

## Written evidence submitted by the Law Society of Scotland (FTP0005)

### Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law sub-committee welcomes the opportunity to consider and respond to Joint Select Committee Inquiry on the Fixed-term Parliaments Act 2011. We responded to the Public Administration and Constitutional Affairs select committee inquiry into the Fixed-term Parliaments Act in May 2020. Our response can be accessed here: <https://www.lawscot.org.uk/media/368944/fixed-term-parliaments-act-2011-003.pdf>

In preparing this memorandum of comments we have also considered the draft Fixed-term Parliaments Act 2011 (Repeal) Bill (CP 332) (Draft FtPA) and the House of Lords Select Committee on the Constitution report entitled *A Question of Confidence? The Fixed-term Parliaments Act 2011* (HL paper 122).

The sub-committee has the following comments to put forward for consideration.

### General Comments

We note the remit of the Joint Select Committee to:

- (a) Carry out a review of the operation of the Fixed-term Parliaments Act 2011, (FtPA) pursuant to Section 7 of that Act, and if appropriate in consequence of its findings, make recommendations for the repeal or amendment of that Act; and
- (b) Consider, as part of its work under sub paragraph (a) and report on any draft Government bill on the repeal of the FtPA presented to both Houses in this session.

Section 7 of the FtPA provides:

(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, and*

*(b) for the publication of the committee's findings and recommendations (if any).*

*(5) A majority of the members of the committee are to be members of the House of Commons.*

*(6) Arrangements under subsection (4)(a) are to be made no earlier than 1 June 2020 and no later than 30 November 2020.*

We agree with the House of Lords Constitution Committee that “*constitutional change must be designed to stand the test of time and that is most likely achieved by building on consensus*” (page 3). The composition of the joint committee may facilitate this objective.

### **Prior to the Fixed-term Parliaments Act 2011**

Prior to the FtPA the maximum duration of a UK Parliament was five years. This provision originated in the Septennial Act 1715/16 which extended the duration of UK Parliaments to a maximum of 7 years. In turn this period was reduced by the Parliament Act 1911 to five years.

Accordingly, for most of the 20th Century and for the first decade of the current century Parliament automatically expired five years after the day on which it was summoned unless it was dissolved earlier. The prerogative power to dissolve Parliament within the maximum five-year period was exercised by Her Majesty who assented to the request by the Prime Minister.

The FtPA was intended to fulfil a commitment in the Government publication *The Coalition: our programme for government*:

*“ We will establish five-year fixed-term Parliaments. We will put a binding motion before the House of Commons stating that the next general election will be held on the first Thursday of May 2015. Following this motion, we will legislate to make provision for fixed-term Parliaments of five years. This legislation will also provide for dissolution if 55% or more of the House votes in favour”.*

The Act substantially attained this objective. Section 1 provides:

*1 (1) The polling day for the next parliamentary general election after the passing of this Act is to be 7 May 2015.*

*(2) The polling day for each subsequent parliamentary general election is to be the first Thursday in May in the fifth calendar year following that in which the polling day for the previous parliamentary general election fell.*

*2. (1) An early parliamentary general election is to take place if—*

*(a) the House of Commons passes a motion in the form set out in subsection (2), and*

*(b) if the motion is passed on a division, the number of members who vote in favour of the motion*

*is a number equal to or greater than two thirds of the number of seats in the House (including vacant seats).*

*(2) The form of motion for the purposes of subsection (1)(a) is— That there shall be an early parliamentary general election.*

The Act was designed by the Coalition Government policy and has operated for 8 years covering 3 general elections.

One problem with the FtPA is that it regulates the length of Parliaments, while failing to regulate the formation and dissolution of governments, although the two things are intrinsically linked.

The Act was designed by a coalition Government -- not by a minority Government and that political fact highlights the failure of the legislation to clarify what the implications are of a loss of a confidence vote for the future of the Government.

In other words does the pre-existing convention remain intact that a government which loses a confidence vote must resign, or does the provision in the Act whereby a general election need not be held if a government wins a confidence vote within two weeks mean that the government may remain in place in order to seek to win back the confidence of the Commons, or does that only apply to a new government?

