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Lord McLoughlin  
Chair, Joint Committee on the  
Fixed-term Parliaments Act  
House of Lords  
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18 February 2021

Dear Patrick,

Thank you for your time on 11 February. I am most grateful to the Committee for its careful consideration of the Fixed Term Parliaments Act and the Government's approach to repeal. During the session I committed to writing to you on a number of points which I have addressed below.

First, the Committee has asked for a fuller legal analysis of why the Government considers it is possible to restore the prerogative power to dissolve Parliament. I attach a memorandum setting out the Government's analysis on this issue (Annex A). In preparing the draft Bill, the Government has engaged a wide range of stakeholders, including academics, on the revival of prerogative. To ensure maximum certainty, the draft Bill makes express provision to revive the prerogative power to dissolve Parliament meaning that once more Parliament will be dissolved by the Sovereign, on the advice of the Prime Minister.

The Government recognises that there is a debate about whether the dissolution prerogative can be revived without specific legislation to do so. By making express provision for the revival of the prerogative powers relating to the dissolution of Parliament, the Act once passed by our Sovereign Parliament will provide legal, constitutional and political certainty to the process for calling elections.

I noted with interest the Committee's observation that the Government's statement of Dissolution Principles referred to the Prime Minister "advising" the Sovereign to dissolve Parliament, and whether this should instead be "request". I am grateful to the Committee for raising this point, and as I said to the Committee the Government will reflect on the wording.

The Committee has asked whether this change would make the ouster clause less necessary. It remains the Government's position that the ouster clause is simply a reflection that this prerogative power is nonjusticiable. The clause also benefits the nation by ensuring maximum certainty and validity of a general election by not being subject to question in the courts.

Second, the Committee asked for a fuller account of the Government's understanding of the

conventions around Government formation and the calling of Parliaments, and how these relate to the Dissolution Principles. This is attached (Annex B). The Dissolution Principles document focuses on the principles underpinning the revived prerogative power to dissolve Parliament. The conventions concerning Government formation and the calling of Parliaments are already clearly described in the Cabinet Manual, and the two should be read together.

Third, I understand the Committee has asked for more information as to why the Government thinks the revival of the prerogative power to dissolve Parliament does not create an incumbent advantage. The Government has noted the research of Professor Petra Schleiter, and indeed all the evidence supplied to the Committee, with interest.

The Government does not accept that this approach provides an inherent advantage to an incumbent party.

There are numerous examples that I mentioned in my evidence where a snap election has been called, and the incumbent Government has been unsuccessful at the polls. Of course, the historical record has shown that a Prime Minister who seeks to call an election have taken advantage of favourable poll ratings. It has generally been the case since 1945 that Prime Ministers enjoying a significant lead in the opinion polls have called an election four years into a five year Parliament. However, there is no evidence that requiring them to wait a further year would have significantly impacted on the subsequent election results. We do not believe that this has any bearing on the conduct of a free and fair election. All political parties and candidates are subject to the same election rules, including the prevailing limits on spending. It is not undemocratic to hold an (earlier) election: rather, it is an expression of democracy.

Ultimately, it is for the electorate to judge on the merits and necessity of a Prime Ministerial decision to dissolve Parliament, and the public will give its view on the government's decisions to call a snap election. A fundamental principle of our constitution is that the sovereign's government must be able to be carried on. We consider that the advantages to the nation of a Government being able to offer the public an election if it cannot get its business through outweigh that very limited perceived advantage that the Prime Minister's discretion gives the Government of the day.

Once again, I am grateful for the Committee's detailed consideration of the draft Bill and Dissolution Principles, and I look forward to reading its final report.

**With every good wish,**

A handwritten signature in black ink, appearing to read "Michael Gove". The signature is fluid and cursive, with the first name "Michael" and the last name "Gove" clearly distinguishable.

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

## **Annex A: Revival of the prerogative power to dissolve Parliament and to call a new Parliament**

In repealing the Fixed-term Parliaments Act, it is the Government's intention to restore the position to how it was prior to the Act. This requires the prerogative power to dissolve Parliament to be revived.

There has been some debate amongst academics as to whether the repeal of a statutory provision that curtails a prerogative power leads to the revival of the prerogative. It is the Government's view that a prerogative power can be revived, but express provision is needed in the repealing statute to put the matter beyond doubt. This is achieved by Clause 2 of the Bill which provides that the powers relating to the dissolution of Parliament and the calling of a new Parliament that were exercisable by the virtue of Her Majesty's prerogative immediately before the commencement of the FTPA are exercisable again as if the FTPA had never been enacted.

The purpose of Clause 2 of the Bill is to prevent any doubt as to our intention to revive the prerogative. The argument that the prerogative in this instance could not be revived on repeal of the FTPA is on the basis that the revival is prevented 'unless the contrary intention appears'. As such the Bill makes express provision for the revival of the prerogative powers to dissolve Parliament and call a new Parliament. We think this provides clear and sufficient evidence of a contrary intention.

