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This memorandum offers some ideas and suggestions that might be taken into consideration in a review of the working of the Fixed-term Parliaments Act 2011.

Literature on the subject

01 My following comments draw on my earlier writings, some of which I hope that the Committee may be able to consult and take into account. In particular, my book *The Meeting of Parliament: The Law and Practice relating to the Frequency and Duration of the United Kingdom Parliament* (1990) considers the subject of general election timing, giving an account of the legal and historical context prior to the Fixed-term Parliaments Act. My book on *The Electoral System in Britain* (1995) contains a chapter on general election timing and fixed-term Parliaments, and I have subsequently written academic articles¹ and works of reference² on related matters.

The duration of Parliaments: 3, 4, 5 or 7 years

02 Differing frequencies of parliamentary election have been advocated from time to time, and in earlier in our history there were maximum statutory limits of three and seven years. Today stated simply, the main argument for shorter Parliaments is that they promote a greater degree of responsiveness by MPs and parties in governments to public opinion. The main argument for longer Parliaments is that governments need a sufficiently long period of time in order to put their programme for office into effect.

03 A judgement therefore needs to be struck that balances these factors, taking into account public opinion. In my view, this is a matter best determined by parliamentarians in a free vote in the House of Commons, first informed by a citizens' assembly deliberating on the issues involved.

04 The most prevalent view is that four year terms are most suitable. This length of time is consistent with the average duration of Parliaments in practice over the past century, and reforms tend to work best when working with the grain of existing expectations and practice.

Early parliamentary elections: how the House of Commons decides

¹ "The Duration of Parliament: Historical Perspectives on the 1911 Amendment to the Septennial Act", *Journal of Legal History* (1988), 98-106; "The Summoning and Meeting of New Parliaments in the United Kingdom", *Legal Studies* (1989) 165; "The Dissolution of Parliament: the Crown Prerogatives (House of Commons Control) Bill 1988", *Modern Law Review* (1989), 837-840; "The Public Announcement of General Elections", *Electoral Studies* (1990), 226-228; "Monarchy and the Personal Prerogatives", *Public Law* (2004), 546-563; "The Prerogative Power of Dissolution of Parliament: Law, Practice, and Reform", *Public Law* (2009), 766-789.

² Griffith & Ryle on *Parliament: Functions, Practice and Procedures* (ed. with A. Kennon and M. Wheeler-Booth), 2nd ed., 2003); and titles in Halsbury's *Laws on Constitutional and Administrative Law* (Vol. 20, 2014) and *Parliament* (Vol. 78, 2018).

05 In my view, the fixed-term Parliament legislation should continue to provide for an early parliamentary election where the utility of the existing Parliament is exhausted and/or there is political gridlock preventing the construction of a viable government.

06 The Fixed-term Parliaments Act as it stands contains two different types of procedure to regulate the calling of early parliamentary elections: a straightforward motion for the election, and the use of confidence motions. There is no necessity for both methods, and consideration could be given to a reform that limits early elections to one of them alone. The characteristics of each are given below, and if one alone were to be chosen, my view is that a scheme of confidence motions is to be preferred.

07 The advantage of a straightforward motion that an early election be held, especially with the high threshold of two thirds of the membership of the House in support as at present, lies in its clarity for public understanding and its simplicity in circumstances where the House overwhelmingly wishes to have an election.

08 However a motion of this type leaves the Prime Minister with the initiative and opportunity to press for an election at a moment of political and electoral convenience to themselves, in the knowledge that the Opposition is under pressure to agree because of the political and presentational embarrassment at being seen as afraid to face the electorate.

09 The advantage of using the technique of confidence motions is that the Fixed-term Parliaments Act can provide for the House of Commons to vote in an alternative government formed from the existing Parliament. This is especially important where prevailing national circumstances are not favourable to an election campaign because of some major national crisis or event, whether of a financial, security or other nature.

10 In my earlier writings, I have suggested that the use of confidence motions for an election should be wider than at present under the Act, so that an early election is provided for by two confidence-related procedures. These are (a) as at present under the Act, by way of a motion of No Confidence in the government being carried in the House of Commons; and (b) in addition, by way of a Prime Minister's motion requesting the House's expression of Confidence in the government being defeated.

Example: Dissolution Following Confidence Resolution

Parliament shall be dissolved by Proclamation of Her Majesty the Queen within fourteen days following there taking place in the House of Commons either a resolution of No Confidence in Her Majesty's Government or the defeat of a Motion for the Confidence of the House of Commons in Her Majesty's Government.

11 In my earlier writings, I have suggested that there should be some disincentive to a Prime Minister seeking an early election within the fixed term for no good reason other than advantageous electoral and public opinion

prospects. This could be a provision in the Act that the duration of the newly elected Parliament shall be the remainder of the existing Parliament being terminated. This would ensure that the early election voting procedure was acting as a genuine safety-value, only being utilised to resolve a political deadlock that cannot otherwise be resolved.

