

Government Response to the Lord's Constitution Committee report - A Question of Confidence? The Fixed-term Parliaments Act 2011 (Twelfth Report of Session 2019-21)

The Government has, in developing the policy to deliver on its manifesto commitment to repeal the Fixed-term Parliaments Act 2011 (FTPA), given careful consideration to where the power to dissolve Parliament should sit, and what the right balance of power is between Parliament and the Executive. In this, the Government has paid particular attention to the work of the Lords Constitution Committee, Public Administration and Constitutional Affairs Committee, and the debates in the last Parliament.

The Committee's report has in its concluding remarks identified the key issues which the Government has considered in developing its policy and the Committee rightly notes that constitutional changes should be well thought out so that they endure over time.

In recognition of the negative effect of the FTPA, and having weighed up the different options about what system should be put in place when the FTPA is repealed, it is the Government's view that voters deserve to know what to expect and be assured that this core part of our constitution operates effectively and efficiently. For this reason, the Government's draft Bill makes express legal provision to revive the royal prerogative powers relating to the dissolution of Parliament (and the calling of a new Parliament) that existed prior to the FTPA.

In returning to this tried and tested system (where the Prime Minister is able to seek a dissolution from the Sovereign at the time of the Prime Minister's choosing), what remains fundamental is that the Prime Minister must be able to command the confidence of the House of Commons. The Government of the day is drawn from the membership of the House of Commons, and accordingly the House of Commons will continue to play a key role in our constitutional system. However, it is the Government's view that, having considered the constraints the FTPA placed on the Government in the last Parliament (and the fact that one-off legislation had to be introduced to bring about an early election), a return to this system, without a vote on the floor of the House, ensures the effective and efficient operation of our democracy.

To ensure that this important piece of constitutional legislation is given due consideration by Parliament, the Government has published its draft Bill for pre-legislative scrutiny and deposited in the libraries of both Houses a draft statement of the constitutional principles that underpin the exercise of the prerogative powers to dissolve Parliament and call a new Parliament. Constitutional changes of this magnitude should not be undertaken lightly and the Government would welcome the Lord Constitution Committee's consideration of the draft Bill and the draft statement of these principles.

Introduction

1. The Fixed-term Parliaments Act 2011 changed core aspects of the UK constitution. It has proved controversial. Given the Government's commitment to repeal the Act, for which it has support in principle from the Official Opposition, a review of it is timely. (Paragraph 21)

The Government thanks the Committee for their considered review of the Act and has observed with interest the Committee's inquiry, which will serve as a useful precursor to the working of the statutory joint committee, who will undoubtedly consider the issues identified by the Committee.

Fixing the length of parliaments

2. The events of the early autumn of 2019 demonstrated that the Coalition Government's objective "to remove the right of a Prime Minister to seek the dissolution of Parliament for pure political gain" has been achieved. Even if the Early General Election Act 2019 circumvented the requirements of the Fixed-term Parliaments Act 2011, it demonstrated that the consent of the House of Commons—irrespective of the legislative mechanism used—was necessary for the Government to dissolve Parliament. (Paragraph 30)

3. That the consent of the House of Commons is needed does not mean that the power of the Prime Minister has been markedly reduced. A Prime Minister with a majority, or who can muster one in favour of an early election, is not encumbered by the Fixed-term Parliaments Act 2011. (Paragraph 31)

It is a fundamental constitutional principle that the Prime Minister must be able to command the confidence of the House, a principle that was not changed by the FTPA and will continue to apply once the FTPA is repealed. The fact that Parliament had to introduce bespoke primary legislation in 2019 to allow for an early general election shows that, by codifying in statute a role for the House of Commons in approving dissolution, the FTPA has not worked efficiently or effectively. Once the FTPA is repealed and the prerogative powers in relation to dissolution are revived, the House of Commons will continue to play a key role in our parliamentary democracy because it shall remain a central tenet of our constitution that the Government draws its authority from the House of Commons. Considering the problems caused by the FTPA in the last Parliament, it is the Government's view that this system, without a vote on the floor of the House, ensures the effective and efficient operation of our democracy

Under the FTPA when a Government does not have a majority the Prime Minister is constrained in that they are reliant on the consent of the House of Commons if an election is needed to break a Parliamentary deadlock (as in 2019). The draft dissolution principles which the Government has published alongside the draft Bill recognises that when the Act is repealed and flexibility is restored, our constitutional arrangements can accommodate Parliament indicating where confidence lies and whether a dissolution would be granted.

