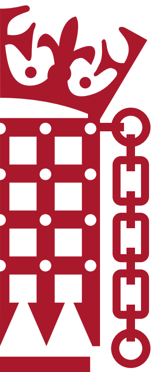

HOUSE OF LORDS

Select Committee on the Constitution

8th Report of Session 2021–22

Dissolution and Calling of Parliament Bill

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Select Committee on the Constitution

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Committee staff

The current staff of the committee are Michael Torrance (Clerk), Rachel Borrell (Policy Analyst) and Jackie Lam (Committee Operations Officer). Professor Stephen Tierney and Professor Alison Young are the legal advisers to the Committee.

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Dissolution and Calling of Parliament Bill

Introduction

1. The Dissolution and Calling of Parliament Bill ('the Bill') was introduced to the House of Commons on 12 May 2021 and passed on 13 September 2021 by a large majority.[1] It was brought to the House of Lords on 14 September and second reading is scheduled for 30 November.

2. The main purpose of the Bill is to repeal the Fixed-term Parliaments Act 2011 ('the FTPA 2011') and to 'revive' the prerogative power of dissolution which existed immediately prior to the FTPA 2011. This will return the power to dissolve Parliament to the monarch, at the request of the Prime Minister.

3. A commitment to repeal the FTPA 2011 was included in the manifestos of the Conservative and Labour parties for the 2019 general election.[2]

Constitutional legislation

4. The Committee has noted in the past the importance of ensuring that significant constitutional legislation receives sufficient scrutiny from Parliament.[3] The Government published a bill in draft,[4] which was scrutinised by the Joint Committee on the Fixed-term Parliaments Act.[5] In addition, both this Committee and the House of Commons Public Administration and Constitutional Affairs Committee have produced reports in anticipation of the repeal of the FTPA 2011.

5. When we considered the Fixed-term Parliaments Bill in 2010 we were not convinced that a strong enough case had been made to overturn an established constitutional practice. We said that the Bill owed more to short-term political considerations than an assessment of constitutional principles.[6] In our report on the FTPA 2011 in 2020 we considered that the Act had "changed core aspects of the UK constitution" and that "parliamentarians must be mindful that constitutional change should not be undertaken lightly or with the short term in mind. Constitutional change needs to be able to

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1 The Bill's committee stage also took place on 13 September and there were no amendments. On third reading 312 MPs voted in favour of the Bill and 55 against. See HC Deb, 13 September 2021, cols 719–59.

2 Conservative and Unionist Party Manifesto 2019, *Get Brexit Done: Unleash Britain's Potential*, p 48: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative_2019_Manifesto.pdf, Labour Party Manifesto 2019, *It's time for real change: for the many not the few*, p 82: https://labour.org.uk/wp-content/uploads/2019/11/Real-Change-Labour-Manifesto-2019.pdf [accessed 18 November 2021]

3 See Constitution Committee, *The Process of Constitutional Change* (15th Report, Session 2010–12, HL Paper 177), para 195

4 Cabinet Office, *Draft Fixed-term Parliaments Act 2011 (Repeal) Bill*, CP 322, December 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940027/Draft-Fixed-term-Parliaments-Act-Repeal-Bill.pdf [accessed 18 November 2021]

5 Section 7(4)–(6) of the FTPA 2011 required a committee to be established to review the operation of the Act. The Joint Committee combined that task with pre-legislative scrutiny of the draft bill.

