monarch's veto over requests is real (rather than ceremonial) they are satisfied that the courts would never, or almost never, grant an application for judicial review of a decision to dissolve Parliament. (Paragraph 161)

23. The majority of the Committee accepts that the general presumption is that Parliament does not intend to oust the jurisdiction of the courts. The Executive should be accountable to both the courts and Parliament. Nonetheless, in principle, the majority believes Parliament should be able to designate certain matters as ones which are to be resolved in the political rather than the judicial sphere, and Parliament should accordingly be able to restrict, and in rare cases, entirely to exclude, the jurisdiction of the courts. This position is not inherently incompatible with the rule of law, even if ousting the courts' jurisdiction will often be at tension with it so that a complete ouster will rarely be appropriate. In this case, when the power in question is to enable the electorate to determine who should hold power, they consider the ouster is acceptable. (Paragraph 162)

24. When Parliament legislates to restrict or oust the jurisdiction of the courts, it should use clear words, and be as explicit as possible about its intentions and the extent of the jurisdiction which it wishes to oust. In the light of previous judgments on other ouster clauses, we understand the Government's approach to drafting. It is clear that the Government wishes to ensure the decision to dissolve one Parliament and summon another, any request for such a dissolution and the advice which may have underpinned the requests or the decision are not justiciable. To do this, it has considered it was necessary to take an expansive approach to drafting. We invite it to consider whether a clearer and more limited approach might be as likely—or even more likely—to be effective. (Paragraph 175)

We agree with the majority view of the Committee that it is acceptable to designate the dissolution of one Parliament and summoning of another as matters to be resolved in the political rather than the judicial sphere. These powers, the exercise of which will enable the electorate to express its view on who should form the next Government, are inherently political in nature and not suitable for review by the courts. This has long been recognised by the courts. For example, in the landmark *GCHQ* case[7] Lord Roskill included the dissolution of Parliament in a list of examples of prerogative powers that in his view were not susceptible to judicial review because their nature and subject matter meant they were not amenable to the judicial process. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 QB 811, Lord Justice Taylor noted dissolving Parliament was not justiciable as it was 'a matter of high policy' 'at the top of the scale of executive

[7] *Council of Civil Service Unions v Minister of State for Civil Service* [1985] AC 374.

functions'. While some prerogative powers have since been held by the courts to be reviewable[8], it is generally accepted that before the commencement of the FTPA, the dissolution of one Parliament and calling of another were not susceptible to judicial review. This has been recognised in the Independent Review of Administrative Law which reported in March 2021[9].

It has been suggested that the Bill could remain silent on the issue of justiciability and simply rely on the generally accepted position described above. However, we agree with the Committee that it is appropriate for Parliament to make clear where it thinks the constitutional boundaries lie. The purpose of clause 3 is to confirm and preserve the generally accepted position.

The recent Independent Review of Administrative Law has recognised this approach.[10] It considered that clause 3 can be seen as a "codifying clause" that 'simply restates the position that everyone understood obtained before the Fixed-term Parliaments Act 2011 was passed' and therefore it may be argued that clause 3 'cannot be sensibly described as an "ouster clause".' as there is nothing to oust. It considered that such a clause 'may not face the kind of judicial pushback that normally attends attempts by Parliament to use "ouster clauses" to cut back on the ambit of judicial review'.

The Committee has invited the Government to consider a more limited approach to the non-justiciability clause. We think that to ensure certainty as to the calling and timing of a general election, it is right that the clause is drafted as such to make it as clear as possible (having regard to previous court judgments) that this is not an area for the courts to review. Judgement on the Government's actions in such matters should be left to the electorate at the polling booth or, in exceptional circumstances, to the Sovereign.

Maximum term of a Parliament

25. The Committee sees no obvious reason why the gap between elections should be greater than five years. The maximum term of a Parliament should be five years from the date of dissolution of the previous Parliament, rather than from when the current Parliament first met. This would prevent the election cycle from "drifting" if successive Parliaments reached, or very nearly reached, their maximum terms. (Paragraph 179)

The Bill returns to the tried-and-tested pre-FTPA position whereby Parliament will automatically dissolve five years after it has met. This provision will allow successive Governments to take a full four years to implement and see through their policies before the run up to a general election.

