



Law Society  
of Scotland

## Second Reading Briefing

# The Dissolution and Calling of Parliament Bill

November 2021



## Introduction

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

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

Our Constitutional Law sub-committee welcomes the opportunity to comment on the Dissolution and Calling of Parliament bill.

We commend the Government for having conducted pre-legislative scrutiny by publishing the draft Fixed-term Parliaments Act 2011 (Repeal) bill (CP 332) and we encourage more pre-legislative scrutiny on future bills.

We responded to the inquiry by the Joint Committee on the draft bill in January 2021: <https://www.lawscot.org.uk/media/370159/04012021-joint-select-committee-inquiry-fixed-term-parliaments.pdf> . We also responded to the Public Administration and Constitutional Affairs select committee inquiry into the Fixed-term Parliaments Act in May 2020. Our response to that inquiry can be accessed [here](#).

In preparing this briefing we have also considered the draft Fixed-term Parliaments Act 2011 (Repeal) bill (CP 332) (Draft FtPA), the House of Lords Select Committee on the Constitution report entitled *A Question of Confidence? The Fixed-term Parliaments Act 2011* (HL paper 122) and the Joint Committee Report on the draft Fixed-term Parliaments Act 2011 (Repeal) bill (CP 332) and the Government's response.

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

## General Comments

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

## Prior to the Fixed-term Parliaments Act 2011

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

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

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

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

The Act substantially attained this objective. Section 1 provides:

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

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

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

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

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

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

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

The Act was designed by the Conservative/Liberal-Democrat Coalition Government and has operated for nearly 10 years covering 3 general elections.

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

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

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

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

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

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

### **Dissolution and Calling of Parliament bill specific comments.**

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

#### **Our comment**

This clause will achieve the policy intention of repealing the FtPA. There has been a debate about the effect of that repeal. Prior to the FtPA, the dissolution of the Parliament was a personal prerogative power exercised by the Monarch at the request of the Prime Minister.

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

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

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

The House of Lords Select Committee on the Constitution thought that the legal position was arguable and therefore recommended that the repeal of the FTPA was not sufficient and that its provisions should be replaced by new provisions - see the 12th Report 2019-2020 "A Question of Confidence? The Fixed Term Parliaments Act.". Clause 2 seeks to achieve that objective.

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

### **Our comment**

Clause 2(1) provides that the “*powers relating to the dissolution of Parliament and calling of a new Parliament that were exercisable by virtue of Her Majesty’s prerogative*” immediately before the commencement of the FtPA, “*are exercisable again*” as if the FtPA had “*never been enacted*”.

This express provision is intended to remove any legal uncertainty as to whether the prerogative powers to dissolve Parliament revive when the FtPA is repealed. They revive the same powers which were exercisable by virtue of the prerogative, but it is less clear whether they are revived as *prerogative* powers. This is because it could be argued that the effect of section 2(1) is that the source of those powers is no longer the prerogative at common law but section 2(1) itself and that therefore they are statutory powers. However, the substance of the prior prerogative power is revived by this clause and accordingly there may not be any difference in practice. This is noted by the Joint Committee in its report at paragraph 124 “*Any legally binding decision to dissolve Parliament and/or to summon a new one would be taken by the Monarch. She would issue a proclamation to that effect. The decision would not, as such, be taken by the Prime Minister.*”.

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

*Clause 3 Non-justiciability of revived prerogative powers*

Clause 3 provides:

*A court or tribunal may not question—*

- (a) the exercise or purported exercise of the powers referred to in section 2,*
- (b) any decision or purported decision relating to those powers, or*
- (c) the limits or extent of those powers.*

### **Our comment**

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

Paragraph 21 of the Explanatory Notes to bill states that this provision is for the avoidance of any doubt that may arise and to preserve the long standing and generally accepted position. This in effect confirms:

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

However, it goes further than “the pre-2011 status quo ante” because, as paragraph 23 of the Explanatory Notes acknowledges the purpose of clause 3(c) is to ‘to address the distinction drawn by the Supreme Court in [*Miller I*] ... as regards the court’s role in reviewing the scope of a prerogative power, as opposed to its exercise’.

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

The Joint Committee on the Draft Repeal bill stated in its report at para 156: *The Law Society of Scotland noted the Government’s stated intention of returning to the status quo ante was belied by the inclusion of the ouster clause and highlighted the Government’s acceptance of this by the acknowledgement in the Explanatory Notes that the ouster clause was a response to the Miller and Cherry cases.* The Joint Committee noted “that views differ [in the Joint Committee] as to whether the Government’s approach on justiciability is the best one”.

We consider that extending the ouster to “purported” exercise of the section 2 powers or a “purported” decision in relation to those powers may go beyond the bounds of the previous law as expressed in *Council of Civil Service Unions v Minister of State for the Civil Service 1985 AC 374*. We take the view that the inclusion of ‘purported’ appears to be designed to address the decision in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22*, where the absence of the word ‘purported’ was treated as significant by some of the judges. It might also be noted that such an extensive ouster might risk provoking a confrontation between the courts and parliament, given the obiter dicta from some of the judges in *Privacy International* that even a watertight ouster clause would not be effective.