4. The possibility of legal challenge to the prime minister's advice to the Monarch, or the Monarch's decision to dissolve Parliament, must be avoided. If the power to dissolve Parliament were to be returned to the Prime Minister, it must be done in such a way that a legal challenge to its use is put beyond doubt. We suggest that this is more likely to be achieved by creating a new statutory power rather than attempting to revive the prerogative. (Paragraph 39)

The Government recognises that there is a debate about whether the dissolution prerogative can be revived without specific legislation to do so, and whether it can be revived in such a

way that places it beyond the purview of the courts. To provide for legal, constitutional and political certainty around the process for dissolving Parliament and to remove any doubt about the underlying intention, the draft Bill makes express provision that the prerogative powers relating to the dissolution of Parliament (and the calling of a new Parliament) that existed before the FTPA are exercisable again “as if the FTPA had never been enacted.”

The Government agrees that the exercise of these prerogative powers is a matter that should not be abrogated to the Courts. For this reason the Government’s draft Bill contains an ouster clause to make clear that the exercise or purported exercise of the revived prerogative powers, any decisions or purported decisions relating to the revived powers (including any preliminary steps and advice leading to the exercise of the powers), and the limits or extent of the revived prerogative powers, are non-justiciable. This facilitates a return to the long-standing norm that operated before 2011.

5. Fixing the length of parliaments could have practical benefits for Parliament. However, there is insufficient evidence from the 2010–15 parliament to draw a firm conclusion. (Paragraph 44)

The Government agrees that there is not sufficient information to determine the benefits of fixed-term Parliaments. Since 2015, the FTPA has not had its intended effect as neither the 2015 Parliament nor the 2017 Parliament lasted for a full-five year term. Flexibility is an essential part of the parliamentary system and for this reason the Government’s Bill does not provide for fixed-term Parliaments. From the proceedings of recent years, it is clear there are disadvantages from such fixed-term provisions.

Generally speaking, the Government agrees that certainty about how long a parliamentary term will run for is desirable to provide the assurance that a Parliament will not last indefinitely if the Prime Minister did not wish to seek a dissolution. For this reason the draft Bill makes express provision that, if an election is not called at an earlier stage, Parliament will automatically dissolve five years after it first met.

6. The dissolution of Parliament ahead of its fixed-term at an untypical time of year may pose a challenge for electoral administrators. In such instances the Government must ensure that individuals and organisations overseeing and administering elections are appropriately resourced and that any risks to free and fair elections are mitigated. (Paragraph 49)

The 2019 general election was well conducted and administered, even given the unusual situation of a December election. The Government will continue to work closely with the Electoral Commission, Society of Local Authority Chief Executives and the Association of Electoral Administrators to identify and resolve any concerns or issues raised in relation to running parliamentary elections. As usual, funding allocations will be made available to each Returning Officer to cover the necessary costs incurred for the efficient and effective running of elections. Whilst funding for each Returning Officer is based on previous payments, allocations are uplifted to reflect any changes in circumstances including any that apply at the time of the poll (e.g. a winter poll).

7. We congratulate electoral administrators for overcoming the logistical challenges posed by the early general election in December 2019 and the smooth running of the poll they oversaw. (Paragraph 50)

The Government in its response to the Electoral Commission's report on the 2019 General Election expressed its thanks to Returning Officers and electoral administrators for the effective running of the election, especially in light of the relatively short notice period prior to the poll, and recognised that an unscheduled poll of this nature requires significant effort to implement and run successfully.

