



THE UNIVERSITY OF  
MELBOURNE

The Clerk of the Constitution Committee  
House of Lords  
London  
SW1A 0PW  
Email: constitution@parliament.uk

24 September 2010

Dear Sir or Madam

**Call for Evidence: Fixed-Term Parliaments**

Thank you for the opportunity to make a submission in relation to your Inquiry into Fixed Term Parliaments.

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.

If you have any questions relating to this submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely

Professor Adrienne Stone  
Director, Centre for Comparative Constitutional Studies

On behalf of:

Professor Simon Evans  
Professor Cheryl Saunders  
Mr John Waugh

## **I. AUSTRALIAN APPROACHES TO FIXED-TERM PARLIAMENTS**

### **1. 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).<sup>1</sup>

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.

### **2. 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.

### **3. 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

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<sup>1</sup> *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.

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.

## **II. 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:

### **1. 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.

### **2. 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.

### **3. 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.

### **4. 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.

### **5. 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.

### **III. 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.

## APPENDIX

### RELEVANT LEGISLATION IN THE AUSTRALIAN STATES

	<b>Legislation governing Term</b>	<b>Legislation Introducing Fixed Term</b>
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)
<b>Three states do not have fixed terms in place:</b>		
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 <sup>st</sup> 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.