

Fixed-term Parliaments

Written Evidence

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Memorandum by David Arter (FTP 1)

Background

- 1) Since the achievement of 'mass democracy' (universal voting rights) by the early 1920s, all the Nordic states have employed PR list electoral systems in multi-member constituencies. In Denmark and Sweden (since 1998) there is the choice of voting for a specific candidate or simply the party list whereas in Finland there is an obligation to cast a 'candidate vote'. Iceland and Norway operate closed list systems. There are electoral thresholds ranging between 2 and 4 per cent of the national vote in all but Finland.
- 2) All the Nordic countries have unicameral legislatures – Finland since 1906, Denmark 1953, Sweden 1970, Iceland 1991 and Norway 2009. The Icelandic *Alþingi* comprises 63 members, the Norwegian *Storting* 169, the Danish *Folketing* 179, and the Finnish *Eduskunta* 200. It is worth noting, in view of the proposal to reduce the number of Westminster MPs, that the Swedish *Riksdag* comprises 349 members for a population of only nine million. In Norway and Sweden members sit by region and not party and in both there is an 'incompatibility rule' and thus the full complement of parliamentarians (deputies replace MPs promoted to ministerial office). All the Nordic parliaments have policy-based standing committee systems (albeit in the Danish case only since 1973) and in Finland there is the distinctive 'Committee for the Future'. All run for 4-year terms (it was 3 years in Sweden between 1970 and 1994)
- 3) Throughout the Nordic region there is evidence of declining public trust/confidence in a range of political actors and political parties in particular. Protest has expressed itself in varying ways including falling turnout and support for radical right populist parties (witness the performance of the 'Sweden Democrats' – 5.7% and 20 seats - on September 19th)
- 4) 'Prime ministerial dissolutions' have been relatively commonplace in Denmark and rather less so in Iceland. 'Presidential dissolutions' were a feature of Finnish politics until the mid-1970s. However, since the move to a single-chamber *Riksdag* in 1970 there has not been an 'early election' in Sweden and in Norway there is no constitutional provision for a dissolution of parliament.

Norway

- 1) As a by-product of the Napoleonic wars, Norway was transferred from Denmark to Sweden in 1815. Baldly stated, in January 1814 Sweden invaded Denmark, which was forced to surrender Norway. However, Norwegian rebels led by Crown Prince Christian Frederick convened an assembly at Eidsvoll and on May 17 1814 this drafted a constitution for an independent Norway. When in July 1814 the Swedes invaded Norway Christian Frederick stood down, the Norwegians accepted the Swedish king but he in turn agreed to accept the Eidsvoll constitution. No provision for a dissolution of parliament was written into the Eidsvoll constitution which, drafted during the interregnum, reflected a concern to protect the newly-created national assembly (*Storting*) against arbitrary action from the executive – between

1815 and 1905 the Swedish monarch. There was an interesting contrast in Finland since between 1907 and 1917 when, still a Grand Duchy of the Russian empire, the new unicameral Eduskunta was repeatedly dissolved by the Czar who, like the Swedish king, exercised federative and executive powers. In any event, it needs emphasis that the absence of a constitutional mechanism for 'going early to the country' long antedated the party politicisation of the legislature and indeed the achievement of accountable government in 1884. It also reflected the influence of the separation of powers written into the US constitution of 1786 and the 1791 French constitution.

- 2) Historically designed to protect the legislature against executive power, it is ironic that since 1961 the absence of the possibility of an early election has tended to sustain numerically weak minority governments in office. Between 1961 and 2005 minority cabinets (both single-party and coalition) were in office in Norway for 82 per cent of the time
- 3) Whilst minority governments have proved remarkably durable, there have been three occasions over the last quarter of a century when non-socialist coalitions have been replaced by single-party Labour cabinets without a general election. In 1986 the three-party, minority, non-socialist coalition led by the Conservative Kåre Willoch fell when it demanded a vote of confidence on a proposal to increase petrol taxes; in November 1990 Jan Syse's Conservative-led minority coalition collapsed over the question of Norway's EU accession; and in March 2000 the Christian Democrat Kjell-Magne Bondevik's centrist coalition, which had the backing of only 42 MPs but lasted three years, was brought down over the question of whether to proceed with gas-fired power stations on the West coast, which it opposed.
- 4) One argument, particularly associated with Kaare Strøm, is that minority governments work best where they are most common (Denmark, Norway and Sweden) and that policy-making on the basis of shifting *legislative coalitions* – largely ad hoc issue-based arrangements in the Norwegian case – gives the legislature significant influence in decision-making.
- 5) The alternative view is that minority government lacking a stable parliamentary majority is weak government and that the people deserve something better. This could be achieved for example by means of the so-called 'positive investiture' – that is, requiring an incoming prime minister to gain a vote of confidence from the Storting (rather than simply *non sfiducia* – 'not no confidence' as at present) and permitting a dissolution if a prime minister loses a vote which he/she has expressly designated a 'confidence question'. In the 2007-08 Storting the Progress Party proposed constitutional change along these lines.
- 6) Ultimately though, legislative-executive relations are not determined simply by constitutional writ (or the absence thereof) but by the structure and dynamics of the party system and across Scandinavia there is recent evidence of significant legislative party system realignment. Put another way, the emergence of bipolar 'bloc politics' has facilitated majority coalitions in both Norway and Sweden (2006-2010) and, to a lesser extent, Finland, and meant that governments last the full four-year term. The

advent of 'majority government', replacing what the Scandinavians have referred to as 'minority parliamentarism', has militated against constitutional change and, in the Norwegian case, undermined the case for introducing provisions for a dissolution of parliament as a way out of weak minority government.

Sweden

- 1) The Riksdag can be dissolved by prime ministerial decree before the end of its 4-year term and new elections called. However, new MPs then hold office only until the date of the next ordinary election, the date of which is unchanged (viz the third Sunday in September every four years). There has not been a premature dissolution since the days of the bicameral Riksdag in 1958.
- 2) The three-year Riksdag terms between 1970 and 1994 acted as a considerable disincentive to calling early elections. The best example occurred in 1978 when Thorbjörn Fälldin's three-party non-socialist coalition – the first 'bourgeois cabinet' for 44 years – which had an eleven-seat majority, collapsed over the question of nuclear power. The single-party Liberal minority cabinet led by Ola Ullsten, which succeeded it, had the direct support of only 39 of the 349 MPs but few wanted a premature dissolution with the scheduled general election less than twelve months away. In Sweden, an express majority for the Speaker's proposal of a new prime minister is not required; rather, if more than half of the House (175+) have voted against, the proposal is rejected. In 1978 the Conservatives and Left-Communists (66 seats) voted against Ullsten as the new prime minister but the Social Democrats and Centre (215 seats) abstained. Several other examples of 'tolerated minority governments in preference to an early election' could be cited: the Social Democrats' 'support' for the Centre-Liberal minority in 1981-82 and others.
- 3) If the Speaker's proposal for a new prime minister is rejected four times, an extraordinary general election must be held within three months. This has never happened.
- 4) It is fair to say that in Sweden the provision for an early dissolution is seen as a way out of a prospective/real 'stalemate'. When, following the September 19th general election, it became evident that the radical rightist Sweden Democrats had not only entered the Riksdag for the first time but denied the non-socialist bloc an overall majority, the respected Swedish television journalist Mats Knutson wrote that "there is a risk that a new election looms round the corner".

Summary points

- 1) Only in Denmark among the Nordic countries can it be said that general elections have been called "according to the prime minister's whims". (Clegg)
- 2) The Norwegian experience suggests that the absence of a constitutional provision for a dissolution of parliament has tended to sustain minority governments in power rather than, as intended, protecting the legislature against the executive.

- 3) The Swedish experience also suggests that the executive has been protected by the constitutional stipulation that a Riksdag elected following a prime ministerial dissolution can sit only until the date of the next ordinary election.
- 4) The Finnish experience associates dissolutions of parliament with presidential power (it was last used in 1975) and this has been undercut by the 2000 constitution. Unlike Denmark, Norway and Sweden, every Finnish government since 1983 has been a broad-based majority coalition.

23 September 2010

Supplementary memorandum from Professor Anthony Bradley (FTP 39)

**In response to the written evidence submitted by the Clerk of the House of
Commons, Malcolm Jack**

Paragraph numbers relate to the relevant paragraph's in the Clerk's written evidence.

(Para 3) I do not wish to add anything of substance to what the Clerk says in discussing the 'risk' under the Bill of parliamentary proceedings being questioned in the courts, since the nature of our disagreement over that risk is clear. There is, in my view, nothing in the Fixed-term Parliaments Bill that could be said expressly or impliedly to restrict the scope of Article 9 of the Bill of Rights.

(Para 4) In commenting on the case of *Bradlaugh v Gossett*, the Clerk refers to section 3 of the Parliamentary Oaths Act 1866, and its requirement that the oath should be taken under directions laid down by the Standing Orders of each House. While this may provide a precedent for what the Clerk proposes should now be done by Standing Orders, I observe that neither Stephen J (save for a passing reference at page 282 of his judgment) nor the other judges in *Bradlaugh v Gossett* mention this provision. They deal with the matter on the basis, as argued by *Bradlaugh*, that the order given to the Serjeant at Arms was contrary to the Act itself.

(Para 4) While there have indeed in recent years been several interventions by the Speaker of the House of Commons to protect parliamentary privilege in the courts, it has not always been obvious that there was a need for such an intervention, and I am doubtful whether those interventions have achieved a great deal. So far as the European Court of Human Rights is concerned, in the case of *A v United Kingdom* in 2002, the Court by a majority of 6-1 upheld the absolute immunity of MPs from being sued in defamation for what they say in debate in the House, and the United Kingdom's successful defence of this position was supported by eight other European governments.

18 October 2010

Letter from the Clerk of the Australian Senate (Rosemary Laing) (FTP 2)

Australia's constitutional arrangements for the terms of the House of Representatives and senators

By way of introduction, the Commonwealth of Australia has a written constitution which provides for a House of Representatives to continue for a maximum of three years, unless sooner dissolved, and a Senate whose members are elected for a fixed term of six years (except senators elected to represent the territories whose term is equal to that of the House of Representatives) (sections 7 and 28). Australia does not therefore have fixed-term parliaments at the federal level. Prime ministers retain the discretion to advise the dissolution of the House of Representatives at a time of their choosing. This magnifies the power of the prime minister and has a tendency to undermine the role and status of Parliament, particularly the House of Representatives. The brevity of a maximum three year term, coupled with the possibility that the House might sooner be dissolved, means that election campaigns are virtually continuous. Only one Parliament has run its full term since Federation in 1901 and that was the third Parliament elected on 12 December 1906 which expired by introduction of time on 19 February 1910. (Note, however, that the recent very close elections for the House of Representatives have produced a minority government and the Prime Minister has undertaken to consult with her cross-bench supporters on the date of the next election.)

There is one brake on a prime minister's discretion to advise the dissolution of the House and that relates to the timing of elections for the Senate. Although elections for the House of Representatives and the Senate are not required to be held at the same time, in practice they are held together for the most part in recognition of the cost of elections for the official apparatus, the Australian Electoral Commission, and the cost of campaigning for candidates and parties. The risk of voter disaffection with too many elections in a country which has three levels of elected governments -- local, state and national -- and compulsory voting for all three, is also a factor in the practice of simultaneous elections for the Houses. Senators' terms expire on 30 June of their sixth year in office. A system of rotation is established under the Constitution and provides for half the Senate to face re-election every third year. (In 1901, and after each simultaneous dissolution, the Senate was divided into two classes, one class to serve for six years, the other to serve for three years and thereby allow the rotation to be established or re-established.)

An election of senators to take their places on 1 July must occur within the previous 12 months. For simultaneous elections to be maintained, it is therefore necessary for House of Representatives elections to be held within 12 months preceding the expiration of senators' terms. As an example, the election held on 21 August 2010 was for the House of Representatives and half the Senate (whose terms expire on 30 June 2011). The current Senate continues till June next year while senators elected on 21 August will not take their

places till 1 July 2011. This is the longest waiting period for senators to begin their terms since Federation. (An election held in July 1987 followed a simultaneous dissolution. In such cases, senators' terms are backdated to the preceding 1 July.) The waiting period is regarded as preferable to subjecting the electorate to a separate half-Senate election which may operate as a mid-term judgement on the government's performance.

Resolving deadlocks

The peculiarities of the electoral systems of both Houses under the Australian Constitution are thus an important check on prime ministerial discretion over the timing of the elections. Under the Australian Constitution, the fixed-term element of the Parliament (the Senate) co-exists with the flexible term element (the House of Representatives). Should the Houses become deadlocked over legislation, there is also a constitutional mechanism in section 57 to break the deadlock, involving simultaneous dissolution of both Houses. The process involves the following elements:

- a contested bill, which must have been introduced into the House of Representatives and either rejected or amended unacceptably by the Senate, or the Senate fails to pass it
- a three month interval between the Senate's action and the passage again by the House of the same bill
- a repetition of the Senate's action in rejecting, unacceptably amending or failing to pass the bill
- the dissolution of both Houses by the Governor-General on the advice of the Prime Minister
- an election for both Houses
- if after the election the government is returned and wishes to pursue the same bill, it must be reintroduced in the same form
- if the bill suffers the same fate a third time in the Senate, the Prime Minister may advise the Governor-General to convene a joint sitting of the two Houses to determine the fate of the bill.

While there have been six simultaneous dissolutions since Federation, there has been only one joint sitting, in 1974, when six bills that had triggered the dissolution were passed. One was subsequently invalidated by the High Court on the basis that its consideration had not complied with the requirements of section 57 (see *Victoria v Commonwealth* (1975) 7 ALR 1). Particular issues associated with the deadlock-breaking mechanism are justiciable (also see *Cormack v Cope* (1974) 131 CLR 432 and *Western Australia v Commonwealth* (1975) 7 ALR 159).

Although there have been proposals to amend section 57 to make a government's task easier, none has proceeded to the referendum required before the Constitution can be altered. Simultaneous dissolutions have led to loss of office by the initiating government in

approximately half of all cases and therefore operate as a very sober, but democratic, check on executive power.

Fixed four-year terms?

There is also a constitutional ratio in operation which could affect the length of any fixed term parliament to be introduced here. Section 24 of the Constitution provides for the House of Representatives to have twice the number of members as the Senate, as nearly as practicable, and senators' terms are twice as long as the maximum term of the House. Proposals for four-year parliaments, whether fixed or not, have always been dogged by the issue of the length of the Senate term and some disquiet has been expressed about eight year terms for senators. One option would be fixed four-year terms for both Houses.

Fixed four-year terms are now in operation in several Australian states and fixed three-year terms in the Australian Capital Territory. Although there are mechanisms to bring about earlier dissolutions, these mechanisms generally have a high threshold and carry some connotations of constitutional 'crisis' in their use. Thus it is possible for sustained poor performance by a government which enjoys a majority in the lower house to continue despite high levels of voter dissatisfaction, as has been the case for much of the term of the current government in New South Wales which is due to face the people in March 2011. No doubt the particular experiences of the Australian states and territories with fixed-term parliaments will be provided to the committee directly from those jurisdictions. Some of the fixed term parliaments were entrenched in state constitutions following successful referenda. Constitutional amendment would be required to entrench them at the federal level in Australia.

Timing

In Australia, elections for all levels of government take place on a Saturday in accordance with electoral legislation. Voting is compulsory (or rather, eligible persons are required to enrol and those on the electoral roll are required to attend on polling day). There are various exemptions in the electoral law (for example, for religious observance on Saturdays) but pre-poll and postal voting options are also available. There has been no serious consideration of any other option for polling day and Australians are used to voting on Saturdays. Many polling places are school halls which would otherwise be unavailable if polling day were on a weekday.

8 September 2010

**Letter from Clerk of the Legislative Assembly, New South Wales
Parliament (Russell Grove) (FTP 3)**

I am happy to provide a submission in relation to the experience of the New South Wales Parliament. New South Wales has had four year fixed terms since 1995 when amendments to the *Constitution Act 1902* (NSW) were agreed to at a referendum.

The attached submission outlines a number of key issues that were considered by a Joint Select Committee that was established to inquire into the proposed amendments. It also discusses some procedural and other issues that have arisen since the amendments were enacted.

While the New South Wales Parliament has not experienced any difficulties with the fixed terms many of the issues considered by the Select Committee related to the implications of fixed terms on the stability of Parliament, codifying the powers of the Governor and providing for special circumstances in which the Parliament could be dissolved during the fixed term. These are important issues, which are relevant to your committee's inquiry.

Summary

The *Constitution Act 1902* (NSW) provides that the term of the Legislative Assembly of New South Wales is fixed at four years unless the House loses confidence in the Government or fails to pass an appropriation bill for the ordinary annual services of Government or, if in accordance with constitutional convention and despite any advice of the Premier or Executive Council, the Governor decides to dissolve the Assembly.

The electors of New South Wales agreed to the fixed term for the Legislative Assembly in a referendum held in March 1995. Prior to the passage of the bill for fixed terms through the Parliament a Joint Select Committee considered the proposed amendments to the *Constitution Act*.

This submission considers a number of issues that were raised during the inquiry into the two bills undertaken by the Joint Select Committee and discusses procedural and other issues that have arisen since the provisions were enacted such as:

- The advantages and disadvantages of fixed terms;
- The practicality of having a motion of no confidence in the Government as a trigger for early dissolution;
- Whether the prerogative powers of the Governor should be retained or codified and whether this would make them justiciable;
- Whether the rejection of major legislation should be considered a motion of no confidence in the Government;
- Confidence motions and whether the Governor's discretionary power to dissolve Parliament should be retained and the problems of multiple "baton changes";
- Whether fixed terms should be entrenched; and
- Whether recall provisions should provide a mechanism for an early election.

Introduction and background

The New South Wales Parliament has a qualified fixed term of four years. The *Constitution Act 1902* (NSW) provides that the term of the Legislative Assembly of New South Wales is fixed at four years unless the House loses confidence in the Government or fails to pass an appropriation bill for the ordinary annual services of Government or, if in accordance with constitutional convention and

despite any advice of the Premier or Executive Council, the Governor decides to dissolve the Assembly.

The Constitution Act provides that if not dissolved earlier the election for the Legislative Assembly will be held on the fourth Saturday in March every four years. (See Appendix A for the relevant provisions of the Act). The practical effect of this provision is that Parliament does not sit from early December when the House adjourns in the year prior to the election until May the next year (a date in May is the latest date for the return of the writs for a General Election). Effectively this means that the time for Parliamentary business is three and a half years. (See Appendix B for the timeframe for the next election to be held in March 2011).

Another practical effect of the fixed term is that the political parties go into election mode earlier than was previously the case where the election campaign was a four or five-week event. The fact that the date of the election is known means that the last sittings of Parliament before an election (September to December) is essentially used by parties for political positioning and thereby the campaign period is lengthened.

There are also practical implications in relation to the entitlements received by Members. Members are entitled to a range of entitlements, some of which that can be rolled over from one financial year to the next within the four-year parliamentary term. This has meant that it is common practice for Members to store up entitlements for use during the last quarter of the parliamentary term to send out newsletters and direct mail to constituents.

The electors of New South Wales agreed to the fixed term for the Legislative Assembly in a referendum held in March 1995. Prior to the amendments to the Constitution Act, the term of the Legislative Assembly of New South Wales was for a maximum of four years.

The move towards amending the Constitution Act commenced in September 1991, when the then Premier announced that the Government had agreed to “adopt fixed four year terms for State Parliament.” Three non-aligned Independent Members who held the balance of power had made the suggestion. On 31 October 1991, the Memorandum of Agreement between the Government and the Independent Members of Parliament, Mr John Hatton, Ms Clover Moore and Dr Peter MacDonald, was signed, affirming the commitment to fixed four year terms. The Memorandum contained the statement of principle that: “The Government acknowledges that changes to the framework of Government in New South Wales to reflect a strong Parliament and to ensure the accountability of Executive Government to the Parliament are necessary”; one element of the reform package was the proposal for fixed four-year terms.

Two bills were appended to the Memorandum for this purpose, namely the Constitution (Fixed Term Parliaments) Special Provisions Bill 1991 and the Constitution (Fixed Term Parliaments) Amendment Bill 1991.¹ Both bills were introduced and read a second time on

¹ The debate on the Special Provisions Bill occurred in the Legislative Assembly on 9 and 11 December 1991 and the debate on the Fixed Terms Bill occurred in the Legislative Assembly on 17, 18 and 19 December 1992. The speeches and debates can be accessed on the Parliament’s website at www.parliament.nsw.gov.au

31 October 1991 and subsequently referred to a Joint Select Committee for consideration and report.

The Committee reported on the Special Provisions Bill in December 1991 and the bill was assented to on 17 December 1991. It provided for the next election to be held on Saturday 25 March 1995 and that a referendum on the Fixed Term Bill must be held on or before that date. The Committee reported on the Fixed Term Bill in March 1992 and September 1992. The legislation was passed by the Parliament in 1993 and was assented to following agreement by the electors in the referendum held on 25 March 1995.

Issues considered by the Select Committee

Advantages and disadvantages

In relation to the advantages of fixed terms, the Committee was informed that most of the arguments for fixed terms related to removing the advantage of the Government being able to determine the date for an election and that fixed terms were more conducive to good planning in government. Accordingly, arguments for fixed terms appeared to be expressed in terms of the interest of Government or of business. It was argued by witnesses appearing before the Committee that the benefits of fixed terms could be expressed in terms of benefits for the parliamentary institution and electors. For example, it would be advantageous for committees of Parliament, which would know how long they have to inquire and report on a matter before the House was dissolved.

The Committee summarised the advantages as follows:

- Fixed term Parliaments protect a government which enjoys the confidence of the Lower House;
- A fixed term may guarantee tenure for the Government which may help to ensure that the government has the requisite amount of time to effectively implement its policies;
- There may be benefits to the Parliamentary Committee process as it allows more in-depth analysis to occur and, in particular, more complex analysis of issues;
- Fixed term parliaments may allow more systematic servicing of the electorate by members of Parliament;
- There may be reduced incentives for parliamentary procedural manoeuvres;
- Fixed election dates remove the partisan advantage enjoyed by incumbents in their choice of election date;
- There will be a reduction in the number of elections and ancillary costs (both monetary and administrative);
- Fixed election dates allow more effective planning of the parliamentary timetable by the incumbent government;
- Fixed term parliaments may help to alleviate the dilemma of an Upper House controlled by the Opposition refusing to pass Supply Bills;
- Minor political participants have more time to effectively campaign and ensure that their political message is publicised;
- Fixed term parliaments insulate the Parliament from fickle public opinion;

- A greater degree of independence may be fostered as the threat of dissolution will not be constantly hanging over the heads of members of parliament;
- Governments will realise that, if their support dissipates, they will not necessarily have recourse to the voters and they may be more encouraged to pay greater heed to the views of the electors.

In relation to the disadvantages of fixed terms the main arguments centred on the difficulty of having an unworkable government and no mechanism to have an early election if a government is unpopular or is unable to implement its policies.

The Committee summarised the disadvantages as follows:

- Fixed term elections may detract from the ideal of frequent accountability to members of the public/voters;
- An election campaign season may result – similar to that experienced in the United States. This may also result in increased campaign costs;
- If a government loses its majority in the Lower House an election can solve a political crisis;
- A failure to understand and implement the essential principles of democracy, that is, belief and trust in the inherent wisdom of the electors. Under a fixed term of parliament that trust only emerges on a fixed date every four years;
- Fixed term parliaments entrench Independents and Members of Parliament whose positions may be more tenuous than normal;
- Comparisons to the United States system are not accurate as their system of electoral primaries enables members of the public to keep a constant eye on the participants in the political process rather than merely washing their hands of the political system for four years;
- The public may have to endure four years of an unpopular government if a government implements decisions which result in it losing its basis of support;
- The argument that a government can manipulate the election season is a fallacious argument, as regardless of whether the parliamentary term is fixed or not, candidates will still be endorsed in the period preceding an election regardless of whether that period is four years or three weeks;
- The result of a by-election can often determine the government of the day;
- The argument that a government needs time to implement its policies is not an argument which should be used in favour of fixed term parliaments but rather it is an argument in favour of extending the government's term from four years to five years;
- Fixed term parliaments can also help to entrench Independent Members of Parliament who hold the balance of power and as a result, periods of instability can be prolonged for longer periods of time;
- A vote of no confidence by Independents and an Opposition could allow them to call an election at an opportune time;
- Fixed term parliaments may make politics more “mechanical” by limiting the conflict inherent in the political system;
- A government with a small majority may be unduly harassed by competing demands with no recourse to an election;

- The election date may turn out to be an inconvenient date particularly if a crisis of some sort occurs. Unforeseen circumstances are a fact of life.

No Confidence motions

The bills as introduced into Parliament provided that the Legislative Assembly could be dissolved early if a motion of no confidence in the Premier and other Ministers was passed. The Committee discussed whether a no confidence motion in the Premier and other Ministers was akin to a no confidence motion in the Government. The Committee concluded that it was not, given that a party can change their leader without the support of the House and install a new Premier. Accordingly, the Committee recommended that the legislative provisions enacted specify that for the purposes of dissolution of the Parliament a motion of no confidence in the Government must be passed. This was subsequently enacted (section 24B of the *Constitution Act 1902*).

There was some discussion of the need to specify that a motion of no confidence in the Government should have to specifically state the words “no confidence”. This has been the practice of the House for many years although it is not specified in the Standing Orders.

A practical effect of the amendment to the *Constitution Act 1902* and corresponding amendments to the Standing Orders to reflect the provisions of the Act, was that it was assumed all motions of no confidence in the Government would be initiated pursuant to the Act. Accordingly such motions could not proceed until three clear days from the giving of the notice had passed. However, in practice there have been a number of occasions when the Opposition has given notice of a motion of no confidence in the Government and wanted the matter debated forthwith and not in accordance with the Constitution Act.

Accordingly, an amendment was made to the Standing Orders in 2009 to provide for motions of no confidence in the Government to be moved otherwise than pursuant to section 24B of the Constitution Act. This was a practical amendment for a House that has a governing majority and where the purpose of such motions are to bring attention to poor government performance as opposed to forcing an early election due to the fact that such motions will be negated along party lines.

While discussing the issue of no confidence motions the Committee considered the terminology that was proposed. Section 24B of the *Constitution Act 1902* provides that the Legislative Assembly may be dissolved if a motion of no confidence in the Government is passed (being a motion of which not less than 3 clear days’ notice has been given). The Committee considered the terminology of “3 clear days”. It was noted that “clear days” meant three calendar days from midnight to midnight and accordingly, it did not include the day on which the notice was given. It was considered that this wording was clearer than using sitting days or business days.

As an aside the Select Committee considered the issue of absolute majority, noting that it was not a common element for resolutions in Houses of Parliament, particularly with respect to no confidence/confidence motions. The Committee noted that the need for an absolute majority in the House/Parliament was predominantly used in relation to “manner

and form” provisions in the Commonwealth and State Constitutions. Accordingly, it was not recommended that an absolute majority be required for a motion of no confidence to be passed.

Reserve powers – prerogative of the Governor

The issue of the reserve powers of the Governor was considered by the Committee in relation to a number of matters, including the prerogative of the Governor to act in whichever way he or she deems appropriate, codifying the reserve powers and whether this would make them justiciable, and the ability of the Governor to act without advice.

In relation to the prerogative of the Governor, the Committee considered whether the bills should be amended to direct the Governor to act in a certain manner if a motion of no confidence was moved in the Government. It was discussed that while the provisions of the Constitution Act provide that certain things cannot take place unless the Governor acts in a certain way, there was no provision in the Act that was a direction for the Governor to act in a certain way. It was noted that the benefit of the reserve powers was that if there is an irregular behaviour the Governor retains the discretion to exercise his or her prerogative and accordingly such powers should not be codified.

The committee heard from a number of witnesses who argued that it was desirable to retain the reserve powers and that they should not be codified by incorporating into legislation all the circumstances in which the House may be dissolved earlier. It was argued that the purpose of the reserve powers is to be a safety valve for circumstances that are unusual and cannot be thought of in advance and accordingly should be left to the discretion of the Governor.

It was also considered that the wording of the legislation should say that the Governor “may” dissolve the Legislative Assembly as opposed to “shall” which in effect would be directing the Governor to do something when the Governor should maintain the discretion.

In relation to whether the Governor’s reserve powers should be justiciable, the Committee considered whether it was a desirable situation to have political and constitutional issues determined by the judicial system. It was put to the Committee that enshrining the powers of the Governor in legislation was converting what is essentially a non-justiciable obligation into a legal obligation, which would erode the discretionary power of the Governor.

It was noted by some witnesses before the Committee that the mere fact of recognising the existence of constitutional conventions the manner of their exercise could become justiciable. This is a matter that is untested. However, Professor Anne Twomey notes:

“Section 24B(1) provides that the Legislative Assembly may only be dissolved by the Governor in circumstances authorised by the section. Accordingly, a court is likely to consider that it has jurisdiction to determine whether a dissolution is authorised by s 24B or is invalid. In particular, a court could determine whether the requisite time periods had been met for a dissolution under s 24B(2). However, where discretion is expressly granted to the Governor to choose whether or not to dissolve, it is unlikely

that the courts would act to interfere with the exercise of that discretion. A question may also arise as to whether a court may determine under s 24B(5) whether the Governor has power to dissolve the House 'in accordance with established constitutional conventions'. As conventions are self-evidently matters of convention, rather than law, the courts generally are not involved in identifying or enforcing them. However, to the extent that s 24B makes a legal power dependent upon 'established constitutional conventions', identifying these conventions may become a justiciable matter."²

There were concerns raised that the usual practice is for the Premier to consent to any dissolution of the House by countersigning the proclamation. However, this is not a constitutional requirement and just a convention. Professor Twomey notes:

"Section 24B alters this position. First, it appears that, at least in relation to the circumstances in 24B(2) and (3), the Governor may dissolve the Legislative Assembly without the advice of any responsible Minister. This is made clear by s 24B(6) which addresses the matters that the Governor is to consider when deciding whether the Legislative Assembly should be dissolved. There is also a reference in s 24B(3)(b) to the time 'that the Governor considers' an appropriation is required. It would appear that the Governor is not bound to act upon the advice of the Premier in these matters and may dissolve the House without advice. This would mean that the proclamation dissolving the House would not be countersigned by a responsible Minister, contrary to previous practice."³

Some concerns were raised with the Committee in relation to the wording of the proposed legislation with the Governor being able to dissolve the Legislative Assembly "despite any" advice of the Premier or Executive Council. It was argued that "despite any" comes too close to asserting a power of the Governor to act contrary to advice. However, the Parliament did not share this view and the wording was included in the bill that was passed by the Parliament and agreed to by the electors at the referendum.

While the discretion of the Governor to dissolve the Legislative Assembly has been maintained there are limited situations in which such reserve powers would normally be used. The existing conventions would only make that course available where the government is acting illegally or if the government did not resign or to seek to dissolve Parliament after it lost the confidence of the lower House.⁴ It should also be remembered that in such cases it may be that the Governor can elect to appoint a viable alternate government without the need for an election to be held.

² A Twomey, *The Constitution of New South Wales*, pp 658-9

³ Ibid, p 655.

⁴ See comments in G Griffith and Lenny Roth, *Recall Elections*, NSW Parliamentary Library Research Service E-Brief 3/2010, February 2010, p. 11.

Rejection of major legislation

The Committee considered whether the rejection of major legislation would be considered a vote of no confidence in the Government. It was considered that the rejection of major legislation would not necessarily be akin to a no confidence motion unless it meant that the Government was unable to govern, such as the rejection of supply.

The provisions of the Constitution Act provide that the Legislative Assembly can be dissolved if it **rejects** a bill which appropriates revenue of moneys for the ordinary annual services of the Government or **fails to pass** such a bill before the time that the Governor considers that the appropriation is required. This provision only works due to the fact that in NSW the Upper House cannot refuse supply and accordingly a rejection of the budget by the Legislative Assembly amounts to a loss of confidence in the Government.

In relation to supply bills, there was some discussion on the power of the Opposition to amend the appropriation bills. Under the provisions of the Constitution Act only Ministers are able to appropriate money without a message from the Governor. Private members require a message from the Governor to appropriate money. This has been interpreted as including any amendment to increase the amount of money in appropriation bills. However, it was argued that an amendment to the appropriation bills to reduce the amount being appropriated could be construed as a rejection of the bill. It was argued that a motion to reduce the budget by \$1 has in some jurisdictions been taken to be a motion of no confidence in the Government. However, under the proposed provisions it would not be read this way. This argument was not supported and the current provisions of the Constitution Act only refer to a rejection of the appropriation bills not to amendments.

There were some concerns raised about deadlocks within the Legislative Assembly and how the inability of a minority government to pass its legislation would render the government unable to govern. If the bill is not an appropriation bill there is no capacity for the House to be dissolved and an early election called to break this deadlock. However, this situation is in many ways similar to what Governments in bicameral Parliaments often face when there is a governing minority in the Upper House. The Government is required to negotiate with minor parties and is often required to agree to the amendments of minor parties in order for its legislation to be passed. This is arguably democracy at work and does not reflect that the confidence of the House has been lost in the Government of the day or render the Government unable to govern. The experience in NSW has been that the Government is able to pass the vast majority of its legislation either by consensus or after negotiations with minor parties and no significant problems have occurred in terms of deadlocks since the fixed term Parliaments have been introduced.

“Baton change”

The provisions of the *Constitution Act 1902* provide for a “baton change” in cases where an existing government loses its majority and a motion of no confidence in the Government has been passed. Under the provisions the Governor is able to appoint an alternate government without an election being held. This decision would take into consideration any confidence motion that had been passed in an alternate government.

Some concerns were expressed to the Committee that the baton change removed the power of the Governor to decide if someone is capable of forming a government and choosing that person. The Committee considered whether the Governor should retain discretion to dissolve the Legislative Assembly even if after passing a no confidence motion in the Government, the House had passed a motion of confidence in an alternative Government in which a named person would be Premier. The Committee agreed that the Governor should not be precluded from dissolving the Parliament just because the House had passed a motion of confidence in an alternate government. Accordingly, it was agreed that the Governor should retain discretionary power to send the Parliament to the people only in exceptional circumstances.

In deciding that the discretionary power should be retained, the Committee noted that this more accurately reflected the position as it was. The Committee noted that the Governor's discretionary powers were "part of the intricate system of checks and balances in the Westminster system that has served us well for some centuries" and that the system should not be changed lightly.

The legislation, as enacted, provides the Governor with discretion to determine whether an alternate government can be formed without dissolving the Legislative Assembly. Section 24B(6) of the *Constitution Act 1902* provides:

"When deciding whether the Legislative Assembly should be dissolved in accordance with this section, the Governor is to consider whether a viable alternative Government can be formed without a dissolution and, in so doing, is to have regard to any motion passed by the Legislative Assembly expressing confidence in an alternative Government in which a named person would be Premier."

The Committee expressed some concern about baton changes noting that in situations where there is a minority government there could be multiple baton changes, which could result in confusion and instability. The Committee was of the view that attention should be directed towards ensuring multiple baton changes do not become a way of life. This has not manifested into a problem because since the amendment to the Constitution Act each successive Government has held an absolute majority. However, if a minority government was in power it has the potential also to become a problem. This could perhaps be resolved through an agreement with the members holding the balance of power such as was the case when the three non-aligned Independent Members held the balance of power in New South Wales between 1991-1995. One of the aims of the Memorandum of Understanding between the Independents and the Minority Government was to provide for stable Government. This was achieved with the Independent Members agreeing to vote with the Government on the following matters:

- (a) Motions regarding Bills for Appropriation and Supply.
- (b) All motions of no confidence except where matters of corruption or gross maladministration are involved which reflect upon the conduct of the Government as a whole.

It was noted by the Committee that fixed terms would ensure that Parliament was stable even though the Executive may change over the period of a parliament. It should be noted that the makeup of the Executive often changes in the absence of a change in the Government as has occurred during the current Parliament where there has been three different Premiers.

Entrenched provisions

The amendments to the Constitution Act omitted an already entrenched provision that provided for maximum four-year terms. Therefore the electors at the referendum were being asked to potentially agree to a situation where the term of the Legislative Assembly could extend beyond four years. This was due to the fact that the new provisions enable the Legislative Assembly to be dissolved early in special circumstances such as following a motion of no confidence in the Government being agreed to, which could mean a Parliament is longer than four years. For example, if an election was held in September 2013 following the passing of a no confidence motion in the Government, this would be two years after the March 2011 election and the next general election would be held in March 2018 – four years and 6 months after the last election.

A referendum was also required because the previous provisions were entrenched and could only be amended or repealed if approved by the electors.

It should however be noted that the Joint Select Committee was of the view that the new provisions should not be entrenched and that the legislative amendment should have a sunset clause so that the operation of the amendment would be confined to one election period. The purpose of the sunset clause would be to ensure the impact of the fixed terms on the political system had been assessed before it was entrenched. This was not supported by the Parliament and the provisions for the fixed terms are entrenched and a referendum is required to alter the duration of the Legislative Assembly or to change the date of a general election. This was arguably the appropriate course of action given that removing entrenched provisions regarding the term of a Legislative Assembly and then replacing them with a fixed term that was not entrenched, could result in the Parliament changing the duration of the Legislative Assembly at any time without the approval of the people.

Recall Provisions

The Joint Select Committee only briefly touched on the issue of recall provisions and whether there should be a capacity for the people to force an election during the fixed term parliament. Some witnesses suggested that citizen-initiated referenda could be a mechanism to call for an election during a fixed term parliament.

The Committee did not consider there was a need for such a mechanism. However, during the current Parliament the issue has arisen in the context of the fixed terms. Recent debate in New South Wales has related to recall provisions. However, unlike other jurisdictions such as the USA and British Columbia the debate has not been concerned about the recall

of an individual Member of Parliament but rather as to how a recall mechanism can be used to trigger an early State election. The Leader of the Opposition has publicly announced, that if elected in March 2011 he would “appoint a panel of constitutional experts to look at introducing a recall election provision in NSW”.⁵

A number of constitutional experts have raised issues during the debate that are worth mentioning. Anne Twomey considers that an amendment to the NSW Constitution Act could be made to include a trigger for an early election by petition of a certain percentage of voters. She argued, “it would be best to avoid requiring grounds for such a petition, as this would embroil the courts in political controversy.”⁶

Another academic Professor George Williams, commented that any recall petition should be required to gain support from across the state to ensure that it cannot be used by a disaffected part of the state at the expense of other interests.⁷ Unlike Twomey, Williams supported a role for recall to be subject to judicial review to ensure that recalls could only be made on specific grounds and be soundly based.

It should be noted that the public debate on recall provisions has been engendered by strong media criticism of the current government, which has been in power in New South Wales for over 15 years. This media debate has not touched on the issue of lobbyist initiated recall campaigns that California has experienced.

In relation to the Legislative Council

Section 22B(2) of the Constitution Act provides that the term of a member of the Legislative Council expires on the day of the termination, either by dissolution or expiry, of the second Assembly following their election. Accordingly the term of service of a member of the Legislative Council is affected if the Legislative Assembly is dissolved early under special circumstances.

Appendix A – Extract from the Constitution Act 1902

Available from the NSW Legislation Website at: www.legislation.nsw.gov.au

Division 3 Special provisions relating to the Legislative Assembly

23 Convocation of Assembly

The Governor may, as occasion requires, by proclamation or otherwise, summon and call together a Legislative Assembly.

24 Duration of Assembly

⁵ Griffith, Gareth and Lenny Roth, *Recall Elections*, NSW Parliamentary Library Research Service E-Brief 3/2010, February 2010, p. 3.

⁶ A Twomey, ‘Total recall: the revenge of the voters’, *Sydney Morning Herald*, 26 March 2009, as quoted in Griffith, p. 5.

⁷ G Williams, ‘Debate the recall, but safeguard the system’, *Sydney Morning Herald*, 15 December 2009, as quoted in Griffith, p. 5.

- (1) A Legislative Assembly shall, unless sooner dissolved under section 24B, expire on the Friday before the first Saturday in March in the fourth calendar year after the calendar year in which the return of the writs for choosing that Assembly occurred.
- (2) In this section, a reference to a writ does not include a reference to a writ issued because of the failure of an election, including a failure of an election because of its being declared void in accordance with law.

24A Date of general election for Legislative Assembly

The writs for a general election of Members of the Legislative Assembly must name as the day for the taking of the poll at that general election:

- (a) if the previous Legislative Assembly expired—the fourth Saturday in March next following the expiry, or
- (b) if the previous Legislative Assembly was dissolved—a day that is not later than the fortieth day from the date of the issue of the writs.

24B Dissolution of Legislative Assembly during 4 year term

- (1) The Legislative Assembly may be dissolved by the Governor by proclamation, but only in the circumstances authorised by this section.
- (2) The Legislative Assembly may be dissolved if:
 - (a) a motion of no confidence in the Government is passed by the Legislative Assembly (being a motion of which not less than 3 clear days' notice has been given in the Legislative Assembly), and
 - (b) during the period commencing on the passage of the motion of no confidence and ending 8 clear days thereafter, the Legislative Assembly has not passed a motion of confidence in the then Government.

After the motion of no confidence is passed, the Legislative Assembly may not be prorogued before the end of that 8-day period and may not be adjourned for a period extending beyond that 8-day period, unless the motion of confidence has been passed.

- (3) The Legislative Assembly may be dissolved if it:
 - (a) rejects a Bill which appropriates revenue or moneys for the ordinary annual services of the Government, or
 - (b) fails to pass such a Bill before the time that the Governor considers that the appropriation is required.

