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Dear Chloe,

Dissolution and Calling of Parliament Bill

Thank you for appearing before the Committee on 23rd June to discuss the Dissolution and Calling of Parliament Bill and for your follow up letter of 1st July. Following the session, the Committee is writing to express its concern with a number of aspects of the Bill and to offer suggestions for routes forward. We believe that these suggestions would better achieve the purposes that the Government has outlined and create the best long-term arrangements for the dissolution and calling of Parliaments. The Committee will outline three areas where concerns persist:

- the lack of clarity of the source of the power to dissolve Parliament;
- the ouster clause; and
- the uncertainty around what conventions, principles and practices will govern the operation of the system set out in the Bill.

The source of the power to dissolve Parliament

You have made the intention of the Government in this Bill clear, stating that the Bill's aim it is to "revive the previous arrangements" and in doing so returning to a "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)."[1] This clear intention was recognised by the Joint Committee and we thank you for setting out these intentions with clarity in your appearance before the Committee. It is clear that the Government would like to bring back the prerogative arrangements and indeed that the fixed term Parliament act had never been passed. Nevertheless, the Fixed-term Parliaments Act 2011 (FTPA) was passed and the consequences of this cannot simply be wished away.

[1] Q6; Explanatory Notes to the Dissolution and Calling of Parliament Bill, p 1

In our report, *The Fixed-term Parliaments Act 2011*, we highlighted the uncertainly in this area saying that:

> *this is a highly contested issue ... It is clear that attempting to revive the prerogative would invite the courts to make the final decision on these issues. These are core political and constitutional questions that neither Parliament nor government should abrogate to the courts. Even if there is a desire to return to the old system for dissolution and calling elections, it would be better setting these arrangements in statute rather than engaging in an unnecessary attempt to revive a prerogative which could have considerable unintended consequences and implications.*[2]

In your oral evidence to us you stated that the Government wants to "*achieve certainty and give people clarity about what has been revived and what has been repealed*" and that the Government has "*aimed to be very clear in the Bill about the effect that we are trying to have*". However, while the intention is very clear, the Committee feels that the substance and detail behind this is not. There remains some considerable uncertainty over what the source of the power to dissolve Parliament will be. Your position is that the prerogative is restored but several witnesses to the Joint Committee disagreed. For example Daniel Greenberg, Counsel for Domestic Legislation, Office of Speaker's Counsel, House of Commons, has said that:

> *The reality is that the restored prerogative powers of dissolution of Parliament will now owe their continued life to a statute, namely section 2(1) of the Draft Bill. That Bill if enacted will direct the courts to behave as if the prerogative power were not converted into a statutory one but had never been diminished. But as a matter of incontrovertible historical fact the continued power of dissolution vested in the Crown will now be owed to statute, simply because it was previously diminished, and then restored, by statute.*[3]

This is important because, as Professor Alison Young outlined, "*even if the content is the same, the courts will deal with statutory powers and prerogative powers in slightly different ways*".[4] It is important that the Government is clear with Parliament not only about its intention but about the effect of the Bill and what the legal position will be if the Bill is passed in its current form. With this in mind, we ask that you set out to us, in writing, the answers to the following questions:

- What would be the source of the power to dissolve Parliament after the Bill is passed?

- What is the legal basis and reasoning for the Government's belief that this is the source? It would be preferable for the Government to choose to publish

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[2] Public Administration and Constitutional Affairs Committee, Sixth report of session 2019-21, The Fixed-term Parliaments Act 2011, HC 167

[3] Written evidence to the Joint Committee on the Fixed-term Parliaments Act FTP 0010

[4] Oral Evidence taken before the Joint Committee on the Fixed-term Parliaments Act on 10 December 2020, Q2

its full legal advice, but at the very least it should endeavour to set this out in full in the explanatory notes.

- If the Government is not certain on what the source of the power to dissolve Parliament is, what considerations have been given to the legal and practical implications of this uncertainty?

The Ouster clause

The Committee has significant concerns regarding clause 3 of the Bill, referred to as the 'Ouster' or 'non-justiciability' clause. In our view, it is both legally unnecessary and constitutionally unwise. We have six distinct but interconnected points that we think the Government and both Houses should take into consideration as the Bill continues its passage.

