



Constitutional Reform Unit

Sydney Law School

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The Recall and Citizens' Initiated Elections

Options for New South Wales

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EXECUTIVE SUMMARY

The NSW O'Farrell Government, when in Opposition, made an election promise that it would ask a panel of constitutional experts to consider whether a system for the recall of Members of Parliament should be implemented in New South Wales. It has met that promise by establishing a panel which is to report on the matter by 30 September 2011.

This report by the Constitutional Reform Unit of Sydney Law School is intended to aid the Panel in its work. The report neither advocates nor opposes a system of recall. Instead, it sets out the history of recall (see Chapter 1) and its use in other countries (see Chapters 2 and 3) and then analyses how it might be implemented within the constitutional system of New South Wales and the types of potential problems that would need to be addressed in doing so (Chapters 4-5).

When the recall proposal for New South Wales was first raised in 2009, reference was made to the existing use of recall in the United States and British Columbia and the proposal to implement it in the United Kingdom (see Chapter 2). In these jurisdictions, what is meant by recall is the use of a petition to initiate a mid-term election at which a member of the legislature may be recalled from office by his or her constituents and replaced. In some jurisdictions members of Parliament can only be recalled because of wrong-doing, but in others recall can occur for any reason at all, such as supporting a tax rise or increasing the salaries of politicians. Recall in these countries is directed at individual members and does not involve the holding of an early general election.

The notion of a citizens' initiated early election is quite different. In practice, it is extremely rare (see Chapter 3). It is theoretically possible in Switzerland at the cantonal level, but it has not been exercised in centuries and is regarded as obsolete. In Germany, such a system existed during the Weimar Republic after World War I at the State and local levels. It was most commonly used by the Nazis and the Communists, sometimes in league with each other, as a means of overthrowing governments and causing political instability in the 1920s and early 1930s. The irony of these parties using a mechanism of democracy to overthrow democratic governments was not lost on the commentators at the time. In Japan, the Americans introduced a form of citizens' initiated elections at the local government level after World War II as a means of strengthening local government and reducing the possibility of a monolithic national government emerging in the future. The system still operates. In 2010 the local assembly of Nagoya was recalled at the initiative of its own mayor.

If a system of recall is to be introduced in New South Wales, the first consideration should be what it is intended to achieve. If it is intended to allow the removal of a member who has committed serious wrongdoing, as proposed in the United Kingdom, then consideration should be given to improving existing procedures for the disqualification and expulsion of members and the jurisdiction of the Independent Commission Against Corruption. The recall of members simply because their constituents no longer approve of how they vote, is a more problematic issue. It assumes that MPs are simply agents of their constituents and have no greater responsibility to the State or the country. Such a mechanism would be difficult to marry with the existing system of responsible government.

However, it appears that what is intended by the O'Farrell Government is the establishment of a means of holding an early election where a government has lost support well before the end of its fixed four year term. If so, other options could also be considered, such as a maximum four year term with a minimum three year term, so that an election could be held at any time in the final

year. Another alternative would be to confer a power on the Houses to dissolve themselves. Both, however, would rely on the support of the government for an early election, which is unlikely if it is unpopular.

If a mechanism for citizens' initiated elections were to be introduced, the initial question would be whether this would just involve the dissolution of the Legislative Assembly, or whether it would also involve the election of half of the Legislative Council, or indeed the whole of the Legislative Council (i.e. a double dissolution)? A second question would be whether the petition itself should initiate the early election, or whether it should simply initiate a vote upon whether an early election should be held, which if successful would be followed by an early general election? Issues arise here about the expense of holding two elections to determine the matter and the democratic legitimacy of the use of a petition to overturn a democratically elected government and initiate a new election.

Other issues include the potential for wealthy corporations or individuals effectively to 'buy' a fresh election by paying professional signature gatherers to meet the petition requirements. Consideration would need to be given to ways in which the influence of money could be diminished while the genuine will of voters would be respected.

Another concern is the potential destabilisation of governments by petitions being initiated every time a government acts in a manner that is unpopular but necessary for the benefit of the State. Four year terms were introduced to allow governments space to govern and take long term hard decisions without having to be on an election footing all the time. It would be important to minimise the risk of fencing governments into short-term populism. One approach would be to have a smaller 'window' in which recall petitions could be brought. For example, Governments could be allowed to serve at least half their term before facing the possibility of recall.

Experience has also shown that recall can be used as a political weapon to re-run elections, disrupt government and tie up the financial resources of the governing political parties. Petitions can be initiated simply to damage the reputation of the government, to distract it from pursuing difficult policy issues or to pressure it to drop policies. Again, limiting the window for recall petitions may help. Imposing a significant threshold of signatures for a petition would also be important, as it would need to be significantly more than the number of members of a political party.

Introducing citizens' initiated elections in NSW is a feasible, but radical reform. Much care, however, would need to be taken in casting the proposal to avoid the potential problems discussed in more detail in Chapter 5 below. Any form of recall in New South Wales, be it the recall of individual members or citizens' initiated elections, will require a referendum to amend the NSW Constitution. While referenda in NSW have proved generally to be more successful than their Commonwealth counterparts, an effective case in favour of such a reform will still need to be made to the people to persuade them to vote in favour of it.

CHAPTER 1 – INTRODUCTION

The Recall

The recall is a mechanism by which voters can remove an elected public official before the next scheduled election. It is commonly initiated by a petition calling for the recall of an elected official (who in the United States may be a member of the executive, legislature or judiciary). If the requisite number of signatures is collected from the voters of the relevant constituency and verified, then a poll is initiated at which voters are asked whether the official should be recalled or not. If a majority vote in favour of recall, the election of a substitute official may be achieved either by way of a second question on the recall ballot or by way of a further election.

McCormick has pointed out that there are two critical aspects of the recall:

First of all, the recall is a device linking officials to the people who elected them. You can only recall your own representative, not anybody else's, no matter how angry that person might make you as a voter. Second, you can only recall your elected representative, not the entire government. It is a device that focuses on the elected member.¹

The recall is one element of a system of 'direct democracy', often described collectively as the 'initiative, referendum and recall' and usually accompanied by a system of citizens' initiated referenda.² Australia's system of government, in contrast, is one of 'representative government', where the people are represented through those they elect to Parliament and the direct involvement of the people is confined to elections. The only real variation on that system of representative democracy in Australia is the use of referenda for the purposes of constitutional reform.

There appear to be two distinct rationales for the recall. The first is based upon the theory that elected politicians are merely agents for the electors and must exercise their vote in the legislature in a manner consistent with the will of their constituents.³

¹ Peter McCormick, 'The Recall of Elected Members' (1994) *Canadian Parliamentary Review* 11.

² On the citizens' initiated referendum, see: S Bowler, T Donovan and C Tolbert, *Citizens As Legislators – Direct Democracy in the United States* (Ohio State University Press, 1998); Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999); David Altman, *Direct Democracy Worldwide* (CUP, 2011); and George Williams, 'Distrust of Representative Government: Australian Experiments with Direct Democracy' in M Sawer and G Zappala, *Speaking for the People – Representation in Australian Politics* (MUP, 2001) 80.

³ Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), p 5. While this theory might represent an extreme form of democracy, it has also been adopted by communist countries, following its support by both Marx and Lenin: V Lenin, 'Draft Decree On the Right of Recall' (1917), <http://www.marxists.org/archive/lenin/works/1917/nov/19.htm> [viewed 4 September 2011]. Countries such as Kyrgyzstan, Belarus, Romania, North Korea, China and Cuba have provisions for recall in their Constitutions, although in practice they tend not to be exercised: European Commission of Democracy Through Law, *Report on the Imperative Mandate and Similar Practices*, (Strasbourg, June 2009) pp 3-4:

According to this theory, an elected official should not exercise initiative or leadership or vote in the legislature on the basis of what he or she believes is best for the polity overall. Munro described the position as follows:

Officeholders stand in the same position to the public as the agent does to the principal. They are simply the instruments for carrying on the business of the public, and if they are faithless in performing their duties the law should provide adequate means for getting rid of them and putting others in their places.⁴

This theory is inconsistent with the system of representative government, under which Members of Parliament represent their constituents, but also hold state or national responsibilities.

The second rationale is a more practical one – that there must be a mechanism to remove corrupt, incompetent or lazy officials, especially where they have a fixed term of office and that term extends for a significant period. When this is the basis for recall, the grounds for recall are often described as malfeasance (eg corrupt conduct), misfeasance (eg incompetence) and nonfeasance (eg failure to perform duties). It is this rationale that is more consistent with systems of responsible government than the agency theory above.

History of the recall

The origin of the recall is often traced back to ancient Athens and the use of ‘ostracism’, by which citizens could vote to banish people for a period of 10 years. However, the analogy is a poor one, as ostracism could be used to remove any citizen, not just an elected official, and removal was from the *polis*, rather than simply removing someone from their elected office.

More relevantly, the recall is traced back to English and Swiss sources. It is sometimes seen as a development of the English ‘right of petition’,⁵ or the use of no confidence motions by the House of Commons to recall a Cabinet, or the practice of governments seeking a dissolution of Parliament to allow matters of high political importance to be determined by voters.⁶ Others trace it back to the Swiss system of removing elected officials, which was exercised initially as part of Swiss customary law, but later became a formal part of the law of some Swiss Cantons.⁷

[http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)027-e.pdf](http://www.venice.coe.int/docs/2009/CDL-AD(2009)027-e.pdf) [viewed 15 July 2011]. The Romanian President faced recall in 2007 but survived the vote with increased support: Matt Qvortrup, ‘Hasta La Vista: A Comparative Institutional Analysis of the Recall’ (2011) 47(2) *Representation* 161, 167.

⁴ William Munro, *The Initiative, Referendum and Recall* (1916), p 314.

⁵ H S Gilbertson, ‘The Recall – Its Provisions and Significance’ (Sept, 1912) *Annals of the American Academy of Political and Social Science* 216, 218.

⁶ *Stirtan v Blethen*, 139 P 618, 620 (1914) (Washington Supreme Court). See also: G de Q Walker, *Initiative and Referendum: The People’s Law*, (Centre for Independent Studies, 1987) p 154.

⁷ Margaret Schaffner, *The Recall*, (Madison, Wisconsin, December 1907), p 8.

The recall was introduced into the United States during the colonial period of the seventeenth century. Its first recorded appearance was in the laws of the General Court of the Massachusetts Bay Colony in 1631,⁸ from where it later spread to other colonies.⁹ Article V of the Articles of Confederation of the United States¹⁰ provided for State legislatures to appoint their delegates annually to the US Congress and to recall them and replace them with others if they so chose. However, an equivalent provision, although debated, was not included in the United States Constitution. The concern was that recall might make members of Congress slaves to the wishes of their own electors, unable to rise above them to consider the interests of the nation as a whole.¹¹

It was not until the twentieth century and the rise of the progressive movement that the recall was implemented in a substantial manner in the United States. One of the major differences between the recall as used in the seventeenth and eighteenth centuries and that of the twentieth century was that the earlier version usually involved the recall of officials by other elected bodies, such as a state legislature.¹² The radical difference in the early twentieth century was the introduction of the role of the people in initiating the recall. This recall method was first implemented at the local level in Los Angeles where concern that local politicians were too influenced by big money and businesses, such as the Southern Pacific Railroad, led to its adoption in 1903. It was nicknamed ‘the grand bounce’. The recall was then adopted at the State level in Oregon in 1908, California in 1911 and Arizona, Colorado, Nevada and Washington in 1912. Since the first wave of adoption in the early twentieth century, there has not been a significant take-up of the recall in the rest of the United States, although the idea remains popular in opinion polls.¹³ The recall does not operate at the national level in the United States.

The recall has since been adopted in countries where the constitutional system has been influenced by United States practice, such as Japan, Taiwan and the Philippines at the local government level, and in countries where there has been a perceived need to strengthen democracy and the direct involvement of the people, such as Kyrgyzstan and Venezuela. In countries with a Westminster parliamentary system, recall has been implemented in British Columbia, Canada, and there is a current proposal to implement a limited form of recall in the United Kingdom in response to a scandal over the use of parliamentary expenses.

⁸ Joshua Spivak, ‘California’s Recall – Adoption of the “Grand Bounce” for Elected Officials’, (2004) 81(2) *California History* 20, 22

⁹ See, eg, Constitution of Pennsylvania 1776, art VI. See further: Margaret Schaffner, ‘The Recall’, (August 1909) 18 *Yale Review* 206-9.

¹⁰ This was effectively the first Constitution of the United States which applied from ratification in 1781 until 1788.

¹¹ Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 129.

¹² Joshua Spivak, ‘California’s Recall – Adoption of the “Grand Bounce” for Elected Officials’, (2004) 81(2) *California History* 20, 22.

¹³ Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) pp 132-3.