This subsection does not apply to a Bill which appropriates revenue or moneys for the Legislature only.

- (4) The Legislative Assembly may be dissolved within 2 months before the Assembly is due to expire if the general election would otherwise be required to be held during the same period as a Commonwealth election, during a holiday period or at any other inconvenient time.
- (5) This section does not prevent the Governor from dissolving the Legislative Assembly in circumstances other than those specified in subsections (2)–(4), despite any advice of the Premier or Executive Council, if the Governor could do so in accordance with established constitutional conventions.
- (6) When deciding whether the Legislative Assembly should be dissolved in accordance with this section, the Governor is to consider whether a viable alternative Government can be formed without a dissolution and, in so doing, is to have regard to any motion passed by the Legislative Assembly expressing confidence in an alternative Government in which a named person would be Premier.



HOUSE OF LORDS

Appendix B - Scheme of Election

(Follows the expiry of the current 54th Parliament)

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| Last General Election Held | The Parliament expired on Friday, 2 March 2007. | 24 March 2007 |
| Return of Writs for Last General Election | The writs for the election were issued by the Governor on 5 March 2007. | 2 May 2007 |
| Expiry of Parliament | Parliament expires on the Friday before the first Saturday in March in the 4th year after the Return of Writs for the last General Election.* Constitution Act 1902, s 24(1). | Midnight Friday 4 March 2011. |
| Issue of Writs | Writs shall be issued within four clear days after publication in the gazette of Proclamation dissolving Parliament, or after expiration of Parliament by effluxion of time ... Parliamentary Electorates and Elections Act 1912, s 68. | Last day—Tuesday 8 March 2011. |
| Polling Day | Polling Day after the expiration of Parliament shall be the fourth Saturday in March following the expiry ...* Constitution Act 1902, s 24A. | Election to be Saturday 26 March 2011. |
| Return of Writs | Writs are returnable not later than the 60th clear day after date of issue thereof or such later day as the Governor may direct. Parliamentary Electorates and Elections Act 1912, s 68. | Last day—Monday 9 May 2011. As the 60th day falls on a Saturday (7 May) the last day is Monday 9 May 2011 — Interpretation Act 1987, s 36(2). |
| Last day on which the Parliament may meet | Parliament to meet not later than the 7th clear day after the day of which writs are returnable. Parliamentary Electorates and | Last day—Monday 16 May 2011. |

| | | |
|--|---------------------------|--|
| | Elections Act 1912, s 69. | |
|--|---------------------------|--|

* Section 24B Constitution Act 1902 provides for the dissolution of the Legislative Assembly within 2 months before the Assembly is due to expire if the election would otherwise be required to be held during the same period as a Commonwealth election, during a holiday or at any other inconvenient time, and at other times if the Assembly passes a motion of no confidence in the Government or rejects or fails to pass an appropriation bill for the ordinary annual services of the Government. Writs must be issued within four clear days after publication of the dissolution proclamation (s 68 Parliamentary Electorates and Elections Act 1912) and an election must be held not later than the 40th day from the date of the issue of writs (s 24A Constitution Act 1902).

1 September 2010

Memorandum by the Clerk of the New South Wales Legislative Council (Lynn Lovelock) (FTP 4)

Current arrangements for fixed four-year terms in New South Wales

New South Wales currently has fixed four-year terms of Parliament, with provision for Parliament to be dissolved sooner in certain circumstances.

Subsection 24(1) of the *Constitution Act 1902* (NSW) provides that the Lower House of the NSW Parliament, the Legislative Assembly, shall expire on the Friday before the first Saturday in March in the fourth calendar year after the calendar year in which the return of the writs for choosing that Assembly occurred, unless it is dissolved sooner under section 24B of the Act.

Section 24B of the *Constitution Act 1902* in turn provides:

24B Dissolution of Legislative Assembly during 4 year term

- (1) The Legislative Assembly may be dissolved by the Governor by proclamation, but only in the circumstances authorised in this section.
- (2) The Legislative Assembly may be dissolved if:
 - (a) a motion of no confidence in the Government is passed by the Legislative Assembly (being a motion of which not less than 3 clear days' notice has been given in the Legislative Assembly), and
 - (b) during the period commencing on the passage of the motion of no confidence and ending 8 clear days thereafter, the Legislative Assembly has not passed a motion of confidence in the then Government.
- (3) The Legislative Assembly may be dissolved if it:
 - (a) rejects a Bill which appropriates revenue or moneys for the ordinary annual service of the Government, or
 - (b) fails to pass such a Bill before the time that the Government

considers that the appropriation is required.

This subsection does not apply to a Bill which appropriates revenue or moneys for the Legislature only.

- (4) The Legislative Assembly may be dissolved within 2 months before the Assembly is due to expire if the general election would otherwise be required to be held during the same period as a Commonwealth election, during a holiday period or at any other inconvenient time.
- (5) This section does not prevent the Governor from dissolving the Legislative Assembly in circumstances other than those specified in subsections (2)-(4), despite any advice of the Premier or Executive Council, if the Governor could do so in accordance with established constitutional conventions.
- (6) When deciding whether the Legislative Assembly should be dissolved in accordance with this section, the Governor is to consider whether a viable alternative Government can be formed without a dissolution and, in so doing, is to have regard to any motion passed by the Legislative Assembly expressing confidence in an alternative Government in which a named person would be Premier.

Under section 24B(2) outlined above, the Legislative Assembly may be dissolved by the Governor by proclamation if a motion of no confidence is passed in the Government and no party can form a workable majority which has the confidence of the House within an eight day period. This provision is not triggered by a motion of no confidence in a minister, or even possibly the Premier. Although a motion of no confidence in the Premier has traditionally been regarded as a motion of no confidence in the Government, circumstances may arise where the Premier loses the support of his or her party on the floor of the House, but another minister may step into the position. Standing order 111 of the Legislative Assembly now sets out the procedures for the passage of a motion of no confidence in the Government.

In relation to section 24B(3), the Legislative Assembly may also be dissolved if it fails to pass a supply bill, other than a bill which appropriates moneys for the Legislature only. However, there is no criteria set out in section 24B to identify when a bill which appropriates revenue or moneys for the ordinary annual services of Government shall be deemed to have failed to pass.

It is important to emphasise that section 24B(5) specifies that the reserve powers of the Governor to dissolve the Legislative Assembly are not to be restricted, provided that the Governor acts in accordance with established constitutional conventions.

In cases where the Assembly is dissolved early, section 24A of the *Constitution Act 1902* provides that the polling date for the general election is to be a day not later than the fortieth day from the date of the issue of the writs.

The adoption of fixed four-year terms in New South Wales

Sections 24(1) and 24B in their current form were inserted into the *Constitution Act 1902* in 1995. The first step in adopting these changes came in 1991, when the Government introduced in the Legislative Assembly two bills to provide for a fixed four-year term of Parliament: the Constitution (Fixed Term Parliaments) Special Provisions Bill and the Constitution (Fixed Term Parliaments) Amendment Bill. The first bill provided that the next general election would be held on 25 March 1995 and that the Assembly could only be dissolved sooner on certain grounds, very similar to those in the current section 24B of the *Constitution Act 1901*. The second bill provided for the insertion of section 24(1) and 24B into the *Constitution Act*.

The introduction of the bills was in consequence of a Memorandum of Understanding between the minority Government and three non-aligned independents, who held the balance of power in the Legislative Assembly. The independents agreed to support the Government on condition that the Government implement a 'Charter of Reform' to redress a perceived imbalance between the Executive Government and the Parliament.

Both bills were referred to a Joint Select Committee on Fixed Term Parliaments. The Committee reported to both Houses in December 1991 supporting fixed-term parliaments and suggesting some minor amendments to the bills.

The first bill passed the Parliament in December 1991. The second bill to insert sections 24(1) and 24B into the Constitution was reintroduced in the following session and passed by the Assembly in November 1992. The bill passed the Council in the next session in May 1993. Finally, the bill was overwhelmingly approved at the referendum held at the general election on 25 March 1995. It was assented to on 2 May 1995.

Advantages and disadvantages of fixed-term parliaments

A number of potential advantages and disadvantages of fixed-term parliaments were canvassed at the time that the Parliament was considering implementing fixed four-year terms⁸. Arguments raised in favour of fixed-term parliaments included:

- Fixed-term Parliaments protect a Government which enjoys the confidence of the Lower House.
- A fixed-term may guarantee tenure for the Government which may help to ensure that the government has the requisite amount of time to effectively implement its policies.
- Fixed election dates remove the partisan advantage enjoyed by incumbents in their choice of election date. Thus, a Premier would no longer be able to seek an early election for purely party political purposes.
- Fixed terms may benefit government processes as it allows more in-depth analysis to occur and, in particular, more complex analysis of issues.
- There will be a reduction in the number of elections and ancillary costs (both monetary and administrative).

⁸ For a discussion of the advantages of fixed term parliaments, see Griffith G, *Fixed Term Parliaments, with a commentary on the Constitution (Fixed Term Parliaments) Amendment Bill 1992*, NSW Parliamentary Library Research Service, 1995, pp 18-21.

- Fixed election dates allow 'more effective planning of the parliamentary timetable by the incumbent government.
- Minor parties have more time to campaign and ensure that their 'political message is publicised.
- Fixed elections may foster a greater degree of independence amongst members as the threat of dissolution will not be constantly hanging over their heads.
- Governments will realise that, if their supporters revolt, they will not necessarily have recourse to the voters and they may be more encouraged to pay greater heed to the views of others.
- The predictability which attaches to fixed election dates facilitates economic planning in both the private and public sectors. In this way, fixed terms could boost confidence amongst the business community and beyond.

Arguments raised against fixed-term parliaments included:

- Fixed-term elections may detract from the ideal of frequent accountability to members of the public/voters. At its worst, it may be argued that fixed-term elections undermine an essential principle of democracy, that is, belief and trust in the inherent wisdom of the electors. Under a fixed term of parliament, trust only emerges on a fixed date every four years.
- An election campaign season may result in increasing rather than decreasing campaign costs. Also, it may result in paralysis in government and administrative decision making, something which might occur over a relatively lengthy period as difficult or potentially unpopular measures are postponed till after the forthcoming election.
- If a Government loses its majority in the Lower House an election can be used to solve the potential political crisis.
- The public may have to endure four years of an unpopular government if a Government loses support.
- The argument that a Government can manipulate the election season is a fallacious argument, as regardless of whether the parliamentary term is fixed or not, candidates will still be promoted in the period preceding an election whether for four years or for three weeks.
- The argument that a Government needs time to implement its policies is not an argument which should be used in favour of fixed term parliaments but rather an argument in favour of extending the government's term. from four years to five years.
- Fixed-term parliaments can also help to entrench independent members of parliament who hold the balance of power and as a result, periods of instability can be unnecessarily prolonged.
- Fixed-term parliaments may make politics more 'mechanical' by limiting the conflict inherent in the political system.
- A Government with a small majority may be unduly harassed by competing demands with no recourse to an election.

The House of Lords Constitution Committee may also be interested in Professor James Crawford's checklist of the basic requirements for successful fixed-term legislation. This

checklist was part of Professor Crawford's advice on the Tasmanian *Constitution (Fixed Term Parliament) Special Provision Act 1992*, which was modelled on its NSW counterpart.

The checklist reads as follows:

- The legislation should not allow a Government to call an election after a vote of no confidence if the House is workable (that is, if there is an alternative government which has the support of the House).
- By contrast, the legislation should allow an election if supply cannot be obtained (this should be regarded as the minimum requirement for workability in a hung parliament).
- The legislation should not confer excessive or vague discretions on the Governor, who in most cases will feel constrained to act on the advice of the Premier. So far as possible the limitations on the minimum term should be simply and objectively defined. These limitations should as far as possible not allow the Premier to manipulate the parliamentary situation so as to call an early election..
- The legislation should not unduly affect the relations between the Houses, in particular by giving the Upper House greater scope to reject legislation without triggering an election.
- The limitations on an early election should be enforceable in the courts by individual members of Parliament.

Recent debate in New South Wales on recall elections

Recently there has been some public criticism about fixed four-year terms in New South Wales, suggesting that they may prolong the life of an unpopular or ineffective government. This has resulted in debate about the merits of providing a trigger for an early election through the mechanism of recall elections. The Opposition Leader has indicated that, if elected in March 2011, he will examine the feasibility of introducing recall elections with a view to holding a referendum on the issue.⁹

The most widespread idea being put forward is for a recall election to be triggered by a petition signed by a prescribed number of electors. The debate has included discussion of mechanisms already in place in other jurisdictions, such as California, where in 2003 Governor Gray Davis was removed as a result of a recall election.¹⁰ While the proposal for recall elections has been the subject of considerable public debate, many difficult technical issues need to be addressed for the proposal to progress further. Constitutional experts have also raised doubts about the merits of recall elections in the New South Wales system of government.¹¹

While the fixed four-year term has been the subject of public criticism for prolonging the term of office of the current government, at least one commentator has argued that fixed-term parliaments are not to blame. As election analyst Mr Antony Green has pointed out, 'even if the NSW Parliament did not have a fixed term, the Rees government would be

⁹ Griffith G and Roth L, *Recall Elections*, NSW Parliamentary Library Research Service, February 2010, p 3.

¹⁰ *Ibid*, P 6.

¹¹ *Ibid*, pp 4-6.

highly unlikely to call an election until the last possible date because opinion polls indicate that it couldn't win'.¹²

21 September 2010

Memorandum by Clerk of House of Representatives, New Zealand (FTP 5)

The New Zealand Parliament currently does not have a fixed term and has no particular experience from which to contribute directly to your inquiry. Our unicameral system, without devolved parliaments is also quite simple by comparison. However, I have set out some observations on New Zealand practice that may be of assistance.

Three-year term

The electorate in New Zealand is strongly wedded to the three-year term, which has been in place since 1879¹³, except for a small number of extensions in times of national crisis¹⁴. The calling of early elections is not a frequent occurrence, and in recent times has not found favour with electors. Governments have tended to wait for the traditional November (summer) election time, advising the Governor-General to dissolve Parliament at a suitable point a month or two prior. Only one Parliament has actually expired¹⁵.

The term of the New Zealand Parliament runs out three years from the day of the return of the writ, which is usually within two weeks of the election¹⁶. The term of Parliament is one of only a very few entrenched provisions in New Zealand law. To change an entrenched provision, a majority at a binding referendum or a 75 percent majority in the House is required¹⁷.

There have been two proposals for extending the term of Parliament from three to four years put to the electorate at indicative referendum. Both were rejected¹⁸.

Early elections

Only two significantly early elections have been called under the three-year term. In 1951, the Parliament elected in 1949 was dissolved as a result of a waterfront dispute and an election held some 14 months early. The 1949-51 Parliament is the shortest of all New

¹² Green A. 'NSW Fixed Term Parliaments', *Anthony Green's Election Blog*, 8 December 2008 <<http://blogs.abc.net.au/antonygreen/2008/12/nsw-fixed-term.html> >

¹³ Prior to 1879 the term was five years

¹⁴ The term of Parliament has been extended on four occasions: in 1914 and again in 1915, in 1934, 1938, and in 1941 and again in 1942. The term was actually extended to four years in 1934, but this was repealed in 1937, following a change in Government.

¹⁵ The 1943-46 Parliament expired when the end of the term was overlooked following previous extensions of the term.

¹⁶ Constitution Act 1986, s.17

¹⁷ Electoral Act 1993, s.268

¹⁸ In 1967 the proposal was rejected by some 700,000 to 300,000 and in 1990 by 1,250,000 to 550,000.

Zealand parliaments. In this case the National Government was returned with an increased majority and remained in power until 1957.

A snap election was also called in July 1984, some four months early. The National Government, which had been in power for nine years was resoundingly defeated. In 2002, the Parliament was dissolved some three months early, following a split in the party of the Labour Government's coalition partner (the Alliance). The Labour Government was returned, but no Alliance Party members survived, although two returned in a new party.

Possible change

The mixed member proportional electoral system (MMP) in New Zealand is to be reviewed through an indicative referendum in 2011, followed by a binding referendum at the next election (2014) if a change is favoured. Whatever the result, review of wider constitutional issues is likely following the 2011 referendum. The possibility of a four-year term, possibly fixed, has been raised in this context.

Three-year terms produce something of an unsettled pattern of governance. The first year sees rushed reform, the second year a period of consolidation and the third year gives way to electioneering. A four-year term is seen as a way of largely overcoming this pattern. The level of support is hard to gauge, but in the past electors have certainly favoured the discipline a three-year term brings to politicians.

Confidence

Possibly because of the shortness of a three-year term, and the strength of our party system the New Zealand Parliament has not been racked by confidence motions bringing down governments, since the late nineteenth century. When parties were much more fluid, confidence votes followed by new political settlements were far more common, but the last time a government was defeated on a confidence vote was in 1928.

Confidence is a matter of political judgment. It is not a matter on which the Speaker is required to rule. Members do not lodge motions expressing want of confidence, although this has been done on rare occasions, the most recent being in 1946. However, there are a number of debates through the parliamentary calendar of sufficiently wide nature to allow for a no-confidence amendment to be moved: the Address-in-Reply debate at the beginning of the Parliament, the Budget debate (second reading of the main Appropriation Bill) in May, the passing of the first Imprest Supply Bill and Supplementary Estimates Bill at the end of June, and the passing of the second Imprest Supply Bill and the main Appropriation Bill in August. A recent initiative is for the government to propose a question of confidence in moving a motion for the debate on the Prime Minister's Statement held at the beginning of each year¹⁹.

¹⁹ "That this House express its confidence in the National-led Government and commend its programme for 2010 set out in the Prime Minister's statement to Parliament." NZPD 2010, Vol. 660, p.8648

The granting of supply and the passing of the Budget inevitably raise questions of confidence, as does the annual confirmation of the tax rates. Failure to secure parliamentary support in these circumstances these would undoubtedly demonstrate a loss of confidence in the government.

Governments may indicate that a particular issue is a matter of confidence. While this is not a frequent occurrence, under MMP, it could have significant implications for a government's support parties, who may have agreed to vote with the government on matters of confidence and supply²⁰. In 1998 following the breakdown of a coalition agreement and a change in Prime Minister, rather than identify a particular issue, the government took the initiative in proposing a question of confidence²¹.

Should a government lose the confidence of the House, the convention is that the government will resign. In such circumstances, the Governor-General may dissolve Parliament and call an election, or invite another party to form a government should it appear that such a party may be able to gain the confidence of the House. It has been suggested, but never tested in New Zealand, that if a government were not to resign having lost the confidence of the House that the Governor-General could dismiss the government. Without a written constitution these are matters of convention.

While the Electoral Act 1993 sets out the circumstances in which a vacancy or vacancies in the seats of members of Parliament can occur and then establishes the process for filling those vacancies through a by-election or general election, the law does not deal with matters of confidence and the outcome of these. They are matters of convention requiring political judgment²². This has ensured against the challenging of such events in the courts, as has often been the case in other Pacific countries with written constitutions.

1 October 2010

Letter from the Clerk to the Northern Ireland Assembly (Trevor Reaney) (FTP 6)

Background

1. The Northern Ireland Assembly was established as a result of the Belfast Agreement on the 10 April 1998. The Agreement was endorsed through a referendum held on the 22 May 1998 and subsequently given legal force through the Northern Ireland Act 1998 (hereafter referred to as 'the Act').
2. The Northern Ireland Assembly consists of 108 members elected from Northern Ireland's 18 Westminster constituencies (6 members per constituency). The

²⁰ New Zealand has not had a single party majority government since the introduction of MMP in 1996.

²¹ NZPD 1998, Vol. 571, pp.11806-41

²² See Cabinet Manual, Section 6 at www.cabinetmanual.cabinetoffice.govt.nz

Assembly first met on 1 July 1998, existing in “shadow” form until 2 December 1999. The Assembly was also suspended on four occasions:

- 11 February – 30 May 2000
- 10 August 2001 (24 hour suspension)
- 22 September 2001 (24 hour suspension)
- 14 October 2002 – 7 May 2007

The context to these suspensions was the ongoing political discussions within a peace process framework between the Northern Ireland political parties and between the British and Irish governments.

Therefore in respect of fixed term Parliaments the experience of the NI Assembly has been intermittent and it is now in the final year of its first full four year mandate.

Date of ordinary elections and dissolutions

3. In accordance with section 31(1) of the Act the date of each Assembly election is the first Thursday in May in the fourth calendar year following that in which its predecessor was elected.
4. The predecessor shall also be dissolved at the beginning of the minimum²³ period which ends with the date of the election of the ‘new’ Assembly.
5. Following election of an Assembly, section 31(4) requires that it shall meet within the period of 8 days beginning with the day of the poll at which it is elected.
6. Furthermore, and for the purposes of section 31(4), Saturday, Sunday, Christmas Day, Good Friday and any day which is a bank holiday in Northern Ireland shall be disregarded.

Powers to vary the date of an ordinary election

7. Section 31(3) allows that the Secretary of State to vary, by order, the date of the election by up to 2 months either side of the date specified in section 31(1).

Extraordinary dissolution

8. The question of a “safety valve” relates to provision to allow for an early dissolution despite the election date being fixed. Section 32(2) of the Act provides a “safety valve” to allow for premature dissolution of the Assembly but only if the number of MLAs supporting that resolution is equal to or exceeds two thirds of the total number of seats of the Assembly. This is an approach that has not yet been tested; therefore no further comment can be made other than to say this reflects the proposals in the Fixed Term Parliaments Bill to allow Parliament to be dissolved early of its own motion as long as there is a two thirds majority.

²³ The “minimum period” means a period determined in accordance with an order of the Secretary of State.

Extraordinary elections

9. Section 32 of the Act establishes a mechanism to allow for an extraordinary election to be called. There are two scenarios under which this can take place:

(A) Resolution to dissolve

- (i) In the event that the Assembly passes a resolution to dissolve then
- under section 32(1) of the Act the Secretary of State will propose a date for the next Assembly election by Order rather than the date specified in accordance with section 31 of the Act; and
 - section 32(2) of the Act determines that such a resolution will not be passed unless it has the support of a number of members which equals or exceeds two thirds of the total number of seats in the Assembly.

(B) Posts of First Minister and deputy First Minister are not filled

- (i) The appointment of First and deputy First Minister follows a process described in section 16A (4) – (7) of the Act and this same process is applied to both the ordinary election process (section 31) and extraordinary elections (section 32).
- (ii) Following an election the posts must be filled within seven days of the first meeting of the newly elected Assembly²⁴. In the event that within a period of seven days beginning with the first meeting of the Assembly following an election, that these offices have not been filled then under Section 32(3) the Secretary of State shall propose, in an Order, a date for the poll for the election of the next Assembly instead of that determined in accordance with section 31. The Secretary of State will also provide that the Assembly be dissolved on a date specified in the Order.
- (iii) It should be noted that where either the First or deputy First Minister ceases to hold office due to resignation or otherwise then the other also ceases to hold office and the appointment process described above would begin²⁵. Again, in accordance with Section 16B(3) the posts must then be filled within 7 days of the resignation.
- (iv) The time allowed for the appointment of the First and deputy First Minister seems to be in accordance with the time proposed in the Bill for a government to be formed following a successful vote of no confidence i.e. “if

²⁴ Section 16B(3)

²⁵ Section 16B(2)

after that vote of no confidence a Government cannot be formed within 14 days, Parliament will be dissolved and a general election will be held”.

Date of subsequent election following an extraordinary election

10. As already stated the date of each Assembly election in an *ordinary* election cycle is the first Thursday in May in the fourth calendar year following that in which its predecessor was elected. In the event that an extraordinary election takes place e.g. if there was an extraordinary election on 1 Jan 2011 then the Assembly may sit for slightly longer, until May 2015 (about 4 years and 4 months). Alternatively, should an election be called earlier e.g. December 2010, then the Assembly would sit until May 2014 about 3 years and 4 months.

However, in the event that an extraordinary election did take place the Secretary of State has the power under section 32(4) to move the date of the next poll by order in council; or under section 31(3) to move the date by 2 months in an attempt to address the length of the mandate.

Constructive vote of no confidence

11. The NI Assembly has no provision for a constructive vote of no confidence. The particular circumstance of the historical and political situation of Northern Ireland has necessitated specific provisions in the NI Act 1998 (section 30A) for the exclusion of a Minister or junior Minister or a party from the Assembly if the Assembly loses confidence that the party/Minister/ junior Minister is committed to non-violence and exclusively peaceful and democratic means or, in relation to Ministers, because of any failure of his to observe any other terms of the pledge of office.

Conclusion

12. I hope that this letter is helpful in your inquiry. Please let me know if you require any further information. As the Speaker is unavailable to attend the evidence session, he has suggested that I make myself available if this would be of assistance to your Committee.

6 October 2010

Letter from the Clerk of the Legislative Assembly of the Northern Territory (FTP 7)

It is our recent experience that the *Electoral Act* was amended to provide for four year fixed-terms for the Legislative Assembly.

It is also the case that we experienced something of a 'constitutional crisis' when the Opposition gave notice that it would move a Motion of No Confidence in the Government, which is one of two triggers for an Extraordinary General Election under the new legislation.

I have attached three papers for your consideration. The first deals with triggers and possible scenarios leading to an Extraordinary General Election (dated 5 Feb 2009).

The second deals with the electoral cycle under the amended *Electoral Act*. It includes the Chief Minister's second reading speech and the explanatory memorandum tabled when the bill was introduced (dated 12 Aug 2009). The third is a conference paper dealing with events leading up to and beyond the Opposition's Motion of No Confidence. I trust they will assist with your Committee's work.

21 August 2010

Memorandum by Clerk of the Legislative Assembly of Saskatchewan (Gregory A. Putz) (FTP 8)

Background and Context

- In the fall of 2007, discussions of setting a fixed election date began in Saskatchewan.
- The Saskatchewan Party outlined in their platform that they would set fixed election dates if elected.
- The day after their election, Hon. Brad Wall, the new Premier of Saskatchewan, announced that the next general election would take place on Monday, November 7, 2011.

Bill 4

- *The Legislative Assembly and Executive Council (Fixed Election Dates) Amendment Act* was introduced on December 18, 2007 and received Royal Assent on April 28, 2008.
- This Bill enacted four-year fixed elections with the first to occur on Monday, November 7, 2011 and every four years thereafter on the first Monday in November.
- Does not alter the constitutional power of the Crown to prorogue or dissolve the Legislative Assembly. Section 8.2 of the *Legislative Assembly and Executive Council Act* states, "Nothing in section 8 or 8.1 alters or abridges the power of the Crown to prorogue or dissolve the Legislative Assembly".
- Government must maintain the confidence of the Assembly and continues to allow the Premier to advise the Lieutenant Governor to dissolve the Assembly in the event that confidence is lost.

Bill 59

- Supporting legislation, *The Election Amendment Act, 2008* which details advertising limitations for government ministries and Crown Corporations, was introduced on November 17, 2008 and received Royal Assent May 14, 2009.
- Bill 59, *The Election Amendment Act, 2008*, details advertising limitations for government ministries and Crown Corporations. The Act states that in the 30 days prior to the issuance of an election writ, no government ministry shall advertise in any manner with respect to the activities of the ministry unless in emergent situations or compelling public information. In the 90-days prior to the new 30 day

pre-writ restriction, ministries may only advertise to inform public about their programs and services and addresses public safety. In this time frame, no government ministry can spend more than their twelve month average.

Benefits, Concerns and Clarification of Fixed Election Dates in Saskatchewan

Rather than restate the advantages and disadvantages that have likely been identified in other written evidence, the following points are the benefits, concerns and clarifications outlined by the Government and Opposition Party.

Benefits

- Remove the guesswork and opportunism that dictates the timing of elections by the governing party.
- Remove the built-in advantage held by the governing parties who can plan for an election that only it is aware of.
- Ensure that members of the public can assess the performance of the government
- Greater democratic accountability by increasing fairness and transparency.
- Easier for parties, legislatures and citizens to plan for.

Concerns

- Can the Legislature be extended in the case of war or insurrection?
- In the event that an election coincides with a holiday, who would be responsible to adjust the date of the election to ensure that it does not conflict?
- American-style campaign lengths and high candidate expenses.
- Advertising near and during the election
- Fixed election dates and fixed terms are inconsistent with a parliamentary form of government, in which the executive must retain the confidence of the Legislature; it is contrary to the basic principle of the supremacy of the Legislature. It is a break from Canadian tradition of government.
- Increased ministry advertising twelve months prior to the issuance of the writ with no specific penalties for breaches of increased advertising.

Clarification

- War, invasion and insurrection – Saskatchewan did not include a clause in the legislation because it recites of section 4(2) of the *Charter of Rights and Freedoms* which states:

In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

- In the event that dissolution occurs in the midst of a four year cycle (i.e. snap election), the four year cycle will resume following the general election.
- In the event that an election occurs on a holiday and the date needs to be changed, it would be up to the Members of the Legislative Assembly to determine the new date. Holidays are identified many years in advance and should receive appropriate debate in the Chamber.

- In addressing the concerns about advertising breaches, senior Crown counsel drew attention to section 216 of *The Election Act* which is the general offence provision and is perceived to be adequate.

28 September 2010

Letter from Clerk to the Scottish Parliament (P E Grice) (FTP 9)

My response highlights comparative powers contained in the Scotland Act 1998 (the Act) and the relevant experience of the Scottish Parliament.

As already intimated by the Presiding Officer, I would be pleased to attend a meeting of your committee to answer any questions you may have.

Session duration

The Act provides for elections on the first Thursday in May every 4 years; variation of the date of the election within prescribed limits; dissolution of the Parliament prior to an election; and the meeting of the Parliament following an election.

Section 2 subsection (2) of the Act provides that the Parliament will be dissolved at the beginning of the "minimum period" which ends with the day of the next general election. The minimum period is determined by a Scottish Parliament Elections Order made by the Secretary of State.

We have no experience of the Parliament's sessions reaching a premature end. Since the Scottish Parliament's elections in 1999 there have been two sessions each, of 4 years duration. We are currently in our third session and it is envisaged that it will also last 4 years.

Extraordinary general elections

If the First Minister resigns and no nomination of a First Minister is made within 28 days, or when the Parliament resolves that it be dissolved, the Presiding Officer is required under Section 3 of the Act to propose to Her Majesty a day for the holding of a poll. A resolution to dissolve the Parliament requires at least two thirds of the total number of members to vote in favour (86 or more votes).

Section 3(3) of the Act provides that if a poll at an extraordinary election is held within six months of the date for an ordinary election then the next general election will not be held. That will not however affect the timing of the next following election.

We have no experience of the section 3 of the Act being invoked.

No confidence

The First Minister may at any time tender his or her resignation to Her Majesty and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament (Section 45 subsection (2) of the Act). If the Parliament resolves, by simple majority, that it has no confidence in the Scottish Executive all Ministers must resign.

Rule 8.12 of our Standing Orders provides for motions of no confidence. Any member may give notice of a motion that the Scottish Executive or a member of the Scottish Executive or a junior Scottish Minister no longer enjoys the confidence of the Parliament. If the motion is supported by at least 25 members, it shall be included in a proposed business programme.

Again, we have no experience of a motion of no confidence in the Scottish Executive.

Ordinary general elections and prerogative powers

Section 2(5) of the Act provides that if the Presiding Officer proposes a day for the holding of the poll in an ordinary general election which is not more than one month earlier, nor more than one month later, than the first Thursday in May, Her Majesty may, by proclamation under the Scottish Seal, dissolve the Parliament, require the poll to be held on the proposed day, and require the Parliament to meet within seven days.

Those powers have not been exercised.

Impact on parliamentary business

The Act provisions that pertain to fixed dates or terms have the benefit of allowing the parliament to plan its business with a degree of certainty. For example, we are able to have a Standing Order that fixes a deadline for the introduction of Members Bills and all other business is conducted with the knowledge of when the parliament would be expected to dissolve. This can be especially valuable in respect of longer term processes such as public bills generally, major committee inquiries and budget rounds. It is also helpful in planning for elections themselves and, in particular, the delivery of services to Members in the immediate aftermath.

8 September 2010

Memorandum by Democratic Audit (FTP 10)

Summary

The introduction of fixed term parliaments to the UK would be a **welcome development**, particularly if as part of a codified UK constitutional settlement.

This shift would be justifiable both in terms of **democratic principle** and because it would serve to align the UK more closely with **international democratic norms**.

For these reasons **current government proposals as contained in the *Fixed-term Parliaments Bill* are broadly speaking to be commended**.

However, **it is necessary to record certain reservations about the Bill** – in particular that:

- **it fixes the term at five years, which is excessively long**, when the international and historical precedents are considered; and

- **this change is yet another piecemeal alteration, implemented with insufficient consultation, to the UK constitution, an entity which is in need of a considered, holistic and democratic codification process.**

Introduction

1. Democratic Audit is an independent research organization based at the University of Liverpool.
2. We assess the performance of UK democracy according to a specific set of criteria.
3. Our particular interest in the issue of fixed-term parliaments arises from its possible impact upon various relationships of accountability between the electorate, Parliament, the executive and the Prime Minister.

Issues of principle for and against fixed-term Parliaments

Q1. What are the arguments for and against fixed-term Parliaments? Should fixed-term Parliaments be introduced?

4. The primary argument against fixed-term parliaments is that they can deny flexibility to the political system, for instance through making more difficult the resolution of parliamentary deadlocks, and delaying new prime ministers who did not take office immediately following general elections in seeking mandates.
5. But it is possible to take steps to try and avoid these flexibility problems, as shown in the present Bill, and in many democracies internationally, where fixed-term parliaments of some kind are the norm.
6. Moreover, the possible problems associated with fixed term parliaments are outweighed by the potential advantages, which include:
 - that they avoid providing an unfair advantage to the executive – and in particular the Prime Minister, who presently possesses the sole right to request Dissolutions – over Parliament;
 - that they avoid providing an unfair advantage to parties of government over other parties in the timing of general elections;
 - that they create more certainty around the electoral timetable, making it easier for public authorities and other organisations which need to plan around this cycle.

Comparative Experiences

Q3. What is the experience of the devolved legislatures in Scotland, Wales, Northern Ireland, and international case studies, including Canada, Australia, Norway, Sweden and Germany? What lessons can be learned from this experience?

Questions 2 and 3 will be dealt with together.

7. The basic lesson from comparative experiences is that fixed-term parliaments of some kind are a democratic norm, including in Western Europe and the US, though there is wide variation in the precise form they take and how rigidly they apply.

8. In recent years they have been introduced increasingly to so-called ‘Westminster model’ democracies, including to most Australian states.

9. Comparative analysis also shows that fixed-terms are widely judged to require some kind of ‘safety-valve’ mechanism allowing for early elections in exceptional circumstances, which, as discussed below, is provided for in what appears to be a satisfactory fashion by the government Bill.

10. According to whether a safety valve is adopted and how it is devised, the extent to which a term is fixed can vary significantly from one territory to another. On one end of the spectrum, in the US the dates of national elections are clearly established; while on the other end in Canada, where fixed term parliaments were introduced in 2007, the Prime Minister in practice possesses a high degree of discretion in bringing about early polls.

11. Finally, comparative and historical analysis gives rise to the main concern about the government proposal: that the proposed five-year term is too long.

12. The following tables detail the length of time that has elapsed between general elections in the UK since 1945; and provide some comparative examples of terms in contemporary international democracies; and within the UK.

Table 1: The length of post-war parliaments

| <i>Date of General Election</i> | <i>Time elapsed since previous General Election</i> |
|---------------------------------|---|
| Thursday 4 July 1945 | --- |
| Thursday 23 February 1950 | 4 years 4 months |
| Thursday 25 October 1951 | 1 year 8 months |
| Thursday 26 May 1955 | 3 years 7 months |
| Thursday 8 October 1959 | 4 years 4 months |
| Thursday 15 October 1964 | 5 years |
| Thursday 31 March 1966 | 1 year 5 months |
| Thursday 18 June 1970 | 4 years 3 months |
| Thursday 28 February 1974 | 7 months |
| Thursday 10 October 1974 | 7 months |
| Thursday 3 May 1979 | 4 years 7 months |
| Thursday 8 June 1983 | 4 years 1 month |
| Thursday 11 June 1987 | 4 years |
| Thursday 9 April 1992 | 4 years 10 months |
| Thursday 1 May 1997 | 5 years 1 month |
| Thursday 7 June 2001 | 4 years 1 month |
| Thursday 5 May 2005 | 3 years 11 months |

| | |
|---------------------|---------|
| Thursday 6 May 2010 | 5 years |
|---------------------|---------|

Average = 3 years 10 months

Table 2: Terms of office internationally and in the UK

| <i>Territory</i> | <i>Institutions/office</i> | <i>Term of office (years)</i> |
|------------------|-------------------------------------|-------------------------------|
| Australia | Members of House of Representatives | 3 |
| France | President | 5 |
| | Members of National Assembly | 5 |
| | Members of Senate | 6 |
| Germany | Bundestag | 4 |
| Netherlands | House of Representatives | 4 |
| New Zealand | Parliament | 3 |
| Poland | Sejm | 4 |
| Scotland | Parliament | 4 |
| Spain | Congress | 4 |
| Sweden | Members of Riksdag | 3 |
| USA | President | 4 |
| | Members of House of Representatives | 2 |
| | Members of Senate | 6 |

13. It can be concluded that in historical and comparative contexts, five years is unusually long. From the point of view of democratic principle, it is important to provide the electorate with frequent opportunities to pass a verdict on their representatives in Parliament, and not allow governments excessively long terms of office, while not creating instability and voter fatigue through terms of office which are too short.

14. There was a long historical struggle to reduce the seven-year maximum term introduced by the Septennial Act of 1715 (which was an increase on the previous three year maximum) (see e.g. R. Blackburn, *The Electoral System in Britain*, 1995, pp19-20). When the five year maximum was finally introduced with the Parliament Act of 1911, the stated intention of the Liberal Prime Minister, Henry Asquith, was that it would mean in practice four year terms – a prediction which, roughly speaking, has come to pass.

15. There is cause for concern that, since its practical effect will be to lengthen the standard parliamentary term, the Fixed-term Parliaments Bill entails a reversal of a long struggle for more accountable government.

16. There are strong grounds for arguing that three or four year fixed-term parliaments would be both workable and more desirable than the current proposal of five years. Previous private members' bills seeking to enact fixed-term parliaments proposed four years.

17. The figure of five years seems to have been arrived at on a basis of the political calculations of the two parties involved in the Coalition – just as the Septennial Act was introduced to buy time for the then newly-established Hanoverian monarchy and its Whig administration. It would be regrettable if short-term political calculations were once again to have a long-term negative impact upon political accountability in the UK.

18. Finally it should be noted that it is theoretically possible to elect portions of a legislative chamber at different times, as takes place in local authorities in the UK and in institutions such as the US House of Representatives.

Dealing with extraordinary circumstances

Q4. Should there be a “safety valve” mechanism to take account of extraordinary circumstances? If so, what form should a “safety valve” take and when should it be used? How can it be ensured that such a mechanism is not abused?

19. Both commonsense and comparative analysis suggests a need for a ‘safety valve’ mechanism of some kind. Ideally, decisions about the Dissolution of Parliament (as it is currently constituted) should rest with the House of Commons, subject to a relatively high super-majority (particularly given that the head of state in the UK, the monarch, lacks democratic legitimacy and cannot therefore appropriately perform this function). The provisions of the Fixed-term Parliaments Bill seem to meet these requirements effectively, though often when such arrangements are tested in practice their strengths and weaknesses become clearer.

What is your opinion of such “safety valves” as:

a) A constructive vote of no confidence;

20. It is arguably better to keep votes of no confidence separate from decisions to trigger general elections, since they are distinct decisions to be made by the Commons, one involving the dissolution of a government, the other a Dissolution of Parliament.

b) An extraordinary dissolution in the event of the agreement of a parliamentary super-majority;

21. Such a provision seems reasonable as a means of avoiding an irredeemably deadlocked House of Commons. To avoid the abuse of such a mechanism, it is necessary to set it at a level requiring support from governing and non-governing parties within the Commons. The 55 per cent threshold initially contemplated by the government would not have provided such a protection. However the decision to raise the necessary majority to two thirds seems wise, since it would in all parliaments since the Second World War have required the support from MPs of parties other than those participating in government.

22. Nonetheless, in practice, if a government chose to seek an early election, the Opposition might well vote with them in order to avoid the charge that they were ‘bottling’ a challenge. In this sense, the initiative in calling early general elections would still rest with the government.

23. Another more formal problem that can be identified in the extraordinary dissolution mechanism provided for in the Bill is that, in theory, if a government could not achieve two thirds support for an early General Election, it could repeal or amend the Fixed-term Parliaments Act (assuming it passes into law) on simple majority votes in Parliament. However, to attempt to pursue such a course of action might widely be interpreted as constitutionally inappropriate and meet with significant political resistance.

24. Nonetheless, this theoretical dilemma serves to draw attention to the peculiar position internationally of the UK in lacking a codified constitution. While provision for fixed-term parliaments in the UK would have to rely to a significant extent on the informal force of convention for protection, in other territories arrangements around the holding of elections might well be enshrined more formally, so that they could not be removed or altered as easily as more regular law.

