

Briefing Note



Fixed Term Parliaments, with a commentary on the Constitution (Fixed Term Parliaments) Amendment Bill 1992

by

Gareth Griffith

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CONTENTS

1.	Introduction	3
2.	Fixed terms and the Memorandum of Agreement	3
3.	Constitution (Fixed Term Parliaments) Special Provisions Act 1991	5
4.	Report of the Joint Select Committee on Fixed Term Parliaments . . .	5
5.	Constitution (Fixed Term Parliaments) Amendment Bill 1992	9
6.	The basic requirements of fixed term legislation	13
7.	Different forms of fixed term Parliaments	14
8.	Arguments for and against fixed term Parliaments	18
9.	Conclusion	21

1. INTRODUCTION

This briefing note looks at the issue of fixed term Parliaments. Its initial focus is on the background to and content of the Constitution (Fixed Term Parliaments) Amendment Bill 1992 (henceforth the Fixed Term Bill 1992) which is to be submitted to the electors in a referendum on 25 March 1995. Under the bill general elections would be held every four years on the fourth Saturday in March, except in the limited circumstances where the Legislative Assembly is able to be dissolved earlier. What is proposed therefore is a qualified fixed term. When the bill was reinstated in the Legislative Council on 21 May 1993, the Minister, Hon JP Hannaford MP, commented in the Second Reading that it would "effect some fundamental changes in the operation of our political system".¹ The most obvious is the restriction the bill would place on the Premier's power to call an election. It has been said that in the Westminster system one of the clearest prerogatives of a Premier or Prime Minister is that of choosing the date of an election.² The system's critics maintain that in practice this power of choosing the election date tends to operate in favour of the Government of the day which, as Professor Colin Howard has said, "is not everyone's idea of democracy".³

At present, maximum four year terms are provided for under the *Constitution Act 1902* (section 7B (1) (b)). This is an entrenched provision. Any bill which might extend the term of the Assembly beyond four years must therefore be submitted to a referendum. As discussed later in this paper, the Fixed Term Bill 1992 is a bill of this sort.

Having considered the particular features of the Fixed Term Bill 1992, the briefing note then discusses the different forms of fixed term legislation, as well as the arguments for and against fixed term Parliaments.

2. FIXED TERMS AND THE MEMORANDUM OF AGREEMENT

In a press release of 4 September 1991 the then Premier, Mr Greiner, announced that the Government had agreed to "adopt fixed four year terms for State Parliament". It noted that a Cabinet discussion paper had suggested that the fourth Saturday in March every four years be set aside for future State elections and, further, that the next election would be scheduled for 25 March

¹ NSWPD, 21 May 1993, p 2555.

² R Jenkins, *Baldwin*, London 1987, p 76.

³ C Howard, "Fixed Term Parliaments" from *Fixed Term Parliaments*, Proceedings of the Third Annual Workshop of the Australian Study of Parliament Group, 1982, edited by AC Thom and A Lynch, p 2.

1995. The Premier added that a referendum would be held on that date for the purpose of entrenching fixed four year terms in the *Constitution Act 1902*, thus ensuring that the proposed fixed term system could not be altered without a further referendum. The announcement made it clear that the fixed term proposal was a key feature of the non-aligned Independents' "Charter of Reform".⁴

It seems the Government did not support the fixed four year term proposal at the outset. The *Sydney Morning Herald* reported on 26 July 1991, "The Government has not endorsed the call for a strictly fixed four-year parliamentary term. Instead...the Government is considering a system similar to that of South Australia and Victoria, where the governments are required to run a minimum of three years".⁵ Likewise, the *Telegraph Mirror* reported on 8 August 1991 that the Premier had said that the Government was "considering a plan for a three-year fixed term with the potential for an election any time in the fourth year".⁶ In the event that view did not prevail.

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 (the Special Provisions Bill 1991 and the Fixed Term Bill 1991 respectively).⁷ Both bills were introduced and read a second time on 31 October 1991 and subsequently referred to a Joint Select Committee for consideration and report. On 25 February 1992 an amended version of the Fixed Term Bill was introduced in to the Legislative Assembly, the Constitution (Fixed Term Parliaments) Amendment Bill 1992 (the Fixed Term Bill 1992).

⁴ Premier of NSW, Press Release, "Fixed four year term announced", 4 September 1991.

⁵ "Reforming the bear pit", *Sydney Morning Herald*, 26 July 1991.

⁶ "Four-year MP terms ruled out", *Telegraph Mirror*, 8 August 1991.

⁷ NSWPD, 31 October 1991, pp 4005-4033.

3. CONSTITUTION (FIXED TERM PARLIAMENTS) SPECIAL PROVISIONS ACT 1991

It was said in the Second Reading Speech that the *Special Provisions Act 1991* deals with "short-term" matters.⁸ In particular, it fixes, except in certain special circumstances (outlined below), 25 March 1995 as the date of the next general election of Members of the Legislative Assembly. It further provides that a referendum on the Fixed Term Bill must be held on or before that date. The Committee reported on the Special Provisions Bill on 3 December 1991 and the Special Provisions Act was assented to on 17 December 1991. The Act provides in section 5 three special circumstances for the early dissolution of the current Legislative Assembly:

- 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.
- If the Legislative Assembly fails to pass a Supply Bill.
- If the date for the election clashed with a Commonwealth election or was inconvenient due to a clash with a holiday period or for some other reason. However, in this circumstance the Legislative Assembly may only be dissolved within 2 months before the current Legislative Assembly is due to expire on 3 March 1995.

