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Summary of Key Points

- Dissolution should remain in the hands of parliament, not the executive.
- The government's draft bill is an overreaction, based on a false premise: a misunderstanding of the causes of gridlock in the 2017 parliament.
- That the 2017 parliament was gridlocked, with a government unable to deliver its flagship policy, resulted from a minority government deeply split within its own ranks, not the FTPA.
- It is unnecessary to go as far as repeal of the FTPA. The problems experienced in the 2017 parliament can be resolved by simpler, neater surgery.
- The FTPA should be amended in three respects: to change the threshold for an early general election from two thirds to a simple majority; to clarify the process whereby an alternative government can be formed within 14 days; and to enable the House of Commons to determine the date of any early general election.
- Prorogation should also be in the hands of parliament, not the executive.

Previous submissions about the FTPA

1 This submission should be read as supplementary to Robert Hazell's written and oral evidence on the operation of the Fixed Term Parliaments Act (FTPA) to the Lords Constitution Committee in August 2019, and the written evidence from Meg Russell and Robert Hazell to the Commons Public Administration and Constitutional Affairs Committee (PACAC) in April 2020. Those submissions focused on the operation of the FTPA; this submission focuses primarily on the government's draft bill.

Role of the Joint Committee

2 The government has run ahead of parliament in producing its draft bill. The process set out in section 7(4) of the FTPA is that first a committee must review the operation of the FTPA, and make recommendations for its repeal or amendment:

> (4) The Prime Minister must make arrangements—
>
> (a) for a committee to carry out a review of the operation of this Act and, if appropriate in consequence of its findings, to make recommendations for the repeal or amendment of this Act

3 The government has got its conclusions in first, that the FTPA should be repealed. The joint committee should not allow itself to be bounced in this way: it should fulfil its statutory duty and carry out a fair-minded review of the operation of the FTPA, before deciding whether the Act should be repealed, or merely amended. The argument of this

submission is that the Act merely needs to be amended. The joint committee should also not allow itself to be rushed, and should not be shy to take extra time if that is required.

The FTPA does not fix terms

4 Notwithstanding its title, which might be seen as something of a misnomer, the FTPA always allowed for early elections to be held. As further discussed below, these provisions are enshrined in section 2. Although one of the stated purposes of ministers when originally introducing the Fixed-term Parliaments Bill was to increase certainty, and end debilitating speculation about the date of the next election, the Act always contained flexibility. The ability to call an early general election was demonstrated relatively unproblematically by Theresa May in 2017.

Dissolution should remain in the hands of parliament

5 Instead, the central change achieved by the FTPA was to shift power from the executive to parliament. It is a myth that the FTPA came into being simply to shore up the Liberal Democrat-Conservative coalition. The proposal had been made for decades previously in several private members' bills, before appearing in the 2010 Labour and Liberal Democrat election manifestos. The Conservatives meanwhile included a more general pledge in 2010 to make 'the use of the Royal Prerogative subject to greater democratic control so that Parliament is properly involved in all big national decisions'. This was an appropriate objective.

6 When originally introducing the Fixed-term Parliaments Bill ministers also emphasised that its objectives included the desire to limit the power of the executive, which was too dominant in relation to the legislature. The subsequent Conservative manifesto of 2015 celebrated this as an achievement of the FTPA, stating that 'We also passed the Fixed Term Parliaments Act, an unprecedented transfer of Executive power'.

7 This was in line with other changes to regulate prerogative power, with respect to public appointments, governance of the civil service, approval of treaties and military action. Parliamentary oversight over the prerogative has also been strengthened in other Westminster countries.

8 In most parliamentary democracies dissolution is controlled by the legislature, with varying degrees of involvement of the executive. It is a complex picture, but Petra Schleiter's comparative research shows that the legislature has a say in its own dissolution in two thirds of the 39 countries studied, in Europe and the Westminster world. In the UK, with its strong tradition of parliamentary sovereignty, parliament should be central to any decision to dissolve.