In Chapter 2, below, the use of recall in the United States is discussed in detail. The position in British Columbia and Venezuela is also considered, as is the proposal to introduce a limited recall system in the United Kingdom.

The Collective Recall – Citizens’ Initiated Elections

In very rare cases, the concept of the recall has been extended to mean the recall of all the Members of an elected assembly or legislature, effectively giving rise to an early general election. Where this occurs it is usually the case that representatives are elected from multi-member electorates by a system of proportional representation, rendering the recall of individual members impractical. It may also be the case that there are fixed term elections and the legislative body has no way, or very limited ways, of causing its own dissolution.

Examples of this occurring are extremely difficult to find. It is, indeed, a rare and radical phenomenon, even in those countries that champion direct democracy. Such a system theoretically exists in Switzerland at the cantonal level, but has not been known to be successfully used since the nineteenth century and is now regarded as obsolete.¹⁴ It also exists, at least in theory, in Liechtenstein. The collective recall was more popularly used at the State and local level in Germany during the Weimar Republic, but became a weapon used for political ends. It is now permitted by a number of German State Constitutions, but has only been utilised once. Finally, the recall of local government bodies is currently permitted in Japan, and although such recalls rarely succeed, the system remains operative there. The operation of collective recall, or citizens’ initiated elections, is discussed below in Chapter 3.

Support for the recall in Australia

The recall has received support in Australia from time to time from both the left and right sides of politics.

Australian Labor Party

The recall was initially favoured by the left side of politics and supported by the Australian Labor Party (‘ALP’) in its early years, particularly before it became a party accustomed to being in government.

The recall was first approved by the ALP federal conference in 1912, but not with a sufficient majority to get it into the General Platform. A motion to introduce the recall was rejected at the 1915 ALP federal conference. Some objected to it, arguing that the recall was a weapon that could be used unfairly ‘at a time of political passion to tear down a man who held honest views on a subject which, on later investigation, might be

¹⁴ Wolf Linder and Isabelle Steffen, ‘Swiss Confederation’ in K Le Roy and C Saunders (eds), *Legislative, Executive and Judicial Governance in Federal Countries*, (McGill-Queen’s University Press, 2006) p 305.

proved right, but it would then be too late to correct the error'.¹⁵ It was again defeated at the ALP federal conference in 1919, where delegates were concerned that the recall would work in the interests of their opponents and that 'men elected by a small majority would be at the mercy of rich men and rich organisations'.¹⁶ In 1921 a different type of recall was proposed – the recall of legislation to which voters objected. The motion was ruled out of order.

The recall was finally included in the ALP General Platform in 1924, although the circumstances of its inclusion and the intention remain unclear. Crisp has concluded that what was meant was the 'recall' of particular pieces of legislation, as proposed in 1921, not the recall of elected Members of Parliament. He stated: 'In the context, there can be no doubt that Recall means recall of legislation, since it is linked immediately with Initiative and Referendum'.¹⁷ This argument in itself is not terribly convincing, because the term 'recall', in the sense of recalling elected officials, is commonly linked with the initiative and the referendum. However, the fact that a resolution was put and defeated at the 1943 ALP federal conference to introduce the recall of Members of Parliament, suggests that the existing reference to 'recall' in the ALP's platform actually meant the recall of legislation. In any case, the recall was removed from the ALP federal party platform in 1963.¹⁸

Griffith and Roth have also recorded that the 'Initiative, Referendum and Recall' formed part of the '1918 State Fighting Platform' of the NSW Branch of the ALP as well as its 1965-6 State Objective and Platform. They noted Crisp's argument that the recall in the context of ALP policies really referred to the recall of legislation rather than Members. However, they also noted that the 1916 resolution at the Conference of the NSW Branch of the ALP referred to the application of the 'Recall to Members of the NSW Parliament'.¹⁹

From a political theory point of view, Crisp argued that 'the Initiative, Referendum and Recall cut right across the basic principles of responsible Cabinet government.' He explained the reluctance of either side of politics to introduce such provisions in the following terms:

Both parties accept the broad traditions of the British parliamentary system: The Initiative, Referendum and Recall would lay both open to destructive harassing by outside pressure groups and extremist forces and occasionally would lay each open to more or less irresponsible harassing by the other. For reasons both of

¹⁵ L F Crisp, *The Australian Federal Labour Party 1901-1951* (Hale & Iremonger, Sydney, 1978) pp 210-11, quoting from Mr P L O'Loughlen.

¹⁶ L F Crisp, *The Australian Federal Labour Party 1901-1951* (Hale & Iremonger, Sydney, 1978) p 212, quoting from conference records.

¹⁷ L F Crisp, *The Australian Federal Labour Party 1901-1951* (Hale & Iremonger, Sydney, 1978) p 212.

¹⁸ G de Q Walker, *Initiative and Referendum: The People's Law*, (Centre for Independent Studies, 1987) pp 154-5.

¹⁹ Gareth Griffith and Lenny Roth, 'Recall Elections', *E-Brief 3/2010*, (NSW Parliamentary Library Research Service, February 2010) p 2.

principle and expediency the Australian parties have long since turned their backs on these devices...²⁰

Liberal Party and National Party

The recall has not traditionally been a part of Liberal or National Party policy. It has, however, recently been proposed in New South Wales.

In a speech to the Sydney Institute on 'Restoring Good Governance' on 12 March 2009, the NSW Opposition Leader, Mr Barry O'Farrell, proposed consideration of the introduction of a recall procedure. Mr O'Farrell stated that although he supported fixed four year terms, he was concerned that they had resulted in governments only focussing on the needs of the community in the last year of the term, rather than the full four years. Mr O'Farrell said:

One option my colleagues and I have considered is the concept of recall. The spectre of being forced to an election by the community could, I believe, provide the stimulus needed for government – even a NSW Labor Government – to perform throughout its term, as well as provide the public with a safeguard against political abuses.

A number of the US states have recall provisions and the mechanism was introduced into the Canadian province of British Columbia in 1995. Recall mechanisms firmly entered the public mind when Californian voters 'recalled' Governor, Gray Davis, in 2003 – an action that led to the entry into US politics of Arnold Schwarzenegger.

The issue of a recall mechanism for NSW, and questions surrounding it, are worthy of consideration in NSW and my colleagues and I am prepared to have that debate.

The public should have a say on issues like:

- whether the community should have the power to bring on an early election in circumstances where a government is failing to fulfil its mandate or purpose;
- whether it is truly democratic for the community to be forced to bear the costs of a government that has become corrupt and inept; and
- the type of recall provision that may best suit NSW's system of government.

But rather than just pose the question, the Liberal/Nationals intend to act. A Liberal/Nationals Government will establish an independent panel of Constitutional experts to advise on the potential for recall elections in NSW. The

²⁰ L F Crisp, *The Australian Federal Labour Party 1901-1951* (Hale & Iremonger, Sydney, 1978) p 213.

expert panel will report on the suitability, effectiveness and model of recall and advise on the best way of achieving Constitutional reform, including putting the question to a referendum at either the 2012 local government or 2015 State election. It's a debate we need to have – and I look forward to hearing the public's views.²¹

On 31 March 2009, Opposition Shadow Minister, Mr Chris Hartcher, further explained that the Opposition would like a panel of constitutional experts to consider the following matters:

We would like to identify the key reasons under which a recall election could be petitioned for New South Wales. We would address the issue of whether the recall system would be confined to individual members or be capable of being extended to the whole of government. We would be interested in looking at the most effective procedure by which the public could pursue a recall election, including the appropriate percentage of voters that would need to petition and the time frame within which signatures would need to be collected. We would look at the process of auditing signatures to establish bona fides, whether the process should be State or self-funded, and the relationship with the New South Wales Constitution and the relationship to local government. We would also be keen to ensure that in any public consultation on the process of recall the community was fully involved. If a final decision were made, we would look to any final decision to go forward to a recall being ratified by the community in a statewide referendum.²²

Mr Andrew Stoner, the State Leader of the National Party, has also supported the use of recall. He has envisaged it being used for the holding of an early general election. He wrote:

A recall mechanism to allow electors to call an early poll would bring the public back to focusing on the quality of the government. By having an option to call an extraordinary election if the circumstances were right, voters would be re-empowered. Similarly, a petition system would involve voters directly regardless of where they live - not just in the marginal seats where elections are won.²³

On 20 June 2011 the O'Farrell Government established an expert panel to inquire into the 'feasibility of establishing a recall procedure in NSW – which would be a trigger for an early general State election'.²⁴ The panel's terms of reference direct it to consider the desirability of amending the *Constitution Act 1902* to permit 'recall elections', being 'early State elections based on a petition by voters'. In doing so the Panel has been asked to consider international practices, including those in Canada and the United States, and

²¹ B O'Farrell, 'Restoring Good Governance', Speech to the Sydney Institute, 12 March 2009.

²² NSW, *Parliamentary Debates*, Legislative Assembly, 31 March 2009, p 14159.

²³ A Stoner, 'In NSW, scandal and fatigue has set in', *Sydney Morning Herald*, 22 December 2009, p 11.

²⁴ Barry O'Farrell, 'Constitutional Panel to Examine Recall Elections for New South Wales': <http://www.nsw.liberal.org.au/news/premier-of-nsw/constitutional-panel-to-examine-recall-elections-for-nsw> [viewed 15 July 2011].

the risks or negative consequences for the accountability, integrity and quality of government. The panel is to report to the Government by 30 September 2011.

The Greens

Ms Lee Rhiannon, when a Greens Member in the NSW Legislative Council, defended the use of fixed four year terms. While being open to the idea of the recall, she queried how it would work in New South Wales. She stated:

It is worth remembering that when fixed terms were adopted in 1991, after much hard work by independent MPs, it was seen as a plus for democracy. It removed the power of one person, the premier, to call the election when it suited his or her political fortunes.

Giving this power back to the premier or allowing the governor to intervene and send an unpopular government to an early poll is not an advance for democracy.

But the debate about building a right of recall into the state constitution has merit. An improvement of the democratic process is needed.²⁵

Ms Rhiannon also noted the problems in the United States with the use of the recall, including the dominance of well-financed lobby groups. She concluded:

The Greens do not rule out building a right of recall into the NSW Constitution. But we need a community-wide debate to answer questions about how to achieve such a change, so the democratic process is advanced but sectional groups do not find ways to exploit the recall provision.

How do we determine the number of voters needed to petition for a recall? Would the new parliament sit for another four years, or just finish off the term of the previous one? Would the upper house be dismissed along with the lower house?²⁶

Other parties

The recall is also currently supported in Australia by the Democratic Labor Party, the Liberal Democratic Party²⁷ and the Australian League of Rights.²⁸

²⁵ Lee Rhiannon, 'Yes, it's time for change - but we need more than a recall provision', *Sydney Morning Herald*, 17 December 2009, p 19.

²⁶ Lee Rhiannon, 'Yes, it's time for change - but we need more than a recall provision', *Sydney Morning Herald*, 17 December 2009, p 19.

²⁷ Liberal Democratic Party, Policies – Democracy: http://www.ldp.org.au/index.php?option=com_content&view=article&id=1145:democracy&catid=101:politics&Itemid=290 [viewed 15 July 2011].

²⁸ The Australian League of Rights, 'Introducing the System of Initiative, Referendum and Recall': <http://www.alor.org/Library/InitiativeReferendumandRecall.htm> [viewed 15 July 2011].

CHAPTER 2 – THE RECALL

The recall in the United States

Nineteen States in the United States use the method of recall elections in relation to state-wide offices.²⁹ Additional States apply it to the county and municipal level of government. While nearly all States that employ the recall use election as a means of determining whether the relevant officer should be recalled, Virginia provides for recall to be initiated by voters but decided by a court in a ‘recall trial’, either by a judge alone or with a jury.³⁰

The recall is used most commonly at the local government level. A 1999 estimate suggested that about 2000 county and municipal officials had been recalled in the United States.³¹ The recall is rarely used at the State-wide level, with only two State Governors ever having been recalled³² and a relatively modest number of Members of State legislatures being successfully recalled.³³ This may be due to the greater difficulty in collecting the requisite number of signatures in State-wide ballots.³⁴ It is much easier to mobilise a small local community to respond to a particular unpopular decision than it is to mobilise a whole State.

Another reason is that terms of office in the United States for the lower House of State legislatures are commonly two years. As the elections are so frequent, there is little

²⁹ Alaska, Arizona, California, Colorado, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington and Wisconsin. Virginia also has a recall process, but provides for a recall trial rather than an election. Source: National Conference of State Legislatures (‘NCSL’): <http://www.ncsl.org/default.aspx?tabid=16581> [viewed 15 July 2011].