As noted in the evidence this committee has already received, there is debate amongst academics on this point, however in practice the effect is the same. This is most clearly expressed by Stephen Laws who in evidence to PACAC sets out that Parliament is able to legislate as it sees fit and what matters is the "practical effect" of the legislation, not whether the prerogative has been abolished and then revived:

- "If Parliament wants to say the law from 2020 is to be the same as it was before 2011, as if we never had the Fixed-term Parliaments Act, that is within the power of Parliament to say. Whether that revised [sic] something that has been abolished or starts it up again is more or less irrelevant, because the practical effect is that you have got to where we were before."
- This is an argument Laws made in evidence to the FTPA Joint Committee where he set out that;

*"There is an interesting academic question about whether, if the Bill passes and becomes an Act, what you have is a power that has its origins in statute or in the prerogative. That is a red herring, because for practical purposes, it is perfectly plain that the intention of the Act is to restore the situation to what it was before the 2011 Act, and therefore the law will then be indistinguishable from what it was before, when all the incidents of a prerogative were attached to the Dissolution.*

*Acts of Parliament ought to be construed in accordance with what practical outcome they are intended to produce by the legislatures. They do not have to fit any conceptual framework. The sovereignty of Parliament means that Parliament has the power to modify or make exception to every constitutional framework. The practical question is, "Is this power the same as the one that existed before 2011?" That is clearly the intention of Parliament and it is clearly the duty of the courts to construe it that way."*

- In their evidence to the Joint Committee, Baroness Hale and Lord Sumption argued that the legal debate on whether the prerogative power was in abeyance or abolished is not a significant legal one because Clause 2 itself is clear that it should be interpreted “as if the FTPA had never been enacted” and that the prerogative is to be revived.

## **Annex B: Principles of Government formation and the calling of Parliaments**

### The calling of Parliaments

The date of the first meeting of a new Parliament is determined by a proclamation issued by the Sovereign, on the advice of the Prime Minister. The Bill returns to the position prior to the FTPA, where the practice was that if Parliament had not reached its full term, the proclamation summoning the new Parliament also dissolved the previous Parliament. By way of example, see attached recent examples of the proclamation. The subject matters covered by these proclamations include:

- notice of the date on which the present Parliament is to be dissolved;
- the prorogation of Parliament to a specified our date;
- the order for the issue of election Writs to the Returning Officers and the writs of summons to attend the House of Lords; and
- appointment of a day and place for the meeting of the new Parliament.

Recent practice had been for Parliament to meet on the Wednesday following the election. In 2007, the Select Committee on the Modernisation of the House of Commons recommended a reversion to the previous practice of having an interval of 12 days between polling day and the first meeting of Parliament. This was adopted in 2010, and retained in 2015. However, following the general elections in 2017 and 2019, the new Parliament met 5 days later on both occasions.

### 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 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.

It is the responsibility of those involved in the political process to ensure that it remains the case that the Sovereign is not drawn into party politics. As the Crown's principal adviser this responsibility falls particularly on the incumbent Prime Minister.

## **Annex C: Royal Proclamations summoning a new Parliament**

2015

### **BY THE QUEEN A PROCLAMATION FOR DECLARING THE CALLING OF A NEW PARLIAMENT ELIZABETH R.**

Whereas We, by and with the advice of Our Privy Council, being desirous and resolved, as soon as may be, to meet Our People, and to have their Advice in Parliament, do publish this, Our Royal Proclamation, and do hereby make known to all Our loving Subjects Our Royal Will and Pleasure to call a new Parliament to be holden at Westminster on Monday the eighteenth day of May next: And We do hereby also, by this Our Royal Proclamation under Our Great Seal of Our Realm, require Writs to be issued by Our Chancellor of Great Britain for causing the Lords Spiritual and Temporal who are to serve in the said Parliament to give their Attendance in Our said Parliament on the said date.

Given at Our Court at Buckingham Palace, this thirtieth day of March in the Year of our Lord two thousand and fifteen and in the sixty-fourth year of Our Reign.

**GOD SAVE THE QUEEN**

2017

### **BY THE QUEEN A PROCLAMATION FOR DECLARING THE CALLING OF A NEW PARLIAMENT ELIZABETH R.**

Whereas We, by and with the advice of Our Privy Council, being desirous and resolved, as soon as may be, to meet Our People, and to have their Advice in Parliament, do publish this, Our Royal Proclamation, and do hereby make known to all Our loving Subjects Our Royal Will and Pleasure to call a new Parliament to be holden at Westminster on Tuesday the thirteenth day of June next: And We do hereby also, by this Our Royal Proclamation under Our Great Seal of Our Realm, require Writs to be issued by Our Chancellor of Great Britain for causing the Lords Spiritual and Temporal who are to serve in the said Parliament to give their Attendance in Our said Parliament on the said date.

Given at Our Court at Buckingham Palace, this third day of May in the Year of our Lord two thousand and seventeen and in the sixty-sixth year of Our Reign.

**GOD SAVE THE QUEEN**

2019

### **BY THE QUEEN A PROCLAMATION FOR DECLARING THE CALLING OF A NEW PARLIAMENT ELIZABETH R.**

Whereas We, by and with the advice of Our Privy Council, being desirous and resolved, as soon as may be, to meet Our People, and to have their Advice in Parliament, do publish this, Our Royal Proclamation, and do hereby make known to all Our loving Subjects Our Royal Will and Pleasure to call a new Parliament to be holden at Westminster on Tuesday the seventeenth day of December next: And We do hereby also, by this Our Royal Proclamation under Our Great Seal of Our Realm, require Writs to be issued by Our Lord High Chancellor for causing the Lords Spiritual and Temporal who are to serve in the said Parliament to give their Attendance in

Our said Parliament on the said date.

Given at Our Court at Buckingham Palace, this sixth day of November in the Year of our Lord two thousand and nineteen and in the sixty-eighth year of Our Reign.

**GOD SAVE THE QUEEN**