9 Leaving dissolution in the hands of parliament is also the easiest way to keep the courts out of these decisions. It is impossible to imagine the crack through which the courts could intervene in a duly recorded decision of the House of Commons to trigger a statutory

power of dissolution. The approach adopted by the government, in seeking to revive the prerogative power, which then requires a complicated ouster clause, is self-defeating.

Causes of gridlock in the 2017 parliament

10 The Conservative 2019 manifesto pledged: 'We will get rid of the Fixed Term Parliaments Act – it has led to paralysis when the country needed decisive action'. The Foreword to the draft bill repeats that the FTPA 'created parliamentary paralysis at a critical time for our country'. This suggests that it was the FTPA which was the cause of the government's travails in the 2017 parliament. But as one of us has argued elsewhere, there were four factors which caused the 'perfect storm' which made the 2017 parliament so dysfunctional: and none of them was the FTPA. The four factors were the unique nature of the Brexit referendum, the unusual circumstances of minority government, divided parties in both government and opposition, and parliamentary rules which give the government tight agenda control.

11 It suited the government to put the blame for its difficulties on the FTPA, when the main cause was the deep divisions within the Conservative Party. In the first vote on Theresa May's Brexit deal, 118 Conservative MPs rebelled; in the second, 75; and in the third, 34. Theresa May made no attempt to change strategy and reach out to supporters of her Brexit deal in other parties, which should have been a basic lesson for any leader of a minority government. It is hard to see the logic of how freedom from the FTPA would have helped this situation, unless the rebels (who included several members of the present Cabinet) now argue that they would have fallen in behind May's deal if she had been able to threaten a general election. Since the numerous Brexit rebels were arguing from conviction, this seems unlikely to have been the case. Meanwhile, the opposition Labour Party would not have rescued the government's deal – it would surely have preferred a general election.

The draft bill is an overreaction, and executive overreach

12 So the draft bill is an overreaction, based on two myths. First, that the FTPA was merely a short term expedient, rather than a principled transfer of power from the executive to the legislature. Second, that the FTPA was somehow the cause of the travails of the 2017 parliament. But in seeking to revive the prerogative power of dissolution, the overreaction also involves some clumsy overreach. The draft bill is a muddle of partial repeal, re-enactment, new enactment and reference to constitutional convention. If enacted, it would produce the bizarre situation where one of the fundamental constitutional texts for the UK was called the FTPA (Repeal) Act 2022. The clumsiness is explored in detailed legal critiques by Alison Young and Mark Elliott, which analyse whether the power of dissolution that has been revived is the old prerogative power, or whether it would become a statutory power. The uncertainty which that creates was laid bare in the oral evidence session with Sir Stephen Laws and Alison Young on 10 December.

13 The overreach is evident in two respects in which the government seeks to go further than the old prerogative. The first is the ouster clause. In the Foreword to the draft bill the government confidently states: 'The long standing position is that dissolution is not reviewable by the Courts …'. In which case, why is the ouster clause needed? More

important, if the power of dissolution were left in the hands of parliament, there would be no possibility of intervention by the courts, and no need for any ouster clause: see para 9 above.

14 The second aspect of overreach is the draft statement of dissolution principles, which appear to give the Prime Minister *carte blanche* to request a dissolution, which the Sovereign must always grant. The principles mention none of the restrictions in the Lascelles principles (1950), which set out three conditions in which the Sovereign might properly refuse a request for dissolution:

> (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) [the Sovereign] could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons.

15 If the government felt that the Lascelles principles were dated, it could instead have relied on the 2010 draft Cabinet Manual, which stated at para 58:

> At present, the Prime Minister may request that the Sovereign dissolves Parliament so that an early election takes place. The Sovereign is not bound to accept such a request, although in practice it would only be in very limited circumstances that consideration is likely to be given to the exercise of the reserve power to refuse it, for example when such a request is made very soon after a previous dissolution. In those circumstances, the Sovereign would normally wish to know before granting a second dissolution that those involved in the political process had ascertained that there was no alternative potential government that would be likely to command the confidence of the House of Commons.