4. REPORT OF THE JOINT SELECT COMMITTEE ON FIXED TERM PARLIAMENTS

The Joint Select Committee (the Committee) reported on the Fixed Term Bill in two stages, publishing an Interim Report in March 1992 and a Final Report in September 1992. At the Interim Report stage the Committee's deliberations were based on the Fixed Term Bill 1991. As noted, the Fixed Term Bill 1992 was introduced in to the Legislative Assembly on 25 February 1992. However, the Committee's Final Report states that it addresses concerns relating to the Fixed Term Bill 1991.

The Final Report notes that the Committee was granted an extension of time to consider in more detail some of the disadvantages of the fixed term proposal "in order to see whether or not they could be effectively addressed".⁹ By way of example the Committee referred in its Interim Report to the need for further

⁸ NSWPD, 31 October 1991, p 4039.

⁹ The Joint Select Committee on Fixed Term Parliaments, September 1992, p 183.

research on "the resolution of deadlocks between the two houses, the effect on elections (in terms of both the length of the campaign as well as possible increases in spending) and the effect on both the Governor and the Premier's powers'...". Other issues noted for consideration included:

- (a) the question of defectors and the possible effect of fixed term Parliaments on political parties;
- (b) the effect fixed terms may have on the adversarial nature of Parliament;
- (c) the effect fixed terms may have on the long term ability of a government to set its agenda;
- (d) the impact on both the quality of debate and analysis in the Parliament and the government and the impact on conflict resolution; and
- (e) the effect on "responsible party government", that is, the ability to judge a government and determine if it should continue in light of its performance (efficiency, maladministration, incompetence or excellence).¹⁰

These and other matters were considered in the Final Report, the core of which took the form of extracts from expert evidence sorted under various question headings, with the Committee appending a "summary" to each issue for the purpose of highlighting the points and concerns at stake in the expert evidence.

The Committee's recommendations are set out in Chapter 8 of the Final Report. These fall into the following three categories:

Legislative: Following a suggestion made by Mr Ted Mack, the Committee recommended that a legislative amendment be inserted into the Constitution Act along the lines of a sunset clause. Its operation would be confined to one election period and its purpose was to ensure the impact of fixed terms on the political system of NSW had been analysed fully before making any final amendment to the Constitution Act: "this Committee is concerned that any amendment to the Constitution should be monitored in order to analyse the effect upon the length and cost of elections and the effect on the political party system

¹⁰ The Joint Select Committee on Fixed Term Parliaments, *Interim Report on the Constitution (Fixed Term Parliaments) Amendment Bill 1991*, March 1992, pp 90-91 (henceforth, Interim Report).

prior to fixed term parliament legislation being entrenched in the Constitution". It was further recommended that consideration be given to points (a)-(e) above in this context.

Mention was not made in the Final Report of the possible effect fixed terms might have on the powers of the Governor. That issue received considerable attention in the expert evidence submitted to the Committee. However, by the time the Final Report was released in September 1992 certain concerns expressed by Professor Winterton and others in regard to the Governor's powers had been addressed in the Fixed Term Bill 1992, by an amendment to proposed subsection 24B (5) and, more particularly, by the insertion of subsection 24B (6).¹¹ The latter is based on section 7 of the *Special Provisions Act 1991*; it requires the Governor, when deciding whether to dissolve the Legislative Assembly, to consider whether a viable alternative Government can be formed. That section was itself a product of the Committee's recommendations on the short-term Special Provisions Bill 1991. In particular, it was recommended that the bill should be amended to provide explicitly for a "baton change". The Committee explained, "The effect of such a provision would be to preclude the Governor from dissolving parliament after a no-confidence motion in the Government if the Legislative Assembly had passed a motion of confidence 'in an alternative Government in which a named person would be Premier'.¹² The Committee stressed that the test should be not simply whether there is an alternative Government but whether there is an alternative **stable** Government. In the event, both section 7 of the *Special Provisions Act 1991* and proposed subsection 24B (6) of the Fixed Term Bill 1992 refer to a "**viable** alternative Government" (emphasis added). The Committee was of the view that in practice current law and convention would already provide for an orderly "baton-change" in most situations. It said it did not favour any proposal which would have the effect "of removing the power of the Governor in exceptional circumstances to send the parliament to the people" and argued that the proposal set out above had the advantage of preserving

¹¹ Proposed subsection 24B (5) is discussed below under the heading, "Constitution (Fixed Term Parliaments) Amendment Bill 1992". Some residual concern regarding proposed subsection 24B (5) remained in the expert evidence to the Committee, whereas proposed subsection 24B (6) seems to have met with more general approval. Perhaps the reservations about proposed section 24B (5) reflect the difficulties inherent in drafting any provision which deals with the Governor's reserve powers in positive terms.

¹² The Joint Select Committee on Fixed Term Parliaments, *Report of the Joint Select Committee Upon the Constitution (Fixed Term Parliaments) Special Provisions Bill 1991*, December 1991, p 66.

the "intricate system of checks and balances" in the Westminster system.¹³

Methodological: The Committee recommended against comparison with the United States, commenting "there are disparities between the two political systems which are too wide to allow any meaningful comparisons to be drawn".

Deliberative: The Committee recommended that "consideration be given by the Parliament to the disadvantages of fixed term parliaments as highlighted in this report".