25. While the proposed Act within which it is contained will not enjoy special protection, the super majority provision for fixed-term parliaments introduces the interesting principle that a simple majority in the Commons may not always be enough. This idea could be in future adapted as a way of embedding constitutional principles within a codified settlement.

c) A discretionary prerogative power of dissolution in the hands of the Head of State;

26. For this mechanism to be satisfactory, the head of state would have to be in possession of democratic legitimacy, being either directly or indirectly elected. If a head of state is to have such powers it is better for them not to be in effect a national leader (as is the French President), able to utilise the power of dissolution to maximise their power. It is more appropriate for them to be a more limited figure, similar to the German President.

27. We note that the current Bill would seemingly end the personal Royal Prerogative power to dissolve Parliament (as stated in the Explanatory notes) – a development to be welcomed from a democratic perspective. This change will render increasingly anomalous another personal prerogative of the monarch, to appoint the Prime Minister. In circumstances in which a government falls mid-term or a General Election delivers no overall winner, this power could potentially end in a democratically damaging intervention in party politics from the Palace. This potential problem should be addressed before it becomes a damaging reality.

d) The flexibility to move the scheduled election date by a short period, e.g. a month either way?

28. The government Bill provides this mechanism. It is possible to conceive of circumstances in which its use could be justified, as when, in 2001, the General Election was delayed in the wake of the foot and mouth outbreak. But placing the initiative in the hands of the Prime Minister, as proposed in the Bill, is a questionable plan, though an order to shift the date must be approved by both houses of Parliament.

29. This mechanism would not deal with issues such as the mid-term collapse of a coalition government, with no other government possible.

Q5. What should happen in the event that no viable government can be formed after a general election?

30. Any measures to deal with such a contingency put in place should emphasise that a second election is a last resort, placing emphasis on the need for parties to work together to produce a government. The need for this approach is heightened because there is strong evidence that general elections yielding no overall majority in the Commons are likely to become a more regular occurrence. A shift to the Alternative Vote (or even more so to a proportionate electoral system) would reinforce this tendency further.

Confidence motions

Q6. What is your view of the Government's proposal that "traditional powers of no confidence will be put into law"? Should a statutory definition include votes traditionally regarded as questions of confidence, such as votes on Supply or the Queen's Speech? Will it also include votes designated by the government as a question of confidence, for instance the 1993 vote on the Maastricht Treaty?

31. The constitutional clarification that placing powers of confidence into statute would entail is desirable.

32. Confidence motions should ideally be only those specifically designated as such; since governments should be accountable to Parliament, and if they are defeated by Parliament over specific policies they should amend those policies, not use the defeat as an excuse to trigger a snap election.

Q7. What is your opinion of the Government's proposal that "if after that vote of no confidence a Government cannot be formed within 14 days, Parliament will be dissolved and a general election will be held"?

33. This provision seems in principle reasonable, providing for circumstances in which another General Election provides the only possible means of escaping a political and constitutional impasse.

Q8. How can it be ensured that such a no confidence mechanism is not open to abuse by a government seeking an early dissolution?

34. There is always a danger of abuse with any such mechanisms. But a government which went for the 'nuclear option' in this way might not be enhancing its chances of winning an election.

Early Dissolution

Q9. What is the purpose of the Government's proposal for dissolution if a majority of two-thirds or more of the House of Commons votes in favour? Is this an appropriate mechanism? Is two-thirds an appropriate figure? If not, what alternative figure would you propose?

35. One potential purpose of this proposal would be that in the event of a irresolvable deadlock, the Commons could vote for an immediate election without waiting for 14 days to lapse.

36. It seems appropriate to leave open the possibility for Parliament to dissolve itself in exceptional circumstances.

37. Two thirds seems an appropriate figure, and is the one used in the Scottish Parliament and the Welsh Assembly. It would make it unlikely that the government party/parties could ever trigger a dissolution without opposition support (see above).

Q10. In the event that an extraordinary general election is called, should the parliamentary term that follows last for an entire fixed term, or only until the next general election was originally due to take place?

38. The main purpose of a system in which the subsequent Parliament only ran to the initial intended election date would be to create less of an incentive for a government to seek an early dissolution for opportunistic reasons. It would mean that governments hoping to capitalise on current popularity could not by this means win another full term.

39. However, the present government has opted for a high Commons 'super majority' as a barrier to opportunistic dissolutions, rather than reducing the prize at stake.

40. There is scope for a full debate about the relative merits of these two approaches. Here is an example of why it would have been preferable for the Coalition to allow a longer period of consultation over the Fixed-term Parliaments Bill, as argued by the House of Commons Political and Constitutional Reform in its recent report on this subject. While the best test of any constitutional provision comes in actual usage, the widest possible advanced consideration is valuable also.

The consequences of the Government's proposals for prerogative powers

Q11. Would the adoption of fixed-term Parliaments necessitate the modification or abolition of the Monarch's prerogative power to dissolve Parliament? If so, what impact would this have?

See 4 (c) above.

Timing

Q12. In the event of fixed-term Parliaments being adopted, what is the most appropriate time of year and day of the week for general elections to take place?

41. There are no obvious constitutional grounds to regard one particular time of year being more appropriate for General Elections than another. Since 1979, general elections have generally been held in springtime. In this sense, May, as currently envisaged, would seem an appropriate month. A case could be made for holding elections in December or January on the basis that this is the time of year at which the electoral registers are most up-to-date, although it is possible that winter elections could depress turnout.

42. There is no reason that general elections must or should, as present convention requires, be held on Thursdays; though the present Bill enshrines this principle. Weekend voting has frequently been proposed as a means of raising turnout, although there is no evidence, from opinion polls, electoral pilots or experience overseas, that it would do so. Consideration could be given to declaring the General Election day as a public holiday, although this might even impact negatively on turnout (by prompting some electors to go away on holiday). If the objective is to increase turnout, then the simple solution may simply be to establish the right for all employees to visit a polling station during their working hours.

Q13. What account (if any) should be taken of the electoral cycle of the devolved institutions and the European Parliament in determining the length of parliamentary terms and the date of future general elections?

43. Since devolved elections follow a four year cycle and European Parliament elections a five year cycle, taking account of both is a complex task, whatever length was chosen for a fixed-term Parliament for the UK.

44. Under a five year fixed term Parliament, as proposed by the government, there would be a cycle of overlaps with devolved elections, the lowest common multiple of the two being twenty years.

45. One development, the possibility of which should be foreseen, is that an early Dissolution could lead to general elections being locked into the same year as European Parliament elections, the former being held in May, the latter in June. This outcome – although a potential one only – may be regarded as undesirable.

46. If any attempt is to be made to fine-tune or alter the UK electoral cycle, European Parliament elections should be regarded as a fixed-point, since they cannot reasonably be expected to be moved for the internal convenience of the UK.

The juridical consequences of the Government's proposals

Q14. Are the provisions of the Government's proposed legislation likely to be enforceable in the courts of law? If so, would this be undesirable from a constitutional point of view? (Consider, for example, *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.)

47. The Bill describes a Speaker's Certificate authorising an early General Election as 'conclusive for all purposes'. The intention of this provision is to prevent legal challenges to the validity of early elections, such as occurred in Germany when a case against an early election was heard by the Federal Constitutional Court in the summer of 2005.

48. There is room for doubt about whether it is appropriate in a mature democracy for all possible counterbalances – judicial or otherwise – to the Speaker (or any other constitutional actor) to be precluded in this way. Within a fully codified UK constitution, it is unlikely that such an arrangement would be possible.

Q15. Given that one Parliament cannot generally bind another, how (if at all) can the principle of fixed-term Parliaments be entrenched?

49. It is likely that this principle would come to be regarded as, by convention, part of the informal UK constitution. But ultimately, this principle can only formally be entrenched through the establishing of a fully codified UK constitution, within which it would be included alongside a number of other measures.

The role of the House of Lords

Q16. What role would you envisage for the House of Lords in any parliamentary fixed term and/or early dissolution arrangements?

50. It would be inappropriate for the House of Lords as currently comprised to become directly involved in such arrangements.

51. On the one hand its members lack the democratic legitimacy which could be used as a basis for their performing some kind of role.

52. On the other hand most do not possess the party political independence that might be another justification for their involvement, because of the role of parties in determining the creation of peerages.

53. Ideally, the future of the House of Lords would be considered as part of a broader process, including the length of parliaments and provisions for dissolution, leading to a fully codified constitution for the UK.

27 September 2010

Memorandum by David C. Docherty (FTP 40)

The debate surrounding fixed terms of office in Canada are no different than they are in other nations governed by a Westminster style of parliament. The primary question is how can you have an election date fixed in legislation in a system of government that holds confidence as one of its foundational principles? After all, every time the Prime Minister steps into the Commons, he or she must understand that if they fail to maintain the confidence of a simple majority of members, their term in office is effectively over. Do fixed election dates not run contrary to this understanding of Westminster government? The Canadian experience has suggested that this is not the case. Indeed, fixed terms of office can be easily accommodated within a parliamentary system of government. In each jurisdiction in Canada where such terms exist, there have been no serious threats to abrogating our long held understanding of the confidence motion.

The maximum term of office for Canadian legislatures is well laid out in the Canadian Constitution. Given the confidence requirement in parliament, there is of course no minimum length of office. Governments can last up to five years without asking the Governor-General (or in the case of the provinces, the Lieutenant Governor) for a dissolution and general vote. Technically, this means that six years might go by between an election and a meeting of a new parliament under a new government.

Yet few governments last five full years. Conventional practice have governments lasting approximately four years before seeking a re-affirmation from voters. Governments that try to hang on much longer than that risk seeming desperate for power and can suffer the fate at the polls. The last federal government to stay on for five years lost power in 1993. While there were many reasons the Progressive Conservatives were reduced from a majority to only two seats in a 295 House, hanging on to power for an additional year did not work in their favour.

No government has stayed on for more than 45 months since that time.

Given the extraordinarily high levels of party discipline in Canada (see Franks 1985, Docherty 2005), majority governments can easily survive a four or five year term. Prime Ministers and Premiers who enjoy majority status rarely have to be concerned about having an election thrust upon them.

By contrast, minority governments enjoy no such luxury. In cases of minority government the threat of an election is always present. Thus, terms are expected to be much shorter. And indeed we find that to be the case. The typical majority government lasts just over four

years while minority governments typically last a year and five months. Since 1962, the average length of term of a minority government is just over twenty months. If we eliminate two brief governments (the Diefenbaker and Clark minorities) the six other minority governments lasted an average of just over two years in office. By contrast, the eight majority governments since 1962 lasted an average of four years and two months in office.²⁶

Thus at first blush it might appear that the introduction of a fixed term of office might only impact minority governments. After all, majority governments tend to last the conventional four years in office and a de facto fixed term is effective in practice but not statute. Yet the reality is that fixed terms of office impact both minority and majority governments, or rather Prime Ministers and Premiers of majority and minority parliaments. First and foremost, we must recognize that the ability to determine the length of one's own government is a phenomenal lever of power. It allows leaders to go to the people when the conditions are best suited for re-election. Anticipating a downturn in the economy (as Prime Minister Harper did in 2008) one might force a snap election hoping to be re-elected prior to voters feeling any financial pinch. Anticipating weakness in the opposition, a party might seek a dissolution or fashion it's own defeat (as Pierre Trudeau did in 1974) hoping to capitalize on problems on the other side of the floor. It is not uncommon for governments to introduce budgets that they have no intention on passing, using them merely as a campaign weapon telling voters to "elect us and we will keep a promise we just presented in the Commons prior to shutting it down."

The primary arguments in favour of fixed terms of office are relatively straightforward. First, in a system characterized by executive control, fixed terms of office takes away an important power from the head of government. In the words of one prominent Canadian academic, "any time you take away an arrow from the quiver of the Prime Minister, you are strengthening parliament."²⁷ Simply put, the move to fix terms of office can be seen as a fundamental reform to strengthen democracy by eliminating the ability of the Prime Minister or Premier to either call a snap election or to delay a vote beyond conventional terms of office to serve partisan self-interest.

A second argument in favour of fixed terms of office suggests that such terms allow for better career planning. The Canadian political career structure is not conducive to systematic and progressive career planning in the manner that characterizes other systems, notably the US congressional model (Docherty 1997). The lack of fixed election dates at

²⁶ These figures are calculated not by the length of each Parliament but simply the time between elections, thus they are not a true indication of actual sitting Parliaments. However, many Governments have had prolonged periods of a Parliament not sitting prior to an election or after an election. Given the more uniform campaign periods since 1962 (they have still varied but have less variation) the numbers provide can be considered a fairly good measure of length of government.

²⁷ Quote from Ken Carty, Professor of Political Science at the University of British Columbia. The quote is not in print, but was made during the 2004 Canadian Study of Parliament Group's conference on "Electoral Reform and it's Parliamentary Consequences." The author loved the quote so much he has never forgotten it.

both the provincial and federal level limits the ability of legislators at the sub-national level to strategically plan moves to the national House. There is no strategic opportunity structure for ambitious politicians, thereby limiting the ability to develop hierarchical career paths (See Borchet forthcoming).

It has also been suggested that the lack of fixed election dates can suppress the participation of females in the legislative process. One impediment to female politicians is the lack of ability to plan for family. Fixed election dates increase the ability of women to strategically plan to have children and to plan for campaign periods well in advance and thus may be more “family friendly.”

The arguments against fixed election dates focus on two factors. First, it is argued that fixed dates are contradictory to Westminster principles of confidence. Governments must always be subject to the confidence of the majority of members of the House. After all, voters elect a parliament, and parliament chooses a government. Can a government use fixed terms to avoid a general election when they lose a vote in the Commons? If this were to be the case, then the fixed date laws would indeed run contrary to one of the most sacrosanct axioms of Westminster government.

Second, critics of this recent move have suggested that fixed terms of office will lead to lengthier election campaigns. This argument suggests that prior to fixed dates, election campaigns were of a prescribed length of time, and that no campaigning - from either the government or the opposition party(s) - occurred prior to the writ being dropped. In Canada, this fear has been justifiably heightened but observers who have watched the increasingly permanent election campaigns that have developed in the United States. It is not untypical to see parties begin to gear up for the off year elections in two years just days after a Presidential election has taken place. Understandably, critics suggest that knowledge of the next election date will allow parties to commence informal campaigns earlier and earlier.

Of all the arguments for and against fixed terms, there is only one that is difficult to refute. Fixed dates in legislation does diminish Prime Ministerial discretion to call elections. As such, while it might not provide Parliament with more authority it does put the Opposition parties at a more level playing field with the government.

There is some evidence (based on comparisons with the United States) that fixed dates increases strategic opportunities for individuals seeking an upwardly mobile political career. However, a welcoming opportunity structure is not an axiom of good governance in the minds of many citizens.

For those that suggest that fixed dates compromise confidence, the answer is simply to check the wording of the legislation. If the legislation suggests that fixed dates override a loss of a vote on the Speech from the Throne, a budget matter or a Bill the Prime Minister (or Premier) expressly states is a confidence vote, then such fears are well founded. But if not, then confidence will still trump fixed dates.

In terms of a potentially never-ending campaign, this is both an empirical and descriptive

question. Campaign periods are well established and in Canada come with rather detailed laws governing campaign spending. Political parties are free to campaign and spend outside these periods, but are not eligible for reimbursement for such expenses. As such, parties are free to campaign, both formally and informally, whether fixed dates exist or are absent.

So what has been the experience of fixed dates in Canada?

Fixed election dates were first introduced in Canada by the Liberal Government in British Columbia in 2001. The government argued the move was a democratic reform, and campaigned on the promise that such a move would reduce the power of the Premier. The legislation called for a four year term of office, and prescribed the date of the next general election. The move was supported by the Opposition New Democrats (who were reduced to a rump opposition party of two seats in the then 79 seat provincial legislature).

As Table One delineates, several other jurisdictions followed suit in subsequent years.

Table One
Fixed Term Election Dates in Canadian Legislatures

| Jurisdiction | Date Fixed Elections Implemented | Party in Power at time of implementation | Have elections occurred before set date | Reason for early election |
|---------------------------|----------------------------------|--|---|--|
| British Columbia | 2001 | Liberal | No | |
| Ontario | 2004 | Liberal | Moved up six days | Religious Holiday |
| Newfoundland and Labrador | 2004 | Conservative | No | |
| Northwest Territories | 2006 | MLA | No | |
| Canada | 2006 | Conservative | Prime Minister called early election | Minority Government PM wished majority |
| New Brunswick | 2007 | Conservative | Premier called early election prior to implementation | Feared losing majority status in house |
| PEI | 2007 | Conservative | Election called prior to passage of legislation | |
| Saskatchewan | 2007 | Saskatchewan Party | | |
| Manitoba | 2008 | New Democratic Party | | |

In all cases, the implementation of fixed terms of office has been recent. It began in British Columbia under the Liberal Government of Gordon Campbell. British Columbia has been in

the forefront of exploring democratic reform, some more productive than others.²⁸ It is therefore not surprising that they were the first to embrace a fixed term. Like most jurisdictions that have enacted fixed terms, they chose a four year term, adjusting the date to account for both the last election and the date the legislation received Royal Assent.

As the first jurisdiction to implement fixed dates, British Columbia became the model for other provinces and the federal government. The first important note is that legislation in each jurisdiction clearly placed confidence above all else in considering when elections would be held. In each case, a vote of non-confidence in the assembly would cause a visit from the head of government to the vice-regal authority to seek either a new government or dissolution of the parliament. Votes of non-confidence is not simply confined to specific motions of non-confidence, but are meant to include such matters as defeat on the Speech from the Throne, Budgetary matters and other legislation that is specifically understood to suggest confidence in the government.

Simply put, the fixed date is seen as the maximum that a government can continue, and a check on the power of the Prime Minister to shorten the date by personal fiat. Thus, the first concern raised by critics of fixed terms is addressed. Legislation enshrined fixed dates recognizes the priority of the principles of Westminster government by establishing confidence ahead of fixed dates.

That is not to say that jurisdictions have not strayed from the original fixed dates, though only one did so in a more blatant, self-interested manner. In Ontario, a rather embarrassing oversight saw the first fixed date election fall on a Jewish holiday, thus the government chose to delay the date by one week. However, this alteration was more a combination of embarrassment and recognition of diversity than a move to usurp legislation.

By contrast, the federal experience serves as an example of a Prime Minister who embraced the concept of reform but not the practice. Prime Minister Stephen Harper's Conservative government authored the fixed date election legislation in 2006, indicating that an election would not take place until 2011. However, the Prime Minister sought the dissolution of Parliament two years early in the late summer of 2008, breaking not the letter of his own legislation but certainly its spirit.²⁹ While taken to task by Opposition Parties for violating the thrust of his so-called reform, the early call was not a major election issue. Harper justified the violation by arguing that the fixed date had more relevance in majority governments, and that in hung parliaments opposition parties are always threatening to

²⁸ British Columbia is the only province to introduce recall mechanisms for sitting members of the provincial legislature. They were also the first of five provinces to propose some form of electoral reform and convened a Citizen's Assembly to recommend the proposed changes. Province wide referendums to implement the change failed on two occasions.

²⁹ The political reasons for the early dissolution are not germane to the discussion presented here, though the Prime Minister was no doubt fearful of losing confidence of his minority parliament during a recession and choose to seek a new mandate prior to the foreseeable economic downturn. The Prime Minister received a slightly stronger minority for his efforts.

defeat the government (see www.cbc.ca).

In two other jurisdictions, legislation was introduced but elections called prior to the implementation of the Bill into law and thus did not have effect. In these cases, the Premiers short-circuited laws that would have tamed their powers.

Having acknowledged that some heads of government have tried to outmaneuver the law, or pre-empt its authority, there has never been an attempt by a Premier or Prime Minister to use the legislation to hold onto power after losing a vote of confidence. While Stephen Harper did controversially prorogue the House to avoid just such a vote, he did not challenge the supremacy of parliament to choose a government or choose when to defeat a government. Fixed dates have never overridden the paramount confidence convention.

Uncovering evidence of an increasingly longer or “permanent” campaign as a result of fixed election dates is more difficult to quantify. Jurisdictions with fixed dates also have fairly strict election spending rules. These rules typically regulate spending during the period of the campaign, both at the constituency level and at the provincial or national level. Political parties are free to spend outside of the campaign period. However, political parties have always engaged in this activity, when permitted under spending laws. Indeed a case can be made that there was more incentive for opposition parties to campaign prior to a writ being dropped when they did not know when the actual date was called. Under these conditions political parties were always on the ready in case the Premier or Prime Minister made an early visit to the Queen’s representative and asked for a new mandate from the voters.

The notion of a “permanent campaign” perhaps has more salience with political observers than it does with the actual political parties. During hung parliaments in Canada, every day is a pre-election day, as there has not been a coalition federally since the First World War era, and they occur only rarely provincially. Thus, the permanent campaign is only a concern in majority situations. Typically, the “unofficial” campaign seems to begin about twelve months prior to the vote date, but there is minimal actual campaigning by political parties until a few months before the writ is dropped. For example in jurisdictions with fall fixed dates (such as Ontario in 2007) election talk began a year prior, but there was no serious campaigning until after the first weekend in September.

Discussion

Fixed election dates have been successfully introduced in seven jurisdictions in Canada and observed in six of them. In each case, the introduction was heralded by the government as a way of building more trust in the political system, and was either explicitly linked to fighting the democratic deficit or implicitly connected to it.

Fears of critics that fixed dates would trump traditional notions of confidence are unfounded. There have been no constitutional controversies as a result of a government attempting to cling to power using the fixed date as their crutch. In the one instance where a government was facing defeat, the federal Conservatives soon after their 2008 election, the fixed date law was never mentioned as a reason to remain in power.

Second, while still early, there is little evidence that a permanent campaign has developed in Canada, and even if there were, there is an argument that this is not necessarily a negative development. In cases of minority governments, there is a permanent campaign underway every day the legislature meets. Prime Ministers and Premiers are always prepared to lose a vote of confidence and most opposition parties are happy to provide that opportunity. Under majority governments, an informal pre-campaign period might have the added benefit of increasing public awareness of the issues and political parties.

Thus, the fears of critics of fixed dates have yet to come true. However, it is not clear that fixed dates have produced the types of results that proponents thought they would. True, fixed dates have taken some power away from the head of government. Yet there has been no net increase in the public trust in government. Nor has there been any positive movement in voter turnout. In British Columbia, voter turnout initially increased, up three percent in the first election with fixed dates in 2005, but fell seven percent four years later. Voter turnout hit an all time low in Ontario's first experience with fixed dates.

One might reasonably conclude that there has been no impact of this reform. Yet, a more nuanced understanding might suggest that fixed dates can only be effective with the addition of two other factors. First, fixed dates must be a necessary part of a larger package of institutional reforms in Westminster systems that all seek to enhance citizen engagement. On their own, it is unreasonable to expect fixed dates to be a panacea for all aspects of the so-called democratic deficit. Second, fixed dates require leaders that follow both the spirit and the letter of the law. It does not help that in three jurisdictions elections were called either before or after fixed date laws were passed. If fixed dates are to be effective, they require those that are impacted by the law to be both adherents and supporters of the reform legislation.

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Memorandum by Professor Adam Dodek, Faculty of Law, University of Ottawa (FTP I I)

Summary

As of September 1, 2010, the federal government and eight of the thirteen provinces and territories in Canada have enacted similar fixed-term Parliaments legislation. Such laws are referred to in Canada as “fixed election date” legislation because they generally set a specified date for elections at four year intervals, rather than imposing a limit on the duration of Parliaments as the proposed Fixed-Term Parliaments Act does. All such laws have limited legal force because they explicitly preserve the powers of the Governor General or the Lieutenant-Governor (in the case of the provinces) to dissolve Parliament. Only a constitutional amendment can alter the Governors’ powers.

As a further result of the continued constitutional power of the governors over dissolution and the lack of power to alter this through ordinary legislation, fixed election date legislation in Canada is little more than a statement of political intention. This has been demonstrated most clearly in the federal case where the Prime Minister ignored his own fixed-election date legislation which provided that a general election was scheduled for October 2009. Instead, the Prime Minister sought and received an early dissolution from the Governor General in September 2008 for an election the next month. The legality of this course of action was later confirmed by the courts. At this point, the federal fixed election date legislation is widely considered to be a failure.

The experience of fixed election date legislation in the provinces and territories has differed from the federal experience, in large part due to the existence of majority governments in those jurisdictions. As of September 1, 2010, six elections have been held under a fixed election date regime. The conventional wisdom is that fixed election date legislation is working in the provinces/territories but has not gotten off the ground at the federal level. However, I believe that this account is too simplistic. A deeper analysis reveals that proponents of fixed election date legislation overpromised and underdelivered. Moreover, even where they appear to be working, fixed election date laws may be contributing to the continuing degradation of the democratic body politic in Canada.

Fixed election date legislation grew out a general malaise with Canadian politics in the 1990s captured in a phrase well-known to observers in this country: “democratic deficit”. Legislation was supposed to increase transparency, level the political playing field, improve governance and increase voter turnout. At best at this early juncture, the results are mixed. The legislation has certainly not increased voter turnout nor has it increased public faith in the electoral system. It creates the potential for future clashes between the Governor General and the Prime Minister, and between their provincial counterparts. For those considering fixed-term Parliaments, the Canadian experience with fixed-election dates produces two questions. What is the problem for which fixed-term Parliaments are intended to be the answer? Might there be other problems created by fixed-term Parliaments?

1. This submission deals solely with the Canadian experience with fixed-term Parliaments and what lessons can be learned from it.
2. Canada is a federal State consisting of the federal government, ten provinces and three territories. Each of these fourteen governments has the power over their own electoral laws subject to the constraints imposed under the Canadian Constitution.
3. The Canadian Constitution sets an outer limit of five years on the duration of the federal Parliament and provincial and territorial legislatures. The federal Parliament and provincial and territorial legislatures may be dissolved earlier by the Governor General who is the Queen's representative federally or by the Lieutenant Governors who represent the Queen in each province and territory. It is extremely rare for parliaments to last their five year maximum. Generally, in the case of majority governments, parliaments tend to last approximately four years. The experience is different for minority governments which have lasted on average of 22 months federally (Peter H. Russell, *Two Cheers for Minority Government* (2008) p. 62).
4. As of September 1, 2010, the federal Parliament and eight of the thirteen provinces and territories have enacted similar fixed-term Parliaments legislation. Such laws are referred to in Canada as "fixed election date" legislation because they generally set a specified date for elections at four year intervals, rather than imposing a limit on the duration of Parliaments as the proposed Fixed-Term Parliaments Act does. For example, the "fixed election date" legislation in Ontario, Canada's most populous province, provides that general elections shall be held "on the first Thursday in October in the fourth calendar year following polling day in the most recent general election."³⁰ The reasons for the focus on the date of the election rather than on the duration of Parliament are discussed below.
5. The critical context for understanding the operation of fixed election date legislation in Canada is a recognition that the Governor General's prerogative power to dissolve Parliament (and the parallel powers of provincial Lieutenant-Governors respecting provincial legislatures) cannot be altered through ordinary legislation. The Governor General and the Lieutenant Governors exercise all powers of the Queen in Canada. The powers of the Governor General and the Lieutenant Governors, including the powers to dissolve Parliament, can only be altered by constitutional amendment, which in this case necessitates unanimous federal and provincial consent. In practice, this is extremely difficult to obtain and highly unlikely to occur.
6. As a result, all fixed election date legislation in Canada contains a similar "caveat clause" providing, in the case of the federal government, that "Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion."³¹
7. As a further result of the continued constitutional power of the governors over dissolution and the lack of power to alter this through ordinary legislation, fixed election date legislation in Canada is little more than a statement of political intention. This has been demonstrated most clearly in the federal case.
8. The Canadian federal government enacted fixed election date legislation with all party support in 2006, after the general election in January of that year. That legislation promised that "the first general election after this section comes into force being held on Monday, October 19, 2009." However, this did not occur. The Prime Minister sought and received an early dissolution from the Governor General and a general election was held in October 2008.

³⁰ *Elections Act*, R.S.O. 1990, c. E-6, s. 9(2)

³¹ *Canada Elections Act*, S.C. 2000, c. 9, s. 56.1(1).

9. The Prime Minister headed a minority government and sought an early dissolution nearly 31 months into his mandate, significantly beyond the average duration of minority governments in Canada. The Prime Minister's request for an early dissolution did not follow a vote of confidence; nor did it follow any vote in the House of Commons on overriding the fixed election date as none was required. In fact, the House of Commons was not even sitting when the Prime Minister sought a dissolution from the Governor General.
10. As generally accepted by most constitutional scholars at the time and later confirmed by the courts after a legal challenge, the Prime Minister's actions in seeking an early dissolution were entirely legal although they certainly flaunted the spirit of the fixed election date legislation.
11. The courts also held that the fixed-election date legislation did not create a new constitutional convention limiting either the Prime Minister's powers in seeking or the Governor General's discretion in granting a dissolution prior to the fixed election date.
12. Therefore, the best interpretation of fixed election date legislation in Canada is that it establishes a four year statutory limit on the duration of Parliament and legislative assemblies, reducing it from the five year constitutional limit.
13. The experience of fixed election date legislation in the provinces and territories has differed from the federal experience, in large part due to the existence of majority governments in those jurisdictions. As of September 1, 2010, six elections have been held under a fixed-election date regime: British Columbia (2005, 2009, next 2013) and Ontario (2007, next 2011) and Newfoundland and Labrador (2007, next 2011), Northwest Territories (2007, next 2011), Prince Edward Island (2007, next 2011). In addition, New Brunswick has its first scheduled election set for September 27, 2010.
14. The conventional wisdom is that fixed election date legislation is working in the provinces/territories but has not gotten off the ground at the federal level. However, I believe that this account is too simplistic. A deeper analysis reveals that proponents of fixed election date legislation overpromised and underdelivered. Moreover, even where they appear to be working, fixed election date laws may be contributing to the continuing degradation of the democratic body politic in Canada.
15. Fixed election date legislation grew out of a general malaise with Canadian politics in the 1990s captured in the phrase "democratic deficit". Fixed election date legislation was part of a package of democratic reforms which included electoral reform of the first-past-the-post electoral system that all Canadian governments at the federal and provincial levels continue to share with the United Kingdom. However, electoral reform failed in every jurisdiction where it was put to the voters in a referendum and has ultimately been abandoned by governments across the country for now. Fixed-election date legislation is one of the remnants of this democratic reform movement in Canada.
16. Canadian proponents of fixed election date legislation argued that it would increase transparency, level the political playing field, improve governance and increase voter turnout. At best at this early juncture, the results are mixed.
17. It is certainly clear that fixed election dates have not resulted in increased voter turnout. Voter turnout has continued to drop in each jurisdiction which has held elections according to fixed election dates.
18. While fixed election date legislation has failed to achieve its stated purposes of arresting voter apathy and increasing voter turnout, the federal experience has contributed to increasing citizen distrust of politicians.

19. Fixed election date legislation in Canada may have unintended negative political consequences. In attempting to take away power from a democratically-elected first minister to determine when to dissolve Parliament, the Canadian legislation transfers a portion of it to an undemocratic official, the Governor General or the Lieutenant Governor, as the case may be. This establishes the potential for a future clash between the occupants of these offices when none existed prior to the enactment of this legislation. Already, in Canada, we have seen increasingly frequent calls on the Governor General to exercise her prerogative powers to reject the advice of her First Minister. The fixed election date legislation exacerbates the trend to call upon the Governor General to exercise discretion as she exercises her constitutional powers.
20. Ultimately, the lessons that can be drawn from the Canadian experience with fixed election dates are limited. In many ways, the Canadian experience has raised more questions than conclusive answers. At this point, the Canadian federal experience with fixed election dates is a disappointment and has contributed to further voter distrust in the Canadian political system. Even where fixed election date legislation appears to be working, the results are actually much more modest. In Canada, fixed election date legislation has failed to achieve much of what its proponents hoped.
21. For those considering fixed-term Parliaments, the Canadian experience with fixed election dates produces two questions. What is the problem for which fixed term Parliaments are intended to be the answer? Might there be other problems created by fixed-term Parliaments?

23 September 2010

Memorandum by the Electoral Commission (FTP 12)

The role of the Electoral Commission

The Electoral Commission is an independent body set up by the UK Parliament. The Political Parties, Elections and Referendums Act 2000 (PPERA) established the Electoral Commission and gave us statutory responsibilities in relation to elections and referendums.

Our role in elections is twofold: we are the independent regulator of party and election finance, and we set standards for electoral administrators, provide advice and assistance and report on their performance.³²

Fixed Term Parliaments Bill

This submission sets out our views on key aspects of the Fixed Term Parliaments Bill.

The main focus of the Bill concerns an important constitutional question which we believe should be decided by Parliament and on which we do not take a view. However, if a fixed-term length for the UK Parliament is introduced, it will provide an opportunity to make some related changes to electoral processes, which will help voters and others involved in elections.

³² The Electoral Administration Act 2006 gave the Commission powers to set and monitor performance standards for the administration of elections.

We are pleased that at Second Reading the Government agreed there is merit in reviewing the election timetable and has committed to set out its proposals for any changes once the review is complete. The Commission will of course support this review as necessary.

We have also asked Government to ensure that an appropriate subsequent legislative opportunity will be found to introduce these changes in good time for the next general election. Our views on these issues are set out below.

1. Extending the election timetable

1.1 The Commission and others, including many Members of Parliament and the Association of Electoral Administrators (AEA), have highlighted examples of problems for electors (particularly service and overseas voters), electoral administrators and candidates caused by the current deadlines, including those for electoral registration and absent vote applications. A longer timetable would, for example, allow more time for ballot papers to be printed and returned for service voters serving overseas.

1.2 A longer timetable for Westminster elections could be created by bringing the key deadlines into line with those used for the majority of elections currently held in the UK. This would mean that the election timetable would begin 25 working days before polling day, rather than the current 17 working days. It would also mean that the deadline for nominations would be 19 working days before polling day, rather than 11 working days under the current timetable. Others have suggested that the timetable could be extended even further, including the AEA which has recommended a standard timetable across all elections of 30 working days.

1.3 It is important that the implications of any changes to the deadlines are considered carefully to ensure a coherent timetable for UK general elections which addresses these concerns as far as possible.

2. Campaign spending by candidates

2.1 We have also urged Government to separately review the rules governing the regulated periods for candidate spending at general elections, to settle on periods which are appropriate in the context of fixed term Parliaments; and to find an opportunity to put in place clear rules in plenty of time for the next general election.

30 September 2010

Memorandum by Professor Simon Evans, Professor Cheryl Saunders, Mr John Waugh, the University of Melbourne (FTP 13)

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies and staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

AUSTRALIAN APPROACHES TO FIXED-TERM PARLIAMENTS

General Information

Since 1984 houses of five Australian legislatures have adopted fixed terms: the lower houses of three State parliaments (New South Wales, South Australia and Victoria) and the

unicameral legislatures of two self-governing federal territories (the Australian Capital Territory and the Northern Territory).³³

In the other three States and in the federal parliament, the Premier or Prime Minister retains a discretion to advise the Governor or Governor-General to dissolve the lower (or, in Queensland, single) house before the expiry of its maximum term.

The relevant legislation is set out in the Appendix to this submission.

Early Elections

Each jurisdiction allows for an early general election if the lower house (or the unicameral legislature) passes a motion of no confidence in the government. How the passage of such a motion is to be established is left largely to the internal proceedings of the house concerned. In the Australian Capital Territory, the motion must be expressed to be one of no confidence in the Chief Minister. Some jurisdictions prescribe minimum periods of notice.

In most jurisdictions, an early election is not possible if a no-confidence motion is followed within a prescribed period (usually eight days) by a vote of confidence.

In South Australia and Victoria, early elections are possible under provisions concerning disagreements between the two houses of parliament. In New South Wales and the Northern Territory, an early election is possible if the Legislative Assembly blocks an appropriation bill for the ordinary annual services of government (variously defined). A New South Wales provision allowing an early election ‘in accordance with established constitutional conventions’ has uncertain effect and has not been adopted elsewhere.

Dates of Full Term Elections

Where fixed terms operate, the relevant statutes specify points in the calendar for ordinary elections, such as the third Saturday in March. All five jurisdictions have adopted four-year terms.

Minor variations in the dates of full-term elections are possible to avoid clashes with federal elections or holiday periods. South Australia adds natural disasters as a ground of postponement. In Victoria, the government may vary the election date ‘in exceptional circumstances’, but only with the agreement of the leader of the opposition.

In the three States, the house elected at an early election serves a four-year term, varied only to the extent necessary to schedule the next election in the ordinary month. In the Northern Territory, a three-year term follows an early election (extended or shortened to place the election in the ordinary month), and in the Australian Capital Territory the new house serves only until the next ordinary election would have been held (unless this would shorten its term to less than six months).

In most jurisdictions, expiry of the house through the passage of time has replaced dissolution as the means of vacating seats before a full-term election. Only in South Australia does dissolution precede a full-term election. An early election, on the other hand, is called by dissolution in all three States, while in the two territories seats are vacated for an early election either by the issuing of writs or by the automatic operation of the relevant statute.

³³ *Electoral Act 1992* (ACT) ss 100–1; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 48; *Constitution Act 1902* (NSW) ss 24–24B; *Electoral Act* (NT) ss 23–26A; *Constitution Act 1934* (SA) ss 28, 28A, 41; *Constitution Act 1975* (Vic) ss 8, 8A, 38, 38A.

CONSTITUTIONAL CONTEXT

In drawing lessons from the Australian experience of fixed terms for lower houses at State level, the Committee may want to note that the constitutional context in which Australian parliaments operate is different in significant respects from that in the UK:

Powers of the Upper Houses

Australian state and national constitutions establish systems of responsible government, in which the government is primarily accountable to the lower house. However, the fact that upper houses are elected (on the same universal franchise as the lower houses) means that those houses have some political basis on which to challenge (to amend or block) the government's legislative programme. This political reality is recognised in their constitutional powers, which for the most part are the same as the powers of the lower houses, save in relation to financial legislation which they may reject but neither initiate nor amend.

No Confidence Motions

The Australian provisions do not define the situations in which a motion constitutes an expression of 'no confidence', leaving the matter to convention and parliamentary practice. Australian (national) governments have not fallen on express motions of no confidence but have resigned after motions to reduce the budget by a nominal amount or to reject key pieces of legislation. These provide illustrations of the broad range of the parliamentary resolutions that may be thought appropriate to trigger an early election. The Committee may wish to consider whether it is appropriate to specify the resolutions that constitute (or do not constitute) triggers. This will be particularly important if the lawfulness of an early dissolution is to be justiciable.

Entrenchment of Fixed Term Requirements

The fixed terms of some State lower houses (Victoria and NSW) are constitutionally entrenched by manner and form provisions that require special procedures, special majorities or referenda if they are to be altered. The Australia Acts 1986 (probably – there remains some controversy) and the Commonwealth Constitution (possibly) provide constitutional bases for such entrenchment. There is no uncontroversial basis for entrenchment in the UK. This raises a question about the effectiveness of any attempt to legislate for fixed terms in the UK. On the other hand, the possible ineffectiveness of the entrenchment of the relevant provisions in NSW and Victoria has never been tested in the courts.

Poorly Performing Governments

The Committee may be aware of current strong criticism of some Australian State governments, which continuing to hold office until the expiry of a four year fixed term. It is important to note that the fixed term is not the source of the problem: even if terms were not fixed, an unpopular government would be under no obligation to call an early election while it holds the confidence of the lower house (and is able to ensure supply by its control of the upper house). Indeed the political incentives would be exactly as they are now under the fixed term arrangement: to wait out the maximum term in the hope that political fortunes will improve.

Election of Party Leaders

The parliamentary leader of the Australian Labor Party and the Liberal Party of Australia (and hence the Prime Minister and Opposition Leader) are chosen by the parliamentary party. As the recent installation of Julia Gillard as Prime Minister in July 2010 illustrates, this can happen overnight. Conceivably, and particularly in a coalition or minority government situation, such a change may be enough to restore the confidence of the House in the government (or lead to the formation of a new government), forestalling the need for an early election. It is not clear to us whether this flexibility exists in the UK party system. It may be feasible to have an interim leader of the opposition pending a ballot of the party at large; we suggest it would be very difficult to govern with an interim leader, who is unable to resolve a parliamentary deadlock by dissolving the parliament.

Assessment

There is broad support for fixed term Parliaments in Australia. Several States experimented initially with partially fixed terms, restricting dissolution of the Parliament within the first three years, but enabling an election to be called at any time during the fourth. When this was found to work without difficulty, the move to fully fixed terms was easily taken and has been uncontroversial. If an attempt were to be made to extend the term of the Commonwealth House of Representatives from three to four years, there would be considerable pressure for the term to be fixed, although the procedures for the resolution of deadlocks between the House and the Senate, which involve a double dissolution of both Houses, would need to be accommodated in some way.

The reasons for the support are both positive and negative. In positive terms, fixed term parliaments have worked well. It has proved possible to make adequate provision for the circumstances in which a Parliament may need to be dissolved early, in accordance with the tenets of responsible government. Fixed terms remove the occasion for speculation about the date of an election over the months leading to the expiry of a Parliament by effluxion of time, and in that sense contribute to the stability of government.

Negatively, Australians see no need for governments to retain the power to, in effect, call an early election. Typically, an early election is timed to suit the political fortunes of the government of the day. Governments already dominate the lower Houses of Parliament to a significant degree and there is no argument for the retention of the power in order to strengthen the executive against a recalcitrant legislature, even where governments lack a clear majority, as occasionally happens at the State level in Australia.