The Scotland Act 1998 section 45, on the other hand makes it clear that the Government must resign following a vote of no confidence. Section 45 (2) provides:

*The First Minister may at any time tender his resignation to Her Majesty and shall do so if the Parliament resolves that the Scottish Government no longer enjoys the confidence of the Parliament.*

The provision for an early General Election is contained in section 3 of the Act and protects the fixed-term by the requirement of a vote of a larger proportion (2/3) of MPs from that envisaged in the Coalition's Programme for Government.

## **Fixed-term Parliaments Act 2011 (Repeal) Bill specific comments**

### *Clause 1 Repeal of the Fixed-term Parliaments Act 2011*

#### **Our comment**

This clause will achieve the policy intention of repealing the FtPA but what is the effect of that repeal?

Prior to the FtPA, the dissolution of the Parliament was a personal prerogative power exercised by the Monarch at the request of the PM.

Section 3(1) of the FtPA made statutory provision for the way in which Parliament can be dissolved and section 3(2) provides that "Parliament cannot otherwise be dissolved".

There is an argument whether the effect of the FtPA is to extinguish the prerogative power permanently or only supersedes it for the time being so that, when the FTPA was repealed, it would automatically revive.

In *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 the majority stated that ‘if prerogative powers are curtailed by legislation, they may sometimes be reinstated by the repeal of that legislation, depending on the construction of the statutes in question.’ [112].

The House of Lords Select Committee on the Constitution thought that the legal position was arguable and therefore recommended that the repeal of the FTPA was not sufficient and that its provisions should be replaced by new provisions - see the 12<sup>th</sup> Report 2019-2020 “ A Question of Confidence? The Fixed Term Parliaments Act.”.

The Government has decided not to follow this recommendation but has indicated that its intention is “to repeal the 2011 Act and to return to the pre-2011 status quo ante” - see the draft statement of the Dissolution Principles which the Government has published along with the draft Bill.

What the Government understands to be the principles concerning “the pre 2011 status quo ante” are set out in that draft statement and the remaining provisions in the draft Bill set out how the Government intends to ensure that “the pre 2011 status quo ante” is revived.

*Clause 2 Revival of prerogative powers to dissolve Parliament and to call a new Parliament*

### **Our comment**

Clause 2(1) provides that “the powers relating to the dissolution and calling of a new election that were exercisable by virtue of the prerogative” prior to the commencement of the FtPA, “are exercisable again” as if the FtPA had never been enacted.

This express provision is intended to remove any legal uncertainty as to whether the prerogative powers to dissolve Parliament revive when the FtPA is repealed. It is clear that they revive the same powers which were exercisable by virtue of the prerogative but it is less clear whether they are revived as prerogative powers. This is because it could be argued that the effect of section 2(1) is that the source of those powers is no longer the prerogative at common law but section 2(1) itself and that therefore they are statutory powers. It may be difficult to avoid the logic of this dilemma.

Clause 2(2) deals with the powers to call a new Parliament and we make no comment upon it.

*Clause 3 Non-justiciability of revived prerogative powers*

Draft clause 3 provides:

*A court of law may not question—*

*(a) the exercise or purported exercise of the powers referred to in section 2,*

(b) any decision or purported decision relating to those powers, or

(c) the limits or extent of those powers.

This clause attempts to create an ouster provision which excludes questioning the exercise (or purported exercise) of the powers in clause 2, any decision (or purported decision) relating to them (such as the Prime Minister's advice to Her Majesty) and even the limits or extent of those powers. It is a targeted provision which attempts to protect the exercise of the dissolution powers from judicial review.

Paragraph 15 of the Explanatory Notes to Bill states that this provision is for the avoidance of doubt and is intended to confirm:

“the long standing position.. that the exercise of the prerogative powers to dissolve Parliament is not justiciable (see *Council of Civil Service Unions v Minister of State for the Civil Service 1985 AC 374 per Lord Roskill*).”

However it goes further than “the pre-2011 status quo ante” because, as paragraph 17 of the Explanatory Notes acknowledges the purpose of clause 3(c) is to ‘to address the distinction drawn by the Supreme Court in [*Miller II*] ... as regards the court's role in reviewing the scope of a prerogative power, as opposed to its exercise’.

Several commentators have raised doubts as to whether, even this ouster clause, would be sufficient to prevent a court from reviewing the scope or nature of the powers in an appropriate case.