6 Constitution Committee, *Fixed-term Parliaments Bill* (8th Report, Session 2010–12, HL Paper 69), para 20

stand the test of time."[7] The Joint Committee on the Fixed-term Parliaments Act considered it important for constitutional legislation to secure as wide a degree of cross-party agreement as possible, so that it can stand a chance of lasting more than a single parliament.[8] **We agree it is important for constitutional legislation to achieve as wide a degree of political consensus as possible, so that constitutional changes are able to stand the test of time.**

Legal certainty

6. Clause 1 repeals the FTPA 2011. The FTPA 2011 placed the power to dissolve Parliament on a statutory footing and fixed parliamentary terms to five years, subject to two exceptions.[9]

7. The explanatory notes to the Bill say Clause 2 "makes express provision to make the prerogative powers relating to the dissolution of Parliament, and the calling of a new Parliament exercisable again, as if the 2011 Act had never been enacted".[10]

8. Reviving prerogative powers by statute is an innovation and is therefore of considerable constitutional significance. There has been academic debate on whether clause 2 revives both the content of the prerogative power of dissolution, and its nature as a prerogative power, or whether clause 2 provides for a new statutory power that contains the same content of the prerogative power of dissolution as it existed immediately prior to the enactment of the FTPA 2011.[11]

9. In our report on the FTPA 2011 we said that "prerogative powers are an exception to the sovereignty of Parliament".[12] We noted the academic uncertainty surrounding both whether repealing the FTPA 2011 would suffice to revive the prerogative power of dissolution and whether it would be possible to revive a prerogative power. Given this uncertainty, the Committee concluded that the best way of ensuring legal certainty and removing the possibility of future legal challenges would be to create a new statutory power, rather than to attempt to revive a prerogative power.[13] The Public Administration and Constitutional Affairs Committee made a similar recommendation.[14]

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7 Constitution Committee, *A Question of Confidence? The Fixed-term Parliaments Act 2011* (12th Report, Session 2019–21, HL Paper 121), paras 21 and 155

8 Joint Committee on the Fixed-Term Parliaments Act, *Report* (Session 2019–21, HC 1046, HL Paper 253), para 12

9 First, an early parliamentary general election could be held following a vote of no confidence if, within a 14-day period following a vote of no confidence, there had been no parliamentary vote of confidence in a government. Second, an early parliamentary general election would take place following a vote of two-thirds of the members of the House of Commons in favour of an early parliamentary general election.

10 Explanatory Notes to the Dissolution and Calling of Parliament Bill (Bill 8-EN, 58/2, 12 May 2021), para 18

11 See Constitution Committee, *A Question of Confidence? The Fixed-term Parliaments Act 2011* (12th Report, Session 2019–21, HL Paper 121), para 37. See also letter from PACAC to Chloe Smith, Minister for the Constitution and Devolution, 21 July 2021: https://committees.parliament.uk/publications/6905/documents/72577/default/..

12 Constitution Committee, *A Question of Confidence? The Fixed-term Parliaments Act 2011* (12th Report, Session 2019–21, HL Paper 121), para 3

13 *Ibid.*, para 39

14 See Public Administration and Constitutional Affairs Committee, *The Fixed-term Parliaments Act 2011* (Sixth Report, Session 2019–21, HC 167), para 50

10. However, the Joint Committee subsequently concluded that the legal nature and scope of the prerogative power is "widely accepted and straightforward to explain" and that as long as "there is clarity about what these rules are, and how the exercise of prerogative powers is governed by constitutional conventions", the Government's preferred approach was likely to be effective. The Joint Committee concluded that the drafting of clause 2 was "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."[15]

11. The Government believes that there is no legal uncertainty. Regardless of whether the power to dissolve Parliament is founded on a revived prerogative power or in statute, clause 2, in its view, clearly instructs the courts to treat the power as if it is a prerogative power. In addition, the Government argues that any lack of certainty as to the nature of the power of dissolution has no practical importance.[16]

12. The main reason for differentiating between a prerogative and a statutory power concerns judicial review. There are some types of judicial review that apply only to statutory powers, or that apply differently to prerogative powers.[17] Clause 3 is designed to ensure that the power of the dissolution of Parliament cannot be reviewed by the courts in any respect (see below). As a result, the Government does not believe there is a need to resolve whether the power of dissolution is a prerogative or a statutory power to determine the appropriate standards of judicial review.[18]

13. That said, uncertainty remains as to how the courts will interpret clause 2—namely, whether they will interpret it as an instruction to treat the power of dissolution in the same manner as a prerogative power. This is important in determining whether, in exceptional circumstances, the courts would feel compelled to override a decision to dissolve Parliament.