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[8] For example, R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett (power to grant passports) and R v Secretary of State for the Home Department, ex parte Bentley (power to grant pardons).

[9] The Independent Review of Administrative Law, published in March 2021, paragraph 2.84; see also R. Blackburn "The Prerogative Power of the Dissolution of Parliament: Law, Practice and Reform" (P.L. 2009, Oct, 766-789, 768). On the summoning of Parliament see Bradley, Ewing and Knight Constitutional & Administrative Law (Pearson, 17th Edition), page 265.

[10] Paragraphs 2.81 to 2.85.

The Government recognises that there is a theoretical possibility of "drift" in the election cycle if the life of a Parliament runs from the date of the first meeting rather than from the moment the previous Parliament is dissolved. What is key here is that this provision for maximum five year Parliaments does not extend the life of a Parliament but simply provides for a five-year term and nothing more. Moreover, the historical record has shown that Parliaments have seldom lasted a full term and were in practice dissolved sooner. This was the case even under the FTPA which did not have its intended effect as neither the 2015 Parliament nor the 2017 Parliament lasted for a full five-year term. It is for this reason that the Bill seeks to restore the flexibility that is an essential part of our parliamentary system by reviving the dissolution prerogative to enable Governments, within the life of a Parliament, to call a general election at the time of their choosing.

However, we are grateful to the Committee for raising this matter, and we will continue to give this careful consideration to ensure that the provisions which relate to the lifecycle of a Parliament operate effectively and are clearly understood.

Ensuring an election period starts immediately following dissolution

26. Under the Government's proposals, the dissolution of Parliament does not automatically trigger the statutory election period. It would be possible, legally, at least, for Parliament to be dissolved, and for the Government to delay the proclamation summoning a new Parliament. The Government should legislate to ensure that a proclamation summoning a new Parliament must be made at the same time as, or immediately after, the dissolution of Parliament. This means repealing and replacing section 2 of the Meeting of Parliament Act 1694. (Paragraph 188)

As the Committee notes, the date for the meeting of a new Parliament is set by royal proclamation, on the advice of the Prime Minister. In repealing the FTPA, the draft Bill returned to the position whereby the proclamation summoning a new Parliament triggers the election period. In practice, the proclamation dissolving Parliament also summoned the new Parliament, but the Joint Committee is correct that it would be possible, legally at least, for Parliament to be dissolved without triggering the election period.

We have reflected on the Joint Committee's recommendation, and have amended the Bill so that the statutory election period will be triggered automatically by the dissolution of Parliament. This will ensure that the theoretical possibility of a dissolution without an ensuing election period is eliminated. Given the broad purpose of the Bill is to return to the pre-FTPA system, the Government does not think legislating to depart from such a tried-and-tested system to specify when the proclamation summoning the new Parliament must be made would be proportionate or helpful. Any Government would not wish to delay the first meeting of Parliament but would want to commence its legislative programme at the earliest opportunity.

This amendment to the Bill to make dissolution the trigger of the election timetable will provide legal certainty that when an election is called (and a dissolution granted) the poll is held in a timely manner and on a known date.

Polling day flexibility in the event of the demise of the Crown

27. The draft Bill allows limited discretion to change the date of the polling day in the event of a demise of the Crown, rather than fixing the delay at fourteen days, as is done now. Even with the Fixed-term Parliaments Act, polling day at general elections could fall close to major public holidays. We agree that it is appropriate for there to be a limited degree of extra flexibility in polling dates if the Monarch dies during an election period, and that it should be exercised by Proclamation, on the advice of the Privy Council. It would be sensible for a Prime Minister to consult the Leader of the Opposition and the leaders of other parties in Parliament before seeking to exercise this flexibility. (Paragraph 192)

As the Committee notes, the draft Bill provides in the event of demise of the Crown after a proclamation summoning a new Parliament, limited discretion for the Prime Minister to move the polling day up to seven days either side of the default fourteen postponement. Only in very specific and highly unlikely circumstances would the Prime Minister decide to exercise this power and would seek to do so at the earliest opportunity (likely in response to fast moving external events) to provide certainty to the electorate over the timing of the election. In this, the Government would engage interested stakeholders, including the political parties and electoral administrators, at an appropriate and early opportunity. The provisions on demise have been amended to take into account the amendment to make dissolution the trigger for the election timetable.