In the course of the Second Reading debate on the Fixed Term Bill 1992 on 17 November 1992 the Shadow Attorney-General, Hon P Whelan MP, cited the Committee's recommendations in support of his own "misgivings" in relation to the bill. Nonetheless, he went on to say that the "Opposition agrees that the bill is timely, and we will support it".¹⁴ When the same bill was reinstated in the Legislative Council on 21 May 1993, the Minister, Hon JP Hannaford MP, noted that the Committee "expressed some reservations about the appropriateness of having a fixed four-year parliamentary term in a Westminster system of government such as we have in this State". The Minister added, "The Government has taken the view that, despite these reservations, the people of this State should be given an opportunity to express their view on this issue".¹⁵ In the event the Fixed Term Bill 1992 passed through both Houses with only one amendment, that is, the insertion at the end of proposed subsection 24B (3), "This subsection does not apply to a Bill which appropriates revenue or monies for the Legislature only". When introducing the motion the Member for the South Coast explained that its purpose was to provide for the independence of Parliament, stating "the question of a separate appropriation for the Parliament is vital to its independence from the Executive Government".¹⁶

¹³ *ibid*, p 67.

¹⁴ NSWPD, 17 November 1992, p 9023.

¹⁵ NSWPD, 21 May 1993, p 2555.

¹⁶ NSWPD, 17 November 1992, p 9039.

5. CONSTITUTION (FIXED TERM PARLIAMENTS) AMENDMENT BILL 1992

The Second Reading Speech for the Fixed Term Bill 1991 described the proposed legislation as "the long-term bill", its purpose being to entrench fixed four-year terms for the future.¹⁷ The long title for the Fixed Term Bill 1992 reads, "An Act to require the Parliament of New South Wales to serve full 4-year terms and to prevent politicians calling early general elections or changing these new constitutional rules without a further referendum".¹⁸

Under the 1992 bill elections would be held on the fourth Saturday in March every four years. Clause 24 (1) of the bill provides that the Legislative Assembly shall, unless sooner dissolved under section 24B, expire on the Friday before the first Saturday in March in the fourth year after the previous general election. Clause 24A then provides two alternatives for the date of the election itself:

- (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.

The existing discretion of the Governor under section 10 of the *Constitution Act 1902* to dissolve the Legislative Assembly at any time and issue writs for an election would be replaced by a power to dissolve only in special circumstances. For this purpose the words "and dissolve the said Assembly" would be omitted from section 10. The circumstances in which the Legislative Assembly may be dissolved by the Governor by proclamation are set out in subclauses 24B (2), (3) and (4). In substance these are identical to the special circumstances for the early dissolution of the current Legislative Assembly under the *Special Provisions Act 1991*:

- 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.

¹⁷ NSWPD, 31 October 1991, p 4039.

¹⁸ The referendum question in relation to the Fixed Term Bill 1992 will be in this form.

- If the Legislative Assembly fails to pass a Supply Bill.¹⁹
- Within 2 months before the Legislative Assembly is due to expire if the general election would otherwise clash with a Commonwealth election or was inconvenient due to a clash with a holiday period or for some other reason.

Also consistent with the approach adopted in the *Special Provisions Act 1991*, subclause 24B (5) of the Fixed Term Bill 1992 preserves the Governor's power to dissolve the Legislative Assembly in accordance with established constitutional conventions, "in circumstances other than those specified in subsections (2)-(4), despite any advice of the Premier or Executive Council". The proposed subclause is in fact modelled on section 6 of the *Special Provisions Act 1991*. The Committee received considerable expert evidence on proposed subsection 24B (5), notably from Professor Winterton and Professor Blackshield. Professor Blackshield, in his written submission, took issue with the phrase "despite any advice of the Premier or the Executive Council". In his view it contemplates "too directly, and with too much equanimity, the possibility that the Governor might act contrary to advice. Even when the 'reserved powers' come into play, I am not sure they permit the Governor to act contrary to advice, at any rate not if the advice is itself constitutionally given. And even if they do permit this, I would feel some discomfort about saying so".²⁰ The concern here seems to be that the provision might codify and possibly strengthen the controversial reserved power to force a dissolution of Parliament. Professor Winterton explained that the provision was designed to "give the Governor the power to dissolve against the advice of the Government", but added that that was "virtually an obsolete power": "The only occasion it could ever arise nowadays would be in a situation like 1975". Professor Winterton pointed out that neither the fixed term legislation in Victoria and South Australia had a corresponding provision and that most of the texts "basically say that the forced dissolution is obsolete. It is really only the consequence of a dismissal". He went on to explain that "when Premier Lang was dismissed, because he had the majority in the House and the Premier put in by the Governor did not, obviously an election followed so it was a forced dissolution in that sense but it was a consequence of dismissal".²¹ The further comment has been made that this reserve power could only be exercised if the Government embarked on a "course of action involving the commission of a significant illegality, such as a breach of a Commonwealth law" and despite court orders to the contrary the Government persisted in this

¹⁹ As noted, clause 24B (3) would "not apply to a Bill which appropriates revenue or moneys for the Legislature only".

²⁰ Interim Report, p 5.

²¹ *ibid*, pp 50-51.

course: "In these exceptional circumstances the Governor may be justified in dismissing his Ministers and dissolving the Assembly, but only where an alternative Government cannot obtain the confidence of the Lower House".²² The range of views on this matter suggest the difficulties involved. By way of a general guide, the following is a useful statement on the power to force a dissolution, applying as it does in this truncated form with equal force to NSW as to the situation under the Commonwealth Constitution:

Existing conventions would only make that course available where the government is acting illegally... A government would also have to be dismissed if it lost the confidence of the lower House and refused to advise a dissolution or resign; however, the Governor-General would be bound to appoint as Prime Minister the person most likely to obtain the confidence of the House and must accept that person's advice as to the need for a dissolution (although if no one was able to obtain the confidence of the lower House the Governor-General could probably appoint a Prime Minister who was prepared to advise a dissolution).²³

As noted, clause 24B (6) would require the Governor, when deciding whether to dissolve the Legislative Assembly, either in accordance with a constitutional convention or under subclauses 24B (2)-(4), to consider "whether a viable alternative Government can be formed without a dissolution". This is the "baton-change" provision which was discussed above.