24 September 2010

APPENDIX

RELEVANT LEGISLATION IN THE AUSTRALIAN STATES

| | Legislation governing Term | Legislation Introducing Fixed Term |
|---|---|--|
| VIC | <i>Constitution Act 1975</i> (Vic) ss 38, 38A | <i>Constitution (Duration of Parliament) Act 1984</i> (Vic) (3+1 years) <i>Constitution (Parliamentary Reform) Act 2003</i> (Vic) |
| SA | <i>Constitution Act 1934</i> (SA) s 28 | <i>Constitution Act Amendment Act 1985</i> (SA) (3+1 years) <i>Constitution (Parliamentary Terms) Amendment Act 2001</i> (SA) (fixed 4 years) |
| ACT | <i>Electoral Act 1992</i> (ACT) s 100 | <i>Electoral (Amendment) Act 1994</i> (ACT) sch 1. |
| NSW | <i>Constitution Act 1902</i> (NSW) ss 24, 24A | <i>Constitution (Fixed Term Parliaments) Amendment Act 1993</i> (NSW), No. 1 of 1995 |
| NT | <i>Northern Territory (Self-Government) Act 1978</i> (Cth) s 17 (4 year maximum); <i>Electoral Act 2004</i> (NT) s 23 (fixed date) | <i>Electoral Act Amendment Act 2009</i> (NT) |
| Three states do not have fixed terms in place: | | |
| TAS | <i>Constitution Act 1934</i> (Tas) ss 19 (upper house), 23 (4 year maximum); <i>Electoral Act 2004</i> (Tas) | <i>Constitution (Fixed Term Parliament) Amendment Bill 2008</i> (TAS) (No. 10 of 2008) – has stalled after 1 st reading. |
| QLD | <i>Electoral Act 1992</i> (Qld) Pt 6 Div 1. | <i>Constitution (Fixed-term Parliament) Amendment Bill 2009</i> (Qld) – failed 16/09/2009. |
| WA | <i>Constitution Acts Amendment Act 1899</i> (WA) s 21 (4 year maximum); <i>Electoral Act 1907</i> (WA) s 71. | Legislation expected later this year. |

Memorandum by the German Federal Government (German Bundestag) (FTP 14)

The German Federal Parliament (German Bundestag) has a fixed legislative period. Members of the German Bundestag are elected for four years (Article 39 paragraph 1 sentence 1 of the German Basic Law). Except for extraordinary circumstances, listed in the German Basic Law (see below), the legislative period of the German Bundestag is always four years, regardless of the reason for the general election. Therefore the legislative period that follows an extraordinary election lasts an entire four year term.

The Members of the German Bundestag are elected by their constituents (Article 38 of the German Basic Law). The election date is not fixed on a specific date. The German Basic Law rather provides for a period in which the election has to take place. Thereafter the election has to be 46 months at the earliest and 48 months at the latest after the legislative period has begun (Article 39 paragraph 1 sentence 3 of the German Basic Law). The specific election day is determined by the Federal President. It must fall on a Sunday or on a statutory public holiday (Section 16 of the Federal Electoral Law). Further restrictions as to the time of year do not exist. The election for the German Bundestag is for example not linked to the electoral cycle of other devolved institutions or the European Parliament.

The length of the legislative period is not mandatory. The statutory legislative period could be reduced or extended. It is however not admissible to extend an ongoing legislative period. The case of defence is the only instance, in which the German Basic Law provides for an extension of the current legislative period (Article 115h paragraph 1 sentence 1 of the German Basic Law). In any other event the extension of the current legislative period does not comply with the principle of representative democracy. Therefore only the extension of an upcoming legislative period is permissible. Such an extension would necessitate an amendment of the German Basic Law. Pursuant to Article 79 paragraph 2 of the German Basic Law, an amendment is only possible with the consent of two thirds of the Members of the German Bundestag and two thirds of the votes of the German Federal Council (German Bundesrat). Furthermore such an amendment needs to be constitutional with respect to the specific length of the legislative period. The principle of representative democracy requires a periodic legitimation of the representatives by their constituents. Consequently the legislative period may not be lengthened too extensively. On the other hand the legislative period may not be too short in view of parliament's capacity to work. The length of the legislative period has to reflect an adequate relation of these conflicting interests.

An extension of the legislative period to five years has often been suggested and discussed in Germany, but so far has always been rejected. The most common argument in favour of an extension of the legislative period is the enhancement of parliament's capacity to work. The first year of the legislative period is supposedly necessary as a start-up period and the last year of the term for the election campaigns. The effective parliamentary work could only be done in between. On the other hand the German Basic Law does not inherit any statutory

restrictions with respect of a reduction of the legislative period. However, a reduction of the legislative period has not been seriously discussed in Germany and it is doubtful whether a reduction would be constitutional.

“Safety valve” mechanisms

The German Basic Law provides for “safety valve” mechanisms in order to take account of extraordinary circumstances. These are the constructive vote of no confidence (Article 67 of the German Basic Law) and the prerogative power of dissolution by the Federal President (Article 64 paragraph 4 and Article 68 of the German Basic Law). The German Bundestag has however no right of parliamentary self-dissolution. The founders of the German Basic Law have consciously relinquished on a parliamentary right of self-dissolution. This decision was grounded on the experiences during the Weimar Republic. Between 1920 and 1931 all seven parliaments have been dissolved before the end of the legislative period. In order to guarantee a stable parliament the German Bundestag was not empowered with the right of parliamentary self-dissolution.

The first „safety valve“ mechanism is the constructive vote of no confidence (Article 67 of the German Basic Law). Thereafter the German Bundestag may express its lack of confidence in the Federal Chancellor only by selecting a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected. The constructive vote of no confidence however has no effect on the constitution of the German Bundestag. In the event of a successful constructive vote of no confidence a new Federal Chancellor is elected, but parliament is not dissolved.

In the history of the Federal Republic of Germany a constructive vote of no confidence was conducted two times. In 1972 a constructive vote of no confidence against Federal Chancellor Willy Brandt was not successful. The nominee Rainer Barzel did not receive the vote of the majority of the Members of the German Bundestag. The first and only successful constructive vote of no confidence took place in 1982. The nominee Helmut Kohl received the necessary majority and succeeded Helmut Schmidt as Federal Chancellor.

The second “safety valve” mechanism is the dissolution of the German Bundestag. The German Basic Law provides two instance in which the German Bundestag is dissolved. The first instance, in which the German Bundestag may be dissolved, is in the event of an unsuccessful election of the Federal Chancellor. The German Federal Government can only be formed after the Federal Chancellor is elected. The Federal Chancellor is elected by the German Bundestag (Article 63 paragraph 1 of the German Basic Law). In the event that the nominee is not elected, the German Bundestag may elect a Federal Chancellor within 14 days after the ballot (Article 63 paragraph 3 of the German Basic Law). If a ballot does not take place within that timeframe, another ballot has to be conducted immediately (Article 63 paragraph 4 sentence 1 of the German Basic Law). If the person elected receives the vote of a majority of the Members of the German Bundestag, the Federal President must appoint him within seven days after the election. If the person elected does not receive such a majority, then within seven days the Federal President shall either appoint him or dissolve the German Bundestag (Article 63 paragraph 4 sentence 3 of the German Basic Law). In the

event of a dissolution of the German Bundestag the following general election has to take place within 60 days (Article 39 paragraph 1 sentence 4 of the German Basic Law).

The second instance, in which the German Bundestag may be dissolved, is in the event of an unsuccessful vote of confidence (Article 68 of the German Basic Law). If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the German Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the German Bundestag within 21 days. The Federal President has discretionary power to decide about the dissolution. In order to prevent a circumvention, the Federal Constitutional Court decided that Article 68 of the German Basic Law inherits another unwritten legal requirement. Thereafter a dissolution of the German Bundestag is only justified if the political balance of power in the German Bundestag impairs the Federal Chancellor's capacity to act in a way that he is not able to pursue his political policies with the constant trust of the majority. The Federal President has to verify the compliance with that legal requirement before he may use his discretionary power to dissolve the German Bundestag. The Federal President's right of dissolution lapses as soon as the German Bundestag elects another Federal Chancellor by the vote of a majority of its Members (Article 68 paragraph 1 sentence 2 of the German Basic Law).

The German Bundestag is currently in its 17th legislative period. Most of the previous parliaments lasted until the end of the full legislative period. In the history of the Federal Republic of Germany a dissolution of the German Bundestag pursuant to Article 68 of the German Basic Law only took place in three instances. In 1972 the motion of the Federal Chancellor Willy Brandt for a vote of confidence was not supported by the Members of the German Bundestag. One day after the vote Federal President Gustav Heinemann dissolved the German Bundestag. In 1982 the German Bundestag did not support a vote of confidence by Federal Chancellor Helmut Kohl and Federal President Karl Carstens dissolved the German Bundestag. The last instance of an extraordinary dissolution of the German Bundestag took place in 2005. The motion for a vote of confidence by Federal Chancellor Gerhard Schröder was not supported by parliament and Federal President Horst Köhler dissolved the German Bundestag. In two instances the motion for a vote of confidence was successful (under Federal Chancellor Helmut Schmidt in 1982 and under Federal Chancellor Gerhard Schröder in 2001).

20 September 2010

Memorandum by Richard Gordon QC (FTP 15)

1. These short submissions focus on a single issue, namely whether or not there are at least potential risks that questions as to the conclusiveness of the Speaker's Certificate as provided for in the Fixed-term Parliaments Bill ('the Bill') could be entertained by a domestic or international court.
2. The short background to the issue is as follows. In the latest version of the Bill which received its second reading in the House of Commons on 13th September 2010,

clause 2 makes provision for early parliamentary general elections where specified circumstances are certified by the Speaker of the House of Commons as being correct. Clause 2(3) provides that *'[a] certificate under this section is conclusive for all purposes.'*

3. So-called 'conclusive evidence' clauses of this kind are a form of ouster clause purporting to curtail the jurisdiction of the Courts. They are a well established statutory formulation by which matters certified in accordance with a prescribed procedure are provided to be conclusive as to the matters so certified. In general terms, such clauses are immune from enquiry into the correctness of the certified matters (see, eg: *R v. Registrar of Companies, ex p. Central Bank of India* [1986] QB 1114).
4. It would, however, be unwise to assume that there are no circumstances in which the validity of a conclusive evidence clause could be questioned in the courts. In his *Judicial Review Handbook* (Hart Publishing 2008, fifth edition) Michael Fordham QC states (see page 294) that *'[s]tatutory prohibition of judicial review is theoretically possible, unlikely in practice, and constitutionally questionable.'* The advent of the Human Rights Act 1998 ('HRA') has led (and is likely to continue to lead) to a willingness by the courts to scrutinise the underlying correctness of matters contained in (for example) a conclusive evidence clause: see, eg: *Tinnelly and Sons Ltd & McElduff and Others v. United Kingdom* (1998) 27 EHRR 249.
5. However, subjecting a Speaker's Certificate to challenge in the courts raises much greater difficulty than in the case of a conventional conclusive evidence provision. This is because of the wording of Article 9 of the Bill of Rights Act 1689 which stipulates that *'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'*.
6. The 2nd Report of the Political and Constitutional Reform Committee ('PCRC') published on 16th September 2010 (HC 436) records that the Speaker of the House of Commons has expressed concern that the Bill *'could lead to scrutiny by the courts of any Speaker's certificate and the parliamentary proceedings underlying them'* (see paragraph 26). The evidence - taken at some speed by PCRC - suggested that the Speaker's concerns were not shared by the constitutional experts who gave evidence before it (see paragraph 30). Nonetheless, these views were not central to the issues to which these experts' evidence was directed (see paragraph 30).
7. Article 9 of the Bill of Rights Act 1689 provides a legal immunity that has been described as being *'comprehensive and absolute'* (see Executive Summary of Joint Committee on Parliamentary Privilege ('JCPP') 1st Report, HL 43-1/HC 214-1 published on 9th April 1999). Nonetheless, the effect of that legal immunity must be distinguished from the scope and reach of Article 9 itself.
8. It is now well established that the scope of Article 9 has been circumscribed in certain respects (and with some subsequent qualification) by domestic courts. In the Executive Summary to its 1st Report referred to above, the JCPP outlines these developments as follows:

In 1993 the courts decided (in a case called Pepper v Hart) that when interpreting ambiguous statutes the courts may look at ministerial statements made in Parliament during the passage of the Bill through Parliament. The courts have also established a practice of examining ministerial statements made in Parliament in another circumstance, namely, when considering challenges by way of judicial review to the lawfulness of ministers' decisions.

9. Since the JCPP reported in 1999 there has been some further domestic judicial activity affecting the scope of Article 9. In *Wilson v. First County Trust* [2003] UKHL 40 the Speaker of the House of Commons and the Clerk of the Parliaments instructed Counsel on the hearing of an early fundamental rights case before their Lordships' House. Their concern as reflected in the submissions recorded at paragraph 53 in the speech of Lord Nicholls of Birkenhead was that:

*The courts should not treat speeches made in Parliament, whether by ministers or others, as evidence of the policy considerations which led to legislation taking a particular form. The exercise on which the Court of Appeal engaged is not an appropriate exercise for a court. There are no circumstances in which it is appropriate for a court to refer to the record of parliamentary debates in order to decide whether an enactment is compatible with the Convention. The policy and objects of a statute must be determined by interpreting its language, which alone represents Parliament's intention. Reference to debates for the purpose of determining whether the policy considerations put forward by those participating in debates in either House were justifiable in Convention terms and proportionate to the remedy proposed would involve 'questioning' what is said in Parliament contrary to article 9 of the Bill of Rights 1689. That is a different exercise from the one undertaken in *Pepper v Hart* [1993] AC 593, and it is an exercise essentially adverse to Parliament's intention, not supportive of it.*

10. Whilst recognising these submissions as raising 'a point of constitutional importance' (see paragraph 54) and emphasising 'the respective roles of Parliament and the courts' (paragraph 55) the House of Lords considered that the enactment of the HRA (which came into force on 2nd October 2000) 'requires the court to exercise a new role in respect of primary legislation' (paragraph 61). That 'new role' was mandated by parliament and required the court to evaluate, where appropriate, whether primary legislation was compatible with the European Convention on Human Rights ('ECHR') in terms of its proportionality. Reference to matters stated in parliament by the courts was a consequence flowing from the Human Rights Act.

11. The House of Lords added that:

The constitutionally unexceptionable nature of this consequence receives some confirmation from the view expressed in the unanimous report of the parliamentary Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-I, HC 214-I), p 28, para 86, that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability.

12. In a domestic context it is probable that, notwithstanding the limited inroad on the scope of Article 9 made since the advent of the HRA, the courts would not be able in terms of their statutory jurisdiction under the HRA to examine the accuracy of a Speaker's certificate or underlying proceedings under the Bill. This is because the HRA excludes from the definition of a '*public authority*' charged with the duty to act compatibly with the ECHR (see HRA s. 6(1)) either House of Parliament '*or a person exercising functions in connection with proceedings in Parliament*' (HRA s. 6(3)).
13. At the level of *international* judicial adjudication, however, it is highly questionable whether an assertion of parliamentary privilege (by reference to Article 9 of the Bill of Rights Act 1689) would necessarily operate to prevent parliamentary materials from being scrutinised.
14. It is true that the European Court of Human Rights has held that the absolute nature of parliamentary privilege does not, of itself, contravene Article 6 or 8 ECHR, however objectionable the statements (see *A v. United Kingdom* (2002) (Application No 35373/97)). But this does not have the obvious consequence that a separate asserted breach of a right protected by the ECHR and provable through scrutiny of materials sought to be protected by parliamentary privilege could not be investigated by the court by reference to such materials. Indeed, in *Demicoli v. Malta* (1991) 14 EHRR 47 the Strasbourg Court applied Article 6(1) ECHR to parliamentary contempt proceedings holding that Article 6 ECHR was infringed when Malta's House of Representatives had adjudged Demicoli, a journalist, guilty of contempt and had imposed a penalty upon him.
15. The Convention rights protected by the HRA through the ECHR overlap with (though are not co-extensive with) the fundamental rights protected in EU law. The doctrine of supremacy of EU law developed by the European Court of Justice ('the ECJ') makes it unlikely in the extreme that the ECJ would in a case within the 'reach' of EU law (whether involving fundamental rights or EU Treaty freedoms or other rights) recognise asserted parliamentary privilege if the effect of such assertion were to render the enforcement of EU rights impossible in practice.
16. Given the limited context in which the Speaker's certificate is intended to operate it may well be that the practical scope for the scope of Article 9 being affected by judicial enquiry into the validity of a certificate is small. The purpose of these Submissions is merely to emphasise that it should be taken into account.

24th September 2010

Memorandum by the Hansard Society (FTP 16)

1. 'Time is the oxygen of Parliament'. So said the now Leader of the House Sir George Young MP in a speech to the Hansard Society in March 2010, setting out his party's agenda for parliamentary and legislative reform and the need for improvements to enable MPs to 'undertake scrutiny in a measured and considered manner'.
2. Good scrutiny is an essential prerequisite of good law-making and good governance. However, with the Fixed Term Parliaments Bill political expediency appears to have

taken priority over Parliament's right to properly scrutinise the executive. Tackling important constitutional issues in such a rushed manner is not a recipe for good government and high quality legislation.

3. There has been no prior consultation process – green and white papers – to examine the policy implications prior to presentation of the bill and there has been no pre-legislative consideration of the bill in draft form. Given the key issues of constitutional concern the legislation would benefit from greater time and scrutiny. We recognise that there are serious time pressures with regard to implementation of the government's proposals for a referendum and the equalisation of constituencies. However, no such time pressures exist with regard to the Fixed Term Parliaments Bill and this legislation should therefore have been subject to pre-legislative scrutiny.
4. This lack of consultation is important and has potentially damaging longer term consequences because the Fixed Term Parliaments Bill has implications that link to the outcome of the proposals to reform the constituency boundary review process, to reform the House of Lords and the review of parliamentary privilege. Consultation and a less accelerated timetable for implementation would have provided for more coherent consideration of the related constitutional issues and questions that these policy changes throw up.
5. The Hansard Society's *Audit of Political Engagement* demonstrates that public interest in and understanding of the concept of a Fixed Term Parliament and its implications is limited. When asked how well, if at all, they felt they understood how the date of a general election is chosen, 60% of the public reported either only a limited level or no understanding at all of the issue. 39% of the public reported being 'satisfied' with the concept of letting the government decide the date for a general election, 23% were 'dissatisfied' with the arrangement, and 38% either had no preference either way or had no view at all on the matter.³⁴
6. However, as a matter of principle, the proposed reduction in the prerogative power and the constraining of a Prime Minister's freedom of action with regard to the calling of a general election is to be welcomed.
7. Nonetheless, we have concerns about the Bill as follows:
 - a. The fixed parliamentary term should be for four not five years.
 - i. Setting the term at five years will turn what has hitherto been the absolute maximum length of a parliament into the norm. Parliaments which have lasted into a fifth year have tended to be ones where the Government has, in reality, run out of steam but is waiting on the turn of events in the hope that something will turn around their flagging poll ratings and likely electoral fortunes.

³⁴ Hansard Society (2008), *Audit of Political Engagement* 5, pp. 53-54.

- ii. Fixing the term at five years rather than four will create a periodic timetabling problem with regard to elections to the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly. This could be avoided with a different term length. Alternatively, a polling date later in the year than May might be chosen; however, this is a less attractive option than having just one national election in any given year.
 - b. Members of the governing party might at some future time subvert the spirit of the bill's intention by laying down a motion of confidence in themselves in order to trigger an early dissolution. This might be prevented by a restraining measure, such as, for example, providing that such a motion can only apply to members of an opposition party.
 - c. In the event of a no confidence motion being passed there will be a 14 day period when an alternative government might be formed before a general election is otherwise called. The legislation in effect will create a new 'caretaker' period when the incumbent government that has lost the confidence of the House nonetheless remains in office until an alternative government can be formed or an election has to be called. In this 14 day period the same constitutional conventions, particularly in respect of 'purdah', that apply following the calling of an election or following an uncertain election result, should apply. This need not be enshrined in the legislation but will necessitate changes to the Cabinet Manual. At present this falls under the purview of the Cabinet Secretary but should be a matter for which a minister at the Cabinet Office is held accountable.
8. The introduction of a fixed term should allow for better planning of the legislative timetable and improved electoral administration.
- a. If a fixed term is introduced then the onus should be on the Government to ensure better management of the legislative timetable thus avoiding the need for the 'wash-up' at the end of each session. Changes to the parliamentary sessions to better align them with the fixed term should facilitate this but assurances should be sought from the Government about the management of business in the final session in order to avoid the problems of the 'wash-up'.³⁵
 - b. The bill as currently drafted misses an important opportunity to address some of the concerns about the administration and management of elections, particularly with regard to the statutory timetable, as set out most recently by the Electoral Commission in its report on the administration of the 2010 general election.

1 October 2010

³⁵ For an analysis of reform of the parliamentary 'wash-up' see R. Fox and M. Korris, 'Reform of the wash-up: managing the legislative tidal wave at the end of a Parliament', *Parliamentary Affairs*, Vol. 63, No. 3, 2010, pp. 558-569.

Memorandum by Andrew Heard, Associate Professor, Simon Fraser University (FTP 17)

Summary

The Canadian experience with fixed election date legislation provides varied lessons to apply to Britain. In the past five years, legislation has been adopted by the national parliament, as well as by seven of Canada's ten provincial legislatures and one of the three territorial assemblies. Due to constitutional reasons unique to Canada, as well as some practical considerations, all of these statutes have preserved the prerogative power to dissolve the legislature at any time, while ostensibly stipulating a fixed four-year schedule between general elections. Two judicial decisions on the federal legislation have underlined the lack of legal obligation to adhere to a fixed election schedule. As a result, all of these laws must ultimately rely upon constitutional conventions to ensure that the spirit of fixed terms is respected in practice. Subsequent political events have revealed some mixed observance of these new rules. While the federal government ignored the spirit of its own legislation and called an election one year prior to the expected date, all five provincial elections called after the enactment of fixed election date legislation have respected the four-year election schedule. A constitutional convention appears to have arisen to constrain a government's discretion to call early election, but that convention may not be sufficient if left as an informal understanding.

There are some remedies available to Canadian legislatures which might better ensure that future governments respect the principle of fixed legislative terms. It may be sufficient to include some non-justiciable statement of principles in the bill, explicitly declaring that elections must normally be held according to the four-year schedule and that early elections should only be called if a government has lost a clear vote of confidence (and no viable, alternative government may be formed) or in order to deal with some emergency that prevents the normal functioning of Parliament. A codified statement of the supporting convention in the statute might well have been enough to deter the government from acting. Other, indirect measures could further constrain a government. For example, the Standing Orders might be amended to provide for some measure similar to s.2(2) of the British Bill 64, providing the House a short period to support the formation of another government in the event that the current one is defeated on a confidence vote. The requirement that early elections be approved by a supermajority based on the total number of seats (including vacancies) appears unwise.

Submission:

The Canadian experience with fixed election date legislation provides varied lessons to apply to Britain. In the past five years, legislation has been adopted by the national parliament, as well as by seven of Canada's ten provincial legislatures and one of the three territorial assemblies. Due to constitutional reasons unique to Canada, as well as some practical considerations, all of these statutes have preserved the prerogative power to dissolve the

legislature at any time, while ostensibly stipulating a fixed four-year schedule between general elections. As a result, all of these laws must ultimately rely upon constitutional conventions to ensure that the spirit of fixed terms is respected in practice. Subsequent political events have revealed some mixed observance of these new rules. While the federal government ignored the spirit of its own legislation and called an election one year prior to the expected date, all five provincial elections called after the enactment of fixed election date legislation have respected the four-year election schedule. There are some remedies available to Canadian legislatures which might better ensure that future governments respect the principle of fixed legislative terms.

The rapid spread of fixed election cycles has been quite remarkable in Canada and was driven by perceptions that governments held an unfair advantage in being able to time elections to best suit the ruling party. All nine Canadian jurisdictions that have adopted fixed election date legislation have opted for a four year cycle. This term has been chosen despite the Canadian Constitution's stipulation that legislative assemblies may last up to five years. There has been a general consensus in Canada for some time that four years provides a good balance between allowing a government some breathing space to enact unpopular legislation, on the one hand, and ensuring that a government does not become too distant from the electorate between elections, on the other.

When such measures have been proposed in Canadian legislatures, there has been overwhelming support from all benches. Nevertheless, the provincial governments in Quebec, Alberta, and Nova Scotia have continued to resist calls for introducing fixed legislative terms. These governments reluctance is often expressed as a desire to avoid unenforceable legislation. This issue touches on the central question of the nature of the obligation upon Canadian politicians to respect such legislation.

Canadian legislators' freedom to draft legislation providing for fixed election dates is hampered by a unique constitutional situation. Section 41 of the *Constitution Act, 1982* requires the unanimous consent of all the national and provincial legislatures for any constitutional amendment relating to the "the office of the Queen, the Governor General and the Lieutenant Governor of a province." This provision is widely, though not unanimously, regarded by constitutional experts as preventing even ordinary legislation from impinging on the constitutional powers of the Queen and her Canadian representatives. Clearly, s.41 does not alter a basic premise of Canadian constitutional law that Parliament has the power to alter or extinguish the common law powers of the Crown. However, it may well protect the personal powers expressly mentioned in Canada's formal Constitution, such as the reference to the power of dissolution in s.50 of the *Constitution Act, 1867*; this section stipulates that a House of Commons "shall continue for five years ...subject to be sooner dissolved by the Governor General." As a result no legislature was willing to risk judicial approbation by drafting legislation that would have definitively eliminated the discretion to dissolve at any time.

The Canadian compromise centered on a basic model in which the governors' discretion is expressly left unaltered, while at the same time stipulating that an election shall be held

every four years. This compromise is succinctly evidenced in the amendments made to British Columbia's *Constitution Act* in 2001 (the first fixed election date legislation in Canada):

23(1) The Lieutenant Governor may, by proclamation in Her Majesty's name, prorogue or dissolve the Legislative Assembly when the Lieutenant Governor sees fit.

(2) Subject to subsection (1), a general voting day must occur on May 17, 2005 and thereafter on the second Tuesday in May in the fourth calendar year following the general voting day for the most recently held general election.

There is an ironic lapse of consistency in this approach, since Canadian legislators have been content to eliminate their governors' discretion during the fifth year of a legislature, while making a show of protecting that same discretion during the first four years.

This legal framework was intended to deal with several concerns at the same time. The most pressing constitutional issue became moot. There was also no need to embody expected exceptions to the four-year term, such as the defeat of a government on a confidence vote, which might otherwise be subject to judicial scrutiny. In particular, there has been general agreement that it would be inappropriate for judges to decide whether a government's defeat on a particular vote constituted a loss of confidence.

The legal impact of the Canadian fixed election date statutes has been minimal. Their only legal effect has been to shorten the ultimate duration of a legislature from five years to four.

The political effect has been much more substantial. Political actors and constitutional scholars across Canada have accepted that the policy goal of a fixed election schedule could only be achieved through the development of constitutional conventions to protect the spirit of these statutes. Without a legal impediment to calling an early election, only the obligations imposed by constitutional convention might effectively constrain a prime minister from calling an early election.

Evolving discussions about how a fixed legislative term should work in practice led to an understanding of a general obligation to respect the four year schedule, with certain exceptions. The most often discussed exception is the necessity to provide for elections when a government loses a clear vote of confidence. However, there has also been notable discussion of other situations that would warrant an early election if a government were rendered incapable of governing for some reason. In particular, it may well be necessary to provide for early elections if some natural disaster, epidemic, or act of violence were to kill or incapacitate a significant portion of a ministry or of a legislature's membership. Some have suggested that a severe political crisis with an intractable paralysis of the legislature might justify an election; a prorogation, however, might initially suffice instead in this instance. Others have suggested that some great controversy of public policy might occasionally arise about which there is broad agreement that a general election might be appropriate to deal with. The strength of relying on an informal set of exceptions is that the political system can deal with unanticipated emergencies.

There has been some discussion as to whether the Governor General or a Lieutenant Governor might enforce the spirit of fixed-election date legislation, by refusing an early election call that was not advised to deal with a loss of confidence or some emergency. In the end, it does not seem appropriate or practical for the governors to refuse dissolution in order to enforce the spirit of fixed election date legislation. In principle, most political actors and scholars have argued that the basic tenets of modern responsible government provide a prime minister with a broad freedom of action that should ultimately be judged by the electorate. In practice, too, the advice of a prime minister supported by a majority in the legislature could not normally be refused. A governor's refusal would likely result in the prime minister's resignation. In which case, the governor could only realistically seek to appoint a new prime minister from among the opposition party leaders, who could not command a majority. However, it is generally accepted that a governor may refuse an early election call within a few months of the last election if a viable, alternative government can be appointed. The right of refusal in these circumstances is supported by a long-accepted constitutional convention in Canada.

As a result, the observance of fixed election dates in Canada comes down to a convention that would constrain a prime minister from advising an early election not falling within one of the noted exceptions. There is strong evidence that this obligation is recognized and accepted by most political actors in Canada. Since the passage of fixed term legislation, no provincial or territorial government has called an early election. General elections have been held according to the statutory schedule in every province that has passed such laws, and where sufficient time has passed since enactment. British Columbia has the oldest legislation and held elections on schedule in 2005 and 2009. The Northwest Territories, Ontario, Prince Edward Island, and Newfoundland held elections respecting the four-year cycle in 2007. New Brunswick's general election in 2010 was the most recent example. Saskatchewan and Manitoba appear set to hold their first scheduled elections in 2011. This, the evidence from the sub-national level in Canada is one of uniform respect for the principle of fixed election dates.

Prime Minister Harper's 2008 national election call is, however, a notable exception to this pattern. Parliament had passed his government's legislation in 2007, which stipulated that the next election should be held in October 2009. In September 2008, the Governor General granted Mr Harper's request for dissolution, ending what was a fractious minority parliament. The government was strongly criticized in the media for having ignored the spirit of its own legislation. The government defended its decision, pointing out that, prior to the election call, the prime minister had met with the leaders of all the opposition parties with parliamentary representation and none had given him an assurance that the current parliament could last the full four years.

A court case challenging the early election calls was launched by Duff Conacher, the director of the public interest group Democracy Watch. His lawyer filed an application to have the court declare that the 2008 election either violated the *Charter of Rights* guarantee for a free and fair election, was contrary to the fixed date election law, or violated a constitutional convention prohibiting an early election call. The Federal Court Trial Division rejected the

application on all counts in 2009.³⁶ The presiding judge held that the prime ministerial discretion to time an election advantageously did not infringe the *Charter*; to hold otherwise, he said, would call into question every previous election. He pointed out that the amendments passed in 2007 to the *Canada Elections Act* maintained the Governor General's power to dissolve Parliament at any time; thus the Prime Minister was not in breach of the legislation in advising an election in 2008.³⁷ And finally, he declared that no convention could have existed because some past precedent was needed before a convention could be established. In reaching his conclusion on conventions, the judge refused to consider provincial precedents and rejected the argument that constitutional conventions could be created by express agreement or declaration by political actors. Furthermore, he concluded that the legislative record provide contradictory evidence about the government's position on fixed election dates. The Federal Court of Appeal upheld this decision in 2010.³⁸

While I believe that the courts' findings are sound on the *Charter* arguments and on the technical compliance with the legislation, I do take issue with their conclusion on constitutional convention. I have explored this matter in detail in an article recently published in *Constitutional Forum*, which I attach for the committee's consideration.³⁹ In short, I argue that it is widely accepted that a convention can be created by the express agreement or declaration of the relevant actors, and that a precedent is not necessary to establish a constitutional obligation. I also conclude that the applications judge failed to consider the full public record of events leading up to the passage of the legislation and the subsequent dissolution. Senior government actors and constitutional experts consistently stated that, even if the new legislation had limited legal effects, it was intended to eliminate the prime minister's discretion to time elections to his party's advantage. Clear statements were made that future elections would occur every four years, unless the government lost the confidence of the House or the government was unable to govern. In short, I believe there were ample grounds to conclude that a constitutional convention had indeed arisen and that the Prime Minister acted in contravention of it.

The 2008 dissolution and consequent judicial decisions underline the weakness of the Canadian model for implementing fixed legislative terms. The skeletal legal framework, with its preservation of an unfettered discretion to call an election at any time within four years, provides no effective barrier to a government tempted to pursue its electoral advantage in an early election. The public's limited ability to hold a government to account for an early

³⁶ *Conacher v. Canada*, 2009 FC 920

³⁷ A new s.56.1 was added to the *Canada Elections Act*:

56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009. S.C. 2007, Chapter 10

³⁸ *Conacher v. Canada*, 2010 FCA 311.

³⁹ Andrew Heard, "Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates," (2010) *Constitutional Forum*, Vol.19, No.1, pp.21-32.

election was also demonstrated; in the 2008 election, the ruling Conservative Party received only 38% of the national vote, but remained in office as a minority government.

There are a number of remedies available to Canadian legislatures which might ameliorate this situation. Perhaps the most straight forward approach would be to include some non-justiciable statement of principles in the bill. It may be sufficient to explicitly state that elections must normally be held according to the four-year schedule, and that early elections should only be called if a government has lost a clear vote of confidence (and no viable, alternative government may be formed) or in order to deal with some emergency that prevents the normal functioning of Parliament. It is likely that the codification of the necessary supporting convention would prevent any but the most determined of governments from calling an early election. In the context of the 2008 election call, the government was able to point to the language of the new law and correctly state that dissolution had not contradicted any of its provisions. A codified statement of the supporting convention in the statute might well have been enough to deter the government from acting. Other, indirect measures could further constrain a government. For example, the Standing Orders of the *Parliament of Canada Act* might be amended to provide for some measure similar to s.2(2) of the British Bill 64, providing the House a short period to support the formation of another government in the event that the current one is defeated on a confidence vote. While there is something to be said for permitting a supermajority in the House to authorize an early election (such as found in s.2(1) of Bill 64), it appears unwise to require a supermajority based on a total of seats (including vacant seats) in every instance other than a loss of confidence; as noted earlier, unforeseen events might result in the death or incapacity of a significant portion of the House's membership.

29 September 2010

Memorandum by Timothy Kingston Hepner (FTP 18)

I am a law graduate from the University of Liverpool (English and German laws - 2003) and have completed the Bar Vocational Course (2008), although I have not yet been successful in securing a pupillage. For several years now I have maintained an interest in the law and politics of constitutional reform, particularly from the point of view of comparative constitutional law. I am not an academic and my interest is purely "amateur" in nature.

I have chosen to respond to the Committee's Call for Evidence primarily for two reasons. Firstly, I am a strong supporter of fixed-term parliaments and I would like to register that support. Secondly, however, and more importantly, I watched the Committee's session with Professors Hazell and Blackburn and Peter Riddell from 21st July 2010. In the course of what was a constructive and informative session, Professor Hazell stated in his evidence:

"I am still slightly puzzled why the Government sees the need for a dual threshold, depending on whether the dissolution procedure is initiated by the opposition, through a no-confidence motion, or the government of the day"

(Pp 15-16, unrevised minutes of evidence)

I believe the answer to Professor Hazell's puzzlement is that there are occasions when an early election is desirable, but where the question of *parliamentary* confidence in the Government of the day does not arise. In my note I have identified at least three circumstances when a Government with a secure majority, together with the Opposition, may wish to have early elections. These circumstances are, briefly:

1. a loss of confidence in Parliament;
2. controversial policies of major public importance; and
3. a significant change in electoral support for the Government.

To give the Executive a simple power to dissolve would defeat the point of the fixed-term. So, there must be a way to enable an early election which is difficult for the Executive to manipulate. The "dual threshold" effectively protects the fixed-term from the Executive, but allows it to be "breached" in these sorts of circumstances with the agreement of the Opposition.

I also wish to raise a minor concern about the particular wording of clause 2(6) of the Fixed-term Parliaments Bill which appears to give an unnecessarily broad discretion to the Prime Minister in fixing election dates.

Introduction

1. I am a supporter of the principle of fixed-term parliaments. It is inappropriate that the Prime Minister, by his or her exclusive right to propose an early dissolution of Parliament, can determine the life of Parliament. Although in practice it has not led to tyranny or significant political advantage, it is wrong in principle and serves no useful constitutional purpose. In short, the current power of the Prime Minister is a constitutional-historical left over and has no place in the modern governance arrangements for the UK.
2. In response to the House of Lords Constitution Committee's Call for Evidence, and in light of my own stated position, I would like to offer my views on mid-term dissolutions.

Germany

3. Although I do not support the present arrangements whereby election dates are in the hands of the Prime Minister, I do recognise that these arrangements do allow for a certain degree of flexibility when it is expedient. To put it another way, the drawback of a "pure" fixed-term parliament (such as in the United States) is that early elections cannot be called even when it is in the public interest to so. To alleviate this problem several countries/regions around the world provide for mechanisms to "breach" the fixed-term. For example, the German Bundestag is on a fixed four year term; but that term can be "breached" in two circumstances:

- a. if, following a general election or a vacancy in the office of Federal Chancellor (otherwise than by no confidence vote), the Bundestag cannot elect a new Federal Chancellor within 14 days; or
- b. if a confidence motion put by the Federal Chancellor is defeated in the Bundestag.

In both cases the Federal President has the right to refuse the dissolution.

4. It is noteworthy that the German Constitution does not allow what the Germans call the “Selbstaufhebungsrecht”, or “right of self-dissolution”, where dissolution follows a parliamentary vote which has nothing to do with confidence in the government. All the Regional Parliaments in Germany, however, do possess such a right (usually by a super-majority in the parliament and/or the presentation of a petition which is then approved in a referendum). The usual reason given in Germany for opposing a “right of self-dissolution” for the Bundestag is that it would be too susceptible to Executive manipulation: Federal Governments could simply engineer votes in the Bundestag to secure an advantageous election date. Nevertheless, following Chancellor Schröder’s success in deliberately procuring the defeat of his own government in 2005 to call elections a year early, pressure for a “breach” mechanism for the Bundestag similar to those at regional level has been mounting.

Desirability of Early Elections: Breach of the Fixed Term

5. Debate surrounding fixed-term parliaments for the UK has, since the publication of the Coalition Agreement, centred on the so-called “55% rule” and the subsequent controversy about the majority which should be required for a vote of no confidence (or to defeat a vote of confidence). As a result of this controversy it appears that a common assumption has arisen that the only reason for holding an early election in breach of a fixed-term is if the Government no longer commands the confidence of the House of Commons. I fundamentally disagree with this assumption. I believe that there are at least three circumstances where an early election could be desirable without the Government having been defeated. In my view these circumstances include at least:
 - a. a loss of confidence in Parliament;
 - b. controversial policies of major public importance; and
 - c. a significant change in electoral support for the Government.
6. The first of these circumstances I describe as a loss of confidence in Parliament; in other words where the House of Commons itself – and not necessarily the Executive – has somehow fallen into disrepute. The recent expenses scandal is a good example, but another might include a House which became paralysed by personal (rather than political or partisan) infighting independent of the political debate. These cases do not affect the confidence of Parliament in the Government – indeed the Government may enjoy a strong majority – but it could be in the wider national interest to have a democratic purge of the Commons (by means of a general election) so as to restore confidence in Parliament as the *forum populi*. “Breach” mechanisms are ideal for such

circumstances. Even more ideal, arguably, would be some form of dissolution petition: a popular recall en masse of the House of Commons.

7. Secondly I refer to controversial policies of major public importance. This is perhaps a wordy way of saying “as an alternative to a referendum”. For example, the Lisbon Treaty was said to be of major public importance and so deserved to be ratified by referendum; yet in response it was argued that the Treaty was not suitable for a referendum. An election might have been an excellent compromise allowing detailed consideration of the Treaty by a Parliament with a specific mandate to ratify or reject. This principle of using election rather than referendum is employed in Belgium for amending the Constitution: before the proposed amendments can be made, both Houses of the Parliament must be dissolved and it is for the new Houses to approve the amendments. A “pure” fixed-term Parliament would be unable to do this and would have to resort either to taking a decision for which it has not democratic mandate or submitting the question to a referendum.
8. Finally, an early election may be expedient if there has been a significant change in electoral support for the Government. Importantly, I refer to “electoral” rather “popular” or “political” support. The confidence defeat engineered by Chancellor Schröder in Germany in 2005 was not, ironically, to take advantage of a sudden spike in the polls for his SPD/Green coalition. Rather, it was because his party had lost control of the North-Rhine-Westphalia region and, consequently, of the second parliamentary chamber, the Bundesrat. There may be occasions when, after a significant defeat or victory in a European election, or a local election, it is obvious that whatever the parliamentary numbers, the Government has lost its popular mandate. In such circumstances, a Government resigned to its fate may consent to an Opposition demand for an election or may want the opportunity to fight and regain its mandate. In the latter case the Opposition will clearly want to exploit the recent change. There would, in effect, be a consensus on both sides of the House that an early election is desirable, or at least necessary. Obviously under present arrangements the Prime Minister could simply “go to the Palace”.

Concluding Remarks

9. I have highlighted three occasions when it may be desirable to hold early elections in “breach” of a fixed-term Parliament when parliamentary confidence in the Executive is not in question. I do not suggest that there should be a fixed list of such circumstances as there may be new situations where an early dissolution becomes necessary. It would not be wise to exclude these unforeseen issues as a potential basis for holding new elections. An exhaustive list, or indeed any list, would also give rise to the possibility that the Courts become required to adjudicate on political questions as opponents of an early election seek any and all remedies. It is my view, therefore, that a “breach” mechanism allowing for the mid-term dissolution of Parliament is a positive thing. It is not my intention in this note to discuss what the

“breach” mechanism should be; as I say, I have only wanted to highlight the need for one and identify circumstances under which it could be used.

