House of Commons

Public Administration and Constitutional Affairs Committee

The Fixed-term Parliaments Act 2011: Government's response to the Committee's Sixth report of Session 2019–21

Sixth Special Report of Session 2019–21

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Public Administration and Constitutional Affairs Committee

The Public Administration and Constitutional Affairs Committee is appointed by the House of Commons to examine the reports of the Parliamentary Commissioner for Administration and the Health Service Commissioner for England, which are laid before this House, and matters in connection therewith; to consider matters relating to the quality and standards of administration provided by civil service departments, and other matters relating to the civil service; and to consider constitutional affairs.

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Committee reports are published on the Committee's website and in print by Order of the House.

Committee staff

The current staff of the Committee are Iwona Hankin (Committee Operations Officer), Claire Hardy (Committee Specialist), Gabrielle Hill (Committee Operations Manager), Dr Philip Larkin (Committee Specialist), George Perry (Media Officer), Sarah Rees (Clerk), Dr Patrick Thomas (Committee Specialist), and Rebecca Usden (Senior Committee Specialist).

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Sixth Special Report

The Public Administration and Constitutional Affairs Committee published its Sixth Report of Session 2019–21, The Fixed-term Parliaments Act 2011 (HC 167) on 15 September 2020. The Government's response was received on 4 December 2020 and is appended to this report.

Appendix: Government Response

Letter from Chloe Smith MP, dated 4 December 2020

I would like to thank the Committee for its considered review of the operation of the Fixed-term Parliaments Act 2011 and its thoughtful identification of the key issues that ought to be considered by the Joint Committee undertaking the review of the existing legislation.

The Government has published a draft Bill for pre-legislative scrutiny by this Joint Committee because constitutional legislation of this form warrants careful consideration. I would welcome the Public Administration and Constitutional Affairs Committee's consideration of the Government's policy to ensure that this Bill is subject to greater scrutiny than the Fixed-term Parliaments Act received.

Government Response to the Public Administration and Constitutional Affairs Committee report—The Fixed-term Parliaments Act 2011 (Sixth 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 (the 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 Public Administration and Constitutional Affairs Committee, the Lords Constitution Committee and the debates in the last Parliament.

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 is able to seek a dissolution by virtue of commanding 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.

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. The Government would welcome PACAC's consideration of the draft Bill and the draft statement of these principles.

The purpose and effect of the Act

1. **The Fixed-term Parliaments Act clearly achieved the purpose of removing the discretion of the Prime Minister to call an election at a time of his or her choosing. It removed the ability of the incumbent party of government to time an election to gain an advantage over its opponents.** ***Whatever legislation replaces the FtPA it is important that this fairness is maintained.***. (Paragraph 17)

As a result of the FTPA, Her Majesty does not currently have any residual power to dissolve Parliament. Instead, an early dissolution either requires the support of two-thirds of MPs, or a statutory vote of no confidence. As the Committee itself recognised, a Prime Minister with a majority can circumvent the two-third majority requirement, as was the case in the 2017 General Election. Furthermore, in the 2017-19 Parliament these arrangements created gridlock. In repealing the FTPA, the Bill returns to a tried and tested system whereby Parliament is dissolved on the advice of the PM.

The Government does not agree that the existence of such a residual power provides the incumbent Government an electoral advantage. As the Sovereign's principal adviser, it is reasonable that a Prime Minister can advise on dissolution. There are numerous examples where, having called a snap election, the Government has been unsuccessful at the polls. Examples of this include the 2017 General Election, the 1974 General Election called by Edward Heath, the 1970 General Election called by Harold Wilson and the 1951 General Election called by Clement Attlee.

When a decision to call an election is taken the Prime Minister will of course recognise that in doing so the electorate can, at the polling booth, judge for itself the Government's actions in such matters. Election law provides for a level playing field between parties and candidates within the regulated election period itself, and the Cabinet Office's "Election guidance for civil servants" outlines the restrictions on Government activity and publicity during the election period.