8. It is an important constitutional convention that the main opposition parties have access to the civil service in the period before a general election. It is essential that this continues, as it helps to ensure a smooth transition when there is a change of party in government following a general election. (Paragraph 54)

9. The Fixed-term Parliaments Act was intended to provide greater certainty about the timings of general elections, but this has not been the case since 2015. A consequence of an early general election is that the main opposition parties do not have as much time to engage with the civil service. This may hamper the ability of the civil service to support an incoming administration. (Paragraph 55)

As the Committee correctly observes, since 2015, the FTPA has not had its intended effect as neither the 2015 Parliament nor the 2017 Parliament lasted for a full-five year term.

The Government is supportive of the convention that the main opposition parties should be authorised to have pre-election contacts with the Civil Service in the period leading up to a General Election. These discussions are designed to allow the Opposition's shadow ministers to ask questions about departmental organisation and to inform civil servants of any organisational changes likely to take place in the event of a change of government. The Cabinet Manual sets out the procedure by which pre-election contacts are authorised by the Prime Minister.

10. The Fixed-term Parliaments Act was not revolutionary in its provision for the length of parliaments. (Paragraph 60)

11. It is for Parliament to determine, whether in the Fixed-term Parliament Act, or any replacement, what the maximum length of a parliament should be and the mechanisms to bring about an early general election. (Paragraph 61)

The Government agrees with the Committee that the FTPA, in providing for the elections to be held every five years, is broadly in line with the pre-FTPA position whereby the Septennial Act 1715 (as amended by the Parliament Act 1911) provided that the maximum length of a Parliament was five years. The draft Bill makes express provision that, if an election is not called at an earlier stage, Parliament will automatically dissolve five years after it first met.

When the FTPA is repealed (and the concept of an 'early general election' will no longer exist in law), the Government's draft Bill will return us to the tried and tested system where the Prime Minister can seek a dissolution from the Sovereign at a time of the Prime Minister's

choosing. The events of 2019 demonstrated that when there are not mechanisms in place which allow for the resolution of political impasses, our democracy becomes deadlocked. By returning to the pre-FTPA arrangements, the flexibility provided will ensure our constitutional democracy is sufficiently robust and able to respond to the challenges of the day.

Early general elections

12. It is difficult to draw conclusions from the unusual circumstances of autumn 2019. In this period the House of Commons rejected holding a general election on three separate occasions before consenting to one through a different route. While the two-thirds threshold can, in certain circumstances, be a meaningful constraint, it can also perpetuate political instability. (Paragraph 73)

13. It is for Parliament to decide whether, if the House of Commons maintains a role in the approval of early general elections, a threshold beyond a simple majority should apply to those decisions. (Paragraph 74)

The Government considers the two-thirds majority requirement under the FTPA undesirable. As the events of the last Parliament demonstrated, this high threshold can lead to a scenario where the Government cannot deliver its core legislative agenda, but there isn't the required majority for an election, creating deadlock in Parliament. The fact that Parliament had to introduce bespoke primary legislation in 2019 to allow for an early general election demonstrates how, under the constraints of a two-thirds majority our system cannot respond to the challenge of political instability.

The Government's draft Bill, in making express provision that the prerogative powers relating to dissolution of Parliament (and the calling of a new Parliament) are to be revived, shall ensure legal, constitutional and political certainty around the process for dissolving Parliament. What will remain unchanged is the fundamental, long-standing principle that the Prime Minister must be able to command the confidence of the House of Commons which will continue to play a key role in our constitutional system.

14. A government's authority derives from possessing the confidence of the House of Commons. The Fixed-term Parliaments Act did not change this constitutional principle, but it has clouded the situation. It is now possible for the Government to retain the confidence of the House of Commons in a statutory sense—winning a vote on a motion of no confidence—while having lost it in the political sense of lacking support for a key part of its policy agenda. (Paragraph 87)

15. It is for Parliament to decide whether the Fixed-term Parliaments Act—or any replacement legislation—should continue to make provision for confidence motions. (Paragraph 88)

The Government agrees with the Committee that our constitutional arrangements should deliver legal, constitutional and political certainty whilst at the same time affording sufficient flexibility to respond to the political challenges of the day. The FTPA created uncertainty in those arrangements given the Act is silent on what would happen in the 14 day period after the passage of a statutory no-confidence motion. By codifying motions of confidence in

statutory form, the FTPA also made these arrangements more rigid. The consequence of divorcing a non-statutory confidence motion from an election was gridlock in the 2017 - 19 Parliament.