Post Scriptum: Power to Appoint Polling Day under Clause 2(6) of the Bill

10. On a slightly different issue I would like to raise a concern about clause 2(6) of the Fixed-term Parliaments Bill. As it stands, it appears that the sub-clause confers on the Prime Minister an unfettered discretion as to the date of an election following either a 2/3 vote in the Commons or a Government defeat. My concern is that there is no fixed time-table foreseen. Parliament will be dissolved 17 working days before polling day, but polling could be recommended by the Prime Minister to be set months, or even years, after the initial vote triggering the election. It may be prudent, as occurs in other countries, for the clause to require the Prime Minister to recommend a day which falls within a fixed period following the Commons vote (perhaps 60 days, for example) and to require him to consult with Speaker and the Leader of the Opposition before making the recommendation. This would ensure that once it was established that the election should happen, the date could not become part of the campaign.

11. I hope this note is of some assistance to the Committee in their inquiry and I look forward to the Committee’s final report on this hugely important subject.

29th July 2010

Memorandum by David Howarth⁴⁰ (FTP 19)

Summary:

- a. Fixed term parliaments are desirable for reasons of fairness and political stability.
- b. There is no dispositive method of deciding whether the term should be four or five years. Fairness points more to four years, stability to five.
- c. Short of adopting a formal constitution, it is very difficult, if not impossible, to entrench fixed terms beyond the reach of repeal by ordinary statute, but that fact is itself an important safeguard and a well-calibrated escape mechanism.
- d. No escape mechanism other than the possibility of an amending statute is either necessary or desirable.

⁴⁰ MP for Cambridge 2005-10, proposer of the Fixed Term Parliaments Bill 2007 (now Reader in Law, University of Cambridge, Fellow of Clare College, Cambridge, Associate Fellow of the Centre for Science and Policy, University of Cambridge).

e. Further consideration of escape mechanisms would be necessary in the event of reform of the House of Lords or the adoption of a formal constitution, not such consideration is not necessary at this point.

f. Fixed terms do not remove the rights of the Commons to call an election or remove a government because such rights do not exist at the moment. Nevertheless the no-confidence provisions of the Bill are unnecessary and create risks of their own. They could be safely omitted.

g. The Bill is in any case flawed in so far as it allows self-induced no-confidence motions.

h. The statutory escape mechanisms create a risk that the courts will intervene. The risk is admittedly small, but since there is no need for escape mechanisms on the face of the Bill, any such risk is unnecessary.

1. Desirability of fixed term parliaments

1. The main purpose of fixing parliamentary terms by law is to remove the power of the prime minister to choose the date of the general election either to the advantage of that prime minister personally (for example, for the purpose of maintaining control over a recalcitrant parliamentary party), or to the advantage of the governing party as a whole (for example, for the purpose of capitalising on short term shifts in popularity).

2. Any personal advantage for a prime minister might be reduced by transferring the power to ask for a dissolution from the prime minister to a majority of the House of Commons (as proposed by the 2007 White Paper 'The Governance of Britain'⁴¹), but such a transfer would be insufficient to remove the advantages of the present system for the governing party. For that, only fixing the dates of general elections by statute will suffice.

3. As the events of the summer of 2007 demonstrated, the power to ask for a dissolution at any time can turn out to be damaging not just for the country, because of the uncertainty and inaction that speculation about its use can produce, but also for the reputation of the prime minister. Those events also revealed another pathology of the present system, namely that once a rumour begins that the prime minister is considering an early dissolution, politicians of all parties are tempted to declare their eagerness for an election, regardless of their actual view of either their party's interest or, more importantly, the public interest. A game of political 'chicken' develops, the result of which might be an election that no one really thinks desirable.

4. An additional purpose for fixed terms is to stabilise coalitions. If a prime minister from one party in a coalition has the power to call an election at any time, its coalition partners will feel threatened by any increase in the popularity of the party of the prime minister. The effect is especially strong under first-past-the-post, which exaggerates the effects of small movements in opinion. The junior partner will thus have an incentive to undermine any temporary popularity of the prime minister, so threatening the stability of the government.

⁴¹ CM 7170 (2007) p. 20

Fixed term parliaments would at the very least banish that problem to the end of the parliament, when parties will in any event start to position themselves for the coming election. Even then the partners will have enough of a common interest in the record of the coalition that cooperation will not entirely disappear.

2. Period of the fixed term

5. My own Bill⁴² proposed a fixed term of four years, although I said in my speech at Second Reading⁴³ that I would be prepared to contemplate amendments changing the period to five years. Subsequently I supported motions calling for five year terms.

6. There is no obviously dispositive method for deciding between the two proposals. There is an argument that the electorate has developed an expectation that it should have an opportunity to vote every four years, but the legal position is otherwise and there have been enough five year parliaments in recent years to call into question whether that is a legitimate expectation.

7. It might be observed, however, that those whose main concern is the stabilisation of coalitions tend towards five years, for the reason that the stabilisation effect might well fade in the final year of the government as the election approaches, so that if one wants four years of stable co-operative coalition government, the temptation is to establish a five year term. Those whose main concern is to prevent ruling parties taking unfair advantage of an arbitrary power to dissolve parliaments tend towards four years, since their assumption is that they are dealing with a single party government.

3. Limit to the extent to which fixed terms can be achieved

8. As long as the United Kingdom adheres to the doctrine of parliamentary supremacy, and so does not adopt a formal constitution whose provisions are protected from repeal or alteration by means of an ordinary statute, it is not possible fully to guarantee fixed terms. It is open to parliament at any time to amend or repeal any Fixed Term Parliament Act.

9. It should be remembered, however, that a government that proposes a bill to amend a Fixed Term Parliaments Act with the intention of causing an early election would need to be able to push the bill through very quickly. Otherwise it would be taking a risk that its political advantage will have disappeared by the date of the election. A bill intended to take advantage of short-run political conditions would inevitably fail to enjoy broad support. Whatever the position in the Commons, such a bill would find itself making slow progress in the Lords. By the time it emerged, the moment would, in all likelihood, have passed.

4. Need for an escape mechanism?

10. Clause 2 of the Bill includes provision for making possible an early election through a two-thirds vote of the House of Commons. Most countries that have fixed term parliaments provide for some kind of escape mechanism to deal with situations in which political

⁴² HC Bill 30 (2007-08) <http://www.publications.parliament.uk/pa/cm200708/cmbills/030/08030.i-i.html>

⁴³ Official Report HC Deb 16 May 2008 cc 1703-1709 at c 1708

deadlock can only be broken by calling an election.⁴⁴ One exception is the United States, but that country has full separation of executive and legislative functions, so that the existence of the executive does not depend in any way on the confidence of the legislature.

11. Escape mechanisms in other countries, however, exist in the context of formal constitutions, according to which legislative terms cannot be varied by ordinary legislation. If an escape mechanism did not exist in such countries, there would be no way short of a constitutional amendment to break a deadlock. In the United Kingdom, that would not be the case. The method of changing the fixed term by ordinary legislation would always be available. Any escape mechanism in a British fixed term statute would not be the only way of breaking a deadlock. It would instead constitute an *additional* way of breaking a deadlock. In the British context, statutory escape mechanisms only make a difference if they are easier to use than passing an amending statute in the ordinary way. If they are more difficult, they make no difference.

12. The result is that there is, in my view, no need for any statutory escape mechanism in a British Fixed Term Parliaments Act. Where sufficient political consensus exists that an early election should be called, an amending bill would go through quickly. Where not, not. That provides a well-calibrated escape mechanism in its own right.

13. Whether a two thirds majority in the Commons, as provided for in the current Bill, is an easier bar to jump over than passing an amending Act will depend on the circumstances, including the precise composition of the Commons (which in turn is affected by the voting system used to elect it). It certainly does not need the consent of both Houses and has an instantaneous effect, so that it could be used opportunistically. But the central point is that any such rule is only relevant if it is easier to use than passing an amending statute. If one takes the view that passing an amending statute is the easiest method that should be adopted, as I do, no other method need be contemplated.

5. Interaction with Lords reform and the development of a written constitution

14. All of the foregoing considerations would have to be revisited were the House of Lords to be reformed in a way that meant that a government could push legislation through both chambers quickly or if a written constitution were to come into force that removed the power of parliament to alter parliamentary terms by ordinary legislation. It is submitted, however, that those issues should be dealt with at whatever time they become relevant.

15. For example, if Lords reform were to produce a situation in which the government could command a majority in the Lords (not the situation now, of course), it would become necessary to consider whether other methods of preventing rapid amendment of the fixed term legislation. The issue is far from straightforward. In the absence of a formal

⁴⁴ See T. Bergman et al, 'Democratic Delegation and Accountability: Cross-national Patterns', ch. 4 of K. Strøm, W. Müller and T. Bergman, 'Delegation and Accountability in Parliamentary Democracies' (Oxford, 2003) at pp 160-63. It is noticeable that many such mechanisms involve the active engagement of the head of state, a solution not available in this country, where it is usually thought to be important to maintain considerable distance between the monarch and party politics.

constitution, any protective measures might be repealed as rapidly as provisions about the election date itself. Suggestions for achieving some degree of entrenchment without a formal constitution do exist, but their effectiveness is untested and uncertain. They include redefining 'parliament' for the purpose of amendments to specified Acts, legislating to control the exercise of the Royal Assent for any bill that alters a specified Act and including the Act controlling the Royal Assent itself,⁴⁵ and adopting similarly self-referential protection in standing orders. Fortunately, however, the issue does not have to be faced now.

6. The 'no confidence' issue

16. Clause 2(2) of the bill provides for a mechanism for calling an early election if the government is defeated in a vote of no confidence and no new government gains the confidence of the House of Commons within 14 days. These provisions have been introduced into the bill to meet the 'government of the living dead' problem, namely that a government might carry on after losing a vote of no confidence in the Commons as long as it had the wherewithal to prevent a two thirds vote for an early election. It is alleged that this possibility has deprived the Commons of its right to dismiss governments and cause general elections. The allegation is, however, wrongheaded. It has arisen out of a misunderstanding of the current situation.

17. The crucial point about no confidence motions is that they currently have no legal effect whatsoever. The creation of legal consequences for no confidence motions in the Bill is an innovation of enormous importance. Although there is a convention that governments defeated on confidence votes should either resign or ask for a dissolution, there is no legal requirement for them to do anything. The only legally decisive method of getting rid of a government is for the monarch to dismiss it.

18. It is sometimes claimed that governments cannot survive the denial of supply. Even that is not strictly true. Given the fact that supply is granted on account in December for the first months of the following financial year, as long as the government keeps the session going, so that appropriation is still a possibility in that session, the vote on account remains valid authorisation of expenditure for many months. Admittedly, if the government manages to fail to get a vote on account through the House, they only have until 1 April the following year before authorisation runs out, but that is not the same as forcing an immediate election.

19. It is therefore not true that fixed terms abolish the Commons' 'rights' to cause governments to resign or to call an election by means of a no confidence vote. Legally, it currently has no such rights. Even under the existing convention, the Commons cannot force an election, because a government that loses a vote of confidence can simply resign. Whether the incoming government asks for a dissolution is, under the current arrangements, a matter for it, not for the Commons.

⁴⁵ For an example of this particular mechanism, see the United Kingdom Parliamentary Sovereignty Bill (2009-10) HC Bill 48 2009-10, cl. 4.

20. Moreover, conventions are ultimately a matter of what governments can get away with. On 10 March 1976, for example, Harold Wilson's government lost a motion endorsing its public expenditure plans. Although the motion had no immediate legal effect, it is difficult to imagine an issue more central to a government's programme. It was undoubtedly a matter of confidence. But Wilson did not resign. Instead, the following day he merely moved a motion "that this House do now adjourn" and declared that to be a matter of confidence. The government won the vote on the motion to adjourn and declared that it had established the confidence of the House to such an extent that it need not resign, even though it remained the case that the House had rejected the whole of the government's expenditure plans.

21. The 'government of the living dead' problem thus exists as a theoretical possibility within the current arrangements. A government defeated on a no confidence motion could in theory take a further leaf out of Wilson's book and simply defy the current convention. It could continue to govern until supply ran out. And if it could subsequently obtain supply, perhaps by coming to terms with some of the members who voted for the no confidence motion, it could carry on entirely as normal.

22. The reasons why such a government would probably not come into existence under the current arrangements are political not legal. If public opinion was heavily in favour of an election, a government would normally be harming its chances of re-election if it soldiered on. The political reasons also include a desire not to involve the monarch in party politics, for defiance of conventions of this type effectively creates a situation in which the monarch is being challenged to dismiss her ministry, an eventuality that arose in Australia in 1975 when Gough Whitlam, denied supply by the Senate, carried on regardless and was promptly dismissed by the Governor-General.

23. Precisely the same political reasons would apply if there were fixed terms. A government defeated on a no confidence motion would either co-operate with the opposition to call an election, using an amending statute or whatever escape mechanism existed, or it would hand over to a new government, or it would re-establish its control. Apart from the need for opposition co-operation to call an election, which it would be very unlikely to refuse for the same political reasons that apply to the government, the introduction of fixed terms makes no difference.

24. My conclusions about the two-thirds mechanism, however, also apply to the no confidence provisions. The possibility of an amending statute is a sufficient safeguard and escape mechanism. The no confidence provisions are unnecessary. There is an argument that there should be some kind of deadline following a successful no confidence vote for the situation to be sorted out one way or another – a new government, an election or, as in 1976, the old government comes back following a second confidence vote. But no such deadline exists now, even though the situation is essentially the same. It is also worth pointing out the risks of imposing such a deadline. At times of national crisis (consider the fall of Chamberlain in 1940), the last thing the country might need is the uncertainty and divisiveness of a general election. Although there is the possibility of passing an amending

statute before the 14 day deadline expires, the chances of such a move going wrong in the limited time available are great.

7. Self-induced no confidence

25. The no confidence provisions have other problems. The most obvious is that a government could evade the whole intention of the Bill by moving and passing a vote of no confidence in itself and using its majority to vote down any confidence motion proposed in the subsequent 14 days for any other government. Provision might be made for no confidence motions not to count unless they are proposed by specified people (e.g. the leader of the opposition) or by specified numbers of opposition members. The whole problem would, however, be avoided by removing all mention of no confidence motions from the Bill.

8. Interference by the courts

26. The one safeguard in the Bill against self-induced no confidence motions and similar abuses is the possibility that the Speaker might refuse to issue a certificate under cl. 2(2). The Bill also seems to envisage that the Speaker will decide which votes count as no confidence votes. The matter is not without difficulty. Votes on supply or on hostile amendments to the Loyal Address are conventionally thought to count as no confidence votes, but other circumstances are trickier. For example, can a minister turn a vote into a vote of confidence by statements made outside the House? Wilson's behaviour in 1976 shows that no stable definitions exist.

27. The central problem with the certificate system is that the Speaker's decision to issue or to refuse to issue a certificate would constitute the exercise of a statutory power. In consequence, the issue might end up in the courts. The Bill tries to prevent legal challenge by making the Speaker's certificate "conclusive for all purposes". But a court that wanted to side-step that provision could easily do so by use of the *Anisminic*⁴⁶ manoeuvre, that is by saying that legal error by the Speaker has resulted in a situation in which the Speaker had not issued a "certificate" under the Act. Any statutory provision that uses a noun is vulnerable to *Anisminic*.

28. Many judges would take the view that they should steer clear of political problems of this sort and might well, as a consequence, be disinclined to accede to any use of the *Anisminic* move on the Speaker. *Anisminic* is generally recognised to be a kind of legal nuclear option, and its use in highly political circumstances would be extremely controversial. But there is no guarantee that judges would restrain themselves. There is nothing much to be learned from previous cases about what view the courts might take in disputes about a Speaker's certificate. Technical precedents are never decisive in cases of such importance, and, in any case, the issue would, technically, be entirely new.

29. The central issue would be the extent to which the rule of law should give way in the face of power politics. A decision either way would look deeply political. Our courts would

⁴⁶ [1969] 2 A.C. 147

be faced by a dilemma similar to that faced by the US Supreme Court in the presidential election case, *Bush v Gore*.⁴⁷ No entirely neutral way through would exist.

30. Moreover, for the courts to announce a sweeping abstentionist rule, that there are no cases whatsoever in which the courts would intervene, would carry the obvious risk that there might arise facts far more extreme than those previously envisaged – for example a case of corrupt collusion between a government and a Speaker to engineer a defeat on a minor matter which the Speaker declares ex post facto to be a vote of no confidence. The courts might therefore take the view that the best approach would be to decide any case on its own facts and its own merits and to avoid sweeping statements of any kind.

31. There is a respectable argument that the risks involved in allowing the possibility of judicial intervention are small. If the courts do take a broadly abstentionist position, the only immediate risk is that of a delay as their decision not to intervene is confirmed through the hierarchy of the courts. Even if they take a more interventionist stance, the chance of a decision being struck down are low. But since, in my view, there is no need for the Bill to make any provisions about no confidence motions in the first place, because the whole matter can be dealt with by other means, my own conclusion is that even a small risk is too much.

9. Conclusion

32. I support the principle of fixed term parliaments as strongly now as I did when I introduced my own Bill. My doubts, however, about the wisdom of introducing complications in the form of escape mechanisms have, if anything, strengthened in the meantime.

33. I understand the political history of the 66% rule and the no-confidence rule. The function of fixed terms in stabilising coalitions was bound to result in hostility from those who object either to coalitions in general or to the present coalition in particular. But it would have been better to deal with that political difficulty by removing the escape mechanisms from the bill. Instead, more such mechanisms have been added and the potential for confusion and mischief has increased.

28 September 2010

Memorandum by Malcolm Jack, Clerk of the House of Commons (FTP 20)

I have read, with interest, the evidence taken by your Committee last week (6 October 2010) on the Fixed-term Parliaments Bill. I would be grateful if the Committee permitted me to make a few, brief comments on the specific matter of Clause 2 and its effects on

⁴⁷ (2000) 531 U.S. 98, 121 S.Ct. 525

parliamentary privilege (in which my opinion was cited) in order to clarify the issue as I see it.

I should preface my remarks by saying, as your Committee will be aware, that in submitting evidence to the Political and Constitutional Reform Committee of this House, I made it clear that I was not challenging the principle of the Bill or in any way commenting on the merits of a fixed-term Parliament which are issues for Parliament itself to consider.

What I am saying, in essence, is that I identify a risk that the provisions of Clause 2 of the Bill could lead to a questioning of parliamentary proceedings in the courts. That risk was, in fact, acknowledged by both your witnesses albeit that their view is that the risk is not a great one. Dawn Oliver admitted that one could not be certain of what the courts would say in the face of “good arguments both ways”.⁴⁸ Anthony Bradley talked of “a huge discussion about justiciability” arising in such a case but his view was that the matter was unlikely to go beyond a “primary” stage of jurisdiction in the courts.⁴⁹ An important aspect of risk not mentioned in that discussion was that of impact. There may be little risk of an accident if one drives up the motorway on the wrong side at four in the morning but the impact, if there were an accident, is likely to be very serious. The risk of a dispute about a vote to dissolve Parliament, argued out in the courts, might be small but were it to happen its impact, politically and constitutionally, would be very great. Taking stock of the evidence you have received does not, therefore, lead me to revise my view that incorporating the provisions of Clause 2 in the Standing Orders of the House remains the safest course of action.

I would also like to comment on the reference made to the case of *Bradlaugh v. Gosset* (1884). While I acknowledge the importance of Judge Stephen’s judgment in that case, I do not think it would be difficult to show that the circumstances which it dealt with, well over a hundred years ago, were very different from the circumstances that would arise in a modern dispute about the workings of Clause 2 of the Bill, for example in the area of human rights. There is also an important point of context to the case not mentioned in the evidence to you: the Parliamentary Oaths Act (1866), under section 3, while stipulating that the oath must be taken in the Chamber of each House nevertheless specifically provides for regulation of the process according to directions laid down by way of Standing Orders of each House. Such a manner of dealing with the provisions of Clause 2, rather than setting out detailed procedure on the face of the Bill, is a precedent for what I am suggesting.

I should add a few further points of clarification which make me, unfortunately, more sceptical than Anthony Bradley about the self-restraint of the courts and have persuaded me of the desirability of a Parliamentary Privileges Act. The first is the not infrequent need in recent years for interventions by the Speaker of the House of Commons to protect parliamentary privilege in the courts. The second is in the attitude of the European Court of Human Rights, which has heard cases that British courts would not consider on the grounds that they fell within the area of parliamentary jurisdiction.⁵⁰ Furthermore, in the case I have just cited, two of the judges expressed reservations about the lack of remedies against the exercise of parliamentary privilege in the UK system.⁵¹

⁴⁸ Q 24

⁴⁹ Ibid.

⁵⁰ See *A v United Kingdom* (2002) (35373/97)

⁵¹ Ibid

Letter from Mr Paul Kildea, Director, Federalism Project, Dr Andrew Lynch, Centre Director and Professor George Williams, Foundation Director, Faculty of Law, University of New South Wales, Australia (FTP 21)

The last point I would like to put to the Committee is this: given that a draft Parliamentary Privileges Bill has now been announced, why deal in advance and separately with a matter affecting the proceedings of the House of Commons in legislation?

11 October 2010

Letter from Mr Paul Kildea, Director, Federalism Project, Dr Andrew Lynch, Centre Director and Professor George Williams, Foundation Director, Faculty of Law, University of New South Wales, Australia (FTP 21)

Thank you for the opportunity to make a submission on the topic of fixed-term parliaments. We hope our submission assists the Committee, particularly in respect of its efforts to appreciate comparative experience with the use of fixed-terms. We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales, Australia. We gratefully acknowledge the assistance of Ms Melissa Chin, the Centre's Social Justice Intern, in the preparation of this submission.

Despite the persistence of proposals to fix the length of parliamentary terms at four years for the parliament of the Commonwealth of Australia, fixed-terms have only been legislated at the State and Territory level. The State Parliaments of New South Wales, Victoria and South Australia and the Legislative Assembly of the Australian Capital Territory all presently run to terms of fixed length. Our submission focuses on the experience in the state of New South Wales (NSW).

I. Duration of NSW Parliament

New South Wales's first fixed term was established by the *Constitution (Fixed Term Parliaments) Special Provisions Act 1991* (NSW) which provided for the next election to be held on 3 March 1995 and the circumstances in which an early election could be held. The *Constitution Act 1902* (NSW) ('the Act') was later amended to permanently include fixed terms for parliament following a referendum at the 1995 election.

Section 24 of the Act provides that the Legislative Assembly, unless sooner dissolved under the circumstances outlined in s 24B (outlined below), will expire 'on the Friday before the first Saturday in March in the fourth calendar year after the calendar year in which the return of the writs for choosing that Assembly occurred'. Section 24A then provides that the date for the general election is to be the fourth Saturday in March. There has been some discussion as to the desirability or otherwise of setting the election date after the Australian summer holiday season rather than before the end of the preceding year in November⁵² –

⁵² Evidence to The Joint Select Committee on Fixed Term Parliaments, Parliament of New South Wales, Sydney, 27 November 1991, 63 (John Nethercote, Senior Parliamentary Officer); Rodney

Letter from Mr Paul Kildea, Director, Federalism Project, Dr Andrew Lynch, Centre Director and Professor George Williams, Foundation Director, Faculty of Law, University of New South Wales, Australia (FTP 21)

and doubtless different considerations apply in the United Kingdom. But a factor that bears pointing out, particularly in light of the number of devolved legislative bodies now operating within the United Kingdom, is the need to avoid a clash. Under Australian law it is illegal for any other electoral poll or referendum to be held on the day of a Commonwealth election. While the superior legislature should be able to secure the date of its choosing, in doing so it should be mindful of the likely impact upon the holding of other electoral processes throughout the United Kingdom.

Currently all States in Australia, except Queensland, have four year parliamentary terms. A referendum was carried in NSW, prior to the introduction of fixed term parliaments, to increase the term from 3 years to 4 years. The arguments in favour of a longer parliamentary term, such as the 5 year term proposed by the UK Government, include:

- providing the government a longer horizon to plan and execute its policies;
- a short electoral cycle tends to place pressure on governments to adopt expedient short term measures; and
- avoiding the expense of frequent elections.

It is debatable whether the various governments in Australia that have enjoyed extended parliamentary terms have managed to capitalise on these purported benefits. The latter do not, of course, come without cost, but must be balanced against the greater parliamentary accountability to the public provided by more frequent elections and the possibility that the public may have to endure a longer period of a government that has lost popular support. These considerations obviously assume even greater importance when parliamentary terms are fixed.

2. Early dissolution

Section 24B of the *Constitution Act* provides for the early dissolution of parliament in the following circumstances:

- a motion of no confidence in the government has been passed;
- the Legislative Assembly has rejected or failed to pass an Appropriation Bill for the ordinary annual services of government;
- the election date needs to be moved forward because of clash with a federal election, holiday period or some similar inconvenience; and
- where the Governor could otherwise do so in accordance with established constitutional conventions.

None of these mechanisms have been used to date. However, in December 2009 there were calls from some sections in the community for the NSW Governor, Marie Bashir, to use her power, established under constitutional convention, to force the dissolution of the NSW Parliament. This arose shortly after the current NSW Premier, Kristina Keneally,

Smith, 'Commentary: The New South Wales Election of 22 March 2003' (2003) 38(3) *Australian Journal of Political Science* 549, 552.

became the third premier to be installed since the last election and widespread media criticism of the performance of the government.⁵³ It was reported at the time that the NSW Governor sought legal advice as to whether it was in her power to do so but had ultimately decided against acting.⁵⁴ In turn, this prompted advocacy in the media for some mechanism, including a facility for the holding of recall elections similar to that available in the state of California, to provide the electorate with 'a way to rid us of a future incompetent government'.⁵⁵

It is open to question what role the use of a fixed-term has had in sustaining the current New South Wales government in power, despite numerous ministerial scandals and its low approval ratings in opinion polls over many months. Even if the date for the next general election was not constitutionally prescribed, it is highly doubtful that the government would have chosen to go to the polls at any earlier stage. One of the chief rationales for the introduction of a fixed-term was to prevent the government of the day calling a 'snap election' so as to capitalise on its prevailing good fortune or the travails that might be afflicting its opposition. On one assessment, the provisions have been successful in this regard, but it is perhaps arguable that they have furnished the government with an iron-clad legal justification for not seeking the endorsement of the electorate when major changes to its personnel (including the Premier, Treasurer and key Ministers) have taken place in controversial circumstances.

3. No confidence motions

Similar to the UK Government's proposal, NSW has enacted traditional powers of no confidence into an Act. As Twomey has said, it is noteworthy that the legislation specifies that the motion must be one of no confidence 'in the Government' and not a particular minister, as traditionally a motion of no confidence in the Premier has been taken to be one of no confidence as the Government as a whole.⁵⁶ The only other circumstance under which the legislature may, under section 24B, bring about an early dissolution is through the outright rejection of, or a failure to enact, a supply bill.

Section 24B(2) stipulates a notice period of 3 clear days before the making of a motion of no confidence, and allows a subsequent period of 8 days for its reversal. These accommodations prevent sheer opportunism by the non-government members of the Legislative Assembly in the event of a brief absence of government MPs.

⁵³ See for e.g. Linda Silmalis, 'A last gasp to fix this messed up state' *The Daily Telegraph* (13 December 2009) available at <<http://www.dailytelegraph.com.au/news/sunday-telegraph/a-last-gasp-to-fix-this-messed-up-state/story-e6frewt0-1225809729775>>.

⁵⁴ ABC Radio National, 'Governor consults on future of NSW Government', *702 Mornings*, 10 June 2010 (Marie Bashir) available at <<http://www.abc.net.au/local/stories/2010/06/10/2923551.htm>>.

⁵⁵ Eg. Tim Dick, 'When governments go bad, it's only fair to give the people a voice' *The Sydney Morning Herald* (11 June 2010) available at <<http://www.smh.com.au/opinion/politics/when-governments-go-bad-its-only-fair-to-give-the-people-a-voice-20100610-y0cy.html>>.

⁵⁶ Anne Twomey, *The Constitution of New South Wales*, (The Federation Press, 2004) 651.

We note that the proposed procedure for a motion of no confidence in the United Kingdom's Fixed-term Parliaments Bill 2010 would allow a 14 day period after a vote of no confidence for an alternative government to be formed. A similar 'baton change' concept was considered by the NSW Parliament when introducing fixed-terms, but was ultimately rejected. While Independent MP John Hatton deemed that the baton change provision was necessary to deal with a crisis situation in a hung parliament,⁵⁷ National Party MP Andrew Fraser voiced concern that it in a hung parliament, it would place too much power in the Independent MPs.⁵⁸

20 September 2010

**Memorandum by Christian Leuprecht, Associate Professor,
Department of Political Science and Economics, Royal Military
College of Canada (FTP 22)**

The purpose of this brief is to reflect on the switch from variable to fixed election cycles as proposed by the Parliament of the United Kingdom. Since the inquiry is not tasked with assessing the utility of this change in policy, I shall forego the question as to whether a fixed system actually makes it any less likely for an incumbent to be reelected than an electoral system where election dates vary. Similarly, given the tasks of the Commission, I shall not comment on whether fixed election cycles infuse a political system with a greater degree of democracy, for instance by increasing voter turnout or public satisfaction with political institutional. I shall also not comment on whether fixed election dates produce better policy outcomes since this is also not a mandate of inquiry for the Commission. Suffice it to say that I am skeptical about all those claims for reasons outlined elsewhere (Leuprecht 2008).

My submission focuses instead on three separate issues. First, I shall comment on the purpose of an electoral system and the implications of a change from variable to fixed dates on the purposes of the UK's electoral system. In particular, my concern is that fixed election dates may inadvertently end up proving counter-productive by strengthening the executive, and especially the Prime Minister, by further eroding the power of Parliament. For now Parliament would effectively lose its most powerful check on power: To bring down the government of the day. Second, I shall comment on the constitutional and institutional implications of fixing election dates in a Westminster parliamentary system. My concern here is that fixed election dates may end up becoming an unseemly accomplice in accruing more power to the political executive by curtailing the discretionary powers of the Sovereign (who would, otherwise, have had the final say in issuing a writ of election). Third, fixed election dates have been shown to give rise to a political business cycle that leads to

⁵⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 November 1992, 9033-9034 (John Hatton).

⁵⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 November 1992, 9024 (Andrew Fraser).

suboptimal economic outcomes by bundling public spending just before elections to curry favour with voters.

Fixed election dates may inadvertently diminish parliamentary government

The basic purpose of an electoral system is to translate votes into legislative seats. In a Westminster parliamentary system such as the United Kingdom's, where the executive is, by convention, drawn from the legislature, the electoral system has the additional task of shaping the character of the executive. Ergo, the Commission needs to ask itself: What implications might switching from variable to fixed cycles have (1) for the purpose of translating votes into legislative seats and (2) in shaping the character of the executive? These are consequential questions. In recent decades the power of the executive, and especially the Prime Minister, is thought to have grown at the expense of parliamentary government and cabinet. Fixed election dates arguably undercut Parliament further by, in theory, moving election calls beyond its purview.

Fixed election dates may curb checks on the political executive as exercised through the discretionary powers of the Crown

Fixing election dates may curb prime-ministerial powers; they definitely curtail the Sovereign's discretionary power. A fixed electoral cycle would impinge upon the Royal Prerogative which allows a ministry to exist at the pleasure of Her Majesty, commonly known as the reserve powers of the Crown. Like all ministers of the Crown, the Prime Minister is appointed as a member of the Queen's political executive. Strictly speaking, the United Kingdom's government is actually appointed by the Sovereign, not elected. The Prime Minister's monopoly on advising the Sovereign on use of the Royal Prerogative is considered a Trojan horse for the governing party. In contrast to some presidential systems of government, since the Glorious Revolution of 1691/92 the Sovereign may not dissolve Parliament without receiving advice, usually from the Chief Minister or, extraordinarily, Cabinet. This is one of the key political outcomes of the English civil war and a hallmark of any constitutional monarchy. Technically, it remains the prerogative of the Crown to issue a writ of election. By convention, the Sovereign issues a writ of election at the Prime Minister's request. Refusal to follow the Prime Minister's recommendation amounts to the rejection of the advice of the accredited Minister which is the bedrock of limited government.

A fixed election cycle notwithstanding, a Prime Minister could attempt to precipitate an election out of cycle by orchestrating a loss of confidence of the House. The Prime Minister could easily do so by arranging for there to be fewer of his MPs in Parliament during the course of a vote that has been designated a motion of confidence: Lose the vote and the government falls. A clever Prime Minister would have little trouble staging such an event. Indeed, Germany's Kohl government did just that (only to be reprimanded for its actions retroactively by Germany's constitutional court). Ergo, fixing election cycles does not preclude the Prime Minister requesting that the Sovereign dissolve Parliament before the pre-ordained election date. To disabuse a Prime Minister of this temptation, there would have to be a period of good faith whereby successive administrations would not indulge

themselves in early elections merely to gain a political advantage. After this period a convention would be established, and the public would have become accustomed to having elections at regular intervals on a set date. In other words, any bill that fixes election cycles requires much broader agreement and political will than one mere majority vote. This is perfectly within the realm of the possible. New Zealand's governments, for instance, have a history of sitting their entire mandate, regardless of Parliament's configuration. Provided the United Kingdom intends to maintain a Westminster-style parliamentary system where the Head of Government must maintain the confidence of the lower house, the possibility that the Prime Minister might fix a confidence motion is not to be discounted. Should the United Kingdom eventually end up moving to a written Constitution, then entrenching fixed election dates therein would provide a more effective check against prime-ministerial thriftiness than mere legislation which could be abused, disregarded or even rescinded at the government's whim.

Fixed election cycles may conjure up suboptimal economic outcomes

One perhaps note entirely unintended consequence of fixing election dates is the political business cycle (PBC). The classic opportunistic PBC model with myopic voters assumes that flux in macro-economic outcomes translates into vote intentions (Nordhaus, 1965; Tufte, 1978). Nuances in electoral timing cause the PBC to differ (Terrones, 1991). In other words, this model suggests that politicians who know well ahead the timing of the next election have political incentives to intervene in the economy. Under immutable electoral cycles, political leaders lack the option of going to the polls at an opportune time; consequently, they manipulate the economic cycle in accordance with the electoral cycle. Concretely, that means governments try to boost their popularity by driving down unemployment prior to an election (Persson & Tabellini, 1990). Until now political business cycles in macroeconomic aggregates have been unobservable in Great Britain. By contrast, they are highly apparent in another Westminster parliament which has switched to fixed election dates: New Zealand (Alesina et al., 1997). Ergo, we would expect the phenomenon to become manifest in the United Kingdom upon adoption of fixed election dates. Pre-election economic expansion thus appears to be tempered by variable election timing. Under a variable cycle, politicians tend to call elections when growth and inflation performance is naturally strong (Ito & Park, 1998). Institutional arrangements allowing elections to be timed opportunistically thus reduce manipulation (Smith, 1996; Kayser, 2006). Owing to the openness of the British economy and its integration into the European economic zone and other free trade agreements, British politicians ability to manipulate the economy for electoral purposes is somewhat limited. Money markets – especially the bond market – would punish such opportunism, an observation that may motivate voters to follow suit and thus temper the government's temptation to do anything of the sort in the first place. Still, the data suggest that fixing election dates is likely to render the British economy more vulnerable to sub-optimal performance.

Since electoral fortunes are, partly, a function of unemployment and the robustness of the economy, the findings indicate that governing politicians who cannot 'manipulate' the electoral cycle by going to the polls at their discretion will be inclined resort to other means

of manipulation, notably manipulation of the economy. Given the UK's current fiscal circumstances, any factor that might exacerbate suboptimal macroeconomic outcomes should raise flags.

Conclusion

None of these observations are necessarily show-stoppers. Yet, it would appear that fixed election cycles may run a serious risk of bolstering prime ministerial government by (1) removing from Parliament its ability to ensure that the government of the day act responsibly, (2) curtailing the ability of the Sovereign to act as a check on government by exercising the Crown's discretionary powers, and (3) by making it much easier for the prime minister to manipulate public spending to improve future electoral fortunes. A bill that fixes election cycles might, ideally, contemplate how best to minimize those three effects while, at the same time, bolstering, rather than reducing, the importance of Parliament and the Sovereign and, in times of economic uncertainty and fiscal austerity, ensuring that a government is prevented from timing public spending to maximize electoral rather than economic prospects.

12 October 2010

Memorandum by Dr Gary Levy (FTP 23)

Editor of the *Canadian Parliamentary Review*, a former professor of Political Science at the University of Western Ontario and Ottawa University.

Canada's Strange Experience with Fixed Date Elections

In Superman's Bizarro World everything is backwards. "Up is down, down is up. He says "Hello" when he leaves, "Good bye" when he arrives."⁵⁹ Canada has had a Bizarro Parliament for the last few years, in large part due to the 2007 law fixing the election date.

In the Westminster Model, theoretically, the government introduces legislation; parliament debates and then either passes or defeats it. If rejected the government can and should regroup and move on to other matters. If the government is stymied to the extent it can no longer govern the Prime Minister, in his sole discretion, has the option of seeking dissolution and asking the people for a new mandate.⁶⁰ He or she can also ask for dissolution when things are going well but may pay a political price at the polls for such overt opportunism. (Dissolution may also occur if the Opposition wins a vote of no confidence. however, the lack of agreement about what is a confidence vote and the ability of the government to postpone confidence votes has added to the bizarro nature of our Parliament.)

⁵⁹ Seinfeld episode 137, originally broadcast on NBC, October 3, 1996.

⁶⁰ For an article on how recent governments have played fast and loose with the confidence convention see Gary Levy, *The Confidence Game*, *InRoads*, No. 25, Summer/Fall 2009, pp. 48-59

Following adoption of the Canadian fixed election date legislation it became clear that the election call was now solely in the hands of the opposition and the government dared them to do it. With an eye on the polls, the Official Opposition declined. Instead they abstained from voting on legislation and gave reasons why there should not be an election. Unable to get a dissolution in this way the government simply ignored the law, called an election anyway and defended itself in the court of public opinion and in Federal Court.

In a word, Canada's fixed election date legislation has created far more serious problems than it has solved.

Background

The principal impetus for the legislation was the action of Liberal Prime Minister Jean Chrétien in 1997 and 2000 when he sought dissolution after only three years in office and at a moment when the main Opposition party was in disarray. The result both times was a majority for the Liberals and a promise by the Conservatives that they would make it impossible for future Prime Ministers to act in such an arbitrary way by introducing fixed dates for future federal elections. There were also other factors at play.

Three provincial legislatures, British Columbia, Ontario and Newfoundland had already held elections under their respective fixed date legislation. However each of them has a single chamber and all had majority governments. The situation in Ottawa with four parties, a minority parliament and a bicameral chamber has proven much more complicated.

Many Canadian electors are very familiar with American election practices. They wonder why Canadian elections cannot be held regularly as they are in the US or, for that matter, in all Canadian municipalities.

Another argument, rarely articulated except by retired MPs, is simply the desire to remove some unpredictability in public life. It is hard enough on individuals and their families to make the decision to enter politics. When they do not even know the date of the election it becomes even harder to convince busy professional people to take the plunge.

More cynical explanations will have to wait the judgement of history. But it is possible that the fixed election law is part of a very carefully thought out plan to re-engineer the Canadian parliamentary system away from its Westminster roots where the emphasis is on unwritten conventions, self discipline in the pursuit of power and a role for Crown discretion in upholding essential fairness, toward a more American understanding of governance where the people are sovereign, government is an evil that has to be constantly checked and the end always justify the means.⁶¹

⁶¹ For an argument that Mr. Harper is deliberately trying to undermine parliamentary institutions see Jennifer Smith, *Parliamentary Democracy versus Faux Populist Democracy* in Peter Russell and Lorne Sossin, *Parliamentary Democracy in Crisis*, University of Toronto Press, Toronto, 2009.

Bill C- 16 and its Consequences

Bill C-16 was a very short and simple amendment to the **Canada Elections Act**. It added these key provisions:

56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009.⁶²

The Bill did not attempt to change the constitutional provision establishing the maximum length of Parliament at five years. Nor did it contemplate the very real possibility that the minority government of Stephen Harper would not last the full 45 months until the scheduled election since the average duration of previous minority governments was about twenty months.

Nevertheless the decision to fix election dates was welcomed enthusiastically by those who believe the Canadian Prime Minister has too much power and that parliamentary democracy is well served by checking this power.⁶³ During testimony to the House Committee most experts felt the Bill did not really change the status quo⁶⁴ although some of them noted how rare it was for a government to propose an institutional reform that does not seem to benefit itself in one way or another.

Adopted on a voice vote by the House the Bill faced an uncertain future in the Senate where the Liberals held a large majority and seemed prepared to delay indefinitely. They heard from witnesses who were much more critical of the Bill such as David Smith who argued that fixed election dates fit neither the theory or practice of parliamentary government. "Fixed election dates do not give the public greater voice in politics. In fact, the partisan motivation and potential for engineering defeats within the House shifts the focus of attention even more than at present from constituents to the party leaders in the House."⁶⁵

The prospects for the bill changed dramatically in the Spring of 2007 when polls were published showing the Conservatives within grasp of a majority. With rumours rampant about a snap election, the Liberal Senators did an about face and returned the Bill to the House in the hope it might forestall an election that could have been disastrous for the Liberals.