³⁰ Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), pp 30-1. See VA code 24.2-233 – Removal of elected and certain appointed officers by courts. Officers may be removed for neglect of duty, misuse of office or incompetence in the performance of duties when that neglect, misuse or incompetence has had a materially adverse effect upon the conduct of the office. Conviction of certain crimes, including drug crimes and hate crimes, can also be grounds for a recall petition and trial.

³¹ Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 128.

³² Governor Gray Davis was recalled in California in 2003 and Governor Lynn Frazier was recalled in North Dakota in 1921. In addition, Governor Evan Mecham of Arizona was impeached in 1987 before a recall vote could be held and Governor Howard Pyle of Arizona had his term end in 1955 before a recall vote could be held.

³³ These include: two in California in 1913-14, one in Oregon in 1935, two in Idaho in 1971, two in Michigan in 1983, one in Oregon in 1985 and another in 1988, two in California in 1995, one in Wisconsin in 1996 and another in 2003. See further: Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 127. In 2011, nine Senators in Wisconsin faced recall elections, with two republican Senators being recalled and the Senate President of Arizona also faces a recall election: NCSL: <http://www.ncsl.org/default.aspx?tabid=16581> [viewed 15 July 2011].

³⁴ For example, there have been 32 recall attempts against Governors of California but only the 2003 recall of Gray Davis reached the ballot. California also has, proportionally, the lowest signature requirement of all States.

perceived need to use the recall as State legislators can be removed soon enough at the next election. Further, most legislation is passed in the last few weeks of the session, not leaving enough time for recall.³⁵

An additional important reason is that States that have the recall also tend to permit citizens' initiated referenda. Accordingly, if citizens are angry about a policy decision, it is more effective for them to direct their attention to getting it overturned through a citizens' initiated referendum, rather than recalling relevant officials, as recall will not change the policy outcome.³⁶ The number of signatures required for a referendum on changing the decision is also usually lower than the number required for the recall of officials, so citizens' initiated referenda are much more popular.³⁷

If, however, the recall is pursued and the requisite number of signatures is collected to qualify for a ballot, the success rate appears to be around 50%.³⁸ This relatively high success rate is probably indicative of the fact that only those proposals with significant support and money behind them make it to the ballot stage.

Mechanics of recall in the United States

Initiation of a recall petition: The first step in initiating a recall petition is usually the filing of a notice of intention to circulate a recall petition. In some States a filing fee is payable. The notice of intention must be signed by a number of voters (eg 10 voters in California or 25 in Minnesota) and often contains a statement (usually limited to 200 words) of why the relevant officer should be recalled. The notice is usually then served on the person who is the subject of the petition, who may give a response, again limited to 200 words, to the allegations.³⁹ The form of the petition is then prepared by a government official, often the secretary of state, containing both the allegation and the response. It is printed and provided to the persons who initiated the notice of intention, who then circulate it to collect the requisite number of signatures. The petition also commonly contains a declaration by the person circulating it that the signatures are genuine.⁴⁰

When a recall petition can be brought: How long must an official have been in office before a recall petition can be initiated? Should officials be given a period to fulfil their

³⁵ Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 152.

³⁶ Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), p 80.

³⁷ The signature requirements for citizens' initiated referenda that amend a State Constitution range from 3% of votes cast in the last gubernatorial election in Massachusetts to 15% in Arizona and Oklahoma: NCSL: <http://www.ncsl.org/default.aspx?tabid=16585> [viewed 15 July 2011]. In comparison, the signature requirements for recall of state-wide officers range from 12% to 40% of voters at the last gubernatorial election.

³⁸ Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 142.

³⁹ In some States both statements are included on the recall ballot paper. In other States the statements are posted on the walls at polling stations.

⁴⁰ For an example of the form of a notice of intention and a petition, see: Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), p 42 and p 44.

duties before being subject to a recall petition? States vary on their approaches to these issues. In Washington State, there is no limitation on how early a petition can be brought in a person's term of office. Louisiana allows its officers 1 day in office and Arizona gives members of the Legislature 5 days from the beginning of their first legislative session before a petition may be initiated. In contrast, Colorado, Michigan, Nebraska and Rhode Island give officials 6 months grace and New Jersey and Wisconsin give a year.⁴¹ This raises the related issue of whether there is a need to give grounds for the recall of an official, and if so whether those grounds must be confined to acts or omissions during the course of his or her current term of office. Should a person be able to be recalled for acts or omissions during a previous term of office or during a period in which the person held no elected office at all?⁴² Should a person be able to be recalled from office on no grounds at all?

At the other end of the scale, a question arises as to whether a person should be able to be recalled towards the end of his or her term, when a general election should suffice to deal with public concerns. A number of States, such as Alaska, Georgia, Kansas and Washington do not permit recall during the last 180 days of an elected official's term of office, while others, including California, Colorado, Louisiana, Michigan, Minnesota and Nebraska extend this period to 6 months before the end of the official's term.⁴³

States, such as Kansas, North Dakota and Wisconsin also place limits on the holding of a second attempt to recall an official after a recall election has been held and failed. In Arizona, Idaho, Montana⁴⁴ and Nevada a second attempt is only permitted if the State is reimbursed for the costs of the first recall election.⁴⁵

Grounds for recall: The need for grounds for recall in part depends upon the rationale for the recall. If it is to give voters control over their representatives and allow them to recall those officials that do not conform to the will of a majority of electors, then there is no need for reasons and if reasons are given, they are not justiciable as the whole procedure is political in nature.⁴⁶ For example, the Michigan Constitution provides that the 'sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question.'⁴⁷ The Californian Constitution also provides that the sufficiency of the reasons in recall petitions is not reviewable⁴⁸ and the Colorado Constitution provides that 'the registered electors shall be the sole and exclusive judges

⁴¹ *Book of the States 2010* (Council of State Governments, Lexington, 2010), Table 6.19: http://knowledgecenter.csg.org/drupal/system/files/Table_6.19.pdf [viewed 15 July 2011].

⁴² In 1990, the Michigan Court of Appeals struck down the validity of a recall petition on the ground that it was based in part on conduct prior to the commencement of the officer's term of office: *Bronkowski v Macomb County Election Committee* 460 NW2d 308 (1990). See also: *Wallace v Tripp* 101 NW 2d 312 (1960).

⁴³ *Book of the States 2010* (Council of State Governments, Lexington, 2010), Table 6.19: http://knowledgecenter.csg.org/drupal/system/files/Table_6.19.pdf [viewed 15 July 2011].

⁴⁴ This only applies for two years after the previous recall election.

⁴⁵ *Book of the States 2010* (Council of State Governments, Lexington, 2010), Table 6.19: http://knowledgecenter.csg.org/drupal/system/files/Table_6.19.pdf [viewed 15 July 2011].

⁴⁶ See further: Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), pp 34-6.

⁴⁷ Constitution of the State of Michigan, Art II, §8.

⁴⁸ Constitution of California, Art II, §14(a).

of the legality, reasonableness and sufficiency' of the stated grounds for recall.⁴⁹ The risk is that the charges are untrue, unfair or so lacking in specifics that they are difficult to refute.⁵⁰

If, however, the rationale for recall is to allow the people to remove a representative for misconduct, corruption or incompetence, then specific grounds are likely to be required and it is more likely that the sufficiency of the grounds given will be justiciable. Because of the serious consequences of the recall of an official, the courts in those jurisdictions where the matter is justiciable have tended to interpret statutory removal grounds narrowly.⁵¹

In Georgia, the person who is targeted for recall may apply to the Supreme Court for a review of the legal sufficiency of the reasons given for recall. The hearing does not decide the truth of the allegations, but the review may determine whether probable cause exists to believe that the alleged facts are true.⁵² Minnesota goes even further. There, before a petition can even be circulated, it must be sent to the Supreme Court which first decides whether the alleged conduct that is claimed to support recall is sufficient to satisfy the constitutionally specified grounds. If so, the Court then determines whether these alleged facts are true. Only if they are held to be true and sufficient will a petition be able to be circulated.⁵³ Garret, however, has argued that 'judicial meddling in the process' is not appropriate and that judicial 'intervention is likely to be generally hostile towards recall efforts because judges are wary of direct democracy and of unusual political arrangements that seem chaotic or dangerous'.⁵⁴

Eight States specify the grounds for recall.⁵⁵ They commonly include malfeasance, misfeasance and nonfeasance. They may also include other matters such as: incompetence (Alaska), violation of oath of office (Georgia), the wilful misuse, conversion or misappropriation of public property or public funds (Georgia), physical or mental lack of fitness for office (Montana), breach of the code of ethics (Rhode Island) and conviction of a drug-related crime or 'hate crime' (Virginia).⁵⁶ Montana also

⁴⁹ Constitution of the State of Colorado, Art 21§1. See also: *Bernzen v City of Boulder* 525 P2d 416, 418-9 (1974) confirming that recall in Colorado is a political process and a trial court may not review the sufficiency of the reasons given for recall. Official misconduct is not necessarily required for recall in Colorado.

⁵⁰ Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 151.

⁵¹ See, eg: *Kotar v Zupan* 658 P 2d 1095 (Montana 1982). See further: Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), pp 38-9.

⁵² Georgia Code, §21-4-6.

⁵³ Constitution of Minnesota, Art VIII, s 6.

⁵⁴ Elizabeth Garrett, 'Democracy in the Wake of the California Recall' (2004) 153 *University of Pennsylvania Law Review* 239, 272.

⁵⁵ Alaska, Georgia, Kansas, Minnesota, Montana, Rhode Island, Virginia and Washington: National Conference of State Legislatures: <http://www.ncsl.org/default.aspx?tabid=16581> [viewed 15 July 2011]. Note that Florida also has a ground of 'drunkenness', but it only applies to elected municipal officials: Florida Annotated Statutes, Title IX, Chapter 100, §100.361.

⁵⁶ National Conference of State Legislatures: <http://www.ncsl.org/default.aspx?tabid=16581> [viewed 15 July 2011].

specifies that ‘no person may be recalled for performing a mandatory duty of the office he holds or for not performing any act that, if performed, would subject him to prosecution for official misconduct.’⁵⁷

Some States require reasons for recall to be given, but do not specify what those reasons must be. Others do not require any reasons to be given for the recall of elected officials.

In practice, the grounds on which state-wide office holders have been recalled have varied. In some cases the grounds concerned allegations of corruption or personal misconduct,⁵⁸ but in most cases it was a matter of disliking the policies of the official or how he or she voted on a particular matter such as a tax increase or an increase of salary for politicians.⁵⁹ The recall has also been used as a means of dealing with party defectors who have voted with the other side on critical matters.⁶⁰

Must a politician receive due process and natural justice in such circumstances, or is it simply a matter of politics? The US Court of Appeals (Fifth Circuit) has held that while governments are required to act fairly, voters are not. The Court noted that ‘an elector may vote for a good reason, a bad reason, or for no reason whatsoever’ and that this principle also applied to recall elections.⁶¹

Timing for circulation of petition: There is a limited period during which the requisite number of signatures has to be collected in order to qualify for a recall election. The maximum period is commonly 90 days or 3 months (Kansas, Michigan, Minnesota, Montana, Nevada, North Dakota and Oregon), but may be as little as 60 days (Colorado, Idaho and Wisconsin) or as long as 180 days (Louisiana) or 270 days for state-wide officials (Washington).⁶²

Number of signatures required: In the United States, the number of signatures required is affected by the absence of both compulsory voting and compulsory enrolment. Most States that use the recall for state-wide officers require signatures amounting to 25% of

⁵⁷ Montana Code, §2-16-603.

⁵⁸ See eg the recall of Californian Senator Black in 1913 (who was indicted for embezzlement) and the attempt to recall Governor Mechem in 1988 (but he was impeached before he could be recalled). See also the recall of Oregon representative Pat Gillis in 1985 for making false statements and forging a signature.

⁵⁹ See, eg, the recall of: Californian Senator Edwin Grant in 1914 as a result of policies such as prohibition (and a campaign by a sore loser trying to regain his seat); Governor Frazier of North Dakota in 1921 for financial policies concerning the Bank of North Dakota; Senator Fisher and representative Aden Hyde in Idaho in 1971 for voting in favour of increasing salaries for politicians; Senators Mastin and Serotkin from Michigan in 1983 for supporting a tax increase; and Senator Petak of Wisconsin in 1996 for shifting his vote to approve a tax law. See further: Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), p 59 and pp 83-91; and Joshua Spivak, ‘California’s Recall – Adoption of the “Grand Bounce” for Elected Officials’, (2004) 81(2) *California History* 20, 28-37.

⁶⁰ Paul Horcher and Doris Allen of the Californian State legislature were recalled in 1995 after both alienated their own Republican party by doing deals with the Democrats.

⁶¹ *Gordon v Leatherman* 450 F 2d 562, 567 (5th Circuit, 1971).