In our uncodified constitution the expectation is that the courts should be able to hold the Government to account under the rule of law. We agree with the concerns expressed by Baroness Hale in the Joint Committee report at paragraph 166:

*Baroness Hale explained the particular concern about the word “purported”:*

*“I completely understand his [Lord Sumption’s] view that the use of the words “or purported” rather look as if it is saying, “Well, even if what we did was not within the power that you have been given by the statute, the courts can’t do anything about it.”*

*“If that is the case, the courts would be very worried about that, because it would mean that the Government—the Prime Minister—had done something that was, at least arguably, not within its powers. Can a Parliament be happy about giving the Executive the power to do something that is not within its powers? The courts are not primarily the people who should be worried about this. Parliament, as the representatives of the people and the law, should be worried about it.”*

This issue was raised in the Second Reading Debate in the House of Commons on the 13 September 2021. In response to a question by Alistair Carmichael MP, the Minister, Chloe Smith MP stated:

*“This has been included to take account of previous judicial decisions—in particular the cases of *Anisminic Ltd v. the Foreign Compensation Commission 1969*, and *Privacy International v. the Investigatory Powers Tribunal 2019*. In the latter, the expectation was expressed that the drafting legislation would have regard to the case law and ensure that the drafting made it clear if “purported” decisions—that is decisions that*

would be considered by a court to be invalid—were intended to be outside the jurisdiction of the courts. What clause 3 does is present an opportunity to Parliament to be absolutely clear on whether it thinks that such things should be outside the jurisdiction of the courts. It is the Government's position and presentation that they ought to be...". Later in the debate the Minister expanded on the Government's reasoning for including purported decisions in the ouster clause:

*"The decision in front of us is whether purported decisions relating to this area should or should not be included in clause 3. It is our contention that they should be, because we believe that the entire area of dissolution and the calling of Parliament is intended to be outside the jurisdiction of the courts. That is a perfectly legitimate question to put to Parliament. It is for us here in this Chamber to decide on that, and the reason for doing so would be that we think that such decisions are political rather than judicial in their nature. Fundamentally, the check on the exercise of power is for the electorate to decide on rather than the courts"* (Official Report, col 724)

The Government's argument is not persuasive. What is the entire area of dissolution and calling of Parliament? Why does the Government need to include "purported" decisions, that is to say, decisions which exceed Government's powers? Such decisions may contravene the rule of law. How are the electorate able to express a view on the exercise of powers on a day-to-day basis?

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

#### **Our comment**

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

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

Clause 4 provides that, if *"it has not been dissolved earlier, a Parliament dissolves at the beginning of the day that is the fifth anniversary of the day on which it first met"*.

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

However, the period of 5 years is calculated differently under clause 4 than it was under the FtPA. Under the FtPA the period of 5 years is calculated from the date of the previous general election but under clause 4 it is calculated from the first meeting of the Parliament. There is no law as to when the first meeting of the Parliament takes place after a general election although the usual practice is for it to take place on the Wednesday after the general election the previous Thursday.

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

We have no comment to make.

*Clause 6 Extent, commencement and short title.*

### **Our comment**

This bill covers a matter which falls within reserved powers under Schedule 5 of the Scotland Act 1998. Accordingly, there is no need for the Scottish Parliament to grant legislative consent.

### **Lascelles Principles**

The Government's Statement of Dissolution Principles asked for comments upon those principles in connection with the pre-legislative scrutiny. We have added our comments on the Lascelles Principles as submitted to the Joint Committee Inquiry.

### **Our comment**

In addition to the comments upon the Bill, we add that the draft Statement of Dissolution Principles make no mention of the Lascelles Principles.

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

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

Instead, the draft Statement only states that-

"The Sovereign, by convention, is informed by and acts upon the advice of the Prime Minister so long as the Government appears to have the confidence of the House, and the Prime Minister maintains support as the leader of that Government."

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

As Professor Mark Elliot states in his blog, Public law for Everyone, "If the Government really did intend to restore the pre-FTPA position, this would not result in the Prime Minister acquiring an entirely unilateral power to call elections at will. That is so because, under the pre-FTPA arrangements, the Lascelles Principles recognised that the Monarch could refuse to dissolve Parliament in certain circumstances – a point that was also acknowledged in the partial draft of the Cabinet Manual that was published before the 2010 election".



The draft bill does not contain any provision which revives the Lascelles principles. The Cabinet Manual states, “The Prime Minister may request dissolution from the Monarch whether or not Parliament is currently sitting” (paragraph 3) and “Once the Monarch has agreed to a dissolution and the Prime Minister has announced an election there are constraints on the way Government should conduct business” (paragraph 11). The Cabinet Manual is currently subject of an inquiry by the House of Lords Constitution Committee which is exploring whether it needs updating. We suggest that the whole circumstances concerning the Monarch’s involvement in granting or refusing a dissolution should be included in any revised Cabinet Manual.

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

Professor Elliot states “*The statement of principles accompanying the Bill appears to presume that the Queen will dissolve Parliament as a matter of course when the Prime Minister so requests, thus implying an intention, on the part of the Government, not to restore the pre-FTPA position but to usher in a regime under which its latitude is greater than before*”<sup>1</sup>.

It may be asked why the Executive alone should define the principles upon which the Monarch may refuse a Prime Minister’s request to dissolve Parliament? Should not Parliament play a part in determining those principles, given how fundamental their operation may be to the role of Parliament itself?

<sup>1</sup> <https://publiclawforeveryone.com/2020/12/02/repealing-the-fixed-term-parliaments-act/>



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