⁶² See Edward McWhinney, Fixed Election Dates and the Governor General's Power to Grant Dissolution, *Canadian Parliamentary Review*, vol. 31, no. 1, spring 2008

⁶³ See for example, Peter Russell, *Two Cheers for Minority Government*, Emond Montgomery Publications Limited, Toronto, 2008, pp. 134-142

⁶⁴ Canada, House of Commons, Standing Committee on Procedure and Organization, October 5, 2007. Testimony of Henri Milner, Andrew Heard and Louis Massicotte Canada, Senate, Standing Committee on Legal and Constitutional Affairs, February 14, 2007

⁶⁵ Canada, Senate, Standing Committee on Legal and Constitutional Affairs, February 14, 2007

The Conservatives did not call an election although on at least two other occasions urgent calls went out to party workers to nominate candidates and get the machinery ready as an election was rumoured to be imminent. For a reform that was supposed to end such speculation the federal law has had virtually no impact.

Nor did the legislation create an equal playing field between government and opposition. Instead it transferred responsibility from the Prime Minister to the Leader of the Opposition for setting the election date. The Official Opposition, led first by Stephane Dion and later by Michael Ignatieff, repeatedly spoke against government bills and then abstained from voting to avoid an election. In early 2008 Prime Minister Harper announced that virtually every vote on government business was going to be a matter of confidence. The result was more abstentions which are the antithesis of what a parliamentary system is supposed to achieve by fixing responsibility in very clear and obvious ways.

In such an atmosphere it is hardly surprising that parliament became more and more dysfunctional. A former Chief of Staff to Prime Minister Mulroney was one of the first to suggest publicly that it was a mistake for the government to feel restrained by its own fixed election ate legislation⁶⁶

The Prime Minister came to this view in August 2008 when he met with his caucus to consider the upcoming fall session. He decided to ignore his own legislation. To do this he claimed that Parliament had become unworkable. He met separately and briefly with the leaders of the other three parties and asked them for assurances they would cooperate in making Parliament work. When he failed to receive such assurances, he declared unilaterally that Parliament had lost confidence in his government and asked the governor general to dissolve Parliament and set the election date for October 14, 2008, one year earlier than required under his own fixed-election statute. No vote of confidence took place in the House.

Mr. Harper could not point to any specific incident other than the general chaotic atmosphere in committees. In calling an election without having been defeated he acted notwithstanding a statute of Canada setting the next federal election for October 2009. Although this was clearly a violation of the spirit of the fixed election date legislation the governor general acceded to the Prime Minister's request to dissolve the House. The other parties theoretically could have proposed an alternative government to run the country until the date set out in the legislation but they did not. The election result was inconclusive as Mr. Harper returned with another minority although with slightly more seats. No one has suggested that the governor general erred in giving Mr. Harper his dissolution but some wondered what is the purpose of a law that can be so easily ignored?

Apologists for the early election likened it to a dentist appointment. If the patient cannot attend he or she simply cancels and makes a new one. This "dental school of governance" did not sit well with many Canadians and the Federal Court was asked to rule on the

⁶⁶ See Norman Spector's column in *Globe and Mail* January 4, 2008.

government's action. The applicants were Democracy Watch, a public advocacy group, and its founder and coordinator Duff Conacher. The named respondents included the Prime Minister, the Governor General and the Governor in Council.

The application sought a declaration that the calling of the election in October 2008 was contrary to the new section 56.1 of the Canada Elections Act, which ostensibly provides for a regime of regular fixed-date elections. The grounds of the application involved the interpretation of the statutory language, but also led the court to a consideration of the nature of the royal prerogative and constitutional conventions. It became necessary for the Court to consider at some length its jurisdiction to hear and determine the issues raised. In particular, it addressed an argument that the Governor General's decision was ultimately political in nature and that judicial scrutiny of such actions would upset the "separation of powers" between the executive and judicial branches of government. The Court accepted this argument, among others, and denied the application.⁶⁷

The Court also reflected upon another practical difficulty. Suppose a loss of confidence in the House of Commons were indeed a necessary condition for the calling of an early election. The courts would then be in the invidious position of determining when a loss of confidence occurs. There is no commonly agreed-upon definition of "non-confidence"⁶⁸ against which a court could make an objective determination. In the words of the Court, "A government losing the confidence of the House of Commons is an event that does not have a strict definition and often requires the judgment of the Prime Minister."⁶⁹

At the outset of the 2008 election campaign the opposition parties roundly criticized Mr. Harper for ignoring his own legislation but with the world heading into the most serious economic downturn since the 1930s, this issue quickly disappeared. During the campaign no opposition party promised to repeal the act. After the election dust had settled one independent Senator, Lowell Murray brought in a bill that would repeal the law. In the debate on second reading he said "The bill that we passed into law is a facade. It is misleading; I would almost say it was intended to mislead. In any case, it is of no force or effect."⁷⁰ A few Liberal Senators agreed but repeal died on the Order Paper. Thus the fixed date election law remains on the books although no one expects the next election to be held in October 2012.

The United Kingdom Fixed Election Date Proposal

The arguments for and against fixed date elections are strikingly similar to the ones in Canada.

⁶⁷ For more information on the case see Doug Stolz, Fixed Date Elections, Parliamentary Dissolutions and the Court, *Canadian Parliamentary Review*, vol 13, no. 1, 2010. See also Guy Tremblay, 'The 2008 Election and the Law on Fixed Election Dates,' *Canadian Parliamentary Review*, 31, no. 4 (2008–9). pp. 24-25

⁶⁸ See Eugene Forsey, "The Problem of 'Minority' Government in Canada" in Forsey, *Freedom and Order*, Carleton Library, 1974.

⁶⁹ Stolz, *op. cit.*

⁷⁰ Canada, Senate, *Debates*, January 29, 2009.

Those in favour argue the legislation will redress the balance between the Commons and the Executive, at present bias in favour of the latter. They also argue that it will bring Westminster into line with the devolved legislatures, with the European Parliament and with many national governments in Europe having fixed date elections without major problems.

Those opposed argue that fixed date elections will lead to much longer election campaigns, will have no effect on the quality of government and will essentially alter the British constitutional system by limiting the Royal Prerogative to dissolve Parliament on the advice of the Prime Minister. Such legislation also risks having the courts intervene on matters heretofore the sole domain of parliament.

The Proposal and Reaction:

The *Fixed-term Parliaments Bill* was introduced on July 22, 2010. It passed second reading by a vote of 311 to 23 on September 13 and will be considered by a Committee of the Whole House.

The Bill fixes the date of the next General Election as May 7, 2015 and provides for five-year fixed terms thereafter although the Prime Minister can alter the date by up to two months.

There are two ways in which an election could be triggered before the end of a five-year term. First, if a motion of no confidence is passed and a new government cannot be formed within fourteen days Parliament will be dissolved and a general election will be held. According to the Deputy Prime Minister's statement on July 5, 2010 the definition of no confidence will be put into law and a vote of no confidence will still require only a simple majority of members of the House. The second way an early election can occur is by a vote of at least two-thirds of the House of Commons.

The Bill authorizes the Speaker of the House to issue a certificate declaring that a vote of no confidence in the government has been passed and certifying that a new government cannot be formed. In a brief to the Political and Constitutional Reform Committee the Speaker raised some concerns about this aspect. He said there could be legal challenges over what constitutes a no confidence motion and whether in fact an alternative government could be formed. At the very least, he suggested, the definition of confidence should be part of the Standing Orders rather than put in legislation where it could be interpreted by the Courts.

Observations and Analysis

While comparisons are tempting there are many nuances between the Canadian and British parliamentary systems. Therefore the following observations will be mainly limited to asking if the proposed UK Bill had been in force in Canada would we have avoided two of the more unfortunate parliamentary episodes in our recent history – first a Prime Minister defying his own fixed date legislation by calling an election without having been defeated in the House and then, a few months later, avoiding certain defeat by proroguing Parliament when faced with a no confidence motion and attacking the legitimacy of the coalition formed to replace the government.

In my view the UK legislation would have prevented both. The requirement for a two thirds majority would have prevented Mr. Harper from seeking the dissolution of Parliament in September 2008. Or if he did the governor general would surely have told him to go back to the House and bring proof that two thirds of the members favoured dissolution.

The prorogation matter is a bit more problematic since the UK Bill specifically says it does not change the Crown's power of prorogation. But if Canada had a law that provided for a 14 day period for forming a new government after a vote of no confidence we would likely have seen a change in government without an election in December 2008.

The opposition coalition was formed in less than 14 days and the government would have been less successful in criticizing its legitimacy if coalitions were specifically anticipated in the fixed date legislation.

The fact that the Leader of the Opposition had resigned and that the two party coalition would be propped up by a third party seeking the breakup of Canada in its present form would still have made many people unhappy. But the alternative government proposed by the Liberal-NDP coalition would, for better or worse, have seen the light of day. It is hard to believe the governor general would have granted prorogation if she had something like the proposed UK law in place at the time.

One issue that seems to be left hanging in the UK as it is in Canada, is the confidence convention. If we are going to have fixed election laws it is extremely important to be clear on what is the convention and when and how such votes shall be taken. Indeed the December 2008 prorogation crisis was made possible by the fact that some confidence votes (those on opposition days) can be unilaterally postponed by the government. This has happened twice in three years and the damage to the Canadian parliamentary system has been considerable.⁷¹

A good starting point for codifying the confidence convention is the Quebec National Assembly which, ironically does not have fixed date elections. However in September 2009 Quebec became the only legislature in Canada to set out the elements of confidence in its Standing Orders. The key paragraphs are as follows:

CONFIDENCE OF THE ASSEMBLY IN THE GOVERNMENT

303.1. Confidence of the Assembly in the Government: how raised – The confidence of the Assembly in the Government may be raised only by means of a vote on:

- (1) a want of confidence motion;
- (2) a motion by the Prime Minister, "That this Assembly approve the general policy of the Government";
- (3) a motion by the Minister of Finance, "That this Assembly approve the budgetary policy of the Government";

⁷¹ See Gary Levy, *A Crisis Not Made In a Day*, in Peter Russell and Lorne Sossin, *Parliamentary Democracy in Crisis*, University of Toronto Press, Toronto, 2009.

(4) a motion for the passage of an appropriation bill introduced pursuant to Standing Order 288; or

(5) any other motion that the Prime Minister, or his representative, shall have expressly declared a question of confidence in the Government.

304. Want of confidence motions; number – Members sitting in opposition may move seven want of confidence motions during any session; and the said motions shall comprise those they are entitled to move during the debate on the opening speech of the session and during that on the budget speech.

304.1 Purpose – A want of confidence motion shall state that the Assembly withdraws its confidence in the Government.

305. Allocation – The President shall allocate such opposition; and in so doing he must have regard to the presence of independent Members.

306. Notice; precedence; how disposed of – Except as otherwise provided, one clear day's notice shall be given of a want of confidence motion, and the debate on such motion shall have precedence. It must be held within a single sitting day and shall conclude one quarter hour before the Assembly is to rise, whereupon the question on the motion shall be put:

Provided that during any period when the Assembly may meet during extended hours the debate on a want of confidence motion shall conclude three hours after the time appointed in these Standing Orders for the Assembly to meet.

306.1. Amendments – No amendment to a want of confidence motion may be received.

A Thought on the Frequency of Elections

It appears that the UK Bill, unlike the Canadian one, will in fact, decrease the number of elections even in situations when no party has a majority.

Polls consistently show that the population at large seems to abhor elections. They would probably be happy with an election every seven, let alone five years. The British proposal seems much more able to deliver fewer elections. Canada has had three elections (2004, 2006, 2008) in six years with the prospect of another one in 2010 or early 2011.

Anyone familiar with American politics will know the difficulty of making coherent policy in a two year election cycle which is basically a permanent election campaign. We simply will not keep pace with China and other developing countries where elections, to say the least, do not consume the time, energy, money and political capital of the western style elections that we hold so dear.

Final Comment

Despite the problems Canada has had with its fixed date election law this is not necessarily an argument against such laws. The UK proposal appears to have drawn the proper lessons

from the Canadian experience. Its provisions would, in most cases, prevent a Prime Minister from abusing the power to dissolve the House by requiring him to have some support from other parties. It also provides an orderly way to move from a successful no confidence motion to either an election or a new government without an election and without dragging the Crown into a political controversy. If enacted it could provide a beacon to help the Canadian Parliament emerge from its present conundrum.

24 September 2010

Memorandum by Professor Errol Patrick Mendes, Faculty of Law, University of Ottawa (FTP 24)

The history of fixed elections or fixed Parliaments laws has not been a very successful one at the federal level in Canada although the provincial versions have yet to be fully tested where they are to be implemented by minority governments. Nine of the provinces and territories have fixed elections laws on the books starting with British Columbia in 2001. The sad history of the federal legislation started with the enactment in November 2006 when Parliament enacted Bill C-16, *An Act to Amend the Canada Elections Act*.⁷² The legislation, which was a key part of the election platform of the Conservative Party that brought them to power, established October 19, 2009 as the first date of a federal election that would bring to an end the first four year fixed Parliamentary periods. As one of the constitutional experts most critical of the Prime Minister for breaking his own cherished election platforms, I penned the following article in one of Canada's leading newspapers, *The Ottawa Citizen*:⁷³

It now seems almost certain that Stephen Harper will visit the governor general just after Labour Day to seek an early election. This is despite the fixed election date of October 2009 which was established by a law that his own government was eager to pass as a demonstration of political fairness, accountability and transparency. It was also a key Reform party core belief and part of the Conservatives' 2006 election platform.

He will claim the right to do so on two grounds. First, he will claim that he is legally able to do so despite the law he championed. This is because he will claim the law, which is a minor amendment to the Canada Elections Act, still gives the governor general the right to dissolve Parliament on the advice of the prime minister. Some experts claim that the prime minister would only be bound by a constitutional amendment that entrenches a fixed date for elections. The experts could well be wrong.

Much of the powers of the prime minister and the governor general are governed not by the written Constitution, but by constitutional conventions, including who has the right to dissolve Parliament and call for elections. Constitutional convention gives the prime minister only the right to advise the governor general to call for dissolution of Parliament and thereby

⁷² Bill C-16, *An Act to amend the Canada Elections Act*, S.C. 2007, c. 10, now codified at *Canada Elections Act*, S.C. 2000, c. 9, s. 56.1.

⁷³ The *Ottawa Citizen*, April 28, 2008 also located at the following url:

<http://www.canada.com/ottawacitizen/news/opinion/story.html?id=d24396f8-fb42-4856-a01e-03eb128d1dcf>

trigger an election. The governor general has an uncontested residual power to deny a prime minister's request for dissolution.

Constitutional conventions can be both entrenched in and overridden by statute law. That is precisely what the Conservatives did when they decided to constrain the conventional power of the prime minister to seek dissolution whenever he smelled political advantage to do so.

However, the fixed election law does not constrain the residual power of the governor general as it expressly stipulates that "Nothing in this section affects the powers of the governor general, including the power to dissolve Parliament at the governor general's discretion."

Historical precedent demonstrates that the use of the conventional residual power by the governor general contrary to the advice of the prime minister has the potential to cause political controversy and create trouble for the Crown in Canada. In the 1926 King-Byng affair, governor general Lord Byng refused William Lyon Mackenzie King's request to dissolve Parliament after losing a confidence vote and called on the Conservative opposition leader Arthur Meighen to form the government. When Meighen could not gain the confidence of the House, Lord Byng granted dissolution of Parliament and Mackenzie King won a majority government, in part by campaigning against the decision of Lord Byng. This precedent, while not a constitutional convention, would present a serious political hurdle for a governor general to refuse to grant the request of a prime minister for dissolution, no matter how contrived.

Even if the fixed elections law does not constrain the governor general's discretion to grant dissolution of Parliament, one could argue that the law constrains the prime minister's power to ask for one until October 2009. Hiding under the political constraints of the governor general's residual power is nevertheless a violation of a statute. Some aggrieved citizen may even consider seeking court action to stop this legally dubious move.

The imminent violation of the fixed elections law is even more distasteful when one considers the second reason for Mr. Harper's claim to ignore his own law. He claims that he may seek the dissolution because Parliament is dysfunctional and will continue to be so with the next session to start soon after Labour Day.

Ignoring the fact that most of his agenda has passed through Parliament and become law, Mr. Harper and other Conservatives point to the dysfunctional nature of parliamentary committees such as the one examining whether the advertising expenses practices of the Conservatives breached the Elections Act. The parliamentary channel's coverage of the proceedings has revealed that it was primarily the disruptive antics of the Conservative party members on the committee and the failure of Conservative witnesses to appear before the committee that was the cause of the dysfunction of this committee. The secret, 200-page Conservative guidebook to disrupt and manipulate parliamentary committees -- including chairs storming out of meetings -- is proof that it is the Conservatives who are orchestrating the dysfunction in Parliament and then blaming it on the opposition parties.

It is as if this Conservative government is convinced that opposition parties have no right to object and oppose policies and practices that they may find repugnant.

There is also the damning logic of Mr. Harper's own admission that any election will result in another minority government. So why call it now if that is the case? To continue the alleged dysfunctional Parliament with a new minority government at the cost of almost \$200 million to the Canadian taxpayer? Or is it to put off more scrutiny on the alleged wrongdoings of the Conservatives that fly in the face of their promise of transparency, honesty and accountability?

If the prime minister does decide to ignore the fixed election date and ask the governor general to dissolve Parliament soon after Labour Day because it is dysfunctional, it would be akin to a person who has blown up his own house asking the rest of us to build him a new one.

If not the rule of law, a most basic sense of political morality should make the prime minister think twice about breaking his own law.

In contrast, the provinces of Ontario, Newfoundland and Labrador and the Northwest Territories duly held their elections at the stipulated time under their fixed elections laws in 2007 and indeed in 2009 British Columbia held its second such election. Since the first provincial fixed elections laws were passed, New Brunswick, PEI, Manitoba and Saskatchewan have also established their own similar law. It should be noted that all the successful provincial laws on fixed elections that resulted in elections being triggered on the stipulated date were passed and implemented by majority governments. The NWT government has a consensual form of government

So one may well ask why the Canadian federal fixed election law seems not to have worked? The answer may well be instructive for the British Parliament that intends to enact similar legislation. The answer is that in a minority Parliament, the political maturity and political ethics that require a government to live up to the fundamental democratic promise it has made seems to be absent from the example in the Canadian Parliament as my article in the Ottawa Citizen indicated. Indeed, the Conservatives have attempted to argue breaking their own law on fixed elections by asserting that it was never intended to apply in a minority situation. This was never stated in any of the debates in the Canadian House of Commons when the legislation was being scrutinized. The decision by the Conservatives to violate their own stated political and moral standards seems to have been based on polls which indicated that they could win a majority. They were returned with a larger minority and a toxic environment in the House of Commons which exists to this present day. Indeed the legacy of that undermining of the fixed elections law continues. The law still exists and stipulates the next election will be in October of 2012. The present Prime Minister has no intention of keeping that date and will likely ask the Governor General to dissolve Parliament at any time when the polls indicate he may get a majority or an even bigger minority. In the meanwhile the House of Commons has become imprisoned in vicious partisan politics on almost every issue before it to the detriment of the country and its people.

The British Fixed Term Parliaments Bill at first glance seems to have learned from this unfortunate Canadian experience, especially when it is being passed by a coalition government that relies on the two governing parties living up to their political and ethical commitments in the coalition agreement. This author, along with millions of Canadians, has deeply admired both leaders of the coalition party for bringing this stability, not only of politics, but also of ethics into British democracy.

In section 2 of the Bill there is a provision that any early election can only be triggered by a vote of no confidence or by a two thirds or greater majority of votes of MPs in favor of dissolution. Unless this provision is repealed by a future Parliament, this legislation should prevent the debacle we have witnessed in Canada in the minority Harper government. In addition, given that the British Parliament is not fettered by a written constitution that prevents any derogation from the prerogative powers of the Monarch by clear and unambiguous legislation, there does not seem to be any constitutional obstacle to ensuring that the coalition government of the present British Parliament being forced to live up to the five year fixed term until the next election. The two thirds or greater majority vote provision, in theory, should in theory, stop either of the two coalition parties even considering breaking their political and ethical commitments when opinion polls may indicate that it is in their interest to do so. What is problematic is that the Bill itself could be amended by a simple majority, opening up the possibility that the present coalition government or a future government could change any of the provisions relating to a super-majority or other vital parts of the Bill. Thought should be given to how to make the super-majority provisions of the Bill or the entire Bill a constitutional document that can only be amended or repealed by a manner and form process that would make it difficult, if not politically impossible, for changes to be made. This author has some ideas in that regards, but that is for another place and time.

The provisions relating to elections following votes of no confidence should also be studied carefully. The 14 day period gives the House of Commons a second chance to express confidence and avoid an election in the interests of the British people. Some thought should be given to avoiding the crisis politics that could take place in that 14 day period that could destabilize the entire government and indeed the British economy and society. Thought should seriously be given as to elaborating in Standing Orders of the House of Commons or in legislation what constitutes a legitimate confidence motion. This may run counter to centuries of the conventional powers of the Prime Minister, but then lots of issues relating to government and politics that were centuries old needed to be changed and were changed when the time was ripe.

Indeed in the absence of such a modernization of what constitutes a confidence motion, the power to prorogue Parliament by the Monarch on the advice of the Prime Minister could well be abused by the government of the day. A Prime Minister who has lost a confidence motion could ask the Monarch for dissolution for the 14 day period. This could be used to prevent a no confidence motion being passed and could therefore result in Parliament being dissolved under the Bill. It is important that there be checks and balances inserted into the Bill to stop this anti-democratic use of the power to advise the Monarch on prorogation. Thought should be given to allow the Speaker to have a role in presenting the Monarch with information and possibly a more formal role in preventing such an anti-democratic result. The situation to avoid was vividly presented by the anti-democratic use by the Canadian Prime Minister who asked the Queen's Representative, the Governor General to prorogue the Canadian Parliament in December of 2008 to avoid a confidence motion that he would lose and again in January of 2009 when he did it again to shut down a Parliamentary Inquiry into the alleged transfer of Afghan detainees to torture. This author was one of the leading jurists who lead the opposition to both anti-democratic prorogations. See the Toronto Star article that I authored that can be found at the following website titled: "Prorogation Redux: Harper in Contempt of Parliament"

<http://www.thestar.com/comment/article/745949>

In that article I stated: "Apart from the doomed attempts of Charles I to prorogue the British parliament in the 17th century, there was no precedent in any parliamentary democracy anywhere in the world where a democratic parliament was shut down to hide from a vote of confidence."

I sincerely hope that this anti-democratic action by the Canadian Prime Minister does not occur in any other Parliamentary system of government and especially not in the mother of all Parliaments. Steps should be taken to develop Standing Orders and if possible quasi-constitutional legislative provisions to avoid the repeat of this awful Canadian precedent.

What some political leaders fail to understand, is that they too shall pass from the scene one day, but both the good and the damage they cause may long outlive them for which they fellow citizens will either remember them with fondness or revile them for a very long time.

17 September 2010

Letter from Peter Milliken MP, The Speaker, House of Commons, Canada (FTP 25)

I am writing in reply to the House of Lords Constitution Committee's request of July 27, 2010, for written evidence concerning "fixed-term parliaments". While it would not be in keeping with my role as Speaker to comment on the full scope of the Committee's inquiry, I am happy to provide factual information about our constitutional and statutory provisions in this regard.

In Canada, the life cycle of a parliament is regulated by constitutional provisions and statute. The most fundamental of these are the *Constitution Acts*, 1867 to 1982, which provide first, that only the Crown may "summon and call together the House of Commons"; second, that subject to a dissolution, five years is the maximum lifespan of the House between general elections; and third, that "there be a sitting of Parliament at least once every twelve months". In addition, revisions to the *Canada Elections Act*, adopted in 2007, require that a general election must be held on the third Monday in October "in the fourth calendar year following polling day for the last general election" unless Parliament was dissolved at an earlier date.

This provision for fixed elections at the federal level was incorporated into the *Canada Elections Act* (S.C. 2000, c. 9) as section 56.1 when Bill C-16, *An Act to amend the Canada Elections Act*, received Royal Assent on May 3, 2007. If an election had not been called beforehand, the first election to be held pursuant to section 56.1 was scheduled for Monday, October 19, 2009 (s. 56.1(2)). However, the Governor General dissolved Parliament at the request of the Prime Minister on September 7, 2008, who opted to seek dissolution in the traditional manner.

A paper from the Library of Parliament, entitled "The Canadian Electoral System", provides a useful summary of the fixed-term election provisions in the *Canada Elections Act*:

"On 3 May 2007 Royal Assent was given to Bill C-16, *An Act to amend the Canada Elections Act*, requiring that; subject to an earlier dissolution of Parliament, a general election must be held on the third Monday in October in the fourth calendar year after polling day for the last general election. The powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion, remain unaffected by the bill. The bill calls for the first general election to be held on

Monday, 19 October 2009. The wording of the bill, however, allows for the four-year period to begin running before 19 October 2009, in the event of an earlier dissolution of Parliament. Thus, the next general election following the 2008 general election should be held on the third Tuesday in October 2012, barring an earlier dissolution of Parliament."

(page 6: <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/bp437-e.pdf>)

I am also including references and corresponding links to relevant sections of *House of Commons Procedure and Practice*, as well as to related sections of the *Canada Elections Act*:

Chapter Two, pages 45-6 (under Duration of Parliaments):

<http://www2.parl.gc.ca/procedure-book-livre/Document.aspx?Language=E&Mode=I&sbdid=A24E8688-CC45-4245-8F5C-DD32F4AA9B0I&sbpid=5A1717DA-CB22-4CEA-9EE5-4AC5EF9A6BIA#56AFBCE7-9F06-4274-9F31-6C02D592153C>

Chapter Four, page 186 (under Electoral Process): <http://www2.parl.gc.ca/procedure-book-livre/Document.aspx?Language=E&Mode=I&sbdid=2AE20CBE-E824-466B-B37C-8941BBC99C37&sbpid=62EE6F0D-655B-42BC-B651-022896C5724F#62EE6F0D-655B-42BC-B651-022896C5724F>

Chapter Eight, pages 359-60 (in chapter on The Parliamentary Cycle): .

<http://www2.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=889ADBF1-F9D0-48F3-A479-FD4B5F7EF59D&sbpid=I&Language=E&Mode=I>

Section 56(1) of the *Canada Elections Act*:

http://laws.justice.gc.ca/eng/E-2.01/page-4.html#anchorbo-ga:l_5-gb:s_56_l

I trust that this information will be of some use to the House of Lords Constitution Committee. Please receive my best wishes for successful deliberations on this matter and thank you for the opportunity to provide your Committee with information concerning constitutional and statutory practices relating to Canada's federal electoral process.

September 2, 2010

Memorandum by National Assembly for Wales (FTP 26)

Background

1. The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.
2. This submission outlines the National Assembly for Wales's position as it relates to fixed terms. Arrangements relating to the National Assembly for Wales' terms are outlined in the Government of Wales Act 2006 ("the Act") and the National Assembly for Wales' Standing Orders ("the Standing Orders").

Ordinary general elections

3. In accordance with section 3 of the Act, the National Assembly for Wales will, ordinarily, have a fixed term of four years. This section of the Act provides that

Assembly ordinary general elections are to take place every four years, on the first Thursday in May, subject to the power under section 4 which allows the Secretary of State for Wales to change the date of an ordinary general election by order (see Section C of this paper).⁷⁴

4. In advance of an ordinary general election, the Assembly is dissolved a specified number of days before that Thursday in accordance with section 3(2) of the Act. This number of days can either be specified in an Order made by the Secretary of State for Wales under section 13 of the Act (power to make provision about elections etc.), or calculated in accordance with rules set out in the Order.⁷⁵ The current provision, which is contained in article 148 of the National Assembly for Wales (Representation of the People Order) 2007⁷⁶, fixes the period at 21 days (not including Saturdays, Sundays, Bank Holidays, etc.). The National Assembly for Wales will formally dissolve for the first time in 2011.⁷⁷
5. Section 3 of the Act also provides that the Assembly must meet with seven days after the day of the poll (again excluding Saturdays, Sundays, Bank Holidays etc.).⁷⁸

Power to vary date of ordinary general election

6. Section 4 of the Act allows the Secretary of State for Wales, by Order, to vary the date of an ordinary general election. The poll can be held on a day which is neither more than one month earlier nor more than one month later than the first Thursday in May.⁷⁹ An Order of this kind must make provision:
 - i. as to when the Assembly is to be dissolved in advance of the varied date of the election; and
 - ii. for the Assembly to meet within seven days after the day of the poll (the same exclusion of certain days applies as for an ordinary general election).
7. Before making an Order to vary the date of an ordinary general election the Secretary of State must first consult the Welsh Ministers. In addition, the Order must be laid before the UK Parliament and is subject to being annulled by resolution of either House.⁸⁰

Extraordinary general elections

Circumstances in which extraordinary general elections can be called

8. Section 5 of the Act provides a mechanism for an extraordinary general election to take place before the next scheduled ordinary general election in the following circumstances:

⁷⁴ *Government of Wales Act 2006* (c.32), section 3(1)

⁷⁵ *Government of Wales Act 2006* (c.32), Explanatory Notes, para 45

⁷⁶ SI 2007 / 236

⁷⁷ Prior to the separation of the Welsh executive and legislature introduced by the *Government of Wales Act 2006* the National Assembly for Wales, a corporate body, did not dissolve.

⁷⁸ *Government of Wales Act 2006* (c.32), section 3(2)(b)

⁷⁹ *Government of Wales Act 2006* (c.32), section 4(1)

⁸⁰ *Ibid*, section 4(5) – 4(6)

- i. if, following one of the triggering events set out in section 47(2), the Assembly fails to nominate a First Minister within the period laid down by section 47 of the Act (usually 28 days); or
- ii. if the Assembly resolves that it should be dissolved (provided Assembly Members representing at least two-thirds of Assembly seats i.e. 40 Assembly Members voting for the resolution).

Failure to nominate a First Minister

9. In accordance with section 5(3) of the Act, an extraordinary general election will be held if the Assembly fails to nominate a First Minister within the period required by section 47 of the Act.
10. Section 47 of the Act provides for the Assembly to nominate one of its Members for appointment as First Minister and for the Presiding Officer to recommend the appointment of that person to Her Majesty. Nomination of an Assembly Member for appointment as First Minister is triggered by one of the following events, as listed in section 47(2):
 - i. the holding of a poll at a general election;
 - ii. the Assembly resolving that the Welsh Ministers no longer enjoy the confidence of the Assembly⁸¹;
 - iii. the First Minister tendering resignation to Her Majesty;
 - iv. the First Minister dying or becoming permanently unable to act or to tender resignation; or
 - v. the First Minister ceasing to be a member of the Assembly, other than by reason of a dissolution.
11. Once one of these events occurs, a First Minister must be nominated by the Assembly within 28 days of the event occurring. If another of the events listed in paragraph 11 above occurs the period is extended to the end of the period of 28 days after that second event. However, a dissolution can take place before the end of the applicable 28 day period if, within that period, the Assembly resolves under section 5(2) that it should be dissolved.
12. Procedures for the nomination of the First Minister by the National Assembly for Wales are outlined in Standing Order 4. The Presiding Officer invites nominations and if only one nomination is made must declare that Member to be the nominee. If more than one nomination is made, the Presiding Officer must, by roll call, invite each Member present to vote for a candidate.⁸² If there are two nominees, the

⁸¹ Standing Order 7.43 provides for a motion of no confidence in the Welsh Ministers. This Standing Order provides that, if a motion that the Welsh Ministers no longer enjoy the confidence of the Assembly is tabled by at least six Members, time must be made available as soon as possible for the motion to be debated; and in any event such a debate must take place within five working days of the motion having been tabled. A motion of no confidence requires a simple majority to be agreed.

⁸² Neither the Presiding Officer or the Deputy Presiding Officer are permitted to vote.

Presiding Officer must declare the candidate who received the greater number of votes cast to be the nominee. If there is an equality of votes, a further vote by roll call must take place. If more than two Members have been nominated and no Member receives more than half of the votes cast by roll call, the candidate who has received the smallest number of votes must be excluded and further votes by roll call taken until one candidate obtains more than half of the votes cast and the Presiding Officer must declare that Member to be the nominee. If there is an equality of votes between the two remaining candidates a further roll call must take place.

13. If the Assembly fails to make a nomination within the period allowed, then the Secretary of State for Wales is required by section 5 to propose a day for the holding of an extraordinary general election.

Resolution to dissolve the Assembly

14. In accordance with section 5(2) of the Act, the Assembly can resolve that it should be dissolved. This can only occur if at least 40 out of the 60 Assembly Members agree. This is therefore one of a small category of resolutions which requires more than a simple majority to be effective and, indeed, belongs to the even smaller category of such resolutions which requires the support of two-thirds *of all Assembly Members* and not just a two-thirds majority of those voting.

Relationship between the two processes leading to an “extraordinary” dissolution.

15. To trigger a requirement to nominate a First Minister (leading, if no First Minister is nominated within 28 days, to a dissolution) only requires a motion of no confidence supported by a simple majority of Members. But a motion leading directly to the immediate dissolution of the Assembly requires the support of two-thirds of all Members. However, this direct route to dissolution makes it possible, if, for example, the Assembly is irreconcilably dead-locked and it is clear that no Government enjoying the confidence of the Assembly can be constituted, to trigger an extraordinary general election, by common consent, without having to wait for the 28 day period for nomination of a First Minister to expire.

Arrangements for extraordinary general elections

16. Should either of these circumstances occur, the Secretary of State for Wales is required by section 5(1) of the Act to propose a day for the holding of a poll at an extraordinary general election. If the Secretary of State for Wales proposes a day under subsection (1), Her Majesty may by Order in Council:
 - i. dissolve the Assembly and require an extraordinary general election to be held;
 - ii. require the poll to be held on the day proposed; and
 - iii. require the Assembly to meet within the period of seven days beginning immediately after the day of the poll.
17. If an extraordinary general election is held more than six months before the date on which the next ordinary election is due to be held, then that ordinary election is still held. So the term of the Assembly elected at an extraordinary general election could, in theory be as short as approximately five months (allowing for the period between

dissolution and the holding of the ordinary general election). In practice, however, the prospect of two general elections within a relatively short period would be likely to be a growing disincentive to triggering an extraordinary election as the six month limit approached.

18. If an extraordinary general election is held less than six months before the date on which an ordinary general election would normally be held, that ordinary general election is not to be held⁸³ but the date of subsequent ordinary general elections would not be affected.⁸⁴ So, for example, if an extraordinary general election were to be held in February 2015 there would be no ordinary general election in May 2015 but the next ordinary general election would still be held in May 2019.

Conclusion

19. The provisions relating to an extraordinary dissolution of the Assembly, prior to the end of its normal four-year term, have not been used so far, but there is no reason for believing that if the relevant circumstances arose they would not operate smoothly. A crucial feature of those provisions is, however, that they do not stand in isolation, but operate in conjunction with the machinery under which a First Minister (and hence the Welsh Government) has to be nominated by the Assembly and can be removed by a motion of “no confidence” supported by a simple majority. So in practice a dissolution of the Assembly can be triggered, where no Government which enjoys the confidence of the Assembly can be constituted, by a simple majority of Assembly Members. The alternative direct method of triggering a dissolution, requiring the support of two-thirds of Assembly Members, is a means of *accelerating* a dissolution where it would be pointless to have to wait for the expiry of the 28-day period within which a new First Minister has to be nominated.

September 2010

Memorandum by James L. Newell, Professor of Politics, School of English, Sociology, Politics & Contemporary History, University of Salford (FTP 27)

1. The proposed legislation stipulates, as a sufficient condition for an early general election, a number of members of the House of Commons voting in favour of such an election ‘equal to or greater than two thirds of the number of seats in the House’. Supposedly designed to reassure the Liberal Democrats that David Cameron will not be able to walk away from the coalition and call an election at a time of his own choosing, it is presumably also designed to reassure the Conservatives: it means that the Liberal Democrats will not be able to jump ship and attempt to force an election by siding with the Opposition, as such a combination would only command 53 percent of the votes.
2. Presumably the proposals have been advanced with at least one eye to the possibility of electoral reform and the consequence that coalition government becomes the

⁸³ Ibid, section 5(5)

⁸⁴ *Government of Wales Act 2006* (c.32), Explanatory Notes, para 51

norm. Under such circumstances, the proposals might be viewed as a means of erecting legal barriers in the way of government instability and consequent risk of frequent recourse to early general elections.

3. I am doubtful about the robustness of the barriers the proposals create in this sense. Assume a government consisting of Right Party with 40 percent and Centre Party with 30 percent. In opposition, Left Party has the remaining 30 percent. Centre and Left can combine to oust the government and form a government of their own. They can then repeal the Fixed-term Parliaments Act and obtain an early election despite lacking the support of two thirds. Such a course of action might not be perceived as illegitimate if the ousted government were unpopular and the new government were able to make the case that it required a fresh popular mandate. Right Party thus gets no assurances when forming a government with Centre Party, of Centre Party's loyalty. But Centre Party gets no reassurances about its coalition partner's loyalty either: in fact, if either wants an end to the coalition and an early election, it has only to persuade Left Party to join it in a vote of no confidence while declining to join with the latter in the formation of an alternative government.
4. One argument that has often been made in favour of the proposals is that of fairness: they supposedly eliminate the advantage currently enjoyed by the party of the Prime Minister thanks to the latter's power to determine the timing of elections. Again, I am doubtful about the extent to which the proposals can achieve this. Much will presumably depend on the distribution of party support in future parliaments. From a formal point of view, a prime minister leading a single-party government with an overall majority might find existing powers hardly diminished at all provided he or she has sufficient control of followers: in such circumstances it would – presumably – be sufficient for the governing party to resign while making it known that it would refuse to support a vote of confidence in any alternative government. A general election would then follow under section 2 subsection (2) of the Bill. (Section 2 subsection (2) requires both a vote of no confidence in the incumbent government *and* the absence of a vote of confidence in any alternative government for an early election to take place. It might therefore be argued that a government resignation would be insufficient to trigger an election. But though this might be the legal position, it is difficult to envisage this as the practical position. Indeed from a legal point of view there seems to be a significant lacuna here: what *does* happen if instead of resigning thanks to defeat in a confidence vote, a government resigns of its own accord and there is no alternative government able to command the confidence of the House?). Alternatively, a single-party majority government could simply repeal the Fixed-term Parliaments Act. The circumstances in which it would be *politically* difficult to do so (when the Government was unpopular) would likely also be circumstances in which the Government would not want an early election anyway.
5. A prime minister leading a party of a size similar to that of the Conservatives currently, might also find it rather easy to obtain an early election by withdrawing his/her party from government: under the current terms of the Bill, if the Conservatives stood down it is unlikely that an election could be avoided by the formation of an alternative government given the current party distribution of Commons seats. Only if a prime minister led a small party in a fragmented parliament might his/her powers be significantly reduced in comparison to the current situation. But this is to suggest that prime ministerial power over the timing of elections has

almost everything to do with the characteristics of the party system and of the system's individual components, and would have almost nothing to do with the provisions of the Bill as currently envisaged.

6. The stipulation that elections can be triggered by a two-thirds majority voting in favour in a division strikes me as redundant. Under the terms of the Bill it is sufficient for a simple majority to table a vote of no confidence in a government: if there is an alternative government able to command a majority there are no elections; if there is no such government then elections follow *anyway* – regardless of whether the majority wanting such an outcome amounts to two thirds, to more than two thirds or to less than two thirds.
7. So I am doubtful that the proposed legislation, as currently drafted, can actually achieve fixed-term parliaments if by that is meant parliaments of predetermined duration in the way that the terms of office of US legislators (say) are predetermined. In the case of the US legislature, fixed terms cause no difficulties because Congress does not sustain the executive, which is elected separately. But in parliamentary regimes, on the other hand, where legislature and executive are by definition conjoined, I struggle to see the advantages of fixed-terms. From the point of view of stable and effective governance it is presumably sufficient that constitutional provisions exist to prevent or place obstacles in the way of dissolution when there is an executive able to command the legislature's confidence, and to facilitate dissolution when this is not the case.
8. What stable government does require, if there are to be fixed-term parliaments, is some kind of legal safety valve allowing early dissolutions when no executive able to command the confidence of a majority exists. As implied in paragraph 4, the current proposals, though allowing for early elections in the event of a no-confidence vote, appear to be deficient in this respect. There are two issues here. On the one hand, the proposals appear to make it legally impossible for a minority government to obtain an early election simply by resigning if it cannot also successfully challenge the opposition to defeat it in a confidence vote – a situation the Canadian government found itself in, in 2008 (before the situation was resolved by use of the Governor General's prerogative power to dissolve) (Maer et al., 2010: 12-13).¹ As Norton (2000: 127) notes, 'If a government is returned with a small or non-existent majority, and/or later slips into a minority in the House of Commons, there is nothing especially democratic about forcing it to stagger on as a minority government or force it to do some deals with other parties, deals that have no electoral sanction. Allowing the government to call an election – and let the electorate decide whether it should continue or not – is a far more democratic option'. On the other hand, restoring the monarch's prerogative power, removed by the Bill, would be no solution. In other political systems, the head of state can dissolve the legislature when it is without a majority able to sustain a government or in a situation of the kind just described. But it is difficult to see how that can work in the case of the UK where the head of state is a monarch whose legitimacy would be (irretrievably?) damaged were they to become involved in making political decisions – as they would be in such circumstances.