⁶² *Book of the States 2010* (Council of State Governments, Lexington, 2010), Table 6.19: http://knowledgecenter.csg.org/drupal/system/files/Table_6.19.pdf [viewed 15 July 2011]. Note that New Jersey has a maximum period of 320 days for the collection of signatures for the recall of the Governor only.

votes cast in the last election for the targeted office.⁶³ Some make a distinction between the numbers of signatures required for recall for different offices. For example, while California has the lowest requirement for recall (12% of votes cast in the previous election for that office) it has a higher requirement of 20% if the recall is for members of the State legislature or judges.

Some States require a higher number of signatures altogether, such as Kansas, which requires signatures amounting to 40% of votes cast for the targeted office in the previous election or Louisiana where it is 33⅓% or 40% where the district has fewer than 1000 voters. Other States, such as Georgia, Idaho, Montana and North Dakota set their figure by reference to the percentage of ‘registered voters’ in the district of the targeted official at the time of the last election. In the absence of compulsory voting, the number of registered voters is usually significantly higher than the number of people who actually vote.⁶⁴ In States such as California and Georgia a specified proportion of signatures must be collected from at least five counties (in the case of California) and from each congressional district (in the case of Georgia) to ensure that the demand for recall is widely distributed, not just centred in one location.

Illinois requires signatures amounting to 15% of votes cast for the Governor in the preceding general election, spread across 25 counties, as well as signatures from at least 20 members of the lower House and 10 Senators with no more than half being from members of the same political party.

Who may collect signatures: In California, most signatures are collected by professional signature collection agencies. The commercialisation of this field is largely the consequence of the significant number of citizens’ initiated referenda that are proposed each year in California. Colorado attempted to prohibit the payment of people to collect signatures, due to fears that it would corrupt the system and allow people to ‘buy’ their way onto the ballot if they were wealthy enough. The legislation was challenged on the ground that it breached the first amendment. The US Supreme Court struck down the Colorado legislation in *Meyer v Grant*, holding that such laws limit the number of voices who will convey the message seeking recall and make it harder to get the matter placed on the ballot.⁶⁵

Verification of signatures: It is usually a requirement that the secretary of state or another government official such as the registrar of voters, verify the signatures collected. This tends to be done by way of some form of statistical sampling. There is usually a

⁶³ See, eg, Alaska, Arizona, Colorado, Minnesota, Nevada, New Jersey and Washington (re statewide offices). See also: Michigan and Wisconsin, where it is 25% of votes cast for the office of Governor in the last election in the targeted official’s electoral district: *Book of the States 2010* (Council of State Governments, Lexington, 2010), Table 6.19: http://knowledgecenter.csg.org/drupal/system/files/Table_6.19.pdf [viewed 15 July 2011].

⁶⁴ See further: Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 126.

⁶⁵ 486 US 414, 421-3 (1988). See further: Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), pp 45-50.

strict time in which signatures must be verified. It ranges from 10 days in California, Colorado, Idaho, Minnesota, New Jersey and Oregon to 90 days in Rhode Island.⁶⁶

Criminal offences: In many States it is a criminal offence to make false statements or misrepresentations in order to gain petition signatures or knowingly to file a petition that contains false signatures or to use a recall petition as a means of extorting money.⁶⁷

Public disclosure: In some States it is also necessary to declare who has contributed to a recall campaign and how much has been expended. The names on the recall petition may also be made public in some jurisdictions.⁶⁸

Resignation option: In a number of States, once the petition is certified as having sufficient validated signatures, the incumbent is given a short period of time, usually five days,⁶⁹ in which he or she can simply resign and avoid a recall election. If the resignation takes place within this period, then it is filled by the ordinary processes to fill a vacancy, rather than by a recall election.

Timing of recall election: There are different ways of dealing with the timing of the election. Some States require that it be held within a fixed period after certification, such as 60-80 days after certification (California) or 30-45 days after certification (Georgia and Nebraska). Other States require it to be held on the next scheduled election date (Louisiana and Michigan). Some State compromise by holding the recall election over to a fixed election date if one arises within 90 days, but otherwise holding a special election (Montana).⁷⁰

One election or two: In some States the one election covers both the recall question and the election of a replacement. It can be done in two ways. The first way involves asking the voters two questions. The first question is about whether the incumbent should be recalled. The second is about who should replace the incumbent if the recall is approved in the first question. A problem arises if the recalled official is permitted to be a candidate in the replacement election. There is a risk that the recalled official will still be elected to fill his or her own office because support is split amongst the other

⁶⁶ *Book of the States 2010* (Council of State Governments, Lexington, 2010), Table 6.20: http://knowledgecenter.csg.org/drupal/system/files/Table_6.20.pdf [viewed 15 August 2010].

⁶⁷ See further: Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 153; and Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), p 51.

⁶⁸ On 24 June 2010, the US Supreme Court held in *Doe v Reed* 561 US __ (2010) that the public disclosure of names of petitioners for a citizens' initiated referendum on gay domestic partnership legislation did not breach the First Amendment. Note that it is possible that this authority would be distinguished in relation to petitions for recall, which are more analogous to voting than petitions for legislative or constitutional change.

⁶⁹ It is 5 days in Arizona, Colorado, Idaho, Montana, Nebraska, Nevada, New Jersey and Oregon. In other States it ranges from 1 day to 10 days: *Book of the States 2010* (Council of State Governments, Lexington, 2010), Table 6.20: http://knowledgecenter.csg.org/drupal/system/files/Table_6.20.pdf [viewed 15 August 2010].

⁷⁰ *Book of the States 2010* (Council of State Governments, Lexington, 2010), Table 6.20: http://knowledgecenter.csg.org/drupal/system/files/Table_6.20.pdf [viewed 15 August 2010].

candidates.⁷¹ For this reason, some States ban the recalled officer from standing to fill his or her own vacancy. There is also difficulty in this approach for the party of which the incumbent is a member. On the one hand, the party will usually campaign against recall, but it will also usually stand a candidate in the recall election, forcing it to give out mixed messages in its campaigning as to which is the better representative.⁷²

The second way of dealing with the matter in one election is simply to hold a by-election for the incumbent's seat.⁷³ The incumbent is automatically a candidate in this election (unless he or she chooses to resign instead). The incumbent is not recalled unless he or she fails to retain office in the election.⁷⁴

Other States hold the recall ballot first and then after a period of time hold a second election to determine who should fill the vacancy. This allows voters to concentrate on the merits of recall without being distracted by other candidates.⁷⁵ It also has the advantage of allowing prospective candidates sufficient time to nominate and campaign for a real vacancy. Otherwise, they are investing their time and money campaigning for a vacancy that might not exist. The problem with this approach is the expense and delay involved in holding two elections and the uncertainty of voters as to whether they wish to recall an elected officer if they do not know who the likely replacement might be (given that the replacement could be even worse).⁷⁶

Formalities of the election: In most States, the election is run in the same way as ordinary elections for that office. However, Oregon has now introduced procedures for recall elections to be held completely by postal votes, rather than at polling booths.⁷⁷

Reimbursement of costs: In California, if a recall election fails and the incumbent survives, he or she is reimbursed his or her campaign expenses.⁷⁸ This also occurs at the municipal level in some States.⁷⁹

⁷¹ Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 151; Elizabeth Garrett, 'Democracy in the Wake of the California Recall' (2004) 153 *University of Pennsylvania Law Review* 239, 260. This is, of course, dependent upon the electoral system used.

⁷² Elizabeth Garrett, 'Democracy in the Wake of the California Recall' (2004) 153 *University of Pennsylvania Law Review* 239, 261.

⁷³ This is the approach taken in Arizona and Nevada.

⁷⁴ Cf the different approach in British Columbia, where the incumbent is recalled by virtue of the petition and ceases to hold office immediately. He or she can then stand in the by-election for the office, but does so as a candidate, not the incumbent.

⁷⁵ The recall election for Gray Davis in California in 2003 turned into a circus with 135 candidates including porn stars and movie stars and anyone who wanted to be famous for 15 minutes, distracting attention from the real issues.

⁷⁶ Elizabeth Garrett, 'Democracy in the Wake of the California Recall' (2004) 153 *University of Pennsylvania Law Review* 239, 262.

⁷⁷ Elections BC, 'Report of the Chief Electoral Officer on the Recall Process in British Columbia', November 2003: p 28.

⁷⁸ Constitution of California, Art II, § 18.

⁷⁹ See further: Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), p 62.

The 2003 recall of Gray Davis – problems and lessons

The 2003 recall election in California raised many problems with the system.⁸⁰ The most prominent factor involved was money. Even though California only requires signatures equal to 12% of those who voted at the last gubernatorial election to remove a Governor⁸¹ and the previous election had had a low voter turnout, reducing the number of signatures needed to initiate a recall, the recall proponents would still have ordinarily failed to collect the relevant number of signatures in the statutory period to recall Davis. The difference in this case was the intervention of a rich and ambitious republican, Darrell Issa, who decided that he would like to run for Governor and paid \$2 million for professional petition circulators to collect the signatures.⁸² In California, professional signature collection agencies give a money-back guarantee for signature collection. If the requisite amount is paid, they will ensure that enough signatures are collected, whether it be for a recall or a citizen initiated referendum on any subject. The effect is that anyone rich enough can buy a recall election. This has led to the wry observation that ‘capitalism is a strange way to allocate ballot access in a democracy’.⁸³

Money also played other roles in the campaign. First, campaign expenditure and donation limits were avoided because the campaign on the ‘recall’ aspect of the ballot fell outside the legislative constraints. Thus, while candidates in the election were constrained in the donations they could accept and their expenditure, there were no constraints upon committees formed to campaign for or against the recall of Gray Davis,⁸⁴ and in many cases candidates appeared in the pro and anti recall advertisements, using them as publicity for their own campaigns.

Money also played a political role. Arnold Schwarzenegger spent \$10.5 million of his own money on his campaign, arguing that because he was rich, he would not be beholden to campaign donors and would therefore ‘stand for the people against special interests’. Gray Davis, on the other hand, was not personally rich and had to raise considerable amounts to compete with Schwarzenegger’s well-funded campaign, leading Davis to be perceived by the public as the pawn of the special interest groups.⁸⁵ Garrett has noted the irony of the fact that when the people want ‘to elect an “ordinary person” who appears to

⁸⁰ See further: V D Amar, ‘Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience’ (2004) 92 *California Law Review* 927.

⁸¹ Curiously, the figure is higher to remove Members of the State legislature – 20%.

⁸² Elizabeth Garrett, ‘Democracy in the Wake of the California Recall’ (2004) 153 *University of Pennsylvania Law Review* 239, 241; and Joshua Spivak, ‘California’s Recall – Adoption of the “Grand Bounce” for Elected Officials’, (2004) 81(2) *California History* 20, 35. Ironically, Issa never ran in the recall election, being squeezed out by the greater money and celebrity of Arnold Schwarzenegger.

⁸³ Elizabeth Garrett, ‘Democracy in the Wake of the California Recall’ (2004) 153 *University of Pennsylvania Law Review* 239, 241, referring to comments of Daniel Lowenstein.

⁸⁴ Elizabeth Garrett, ‘Democracy in the Wake of the California Recall’ (2004) 153 *University of Pennsylvania Law Review* 239, 247.

⁸⁵ Elizabeth Garrett, ‘Democracy in the Wake of the California Recall’ (2004) 153 *University of Pennsylvania Law Review* 239, 247-9.

be independent from interest groups, current campaign laws may leave voters only with a field of extraordinarily rich people'.⁸⁶

Another important element in the 2003 recall election was the lax provisions regarding nominations for candidates to replace the Governor. Candidates needed only to obtain 65 signatures and pay \$3500. This led to 135 candidates nominating, including porn stars, former television stars, comedians and anyone who wanted to be a candidate in the same election as Arnold Schwarzenegger. The result was a media circus which became a distraction for voters who found it increasingly difficult to identify and assess the serious candidates. The long and unwieldy ballot paper also risked inaccurate voting.

A further significant factor was that unlike ordinary elections, given the speed of this extraordinary election, no primaries were held, so the political parties had little if any control over the nomination of candidates. It has been speculated that if primaries had been held, Arnold Schwarzenegger would not have won the Republican nomination.⁸⁷

As noted above, the recall was first introduced in California in response to concerns that local politicians were too influenced by big money and well-funded special interest groups.⁸⁸ It was intended to give the electors power, through their vote, to ensure that their interests were being represented above the interests of the rich. In practice, this intention has been subverted, with the recall being accessible only by the rich or by well-funded special interest groups and being used as a threat or a weapon by them to make legislators dance to their tune.

