

Written evidence from The Law Society (FTP16)

Public Administration and Constitutional Affairs Committee Fixed-term Parliaments Act 2011 inquiry

Introduction

The Law Society of Scotland is the professional body for over 11,000 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 the Public Administration and Constitutional Affairs Committee Inquiry into the Fixed-Term Parliaments Act 2011. The sub-committee has the following comments to put forward for consideration.

General Comments

1. What were the purposes of the Fixed-term Parliaments Act 2011(FtPA) and to what extent have these purposes been met?

Our Comment

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. This was reduced by the Parliament Act 1911 to five years.

A 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 on the advice of 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.

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

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 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.

2. If the Fixed-term Parliaments Act 2011 is amended or repealed, what arrangements should be put in place?

Our Comment

One provision which should be clarified is section 1(4) that after an early general election, the next election has to default to the first Thursday in May. In our view, if the statute provides that the Parliamentary term should be 5 years, it should be so irrespective of when it began.

The Scotland Act 1998, section 3, provides that an early general election does not interfere with the normal schedule of general elections, so that a Parliament formed after an early general election will only run until the next scheduled date, unless it's within six months of that date. That is a less complicated rule but could lead to some very short parliamentary terms.

3. Should parliamentary terms be fixed?

Our Comment

The principle of fixed-term Parliaments, or that it should be for the House of Commons rather than the Prime Minister to authorise early general elections, presents political problems rather than constitutional ones. Such arrangements are common in other legislatures - not least in the devolved landscape - and there are strong arguments in their favour, in terms of avoiding partisan manipulation of election dates.

- How can fixed terms be assured?

The FtPA created a mechanism which constrained executive power to call an earlier election which was close to assurance as possible within the current constitutional arrangements. Even so the Early Parliamentary Election Act 2019 showed that the provisions in the Act could be circumvented by a simple majority (albeit of both Houses).

- What should be the length of parliamentary term?

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) Bill 2019 currently at Stage 3 in the Scottish Parliament seeks to make such a change permanent for Scotland, as did the Northern Ireland (Miscellaneous Provisions) Act 2014 and the Wales Act 2017.

- Should scheduled elections be fixed to a certain point in the year?

We have no view on this.

4. Can the prerogative powers be restored or created anew?

Our Comment

The question is whether the prerogative has simply been put into abeyance by an Act, and will therefore revive on repeal, or whether it has been abolished and has to be replaced.

There is a current debate as to whether Parliament, in exercise of its sovereignty, could legislate to restore prerogative power. Judicial comment in the case of Miller points to the view 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'. This approach follows the Interpretation Act 1978 section 15 *Where an Act repeals a repealing enactment, the repeal does not revive any enactment previously repealed unless words are added reviving it.*

On the other hand there are those who take the view that if the FtPA did not attempt to abolish the dissolution prerogative then the repealing Act, with express words of revival, would allow the prerogative to be exercised again see: <https://ukconstitutionallaw.org/2017/05/24/robert-craig-zombie-prerogatives-should-remain-decently-buried-replacing-the-fixed-term-parliaments-act-2011-part-1/>

5. Should the prerogative powers to prorogue parliament also be abolished by setting out arrangements in statute?

- What provisions should be established for the ending and beginning of parliamentary session?

Our Comment

The FtPA provides in Section 6 that the '*Act does not affect Her Majesty's power to prorogue Parliament*'.

This question could be answered in two ways: 1. Should the prorogation power *in general* be regulated by statute; or 2. Should the interaction of prorogation and fixed term parliaments be regulated by statute?

The prorogation power was not covered by the FtPA to preserve the possibility of using it to prevent the formation of an alternative government within two weeks. Arguably, such a use of the prerogative might be regarded as frustrating the statute, or otherwise unlawful under the principle in the Miller 2 and Cherry case. The willingness of the courts to regulate the use of prorogation to maintain parliamentary accountability is relevant in this specific context.

If there were to be legislation regarding such an important constitutional issue as the prerogative powers to prorogue Parliament it should be consulted on separately and widely.

The issue of prorogation has recently been considered by the UK Supreme Court in R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) and Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019] UKSC41.

The Order in Council of 28 August 2019 ordered that Parliament be prorogued. The prorogation was to take effect between 9 and 12 September until 14 October when Parliament could reconvene for a new session. Parliament was prorogued on 9 September.

The prorogation was controversial, attracting criticism from the Speaker and from many parties in Parliament and legal and constitutional commentators. It also provoked litigation in England and Scotland.

The courts had to decide the justiciability of the prerogative power to prorogue Parliament, the legality of the prorogation and the impact upon prorogation if the advice upon which the prorogation was based was deemed to be unlawful, what impact would that have for the order and its execution.

The UK Supreme Court decided that it could determine the lawful limits of the exercise of a prerogative power to prorogue Parliament. In doing so the Court stated that it could protect;

‘Parliamentary sovereignty from threats posed to it by the use of the prerogative powers and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty.’ [para. 41].

The Court also stated:

‘The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased.’ [para 42].

The Court determined that the power to prorogue was not unlimited and was subject to judicial review.

On the legality of the prorogation, the Court concluded:

'It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful. '[para. 61].

The Court considered the effect of prorogation and came to the conclusion that prorogation would be unlawful if it "has the effect, of frustrating or preventing, without reasonable justification, the power of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive". It found that proroguing for five weeks, rather than the normal four to five days, prior to the UK's Withdrawal from the EU on 31 October was unlawful. The Court accordingly quashed the Order in Council, meaning prorogation never happened.

6. If a committee is appointed to review the Act, how should this committee be constituted?

We have no comments to make.

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