First, the Government has made clear that the central aim of the Bill is to return to the system in place prior to the Fixed-term Parliaments Act 2011 (FTPA) entering into force. In line with this, you told us that you believe that clause 3 *"simply states what went before"*, going on to say that the clause was needed *"to give maximum clarity. It is actually simply to be able to put in one place, for the avoidance of doubt, that that is how that is seen to be working."*[5]

It was the longstanding and widely understood position that the exercise of the prerogative power to dissolve Parliament was not reviewable by the courts and so was non-justiciable prior to the passing of the FTPA, nor was there a statute setting out non-justiciability. The explanatory notes to the Bill set out the recent relevant legal precedents for this and so I see no need to repeat something already well established and agreed upon.[6] The inclusion of clause 3 in the Bill is something new, it is a change to the old arrangements. Therefore, the Government's claim that clause 3 simply provides clarification is, in the Committee's view, inaccurate.

The Government's approach in clause 3 has found some support, however what is common to all the arguments in favour of the clause is that it is something new rather than a restoration of the status quo ante; it would change the arrangements in an attempt to crystallise the non-justiciability in the previous arrangements through statute in reaction to the decision in the *Miller-Cherry* case.[7] This was the position Sir Stephen laws made to the Joint Committee when he said that *"in the light of the Prorogation judgment, it is obvious why something needs to be said."*[8] Similarly Professor Richard Ekins argues that:

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[5] Q24

[6] Explanatory Notes to the Dissolution and Calling of Parliament Bill, para 8

[7] R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019] UKSC 41

[8] Oral Evidence taken before the Joint Committee on the Fixed-term Parliaments Act on 10 December 2020, Q21

> *Parliament cannot effectively restore the law as it stood immediately before the FtPA in 2011 without addressing the strong risk of litigation challenging a future dissolution. That is, if Parliament is to restore the 2011 legal position it must enact Clause 3 or a clause to similar effect. The Supreme Court's prorogation judgment makes it likely that a future dissolution will be challenged by way of judicial review proceedings. Such litigation would be politically damaging and constitutionally improper.*[9]

What is clear from Professor Ekins' analysis is that clause 3 is there to address judgments handed down subsequent to 2011. Similarly, Robert Craig has raised the concerns that in light of the *Miller-Cherry* case it has been suggested "*that a dissolution could one day be challenged in court*". As such he argues that it is therefore "*essential in this Bill to make crystal clear that judicial intervention would be absolutely unacceptable*".[10]

The Committee has sympathy with these concerns regarding clause 3, however we feel that concerns relating to recent court decisions are misdirected. As Lord Sumption told the Joint Committee, there is no read-across from prorogation to dissolution:

> *The critical difference between the two things is that in the prorogation case in the Supreme Court, the basic problem was that if the Government had prevailed, a public power, which is what the power of prorogation is, would have been available to the Prime Minister without being responsible to anyone at all—not to the monarch, because he is exercising for practical purposes the monarch's power, not to Parliament, because it has been prorogued, and not to the electorate, because they only sit once every five years.*
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> *I think the common law has always been reluctant to accept that a public power can be exercised in a manner that makes the Executive answerable to nobody at all. That is why it was held that they might in certain circumstances be answerable to the courts. A Dissolution is completely different, because a Dissolution does not create the constitutional void of answerability and authority that was implicit in the way that the Government wished to use prorogation last year. It is, as Bagehot said, an appeal to a new Parliament.*[11]

Second, as Dr Craig Prescott describes it, "*one of the difficulties is that the success of the ouster clause itself is a matter for the courts to determine*".[12] The relevant clause of the Bill has clearly drafted the clause in the widest way possible in an attempt to address the manner in which ouster clauses have been read down previously, such as

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[9] Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0007
[10] Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0019
[11] Oral Evidence taken before the Joint Committee on the Fixed-Term Parliaments Act on 7 January 2021, Q108
[12] Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0016

in *Anisminic v Foreign Compensation Commission* and *Privacy International.*[13] As Sir Stephen Laws described, recent ouster clauses – including the one included in this Bill – have *"become larger and larger sledgehammers as a result, because it is clear that the courts will find any device that they can to circumvent them"*.[14] We also note Professor Vernon Bogdanor's view that the unwillingness of the courts to allow *"any unfettered executive discretion"* means the courts are *"perfectly capable of ignoring an ouster clause"*.[15]

Daniel Greenburg, has also expressed that the ouster clause will be *"at best, partially successful"*, going on to explain that:

> *It is impossible to ignore the possibility that a situation may arise in which the courts feel bound to treat, for example, something that is presented as if it were a decision in relation to dissolution as being so far from what might have been expected as not even to fall within the legislative intention of the expression a "purported decision".*
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> *It is difficult to imagine what such a case might look like: but it would have been equally difficult to imagine in advance the circumstances of* Miller (No. 2) *in relation to prorogation.*[16]

Numerous other experts have set out ways in which clause 3 may not succeed in ousting the jurisdiction of the courts.[17] Indeed, it seems that the inclusion of the clause itself may well be the point of law that leads to a dissolution being challenged. It simply does not make sense to the Committee to insert a clause that would create, or at least perpetuate, a faux conflict between those who make the laws, those who execute them and those who interpret them; a situation in which there is unlikely to be a winner. The courts already tacitly recognise the non-justiciability of dissolution. In that context, an ouster clause risks being a confected provocation: a legislative provision that undermines, rather than re-enforces, the mutual institutional respect that exists between the courts and Parliament. The Committee remains unconvinced as to its value and concerned about the conflict it may unnecessarily generate.

Third, it is clear to the Committee that inclusion of clause 3 in the Bill seeks to prevent judicial intervention and interference in normal times. This is the right sentiment. No one wants the courts to insert themselves into the democratic process of the people

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[13] Anisminic Ltd v Foreign Compensation Commission [1968] UKHL 6; R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents), [2019] UKSC 22

[14] Oral Evidence taken before the Joint Committee on the Fixed-Term Parliaments Act on 10 December 2020, Q21

[15] Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0001

[16] Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0010

[17] Oral Evidence taken before the Joint Committee on the Fixed-Term Parliaments Act on 10 December 2020, Q22; Oral Evidence taken before the Joint Committee on the Fixed-Term Parliaments Act on 21 January 2021, Q199; Oral Evidence taken before the Joint Committee on the Fixed-Term Parliaments Act on 21 January 2021, Q203, Q215 ; Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0020; Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0011; Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0005;

choosing who should represent them and ultimately govern the country. We do not believe for the reasons set out elsewhere in this letter that such protection is needed to protect dissolution decisions in 'normal times'. This leaves clause 3 only becoming relevant in extreme situations. As Tom Hickman QC has set out since, "*under our constitution the courts have always stood as a key backstop protection against abuse of power*", clause 3 would potentially remove or weaken this protection.[18] Indeed it is likely in such an extreme situation that the Courts might seek to find a way past an ouster clause, adding further constitutional wrenching to a moment of crisis.

Clause 3 seeks to legislate for a feared future problem in the abstract, namely the interference of the courts in dissolution decisions, when there are already tried and test arrangements (those in place prior to the FTPA) preventing the very thing that the Government seeks to avoid. One of the distinctive characteristics and strengths of the UK constitution is that we are apt in considering present questions to give consideration to the past, enabling us to secure our arrangements for the future. This has enabled the UK to renovate and reform our constitution time and time again. It is one if the strengths of the Government's approach in the Bill that it seeks to repeat this pattern, by drawing on what has worked before. It is with this in mind that the Government would do well to take heed of the concerns of one of the great British constitutional thinks Edmund Burke. Burke warned against legislating in the abstract without a demonstrable problem that needs to be solved.

> *On what grounds do we go to restore our Constitution to what it has been at some given period, or to reform or reconstruct it upon principles more comfortable to a sound theory of government? A prescriptive government, such as ours, never was the work of any legislator, never was made upon any foregone theory. It seems to me a preposterous way of reasoning, and a prefect confusion of ideas, to take the theories which learned and speculative men have made from that government, and then, supposing it made on those theories which were made from it, to accuse the government of not corresponding with them.*[19]

What we should heed from Burke is that there is a real danger that clause 3 is a new "solution" to a problem that does not exist and may never arise, and to which there are already measures in place to deal with that situation should it arise. The Committee feels that acting in this manner could have unforeseen and unintended consequences for our long-established constitutional arrangements.

Fourth, while it is tempting to seek a legal remedy to a potential interference by the courts in dissolution decisions, the issue is ultimately one that is to be dealt with under the political aspect of the constitution, not the legal aspect. Surely it is better and more powerful to simply state - as constitutional fact - that dissolution and the calling of elections is not a matter for the courts, than to try and contrive a law that purports to do so but leaves the validity of such a claim ultimately to be decided on by those same courts. This reinforces the Committee's point that the ouster clause is

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[18] Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0014

[19] Edmund Burke, 'Speech on a Committee to Inquire into the State of the Representation of the Commons in Parliament, 1782', Burke's Works, Vol II, pp487-8

unnecessary and we recommend that a more powerful and constitutionally appropriate way to reinforce the principle of non-justiciability would be to place it in the conventions, principles and practices document.