Seeking to reduce the 25 working day statutory election period

28. UK General Elections have become more complex because of changes to voter registration and relaxation of the rules to do with postal vote eligibility. Other policy initiatives, such as extending the rights of overseas voters and the introduction of voter ID initiatives seem likely to place additional pressures on electoral administrators. The current legislative framework, set out in the Representation of the People Act 1983, is nearly forty years old. The Committee appreciates the difficulties that electoral administrators might face in reducing the election timetable from its current 25 working days. However, the lengthening of the election period has meant that the time between the dissolution of Parliament and its return is also lengthened. While we consider the country should be without Parliament for as short a time as possible, this must be balanced with the need to ensure that as many citizens as possible can register to vote and exercise their democratic right to vote in elections. (Paragraph 214)

29. We would like to see a significant reduction in the election timetable, insofar as this is compatible with ensuring the register is up to date and proxy and postal votes are possible, including for overseas voters. A cross party working party should be established by Government to examine how the General Election campaign period can be shortened from 25 days without compromising voter participation, including through the increased use of technology and increased focus on year round voter registration. The working party should report its recommendations to Government as soon as possible and in time to ensure any legislative requirements can be put

forward in legislation for consideration before the expected date of the next General Election. (Paragraph 215)

The FTPA made a number of amendments to electoral law. Clause 5 and the Schedule to the Bill contains amendments which either reverse, amend or retain legislative amendments made by the FTPA or subsequent to the FTPA to ensure that our electoral arrangements operate effectively on repeal.

In particular, the FTPA introduced some changes (and also incorporated subsequent changes made by other legislation) to enable the smooth running of elections. In 2013, the Electoral Registration and Administration Act 2013 extended the length of the electoral timetable for UK elections from 17 working days to 25 working days to ensure the smooth and effective running of our elections. The Bill retains the 25 working day period between dissolution and polling day to ensure the continued operability of our electoral system.

In terms of legislation on electoral matters, the Government's current priority is the implementation of manifesto commitments related to electoral integrity. We agree in principle that it is desirable to keep the dissolution period as short as practicable whilst also recognising the importance of ensuring the operability of elections as effective and well-run polls are essential to democracy.

Minimising the periods before dissolution and after polling day

30. In recent years concern has been focussed on the delay to the meeting of Parliament and the reestablishment of its scrutiny mechanisms rather than on the need for a new Parliament to prepare itself. This is particularly acute in the Commons, where committees need to be constituted afresh each Parliament. The Committee considers that it is desirable for the periods in which Parliament is not functioning, or a House is not yet able to scrutinise effectively, should be as short as possible. The election timetable is only one part of this. The Committee believes that both the period between the last sitting of Parliament and dissolution and the period between polling day and the first meeting of Parliament should, wherever possible, be less than a week. While we would be concerned about legislation which dictated Parliamentary procedure, we recommend that the Government consider whether there should be statutory provision setting a shorter limit on the period in which the country can be without a functioning Parliament. (Paragraph 220)

The Government shares the Committee's view that it is desirable for Parliament to meet as soon as possible after polling day, but also its concern that procedures in Parliament should not be codified in legislation and instead should remain a matter for Parliament. The Government believes it is reasonable that, as the Sovereign's principal adviser, the Prime Minister can request a dissolution and advise on the date of the first meeting of the new Parliament.