The question can be posed as to whether there is a legal requirement for the Fixed Term Bill 1992 to be submitted to a referendum.²⁴ This can be

²² T Robertson, "Memorandum of advice on the fixed terms legislation", attached to - Richard Jones MP, Media Release, "No early election", 24 September 1993. The advice was specifically in regard to the *Special Provisions Act 1991* but it would seem to apply equally to the Fixed Term Bill 1992.

²³ The Report of the Republic Advisory Committee, *An Australian Republic: The Options, Volume 2 - The Appendices*, Commonwealth of Australia 1993, p 264.

²⁴ The requirement to hold a referendum at the forthcoming general election in relation to the Fixed Term Bill 1992 is provided for under section 10 of the *Special Provisions Act 1991*. That section amended the *Constitution Further Amendment (Referendum) Act 1930* by inserting section 7 (3) in the following terms: "The day appointed for the taking of the votes of the electors on the Constitution (Fixed Term Parliaments) Amendment Bill 1991 (or, if that Bill is re-introduced into the Legislative Assembly in 1992 with or without amendment, that Bill) shall be no later than the day named for the taking of the poll in the next

answered in relation to the proposed amendment to subsection 7B (1) (b), in regard to which the issue of the requirement to hold a referendum can be approached in two ways. As noted, the Fixed Terms Bill 1992 would entrench four-year fixed terms in the NSW Constitution. This would be achieved by omitting the present subsection 7B (1) (b) which provides for maximum four year terms. That subsection is already entrenched, which means that any amendment extending the term of the Legislative Assembly beyond four years must be submitted to a referendum. The Fixed Term Bill 1992 is a case in point. This is because the extension of a term of the Legislative Assembly beyond four years could occur under the Fixed Term Bill 1992, that is, where a Parliament is dissolved early due to one of the special circumstances noted above. It is explained that if the Assembly was dissolved in this way, then the general election would be held within 40 days after the issue of the writs for the election. The following general election would then revert to the fourth Saturday in March. Accordingly, the Assembly chosen after the dissolution would have a term generally between 3 years and 2 months and 4 years and 2 months depending on the date of the dissolution. The Committee stated: "As a result of this early election the next election may possibly be longer than a maximum 4 year term that is four years and two months depending on the actual date of the dissolution". The upshot, therefore, is that the Fixed Term Bill 1992 must itself be submitted to a referendum.

In fact a referendum would be required in any event. This is because the whole of section 7B (1) is entrenched, with subsection 7B (1) (a) stating that a Bill that "expressly or impliedly repeals or amends...this section" would have to be approved by the electors. On this basis, too, any amendment to section 7B (1) would need to be approved by the electors.

Specifically, the Fixed Term Bill 1992 would replace section 7B (1) (b) with a provision stating that a referendum would be required to alter the duration of the Legislative Assembly or to change the date of a general election. Fixed term Parliaments would thus be entrenched in the NSW Constitution. As amended section 7B (1) would read:

A Bill that -

- (a) expressly or impliedly repeals or amends section 11B, 26, 27, 28 or 29, the Seventh Schedule or this section; or
- (b) *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*

general election (within the meaning of the Constitution (Fixed Term Parliaments) Special Provisions Act 1991)".

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.

6. THE BASIC REQUIREMENTS OF FIXED TERM LEGISLATION

Having set out the substance of the Fixed Term Bill 1992, it is interesting to note Professor James Crawford's checklist of the basic requirements for successful legislation of this kind. The checklist was part of Professor's Crawford's advice on the Tasmanian *Constitution (Fixed Term Parliament) Special Provisions Act 1992*, which is modelled on its NSW counterpart and which fixes (subject to certain exceptions) 24 February 1996 as the date for the forthcoming Tasmanian general election. 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).
- It 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 limitation 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 Council 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.²⁵ Writing in relation to the Special Provisions Act 1991, Tim Robertson said, "A Member of Parliament whose term of office was truncated by dissolution would

²⁵ TPD (HA), 10 November 1992, p 4753.

plainly have standing to enforce these provisions".²⁶ It seems the same would apply in regard to the Fixed Term Bill 1992.

7. DIFFERENT FORMS OF FIXED TERM PARLIAMENTS

Both the Joint Select Committee on Fixed Term Parliaments and the Constitutional Commission in its 1987 Background Paper on *Fixed Term Parliaments* noted that fixed terms could take different forms. The term could be fixed absolutely (an unqualified fixed term) or fixed subject to certain exceptions (a qualified fixed term). A third option would be to have a maximum term with a qualified fixed term component. Using the Constitutional Commission's Background Paper as a guide, there follows a brief account of the key arguments for and against each of these options.

(i) *Unqualified fixed term*

Under an unqualified fixed term system, the Constitution would specify the exact date on which an election would be held. The Legislative Assembly could not be dissolved earlier whatever the situation in parliament or the wishes of the government. An illustration of the unqualified fixed term system is the USA. There elections are held on firm dates in alternate years (the Tuesday after the first Monday in November in even-numbered years) for all political positions which are due to be filled, not only in the Federal sphere but in 45 of the 50 States. As noted, the Committee discussed the problems involved in comparing the Australian and US political systems. The Constitutional Commission commented in a similar vein, stating that in the US, which does not have a system of responsible government, the executive government is independent of the legislature.