The recall in Canada

The recall was briefly introduced in Alberta, Canada, in 1936.⁸⁹ No grounds were specified for the recall of a Member. A recall petition could be initiated on any grounds or none, as long as it was signed by at least ten voters and a fee of \$200 paid. The Clerk of the Legislative Assembly then prepared and provided the petition form. The threshold for the petition was two-thirds of the total number of enrolled voters at the previous election and only 40 days were given to collect the signatures which also had to be witnessed.⁹⁰ The petition was then lodged with the Clerk of the Executive Council and a true copy of the petition with all signatures had to be placed for display at each post office in the electoral division. The Clerk then had to pass the petition to the Chief Justice of Alberta who would hold a public inquiry into the regularity of the petition. If

⁸⁶ Elizabeth Garrett, 'Democracy in the Wake of the California Recall' (2004) 153 *University of Pennsylvania Law Review* 239, 249.

⁸⁷ Elizabeth Garrett, 'Democracy in the Wake of the California Recall' (2004) 153 *University of Pennsylvania Law Review* 239, 255.

⁸⁸ Joshua Spivak, 'California's Recall – Adoption of the "Grand Bounce" for Elected Officials', (2004) 81(2) *California History* 20.

⁸⁹ *Legislative Assembly (Recall) Act 1936* (Alberta). See also: Peter McCormick, 'The Recall of Elected Members' (1994) *Canadian Parliamentary Review* 11, 12.

⁹⁰ Duff Conacher, 'Power to the People: Initiative, Referendum, Recall and the Possibility of Popular Sovereignty in Canada' (1991) 49 *U Toronto Faculty of Law Review* 174, 208.

the Chief Justice was satisfied that the petition met the requirements of the Act, he would declare the petition duly lodged and the seat of the relevant Member would be vacated. The recalled Member could stand for re-election to the seat in the subsequent by-election. Only one recall petition could be initiated against a Member for an electoral district during the life of one Parliament.⁹¹

The Alberta recall provision did not last long. It was a policy developed by William Aberhart, when in Opposition. When he became Premier of Alberta, he introduced it, albeit with extremely high hurdles to meet. The very first recall petition was then made against Aberhart himself and appeared to have some popular weight behind it. Aberhart responded by causing the repeal of the *Legislative Assembly (Recall) Act*, with retrospective effect to the day it had received royal assent, terminating the recall petition that had been lodged against him.⁹² Aberhart concluded that it was a measure for harassment and political attack and that it was best removed.

Others have taken the view that the system of recall is inconsistent with Canada's parliamentary tradition.⁹³ Boyer has argued that the 'device of "recall" has remained alien to the Canadian political and legal system'. He observed:

This American idea never caught on in Canada largely because the political theory in this country concerning the role of elected legislators is that they are not just "representatives" of their constituents, but also "members" of Parliament or of a legislative assembly, and as such have a duty to both.⁹⁴

It was not until 1995 that the recall was again implemented in Canada, this time in the province of British Columbia.⁹⁵ British Columbia has a unicameral legislature with fixed four year terms. It permits Members of its Legislative Assembly to be recalled. Recall is not confined to specific grounds, such as the commission of a crime or misconduct. A Member can be recalled for any reason at all.

British Columbia's main variation upon the American form of recall is that there is no recall election as such. If the high signature threshold (40% of persons eligible to sign the petition) is met, then instead of having a recall election, the Member's seat is simply vacated and a by-election is held, at which the former Member is able to stand. The judgment of the people, therefore, is expressed in the election to fill the vacancy.

⁹¹ J Patrick Boyer, *Lawmaking by the People – Referendums and Plebiscites in Canada* (Butterworths, Toronto, 1982) pp 22-3.

⁹² J Patrick Boyer, *Lawmaking by the People – Referendums and Plebiscites in Canada* (Butterworths, Toronto, 1982) p 24; and Peter McCormick, 'The Recall of Elected Members' (1994) *Canadian Parliamentary Review* 11.

⁹³ Duff Conacher, 'Power to the People: Initiative, Referendum, Recall and the Possibility of Popular Sovereignty in Canada' (1991) 49 *U Toronto Faculty of Law Review* 174, 208.

⁹⁴ J Patrick Boyer, *Lawmaking by the People – Referendums and Plebiscites in Canada* (Butterworths, Toronto, 1982) p 22.

⁹⁵ *Recall and Initiative Act 1995* (BC).

The greater significance of the petition under this system is used to justify a higher threshold requirement for signatures. As McCormick has noted:

If the effect of the petition is simply to trigger a vote on whether or not to have a recall, it makes sense for the threshold to be relatively low.... On the other hand, if it is the petition itself that triggers the by-election that creates the vacancy in the seat that removes the member, then it makes sense to have the threshold considerably higher.⁹⁶

In the first parliamentary term in which the recall system was operative, eleven recall petitions were issued. Twenty-four petitions have so far been initiated (including one still in progress) but none has been successful. In one case in 1998 the petition was returned with approximately 8000 more signatures than were required,⁹⁷ but the Member of the Legislative Assembly who was the subject of the petition, Paul Reitsma, resigned before the petition signatures could be verified.

Mechanics of the recall in British Columbia

Any registered voter may apply for the issuance of a petition for the recall of the Member of the Legislative Assembly for the electoral district in which the voter is registered. The petition must contain a statement, not longer than 200 words, explaining why the recall is warranted. It must also be accompanied by a \$50 processing fee. A recall petition cannot be brought within the first 18 months of the Member's term of office.⁹⁸ If the petition meets these requirements, it must be formally issued by the Chief Electoral Officer within seven days.

The period for gathering signatures is 60 days. A person is entitled to sign the petition if he or she was registered in the Member's electoral district at the last election and remains at the time of signature a registered voter (although not necessarily still in the Member's electoral district).⁹⁹ The proponent of the recall petition and the targeted Member of the Legislative Assembly both receive a copy of the list of registered voters for the last election, giving their current registered address. This allows canvassers to check that people are qualified to sign a petition before they do so.

Any person registered to vote in British Columbia for at least 6 months may canvass for signatures, but he or she must not, directly or indirectly, accept any inducement for canvassing, nor may any person give such an inducement.¹⁰⁰ It is an offence to do so. It is also an offence to offer an inducement to someone to sign a petition or reward them for so doing.¹⁰¹ To be effective, the petition must be signed by 40% of the total number of

⁹⁶ Peter McCormick, 'The Recall of Elected Members' (1994) *Canadian Parliamentary Review* 11, 12.

⁹⁷ 17,020 signatures were required and 25,430 signatures were collected: Elections BC: <http://www.elections.bc.ca/docs/rcl/Summary-of-Recall-Petitions.pdf> [viewed 15 July 2011].

⁹⁸ *Recall and Initiative Act* 1994, s 19.

⁹⁹ *Recall and Initiative Act* 1994 (BC), s 21.

¹⁰⁰ *Recall and Initiative Act* 1994 (BC), s 22.

¹⁰¹ *Recall and Initiative Act* 1994 (BC), ss 156 and 159.

persons entitled to sign the recall petition.¹⁰² This includes those who have left the electoral district but were registered there at the previous election. All persons signing must give their name and address and their signature must be witnessed by the canvasser.

Once it is submitted, the Chief Electoral Officer has 42 days in which to verify the petition. For this purpose, Elections BC had to develop, maintain and update a voter signature verification system.¹⁰³ The verification process is arduous. Every signature on the petition is checked, even if it is clear that there are enough valid signatures for the petition to be passed. In one case in 2002, 24% of signatures were rejected, usually because the person was ineligible to sign, but in some cases because the signature on the petition did not match the signature on file, the address did not match the address on file, the person had signed the petition more than once, or there was just a name but no signature.¹⁰⁴

Petitions are public documents that can be viewed by any member of the public. The intention was to include a measure of self-policing, as people could check whether signatures were included of non-existent people. However, the Chief Electoral Commissioner has been critical of this provision, arguing that it might intimidate voters who fear retribution, causing them not to sign petitions even when they support them. He recommended removal of the requirement that a petition be a public document.¹⁰⁵ This has not yet occurred. Voters may, however, request that their address be obscured if the petition is viewed by a member of the public. Further, those who view the petition are required to sign a declaration that the information will not be used for purposes other than those permitted by the Act.¹⁰⁶

Campaign financing reports must also be submitted by the applicant and the Member within 28 days of the submission of the petition. If the legislative requirements are met, the Member ceases to hold office and his or her seat becomes vacant.¹⁰⁷ A by-election must then be held within 90 days to fill the seat, at which the recalled Member may be a participant. There may only be one recall by-election between general elections.¹⁰⁸

There are also extensive provisions concerning the financing of recall petitions, including limits on donations and expenditure and the disclosure of information. In addition, there are strict provisions about the use of advertising during a recall campaign.¹⁰⁹

¹⁰² *Recall and Initiative Act* 1994 (BC), s 23.

¹⁰³ See further: Elections BC, 'Report of the Chief Electoral Officer on the Recall Process in British Columbia', November 2003: p 8. The administration of recall petitions can be expensive. Note that in 2002-4, when Elections BC dealt with 9 petitions, it cost CAN \$553,954.

¹⁰⁴ Elections BC, 'Report of the Chief Electoral Officer on the Recall Process in British Columbia', November 2003: p 10.

¹⁰⁵ Elections BC, 'Report of the Chief Electoral Officer on the Recall Process in British Columbia', November 2003: pp 16-17.

¹⁰⁶ Elections BC: <http://www.elections.bc.ca/index.php/referenda-recall-initiative/recall/faqs/> [viewed 15 July 2011].

¹⁰⁷ *Recall and Initiative Act* 1994 (BC), s 25.

¹⁰⁸ *Recall and Initiative Act* 1994 (BC), s 27.

¹⁰⁹ *Recall and Initiative Act* 1994 (BC), Parts 7 and 8.

Criticism of the British Columbia system

Criticism has been levelled at the British Columbia system on a number of grounds. One concern is that there is no requirement that the recalled member has engaged in some form of misconduct. Some see it as a right of harassment which may be abused for personal or political reasons.¹¹⁰ Others have criticised the high percentage of signatures needed and the technicalities regarding the time at which the signatories had to be registered in the electorate. They see the recall process as designed to fail, and little more than democratic window dressing.¹¹¹

The Chief Electoral Officer of British Columbia has been critical of the use of the petition to vacate a Member's seat, rather than a recall election. He noted that the petition is treated as a recall election without the safeguards and formalities of an election. He recommended that the petition should instead result in a recall election which could be held on the same occasion as a by-election vote, as occurs in the United States.¹¹² Such a change has not been made.

Proposals for the introduction of the recall in the United Kingdom

At the 2010 general election, all three main parties in the United Kingdom made commitments in their manifestos to introduce a 'recall' procedure for Members of Parliament who had committed acts of serious wrong-doing. This was in response to the 'expenses scandal' that had rocked the Parliament in the previous year.

In May 2010 the Queen's Speech upon the opening of Parliament contained the following commitment from the Conservative-Liberal Democrat Coalition:

Measures will be brought forward to introduce fixed term Parliaments of five years.

A Bill will be introduced for a referendum on the Alternative Vote system for the House of Commons and to create fewer and more equal sized constituencies.

Constituents will be given the right to recall their Members of Parliament where they are guilty of serious wrongdoing.¹¹³

¹¹⁰ See, eg, Professor Robert Hazell, 'The Conservative-Liberal Democrat Agenda for Constitutional and Political Reform', June 2010, p 38: <http://www.ucl.ac.uk/constitution-unit/publications/index.html> [viewed 15 July 2011].

¹¹¹ See, eg: Richard Johnson, 'A piece of democratic window dressing', *Sydney Morning Herald*, 31 December 2009: <http://www.smh.com.au/opinion/politics/a-piece-of-democratic-window-dressing-20091229-linf.html> [viewed 15 July 2011].

¹¹² Elections BC, 'Report of the Chief Electoral Officer on the Recall Process in British Columbia', November 2003: p 16.

¹¹³ UK, *Parliamentary Debates*, House of Commons, 25 May 2010, col 32. Note that the *Fixed-term Parliaments Bill* has been introduced into the UK Parliament and remains the subject of debate. The alternative vote proposal was put to a referendum but failed.