Recall of MPs Act

We are concerned that the proposed amendments to the Recall of MPs Act 2015, inadvertently, fail to give effect to the Government's policy intentions. (Paragraph 196)

The Government is grateful to the Committee for its forensic consideration of the Government's proposed amendments to the Recall of MPs Act 2015. The Committee rightly identifies the Government's policy intention is to avoid redundant by-elections towards the end of a Parliament. The Government recognises that the initial drafting did not account for how this amendment would interact with the election timetable in Schedule 1 to the Representation of the People Act 1983 as well as the Meeting of Parliament Act 1694, which allows for the issuing of a proclamation summoning a new Parliament to be separated by almost three years from the date of dissolution.

The Government has, in order to address a concern raised by the Joint Committee, decided to amend the Bill to make dissolution the trigger for the election timetable in Schedule 1 to the Representation of the People Act 1983. As the Committee notes, this means the drafting problems identified in relation to the amendments in the Schedule to the Bill to section 5 of the Recall of MPs Act 2015 will no longer apply and the "protected" period against recall will fall in the final six-month period of a full term Parliament, as intended.

The Dissolution Principles document and the operation of conventions

31. The "Dissolution Principles" document is inadequate. It does not reflect the nature of Monarch's personal prerogatives to do with dissolving Parliament prior to 2011. Further by not considering and setting out the interrelated matters to do with other aspects of the election cycle, confidence of the House of Commons and government formation, it cannot provide a proper guide as to how dissolution should operate under a prerogative. The document cannot form the basis of a "shared understanding" of political practice and conventions which will be needed in future. (Paragraph 231)

32. This Report sets out the Committee's views on the conventions on dissolution, Government formation and confidence. We expect the Government to respond to it before any legislation is introduced. In that response the Government must address these conventions in detail, explaining where it agrees with the Committee and where it does not. Most importantly, it must give a full explanation in a statement to Parliament for its position. Consideration should also be given to enshrining some conventions relating to confidence in the House of Commons Standing Orders. (Paragraph 232)

33. We recommend that the principles and conventions set out by the Committee are adopted as the basis for creating a new shared understanding of conventions and practices. (Paragraph 233)

In repealing the FTPA, the Government is returning to the long-term constitutional norm, whereby the Prime Minister could request an early dissolution of Parliament. In doing so, we are restating the tried-and-tested constitutional principles that previously applied to the exercise of the prerogative power to dissolve Parliament.

These principles can only operate effectively when they are commonly understood and where there is tacit agreement that they should be respected irrespective of the particular political challenges and circumstances of the day. Therefore, the Government has published a draft statement of what it thinks these principles are, so that they can be given careful consideration by Parliament.

In response to the Committee's views on the conventions on dissolution, government formation and confidence, the Government agrees with the Committee that the Prime Minister can request a dissolution of Parliament by virtue of his ability to command the confidence of the House. This is a core principle of our constitution.

Confidence

The Committee outlines a number of ways by which the House of Commons could express a lack of confidence in the Government. Whilst such votes have been historically recognised as matters of confidence, it is not possible or desirable to produce a definitive list of what constitutes a motion of no confidence that if lost, would lead to a resignation or dissolution.

There is a convention recognised in *Erskine May* which sets out that, 'the Government always accedes to the demand from the Leader of the Opposition to allot a day for the discussion of a motion tabled by the official Opposition'. This is because it is in the interest of the Government to meet the challenge of a no confidence vote at the earliest opportunity. *Erskine May* also recognises that 'Motions critical of the conduct of Ministers, either individually or collectively, have not been treated as falling within this convention'. To lead to a resignation or a dissolution, by convention these confidence motions ought to be expressed in terms of the Government, not individual Ministers.

Dissolution requests

It is not possible, or desirable, to predict scenarios in which the Sovereign might refuse a dissolution request. It is not possible to predict every scenario and challenge that a country might face. That is why a constitution that provides flexibility in exceptional circumstances is necessary for a functioning and modern democracy.

It is incumbent on those involved in the political process to ensure that the Sovereign is not drawn into party politics and not involved in the negotiations that follow in a period of Government formation (whether after the withdrawal of confidence or an uncertain election outcome). As the Crown's principal adviser this responsibility falls especially on the incumbent Prime Minister.