2. **It is clear that the Act has shifted the balance of power from the executive to the legislature. It is less clear if the right balance of power has yet been struck.** ***While there should not be a return to the Executive dominance of election calling, careful consideration needs to be given for how the power of early election calling is balanced between the Executive and the Legislature.*** (Paragraph 18)

The Government's draft Bill, which has been published for pre-legislative scrutiny, will repeal the FTPA and revive the prerogative powers relating to the dissolution of Parliament (and the calling of a new Parliament) that existed before the FTPA. The Bill will therefore deliver a return to the tried and tested system where the Prime Minister is able, at a time of their choosing, to seek an early dissolution of Parliament and designate an issue as a matter of confidence in order to break a political deadlock. 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.

Once the FTPA is repealed and the prerogative power to dissolve Parliament is revived, the House of Commons will continue to play a key role in our constitutional system because it is a long-standing principle that the Prime Minister must be able to command the confidence of the House of Commons.

3. **The Act has clearly also altered the default expectation with regards to the timing of elections. The expectation is now that, where the Government has a working majority, a Parliament will normally last a full five-year term. Given that there are mechanisms for an early election included in the Act, the length of a Parliament is never truly a fixed term and, in this regard, the Act was misnamed.** ***While changes may need to be made to the current arrangements, the Committee can see no good reason for altering the default expectation that parliaments should run their full term and elections will occur at scheduled times, thereby providing certainty for those administering elections and for the public who vote in them. The only exceptions should be in circumstances where an early general election is the only means of resolving political deadlock, or if the House of Commons expresses no confidence in the Government.*** (Paragraph 19)

As the Committee observes, since 2015 the Act has not had its intended effect. Neither the 2015 Parliament nor the 2017 Parliament lasted for a full-five year term. The fact that

Parliament had to introduce bespoke primary legislation in 2019 to allow for an early general election shows that the FTPA has not worked effectively. The Government's Bill to repeal the FTPA 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. This will enable Governments, within the life of a Parliament, to call a general election at the time of their choosing, but the Bill provides for five year Parliamentary terms, as before the FTPA, and therefore there is certainty as to the maximum length of a Parliament and the latest date for a parliamentary general election. As a result of this provision Parliament will automatically dissolve at the end of the five year term, if not dissolved earlier.

The Government shares the Committee's concerns about political deadlock.

4. **It is clear that one of the main purposes of the Fixed-term Parliaments Act 2011 was to provide assurance to the Coalition partners that an early election would not be called. The fact that the Coalition Government was maintained for the full 2010–15 Parliament, makes it evident that the Act achieved this narrow purpose. Whatever system replaces the Act needs to be able to accommodate the formation of future coalition governments without further changes to the law for dissolving Parliament and calling elections.** ***The Government and review committee in considering what should replace the Fixed-term Parliaments Act must establish a system that will support majority, coalition and minority governments to be formed, and for them to govern for a full term, notwithstanding circumstances in which an early general election is the only means of resolving political deadlock, or if the House of Commons expresses no confidence in the Government***. (Paragraph 23)

We note that the 2011 Act was passed by the Coalition Government in order to provide stability to that administration. However, we would question the merits of making such fundamental changes to long-standing constitutional practice for short-term expediency. Since 2015 the Fixed-term Parliaments Act has not had its intended effect. Neither the 2015 Parliament nor the 2017 Parliament lasted for a full-five year term. The fact that Parliament had to introduce bespoke primary legislation in 2019 to allow for an early general election shows that the FTPA has not worked effectively. Flexibility is an essential part of the parliamentary system. It is the Government's view that the draft FTPA (Repeal) Bill is the means by which flexibility can be re-introduced into our system via a return to the pre-FTPA position where the Prime Minister is able to seek an early dissolution of Parliament.

The Government awaits with interest the findings of the Joint Committee undertaking a review of the FTPA and also any conclusions it reaches about the system of dissolution and how it operates in relation to majority, coalition and minority governments.