The overriding principle of our constitution should be that the Government of the day has the confidence of the House of Commons. The FTPA's codification of confidence motions (and the uncertainty around what happens following the passage of a no confidence vote under the Act) undermines this democratic necessity, hindering the function of representative democracy by making it harder to have necessary elections. In repealing the FTPA, it is vital that the link between confidence and dissolution is restored in order that the Government will once more be able to designate critical votes as matters of confidence which, if lost, would lead to an early election or the resignation of the Prime Minister where there is a clear alternative that can be recommended to the Sovereign.

16. It is an important constitutional convention that if a Leader of the Opposition tables a vote of no confidence in the Government time is quickly made available to debate it. (Paragraph 91)

The Government agrees that it is in the interest for a Government to meet the challenge of a no confidence vote at the earliest opportunity. This is a convention recognised in Erskine May which sets out that, "the Government always accedes to the demand from the Leader of the Opposition to allot a day for the discussion of a motion tabled by the official Opposition".¹

17. In some situations a government could manipulate the no-confidence process to enable an early general election. This would be against the spirit of the Fixed-term Parliaments Act, but perversely the Act makes such a scenario possible. (Paragraph 95)

18. We do not envisage many circumstances where a successful vote of no confidence would result in a change of party in government. It is more likely that there would be a dissolution or a reshaping of the existing Government such that it can regain the confidence of MPs. (Paragraph 100)

19. It is unknown what might happen in the 14 days following a government losing confidence in the House of Commons. But, for the avoidance of doubt, the Cabinet Manual should state that the existing Government remains in office until the Monarch invites a new Government to be formed. This remains the case even if the Government has lost a vote of confidence in the House of Commons. The Prime Minister would not be "squatting" in Number 10 in such circumstances; rather, they would be doing their duty in maintaining Her Majesty's Government until such time a replacement was appointed. (Paragraph 106)

20. The Fixed-term Parliaments Act is silent on the process for finding an alternative administration during the 14 days after a vote of no confidence, save for the provision for a vote of confidence. The Act may create a circular situation whereby an alternative administration would need to demonstrate a majority in support in the House of

¹ Paragraph 18.44, Erskine May.

Commons, but may not be able to demonstrate said support until it is in office. (Paragraph 112)

21. It is a cardinal principle that the Monarch should not be drawn into the political debate regarding who should govern. There should therefore be a process for MPs to demonstrate who is best placed to command a majority in the House of Commons in order to signal to the Monarch who should be invited to form a government. It is for the House of Commons to decide what process would be appropriate. (Paragraph 114)

22. Under the current system a Prime Minister opposed to any alternative administration could block its formation by preventing any effort to command a majority and waiting out the 14 days until an election was triggered. Such behaviour would be deprecated, but it underlines the need for greater certainty on this matter. (Paragraph 115)

23. After losing a vote of no confidence a Prime Minister must continue to follow constitutional practice. If an alternative Government can be formed during the 14 days prescribed by the Fixed-term Parliaments Act, the incumbent has a duty to resign. A Prime Minister who did not do so would be behaving unconstitutionally. (Paragraph 117)

24. No parliament can bind its successors. Therefore any legislation setting a threshold greater than a simple majority of MPs will be vulnerable to a bill bypassing that threshold. (Paragraph 122)

Confidence motions operate most effectively as a matter of convention rather than in statutory form; flexibility is an essential part of our constitutional system and the codification of confidence motions under the FTPA led to parliamentary paralysis. This is because under the FTPA system, the passage of confidence motions which do not conform to the statutory wording of the Act means that the Government could remain in office even if it was unable to secure its business (amounting to a de facto withdrawal of confidence) or agreement for an early general election as a means to break a political impasse.