The main advantage of an unqualified fixed term system is that it provides stability and predicability. This contrasts with the present system under which there is often a long period of speculation about when an election will be called. The Commission commented, "This uncertainty may have harmful consequences, not only for government and Parliament but for public administration and the community generally".²⁷ The point is made that the predicability which attaches to fixed terms facilitates long-term planning at the governmental level and that this, in turn, boosts confidence and assists economic planning in the business sector. With unqualified fixed terms the Government would be able to plan the implementation of its policies within a

²⁶ T Robertson, "Memorandum of advice on the fixed terms legislation", p 2.

²⁷ Constitutional Commission, *Background Paper No 13, Fixed Term Parliaments*, 1987, p 7.

clear period; conversely, the Opposition could assess Government policies and formulate its own platform without being preoccupied with the need to prepare for an election on an unknown date.

Further, under an unqualified fixed term system the Government would lose the power to determine when an election will be held, thereby choosing the time most favourable to its own chances of re-election: "Many regard this electoral advantage which governments have as unfair and unnecessary".²⁸

The obvious disadvantage of an unqualified fixed term system is that it lacks flexibility. If a Government lost its majority in the Legislative Assembly, the situation could not be resolved by dissolving the House and holding an election. The Commission said "it is possible to imagine other situations arising which, arguably, could best be dealt with by dissolving the Parliament and holding an early election". British parliamentary history offers the examples of the controversy surrounding the *Reform Act 1832* and the *Parliament Act 1911* as two instances of when early dissolution was obtained so that the great constitutional issues of the day could be resolved, which on both occasions had crystallised into a dispute between the Upper and Lower Houses. On the issue of inflexibility, the point has been made elsewhere that, under the US system: Watergate occurred in June 1972; President Nixon resigned in August 1974 but the people did not get a chance to vote out his successor until November 1976; and President Carter did not take office until January 1977 - four and a half years after Watergate.²⁹

(ii) *Qualified fixed term*

This is the approach proposed under the Fixed Term Bill. It has clear advantages over the inflexible unqualified fixed term system, the disadvantages of which could be overcome by specifying appropriate exceptions to a fixed term rule.³⁰

A system of this kind operates at present in the ACT. Thus, section 10 of the *Australian Capital Territory (Electoral) Act 1988* (Cth) provides for three year fixed terms in which general elections are to be held on the third Saturday in

²⁸ *ibid.*

²⁸ Senator A Lewis, "Fixed Term Parliaments: General Paper", in *Fixed Term Parliaments* edited by AC Thom and A Lynch, Proceedings of the Third Annual Meeting of the Australasian Study of Parliament Group, 1982, p 38.

³⁰ The Constitutional Commission commented that such a scheme has considerable merit, but that "it lacks the flexibility of the present system": *Final Report of the Constitutional Commission*, Vol 1, 1988, p 205.

February. That section is subject to sections 16 and 48 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) which provide for the early dissolution of the Legislative Assembly. Section 16 permits the Governor General to dissolve the Assembly if in his or her opinion it is "incapable of effectively performing its functions" or "is conducting its affairs in a grossly improper manner". Section 48 provides for early dissolution in the pre-election year where a resolution of no confidence is passed in the Chief Minister.

(iii) Maximum term with qualified fixed term component

This was the approach recommended by the Constitutional Commission in relation to elections for the House of Representatives. In its Final Report, the Commission said it had decided to recommend a scheme which "combines the present maximum term system with a qualified minimum term". The proposal was that the House of Representatives should have a maximum term of four years but should not be dissolved within the first three years unless it passes a vote of "no confidence" in the Government and no other Government can be formed from the existing House. The power of the Government to dissolve both Houses in the event of a deadlock would also be restricted to the fourth year. The Commission commented, "We believe that our proposal achieves a sensible balance between competing interests. If implemented, it would ensure longer terms and more stability and predicability than the present system, while allowing for more flexibility than under a fixed four year term".³¹

Against this, it could be argued that as the Government would still be able to choose an election date to suit itself in the fourth year, one of the important advantages of a fixed term would be lost.³²

The Commission acknowledged that its recommendation was influenced by the fact that both Victoria and South Australia have adopted a three year qualified minimum term with a four year maximum for the lower House. The Victorian *Constitution Act 1975* was amended by the *Constitution (Duration of Parliament) Act 1984* for this purpose. In Victoria therefore the Legislative Assembly has a maximum term of four years and cannot be dissolved during the first three years unless:

- a resolution expressing a lack of confidence in the Government is passed by the Assembly;
- the Legislative Council rejects or fails to pass an appropriation bill for ordinary annual services (ie a supply bill) within one month of its

³¹ *Final Report of the Constitutional Commission*, Vol 1, 1988, p 206.

³² Background Paper No 13, op cit, p 10.

transmission from the Assembly; or

- a deadlock has developed between the two Houses over a bill which the Assembly has resolved to be a "Bill of special importance".

The South Australian *Constitution Act 1934* was amended along similar lines by the *Constitution Act Amendment Act 1985*. In this case the exceptions to the three year minimum term are:

- a vote of no confidence by the Assembly;
- defeat of a motion of confidence by the Assembly;
- rejection of a bill of special importance by the Legislative Council; and
- a double dissolution in accordance with section 41 of the Constitution (which provides for the settlement of deadlocks).

In both Victoria and South Australia these exceptions permit but do not require an early election.