Review committee

5. **The Committee welcomes the Government's commitment not to rush through replacement legislation and to provide adequate time for full scrutiny. We also appreciate the Minister's commitment to forging cross-party support for whatever replaces the Fixed-term Parliaments Act.** ***The first step, as the Minister recognised, is for the review committee to be set up. It is important that the review committee is given***

time to carry out its work to its full satisfaction. Following the reporting of the review committee the Government should produce its proposals and allow time for full pre-legislative scrutiny. (Paragraph 34)

6. ***The Committee does not recommend a particular composition for the review committee beyond that set out in the Act. But the Committee believes that the review committee should be a Joint Select Committee, subject to parliamentary approval and not an executive-appointed committee. The Joint Committee could require additional provisions to include experts to be included as Committee members***. (Paragraph 35)

To fulfil its statutory responsibilities under Section 7 of the FTPA the Government tabled a motion, in the House of Commons on 10 November, to make arrangements for a committee to undertake a review of the FTPA and conduct pre-legislative scrutiny of the Government's draft Bill. That motion was agreed to by the House on 10 November without objection.

The Government made a commitment in its manifesto to repeal the FTPA, and to ensure this draft Bill receives adequate parliamentary scrutiny, it is appropriate that this Joint Committee of both Houses is, alongside its consideration of the FTPA, given the opportunity to scrutinise the Government's draft Bill. The FTPA was rushed and what replaces the FTPA must be subject to greater scrutiny so that we do not repeat this mistake with a core part of our constitution.

In giving consideration to the constitutional challenges that the FTPA presented, it is the Government's view that the Joint Committee will be well placed to scrutinise the draft Bill. The Government is committed to ensuring Parliament is properly consulted on the policy proposals to ensure that the arrangements made for this important part of our democracy, the calling of an election, will operate effectively.

The FTPA provides that the majority of the members of this Joint Committee must be MPs but beyond this is silent on the membership. Parliamentarians from both Houses are represented on the Joint Committee who, with their expertise and experience, are best placed to conduct this review. As is the case with all Joint Committees, it will have the power to call witnesses and collect evidence, including from experts whose opinion will undoubtedly be helpful in informing its work.

The prerogative of dissolution

7. **The question of whether or not the dissolution prerogative can be restored is a complex one, which involves fundamental constitutional principles. It clearly was the intention of the Government in 2011 to abolish the prerogative, but the wording of the Act is less conclusive on this point. Some also hold the view that the fact of abolition does not even matter. As all the evidence to this inquiry makes clear, this is a highly contested issue. There are also questions as to what exactly would be revived and for example what the legitimate expectations of the Sovereign as a constitutional backstop would be. This is of particular concern in light of the Supreme Court's recent decision about the prerogative power of Prorogation.** ***It is clear that attempting to revive the prerogative would invite the courts to make the final decision on these issues. These are core political and constitutional questions that neither Parliament nor government should abrogate to the courts. Even if there is a desire to return to the old system for***

dissolution and calling elections, it would be better setting these arrangements in statute rather than engaging in an unnecessary attempt to revive a prerogative which could have considerable unintended consequences and implication. (Paragraph 50)

8. **While not all members of the Committee would oppose such a move, it is also cognisant that reviving the prerogative would mean taking a power that is set out in statute and regulated by Parliament and handing it back to the Crown. Whether or not adequate consideration was given to the full implications of removing the prerogative in 2011, Parliament now has responsibility for this area of the UK political system. *The Government should not simply rely on reviving the prerogative, but look to establish a new, robust system for dissolution and calling of elections in the UK***. (Paragraph 51)

The Government recognises that there is a debate about whether the dissolution prerogative can be revived without specific legislation to do so. 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 powers, are non-justiciable. This facilitates a return to the long-standing norm that operated before 2011.

Early elections: avoiding paralysis and propping up of weak governments

9. **The two-thirds 'super majority' required to trigger an early election under the Act can, like any statutory provision, be circumvented by passing an Act of Parliament to set an election date. As was made clear to the Committee the option of such a circumvention was clearly always contemplated as a possibility in certain circumstances, such as occurred in Autumn 2019. The principle of parliamentary sovereignty means this will always remain a possibility. *Attempting to entrench a 'super majority' would be a difficult, unnecessary and potentially damaging move; the Committee advises against this being included in any proposals to replace the FtPA***. (Paragraph 63)

The FTPA, in providing that a two-thirds majority is required to bring about an early general election, served to hinder the calling of elections, and as the events of 2019 demonstrated, led Parliament to legislate to circumvent this provision in the FTPA. The Government agrees therefore that a two-thirds majority is a particularly undesirable feature of the FTPA and considers the codification of the system of dissolution undermines the flexibility which is an essential and necessary part of our constitutional system. It is for this reason that the Government's draft Bill repeals the FTPA and revives the prerogative powers relating to dissolution to enable a return to a tried and tested system which allows for the holding of necessary elections.