14. **Whether, and how, a prerogative power which has been extinguished by statute can be revived is a complex matter which has been much discussed by academics. We note that the Joint Committee on the Fixed-term Parliaments Act was satisfied that the Government's preferred approach, as in clause 2 of the Bill, was "clear, and properly encapsulates its intentions."**

Non-justiciability/ouster clause

15. Clause 3 is designed to ensure that the power of dissolution cannot be questioned by the courts. It is very broadly worded in an attempt to ensure that it removes all possibility of judicial review. First, the clause removes judicial review over the exercise or purported exercise of the power of dissolution. Second, the clause removes judicial review over decisions or purported decisions relating to the exercise of the power of dissolution. Third, the clause excludes a court from determining the limits or extent of this power.

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15 Joint Committee on the Fixed-Term Parliaments Act, *Report* (Session 2019–21, HC 1046, HL Paper 253), paras 118-119

16 Letter from Chloe Smith, Minister for the Constitution and Devolution to PACAC, 12 August 2021: https://committees.parliament.uk/publications/7141/documents/75484/default/

17 R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] UKSC 44

18 Letter from Chloe Smith, Minister for the Constitution and Devolution to PACAC, 12 August 2021: https://committees.parliament.uk/publications/7141/documents/75484/default/

16. The most significant provision is clause 3(c), which prevents a court from examining the "limits or extent" of the power of dissolution. It is clear this is an ouster clause. It is specifically designed to ensure that the power of dissolution cannot be subject to judicial review in the same manner as occurred over the prerogative power of prorogation in the Supreme Court's decision in *Miller v Prime Minister*.[19] This is reinforced by the explanatory notes to the Bill.

17. However, the clause goes further because it excludes judicial review beyond that which took place in *Miller v Prime Minister*. In that case, the Supreme Court did not specifically determine the limit or extent of the prerogative power of prorogation. Rather, it determined that the scope of the prerogative power was limited such that, were the prorogation to have the effect of "frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive". This approach would seem to require the Government to provide a reasonable justification, reviewed by the courts, of a prorogation that would otherwise have the effect of frustrating or preventing Parliament from performing its functions.

18. Clause 3(c) is so clearly worded that it is difficult, if not impossible, to see how it could be interpreted to preserve judicial review, even in the most extraordinary circumstances. Consequently, were the power to dissolve Parliament to be abused, the courts may feel that the only way to protect constitutional principles would be to rely on the obiter remark by Lord Carnwath in *Privacy International v Investigatory Powers Tribunal* that "regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law".[20]

19. The majority of the Joint Committee believed that 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." The Joint Committee did not consider this position to be inherently incompatible with the rule of law but considering the tensions with this principle thought a "complete ouster will rarely be appropriate".[21] In the context of the Bill, taking the view that the electorate would be able to determine who should hold power, the Joint Committee considered the ouster clause to be acceptable.[22] However, while the Joint Committee understood why the Government felt it necessary to adopt an expansive approach to drafting, it invited them "to consider whether a clearer and more limited approach might be as likely—or even more likely—to be effective."[23]

20. The Public Administration and Constitutional Affairs Committee has raised concerns about clause 3. In particular, it questioned whether the clause would

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19 *R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41

20 *R (Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22

21 See also chapter 2 of The Independent Review of Administrative Law, *Report*, CP 407 (March 2021): https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/IRALreport.pdf [accessed 18 November 2021]

22 Joint Committee on the Fixed-Term Parliaments Act, *Report* (Session 2019–21, HC 1046, HL Paper 253), para 162

23 *Ibid.*, para 175

succeed in completely removing judicial review and, specifically, whether the broad wording of the clause would be more likely to give rise to arguments that the clause should be read down by the courts in possible future litigation.[24] This risk is exacerbated as it is likely that litigation over the use of the power of dissolution would arise only in exceptional circumstances.