In evidence to the Joint Select Committee on Fixed Term Parliaments, Professor Winterton said he approved of the Victorian and South Australian provisions relating to "bills of special importance". He had in mind the problem of dealing with disagreements between the Lower and Upper Houses which he considered "a serious problem with the fixed term Parliament". The matter is not dealt with under the Fixed Term Bill 1992. However, provision is already made for dealing with such disagreements in section 5 of the NSW *Constitution Act 1902*. Thus, Professor Winterton explained that his concern was not in regard to disagreements over Appropriation Bills, as this matter is already dealt with under section 5A of the NSW *Constitution Act 1902*.³³ It is also the case that, under section 5B of the NSW Constitution, disagreements between the Houses over other bills can be settled by means of a referendum. The question that would seem to arise here is whether a Government which lost such a referendum for a bill it considered to be fundamental to its mandate should then have the further option of calling a general election. In relation to issues of this kind, Professor Crawford was mindful of the potential certain provisions could have for placing a Governor in a situation where he or she has to make difficult political judgments. Professor Crawford was sure there cannot be a fixed term system under which the Premier of the day can say

³³ Interim Report, p 61.

simply "We think this is so important we will have an election about it".³⁴ The Victorian Constitution bypasses the difficulty by leaving it to the Assembly to resolve "that the Bill is a Bill of special importance" after it has been rejected by the Council.³⁵ The South Australian Constitution defines "Bill of special importance" to mean, "a Bill declared by resolution of the House of Assembly, passed before, or immediately after, the third reading of the Bill in the House of Assembly, to be a Bill of special importance".³⁶

8. ARGUMENTS FOR AND AGAINST FIXED TERM PARLIAMENTS

The advantages and disadvantages of fixed term Parliaments have been discussed on several occasions. Sometimes the focus has been on certain core issues. For example, the South Australian Attorney General, Hon CJ Sumner MP, set out the case for fixed term legislation in these terms:

The advantages occasioned by a fixed term for the House of Assembly are both numerous and overwhelming... The real advantages of the proposals inherent in this Bill are the removal of the potential for cynicism and opportunism from the decision-making processes that apply to elections. Acute uncertainty very often reigns even from the early life of a new Parliament. Rational planning, in both the private and public sectors, becomes very difficult. Short term *ad hoc* political advantages will not hold sway in the decision to go to the people.³⁷

At other times the approach has been more expansive in nature. Particularly comprehensive is the approach of the Joint Select Committee on Fixed Term Parliaments which commented that "The advantages and disadvantages of fixed term parliaments are numerous and depend on the beliefs, values, ideas and knowledge of the individual making the assessment". A revised version of the

³⁴ Ibid, p 42. It should be noted that Professor's Crawford's evidence was not directed specifically to the subject of "Bills of special importance' but was concerned instead with constructive no confidence motions, that is, the rejection of a bill that the Government regards as being central to its mandate. The question posed by Professor Crawford was whether the system could cope with such contingencies within the framework of the fixed term legislation.

³⁵ Section 66 (1) (b), *Constitution Act 1975* (Vic).

³⁶ Section 28A (5), *Constitution Act 1934* (SA).

³⁷ SAPD (LC), 5 December 1984, p 2138.

approach adopted by the Committee is set out below.³⁸

(i) *The advantages of fixed term Parliaments*

- 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 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.
- 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.
- Minor political participants have more time to effectively campaign and ensure that their political message is publicised.
- 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 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 predicability which attaches to fixed election dates would facilitate economic planning in both the private and public sectors. In this way, fixed terms could boost confidence amongst the business community and beyond.

³⁸ The Joint Select Committee on Fixed Term Parliaments, September 1992, pp 184-186.

(ii) *The disadvantages of fixed term Parliaments*

- 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 result in increased 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 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 promoted and manipulated 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 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 unnecessarily prolonged.

- A vote of confidence by Independents and an Opposition could allow them to call an election at an opportune time. However, this would depend on the Independents and the Opposition having the requisite majority and would, in addition, be subject to the requirement under clause 24B (6) that the Governor is to consider "whether a viable alternative Government can be formed without a dissolution".
- Fixed term parliaments may make politics more "mechanical" by limiting the conflict inherent in the political system. The argument has been put that "The idea seems to be based on a desire to make politics as mechanical as possible and to contain if not limit the conflict in the parliamentary system. But democracy and parliament do not lose from conflict or from the uncertainties which conflict generates".³⁹
- 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.

9. CONCLUSION

The Fixed Term Bill 1992 would effect some fundamental changes in the operation of our political system. The reservations of the Joint Select Committee on Fixed Term Parliaments in regard to the bill have been noted. These crystallised in the recommendation for a sunset clause in the *Constitution Act 1902* in order to ensure full analysis of the impact on the political system in New South Wales prior to the making of any final amendment to the Constitution. The recommendation was not adopted by Parliament.

The bill would introduce qualified fixed terms, as against the unqualified form found in the United States, on one side, or the "maximum term with qualified fixed term component" form found in South Australia and Victoria, on the other. The original preference of the NSW Government for the latter form of fixed term Parliaments legislation has been noted.

Clearly, the arguments for and against fixed term Parliaments in a general sense are many-sided, as are the considerations regarding the different forms such legislation can take. For this reason a particularly cautious approach was adopted by the Australian Constitutional Convention's Sub-Committee on

³⁹ *Fixed Term Parliaments* edited by AC Thom and A Lynch, op cit, p 66.

Terms of the Parliament at Adelaide in 1983. The Sub-Committee reported: "The advantages claimed for a fixed term for the House of Representatives cover a wide range. The usefulness of the fixed term proposal depends partly on which of these advantages is seen to be the primary object to be achieved. Further, some of the alleged disadvantages of the proposal arise from predictions about its long term effects on the system of parliamentary government. The result is that it is difficult to weigh them in the balance with any degree of certainty".⁴⁰

⁴⁰ Proceedings of the Australian Constitutional Convention, Vol 2, Adelaide 1983, p 67.