16 There is a clear overlap between the last sentence, a restatement of Lascelles' third principle, and the no confidence provisions of section 2 of the FTPA, which provide for a 14-day period in which the House of Commons can test whether it could have confidence in an alternative government. That brings us back to whether it is necessary to go as far as repeal of the FTPA, or whether the problems experienced in the 2017 parliament could not be resolved by simpler, neater surgery. We argue that there is no need to try to restore the old prerogative power, with all the uncertainties that involves: a neater solution would be to amend the FTPA in three respects, discussed in paragraphs 20 to 29 below.

The risks to the monarchy

17 The government has sought to minimise the risks to the monarchy by including the following in the non-legislative statement of dissolution principles:

> The Sovereign 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.

18 This will arouse a wry smile from those still smarting from the controversy over the PM's bungled attempt to prorogue parliament, resulting in the Queen's order of

prorogation being declared unlawful by the Supreme Court. Under the government's proposals, in the event of an improper request for dissolution the Queen would be on her own: because of the ouster clause, the monarch would lack the advice and protection of the courts. The government justifies this in the Foreword to the draft bill by stating:

> The long standing position is that dissolution is not reviewable by the Courts and judgement on the Government's actions in such matters should be left to the electorate at the polling booth or, in extremely exceptional circumstances, to the Sovereign.

19 But this offers cold comfort to the Palace. If the Crown is left as the only check on improper or untimely requests for dissolution, it would inevitably be drawn into controversy if such requests are refused. This happened in the King-Byng affair in Canada in 1926, and with Gough Whitlam in Australia in 1975: in each case the Governor-General's refusal of the Prime Minister's request for dissolution triggered a major constitutional crisis. The most effective way of avoiding such crises is to leave decisions on dissolution with parliament, which is the right place for a quintessentially political decision. As the Lords Constitution Committee said when publishing its report on the FTPA in September, 'Reform of the Fixed Term Parliaments Act must keep the Queen out of politics'. By proposing that the monarch should be the only check on a questionable request for dissolution, the government's proposals inevitably risk dragging the monarch back into politics.

The two-thirds threshold for voluntary early dissolution should be reduced to a simple majority

20 This is the single most important change to resolve the recent difficulties. The FTPA contains two routes to early dissolution, in sections 2(1) and 2(3):

- 'a motion that there should be an early parliamentary general election'; or
- 'a motion that there should be no confidence in Her Majesty's Government'.

21 The first route, a voluntary motion for dissolution, requires a two-thirds majority of all MPs; while a no confidence motion can be passed by simple majority. No confidence could still lead to dissolution, if an alternative government cannot be formed. The justification for a higher threshold for government-initiated dissolution would appear to be aimed at requiring significant cross-party support: it makes it very unlikely that a government could call an early election without the support of at least one other party.

22 In 2017, Theresa May had no difficulty in securing the necessary two-thirds majority to trigger an early election, with official Labour support. After Boris Johnson became Prime Minister he tried three times to obtain an early dissolution under section 2(1) of the FTPA. On 4 September 2019 the vote was 298:56; on 9 September it was 293:46; and on 28 October it was 299:70. If the threshold had been a simple majority of those voting, he would have won his early dissolution; if it had been an absolute majority of the House (326) he would have failed. This raises the question of whether the threshold should be reduced to a simple or absolute majority.

23 There are some attractions in reducing the threshold to an absolute majority of MPs (i.e. a majority of all MPs, not just those voting). But the events of 2019 have demonstrated that any form of supermajority requirement will ultimately fail, as it can be circumvented by the government passing separate legislation for an early election, as it did in the Early Parliamentary General Election Act 2019. So long as the government can assemble a majority to legislate for an early election, the two-thirds requirement is an artificial barrier which can be side stepped, and the same would apply if it were replaced with a requirement for an absolute majority.

24 This leads us to conclude that the threshold for early dissolution under section 2(1) of the FTPA should be reduced to a simple majority: the same threshold that enabled the Johnson government to legislate for an early election in October 2019. To those who fear the threshold being set too low, enabling Prime Ministers to call an election whenever they like, the counter argument is that the main barriers will always be political, not legal. Elections are expensive for political parties, exhausting for the participants, and uncertain in their outcome – a government which calls an early election on opportunistic grounds will always risk being punished at the polls.

