

Sir Malcolm Jack KCB Former Clerk of the House of Commons – written evidence (FPA0002)

I am pleased to submit written evidence to the Committee on its inquiry into the Fixed-term Parliaments Act 2011 and Motions of No Confidence under it.

The Committee will appreciate that this is a complex subject which involves a mixture of statute and long-standing constitutional convention.

Underlying constitutional principle

1. The underlying constitutional principle is that the Government's authority to govern derives from its ability to command the confidence of the elected House. That authority is tested by Motions of Confidence or No Confidence.

Established Convention on Confidence

2. Features of the Convention as it predated the Fixed-term Parliaments Act included:
 - (a) the Government acceded to a demand from the Leader of the Opposition for a No Confidence Motion on the basis that the Official Opposition was an alternative Government. Such a Motion was taken in Government time.
 - (b) Government itself could make a matter of policy a Confidence issue.
 - (c) Defeat on a Motion of No Confidence led to resignation of the Prime Minister and Dissolution under prerogative power (1924) (1979).
 - (d) It should be noted that this system is still operating in Canada/Australia at federal level, within fixed terms, as the Prime Minister can seek dissolution from the Governor-General.

Provisions of Section 2 and 3 of 2011 Act

3. The Fixed-term Parliaments Act 2011 was drafted in a hurry to bolster the coalition of Conservatives/Liberal Democrats. The original Bill contained provisions involving the issue of a Speaker's Certificate under Section 2 which was removed on grounds of privilege.
4. Section 2 of the Act specifies two ways in which a General Election can result:
 - (a) by the passing of a Motion calling for an early parliamentary election by a majority amounting to two thirds of the number of seats of the House (including vacant seats) and
 - (b) the passing of a No Confidence Motion but with a provision that a Confidence Motion is not passed within 14 days reversing that resolution.
5. Section 3 (2) of the Act states that Parliament cannot otherwise be dissolved.

Disadvantages of the Act

- a) Changing from a system based on convention to a statutory system means that parliamentary proceedings could be subject to interpretation in the courts. For example there could be a dispute about whether a No Confidence Motion had or had not been properly agreed to. That could happen in a fraught situation where Government had a small majority.
- b) The provision in Section 2 (3) & (5) for a Confidence Motion to be passed within 14 days of the passing of a No Confidence Motion considerably strengthens the hand of Government. In 1979 the Government of the day was forced to resign when a No Confidence Motion was passed by a majority of one, something that could certainly have been overturned in a 14 days period.
- c) The provision of a 14 day period raises considerable complications including the likelihood of the Crown being drawn into the matter.
- d) It is open, under Section 2 (4) for the Government to move a Motion of No Confidence in itself to avert the need for a two-thirds majority needed in Section 2 (1) of the Act to force Dissolution.

Censure outside the Act

6. The Cabinet Manual suggests that the Government can be censured in a Motion outside the strict terms of the Act but dissolution could only be achieved through the Act itself.

Royal Prerogative of Dissolution

7. Although the Act appears by Section 3 (2) to remove the Royal Prerogative to dissolve Parliament, the Canadian and Australian systems suggest that the Prerogative still exists in respect of those countries. The Committee might wish to investigate the exact position in respect of the Commonwealth countries where the established convention co-exists with fixed term parliaments.

Conclusion: Options for Committee to recommend

8. The Fixed-term Parliaments Act 2011 was heralded as a transfer of power from the Executive to Parliament. In fact its provisions allow the Government as much control and, in the area of No Confidence Motions, more control than previously in settling the length of any parliamentary term. The Committee should recommend that that imbalance is corrected in one of two ways.
9. The most drastic would be to repeal the Act. That would require some saving provision to re-instate the maximum duration of a Parliament as the Septennial Act, itself amended to provide a maximum 5 year term, was repealed by the 2011 Act. If the Committee also considered that a minimum fixed term was required, that would also need to be provided for.
10. Alternatively the Committee could recommend that the Act be amended:
 - (a) particularly by deleting the provision in Section 2 (3) & (5) for a successful No Confidence Motion to be reversed within a fourteen day

period by the House agreeing to a Confidence Motion. Such an amendment would remove most of the disadvantages set out in paragraph 8 above;

- (b) in Section 1 (3) so as to set a four, instead of a five, year term. Four years has been argued as a more reasonable length for a term and matches provisions in most Commonwealth parliaments; and
- (c) in Section 2 (1) reducing the 2/3 needed in favour of an early general election to a simple majority.

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