10. **It is clear that the inability for the House of Commons to set the date combined with an apparent lack of trust in the Prime Minister, contributed to the paralysis last autumn. There was support in our evidence for the view that allowing the Queen to set the date on the advice of a Prime Minister was a deficiency in the drafting of the Act. *Given the Government's stated reasons for seeking to repeal the Fixed-term Parliaments Act, it is important that consideration is given to mechanisms providing the House of Commons with the power to set the date of an early general election. The Committee recommends that the review committee consider this issue and the advantages and disadvantages of the power to call an early election and to set the date for that election being held by different institutions or whether the election state should be set in statute with a limited power of delay, as is presently the case in regards to the scheduled election date***. (Paragraph 69)

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.

11. **The principle that the Government must have, and retain, the confidence of the elected House of Commons is fundamental to our system of Parliamentary democracy. The Committee fully endorses the findings of our predecessor Committee on the operation of confidence since the establishment of the Fixed-term Parliaments Act, and recommends it to the review committee and the Government as an authoritative account of the issue**. (Paragraph 79)

12. **It is clear that some mix of statue and convention is the best way for this area to be governed, but this requires the actors involved to act in ways which engender trust**. (Paragraph 80)

13. **The Fixed-term Parliaments Act is compatible with the confidence principle and has not divorced confidence from dissolution. If the House of Commons wanted to trigger dissolution by removing confidence from the Government, it has that power under the Act. However, as was seen last year, the Act has created a situation where the Government can lose the confidence of the House, but the House is not prepared to trigger an election or support an alternative government. This is an unacceptable situation as it leaves the UK without a government that has the legitimate authority to govern. The ultimate responsibility for this situation under the Fixed term Parliaments Act rests with the House of Commons**. (Paragraph 81)

14. **Providing the House of Commons with the power to set the date of an election could provide one route to avoid unnecessary paralysis at times of deadlock**. (Paragraph 82)

15. **Changing the current arrangements to allow the Government to designate a vote a matter of confidence that if lost would trigger a general election—an established practice under the old arrangements—could be a retrograde step. If it were included in any future arrangements, it would clearly empower the Executive (via the Government Whips) and weaken the House of Commons, in particular Government backbenchers. This would be a matter of political judgment and the Committee does not advocate one way or the other at this point. *The Committee recommends that proposals to include the ability for the Government to designate a vote of confidence are included in the review committee's terms of reference, and if this is to be taken forward, it is given proper consideration by the House*.** (Paragraph 83)

The Government does not share the Committee's assessment of the effect of the FTPA, which, by codifying motions of confidence in statutory form, did divorce the issue of confidence from dissolution, as demonstrated by the events 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.

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 agenda or confidence was withdrawn in de facto, non-statutory terms.

When the Act is repealed it will be vital that the link between confidence and dissolution is restored in order that critical votes can be designated as matters of confidence which, if lost, would trigger an early election. 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.

Prorogation

16. **The Supreme Court's decision in the Miller-Cherry case highlights that at the heart of the UK's constitutional arrangements is a fine but constantly-shifting balance of convention, principle and law, that provides clear guidance, but also flexibility. These arrangements, when working successfully, rely as much on self-regulation and collective approbation as they do on the hard edge of the law. This is not a constitutional system in which the courts are intended be the ultimate arbiter. In areas of prerogative power, the Sovereign remains the constitutional backstop. However, the prorogation case raised questions over the extent to which the Sovereign is now able to perform this role, especially if the convention that the Sovereign should not be drawn into politically-objectionable matters is not adhered to. A range of options of how to prevent this have been suggested to the Committee, including setting out the power of prorogation in statue. *The Committee recommends this is included in the review committee's terms of reference*.** (Paragraph 94)

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.