Fifth, as Professor Vernon Bogdanor has set out, the purpose of the Bill is to seek to bring back the status quo ante for dissolving Parliament. In that system, the power of dissolution rests with the Monarch and the Prime Minister requests that Parliament be dissolved. He stated that:

> *Because dissolution is a decision by the Queen and not a matter of advice, I doubt if it is justiciable. Therefore the status quo ante offers a better protection for a government anxious to avoid any involvement by the courts than the ouster clause proposed in the bill, since the courts are unwilling to allow any unfettered executive discretion and are perfectly capable of ignoring an ouster clause.*[20]

The Joint Committee made precisely this point by insisting that the Government accept that a Prime Minister *requests* the Monarch dissolve Parliament and does not *advise* the Monarch to dissolve Parliament. The Government has accepted the change of language and made the consequential changes in the Explanatory Notes to the Bill. However, the Government has failed to fully recognise that a consequence of this, under the system the Bill purports to establish, the ouster clause is wholly unnecessary. This Committee nevertheless welcomes the changes in language, and agrees with Professor Bogdanor that this language offers better protection from involvement of the courts.

Sixth, the Government has made clear that a Prime Minister has the authority to seek a dissolution because they command the confidence of the House of Commons. This is absolutely correct. As such, all a Prime Minister needs to do is demonstrate this confidence through the passage of a resolution backing an early general election, and as the Joint Committee and many of the witnesses to their inquiry pointed out. This would also provide the protection of Article 9 of the Bill of rights 1688. As Lord Hennessey put it, if any challenge to a dissolution decision was made following a vote of the House of Commons, "*Article 9 would rise and ride across the scene in full armour if the courts tried to get involved*".[21] While there is obviously the option of including a vote by the House of Commons in relation to dissolution in the Bill, we agree that this is unnecessary. To assuage the Government and others' concerns in regard to justiciability and the ouster clause, one option would be to adopt a practice, with a view to establishing a convention, that an early general election would only be called following a resolution of the House of Commons. In addition to providing a firmer guarantee that the courts will not become involved, we also suggest that such a practice statement would enable the arrangements in the Bill to better equipped to deal with any future minority and coalition Governments.

Conventions, Principles and Practices

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[20] Written evidence to the Joint Committee on the Fixed-Term Parliaments Act FTP0001

[21] Oral Evidence taken before the Joint Committee on the Fixed-Term Parliaments Act on 28 January 2021, Q264

In order for the system established by the Bill to function appropriately for a modern democracy, it will need to be governed by a clear, widely-recognised and accepted set of conventions, principles and practices. These are as important to fulfilling the Government's intentions than the legislation itself, if not more so. The Government recognised this, as evidenced by the publication of the Dissolution Principles document alongside draft Bill. The Joint Committee gave considerable attention to the document and Conventions, principles and practices, ultimately describing the document as "inadequate" and setting out its view of the principles and conventions.[22]

This is a matter of grave concern to the Committee. In your oral evidence, you told us the intention behind this document was to "*kick off the debate*". However, the Government has not continued the conversation. You told us that you did not think it would have "*been practical or reasonable for the Government to do a running reprint of that after every report that came back or at every moment. You would want to do that sparingly*".[23] We have to respectively but strongly disagree with this. It is precisely by responding in detail to the Reports of Parliamentary Committees that the conversation is continued and agreement on the principles is reached. Given the importance of these principles to the operation of the framework established by the Bill, discussion and refinement of these principles is as important as scrutiny of the Bill itself.

We therefore call upon the Government to produce a document setting out its view of the conventions, principle and practices, in good time ahead of Committee stage in the House of Commons, and to hold a separate debate on the floor of the House to discuss the document.

Thank you once again for your engagement with the Committee on this important constitutional piece of legislation. We look forward to receiving your full response by Tuesday 31th August. We will be placing a copy of this letter in the public domain and will do the same with your response once received.

Yours ever,

William Wragg MP
Chair, Public Administration and Constitutional Affairs Committee

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[22] Joint Committee on the Fixed-Term Parliaments Act, Session 2019–21, Report, HC 1046 HL 253, Chapter 5
[23] Q62