What is unclear about this proposal is how a Member of Parliament is ‘judged’ to have engaged in serious wrongdoing, and whether serious wrongdoing means a breach of a law or whether it encompasses other forms of wrongdoing.¹¹⁴ Some have suggested that the Parliamentary Commissioner for Standards or the Commons Standards and Privileges Committee should make that decision, but there are concerns that a parliamentary committee might be subject to party political influences and would therefore be an inappropriate forum in which to make such decisions.¹¹⁵

The Deputy Prime Minister, Mr Clegg, is in charge of these reforms. On the crucial question of how serious wrongdoing is to be ‘judged’, he said:

Finally, if, once all those reforms are in place, there are individual parliamentarians who still break the rules, we will also guarantee that the House of Commons is not a safe house. We will introduce legislation to ensure that, where it has been proven that a Member has been engaged in serious wrongdoing, their constituents will have the right to organise a petition to force a by-election. When people have been let down by their MP in that way, they must not be made to wait until the next election to cast their judgment, but I also want to be clear: recall will not collapse into some tit-for-tat game between party political rivals, with parties seeking to oust each other through those petitions. When MPs are accused of doing something seriously wrong, they are entitled – everyone is entitled in the House – to expect a fair and due process to determine their innocence or guilt. That is why I certainly would not be content for a body composed only of MPs, as the Select Committee on Standards and Privileges was, to be the sole route by which we decide an MP's culpability. That is why we are looking into exactly what would be the fairest, most appropriate and most robust trigger. I shall outline those plans very soon.¹¹⁶

On 5 July 2011 the Deputy Prime Minister confirmed that the UK Government was still committed to this proposal and that it planned to publish a draft Bill for pre-legislative scrutiny.¹¹⁷

¹¹⁴ For example, British students have been arguing for a ‘right to recall’ Members of Parliament who breached campaign pledges regarding student fees. See: <http://www.righttorecall.co.uk/> [viewed 15 July 2011.] The Deputy Prime Minister has also been asked in Parliament how many Liberal Democrats should be subject to the recall procedure for breaking electoral promises: UK, *Parliamentary Debates*, House of Commons, 1 March 2011, cols 146-7.

¹¹⁵ Professor Robert Hazell, ‘The Conservative-Liberal Democrat Agenda for Constitutional and Political Reform’, June 2010, pp 37-40: <http://www.ucl.ac.uk/constitution-unit/publications/index.html> [viewed 15 July 2011].

¹¹⁶ UK, *Parliamentary Debates*, House of Commons, 7 June 2010, col 42.

¹¹⁷ UK, *Parliamentary Debates*, House of Commons, 5 July 2011, Vol 530, col 1161W.

The recall in other countries

A number of other countries have recall provisions, including Taiwan,¹¹⁸ the Philippines,¹¹⁹ Bolivia,¹²⁰ Uganda¹²¹ and Venezuela. Of these, the Venezuelan recall has been most prominent as it was used in an attempt to recall the Venezuelan President in 2004.

Venezuela permits recall in relation to elected positions, including that of the President. Article 75 of the Venezuelan Constitution provides that a petition signed by no less than twenty percent of the electors registered in an official's constituency is sufficient to cause a recall election of an elected official. A recall petition can only be lodged after half the period of the official's term of office has elapsed. For recall to succeed: (a) the majority of votes cast must favour recall; (b) the number of votes for recall must be equal to or greater than the number of votes the official received at the last election; and (c) the number of electors voting at the recall election must amount to at least twenty-five percent of registered electors. If the official is recalled, then the office is to be filled by the usual methods for filling a casual vacancy, as outlined in the Constitution. It is unclear, however, whether a recalled official may stand in the election.¹²² Only one recall petition may be lodged against an official during an elected term of office.

On 15 August 2004 an election was held to recall the Venezuelan President, Hugo Chávez, but it failed to pass. As the President's electorate was the entire country, 2.4 million signatures were needed to initiate a recall election. In August 2003, 3.2 million signatures were collected, but they were ruled invalid because some had been collected before President Chavez had reached the half-way point of his term. In November 2003, 3.6 million signatures were collected in four days. This petition was also ruled invalid, this time on the ground that many signatures were invalid or dubious. Riots ensued and a number of people were killed. After various legal actions a compromise ensued and those whose signatures were deemed dubious had the opportunity to confirm that they

¹¹⁸ See Constitution of Taiwan, arts 17, 34, 123 and 133.

¹¹⁹ In the Philippines recall only applies at the local government level: Constitution of the Philippines, art X, s 3. See further: Jau-Yuan Hwang, *Direct Democracy in Asia: A Reference Guide to the Legislations and Practices*, (Taiwan Foundation for Democracy, 2006) pp 372-3.

¹²⁰ In August 2008 the Bolivian President survived a recall vote but two Departmental Prefects lost office. See further: Fabrice Lehoucq, 'Bolivia's Constitutional Breakdown', (2008) 19(4) *Journal of Democracy* 110.

¹²¹ Constitution of Uganda, s 84. A Member of Parliament may be recalled on the grounds of: physical or mental incapacity; misconduct or misbehaviour likely to bring hatred, ridicule, contempt or disrepute to the office; or 'persistent deserting of the electorate without reasonable cause'. Recall is initiated by a petition signed by 2/3 of registered voters in the constituency and is then the subject of a public inquiry by the Electoral Commission. The seat is declared vacant by the Speaker if the Electoral Commission is satisfied that the petition is genuine. While the provision works in theory, in practice recall is controlled by the political party that holds the seat, making it extremely difficult to recall a Member of Parliament, unless the Member is an independent: 'Uganda – Why It's Hard to Recall Your MP', *The Monitor*, 26 October 2009: <http://allafrica.com/stories/200910261187.html> [viewed 16 July 2011].

¹²² Miriam Kornblith, 'Direct Democracy and Referendum to Recall the President in Venezuela', Paper to the 6th Global Forum on Reinventing Government, May 2005, p 5. <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020461.pdf> [viewed 16 July 2011].

were genuine.¹²³ In the meantime there had been allegations that government employees who had signed the recall petition had been dismissed from their jobs. The correct number of signatures was eventually validated and the election held.

One of the problems with the recall campaign was that the Opposition decided to defer choosing its own presidential candidate until after the recall election. The consequence was that the people in voting on recall did not know who might replace the President.¹²⁴

At the recall election there was a high voter turn-out, with 70% of electors voting. This satisfied the requirement for 25% of the electorate to vote. There were also enough recall votes to satisfy the requirement that more people vote for recall than had voted in favour of the President at the previous election. However, the recall election still failed because the majority of voters, 59%, voted against recall.

Advantages and disadvantages of the recall

Many arguments are given both for and against the recall.¹²⁵ Below is a summary of them:

Advantages of the recall

Accountability: The recall ensures that officials remain accountable throughout their term and must be responsive to the wishes of their electors and must behave in a competent and exemplary fashion.

A check on undue influence: The original purpose of recall was to make officials responsible to the voters rather than campaign donors. It increases the power of voters over their elected representatives and diminishes the hold over them of donors and political parties.

Permits longer terms: The need for frequent elections is diminished if the recall is in place. This means that legislatures and officials can be elected for longer terms, allowing better planning and more efficient and stable governance.

Safety-valve: The recall fulfils the role of a safety-valve when political conflict becomes too heated and rebellion might otherwise be likely. It is the most democratic way of resolving disputes that arise mid-term.

¹²³ Jennifer McCoy, 'The 2004 Venezuelan Recall Referendum' (2006) 2(1) *Taiwan Journal of Democracy* 61, 67.

¹²⁴ Jennifer McCoy, 'The 2004 Venezuelan Recall Referendum' (2006) 2(1) *Taiwan Journal of Democracy* 61, 67.

¹²⁵ See further: Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), pp 132-146; Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) pp 133-9; and Gareth Griffith and Lenny Roth, 'Recall Elections', *E-Brief 3/2010*, (NSW Parliamentary Library Research Service, February 2010) pp 8-12.

More effective than impeachment: The recall is a simpler and more effective way of removing an elected official than impeachment. No proof of wrong is needed and it is less likely to be held up by evidential issues and legal challenges.

Engagement of voters: The recall reduces the alienation of voters and keeps them engaged as they know they have the power to recall their representative if his or her behaviour proves unsatisfactory. The initiation of a recall petition also stimulates public debate and interest in public affairs, resulting in the education of the people.

Requires true leadership: If governments are to make tough decisions when they are needed, then they must show true leadership and be able to explain to the people why the decisions are necessary. Greater communication with voters is required.

Loosening of party discipline: If elected representatives can be removed for following the policies set down by their party, rather than those demanded by their constituents, the links between representatives and their parties are likely to be loosened with more representatives crossing the floor so as to avoid being recalled by their constituents.¹²⁶

Disadvantages of the recall

Cost: One of the significant disadvantages of recall elections is their cost. It is not the case of an early election, but a completely new election, as the person elected to office (if the recall is successful) merely serves the rest of the term of the recalled officer. Accordingly, a further full election may not be far off when a recall election is held. Elections cost significant amounts, not only for the mechanical running of the election, but also for political parties and candidates.

Re-running elections: There is a significant risk that the recall could be used by the loser of an election to have a second chance at winning.

The influence of money: In the United States, signature collection is done by professional agencies for a price (ranging from \$2.50 to \$3 per signature). Anyone with enough money to spend can effectively ‘buy’ the holding of a recall election. While the primary purpose of introducing the system of recall elections in the United States was to remove politicians beholden to well-financed special interest groups, the recall can be used as an instrument of oppression by well-financed special interest groups which can threaten officials with facing a recall campaign unless they bow to their wishes.

Populist but ineffectual governance: There is a risk that with the prospect of recall hanging over them, officials will make short-term populist decisions and not make the hard and unpopular decisions that are often necessary for good governance in the long term. Garrett has argued, for example, that the threat of the recall of Governor Gray Davis in 2003 caused him to change his political behaviour and approve laws that he had

¹²⁶ Peter McCormick, ‘The Recall of Elected Members’ (1994) *Canadian Parliamentary Review* 11, 13.

previously rejected in order to shore up the vote of those likely to vote against his recall.¹²⁷

Arbitrary application: Those likely to be removed by way of recall are those elected in marginal electorates, whereas those elected in a ‘safe’ electorate will be unthreatened. The best leaders are often the ones who make unpopular decisions for the good of their people. As President Taft of the United States noted, if the recall applied to the presidency, then Washington, Madison and Lincoln would all have risked recall, as all were deeply unpopular at times during their period in office.¹²⁸

Destabilisation of Government: Recall petitions may be initiated, even if they have no hope of success, as a means of destabilising political opponents, exhausting their financial resources and distracting them from governing.¹²⁹ They can be used as a threat by groups that want to influence policy to their advantage.¹³⁰ Recall campaigns are disruptive to governments and potentially undermine business confidence in the relevant jurisdiction. Petitions can also be used for their nuisance value. In California, out of 88 recall petitions issued in 20 years, 37 were issued by a single citizen who was angry at the closure of some frog ponds.¹³¹

Divisiveness: Use of the recall mechanism may escalate political conflict and deepen divisions within the community. They can develop into a succession of tit-for-tat campaigns, particularly in small communities that can be torn apart by the conflict.

¹²⁷ Elizabeth Garrett, ‘Democracy in the Wake of the California Recall’ (2004) 153 *University of Pennsylvania Law Review* 239, 279-80.

¹²⁸ William Howard Taft, *Popular Government: Its Essence, its Permanence and its Peril* (Yale University Press, 1913) pp 84-5, quoted in: Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) pp 136-7.

¹²⁹ Elizabeth Garrett, ‘Democracy in the Wake of the California Recall’ (2004) 153 *University of Pennsylvania Law Review* 239, 244.

¹³⁰ See the example of the police official in Iowa threatened with recall by gambling interests: Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 152.

¹³¹ Minnesota House of Representatives Research Department, ‘Recall of State Elected Officials’, October 1996, p 10.

CHAPTER 3 – CITIZEN INITIATED ELECTIONS

Introduction

The recall is predominantly directed at individual elected officials and it is the people who elected the official who recall that official. This means that in a system of responsible government, such as that which exists in Australia, only the voters in the Premier's electorate could recall the Premier. Voters from the rest of the State would have no such power.

Difficulties arise where the electoral system involves the election of multiple candidates by the one electorate through a system of proportional representation. The NSW Legislative Council is an example. If voters wanted to recall a particular Member of the Legislative Council, then the entire State would be the electorate. Moreover, as each Member of the Legislative Council has usually been elected by a small percentage of the popular vote, it would seem unfair that a Member should have to receive majority support from the entire State to defeat recall. For this reason, the recall is not really appropriate for such systems, unless it is directed at the recall of the entire body and the initiation of a state-wide general election for that body. This involves, in effect, a citizens' initiated election, rather than the recall of a particular official.

This approach has been rarely tried, but examples can be seen in Switzerland at the cantonal level, Germany at the State and local level, Liechtenstein at the national level and Japan at the local government level, as described below.

Citizens' initiated elections in Switzerland

A number of Swiss Cantons include in their Constitution provisions that permit the recall and the holding of a new general election for the Grand Council (which is the unicameral legislature of the Canton) and in some cases the Council of State (which is the executive of the Canton).¹³² The provisions vary, particularly in the number of signatures required for recall and the period for collecting them:

- **Berne** – Article 57 of the Constitution of the Canton of Berne provides that 30,000 citizens may petition at any time for the general renewal of the Grand Council or the Executive Council. The newly elected body fills the rest of the term of the previous body. The petition is put to a popular vote within three months of its submission. If it is approved new elections shall be ordered immediately.