Example: Duration of Term Following Dissolution

The term of any Parliament summoned following an early parliamentary election shall be the remainder of the term of the previous Parliament.

Dissolution procedure following early election vote

12 The absence in the Fixed-term Parliaments Act of any limitation upon a Prime Minister's discretion³ to set the precise date for dissolution following an early election being triggered is unsatisfactory. It could allow a Prime Minister to put off the required election for months in order to achieve some political advantage.

13 A new provision could be included in the Act therefore, that dissolution is to take place within fourteen days of the Commons passing a motion for an early election or the end of the fourteen day period following a no confidence motion (or confidence motion as discussed in para. 11). This would permit sufficient time for the necessary pre-election procedures to be drawn up and completion of any Bills near Royal Assent.

Replacing the Prime Minister in the lifetime of a Parliament

14 The provision in the Fixed-term Parliaments Act dealing with how a Prime Minister might be replaced during the lifetime of a Parliament is widely regarded as having been poorly thought-through and drafted.⁴ This states that following the government receiving a No Confidence resolution, there will be an early election unless "Her Majesty's Government" receives a resolution of Confidence for taking office within fourteen days.

15 It is therefore only after becoming head of "Her Majesty's Government" that the Leader of the Opposition qualifies under the Act to receive the necessary confidence resolution in support to avert an election. This allows a Prime Minister whose government has been censured to refuse to resign on the pretext of attempting to re-negotiate a vote in support. This then denies the Leader of the Opposition as Prime Minister-in-waiting the right to form an administration if they wish to do so, having negotiated a cross-parliamentary confidence and supply agreement.⁵

³ s.2(7).

⁴ s.2(3)(b) and (5).

⁵ This existing provision also carries dangers for the Monarchy because of the potential for arguments and misunderstandings about whether the Monarch could or should become involved in mediating or exercising their judgement during the fourteen day period on who is entitled to be Prime Minister. A Monarch who took sides between the parties on such a sensitive political issue would face hostility and possible repercussions from the party against whose interests the Monarch acted. Generally see Robert Blackburn, "Monarchy and the Personal Prerogatives", *Public Law* (2004) 546-563.

16 A solution to this defect, set out in my earlier writings, is to include a new section in the Act that enables the House Commons to put forward a motion specifically designed to replace the government, rather than call a general election, by way of passing a motion of No Confidence in the "Prime Minister" rather than in "Her Majesty's Government".

Example: Dissolution Upon Failure to Appoint a Prime Minister
If, following a House of Commons resolution of No Confidence in the Prime Minister, within fourteen days the House of Commons has not nominated and communicated in the form of an Address to Her Majesty the Queen the name of a new Prime Minister, Parliament shall be dissolved forthwith by Proclamation of Her Majesty the Queen.

The significance of the Parliamentary Early General Election Act 2019

17 The theoretical possibility has always existed that the Fixed-term Parliaments Act could be ignored and overridden by an Act of Parliament simply legislating for the date of the next general election. This is precisely what has happened, with the Early Parliamentary General Election Bill passing all its stages in the House of Commons on 29 October and the House of Lords on 30 October.

18 The government will have earlier considered but rejected such an approach for fear of accusations of sharp and immoral constitutional practice, especially after the prorogation debacle in September 2019. Their proper approach to obtaining the early election they desired was through trying to secure the votes of two-thirds of the membership of the Commons in a motion as set out in s.2(1) and (2) of the Fixed-term Parliaments Act. Motions to this end were accordingly tabled, but without success, on three occasions, 4 and 9 September, and 28 October 2019.

19 However on 28 October 2019 the Liberal Democrats and SNP unexpectedly announced that they would be tabling a Bill to legislate for an election date. This political initiative served to release the government from any earlier embarrassment it might have felt at adopting such a tactic, and provided an aura of parliamentary consent and legitimacy to the idea buttressed by the certainty that numerically with these two other parties' support the government was bound to secure a majority for passage of a Bill of this nature.

20 This legislation has now driven a coach and horses through the Fixed-term Parliaments Act and as a matter of process is to be greatly regretted. Whatever one thinks of the Fixed-term Parliaments Act, while it is in force its terms should be complied with until and unless it might be amended or repealed. The subject of election timing is fundamental to our democracy and bypassing constitutional law in this manner is akin to disrespecting other legislation of a fundamental character such as the Human Rights Act or Scotland Act.

Repeal of the Fixed-term Parliaments Act

21 A pledge to repeal the Fixed-term Parliaments Act was made in the Conservative Party 2017 election manifesto and may re-appear in its imminent 2019 manifesto. If the Conservative Party wins the forthcoming election on 12

December, powerful voices to be rid of the Act can be expected, because of its association with the political stagnation and paralysis in the 2017-19 Parliament.