Government formation

After an election, if an incumbent government retains an overall majority, it will normally continue in office and resume normal business. If the election results in an overall majority for a different party, the incumbent Prime Minister and Government will immediately resign and the Sovereign will invite the leader of the party that has won the election to form a government. (Paragraph 2.11 of the Cabinet Manual).

In the event of an uncertain election outcome, it is the responsibility of the incumbent Prime Minister to remain in office until such a time that they can recommend who should be invited to form a Government. Paragraph 2.10 of the Cabinet Manual specifies that 'Recent examples suggest that previous Prime Ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a government.'

The Cabinet Manual is clear that in the event of a hung parliament, it is the responsibility of the incumbent Prime Minister to resign where there is a clear alternative Government that can be recommended to the Sovereign. Until that point, and in the circumstance where a range of different administrations could be formed whilst negotiations are ongoing between political parties, the Prime Minister remains in office until it is established who is best able to command the confidence of the House.

Conclusion

We are grateful to the Committee for its detailed scrutiny of these principles. The purpose of publishing this draft statement for Parliament's careful consideration is to ensure that from the outset, and in parallel with scrutiny of the Bill, these underlying principles are discussed and debated. They are not intended to cover every scenario. Instead, as with all conventions, they will continue to evolve in response to political circumstances. We look forward to them being given further consideration by Parliament during the passage of the Bill.

Ensuring confidence in a Government can be tested

34. In the past the requirement that a motion of no confidence in the name of the Leader of the Opposition should be debated as quickly as possible has rested on convention. The time taken to arrange such debates has ranged from one to seven days. We consider that motions of no confidence tabled by the Leader of the Official Opposition, whether directed at the Prime Minister or in the Government as a whole, should be debated as soon as possible and preferably on the next sitting day. (Paragraph 236)

35. Given the refusal to find time for a debate on a motion of confidence in the name of the Leader of the Opposition in 2019, it may no longer be sufficient to rely on convention to enforce this. We consider there should be a Standing Order requirement that such a motion of confidence tabled by the Leader of the Opposition should be debated no later than the third sitting day (not being a Friday) after the day on which it is tabled. (Paragraph 237)

It is in the interest of any Government to meet the challenge of a no confidence vote at the earliest opportunity. This is a convention recognised in *Erskine May* which sets out that, 'the

Government always accedes to the demand from the Leader of the Opposition to allot a day for the discussion of a motion tabled by the Official Opposition'.[11]

However, as the events of the 2017-19 Parliament demonstrated, the FTPA's codification of confidence motions (and the uncertainty around what happens in the 14-day period following the passage of a no confidence vote under the FTPA) hindered the function of representative democracy by making it harder to have necessary elections. Moreover, our constitutional democracy functions effectively when it is able to flexibly evolve. This is a principle that Lord Sumption recognised in giving evidence to the Committee when he argued that 'One should be careful not to start codifying conventions, because their practical value is that they represent experience and practice. They represent the way in which Parliament can be made efficiently to work, and what is required to make Parliament work is not necessarily the same today as it was half a century ago.'

To codify this convention and to place in Standing Orders requirements for when motions of confidence are to be debated would unnecessarily curtail the flexibility of our constitution.

Conclusion

The Government is committed to ensuring that, in repealing the FTPA, we put in place arrangements that deliver the maximum possible legal, constitutional and political certainty around the process for dissolving Parliament.

We would like to express our thanks to all those who contributed to the Committee's inquiry. In particular we would like to thank the Committee Chair, the Members and the Committee Secretariat, who have given their time, effort and expertise to scrutinise and improve this legislation throughout the pre-legislative scrutiny process. The Government would also like to express its gratitude for the valuable work of the Public Administration and Constitutional Affairs Committee and the Lords Constitution Committee on the operation of the FTPA. We look forward to both Houses properly scrutinising this important piece of constitutional legislation as well as further discussion and debate of the conventions underpinning the exercise of the dissolution prerogative.

[11] Paragraph 18.44, Erskine May.

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