When the Act is repealed, it will be vital to return to the FTPA 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 Sovereign, 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.

It is not possible to predict every scenario and challenge that a country might face. But that is why a constitution that provides flexibility is necessary for a functioning and modern democracy. The Government has produced a draft statement setting out what it thinks are the relevant constitutional principles in this space for careful consideration by Parliament.

The Government shall of course carefully consider the conclusions of the Joint Committee on the operation of confidence votes, both under the FTPA and under the Government's draft repeal Bill.

The Act and other prime ministerial powers

25. The Fixed-term Parliaments Act transferred power to the House of Commons to decide whether there should be an early general election, but it did not give MPs control over the date of the election. (Paragraph 130)

26. When the Fixed-term Parliaments Bill was being considered it was widely believed the risk of a Prime Minister misusing the power to set the date of a general election was small. However, Parliament may wish to consider whether the House of Commons should be required to approve the date on which an early election is to be held. (Paragraph 131)

27. While there may be circumstances in which a Prime Minister could seek to misuse the power to delay a scheduled election for political purposes, the requirement for an affirmative instrument provides Parliament with an appropriate level of control. (Paragraph 132)

It has long been the position that the date of the election is set by Royal Proclamation on the advice of the Prime Minister. This was reflected in the FTPA and will continue to be the case under the legislation which repeals the FTPA. In taking the decision to seek a dissolution of Parliament, any Prime Minister will be mindful of the fact that the electorate at the polling booth can judge for itself the Government's actions in such matters. The Government does not accept that the power to set the precise date of the election should be provided to the House of Commons or subject to Parliamentary approval. Having considered the constraints the FTPA placed on the Government in the last Parliament (and the fact that one-off legislation had to be introduced to bring about an early election), a return to the tried and tested system of Parliament being dissolved by the Sovereign on the advice of the Prime Minister, without a vote on the floor of the House, ensures the effective and efficient operation of our democracy.

28. Any Government advising the Monarch on prorogation in the future will need to take into account the experience of the September 2019 prorogation and Supreme Court judgment in *Miller/Cherry*. (Paragraph 143)

29. 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. (Paragraph 144)

As the Supreme Court itself noted, the circumstances of *Miller / Cherry* were exceptional and unlikely to arise again. The exercise of the prorogation prerogative is an issue separate from the FTPA which is concerned with the calling of elections.

The Government's manifesto made a clear commitment to repeal the FTPA and the draft Bill which the Government has published for pre-legislative scrutiny is intended to deliver on this commitment. The draft Bill is short and narrowly focused on the dissolution of Parliament and the calling of a general election, not the ending of a parliamentary session.

Future of the Fixed-term Parliaments Act

30. The Fixed-term Parliaments Act 2011 was not the cause of the political deadlock in the 2017–19 parliament, but without the Act the deadlock would not have lasted as long. (Paragraph 149)

31. A straight repeal of the Fixed-term Parliaments Act 2011 is not feasible. The Act repealed the Septennial Act 1715, which set the maximum length of a parliament. Repealing the FTPA without any replacement would mean that the current parliament could never end. (Paragraph 152)

32. To determine the future of the Fixed-term Parliaments Act 2011 a series of linked questions must be answered. These are:

- **Should the length of parliaments be fixed absolutely or should mechanisms allow for early general elections?**
- **What should be the maximum length of a parliament?**
- **Should the calling of an early general election require the consent of the House of Commons?**
 - **If the consent of the Commons is required for an early general election, what threshold, if any, should be set for approving the motion?**
 - **If the consent of the Commons is required for an early general election, should the Commons be asked to approve the date for the election?**

These questions are ultimately ones that Parliament must determine. (Paragraph 153)

33. In making those determinations, Parliament may also wish to consider the separate question of whether it should be asked to approve the prorogation of Parliament. (Paragraph 154)

34. In making these decisions, 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 stand the test of time. (Paragraph 155)

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