Dear Sir/Madam,

Inquiry into Fixed-Term Parliaments

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).

1. 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 November 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 have 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, became the third premier to be installed since the last election and widespread media criticism of the performance of the government.² 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.³ 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’.⁴

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. 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.

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, National Party MP Andrew Fraser voiced concern that it in a hung parliament, it would place too much power in the Independent MPs.

Yours sincerely,

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Centre Director

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1 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 Smith,  


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