22 However in my view the weakness of that Parliament was not due to the Fixed-term Parliaments Act. They were caused by the Conservative government's decision to call a referendum in 2016 on a complex and divisive issue, inviting the electorate to reject the view of itself and a large majority in Parliament that the UK should remain in the EU, without having prepared in advance detailed plans on what exiting the EU would involve. The subsequent re-election of the Conservatives as a minority government in 2017 compounded these problems, then finally made much worse when the government failed to resign on 15 January 2019 after its devastating defeat in the Commons on its negotiated EU-UK withdrawal agreement.⁶

23 The argument for fixed-terms between general elections is that it resolves a series of negative issues that have been developing over the course of the last 100 years. Above all, this includes the pre-2011 practice of the Prime Minister before the end of a five-year maximum period choosing the date for the election, published at minimal notice, which was most beneficial to his party and least to the Opposition. The power of dissolution based on the royal prerogative had become increasingly arbitrarily exercised by the Prime Minister. A fixed term arrangement levels the electoral field by enabling all the political parties to know when the next election will be, and Whitehall, industry and business are able to plan ahead, avoiding the ruptures caused by a sudden election and possible change in government policies.

24 If the next government and Parliament decide to repeal the Act, in terms of its legislative drafting and for the avoidance of doubt, the repealing Bill should include a provision and statement of intent that the pre-existing Crown prerogative power of dissolution is to revive.⁷

25 To restore the maximum duration of Parliament at five years, the Septennial Act 1715 and Parliament Act 1911 s.7, repealed by the Fixed-term Parliaments Act, will need to be expressly revived.

26 Finally, if the Fixed-term Parliaments Act is to be repealed, in my view some measure of parliamentary involvement must accompany the measure in order to govern the Prime Minister's future exercise of the power of dissolution. This could simply be that the Prime Minister's decision on dissolution and general election dates are laid before the House of Commons in a motion and agreed to by a simple majority. In my view such a rule would be best provided for as a legal requirement within the repealing Act itself, but at the very least it might be created by way of a cross-party declaration of constitutional convention.

⁶ At this point the leader of the Opposition should have been appointed Prime Minister, and if within 14 days he could not secure a Confidence motion in support, a general election would have taken place under s.2(4).

⁷ On the revival of prerogative powers that have been earlier superseded by statute, see Halsbury's Laws, *Constitutional and Administrative Law* (vol. 20, 2014), edited by me: "Where a prerogative power has been superseded by statute, and the statutory provision is later repealed, the prerogative will not revive unless it is a major governmental attribute" (para. 169, and see footnote case authorities). The prerogatives relating to the life of Parliament are most certainly major governmental attributes.

Prorogation

27 Given the recent misunderstandings surrounding the conventions and limits of executive discretion over the Crown prerogative of prorogation, legislative reform or repeal of the Fixed-term Parliaments Act would be a convenient opportunity to substitute its s.6(1) with a provision that prorogation shall be subject to a vote in both Houses of Parliament on a motion moved by the government.

A permanent Parliament

28 In my view, ideally the present scheme of arrangement by which Parliaments are summoned and dissolved should be replaced by one in which Parliament is maintained in permanent legal existence. This could be provided for by an Act of Parliament or as part of the future enactment of a written UK constitution.⁸

29 Such an arrangement would involve elections taking place at the prescribed fixed intervals, and then on a specified date following the date of each polling day the newly elected Members would take the place of those who had stood down or been defeated in their constituencies.

Example: The Permanence of Parliament

(1) Parliament remains in continuous existence, subject to the composition and meetings of the House of Commons being regulated in the electoral terms prescribed in sub-section (2).

(2) The House of Commons shall function in five⁹ yearly electoral terms, which expire following a general election on the date that the newly elected members of the House assemble for their first meeting.

(3) Within six weeks prior to the expiry of each electoral term, the Privy Council shall issue a proclamation that authorises the procedures and timetable set out in an Act of Parliament¹⁰ necessary for the holding of a general election; and specifies the dates for polling day (being a date before the end of the electoral term) and the first meeting of the newly-elected House of Commons which shall be no more than fourteen days after the date of the polling day.

30 The arrangement would abolish and supersede the legal concepts of dissolution and summoning of Parliaments. In advance of polling day, both Houses would simply go into recess or be prorogued during the period of the election campaign.

31 The advantage of this reform would be that in the event of some extremely important event or emergency arising during the six week election period between the termination of parliamentary business and the assembling of the newly-elected Members, a procedure exists for Parliament to be re-convened to give an expression of parliamentary opinion on the matter, and/or receive

⁸ Robert Blackburn, "Enacting a Written Constitution for the United Kingdom", *Statute Law Review* (2015), 1-27. This reform would not affect the normal annuality of parliamentary business, regulated by way of prorogation.

⁹ Or whichever term of years might replace the five-year period provided for in the Fixed-term Parliaments Act.

¹⁰ Currently the Representation of the People Act 1983.

ministerial statements and hold the government to account for any emergency actions being taken. Under the current situation there is no Parliament in legal existence during this constitutional hiatus to be recalled.

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