21. There is a risk that a Prime Minister might abuse the power of dissolution if the courts are unable to exercise control over the limits and extent of this power, particularly in exceptional circumstances. This might in turn prompt the courts to either read down or refuse to apply the ouster clause. It is possible to use more qualified wording as found in clause 2 of the Judicial Review and Courts Bill,[25] which partially removes judicial review over decisions of the Upper Tribunal to refuse to grant an appeal of a decision of a lower tribunal. However, it preserves judicial review to check whether a valid application has been made to the Upper Tribunal; if the Upper Tribunal was improperly constituted; if the Upper Tribunal acted in bad faith; or if the Upper Tribunal's decision constituted a fundamental breach of the principles of natural justice.

22. The Public Administration and Constitutional Affairs Committee recommended considering whether the House of Commons should continue to have a role in deciding when a general election should be held.[26] While the Joint Committee noted that replacing the FTPA 2011 with a requirement for the Commons to hold a vote before Parliament was dissolved would avoid the need for an ouster clause,[27] as well as removing any perception that the monarch may not be politically neutral, a majority of the Joint Committee's members did not support such an approach.[28]

23. **The use of ouster clauses to restrict or exclude judicial review of executive decisions touches the bedrock of the constitution, particularly the precise balance between the rule of law, the separation of powers and the sovereignty of Parliament. On the one hand ouster clauses should provide legal clarity about the ability of the executive to make decisions which may be considered more appropriate to political rather than judicial deliberations. On the other hand, judicial review should provide a backstop against exceptional use of an executive power which significantly erodes a fundamental principle of the UK constitution.**

24. **There is a risk that a Prime Minister might abuse the power of dissolution if the courts are unable to exercise control over the limits and extent of this power, particularly in exceptional circumstances.**

25. ***We recommend that legislative intervention by Parliament in this area should only be resorted to in defined and exceptional circumstances. We note that the Government has included a partial and qualified ouster clause in clause 2 of the Judicial Review and Courts Bill. The***

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24 Letter from PACAC to Chloe Smith, Minister for the Constitution and Devolution, 21 July 2021: https://committees.parliament.uk/publications/6905/documents/72577/default/

25 Judicial Review and Courts Bill

26 See Public Administration and Constitutional Affairs Committee, *The Fixed-term Parliaments Act 2011* (Sixth Report, Session 2019–21, HC 167), para 69

27 As a vote would be a proceeding in Parliament and would not be questioned by the court under Article 9 of the Bill of Rights 1689.

28 Joint Committee on the Fixed-Term Parliaments Act, *Report* (Session 2019–21, HC 1046, HL Paper 253), paras 83–86

default position is that matters of justiciability should be determined by the courts. It is for Parliament to determine whether the ouster clause in this Bill is acceptable.

Maximum term of a parliament

26. Clause 4 provides for the automatic dissolution of Parliament on the fifth anniversary of the day on which Parliament first met. This provision is required to reinstate the maximum term of a Parliament as five years, which was repealed by the FTPA 2011.[29] ***We recommend that the House endorses the reinstatement of five years as the maximum term of a Parliament.***

The role of the monarch

27. Before 2011, the prerogative power of dissolution was a personal prerogative of the monarch. The Prime Minister could request that the monarch dissolves Parliament and the monarch had the discretion to refuse.

28. As the Bill is clear that it intends to revive the pre-FTPA 2011 prerogative power, it is important to be clear what the nature of that power was. As the Joint Committee observed: "If the old conventions on dissolving and summoning Parliaments are to be restored, or indeed if they are to be replaced by new ones, there needs to be a political process to identify, and to articulate, what those conventions are."[30]

29. The Government issued a set of Dissolution Principles when it published its draft Bill. These principles differ from and are less clear than the Lascelles Principles. Both sets of principles are in Appendix 2. The Joint Committee considered the Dissolution Principles to be "inadequate" as they did "not reflect the nature of the Monarch's personal prerogatives to do with dissolving Parliament prior to 2011." Instead, the Joint Committee set out its understanding of the conventions on dissolution, government formation and confidence and recommended that these should be "adopted as the basis for creating a new shared understanding of conventions and practices" which could eventually be set out in an updated Cabinet Manual.[31]