Index to NSW Parliamentary



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- (A) BACKGROUND PAPER
- (B) BILLS DIGEST
- (C) BRIEFING NOTE
- (D) STATISTICS

(A) BACKGROUND PAPER

TITLE	NUMBER
<i>Sydney's Transport: Contemporary Issues, 1988-1992</i> by John Black and Peter Rimmer	1992/1
<i>Capital Punishment in New South Wales</i> by Catherine Gilbert	1993/1
<i>Women's Refuges</i> by Jaleen Caples	1993/2
<i>Censorship: Law and Administration</i> by Gareth Griffith	1993/3
<i>Lead</i> by Rebekah Jenkin	1993/4
<i>Cannabis: The Contemporary Debate</i> by Gareth Griffith and Rebekah Jenkin	1994/1
<i>NSW Elections 1984 to 1991: A Comparative Analysis</i> by Antony Green	1994/2
<i>Breast Cancer</i> by Rebekah Jenkin	1994/3
<i>Women's Health Policy in Australia</i> by Sharon Rose	1994/4
<i>The Rural Sector: A Changing Economy</i> by John Wilkinson	1994/5
<i>1991 New South Wales Legislative Assembly Election: Estimated Two-Candidate Preferred Results by Polling Place</i> by Antony Green	1994/6

(B) BILLS DIGEST

TITLE	NUMBER
<i>Legal Aid Commission (Amendment) Bill 1994</i> by Gareth Griffith	001/94
<i>Maritime Services (Offshore Boating) Amendment Bill 1994</i> by Sharon Rose	002/94
<i>Gaming and Betting (Race Meetings) Amendment Bill 1994</i> by Sharon Rose	003/94
<i>Lotteries and Art Unions (Amendment) Bill 1994</i> by Gareth Griffith	004/94
<i>Occupational Health and Safety Legislation (Amendment) Bill 1993</i> by Jan Newby	005/94
<i>Workers Compensation Legislation (Miscellaneous Amendments) Bill 1993</i> by Jan Newby	006/94
<i>Property, Stock and Business Agents (Amendment) Bill 1994</i> by John Wilkinson	007/94
<i>Crimes Legislation (Unsworn Evidence) Amendment Bill 1994</i> by Gareth Griffith	008/94
<i>Bush Fires (Amendment) Bill 1994</i> by Rebekah Jenkin	009/94
<i>State Emergency and Rescue Management (Amendment) Bill 1994</i> by Rebekah Jenkin	010/94
<i>Police Service (Complaints) Amendment Bill 1994</i> by Sharon Rose	011/94
<i>Timber Industry (Interim Protection) Amendment Bill</i> by Rebekah Jenkin	012/94
<i>Privacy and Data Protection Bill 1994</i> by Gareth Griffith	013/94
<i>Health Legislation (Miscellaneous Amendments) Bill 1994</i> by Jan Newby	014/94

<i>Retail Leases Bill 1994</i> by Gareth Griffith	015/94
<i>Environmental Planning and Assessment (Amendment) Bill 1994</i> by Rebekah Jenkin	016/94
<i>Mental Health (Amendment) Bill 1994</i> by Sharon Rose	017/94
<i>Crimes Legislation (Dangerous Articles) Amendment Bill 1994</i> by Sharon Rose	018/94
<i>Native Title (New South Wales) Bill 1994</i> by Rebekah Jenkin & Gareth Griffith	019/94
<i>Rural Lands Protection (Amendment) Bill 1994</i> by Rebekah Jenkin	020/94
<i>Motor Accidents (Amendment) Bill 1994</i> by Rebekah Jenkin	021/94
<i>Protected Disclosures Bill 1994</i> by Gareth Griffith	022/94
<i>Film and Video Tape Classification (Amendment) Bill 1994</i> by Gareth Griffith	023/94
<i>Constitution Further Amendment (Referendum) Amendment Bill 1994</i> by John Wilkinson	024/94
<i>Crimes (Detention After Arrest) Amendment Bill 1994</i> by Gareth Griffith	025/94
<i>Courts Legislation (Mediation And Evaluation) Amendment Bill 1994</i> by Rebekah Jenkin	026/94
<i>Criminal Procedure (Indictable Offences) Amendment Bill 1994</i> by Gareth Griffith	027/94
<i>Courts Legislation (Civil Procedure) Amendment Bill 1994</i> by Rebekah Jenkin	028/94
<i>Professional Standards Bill 1994</i> by Vicki Mullen	029/94
<i>Water Board (Corporatisation) Bill 1994</i> by Vicki Mullen	030/94
<i>Traffic (Penalty Defaults) Amendment Bill 1994</i> by Gareth Griffith	031/94
<i>State Bank (Privatisation) Bill 1994</i> by Vicki Mullen	032/94
<i>Tree Plantations (Harvest Security) Bill 1994</i> by Gareth Griffith	033/94
<i>Crimes (Prohibited Material) Amendment Bill 1994</i> by Gareth Griffith	034/94
<i>Community Protection Bill 1994</i> by Gareth Griffith	035/94
<i>Electricity Transmission Authority Bill 1994</i> by Vicki Mullen	036/94
<i>Forestry (Environmental and Fauna Impact Assessment) Bill 1994</i> by Stewart Smith	037/94
<i>Crimes (Dangerous Driving Offences) Amendment Bill 1994</i> and <i>Traffic (Negligent Driving Offences) Amendment Bill 1994</i> by Marie Swain	038/94
<i>Crimes (Home Invasion) Amendment Bill 1994</i> by Gareth Griffith	039/94
<i>Crimes (Threats and Stalking) Amendment Bill 1994</i> by Vicki Mullen	040/94