The process whereby an alternative government can be formed within 14 days needs clarifying

25 The provision in section 2(3) of the FTPA, that an election should occur if a 14-day period elapses following a parliamentary vote of no confidence in the government, is also problematic for various reasons – as was demonstrated by debates during 2019.

26 The basic principle that there should be a breathing space to install an alternative government following a vote of no confidence is correct, and reflects UK traditions. But there is uncertainty over what should happen during the 14-day period in terms of parliament's ability to demonstrate confidence in an alternative government. Section 2(5) implies that a vote of confidence during the 14-day period should take place in a government (as already appointed by the monarch) rather than a putative government (as recommended by MPs). It should be made possible for the House of Commons to do something to indicate its preference, for example through a motion for an humble address, rather than expect the monarch to install an alternative government on the basis of guesswork that it might command confidence.

27 In addition, as currently drafted the 14-day period could encompass a period when the House of Commons is not sitting, with perverse effects – including the possibility that a general election could happen against the wishes of MPs. This could occur if a vote of no confidence took place shortly before a planned recess. It could also potentially arise if the Prime Minister sought to prorogue parliament during the 14 days – though this would raise immediate questions about abuse of the 'caretaker convention' (see paras 2.27-31 of the Cabinet Manual), which could end up in the courts. These difficulties could be relatively easily avoided through, for example, amending the provision to a period of 10 sitting days. Amendments to similar effect were proposed to the Fixed-term Parliaments Bill in 2010 – including by members of the Commons Political and Constitutional Reform Committee on a cross-party basis – but did not succeed.

When the House of Commons votes for early dissolution, the House and not the Prime Minister should determine the date of the election

28 Section 2(7) of the FTPA provides that following a mid-term dissolution, 'the polling day for the election is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister'. Given the controversy in September 2019 over the discretion that this might confer on the Prime Minister to choose a distant polling day (in this case potentially a date after 31 October) had he been defeated on a no-confidence motion, it would be preferable to provide that the polling day should be approved by the House of Commons, before the Prime Minister recommends a date to the Queen.

29 The process to set a date for an election explicitly approved by parliament is also currently a two-step process, which is unnecessarily complex. Section 2(2) of the FTPA could be amended to require a motion stating that 'That there shall be an early parliamentary held on [X date]'. In the event of an early election following a no-confidence vote and the elapse of the 14-day period, the Act could specify a limited period within which an election should be held.

Prorogation

30 Both the Lords Constitution Committee and PACAC recommended that the power of prorogation should be considered as part of the review now being conducted by the Joint Committee. The Lords Committee said, 'As part of the statutory review of the Fixed-term Parliaments Act 2011, Parliament may wish to consider whether the prorogation of Parliament should require its approval in the same way the Commons approves its recess dates'. If the Joint Committee concludes that dissolution should remain in the hands of parliament, not the executive, it would make sense to include a similar recommendation about prorogation, so that in future prorogation requires the consent of the House of Commons, and is not simply triggered by the executive.

31 There are two arguments in favour of doing this. One is an argument of basic principle: the meeting of parliament should not be at the whim of the executive. The only time when the government would face a theoretical difficulty in getting the House of Commons to agree to prorogation is when it could not command a majority. If it cannot do that, the executive's possession of an arbitrary power to suspend parliament does not stand up to close inspection. The second argument in favour is again that the courts would effectively be excluded. It is impossible to imagine the courts being asked to overrule a duly recorded decision of the House of Commons.

32 So long as prorogation continues as a prerogative power, one way to avoid parliament being prorogued against its will would be to make the prerogative power exercisable at the request of parliament rather than on the advice of the Prime Minister. An alternative would be to abolish the prerogative power, and put prorogation on the same footing as the power of adjournment, enabling parliament to be prorogued when the House of Commons passes a motion to that effect.

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