Notes

¹ The Canadian example is not the only one of its kind. In Italy, in 1987, following the demise of the then five-party coalition government under the Socialist, Bettino Craxi, a minority Christian Democratic government took office under Amintore Fanfani. The Craxi government had fallen because of a disagreement between the Prime Minister and the Christian Democrats over the existence of a presumed agreement by Craxi to cede the premiership after one year (the so-called *staffetta* or ‘relay’) – while the general expectation was that the purpose of the incoming Fanfani government was merely to preside over a dissolution and the calling of fresh elections. However, Craxi’s Socialists then announced that they would vote in favour of Fanfani’s administration, so that the Christian Democrats’ group leader in the Chamber, Mino Martinazzoli, was obliged to announce that Christian Democrats would abstain in order to bring the government down (Damilano, 2010).

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29 September 2010

Memorandum by the Norwegian Parliament (FTP 28)

Introduction

Norway follows a four year cycle for general elections. The Norwegian Constitution, Article 54 states that: “*The elections shall be held every fourth year. They shall be concluded by the end of September*”. Furthermore, the Election Act states that the general election is to take place on a Monday and has to be on the same day in all constituencies.

The Norwegian electoral system is based on the principles of direct election and proportional representation in multi-member electoral divisions. Dissolution of parliament between general elections is not possible under any circumstances. This is an anomaly since most western democracies have the possibility of dissolving the parliament in one way or another. Although the Storting has debated the introduction of dissolution power on several occasions over the years, the motions put forward have never obtained the two-thirds majority necessary for an amendment in the Constitution to be enacted.

This paper sets out the Norwegian experience of a fixed term parliament, including a brief summary of the political system in Norway; the considerations that have dominated the

political debate on the issue of a fixed term parliament and the procedure when a government crisis occurs between general elections, giving some historical examples. Finally, in section 5, there is a brief summary of the paper.

Background

The political system in Norway takes place within a framework of a parliamentary, constitutional monarchy, in which the Prime Minister is the head of government. The King has mainly symbolic power but sometimes plays a formal role, for instance when a new government is formed. As with other parliamentary systems of government, the executive is accountable to the parliament. Under the Norwegian Constitution, the government does not need a vote of confidence in order to govern, but if the Storting gives the government a vote of no confidence, the government must resign (negative parliamentarianism).

The principle of parliamentarianism has been considered to be constitutional customary law for more than 100 years, but was only recently - in 2007 - incorporated in the written Constitution Section 15 which reads:

"Any person who holds a seat in the Council of State has the duty to submit his application to resign once the Storting has passed a vote of no confidence against that Member of the Council of State or against the Council of State as a whole.

The King is bound to grant such an application to resign. Once the Storting has passed a vote of no confidence, only such business may be conducted as is required for the proper discharge of duties."

This means that it is only a vote of no confidence that leads to an obligation for the government to step down. A question of confidence presented by the Government may be rejected in the Storting, but is not considered to imply such an obligation. Still, every time a government has demanded a vote of confidence and lost, the government has resigned.

Due to the proportional representation system in elections, Norway has a multi-party system with numerous political parties, in which no single party can easily gain power alone. The principle of negative parliamentarianism and the multi-party system have often resulted in the formation of minority governments that rely on the support of other parties to retain the necessary parliamentary votes.

At present, the following seven parties have seats in the Storting: the Labour Party, the Progress Party, the Conservative Party, the Socialist Left Party, the Centre Party, the Christian Democratic Party and the Liberal Party. In contrast to the political situation in the recent decades, the current government is a majority government, and consists of a coalition between the Labour Party, the Socialist Left Party and the Centre Party, known as the Red-Green Coalition.

The Norwegian debate on introducing dissolution power

Those who support the introduction of dissolution power have mainly focused on the following issues:

- The need to strengthen the balance of power between the parliament and the executive
- The need for a safety valve in times of parliamentary crisis
- The need for democratic control in deadlocked situations

Some claim that minority governments in Norway in recent decades were weak and “ordered around” by the Storting. One might argue that dissolution power is necessary in order to strengthen the Government’s position in relation to the Storting and to ensure that it has a stable basis. Dissolution power would thus eliminate weak minority governments.

Furthermore, it has been contended that the need for a safety valve in times of parliamentary crisis is an adequate tool if no viable government can be formed. The importance of the direct participation of the electorate in deadlocked situations has also been used as an argument in favour of dissolution power.

These arguments have so far not resulted in any change.

Statistics show that minority governments in Norway during the last three decades of the 20th century had a parliamentary basis between 30 – 50 %. Most of them have been viable because, historically, Norway has had small ideological differences and a tradition of consensus. Some minority governments have governed with more or less formal support from other parties in the Storting, while others have had to deal with “jumping majorities”, i.e. the government has needed to negotiate support from issue to issue, from bill to bill. Still, when decisions on important issues are made, there is a great determination among the political parties to reach (near) all-party compromises that will endure through shifting (minority) governments.

Norway has little experience in long-lasting parliamentary crises (see section 4). The Norwegian experience shows that the lack of a safety valve has made parties act more responsibly when they are forced to settle for an agreement. This may have affected the climate for cooperation among the parties in the Storting. In fact, it may be asserted that dissolution power could increase the level of conflict since the opposition parties would not feel the same responsibility to contribute to form a new government.

Furthermore, dissolution of the Storting in the wake of a parliamentary crisis may lead to a situation where the issue in question overshadows all other issues, with the result that the electorate only takes this into consideration on Election Day. It may be argued that the mandate from the electorate in this sense is weak and narrow and that this may lead to an unstable situation in the long run. Unstable governments may also lead to frequent elections, which may result in voter fatigue and low voter turnout.

What happens when a government crisis occurs during a parliamentary term?

When a prime minister considers that his or her government has lost its parliamentary mandate in the Storting, it will tender its resignation. During a parliamentary term this situation may arise when a government has received a vote of no confidence in the Storting,

when a government has demanded a vote of confidence and lost, when a government has lost an important referendum, or when an internal conflict has caused a shift of government.

Once the resignation has been received, the King requests the outgoing Government to continue as a caretaker government until a new government can be formed. The King will then ask the outgoing Prime Minister for advice as to who he should approach with regard to forming a new government. The outgoing Prime Minister will normally advise the King to approach one of the parliamentary leaders in the Storting – the leader of the largest party or the largest opposition party. If this fails, the Prime Minister will normally advise the King to approach the President of the Storting, who will explore other options. If the parliamentary situation is very complex, the Prime Minister may also advise the King to approach all parliamentary leaders of the Storting. The King will normally follow the Prime Minister's advice and summon the person(s) concerned to the Royal Palace.

As mentioned earlier, Norway has little experience in long-lasting parliamentary crises. Only occasionally have several attempts to form a government been necessary. One example was in 1971 after the resignation of the Borten Government, a majority coalition government. When the government resigned on 2 March 1971 due to internal disagreement on the issue of the EEC, the parliamentary situation became unclear. The President of the Storting was unable to find a solution, and therefore all the parliamentary leaders were summoned to the Royal Palace. The Christian Democrat Kjell Bondevik undertook the task to try to form a new non-socialist coalition. However, these negotiations failed, paving the way for a Labour minority government. (appointed on 17 March 1971).

When the Syse Government, a minority non-socialist coalition government, resigned in 1990, also due to internal conflict on the issue of Norway's relations to the EEC, the change in government was effected in considerably less time. The King received the government's resignation on 29 October. On 3 November, a Labour minority government (Brundtland III) was appointed.

On 25 September 1972 the Norwegian people voted against EEC membership. One month earlier Prime Minister Bratteli had stated that his minority government would resign if this was the result of the referendum. The King received the government's resignation on 7 October and was advised to summon the parliamentary leaders. It became clear that the leader of the Christian Democratic Party was willing to form a coalition minority government. This Government, which was appointed on 18 October 1972, had a very narrow basis in the Storting with the support of only 38 of the Storting's 150 members.

The most recent example of mid-term change of government was the resignation of the Bondevik I Government in 2000. This minority coalition government demanded a vote of confidence on the issue of gas-fired power stations. The government lost the vote and therefore tendered its resignation on 10 March. Again, the change was effected relatively quickly. A week later a single-party minority Labour government (Stoltenberg I) was appointed.

These examples show that the political parties in Norway are prepared and willing to take responsibility in situations where a government resigns, even when this means having to form a minority government with a jumping majority in parliament. Because there is no other option than the current parliamentary composition, the parties are forced to find compromises.

Summary

Though dissolution of parliament is not possible between general elections in Norway, the country has still managed to solve mid-term cabinet crises. Owing to the fact that the Norwegian parties have been responsible and willing to compromise, most crises have been solved in a relatively short period of time. The formal procedure for a change in government also seems adequate in achieving a satisfactory solution in extraordinary circumstances.

Norway has often been saddled with minority governments. Some claim that dissolution power vested in the hands of the government would prevent a situation whereby weak governments are “ordered around” by the Storting. Nevertheless, this argument has not been considered strong enough to lead to any changes in the Norwegian parliamentary system.

Finally, our experience does not suggest that any of the parliamentary mid-term crises in Norway would have been solved more efficiently if the possibility to dissolve parliament had been present.

4 October 2010

Memorandum by Mrs Anne Palmer (FTP 30)

1) Issues of principle for and against fixed-term Parliaments

There are very grave and major constitutional implications involved in any proposed fixed term Parliament, and from recent experience, five years is far too long. Too much irreparable damage may happen in those five years. (b) Any constitutional changes particularly of this nature must be subject to the highest pre-legislative scrutiny. (c) **This Bill ends the Monarch’s Prerogative Power to dissolve Parliament on the advice of the Prime Minister. This, to me, is deliberately sidelining the Monarchy yet again, and not worthy of those that bear true and faithful allegiance to the British Crown.** (d) Fixed term Parliaments should not be introduced, far better to celebrate that which we already have in place. Four years term is perhaps; the maximum term tolerated by the general public that use their vote.

2) In a speech given at the Scottish Parliament on 14 May 2010, after the coalition terms had been agreed, David Cameron said: “I’m the first Prime Minister in British history to give up the right unilaterally to ask the Queen for a dissolution of Parliament. This is a huge change in our system, it is a big giving up of power. Others have talked about it, people have written pamphlets and made speeches about fixed term parliaments, I have made that change. It’s a big change and a good change”. **(He gives up nothing compared to what he would be asking Her Majesty to give up.**

3) Comparative Experiences.

a) As most of the continental Country's Constitutions start from after 1945, our

Country, with its Common Law Constitution that has lasted for hundreds of years can hardly be "compared" to any of them. We should be celebrating and rejoicing the fact that it has indeed lasted so long. The people of this Country have fought and paid dearly to keep their Common Law Constitution in two terrible World Wars. I respectfully remind all our Members of Parliament, that "constitutions" are the very foundations upon which all other laws should be built. Like the foundations of a house, add on to those foundations, and the "House" remains solid. Remove any of those foundations and eventually the whole house may fall. Are any of you prepared to take such a risk with something that is only temporarily in your care?

4) b) As regards Members of the Commonwealth, I note that the Royal Prerogative is also used. However, any alteration to the 'mother' Country regarding the proposed FIXED-Term Parliament will have an affect on those Commonwealth Country's. It may be the opportunity some are looking for a change so that they too may also sideline the Monarchy. It may be that even the proposal itself might bring about the loss of the best friends this country as ever had. These are countries that have stood by us through thick and thin, have fought the same battles and we understand each other. Sadly, in looking to the European Union Countries, most cannot even drink socially with each other without having an interpreter standing by. The European Union will not last, yet if IT does and the United Kingdom remains in it, there is the possibility that the United Kingdom will not last.

5) The consequences of the Government's proposals for prerogative powers. I place the question in full here. Question 11. Would the adoption of fixed-term Parliaments necessitate the modification or **abolition of the Monarch's prerogative power to dissolve Parliament? If so, what impact would this have? To even ask or question whether to abolish our Monarch's Prerogative Powers makes me question the motives of those that swear true and faithful allegiance to Her Majesty.**

6) Why ask this question now, when in the Treaty of Lisbon the people were not asked then if we thought it permissible to pass the Royal Prerogative Powers of the British Crown to foreigners for them to make "Agreements/Treaties on behalf of this Country when giving them "Legal Personality" so to do. There is no debate in our Parliament when the EU makes such an "Agreement or Treaty", yet as far as this Country is concerned, such an Agreement or Treaty **has** to have the Royal Prerogative for it to be activated here in the UK. If not, then no new EU Agreement/Treaty put forward by the EU can be activated here in the UK until sanctioned by the Royal Prerogative can it? The Royal Prerogative is a "**Safe-Guard**" so that none other than our own faithful and true Politicians or Members of our Government that have solemnly sworn allegiance to their Monarch and through the Crown to all the people in this land, our Country and Commonwealth, can ride roughshod over anyone, or any part of our Common Law Constitution. Was the passing of the Royal Prerogative to foreigners' lawful/legal? Using the Royal Prerogative on behalf of the Crown for ratification of the Treaty of Lisbon as a whole, cannot be taken as 'agreement' for every

EU Agreement/Treaty. What if the EU makes a Treaty stating “**that nation states did not have the right to secede and that any act of secession was legally void**”? (See **Constitution of the USA**)

7) The juridical consequences of the Government’s proposals. Question 15. Given that one Parliament cannot generally bind another, how (if at all) can the principle of fixed-term Parliaments be entrenched? Thankfully, no Parliament may bind another, even looking at case law re Treaties *Blackburn v Attorney-General* 1971 Supremacy of Parliament-Treaty of Rome irrevocable once signed and limits the sovereignty of the United Kingdom-**but future parliaments not bound**. Etc. However, that is not the ‘findings’ in the Vienna Convention on the Laws of Treaties or perhaps the intention. But the Supremacy of Parliament remains “supreme”, providing, I would suggest, that the Treaties are in keeping with the UK’s Common Law Constitution and does not disturb the Members of Parliament and Government’s Oaths of Allegiance to the British Crown. **Can the principle of fixed-term Parliaments be entrenched?** The theory of sovereignty means that no Parliament can bind its successors, and this inability of Parliament to prevent any law from being later altered or repealed by a Parliament means that, in principle, no scheme of constitutional change-new Bill of Rights-devolution, even perhaps a written constitution itself or any statutory ‘constitutional’ guarantees, such as those for Northern Ireland-can be entrenched-made secure against any or easy amendment or repeal-in the legal order.

1707 seems to be a likely date which prevents other newer proposals from being entrenched. In other words our Common Law Constitution remains

8) The role of the House of Lords? Question 16: What role would you envisage for the House of Lords in any parliamentary fixed term and/or early dissolution arrangements? I would have to say that I thought the House of Lords worked the best **before** the Hereditary Peers were abolished. I also looked to the Act of Union, which, in Clause XXII states clearly that 16 Scottish Peers of the Realm should be entitled to sit in the Lords. As there were only ‘Hereditary Peers’ at that time, one assumes that there should always be at least 16 Scottish Hereditary Peers in the House of Lords no matter what kind of House of Lords might be chosen. There maybe certain people in Scotland that would like to free themselves of UK rule, if perhaps the UK Government does not continue to fulfill all the Acts in the Treaty and Act of Union 1706/7 it maybe that the UK Government may be seen as lacking in fulfilling their duties to the whole of the United Kingdom.

9) In “today’s” House of Lords it seems to be being filled by those that either want the title or are no longer ‘electable’ for the House of Commons. Having written that, the present House of Lords seemed to have settled down after the first great upheaval in our time, yet it would not bode well to change it again for changes sake. What ever is decided, it should be remembered that the people are absolutely at the least enchanted stage with politics and politicians, in particular than they have ever been in the past. They certainly do not want any further changes in the House of Lords especially if its costs the tax-payer more money.

23 September 2010

Memorandum by Richard J. Pond (FTP 31)

Summary

- Fixed-term Parliaments should be four years in length, not five. On average, Parliaments since 1945 have lasted less than four years - and less than four and a half years even if the 1950-1, 1964-66, and 1974-74 terms are excluded from the calculation.
- General Elections should be in May or early June.

Fixed Term Parliaments

1. I strongly believe that the appropriate length of a fixed-term Parliament is four years and not five.
2. Four-year terms are much more in line with recent British tradition. The Scottish Parliament, Welsh Assembly, Northern Ireland Assembly, London Assembly, and Mayor of London are all elected for four-year terms. Local councillors are also normally elected for four-year terms.
3. Of the 26 EU member-states other than the UK, nineteen elect their lower house (or only house, if unicameral) every four years, and only seven elect it every five years. (In some cases these are maximum terms rather than fixed terms; and in some cases the upper houses have longer terms.) In other words, almost three-quarters of these 26 states have quadrennial parliamentary elections. The pattern is even more predominant if EEA and other associated states such as Norway, Iceland, Switzerland are examined (all are four-year, as are EU membership aspirants such as Croatia and Turkey). There appears to be an emerging consensus in favour of four-year terms: Turkey has recently switched from five years to four, while twenty years ago Sweden switched from three years to four.
4. Of other English-speaking nations, Canada, South Africa, India, and Pakistan have five-year terms, but Australia elects its lower house for three-year terms, New Zealand also for three years, and the US for two years.
5. Four years has increasingly become the normal interval between UK general elections. Four-fifths of Parliaments since 1945 have been less than five years in duration, and almost two-thirds have lasted four-and-a-half years or less. The average length of a Parliament since 1945 has been about three years and ten months, and even if the three short Parliaments (1950-51, 1964-1966, 1974-1974) are excluded, the average is still only four years and four months.
6. Further, the above statistic to some extent understates the degree to which four years is considered the UK norm. Voters know that elections tend to be held at four-year intervals except when the governing party believes that it is about to lose power. Of the three full five-year Parliaments since 1945, all have been followed by a change of Government at the subsequent General Election, and so have all but one of those exceeding four and a half years in duration.
7. It is also perhaps worth noting that although the maximum length of a Parliament was seven years, the average length of a Parliament in the nineteenth century was four years - much as it is today.
8. It is evidently more democratic to hold elections more frequently, and while there may be both practical and principled arguments against excessively frequent elections (such as the annual Parliaments demanded by the Chartists), no democrat can consider four years to be any way excessive. The difference between four years and five should not be regarded as slight. The latter would obviously mean Parliaments some 25% longer than the former.

9. So in keeping with recent British practice and custom and the prevalent custom elsewhere in Europe, and to increase significantly the democratic accountability of MPs above what five year terms could provide, four-year terms should be the legal limit.

Appropriate Date for Elections

10. There appears to be an emerging tradition of holding British general elections in either May or June. Of the eight elections since 1979, four have been in May, three June, and one April.

11. It is desirable to avoid the latter half of June, July, and August, as these are popular holiday months. The cold winter months would normally not be ideal either.

12. It is highly desirable that UK general elections should not coincide with elections to the Scottish Parliament or Welsh Assembly. If five-year terms are adopted for the House of Commons, the elections will sometimes, but not always, coincide (unless different months are chosen).

20 July 2010

Memorandum by Mark Ryan, Senior Lecturer in Constitutional and Administrative Law, Coventry University (FTP 32)

1. My name is Mark Ryan and I am a Senior Lecturer in Constitutional and Administrative Law at Coventry University. I have a longstanding interest in constitutional affairs as I have previously submitted written evidence to both the House of Lords Select Committee on the Constitutional Reform Bill and the Joint Committee on the Draft Constitutional Renewal Bill (Ev36) as well as providing written evidence in response to the Government's 2008 White Paper on House of Lords reform. My submission is made in my own personal capacity and indicates my personal observations on the issues raised by the Fixed-term Parliaments Bill 2010. It in no way reflects the views of my employers (Coventry University).
2. At the outset it is disappointing that this Bill was not presented in draft form and subject to pre-legislative scrutiny (a practice which should be encouraged for all Bills of a constitutional nature). This is particularly the case with regard to this Bill as it was not preceded by any form of consultation, set out in either a Green or White Paper or even foreshadowed in the 2010 Conservative Party manifesto (albeit fixed-term Parliaments were in the manifesto of the Liberal Democrats). Further, as the Bill refers to the next General Election taking place in May 2015, there is clearly no urgency for this measure to be introduced at this point. This Bill therefore should have first been issued in draft and then subsequently re-presented to Parliament (no doubt having been modified in the light of pre-legislative scrutiny). Furthermore, provision should also have been made for consultation with the devolved institutions whose electoral dates may be subject to alteration as result of this legislation.
3. (Q 1) The arguments for fixed-term Parliaments are varied and as follows: Firstly, they reduce necessarily Prime-Ministerial Executive power by denying an inbuilt electoral and political advantage of determining the date of a General Election. Excessive dominance of the Executive in our uncoded constitutional arrangements has

unfortunately been too prevalent a hallmark in recent decades and so any means which restricts Executive power is to be welcomed. Secondly, fixed-term Parliaments would result in less uncertainty with regard to the legislative process as the number of sessions would be fixed (which in turn would require realignment). In addition, a fixed-term Parliament should obviate the problem of the 'wash up'. The recent experience of the Constitutional Reform and Governance Bill 2010 (which was shorn of a number of its elements in April 2010) represents a salutary lesson of the difficulties that can ensue during the wash up process. In short, this is a highly unsatisfactory way of passing legislation. Although fixed-term Parliaments should therefore avoid the use of the wash up, it would still operate in the event of any early dissolution.

4. Thirdly, fixed-term Parliaments would result in less political turmoil and economic instability. Fourthly, as constitutional reform cannot be forged in a constitutional vacuum independent of its secondary effects reverberating elsewhere, a fixed-term Parliament would be beneficial in the context of the reform of the House of Lords. One consequence of variable Parliaments is that there is difficulty in determining (and agreeing) the length of term to be served by members of a reformed second chamber. Fixed-term Parliaments, however, would help to resolve this particular difficulty. Lastly, it is fair to suggest that fixed General Election dates would help cement parliamentary elections in the psyche of the electorate and consequently, an expectation of fixed elections *may* in turn encourage higher turnouts.
5. (Q2) The ideal length of a parliamentary term should be four years. This would be consistent with the terms in the devolved institutions. It would give an incumbent Government sufficient time to enact its policies in legislation but in addition, it would also avoid it becoming stale. Further, a four year term would conform to the typical *de facto* lengths of modern Parliaments in the last half century or so. It should be noted at this juncture, however, that owing to our almost unique uncoded constitutional arrangements, international comparisons of the term lengths of legislatures, although of interest, are necessarily of limited value. One obvious consequence of a four year term in relation to legislation would be to increase *ipso facto* the power of the House of Lords *vis-a-vis* the House of Commons (or more specifically the Executive in control of the lower chamber). In the absence of a codified constitution constraining Parliament (or more specifically a House of Commons dominated by the Government of the day), any further constitutional brake on the Executive is to be welcomed.
6. (Q3) The experience of fixed-term Parliaments in Scotland would appear to suggest that after three such elections, these fixed, periodic elections have now become accepted (and indeed *expected*) fixtures in the electoral calendar.
7. (Q4) There should, of course, be a safety-valve in the event of exceptional circumstances arising: (a) There is an argument that a Government should not be allowed a constructive vote of no confidence in itself as this could be used for electoral advantage; (b) It is argued that there should not be an extraordinary dissolution in the event of the agreement of a parliamentary super-majority. It is unclear as to the circumstances in which a secure Government (or a coalition) with a healthy majority would seek to dissolve Parliament (other than for gaining naked electoral advantage). In any event, enabling an early dissolution of Parliament (other

than being triggered by a vote of no confidence) appears to defeat the *raison d'être* of the Bill which is to remove an electoral advantage from the Prime Minister; (d) It is eminently sensible to move an election date by a month or so as detailed in the Bill to take account of extraneous events. The Bill, however, proposes that the House of Lords would effectively have a veto over this rearrangement and it is suggested that as this matter refers specifically to the affairs and proceedings of the lower chamber (albeit having an impact on the Upper House as part of Parliament), this provision might result in disquiet among some MPs. After all, the present House of Lords has no say over the timing of General Elections today. One suggestion could be for the Bill to provide for a positive resolution for the Commons alone to consider.

8. (Q5) A second General Election should be held as soon as possible otherwise parliamentary business would be in stalemate.
9. (Q6) Codifying constitutional conventions can, owing to their lack of precision, prove notoriously problematic. However, those issues listed in Q6 (i.e. Queen's Speech, Supply) should be specified in legislation, together with any motion of confidence instituted by the Government itself in an effort to bolster support of it in the Commons. As the boundaries of this convention are somewhat nebulous, beyond the list stated above, it is rather tentatively suggested that one possibility could be for the Speaker of the House of Commons to determine what a confidence issue is for the purposes of the Act (having consulted his Deputies and taken soundings from the *usual channels* as well as key figures in the House). This decision would then be stated before any vote was taken so that the House of Commons was fully conversant with what it was voting for and the consequences of that vote.
10. (Q7) Clause 2(2) (b) is a sensible proposal otherwise parliamentary business would be paralysed. (Q8) There would be a clear disincentive for a Government from abusing this procedure if the parliamentary term that followed lasted only until the next General Election was originally scheduled to take place.
11. (Q9) As noted earlier, the rationale behind this proposal is unclear as it seemingly runs counter to the *raison d'être* of the Bill which is to regularise General Election dates and prevent a Government from taking advantage of an election.
12. (Q10) in the event of an extraordinary General Election being called (and in contrast to the proposal in the Bill), the subsequent term should last only until the date of the next General Election as originally scheduled. This would act as a palpable disincentive for a Government to move for an extraordinary General Election. It would also retain the integrity and regularity of fixed-term Parliaments.
13. (Q12) The most appropriate day and time for elections would be on a Thursday in May (the former is clearly the day of the week on which people would have an expectation of voting). (Q13) As the Bill refers to the next General Election taking place on 7th May 2015 it will coincide with elections to the devolved institutions in Scotland and Wales and if this overlap is generally considered undesirable (although no doubt the electorate are sophisticated enough to distinguish between their votes in these different elections), then the General Election should be altered to take place either just before or after those in the devolved institutions. There is an argument for retaining the integrity of the electoral cycles of the devolved institutions

which are already in place and given the fact that under the Bill such overlaps would only take place every twenty years.

14. (Q14) If there is concern about the courts interfering with the internal proceedings of Parliament (raising an issue of the separation of powers and exclusive proceedings), an ouster clause could be inserted into the Bill which plainly and expressly directed the courts that the issues detailed in the measure (eg in relation to confidence motions) were *non-justiciable*. Although such a plain and explicit direction (eg, *the provisions of this Act are not to be called into question in any court of law*) would provide the courts with a clear signal as to their constitutional and legal boundaries in relation to this legislation, this would *not* necessarily be absolutely conclusive. Ultimately, it would be for the courts to adopt a ‘hands off’ approach. After all, it was Dicey who noted that although the Queen in Parliament may pass the law, however “from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land.”
15. (Q15) The measure could include an explicit clause that this Act was entrenched legally and not subject to either express or implied repeal by subsequent legislation. Although the legislative supremacy of Parliament is the central hallmark of the United Kingdom constitution, as a construct of the common law it has been subject to modification and reinterpretation (most notably in the context of the European Union having been given a clear steer by parliamentary legislation, see s2(4) European Communities Act 1972). In this light, if the Fixed-term Parliaments Bill stated explicitly that it was not to be repealed (and that the principle that one Parliament cannot bind another in terms of subject matter was in abeyance in respect of this measure), although it is not absolutely certain how the courts would respond to subsequent legislation seeking to repeal the Act, it is possible that the judiciary would regard this as determinative and alter their view of the principle of legal entrenchment. In any case, it is proposed that the Fixed-term Parliaments Act would undoubtedly fall into the classification of a ‘constitutional statute’ as defined (albeit *obiter*) by Lord Justice Laws (in Thoburn v Sunderland City Council [2002] EWHC 195 (Admin)) and therefore not liable to be subject to implied repeal. Finally, notwithstanding the arguments about legal entrenchment, the Act would over time inevitably become *politically* entrenched with the political will to repeal it lacking.
16. (Q16) In an effort to preserve the separation of the proceedings of each chamber, the House of Lords - as currently constituted - should not have a role to play in the early dissolution arrangements as this should be a matter effectively for the Commons. This issue would arguably have to be revisited in the event of the Upper House being reformed which included members (unlike at present) whose term of service was linked directly to the length of a Parliament or a number of Parliaments.

23rd September 2010

Memorandum by Alastair Smith, Professor of Politics, New York University (FTP 33)

Summary:

Although under the current system the ability of the Prime Minister to call elections whenever he wishes is generally perceived to be a huge electoral advantage, in practice this benefit is muted. The timing of elections signals the incumbent's beliefs about likely future performance and voters integrate this information into their assessment of the government. Prime Ministers who call snap elections generally see a decline in their electoral support relative to pre-announcement opinion poll data: opportunism is punished. Electoral fairness, one of the major justifications for a move to a fixed term system, is greatly overstated.

Your request for evidence is extremely broad in scope. Since you request concise evidence, I will limit my comments to my area of expertise. In 2004 I published *Election Timing* with Cambridge University Press. Despite the wide scale popular and press speculation about the timing of elections in the UK, to the best of my knowledge, this is the only book on the topic of when prime ministers call elections and the consequences of these decisions.

The current system in the UK allows the Prime Minister to ask the monarch to dissolve parliament and call new elections at anytime. The major objection to the current system is it provides the incumbent government with an unfair advantage that greatly privileges it relative to the opposition. An apt analogy might be that Chelsea FC can schedule its fixture with Manchester United at a day's notice any time during the season. By waiting until its squad is at full strength and United's is devastated by injury, Chelsea greatly enhances its prospects of victory. Yet, such an argument is wrong. First, incumbent parties in a flexible timing system do not win at a higher rate than in a fixed timing system. Second, the timing of elections provides important cues that both voters and economic actors respond to. Incumbent parties cannot simply translate an advantage in opinion polls into an electoral victory.

Election timing informs voters about the quality of the ruling party. Consider a simplified version of the Prime Minister's decision. The PM either calls an election today or waits until the end of the term when an election is mandatory. If he waits then the voters get an additional opportunity to see the government in action and can update their assessment of the ruling party accordingly. This opportunity to learn more about the abilities of the incumbent is censored if the PM calls an early election.

The PM is unlikely to call an early election he expects to lose (although this was the case in 1951). However, suppose the ruling party is reasonably popular and therefore likely to have a reasonable prospect of winning an immediate election. The PM's incentives to call an election depend upon how well he expects his party to perform in the future. If the PM expects his party will govern well, problems will be manageable and economic conditions will be rosy, then the PM is likely to win reelection at the end of the term. Even though the opposition will likely be better prepared for an electoral battle later in the term, the expectation of good performance makes waiting attractive. In contrast, if the PM anticipates

a series of intractable problems, internal party problems or scandals or declining economic conditions, then waiting is less attractive. The PM's decision to call an election is governed by two sets of factors: 1) current, known and observable conditions, such as government popularity, size of government majority and time remaining in the term, and 2) the PM's expectations about his party's likely success in the future.

The known and observable factors dominate some timing decisions. For instance, when the government is badly behind in the polls and has a controlling majority, then the PM typically runs out the clock, as was the case in 1964, 1992 and 1997. In other cases the government lacks effective legislative control and so calls an early election (1951 and Oct. 1974). Outside of these extremes, however, the PM's expectations affect the timing of elections. To keep discussion simple, suppose we rank the PM's expectation of his party performance on a single scale between very good and very bad. Which expectations on this scale trigger an election depend upon observable factors. For instance, if the government is highly popular, has only a slim majority and the remaining term is relatively short, then the PM need only anticipate a relatively mild downturn in his party's future before he calls an election. In contrast, if the party was less popular and had a strong majority, then the PM would have to anticipate a collapse in the economy or the party's fortunes before chancing an election now would be better than chancing an election later.

Calling an election signals the PM's beliefs about future performance. When the PM has strong observable incentives to go to the people, that is to say an election is widely anticipated, even a very mild downturn in the PM's expectation of future performance triggers an election. In contrast, for an election to be early relative to expectations, the PM must have anticipated a drastic decline in his party's performance. Future performance and election timing are linked. An election called very early relative to expectations indicates the PM anticipates a severe downturn, otherwise he would not have called the election in the first place. Via this mechanism, election timing signals future performance.

There is empirical support for the relationship between election timing and future performance. As I document in *Election Timing*, the earlier an election is called relative to expectations the worse economic performance is over the following year. On average, inflation and unemployment rise after early elections and economic growth declines. This is not to say that the early elections cause economic decline, rather elections are called in advance of downturns. As such, early elections warn of decline.

Voters and economic actors respond to the election timing signal. Moderately popular governments with comfortable majorities are not anticipated to call election early into a term. Hence an election called under such a circumstance indicates that the PM expects a drastic decline. Voters incorporate this information into their expectations. In *Election Timing* I compare support for the ruling party in opinion polls prior to the announcement of elections with its actual performance at elections. On average, the earlier an election is relative to expectations, the more a government electoral performance declines at the election. For instance, in 1970 having consistently trailed the Tory for in opinion polls, Labour gained a small lead and Harold Wilson announced a snap election, which he lost as

Labour experienced a 6% decline in their support relative to pre-announcement opinion polls. Incumbents who call snap elections generally don't do as well as opinion polls suggest they should. Parties which are seen as patient and call election late relative to expectations generally experience robust support. While superficially the ruling party can use a momentary advantage over the opposition to gain reelection, the voters factor this into their electoral calculation and punish opportunistic politicians.

Financial markets also respond to the announcement of elections. Comparing indices prior to the announcement of elections to indices immediately before and after the election, there is a trend. Stock prices fall with the announcement of elections called early relative to expectations, but not so for late elections.

Although on the face of it flexible election timing offers a huge advantage, in practice the ruling party cannot capitalize on it. The timing of an election signals likely future performance and voters cue off this information. Political turnover under Britain's flexible timing rules are indistinguishable from those under US's fixed term rules. The postwar average probability for the US President's party retaining the Presidency and the probability of the British ruling party retaining the Prime Ministership are both statistically indistinguishable from a 50:50 coin flip. While flexible timing nominally transfers great advantage to the incumbent, in practice the signal that election timing provides mitigates such advantages.

The choice between fixed and flexible terms involves tradeoffs. Flexible timing advantages the incumbent, although as I have argued, this advance much smaller than popularly perceived. Flexible terms possibly mitigate the harmful effects of business cycles. When the election timetable is fixed, political business cycle theorists suggest politicians have incentives to manipulate policy to improve short run conditions at the expense of long run economic performance. Flexible elections ameliorate, although do not eliminate, such concerns. Instead of having to engineer short-term advantage, prime ministers can take surf—that is, ride an existing wave rather than try to make one.

As the current proposed bill demonstrates, a shift to fixed terms inevitably involves complex procedures to allow the termination of zombie parliaments. As with all legalize, all rules have their pathologies and any set of rules will be gamed. Unfortunately, it is difficult to foresee all such contingences and the possibly of undesirable unintended consequences abound.

I remain agnostic as to whether fixed or flexible elections provide the best system of government. In this memo I have focused on my area of expertise, the timing of elections and their consequences and I have drawn on the evidence in *Election Timing*. The timing of elections signals the PM's expectations about likely future performance. The record suggests voters incorporate this information into their evaluation of the government and opportunism is punished. While notionally flexible elections provide the ruling party with an unfair electoral advantage, such criticism does not stand up to scrutiny.

3 September 2010

Memorandum by Swedish Parliament (Ulf Christoffersson, Deputy Secretary General) (FTP 34)

Summary

1. The Swedish Parliament, the Riksdag, has had fixed terms for as long as it has been holding yearly sessions. Arguments for or against fixed-terms have not really been presented in the Swedish constitutional debate. Fixed terms have simply been taken for granted. One reason for this is that for a long time the dates for the parliamentary elections have been set in relation to the dates for regional and local elections, different systems at different points in time, but all based on fixed electoral terms.

2. There has always been a possibility to call extraordinary elections in mid-term but it has rarely been made use of. Perhaps the main reason for that is that a parliament elected in an extraordinary election will only serve for the remainder of the ordinary fixed term.

The bicameral Riksdag, 1866-1970

3. The Riksdag that was established in 1866 and met for the first time in 1867 had two Chambers of equal standing. One of them, somewhat confusingly perhaps for British readers named the Second Chamber, was elected through direct elections every third year.

4. The members of the First Chamber were elected indirectly by the county councils and the city councils of the three biggest cities. The term of office was nine years and elections took place whenever vacancies occurred. New members were given individual nine year terms. This meant of course that except for the start in 1866 the First Chambers was never renewed at any one point in time. Unlike the members of the Second Chamber, members of the First Chamber were free to resign whenever they wished. On average they served for six years out of their nine-year terms.

5. Proportional representation was introduced in 1909. The members of the First Chamber were from then on elected for six years. The constituencies were divided into six groups so that the Chamber could be renewed with one/sixth every year.

6. Ten years later the fixed-terms were prolonged for both Chambers, to four years for the Second Chamber and eight years for the First Chamber. Increased efficiency in the legislative process and lower costs for election campaigns were among the arguments put forward by those who proposed this reform. The main reason given by the Committee on the Constitution was that by holding elections to the Second Chamber on a fixed date every four year, local and county elections could be held at the same date two years into every parliamentary period.

The unicameral Riksdag 1971-

7. The electoral period for the unicameral Riksdag was at first three years. This was part of a compromise reached among all the parliamentary parties. Elections to the Riksdag, the county councils and the local councils were to be held on the same day, the third Sunday in September, every third year. The argument for shortening the length of the electoral period was that previously elections had up until then been held nationwide every two years. Doubling the interval seemed a big step. It was argued, among other things, that it would

threaten the vitality of the political party organisations if election campaigns had to be organised only every four years.

8. The electoral period for the Riksdag, the county councils and the local councils were however changed again in 1994, so that from that year elections at all three levels are held every fourth year in September. The main reasons given for the change was to facilitate the legislative work and give an incoming Government more time to carry through its proposed reforms.

9. This year's elections were the last to be held on the third Sunday in September. The 2014 elections will be held one week earlier, on the second Sunday in September. The reason for the change is to give an incoming government a little more time to prepare the budget proposal that is to be presented to the Riksdag in mid-October.

Extraordinary elections and dissolution

10. Except for the first three months following an ordinary election the Government may order an extraordinary election to the Riksdag to be held. The Riksdag elected through an extraordinary election will serve only for the remainder of the ordinary electoral period. This is of course a necessity if one wants to continue holding national, regional and local elections on the same day.

11. The possibility to call for mid-term extraordinary elections existed also for both Chambers in the bicameral Riksdag. It has however rarely been made use of. Extraordinary elections caused by representational or constitutional changes were held 1921 and 1970 to the Second Chamber and 1919 and 1921 to the First Chamber. Extraordinary elections caused by disagreement on major political issues were held to the Second Chamber in 1887, 1914 and 1958.

12. There has to date not been an extraordinary election to the unicameral Riksdag, although one of the reasons given for the lengthening of the electoral term from three to two years was that it would make an extraordinary election more of a viable option.

13. The Riksdag is not dissolved prior to an ordinary election, although it is normally in recess from the end of June. If the Government has called an extraordinary election, the Speaker may determine, in response to a request from the Government, that the work of the Chamber shall be suspended for the remainder of the electoral period.

Formation of Government

14. It is for the Speaker of the Riksdag to propose the name of a new Prime Minister. If more than half the members of the Riksdag vote against the proposal it is rejected. In any other case, it is accepted. If the Riksdag rejects the Speaker's proposals four times, the procedure for appointing a prime minister is abandoned and resumed only after an election for the Riksdag has been held. If no ordinary election is due in any case to be held within three months, an extraordinary election shall be held.

Vote of no confidence

15. The Riksdag may declare that a minister no longer enjoys the confidence of the Riksdag. Such a declaration of no confidence requires the concurrence of more than half the total membership of the Riksdag. The Speaker shall discharge the minister concerned. If the Government is in position to order an extraordinary election, however, no decision to

discharge the minister shall be announced, provided the Government calls an extraordinary election within one week from the declaration of no confidence.

Timing

16. The pros and cons of the system with elections to parliamentary assemblies at three levels of government on the same day every three or four years have been debated ever since it came into being. The argument against is primarily that regional and local elections are hopelessly overshadowed by the Riksdag elections.

17. Those who are in favour of the present arrangement argue that there is a natural connection between national and local issues and that elections on the same day give a higher turnout in the local elections. They can also point to the fact that an increasing percentage of the electorate vote for different parties in the national and the local elections indicate an ability to distinguish between the different levels of government.

18. In 2014 we will be in the situation that the election to the European Parliament will take place in early June to be followed by elections to the Riksdag, the county councils and the local councils three months later.

Planning the legislative work

19. The main advantage with fixed terms, at least from a parliamentary point of view is that it is easier to schedule the legislative work. We can make a plan for the full four year period for the parliamentary sessions, which weeks the Riksdag is sitting and when it is in recess. With the help of information from the Government we can also with some accuracy plan the plenary sessions for at least six months at a time.

14 October 2010

Letter from Dr Anne Twomey, Associate Professor, Faculty of Law, University of Sydney (FTP 35)

1. Please accept the following submission with respect to your inquiry on 'Fixed Term Parliaments'. I am an Australian constitutional lawyer, with a particular expertise in State Constitutions, both as a practitioner (having previously been head of the Legal Branch of The Cabinet Office of NSW) and as an academic (having written a book on *The Constitution of New South Wales*). I thought your Committee might be interested in a comparative perspective from Australia where New South Wales, Victoria, South Australia, the Australian Capital Territory and the Northern Territory all have fixed four year term Parliaments. For present purposes, I will outline the experience in New South Wales, but the position is similar in other Australian jurisdictions.