(C) BRIEFING NOTE

TITLE	NUMBER
<i>National Competition Policy: Report by the Independent Committee of Inquiry (The Hilmer Report)</i> by Jan Newby	001/94
<i>Unsworn Statements of Accused Persons: The Case For and Against Abolition</i> by Gareth Griffith	002/94
<i>Female Genital Mutilation</i> by Sharon Rose	003/94
<i>Victims Compensation: Summary of the Review of the Victims Compensation Act (The Brahe Report)</i> by Gareth Griffith	004/94

<i>Gatt Uruguay Round: Summary of the Federal Department of Foreign Affairs and Trade Paper 'Uruguay Round, Outcomes for Australia'</i> by Jan Newby	005/94
<i>Heritage Conservation in NSW: The Legal Position</i> by Rebekah Jenkin	006/94
<i>Fisheries Management in NSW: The Fisheries Management Bill 1994</i> by John Wilkinson	007/94
<i>Bush Fire Control in NSW: Commentary on the Cabinet Committee on Bush Fire Management and Control Interim Report</i> by Rebekah Jenkin	008/94
<i>Vocational Education in NSW: Commentary on the Board of Vocational Education and Training Bill 1994</i> by Sharon Rose	009/94
<i>Commentary on the Building Services Corporation (Amendment) Bill 1994</i> by Sharon Rose	010/94
<i>Irrigation in Southern NSW: The Irrigation Corporations Bill 1994</i> by John Wilkinson	011/94
<i>The Regulation of Agricultural and Veterinary Chemicals: The Agricultural and Veterinary Chemicals (New South Wales) Bill 1994</i> by John Wilkinson	012/94
<i>The Proposed Privatisation of the State Bank of NSW: Background Issues</i> by Jan Newby	013/94
<i>Corporatisation of the Water Board</i> by Sharon Rose	014/94
<i>Sentencing Guidelines and Judicial Discretion</i> by Gareth Griffith	015/94
<i>Rural Assistance Schemes and Programs</i> by John Wilkinson	016/94
<i>Resource Security</i> by Rebekah Jenkin	017/94
<i>The Independent Commission Against Corruption: An Overview</i> by Marie Swain	018/94
<i>The Habitual Criminals Act 1957: A Commentary on Issues Relating to Persistent and Dangerous Offenders</i> by Gareth Griffith	019/94
<i>Drought in New South Wales</i> by John Wilkinson	020/94
<i>The Olympic Games: Past History and Present Expectations</i> by John Wilkinson	021/94
<i>Commentary on the Proposal to Provide for a Balanced Budget in the New South Wales Constitution</i> by Gareth Griffith	022/94
<i>Reform of Evidence Laws in NSW</i> by Vicki Mullen	023/94
<i>The Outlook for Agricultural Marketing Boards</i> by John Wilkinson	024/94
<i>The Uniform Consumer Credit Code</i> by Marie Swain	025/94
<i>Stock Disease in New South Wales: The Stock Diseases (Amendment) Bill 1994</i> by John Wilkinson	026/94
<i>Federal-State Borrowing Arrangements in Australia: The Financial Agreement Bill 1994</i> by John Wilkinson	027/94
<i>Reform of Defamation Law in New South Wales</i> by Vicki Mullen	028/94
<i>Waste Management in the Sydney Metropolitan Area</i> by Stewart Smith	029/94
<i>Sentence Indication Hearings Pilot Scheme</i> by Marie Swain	030/94
<i>The Western Division of New South Wales: The Western Lands (Land Purchase) Amendment Bill 1994</i> by John Wilkinson	031/94
<i>Residential Tenancies in Caravan Parks and Manufactured Home Estates</i> by Gareth Griffith	032/94
<i>Stormwater Quality and Urban Living</i> by Stewart Smith	033/94

<i>Commentary on the Children (Parental Responsibility) Bill 1994 and Summary Offences and Other Legislation (Graffiti) Amendment Bill 1994</i> by Marie Swain	034/94
<i>Maritime Services in NSW: Issues for Reform</i> by Vicki Mullen	001/95
<i>Water Resources and Water Strategies</i> by John Wilkinson	002/95
<i>Fixed Term Parliaments, with a commentary on the Constitution (Fixed Term Parliaments) Amendment Bill 1992</i> by Gareth Griffith	003/95

(D) STATISTICS

TITLE	NUMBER
<i>Quarterly Statistical Bulletin</i> by Jan Newby	Vol 1 No 1 October 1993 Vol 1 No 2 March 1994 Vol 1 No 3 May 1994 Vol 1 No 4 August 1994 Vol 2 No 1 November 1994

TITLE

Electorate Profile - Parramatta No 001/94	by Jan Newby
Electorate Profile - Maitland No 002/94	by Jan Newby
Electorate Profile - Manly No 003/94	by Jan Newby
Electorate Profile - Coogee No 004/94	by Jan Newby
Electorate Profile - Cabramatta No 005/94	by Jan Newby
Electorate Profile - Camden No 006/94	by Jan Newby
Electorate Profile - Badgerys Creek No 007/94	by Jan Newby
Electorate Profile - Blue Mountains No 008/94	by Jan Newby
Electorate Profile - Gladesville No 009/94	by Jan Newby
Electorate Profile - Sutherland No 010/94	by Jan Newby
Electorate Profile - Murwillumbah No 001/95	by Jan Newby