30. In our report on the *Revision of the Cabinet Manual* we recommended that a draft update of the Cabinet Manual should be produced as soon as possible. Chapter two of the Cabinet Manual concerns elections and government formation; it currently reflects the terms of the FTPA 2011.[32] The Cabinet Secretary, Simon Case, told us he anticipated that Parliament and the public would be consulted on any updates to the Manual, before they were finalised.[33] This was the approach adopted when producing the first edition of the Manual.

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29 The maximum length of a parliament was set at seven years by the Septennial Act 1715. This was reduced to five years by the Parliament Act 1911.

30 Joint Committee on the Fixed-Term Parliaments Act, *Report* (Session 2019–21, HC 1046, HL Paper 253), para 227

31 *Ibid.*, pp 61–64. See also letter from Chloe Smith, Minister for the Constitution and Devolution, to PACAC, 12 August 2021: https://committees.parliament.uk/publications/7141/documents/75484/default/.

32 Constitution Committee, *Revision of the Cabinet Manual* (6th Report, Session 2021–22, HL Paper 34), paras 34–35 and 45–46. See Cabinet Office, *The Cabinet Manual: a guide to the laws, conventions and rules on the operation of government* (1st edition, October 2011): https://www.gov.uk/government/publications/cabinet-manual [accessed 18 October 2021]

33 Constitution Committee, *Revision of the Cabinet Manual* (6th Report, Session 2021–22, HL Paper 34), para 32

31. As Clause 3 excludes judicial review of powers relating to the dissolution of Parliament, and Parliament will no longer have a role, only the monarch can perform the role of a 'constitutional backstop' to prevent a potential abuse of the power of dissolution. However, it is important to ensure that, when performing this role, the monarch's political neutrality is protected. It therefore becomes even more important to ensure that the Dissolution Principles provide as clear an account as possible as to when it is constitutionally legitimate to refuse to grant a dissolution of Parliament.

32. ***We repeat our recommendation that a draft update of the Cabinet Manual should be produced as soon as possible, and that Parliament and the public should be consulted on the text before it is finalised. We also urge the Government to respond to our report on the revision of the Cabinet Manual, which was due by 8 September.***

33. ***We recommend that the Dissolution Principles should be subject to further detailed scrutiny by Parliament, preferably as part of a consultation on a draft update of the Cabinet Manual. The principles should be clear and reflect a general political consensus. They should also safeguard the political neutrality of the monarch in the dissolution process.***

Devolution implications

34. The Bill extends to the whole of the United Kingdom.[34]

35. The Scottish and Welsh governments have expressed concern that, by allowing the Prime Minister to request a dissolution of Parliament from the monarch at any time, the Bill risks allowing a UK-wide general election to be scheduled at the same time, or close to, national or local elections in Scotland, Wales or Northern Ireland.[35] Under the Scotland Act 1998 and the Government of Wales Act 2006, if a UK general election is called for the same day as an ordinary election to the Scottish Parliament or the Welsh Parliament/Senedd Cymru, these scheduled elections must be moved.[36]

36. ***We understand the concerns expressed by the Scottish and Welsh governments about the possibility of UK-wide general elections being scheduled at the same time, or close to, elections in Scotland, Wales or Northern Ireland. We recommend that the UK Government should take account of the dates of these elections before deciding when to hold a UK-wide general election.***

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34 Dissolution and Calling of Parliament Bill, clause 6 [HL Bill 51]. The Schedule includes consequential amendments to the Scotland Act 1998, the Referendums (Scotland) Act 2020, the Representation of the People (Scotland) Regulations 2001, the Governance of Wales Act 2006 and the Wales Act 2014. These amendments apply only in Scotland and Wales respectively. As these amendments are purely consequential, it is the Government's view that the Bill does not require the legislative consent of the devolved legislatures. See Explanatory Notes to the Dissolution and Calling of Parliament Bill (Bill 8-EN, 58/2, 12 May 2021), para 14