¹³² In the absence of an available English version of the Constitutions of all Swiss Cantons, the following description derives from my translation of the French version. Any mistranslation is unintended and regretted. French, German and Italian versions are available at: <http://www.admin.ch/ch/f/rs/13.html> [viewed 15 July 2011].

- **Lucerne** – Article 44 of the Constitution of the Canton of Lucerne provides that 5000 citizens can petition the Government for a popular referendum on the dissolution of the Grand Council. The petition must be put to a popular vote within four weeks and is approved only if an absolute majority of citizens taking part vote in favour of dissolution. If the dissolution is approved, elections for a new Grand Council must be held within another four weeks. The new Grand Council fills the term of office of the dissolved Grand Council.
- **Schaffhausen** – Article 27 of the Constitution of the Canton of Schaffhausen requires only 1000 electors to propose the ‘entire renewal’¹³³ of the Grand Council or the Council of State. The procedure is to be regulated by statute. If a majority of voters vote in favour of recall, new elections are to be held. The newly elected body fulfils the rest of the term of the recalled body.
- **Solothurn** – Article 28 of the Constitution of the Canton of Solothurn provides that the people may at all times recall the Grand Council or the Council of State. In this case only 6000 signatures are needed and there is six months to collect them. The election must take place 2 months after the signatures are filed. If the proposal to recall is accepted by the people, new elections take place within four months.
- **Thurgau** – Article 25 of the Constitution of the Canton of Thurgau provides that 20,000 active citizens may petition for the recall of the Grand Council or the Council of State. There is a three month period for the collection of the signatures. The petition must be submitted to the people three months later. If the people decide upon recall then new elections are to be held within another three months.
- **Ticino** – Article 44 of the Constitution of the Canton of Ticino provides that 15,000 voters may present to the Grand Council a petition for the recall of the Council of State. This petition cannot be presented less than a year or more than three years after the general election. The 15,000 signatures must be collected in 60 days following the formal publication of the petition. The election must take place within 60 days of the verification of the outcome of the petition.

Despite such provisions and the relatively low thresholds,¹³⁴ this procedure does not appear to be utilised in Switzerland. In 1912, Rappard wrote of the recall that it ‘is little known and less practiced in Switzerland’. He noted that ‘in the memory of the present generation these rights have never been exercised.’¹³⁵ The use of the recall in Switzerland was also more recently investigated by the British Columbia Electoral

¹³³ Mille électeurs peuvent proposer le renouvellement intégral du Grand Conseil ou du Conseil d’Etat.

¹³⁴ Note that the low signature requirements are probably the consequence of the laws being effectively obsolete and not having been updated to take into account current voting populations.

¹³⁵ William E Rappard, ‘The Initiative, Referendum and Recall in Switzerland’ (1912) 43 *Annals of the American Academy of Political and Social Science* 110, 129.

Commission, but it too reported that recall was rarely used in Switzerland and that ‘an elected official has yet to be removed’.¹³⁶ Finally, Linder and Steffen have observed that recall was used ‘very rarely in the nineteenth century and always failed in the popular vote (eg in 1852 in Berne)’. They noted that no examples of its use are known in the twentieth century and that ‘in practice, the instrument no longer exists’.¹³⁷

Citizens’ initiated elections in Liechtenstein

The Constitution of the principality of Liechtenstein provides in art 48(3) that 1500 voters or four communes (ie local government bodies) may, in writing, demand a referendum with regard to the dissolution of the Landtag (ie the legislature). The number of registered voters in 2009 was 18, 493, so the level of support needed to initiate a referendum on the dissolution of the Landtag is approximately 8% of voters. Despite this low threshold, this mechanism appears not ever to have been used.¹³⁸

Citizens’ initiated elections in Germany

In Germany, during the Weimar Republic after World War I, various measures of direct democracy were introduced. These included provisions permitting the people to initiate the dissolution of the Landtag (the unicameral legislature) of the Länder (States). Most of these legislatures were elected for four years and some had no procedures to dissolve themselves before their expiry, while others could do so by a majority vote of the Landtag or by a special majority. The people could also initiate the dissolution of the Landtag by use of citizens’ initiated referenda. In most cases the criteria for petitions for dissolution were the same as for ordinary citizens’ initiated referenda, although in some cases a higher hurdle was required. For example, in Prussia the signatures of one twentieth of voters were needed to initiate a referendum but the signatures of one-fifth of registered voters were needed for a resolution to dissolve the Landtag.¹³⁹

In the turbulent period of the 1920s and 1930s, during the rise of Nazism, petitions for referenda for the dissolution of the Landtag in the Länder were not uncommon. The petitions for dissolutions were primarily proposed by opposition parties seeking political advantage through a fresh election. This occurred in Saxony in 1922, 1924 and 1931-2, Bavaria in 1924, Brunswick in 1924 and 1931, Schaumburg-Lippe in 1924, Mecklenburg-Schwerin in 1925, Hesse in 1926, Lippe in 1929 and 1931, Prussia in 1931,

¹³⁶ Elections BC, ‘Report of the Chief Electoral Officer on the Recall Process in British Columbia’, November 2003: p 29. Note that it is recorded on Wikipedia that there was an unsuccessful attempt to recall the executive in Schaffhausen in 2000 and an unsuccessful attempt to recall the legislature and executive in Solothurn in 1995: http://en.wikipedia.org/wiki/Recall_election#Switzerland [viewed 3 September 2011].

¹³⁷ Wolf Linder and Isabelle Steffen, ‘Swiss Confederation’ in K Le Roy and C Saunders (eds), *Legislative, Executive and Judicial Governance in Federal Countries*, (McGill-Queen’s University Press, 2006) p 305.

¹³⁸ Wilfried Marxer, ‘Direct Democracy in Liechtenstein’, March 2007: http://www.liechtenstein-institut.li/Portals/11/pdf/politikwissenschaft/Marxer_Wilfried_Direct_Democracy.pdf [viewed 3 September 2011].

¹³⁹ Richard Thoma, ‘The Referendum in Germany’, (1928) 10 *Journal of Comparative Legislation and International Law* (3rd series) 55, 69.

Anhalt in 1931, Oldenburg in 1932 and Bremen in 1932.¹⁴⁰ In all these cases, only in the case of Oldenburg in 1932 did the proposal to dissolve the Landtag get to a referendum and get approved by the voters. However, in a number of other cases, such as Saxony in 1922, Bavaria in 1924 and Brunswick in 1924 the legislatures dissolved themselves after having received a petition that would otherwise have allowed a referendum on dissolution.¹⁴¹

The main users of this mechanism were the National Socialist ('Nazi') Party and the Communist Party. In some cases, such as Prussia in 1931 and Saxony in 1932 the Nazis and the Communists, despite being the bitterest of enemies, banded together in attempts to unseat governments. Greene has observed:

The frequent use of direct legislation by the Communist and "Nazi" parties shows clearly their willingness to adopt weapons offered them by the republican system to which they are opposed.¹⁴²

Greene, writing in 1933, concluded:

It must be admitted that the twelve years' trial of direct legislation in the states of Germany does not seem to have resulted in much beneficial activity. The opportunities which the machinery offered to opposition groups resulted in great embarrassment to the governments and helped to keep the populace in a state of agitation. The expense of frequent voting must also be considered.¹⁴³

However, Greene also added that where there is a fixed term and the Landtag cannot otherwise be dissolved, then some mechanism for calling a popular vote on dissolution would be an important aid, especially in a system where deadlocks frequently arise.

Nine of the Länder¹⁴⁴ also authorised voters in cities to initiate the dissolution of local government councils. The number of voters required for a successful petition varied. In five of the Länder the signatures of one-third of registered voters were required. In three of the Länder the signatures of one-fifth of registered voters were required and in Mecklenburg-Schwerin it was one quarter of registered voters.¹⁴⁵ Once the petition was verified a vote would be held to dissolve the council. The majority approval required in each of the Länder again varied. In five of the Länder, the approval of a majority of all

¹⁴⁰ Lee S Greene, 'Direct Legislation in the German Länder 1919-32' (1933) 27(3) *American Political Science Review* 445, 451.

¹⁴¹ See further: Richard Thoma, 'The Referendum in Germany', (1928) 10 *Journal of Comparative Legislation and International Law* (3rd series) 55, 70-2.

¹⁴² Lee S Greene, 'Direct Legislation in the German Länder 1919-32' (1933) 27(3) *American Political Science Review* 445, 452.

¹⁴³ Lee S Greene, 'Direct Legislation in the German Länder 1919-32' (1933) 27(3) *American Political Science Review* 445, 454.

¹⁴⁴ Baden, Bavaria, Bremen, Brunswick, Lippe, Mecklenburg-Schwerin, Oldenburg, Saxony and Thuringia.

¹⁴⁵ Roger Wells, 'The Initiative, Referendum and Recall in German Cities', (1929) 18 *National Municipal Review* 31, 32.

registered voters was required, in others it was the majority of votes cast, while in Bavaria a special majority of three-fifths of votes cast was required. If a council was dissolved, this did not stop individual councillors from standing again as candidates in the election to establish a new council. The newly elected council would then serve out the rest of the term of its predecessor.¹⁴⁶

An analysis of the use of recall in German cities between 1920 and 1927 showed that it was used by various political parties to overthrow councils controlled by other political parties. Wells concluded that it was ‘a party instrument used to improve the representation or position of the party in the municipal legislature’.¹⁴⁷ Nonetheless, Wells also observed that recall was not commonly used in the big cities, in part due to the difficulty of obtaining the requisite number of signatures and votes, but also because there were sometimes easier ways of getting a new election.¹⁴⁸

In post-war Germany, measures of direct democracy became unpopular, partly because of their chaotic effects during the Weimar Republic and partly because of Cold War fears that they might be used to undermine the strength of governments. Since the 1990s and the reunification of Germany, measures of direct democracy have increased in the Constitutions of the Länder.¹⁴⁹ In Berlin, for example, the entire State legislature can be forced to an early election by the initiative of the people, through a petition signed by 20% of registered voters and a vote by a majority in a referendum in favour of an early dissolution, as long as there is a turnout of more than 50% of registered voters.¹⁵⁰ In 1981 when the requisite number of signatures was collected, the legislature was dissolved early by other means, rather than face a recall election.¹⁵¹ This kind of recall procedure has apparently not been used in any of the other Länder.¹⁵²

Citizens’ initiated elections in Japan

In Japan a measure of direct democracy applies at the local government level. It was initially imposed by occupation forces after World War II, largely based upon the American model, in the hope that a strong local government system with participatory democracy would prevent the future emergence of a monolithic national government.

¹⁴⁶ Roger Wells, ‘The Initiative, Referendum and Recall in German Cities’, (1929) 18 *National Municipal Review* 31, 33.

¹⁴⁷ Roger Wells, ‘The Initiative, Referendum and Recall in German Cities’, (1929) 18 *National Municipal Review* 31, 35.

¹⁴⁸ Roger Wells, ‘The Initiative, Referendum and Recall in German Cities’, (1929) 18 *National Municipal Review* 31, 35.

¹⁴⁹ Arthur Gunlicks, ‘Land Constitutions in Germany’ (1998) 28(4) *Publius* 105.

¹⁵⁰ Constitution of Berlin, Art 63.

¹⁵¹ Matt Qvortrup, ‘Hasta La Vista: A Comparative Institutional Analysis of the Recall’ (2011) 47(2) *Representation* 161, 166; IDEA, *Direct Democracy: The International IDEA Handbook* (2008), Ch 5, p 116.

¹⁵² IDEA, *Direct Democracy: The International IDEA Handbook* (2008), Ch 5, p 116. According to IDEA, the other Länder in which the entire legislature may be recalled are: Baden-Württemberg, Bavaria, Brandenburg, Bremen and Rhineland-Palatinate.