Background

2.1 In the nineteenth century, parliamentary terms in New South Wales were flexible, initially with a maximum term of five years. In 1874, the *Triennial Parliaments Act 1874* (NSW) was passed, reducing the term of the Legislative Assembly to three years from the date of the return of the election writs, unless

dissolved earlier by the Governor. The flexible three year term remained in place until it was extended to four years under the Wran Labor Government in 1981.

2.2 New South Wales has a written Constitution, part of which is entrenched and part of which, as in the United Kingdom, can be amended by ordinary legislation. Originally, the term of the Parliament was not entrenched. It could be extended or reduced by ordinary legislation, although the extension of Parliament's term was regarded as a very serious matter. The only time it occurred was during World War I, in controversial circumstances.⁸⁵ In 1950 a provision was inserted and entrenched in the NSW Constitution which required any extension of the term of the Legislative Assembly to be approved by a referendum. Accordingly, when the Legislative Assembly's term was extended to four years in 1981, it was first approved by the people in a referendum.

2.3 Fixed four year terms were introduced in New South Wales in 1995. They were proposed by the minority Greiner Liberal Government in 1991 and enshrined in the Memorandum of Agreement of 31 October 1991 between the Greiner Government and the three Independents who held the balance of power in the Legislative Assembly. It was a key plank in the reform proposals of the Independents. As a referendum was required to implement the fixed four year term proposal,⁸⁶ legislation was enacted in two stages. The first stage was the enactment by ordinary legislation of the *Constitution (Fixed Term Parliaments) Special Provisions Act 1991* which identified 20 March 1995 as the next election date for the Legislative Assembly. It also provided for the second stage, being a referendum to be held at the next election to approve and entrench fixed four year terms for the future.

2.4 I note, at this point, that this answers one of the questions that was raised in the House of Commons Political and Constitution Reform Committee's inquiry into 'Fixed-term Parliaments Bill' as to whether there was any overseas experience of a legislature setting the next election date for the existing Parliament, rather than a future Parliament. This is one such example.

2.5 At the 1995 referendum, the official 'Yes/No' case published by the Government set out the following arguments for and against a fixed-term Parliament:

| Yes Case | No Case |
|----------|---------|
|----------|---------|

⁸⁵ See further: A Twomey, *The Chameleon Crown – The Queen and Her Australian Governors* (Federation Press, 2006) p 58.

⁸⁶ This was because the provisions that were included to get the Houses back into the four year cycle after an early election contained the possibility that a parliamentary term might extend a little over four years. Cf the position regarding the UK Fixed-term Parliaments Bill which permits the extension of the five year term by up to two months in certain circumstances, potentially drawing it under the exception in s 2(1) of the *Parliament Act 1911* (UK).

| | |
|---|---|
| <p>In 1981, the people of NSW voted in favour of extending the Legislative Assembly's term from a maximum of 3 years to a maximum of 4 years. However, the amendment made did not actually compel a full four year term to be served before the next election is held. A fixed term of the Assembly will provide this assurance.</p> | <p>Governments will be unwilling to take difficult decisions for the latter part of the four year cycle, or, conversely, will be more likely to take "popular" decisions only in that period. The Government will effectively move into "caretaker mode" at far too early a time.</p> |
| <p>Electors vote an Assembly in for a term, with the expectation that the Assembly will serve out that full term. The ability for governments to call elections virtually at will contradicts that principle, and submits the electorate to more elections at a greater cost to the public.</p> | <p>Where the government suffers a loss of support within the Assembly the fixed four year term legislation is more likely to allow the Opposition to form a government without a general election being held. This undermines the democratic system by allowing a government to be changed without the approval of the electorate.</p> |
| <p>Fixed four year terms will allow governments sufficient time to implement their policies. Some policies, especially in the economic and social arena require time to be implemented and may be unpopular at first. The electorate will have time to judge a government's worth by the results of its policy initiatives in practice.</p> | <p>New South Wales already has four year term Parliaments. It only requires courage for governments to serve the full term and any government calling an early election risks being criticised and losing votes.</p> |
| <p>The proposal will not prevent a government which loses support in the Legislative Assembly from being removed from office and an alternative party or group with support forming a government.</p> | <p>Where the composition of the Parliament changes resulting in a minority government, a fixed term for the Assembly will more likely entrench an unstable situation. The government will be unable to call an election to determine the issue, but will equally be prevented from governing effectively with a clear mandate. The government will not be able to carry out those policies on which it was elected.</p> |
| <p>Governments in this State will no longer be able to call elections at a</p> | <p>Experience in other countries with fixed election programs is that campaigning</p> |

| | |
|--|---|
| time which is convenient to them. A system providing certainty of election dates is fairer to parties in opposition, by removing the electoral advantages available to the government of the day. | commences as early as a year in advance. With fixed terms, the campaign period will inevitably be greatly extended which will mean increased election costs and increased periods of electioneering. |
| Experience in other countries with fixed election programs demonstrates that “election mode” prevails for the last year of the term, this still leaves three years for implementing policies without speculation about the outcome of an election. | The costs of holding an election should not be an issue. More and frequent elections are a good thing because they keep governments accountable by giving voters an opportunity to vote them out of office. |
| The average cost of a general election is \$20mil. Fixed terms will ensure that tax payers will only have the expense of an election every four years. | Independent members of Parliament, where there is a minority government, will be able to exert a disproportionate degree of power relative to the constituency they represent. The government, under the fixed terms legislation, would ordinarily be powerless to rectify this situation by calling an early election. |

2.6 The referendum was held on 25 March 1995 and passed with a substantial majority. The fixed-term provisions then came into force.

Current provisions in New South Wales

3.1 Section 24 of the *Constitution Act* 1902 (NSW) provides for the expiration of the Legislative Assembly and s 24A provides that the election date is the fourth Saturday in March following the expiry of the four year term of the Legislative Assembly. If the Legislative Assembly has been dissolved early under s 24B, the election date can be no later than the 40th day from the date of the issue of the writs for the election.

3.2 Section 22A(3) sets the date for a Legislative Council periodic election as the same date as the Legislative Assembly general election. Hence the two elections must be run together, with Members of the Legislative Council serving two terms of the Legislative Assembly, and half the Legislative Council up for election at each periodic election.

3.3 Section 24B is the critical provision for determining when an early election may be held, instead of waiting the fixed four years. As it is critical to the issues

raised below in relation to the UK Fixed Term Parliaments Bill, it is extracted here in full:

24B Dissolution of Legislative Assembly during 4 year term

(1) The Legislative Assembly may be dissolved by the Governor by proclamation, but only in the circumstances authorised by this section.

(2) The Legislative Assembly may be dissolved if:

(a) a motion of no confidence in the Government is passed by the Legislative Assembly (being a motion of which not less than 3 clear days' notice has been given in the Legislative Assembly), and

(b) during the period commencing on the passage of the motion of no confidence and ending 8 clear days thereafter, the Legislative Assembly has not passed a motion of confidence in the then Government.

After the motion of no confidence is passed, the Legislative Assembly may not be prorogued before the end of that 8-day period and may not be adjourned for a period extending beyond that 8-day period, unless the motion of confidence has been passed.

(3) The Legislative Assembly may be dissolved if it:

(a) rejects a Bill which appropriates revenue or moneys for the ordinary annual services of the Government, or

(b) fails to pass such a Bill before the time that the Governor considers that the appropriation is required.

This subsection does not apply to a Bill which appropriates revenue or moneys for the Legislature only.

(4) The Legislative Assembly may be dissolved within 2 months before the Assembly is due to expire if the general election would otherwise be required to be held during the same period as a Commonwealth election, during a holiday period or at any other inconvenient time.

(5) This section does not prevent the Governor from dissolving the Legislative Assembly in circumstances other than those specified in subsections (2)-(4), despite any advice of the Premier or Executive Council, if the Governor could do so in accordance with established constitutional conventions.

(6) When deciding whether the Legislative Assembly should be dissolved in accordance with this section, the Governor is to consider whether a viable alternative Government can be formed without a dissolution and, in so doing, is to have regard to any motion passed by the Legislative Assembly expressing confidence in an alternative Government in which a named person would be Premier.

3.4 Where an early election is held, the procedure for getting elections back into fixed four year cycles is set out in s 24. It states that the new Legislative Assembly, regardless of when it was elected, will expire 'on the Friday before the first Saturday in March in the fourth calendar year after the calendar year in which the return of the writs for choosing that Assembly occurred'. In most cases this will mean that the legislature elected at an early election will serve less than four years, although if the election writs were returned in January or February, which is unlikely because of Christmas and summer holidays in Australia, then the Parliament will serve a term that is a little longer than 4 years (hence the need for a referendum).

3.5 Section 7B of the *Constitution Act 1902* (NSW) provides that a Bill that 'contains any provision to reduce or extend, or to authorise the reduction or extension of, the duration of any Legislative Assembly or to alter the date required to be named for the taking of the poll in the writs for a general election, shall not be presented to the Governor for Her Majesty's assent until the Bill has been approved by the electors in accordance with this section'. It then sets out the requirements for a referendum. The provision is doubly entrenched.

Comments on the Fixed-term Parliaments Bill 2010 (UK)

4.1 There are a number of aspects of the Fixed-term Parliaments Bill that would raise eyebrows if a similar Bill were introduced here.

The removal of the role of the Queen

4.2 The first, and from an Australian point of view, most remarkable aspect of the Bill is the removal of the Queen's powers with respect to dissolutions. Future dissolutions in the United Kingdom will occur automatically by reference to the election date. The only role of the Queen with respect to the dissolution of Parliament will be setting the date for an early poll, upon the advice of the Prime Minister, if the Speaker certifies that certain events have taken place in the House of Commons.

4.3 If any Australian Parliament were to propose such a Bill, there would be great controversy and concern that a check on government power was being removed. The reserve powers of the monarch's representatives in Australia are regarded as significant because they have been exercised more frequently than in the United Kingdom and people are therefore more sensitive to their significance.⁸⁷ Hence the NSW provision concerning fixed term Parliaments makes an express attempt to preserve the Governor's reserve powers.⁸⁸ Moreover, the provision merely

⁸⁷ Apart from the dismissal of the Lang Government in 1932 and the Whitlam Government in 1975, there have been 3 occasions of vice-regal refusal of Commonwealth dissolutions and at least 25 at the State level. See further: A Twomey, 'Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State' *Republics, Citizenship and Parliament*, Papers on Parliament No 51, July 2009, 19.

⁸⁸ Note that this provision is badly drafted and probably ineffective because established constitutional conventions never gave the Governor a power to dissolve the Legislative Assembly contrary to the advice of

states that the Legislative Assembly 'may' be dissolved in those circumstances, leaving it to the Governor to do so. Sub-section 24B(6) instructs the Governor 'to consider whether a viable alternative Government can be formed without a dissolution and, in so doing, ... to have regard to any motion passed by the Legislative Assembly expressing confidence in an alternative Government in which a named person would be Premier.' Hence the Governor is left with a discretion so that there is flexibility to best fit the outcome with the particular circumstances.

4.4 No doubt it would be argued that the provisions in the UK Bill are intended to protect the Queen by avoiding her involvement in political crises. Certainly, it would avoid the potential dilemma for Her Majesty of whether to grant a dissolution to a Prime Minister who had lost the confidence of the House or whether instead to commission an alternative person as Prime Minister on the basis that he or she has the confidence of the House and could form a stable government for a reasonable period. However, it might provoke other dilemmas. For example, cl 3(1) determines the dissolution of the House by reference to the polling day. In the case of an early election, the polling day is fixed by the Queen on the advice of the Prime Minister. What if a Prime Minister, who has lost the confidence of the House of Commons, advises the Queen to prorogue the Parliament and does not advise her in relation to the proclamation of a polling day or advises her to fix a date six months in the future or even later? This is not a completely outlandish scenario, as the recent Canadian experience with respect to prorogation shows.⁸⁹ The Queen would then face calls to refuse to prorogue Parliament or dismiss her Prime Minister.

4.5 What should the Queen do if there is a dispute about whether an 'early election' motion has been passed by the requisite number or whether a motion is one of 'no confidence in Her Majesty's Government', and the Prime Minister advises Her Majesty to issue a Proclamation setting the polling day, but the Speaker has not issued a certificate or the facts do not support the issue of such a certificate? There is still potential to place the Queen in a difficult position.

4.6 If there were some kind of public crisis of confidence in the Government (for example, it was found to have engaged in systemic corruption or other forms of illegality) there would be no chance of an election as long as the Government controlled majority support in the lower House and did not want an election. This would put extreme pressure on Her Majesty to dismiss the Government and commission the Leader of the Opposition as Prime Minister so that the House might then vote no confidence in the new Government in order to obtain an

the Premier or Executive Council. Forced dissolutions instead occurred by the Governor dismissing the Premier and appointing a new Premier on the condition that the new Premier would advise the dissolution of Parliament. See further: A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) pp 656-8. See also the dismissal of the Lang Government in 1932.

⁸⁹ See further, P Russell and L Sossin (eds), *Parliamentary Democracy in Crisis*, (Uni of Toronto Press, 2009).

election. Even then, if the members of the former Government passed a vote of confidence in itself within 14 days, no election could be held. While this might be an extreme example, it loosely follows the circumstances of the dismissal of the NSW Lang Labor Government in 1932 (on grounds of illegality) and also reflects the current discontent within New South Wales with regard to the lemma/Rees/Keneally Government, which has had three Premiers, numerous scandals and ministerial dismissals and has been the subject of corruption allegations, claims of incompetence and campaigns pressuring the Governor to dismiss the Government.

4.7 While for my part I accept that there are significant advantages in diminishing vice-regal discretion, I am confident that many in Australia would be very wary of removing altogether the vice-regal check upon governmental power which is only exercisable in the most extreme of circumstances. The fact that such powers have not been formally exercised in the United Kingdom for a very long time does not necessarily render support for their removal. It may well be the case that the fact that such powers exist means that they never need to be exercised as no one is willing to provoke their exercise. Guaranteeing a Government a full five years in office, without any check or possibility of removal against its will, no matter how badly it performs or how corruptly it acts, is certainly a 'courageous' act which I do not think would be contemplated with such equanimity in Australia. It is therefore surprising that it seems not really to have been raised as an issue in the United Kingdom.

No confidence motions

4.8 The equivalent NSW provision requires 3 days notice to be given for any motion of no confidence that can be used as a trigger for an early election. This has the advantage of ensuring that all sides have sufficient warning to have all their Members available for the vote and can recall them from overseas if necessary. It also ensures that everyone is clear that it is a motion of no confidence that is intended to give rise to an election. It avoids debate about whether other motions (such as a defeat of an important Government Bill, a defeat on the Address in Reply, a Government defeat on the adjournment or the reduction of an appropriation Bill by £1) amount to a motion of no confidence in the Government for the purposes of an early election. The Constitutional Committee should consider the inclusion of such a notice provision as it is likely to avoid disputes about what amounts to a motion of no confidence for the purposes of cl 2(2).

4.9 The NSW provision also specifies that the House 'may not be prorogued' during the 8 day period after the vote of no confidence has passed and may not be adjourned for a period extending beyond that 8 day period, unless a vote of confidence has already been passed. Again, the Constitutional Committee should consider including a provision that addresses prorogation and adjournment during

the 14 day period after a vote of no confidence in cl 2(2). This would also avoid the Queen being placed in a difficult position if advised by a Prime Minister, who has just lost the confidence of the House, to prorogue the House in such circumstances.

4.10 It should be noted that the 'no prorogation' rule does not apply in NSW in the three day period before the holding of a vote of no confidence. The reason for this was to avoid the giving of a string of notice of motions of no confidence, which had no hope of succeeding, purely for the purpose of prolonging the Parliament and preventing prorogation. The view was taken in NSW that it would be unwise to facilitate this tactic and that the issue of prorogation should only be dealt with where a vote of no confidence has been successful.

4.11 Clause 2(2)(b) of the UK Bill provides that an early election takes place if, amongst other things, 'the period of 14 days after the specified day has ended without the House passing any motion expressing confidence in *any Government of Her Majesty*' [emphasis added]. Some ambiguity arises with respect to the phrase 'any Government of Her Majesty'. Does this include a vote of confidence in a previous Government that has since resigned and been replaced? Does it refer only to the Government in existence at the time the motion is passed, whether the Government in which no confidence was previously expressed or a new Government? Does it refer to a prospective Government that does not yet exist (eg a motion that the House has confidence in X to form a Government)? On its face, the word 'Government' can only mean one that has been formally commissioned by the Queen, so there must be some doubt as to whether this can apply to a parliamentary group that has not yet been commissioned as a 'Government'.

4.12 This is a critical issue. It is not clear from the provision whether it is intended that a Government that is subject to a successful vote of no confidence follows the customary practice and resigns, leaving Her Majesty to commission a new Prime Minister whose Government then needs a vote of confidence to survive. Alternatively, it could be intended that matters remain frozen once the vote of no confidence is passed and the existing Government remains in office until the end of the 14 days to see if the absence of confidence is reversed. If it is not reversed, then an election would be held. A third alternative is that it is intended that the House may pass a motion indicating its confidence in someone else to form a Government, even though it is not yet formally a 'Government of Her Majesty'. Query whether this would oblige Her Majesty to commission that person as Prime Minister? The Bill ought really be clearer as to what is intended.

Entrenchment

4.13 In New South Wales, there is a capacity to entrench provisions in the Constitution so that they can only be altered or repealed, directly or indirectly, by compliance with a special 'manner and form' requirement, such as a referendum

or special majority. In the United Kingdom the principle of parliamentary sovereignty has traditionally prevailed so that one Parliament cannot bind a future Parliament. Thus fixed term Parliaments will only be 'fixed' to the extent that the legislation imposing them is not amended or repealed by later legislation enacted by ordinary majorities. A Government in control of both Houses will therefore still have the capacity to have an election at a time of its choosing.

4.14 Nonetheless, there have been recent jurisprudential moves in the United Kingdom towards recognising a higher status of 'constitutional' statutes⁹⁰ and implied limits on legislative power.⁹¹ Theories of self-embracing entrenchment also abound. In this context it might be wise for Parliament to make clear its intent (if it is its intent) that this Act be subject to amendment or repeal in the future by ordinary legislation, to head off any future judicial efforts of 'statutory interpretation' which might decide otherwise.

General observations

5.1 Like many other commentators, I take the view that five years is too long and that four years is a more appropriate length, balancing the public interest in a government having a reasonable time to govern and the public interest in maintaining the accountability of governments through elections. I also consider, despite the deep unpopularity of fixed four year terms in New South Wales at the moment, that fixed terms have great advantages and have created a much fairer electoral system.

5.2 Again, like many commentators, I am surprised by the rush to pass this legislation and consider that it would be better addressed once the reform of the House of Lords is settled, as much depends upon how the House of Lords is comprised and its electoral cycle. It is unwise to try and fix the electoral system of one House while that of the other House remains undetermined.

Conclusion

6.1 I hope the Committee finds these observations useful. If you would like any further information on this matter or any other concerning electoral systems, upper houses or the recall of parliamentarians, please do not hesitate to contact me.

27 September 2010

⁹⁰ See, eg: *Thoburn v Sunderland City Council* [2003] QB 151.

⁹¹ See, eg: *R (on the application of Jackson) v Attorney-General* [2006] 1 AC 262.

Memorandum by Anders Widfeldt (FTP 36)

The Swedish *Riksdag* can be dissolved before the end of the full parliamentary term, but this has had little practical significance. The newly elected parliament does not start a new full parliamentary term; it merely continues the term already started, and the next election is held at its original date. Elections held as a consequence of premature dissolutions are referred to as “extra elections” in the constitution, a term which indicates that they do not affect the ordinary election cycle. This means that, although Sweden does not strictly speaking have a fixed-term parliament, premature dissolutions and “extra elections” are extremely unusual. So far “extra elections” have been held in Sweden four times; most recently in 1958.

In Norway, parliament cannot be dissolved in any circumstances. Several proposals to introduce premature dissolutions have been voted on in parliament, most recently in 2007. In some cases the reform proposals have been supported by a majority of MPs, but not reached the 2/3 majority required for constitutional amendments, and therefore rejected. The issue is debated relatively frequently, however, and it is not impossible that some form of premature dissolution will be introduced in the future; possibly similar to that of Sweden, where a parliament elected in an “extra election” does not start a new four-year term. As the Swedish experience suggests, it seems unlikely that such a reform would significantly increase the frequency of elections.

The Swedish system, which be described as a case of *de facto* fixed term parliament, is largely uncontroversial. In 2008 a seven-party parliamentary commission on constitutional reform proposed that the existing regulations regarding dissolutions should remain unchanged.

Both Norway and Sweden are regarded as stable parliamentary systems. That does not mean that governments are always stable. The table below reports the parliamentary status of Norwegian and Swedish governments since 1970. Majority governments are rare. In Norway, one in five governments has commanded a majority in parliament; in Sweden the proportion is marginally lower. The table does not report the duration of governments, but both Norway and Sweden have had majority governments for approximately eight out of the forty years passed since 1970.

| | Norway | Sweden |
|-----------------------|--------|--------|
| Single party majority | 0 | 0 |
| Single party minority | 11 | 10 |
| Coalition majority | 4 | 3 |
| Coalition minority | 5 | 3 |
| total | 20 | 16 |

The existence of fixed term parliaments, *de jure* in Norway and *de facto* in Sweden means that governments have to find other means of resolving political crises than turning to the voters. Since 1970 government resignations between elections have occurred five times in Sweden. Two of these resignations were caused by the death or retirement of the prime minister, but in the other three cases the reason was political.

In neither case an “extra election” was considered as worthwhile. It should be noted that between 1970 and 1994 the Swedish parliamentary term was only three years, which meant that, almost by definition, either the previous or the next election was too close in time.

Much suggests that this perception has not changed after the parliamentary term was increased to four years.

In 1978 and 1981 centre-right majority coalitions collapsed due to internal disagreements. In the former case, when the divisive issue was nuclear power, the Liberal Party took over as a single party minority government. This was made possible by the Social Democrats abstaining in the vote of investiture. The 1978-79 Liberal government was essentially of a caretaker nature, not taking any major initiatives.

The 1979 election resulted in the return of a centre-right majority coalition, comprising the same three centre-right parties as until 1978. In 1981, however, the coalition collapsed again, now over taxation reform. This time, a two-party minority coalition comprising two of the previous three parties took office. The defecting Moderate Party continued to provide parliamentary support to its former coalition partners, which meant that the minority coalition could continue in office without too much trouble until the 1982 election, which resulted in a Social Democratic victory.

The third Swedish case took place in the winter of 1990. A Social Democratic single party minority government resigned after an economic austerity package had been defeated in parliament. The speaker of parliament unsuccessfully investigated whether an alternative government could be formed. There was speculation of an “extra election”, but the prime minister could not call such an election after his resignation. An “extra election” would also have been called if parliament had rejected four successive proposals of a new prime minister in votes of investiture, but such a repetitive process was never seriously considered. Instead, the Social Democratic government returned to office, with a new minister of finance but with the austerity package withdrawn (new austerity measures were presented, and passed, later the same year).

In Norway, government resignations between elections are more common than in Sweden. Eight such resignations occurred in the 1970-2010 period. The most recent case was in March 2000, when a centre-right minority coalition resigned over a proposal to build gas power plants. The government opposed the, and made the issue a vote of confidence. An unholy alliance of the Labour, Conservative and Progress parties secured a majority for the proposal; the government resigned and was succeeded by a single party minority Labour government, which stayed in office until the 2001 election.

Another example of an inter-election resignation was in 1986, when a coalition consisting of the Conservative, Christian People's and Centre parties was defeated in a vote on an economic reform proposal. The centre-right coalition had been in office since 1983, commanding a majority until the 1985 election, when the outright majority was lost due to the pivotal position of the Progress Party, which had two seats. The Progress Party was regarded as populist, but also as clearly right-of-centre, and it was not expected that it would topple a centre-right government. This, however, is what happened in April 1986, when the Progress Party voted with the opposition, forced the conservative-led government to resign and allowed a minority Labour government to take office. The Progress Party leader, Carl I Hagen, gave economic reasons for his party's action (he claimed that the government did not sufficiently recognize the need for a reduction in public expenditure), but also that he had not been taken seriously, especially by the prime minister, and wanted to show that his party's support could not be taken for granted. The succeeding Labour government remained in office until the 1989 election.

Thus, both Sweden and Norway have shown that the political system is able to handle political crises without being able to resort to extra elections. The solutions have not always been elegant, or democratically satisfactory. The Swedish muddle in 1990 was generally regarded as a national embarrassment. The Norwegian events in 1986 and 2000 were the consequences of advanced political wheeler-dealing, and did not lead to a more stable majority situation – even though the incoming labour governments could govern with ad-hoc majorities, and stayed in office until the next election.

At the same time, it is questionable whether parliamentary dissolutions would have improved the respective situations. An often cited contrasting example is Denmark, which has a system very similar to that hitherto used by the UK, where the incumbent government is free to choose when to dissolve parliament, and the newly elected parliament starts a full new election period. This has meant that Denmark has had periods of frequent elections. For example, Denmark held parliamentary elections in September 1987, May 1988 and December 1990. Neither of these elections clarified the parliamentary situation. The Danish experience could be taken as an example of how frequent dissolutions can tire voters as well as parties, without solving the political problem. At the same time, it should be mentioned that the Danish system has been more stable since 1990. The current Danish government is a centre-right minority coalition, which has been in office since November 2001, with its mandate renewed in elections in February 2005 and November 2007.

To conclude, the Scandinavian evidence does not point in any particular direction. The consequences of fixed-term parliaments in Norway and Sweden may not be democratically optimal, but as the Danish example shows, the possibility to dissolve parliament and start a full new parliamentary term would not necessarily be an improvement.

It should also be remembered that the Scandinavian situation, with proportional electoral systems (which, of course, is not being proposed in the UK) and multiparty systems, is not easily applicable to the UK. In Norway and Sweden government crises have tended to be resolved with new minority governments taking office, and these governments governing courtesy of informal parliamentary support from other parties, or jumping majorities. This is not considered as an ideal situation even in the respective countries. It could be regarded as incompatible with the British political culture and tradition, and may not improve the legitimacy of parliament, or the political parties.

September 2010

**Memorandum by Nelson Wiseman, Associate Professor,
Department of Political Science, University of Toronto (FTP 37)**

I. The Canadian Constitution limits the life of the federal Parliament and provincial legislatures to five years.⁹² The usual practice is that in the fourth year of a legislature, the Prime Minister (or provincial premier) requests that the Governor General (or the provincial Lieutenant Governor) dissolve the legislature and issue writs of election. Going back to New Brunswick's first legislative assembly in 1785, elections in that province have

⁹² Section 4(1), Schedule B to *Canada Act, 1982*, c. 11 (U.K.).

occurred every four years with one exception. On a number of occasions, a request by a first minister for a dissolution has come in the third year of a Parliament but, when he feared defeat as occurred in New Brunswick in 1987, he waited until the fifth year. In 1990 when Ontario's governing party led in the public opinion polls, but the province appeared headed toward an economic recession, the premier triggered an election three years into his mandate. At the federal level, the Prime Minister similarly caused an election three years into his mandate in 2000, soon after the creation of a new official opposition party and under a new leader, both of whom were unprepared for an election campaign. In 2008, the Prime Minister triggered an election after two years in office. This also occurred in 1974. In none of these cases did the government lose the confidence of their legislatures.

2. Increased criticism of the arbitrary timing of elections by first ministers in the 1970s, 1980s, and 1990s led a number of federal and provincial opposition parties to promise that they would introduce legislation to establish four-year fixed election dates if they formed the government. A private member's bill to that effect, first introduced in Parliament in 1970, died on the order paper.⁹³ The federal Reform party, which formed the official opposition in the 1990s and of which the current prime minister was a leading MP, included the concept of fixed election dates in all of its platforms from its formation in 1987. In 2004, the then Leader of the Official Opposition and now Prime Minister Stephen Harper introduced another private member's bill, the *Dissolution of Parliament Act*,⁹⁴ to fix election dates. It too died on the order paper.

3. British Columbia, the first Canadian jurisdiction to adopt a fixed election date, has held two fixed date elections. Five other provinces, one territory, and the federal Parliament have since followed suit with similar statutes. Majority governments have been in power in all of the provinces that have held elections on fixed dates. All of the premiers have abided by the spirit and letter of their fixed election date laws to date.

4. After its election in 2006, the new federal Conservative minority government introduced a bill to fix election dates. The legislation had the support of public opinion (78 percent in one poll) and of the three parliamentary opposition parties. The bill became law in May 2007 and requires that each general election take place on the third Monday in October, in the fourth calendar year after the previous poll, starting with October 19, 2009. The government minister who shepherded the bill, *An Act to amend the Canada Elections Act*,⁹⁵ told Parliament that the law would limit the advantage of the Prime Minister and the governing party, contribute to the efficiency of Parliament and policy planning, save money for taxpayers, and increase voter turnout. On third reading, the minister said, "...the timing of elections should not be left to the Prime Minister but should be set in advance so that all Canadians will know when the next election will occur." He also said, "Instead of the governing party having the advantage of determining when the next election will take place – an advantage they may have over the other parties for several months – all parties will be on an equal footing... Fixed date elections will provide for greater fairness in election campaigns, greater transparency and predictability, improved governance, higher voter

⁹³ James R. Robertson, Legislative Summary LS-530E, "Bill C-16: An Act to Amend the Canada Elections Act," Revised, May 3, 2007, p. 12. <http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/39/1/c16-e.pdf>

⁹⁴ 3rd sess., 37th Parl., 52-53 Eliz. II, 2004.

⁹⁵ 1st Sess., 39th Parl., 55-56 Eliz. II, 2006-2007.

turnout rates, and will help in attracting the best qualified candidates to public life.”⁹⁶ Some proponents of fixed election dates argued that they would result in relaxed party discipline and in more free votes as the Prime Minister and cabinet would no longer be able to use the threat of an election to keep their caucus in line. The legislation has accomplished none of the above objectives.

5. Some of the arguments against fixed election dates are that they are inconsistent with parliamentary tradition, that they would reduce Parliament’s effectiveness and thwart the prime minister’s freedom to seek a fresh mandate for a new or major policy initiative that arises between elections. Provincially and federally, fixed election dates have had no effect on party discipline – a major issue in Canadian politics where candidates cannot run under a party’s banner unless the party leader signs their nomination paper.

6. The federal legislation states that, “Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General’s discretion.”⁹⁷ Similar provisions exist in the provincial and territorial laws. The statutes are silent on what occurs when a government loses the confidence of Parliament but, by convention, the first minister resigns or more commonly, he requests Parliament’s dissolution and an election. By custom in Canada, the Prime Minister may declare any motion or piece of legislation, in addition to Supply bills and the Speech from the Throne, a matter of confidence. No constitutional scholar in Canada deems the unelected upper house (the Senate) a confidence chamber, but the current Prime Minister indicated in 2009 that if the Senate did not act promptly on some of the government’s bills, he could take that as a signal of non-confidence and request Parliament’s dissolution. In effect, the fixed election date laws in Canada have changed only the maximum duration of a Parliament. They leave open the possibility of an earlier election because by convention, it is the Prime Minister’s prerogative to advise the Governor-General to dissolve Parliament.

7. Apart from exceptional circumstances, which occurred in 1926, the Governor General has complied with the advice of her first minister. In 1926 the Liberal prime minister, in the face of an impending non-confidence vote in Parliament, requested and was denied a dissolution of Parliament by the Governor General, Lord Byng. The Governor General then asked the Conservative leader to form a government. That government fell after three parliamentary sitting days. The upshot of the subsequent election was a return to power of the Liberal leader who had made an election issue of the Governor General’s refusal of the dissolution request. Since then, the Governor General’s discretionary powers appear to have been effectively reduced, although not eliminated. He or she has complied with every prime ministerial request for a dissolution since 1926.

8. In August 2008, with the governing party well ahead in the polls and the House of Commons not sitting, the Prime Minister opined that Parliament had become “dysfunctional,”⁹⁸ although his minority government had prevailed on every vote of confidence since the government’s formation in 2006. The Governor General then granted the Prime Minister’s request for the dissolution of Parliament and a fresh election. The

⁹⁶ Rob Nicholson, “Bill C-16 on Fixed Date Elections,” November 6, 2006.

<http://www.rob Nicholson.ca/EN/3376/46777>

⁹⁷ Section 56.1 (1).

⁹⁸ CBC News, “Harper hints at triggering election,” August 14, 2008.

<http://www.cbc.ca/canada/story/2008/08/14/harper-election.html>

Prime Minister's violation of the spirit of the law did not become an election issue. The opposition parties and the media rarely mentioned it after the first day of the election campaign.

9. When the opposition parties moved in November 2008 to vote non-confidence in the government after the new Parliament had met for only 13 days, the Prime Minister requested and received a prorogation of Parliament by the Governor General. In December 2009, she again granted his request for a prorogation. The effect of the latter prorogation was the dissolution of a Parliamentary committee examining the controversial treatment of detainees by the Canadian Armed Forces in Afghanistan. "The Canadian Parliament is more dysfunctional than any of the other Westminster Parliaments . . . in Australia, New Zealand, the U.K. and Scotland," according to Robert Hazell, the director of the Constitution Unit at the University College London. "No other Parliament has been prorogued in recent times to rescue the government from a political difficulty."⁹⁹ In Canada, this occurred twice in less than 13 months between 2008 and 2009.

10. Two weeks after the writs were issued for the September 2008 election, a self-defined "citizens advocacy" group, Democracy Watch, filed a case in the Federal Court of Canada that asked it to quash the Prime Minister's advice on dissolution and to declare the election contrary to the new *Elections Act*. Democracy Watch argued that the election had violated the right of Canadian citizens to fair elections as guaranteed by the constitutionally entrenched *Canadian Charter of Rights and Freedoms*. The organization argued that the fixed election date law, in the absence of a vote of non-confidence, prohibited the Prime Minister's request of the Governor General for Parliament's dissolution and that the law had established a constitutional convention. The judge disagreed and wrote, "It is the court's conclusion that votes of [no confidence] are political in nature and lack legal aspects," as there is no narrow or legal definition of the loss of confidence in a government. Had he ruled otherwise, a Prime Minister could be challenged in court to determine if he had truly lost the confidence of the House of Commons. "Similarly," wrote the judge, "a court would be able to force the Prime Minister to dissolve Parliament, effectively dictating to the Governor-General to exercise his or her discretion." Democracy Watch, which lost the case at trial and on appeal at the Federal Court of Appeal,¹⁰⁰ has indicated it will seek to appeal the decision at the Supreme Court of Canada.¹⁰¹

5 August 2010

⁹⁹ Richard Foot, "Only in Canada: Harper's Prorogation is a Canadian Thing," *National Post*, January 17, 2010.

¹⁰⁰ Federal Court, Ottawa, September 17, 2009, Docket: T-1500-08

<http://www.dwatch.ca/camp/ReasonsForJudgment-Sep17-09.pdf>

¹⁰¹ Democracy Watch, "Voter Rights Campaign, Summary of Fixed Election Date Court Case," http://www.dwatch.ca/camp/Fixed_Election_Court_Case.html

Memorandum by Raymond Youngs, Senior lecturer, Law School, Kingston University (FTP 38)

Summary

The German Constitution provides a possible model for greater flexibility in a requirement for fixed term parliaments. It allows for governments to ask for a vote of confidence with the intention of suffering a defeat and so ensuring a dissolution of Parliament. This is only permissible when the government finds itself unable to act, and this is an issue which can form the subject-matter of a court challenge. However, if the German model is followed, the court will show considerable restraint on political matters. The model ensures that a government can achieve an early dissolution to avoid paralysis, but the principle of fixed term parliaments is nevertheless maintained.

Submission

1. I am a senior lecturer at Kingston University and the author of a sourcebook on German law and textbook on English French and German comparative law. I have written a number of articles on themes connected with German law, and translated cases and other German law material (appearing on the website of the Institute of Transnational Law of the University of Texas. I was employed by the Law Commission between 2002 and 2005. The purpose of my submission is to draw attention to the way in which German constitutional law deals with the issue of fixed term parliaments.

2. The relevant provision of the German Basic Law (Grundgesetz) states (translation of Basic Law articles in this submission are mine):

Article 39

1 The Federal Parliament is elected for four years subject to the following provisions. Its electoral life ends with the meeting of a new Federal Parliament. The new elections must take place 46 months at the earliest and 48 months at the latest after the beginning of its electoral life. In the case of a dissolution of the Federal Parliament, the new election must take place within 60 days...

A little flexibility is therefore given as to the actual date of the election.

3. Normally the Federal Parliament takes decisions by a simple majority.

Article 42

1 ...

2 For a decision of the Federal Parliament a majority of votes given is necessary, insofar as this Basic Law does not provide otherwise...

4. However, the Basic Law is entrenched so that (subject to an exception not relevant here) its provisions can only be changed by a super-majority.

Article 79

1 The Basic Law can only be changed by a statute which expressly alters or adds to the wording of the Basic Law...

2 Such a statute needs agreement of two-thirds of the members of the Federal Parliament and two-thirds of the votes of the Federal Council...

5. The effect of votes of no confidence is particularly interesting, as they have the effect of interrupting the four year term. First it is necessary to mention how the Chancellor is appointed and how his tenure will normally end.

Article 63

1 The Federal Chancellor is chosen on the proposal of the Federal President by the Federal Parliament without discussion.

2 The person will be chosen who receives the votes of the majority of the members of the Federal Parliament. The person chosen is to be appointed by the Federal President.

3 If the person proposed is not appointed, the Federal Parliament can choose a Federal Chancellor within 14 days after the ballot with more than half of its members.

4 If an election does not take place within this period, a new ballot will take place without delay, in which the person will be chosen who receives the most votes. If the person chosen receives the votes of the majority of the members of the Federal Parliament, the Federal President must appoint him within seven days after the election. If the person chosen does not attain this majority, the Federal President must within seven days either appoint him or dissolve the Federal Parliament.

Article 69

1 ...

2 The office of the Federal Chancellor... ends... with the meeting of a new Federal Parliament...

3 At the request of the Federal President the Federal Chancellor... is obliged to continue to carry on business until the appointment of his successor.

6. Votes of no confidence in the Chancellor are possible, but only if a successor is simultaneously nominated. This requirement was inserted in order to avoid the paralysis which occurred during the Weimar Republic when a Chancellor was dismissed but no successor could be found.

Article 67

1 The Federal Parliament can only express absence of confidence in the Federal Chancellor by choosing a successor by the majority of its members and asking the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person chosen.

2 There must be 48 hours between the application and the election.

7. However, it is also possible for the Chancellor to force the issue by seeking a vote of confidence himself.

Article 68

1 If an application by the Federal Chancellor for an expression of confidence in himself does not obtain the agreement of the majority of the members of the Federal Parliament, the Federal President can dissolve the Federal Parliament on the proposal of the Federal Chancellor within 21 days. The right of dissolution ceases as soon as the Federal Parliament chooses another Federal Chancellor by the majority of its members.

2 There must be 48 hours between the application and the vote.

8. It is this last provision which is most interesting, as it is potentially a means whereby a Chancellor could engineer an early election before the fixed term expires. Chancellor

Schröder, who had recently suffered setbacks in his legislative programme, asked for such an expression of confidence in 2005 with the intention of losing the ensuing vote. He wanted an early election, which he hoped to win with an increased majority, so that he could pursue his policy of reform, rather than continuing for the remainder of his term as a “lame duck” Chancellor. In the event, of course, following the no confidence vote, he failed to win the election and was replaced by Chancellor Merckel and a coalition government.

9. Before the election, however, the President's decisions to dissolve the Federal Parliament and to call an election were unsuccessfully challenged by two MPs in the Constitutional Court. I have translated the Court's decision in this case and it appears in the Kingston University Research Repository. The link is set out below.

<http://eprints.kingston.ac.uk/5190/>

10. The striking features about the case are:

- (a) that the Court considered that it was necessary not only to assess whether the formal requirements of Art 68 were fulfilled but also its purpose ie that there was a government capable of action; and therefore the use of the article to secure dissolution would only be justified if the government had lost the capability to act, and
- (b) the Court's restraint on political issues. It did not insist on evidence of the government's inability to act and it accepted the decisions of the Chancellor, the Parliament and the President as indications that the Basic Law requirements had been fulfilled.

11. I think that the German constitutional experience demonstrates that the ability of a government to secure a dissolution by initiating a vote of no confidence in itself is a useful “safety-valve”. It ensures that the country is not saddled for any significant period with a government which has lost the ability to carry through its legislative programme because of decline in support for it in the House of Commons. This may not be apparent to the opposition, or the opposition may have no motivation for initiating a vote of no confidence if it perceives its support in the country as insufficient to win an election. The requirement of a super-majority for a government-initiated vote provides no solution for this kind of dilemma.

12. But it should also be explicitly or implicitly a requirement that such a vote can only be used for its proper purpose. This also implies that court challenge should be a possibility. But there is no reason to think that such a challenge could not be dealt with expeditiously, and with the same sort of sensitivity that the German Constitutional Court have shown to political issues: deference to the executive and the legislature except where there is clear evidence of bad faith.

13. Entrenchment of legislation prescribing fixed term parliaments in the way that the Basic Law is entrenched is of course impossible in the UK. But there is no reason why the legislation should not be entrenched in the same manner as the current requirement for a five year maximum term i.e. by a provision that the procedure under the Parliament Acts 1911 and 1949 cannot be used to remove it. This would ensure that the House of Commons alone could not repeal the necessary legislation.

16 September 2010