35 Letter from George Adam MSP and Mick Antoniw MS to Kemi Badenoch MP, 1 October 2021: https://committees.parliament.uk/publications/7584/documents/79592/default/. Following the passage of the Fixed-term Parliaments Act 2011, elections to the House of Commons and the devolved legislatures in Scotland and Wales were all due to take place in May 2020. To avoid these elections coinciding, the terms of the Scottish Parliament and the Welsh Parliament were extended from four to five years. However, no general election ultimately took place in 2020.

36 Scotland Act 1998, section 2; Government of Wales Act 2006, section 3

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Doocey
Baroness Drake
Lord Dunlop
Lord Faulks
Baroness Fookes
Lord Hennessy of Nympsfield
Lord Hope of Craighead
Lord Howarth of Newport
Lord Howell of Guildford
Lord McAvoy
Lord Sherbourne of Didsbury
Baroness Suttie
Baroness Taylor of Bolton (Chair)

Declarations of interest

Baroness Doocey
No relevant interests
Baroness Drake
No relevant interests
Lord Dunlop
No relevant interests
Lord Faulks
Chair, Independent Review of Administrative Law
Baroness Fookes
No relevant interests
Lord Hennessy of Nympsfield
No relevant interests
Lord Hope of Craighead
No relevant interests
Lord Howarth of Newport
No relevant interests
Lord Howell of Guildford
No relevant interests
Lord McAvoy
No relevant interests
Lord Sherbourne of Didsbury
No relevant interests
Baroness Suttie
No relevant interests
Baroness Taylor of Bolton (Chair)
No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests: https://members.parliament.uk/members/lords/interests/register-of-lords-interests

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They both declared no relevant interests.

APPENDIX 2: LASCELLES AND DISSOLUTION PRINCIPLES

Lascelles Principles

The Lascelles Principles were a constitutional convention which referred to the conditions under which a request for a dissolution might be denied by the monarch. These were:

(1) The existing Parliament was still vital, viable and capable of doing its job.

(2) A general election would be detrimental to the national economy.

(3) Another Prime Minister could be found who could carry on the government, for a reasonable period, with a working majority in the House of Commons.

The Joint Committee on the Fixed-Term Parliaments Act considered that these principles "used to be taken to be a reliable guide as to the nature of the Monarch's veto over dissolution from 1950 to at least the 1990s".[37]

Dissolution Principles[38]

In restoring the pre-Fixed Term Parliaments Act 2011 position, the United Kingdom is returning to a position where the Prime Minister (by virtue of commanding the confidence of the House of Commons), can advise the monarch to dissolve Parliament at a time of their choosing.

The circumstances in which a Prime Minister might seek a dissolution are underpinned by two core constitutional principles:

(1) The Prime Minister holds that position by virtue of their ability to command the confidence of the House of Commons and will normally be the accepted leader of the political party that commands the majority of the House of Commons.

(2) The monarch should not be drawn into party politics, and it is the responsibility of those involved in the political process to ensure that remains the case. As the Crown's principal adviser this responsibility falls particularly on the incumbent Prime Minister.

A return to the pre-2011 status quo ante will also restore the position whereby the Prime Minister, having lost a designated or explicit vote of confidence, can either resign or seek a dissolution, which would usually be granted and lead to an election.

The monarch, by convention, is informed by and acts upon the advice of the Prime Minister so long as the government appears to have the confidence of the House, and the Prime Minister maintains support as the leader of that government.

37 See Joint Committee on the Fixed-Term Parliaments Act, *Report* (Session 2019–21, HC 1046, HL Paper 253), para 129

38 HM Government, 'Dissolution Principles': https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940028/Dissolution-Principles.pdf [accessed 18 November 2021]