#### *Clause 4 Automatic dissolution of Parliament after five years*

#### **Our comment**

Our introductory comments highlighted that parliamentary terms have varied over the centuries. The Septennial Act (7 year Parliament) replaced the Triennial Act 1694 (3 year Parliament). The Parliament Act 1911 (5 year Parliament) set the law for 100 years until the FtPA superseded it.

Parliamentary durations in devolved legislatures were originally 4 years, but over time have been extended to 5 years. The Scottish Elections (Reform) Act 2020 made such a change permanent for Scotland, as did the Northern Ireland (Miscellaneous Provisions) Act 2014 and the Wales Act 2017.

Clause 4 provides that, if it has not been dissolved earlier, a Parliament will automatically dissolve 5 years after it has first met.

This is intended to replicate the position as it was prior to 2011 when the maximum term of Parliament was fixed at 5 years as referred to above.

However, there is a difference as to how that period of 5 years is calculated. Under the 1911 Act the period of 5 years is calculated from the date of the general election but under clause 4 it is calculated from the first meeting of the Parliament. There is no law as to when the first

meeting of the Parliament takes place after a general election although the usual practice is for it to take place on the Wednesday after the general election the previous Thursday.

#### *Clause 5 Minor and consequential amendments and savings*

We have no comment to make.

#### *Clause 6 Extent, commencement and short title.*

We have no comment to make.

### **Lascelles Principles**

The Government's draft Statement of Dissolution Principles asks for comments upon those principles.

In addition to the comments upon the draft Bill, the main comment which should be made is that the bill and the draft Statement of Dissolution Principles make no mention of the Lascelles Principles.

These were a constitutional convention before the FtPA under which the Monarch could refuse a request from the Prime Minister to dissolve Parliament if three conditions were met:

1. if the existing Parliament was still "vital, viable, and capable of doing its job",
2. if a general election would be "detrimental to the national economy", and
3. if the Sovereign could "rely on finding another prime minister who could govern for a reasonable period with a working majority in the House of Commons".

Instead the draft Statement only states that -.

"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 gives the impression that the Queen will dissolve Parliament when the Prime Minister so requests. This would not be restoring the position as it was "pre 2011 status quo ante".

As Professor Mark Elliot states in his blog Public law for Everyone "*If the Government really did intend to restore the pre-FtPA position, this would not result in the Prime Minister acquiring an entirely unilateral power to call elections at will. That is so because, under the pre-FtPA arrangements, the Lascelles Principles recognised that the Monarch could refuse to dissolve Parliament in certain circumstances — a point that was also acknowledged in the partial draft of the Cabinet Manual that was published before the 2010 election*" <https://publiclawforeveryone.com/2020/12/02/repealing-the-fixed-term-parliaments-act/> .

The draft bill does not contain any provision which revives the Lascelles principles. The Cabinet Manual states, "The Prime Minister may request dissolution from the Monarch whether or not Parliament is currently sitting" (paragraph 3) and, "Once the Monarch has agreed to a dissolution and the Prime Minister has announced an election there are constraints on the way Government should conduct business" (paragraph 11).

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60646/election-rules-chapter6-draft\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60646/election-rules-chapter6-draft_0.pdf).

The House of Lords Constitution Committee report confirms the pre-FTPA position, “Until 2011, the dissolution of Parliament was a personal prerogative power exercised by the Monarch, at the request of the Prime Minister” (paragraph 3).

Professor Elliot states *“The statement of principles accompanying the Bill appears to presume that the Queen will dissolve Parliament as a matter of course when the Prime Minister so requests, thus implying an intention, on the part of the Government, not to restore the pre-FTPA position but to usher in a regime under which its latitude is greater than before”*  
<https://publiclawforeveryone.com/2020/12/02/repealing-the-fixed-term-parliaments-act/>.

It may be asked why the Executive alone should define the principles upon which the Monarch may refuse a Prime Minister’s request to dissolve Parliament? Should not Parliament also play a part in determining those principles, given how fundamental their operation may be to the role of Parliament itself? In the modern age, why should such crucial constitutional provision depend solely on concepts of prerogative, or the like?

If the Government is to be true to its original policy intention, then the Bill will need an amendment to ensure that the restoration of the prerogative powers to dissolve parliament specifically requires the consent of the Monarch.