The system went beyond the American model, however, in permitting electors to initiate the early dissolution of local government assemblies.¹⁵³

One third of the electorate must ordinarily initiate the call for dissolution. However, in local entities with over 400,000 voters, the requirement is one third of the 400,000 voters plus one sixth of the number of voters over 400,000. Once the requisite number of signatures is collected and verified, the call for dissolution must then be approved by a popular vote (known colloquially as ‘recall tohyo’ or more formally ‘chokusetsu seikyu’). If a majority of voters approve dissolution, then the local assembly is dissolved. This process may also be used to dismiss individual members of assemblies or the chief executive officers of public entities.¹⁵⁴

During the period from 1947 to 1992, 400 petitions were submitted for the dissolution of local assemblies. Of those that made it to referendum, most were passed, with only 11 percent failing. This is partly because of the high hurdle of gaining support from a third of electors before the matter is even put to a vote. Some have argued that this hurdle is too high, given that turnout in local assembly elections is often less than a third of registered voters. Requiring a higher number of voters to petition for dissolution than actually voted to elect the assembly in the first place has been criticised as unfair.¹⁵⁵

The reasons for dissolution of assemblies have tended to concern corruption and other scandals but in more recent times have been based upon policy differences.¹⁵⁶ In August 2010, the Mayor of Nagoya took the unprecedented step of initiating a recall petition for his own local assembly. This was because the assembly would not support the mayor’s policy, including a cut in the number of the members of the assembly and their salaries. Press reports noted that no petition to dissolve an assembly has ever been successful in a major city, such as Nagoya. The requisite number of signatures was collected and a referendum on recall succeeded in February 2011.¹⁵⁷

In smaller local government areas, however, such petitions are not so rare, especially in relation to individual recalls rather than dissolutions. For example, a group of citizens in

¹⁵³ Local Autonomy Law, art 76-3.

¹⁵⁴ See: Jau-Yuan Hwang, *Direct Democracy in Asia: A Reference Guide to the Legislations and Practices*, (Taiwan Foundation for Democracy, 2006) p 78.

¹⁵⁵ Takanobu Tsujiyama, ‘Local Self-Governance in Japan: The Realities of the Direct Demand System’ (2000, Spring) *NIRA Review* 26, 29: <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN027680.pdf> [viewed 15 July 2011].

¹⁵⁶ Takanobu Tsujiyama, ‘Local Self-Governance in Japan: The Realities of the Direct Demand System’ (2000, Spring) *NIRA Review* 26, 27: <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN027680.pdf> [viewed 15 July 2011].

¹⁵⁷ ‘Mayor’s supporters request recall referendum for Nagoya Assembly’ *Japan Today*, 18 December 2010; ‘In reversal – Nagoya’s Assembly Faces Recall’ *The Japan Times Online*, 16 December 2010; and ‘Nagoya Elections’ *The Asahi Shimbun*, 8 February 2011: http://www.asiaviews.org/index.php?option=com_content&view=article&id=27865:nagoya-elections&catid=3:column-a-commentaries&Itemid=10 [viewed 15 July 2011].

the town of Akune commenced a petition to recall the Mayor because he was ‘too self-righteous’.¹⁵⁸ The petition succeeded and the Mayor was recalled.

¹⁵⁸ ‘Group campaigns to recall mayor of Kagoshima town’, *The Japan Times*, 17 August 2010: <http://search.japantimes.co.jp/cgi-bin/mn20100817a6.html> [viewed 15 July 2011].

CHAPTER 4 – CURRENT POSITION IN NEW SOUTH WALES

The removal of Members of the New South Wales Parliament

In New South Wales, a Member of Parliament may be disqualified from sitting and voting as a Member of Parliament on a number of grounds,¹⁵⁹ including:

- holding a contract for or on account of the public service (*Constitution Act* 1902, s 13);
- failure to attend the House for a whole session of Parliament, unless excused (*Constitution Act* 1902, s 13A(1)(a));
- foreign allegiance, including becoming a citizen of a foreign state (*Constitution Act* 1902, s 13A(1)(b));
- bankruptcy or becoming a public defaulter (*Constitution Act* 1902, s 13A(1)(c) and (d));
- conviction of an infamous crime or an offence punishable by imprisonment for life or a term of five years or more (*Constitution Act* 1902, s 13A(1)(e));
- holding an office of profit under the Crown or accepting a pension from the Crown (*Constitution Act* 1902, s 13B);
- failure to disclose the Member's pecuniary interests (*Constitution Act* 1902, s 14A); and
- the commission of certain electoral offences (*Parliamentary Electorates and Elections Act* 1912, s 164).¹⁶⁰

In addition, a Member may be expelled from Parliament by the House to which the Member belongs. Each House has an inherent power to expel its Members. However, expulsion may not be used as a punishment. It may only be used to protect the House and its standing so that 'it may discharge with the confidence of the community and its members the great responsibilities which it bears'.¹⁶¹ To warrant expulsion, the conduct in question must be of 'sufficient gravity to render the member unfit for service'.¹⁶² This has been explained as meaning that the Member is 'unfitted because of serious misconduct to be entrusted with parliamentary responsibilities'.¹⁶³ In particular, conduct involving want of honesty and probity would fall within this category.¹⁶⁴

¹⁵⁹ For a detailed analysis, see: A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) Chapter 8.

¹⁶⁰ If a person elected to Parliament is found by the Court of Disputed Returns to have committed or attempted to commit the offences of bribery, treating or undue influence, then the Court is required to hold that the election is void and the person has therefore not been validly elected.

¹⁶¹ *Armstrong v Budd* (1969) 89 WN (NSW) 241, 260-1 (Sugerman JA).

¹⁶² *Armstrong v Budd* (1969) 89 WN (NSW) 241, 250 (Herron CJ).

¹⁶³ *Armstrong v Budd* (1969) 89 WN (NSW) 241, 253 (Wallace P).

¹⁶⁴ *Armstrong v Budd* (1969) 89 WN (NSW) 241, 250 (Herron CJ); 256 (Wallace P); and 261 (Sugerman JA).

Standing Order 254 of the Legislative Assembly also provides that a Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by a vote of the House and the seat declared vacant.¹⁶⁵

Finally, the Independent Commission Against Corruption ('ICAC') may make findings of corrupt conduct against Members of Parliament, which may form the basis upon which a House decides to expel a Member for unworthy conduct or, more commonly, may be the spur for an affected Member to resign.¹⁶⁶ Members of Parliament are subject to codes of conduct imposed by their respective Houses.¹⁶⁷ Conduct which amounts to a serious breach of the code of conduct, which would also fall within the definition of corruption in s 8 of the *Independent Commission Against Corruption Act 1988* (NSW), may give rise to a finding of corrupt conduct against a Member of Parliament. If a Member's conduct does not involve a breach of the code of conduct but would otherwise meet the legislative definition of corruption and involve a breach of the law, a finding of corrupt conduct may be made if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the Parliament into serious disrepute.¹⁶⁸

Accordingly, unlike the position in many countries where recall is needed to deal with Members of Parliament who have committed corrupt or criminal acts, there are several different mechanisms for dealing with such matters in New South Wales.

Fixed Four Year Terms

History of parliamentary terms in New South Wales

Originally, parliamentary terms in New South Wales, under the 1842 and 1855 Constitutions were a maximum of five years. In 1874, the *Triennial Parliaments Act 1874* (NSW) was passed, reducing the term of the Legislative Assembly to three years from the date of the return of the election writs, unless dissolved earlier by the Governor.¹⁶⁹ The flexible three year term remained in place until it was extended under the Wran Government to four years in 1981.

¹⁶⁵ See also Standing Order 255 which allows the House to suspend a Member pending the outcome of a criminal trial.

¹⁶⁶ See, for example, the resignations of Mr Greiner, Mr Moore, Mr Langton (as a Minister), Mr Malcolm Jones and Ms Paluzzano, after ICAC investigations or findings. See further: A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) p 459.

¹⁶⁷ See Legislative Assembly code of conduct: <http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/LABP11> and LC Code of Conduct: [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/LegislativeCouncilMembers'CodeofConduct/\\$File/Code+of+Conduct+2007.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/LegislativeCouncilMembers'CodeofConduct/$File/Code+of+Conduct+2007.pdf) [both viewed 15 August 2011].

¹⁶⁸ *Independent Commission Against Corruption Act 1988* (NSW), s 9.

¹⁶⁹ Note that it was a Private Member's Bill, passed in the face of opposition by the Parkes Government: D Clune and G Griffith, *Decision and Deliberation – The Parliament of New South Wales 1856-2003* (Federation Press, 2006) p 41.

Originally, the term of Parliament was not entrenched. It could be extended or reduced by ordinary legislation, although the extension of an existing Parliament's term was regarded as a very serious matter. The only time it occurred in New South Wales was during World War I, in controversial circumstances.¹⁷⁰ In 1950 a provision was inserted and entrenched in the Constitution which required any extension of the term of the Legislative Assembly to be approved by a referendum. Accordingly, when the Legislative Assembly's term was extended to four years in 1981, it was first approved by the people in a referendum.¹⁷¹

Fixed four year terms were introduced in New South Wales in 1995. They were proposed by the minority Greiner Government in 1991 and enshrined in the Memorandum of Agreement of 31 October 1991 between the Greiner Government and the three Independents who held the balance of power in the Legislative Assembly. It was a key plank in the reform proposals of the Independents. As a referendum was required to implement the fixed four year term proposal,¹⁷² legislation was enacted in two stages. The first stage was the enactment by ordinary legislation of the *Constitution (Fixed Term Parliaments) Special Provisions Act 1991* which identified 20 March 1995 as the next election date for the Legislative Assembly. It also provided for the second stage, being a referendum to be held at the next election to approve and entrench fixed four year terms for the future.

The Yes/No case for the referendum at the 1995 election provided the following arguments:

| Yes Case | No Case |
|---|---|
| In 1981, the people of NSW voted in favour of extending the Legislative Assembly's term from a maximum of 3 years to a maximum of 4 years. However, the amendment made did not actually compel a full four year term to be served before the next election is held. A fixed term of the Assembly will provide this assurance. | Governments will be unwilling to take difficult decisions for the latter part of the four year cycle, or, conversely, will be more likely to take "popular" decisions only in that period. The Government will effectively move into "caretaker mode" at far too early a time. |
| Electors vote an Assembly in for a term, with the expectation that the Assembly will serve out that full term. The ability for governments to call elections virtually at will contradicts that principle, and submits the electorate to more elections at a greater cost to the public. | Where the government suffers a loss of support within the Assembly the fixed four year term legislation is more likely to allow the Opposition to form a government without a general election being held. This undermines the democratic system by allowing a government to be changed without the approval of the electorate. |
| Fixed four year terms will allow governments sufficient time to implement their policies. Some policies, especially in the economic and social arena require time to be implemented and may be unpopular at first. The electorate will have time to | New South Wales already has four year term Parliaments. It only requires courage for governments to serve the full term and any government calling an early election risks being criticised and losing votes. |

¹⁷⁰ See further: A Twomey, *The Chameleon Crown – The Queen and Her Australian Governors* (Federation Press, 2006) p 58.

¹⁷¹ The referendum, on 19 September 1981, was approved by 1,951,455 voters with 874,944 voting No.

¹⁷² This was because the provisions that were included to get the Houses back into the four year cycle after an early election contained the possibility that a parliamentary term might extend a little over four years.

| | |
|---|--|
| judge a government's worth by the results of its policy initiatives in practice. | |
| The proposal will not prevent a government which loses support in the Legislative Assembly from being removed from office and an alternative party or group with support forming a government. | Where the composition of the Parliament changes resulting in a minority government, a fixed term for the Assembly will more likely entrench an unstable situation. The government will be unable to call an election to determine the issue, but will equally be prevented from governing effectively with a clear mandate. The government will not be able to carry out those policies on which it was elected. |
| Governments in this State will no longer be able to call elections at a time which is convenient to them. A system providing certainty of election dates is fairer to parties in opposition, by removing the electoral advantages available to the government of the day. | Experience in other countries with fixed election programs is that campaigning commences as early as a year in advance. With fixed terms, the campaign period will inevitably be greatly extended which will mean increased election costs and increased periods of electioneering. |
| Experience in other countries with fixed election programs demonstrates that "election mode" prevails for the last year of the term, this still leaves three years for implementing policies without speculation about the outcome of an election. | The costs of holding an election should not be an issue. More and frequent elections are a good thing because they keep governments accountable by giving voters an opportunity to vote them out of office. |
| The average cost of a general election is \$20mil. Fixed terms will ensure that tax payers will only have the expense of an election every four years. | Independent members of Parliament, where there is a minority government, will be able to exert a disproportionate degree of power relative to the constituency they represent. The government, under the fixed terms legislation, would ordinarily be powerless to rectify this situation by calling an early election. |

The referendum was held on 25 March 1995. The referendum question asked:

Do you approve of a Bill entitled: "A Bill to require the Parliament of NSW to serve full four year terms and to prevent politicians calling early general elections or changing these new constitutional rules without a further referendum"?

The referendum was passed, with a substantial majority.¹⁷³

Current provisions

Section 24 of the *Constitution Act* 1902 (NSW) provides that the term of the Legislative Assembly is effectively just under four years. It states that the Legislative Assembly shall expire on the Friday before the first Saturday in March in the fourth calendar year after the writs were returned for choosing that Assembly. This is subject to it being dissolved early under s 24B.

Section 24A provides that the election date is the fourth Saturday in March following the expiry of the four year term of the Legislative Assembly. If the Legislative Assembly has been dissolved early under s 24B, the election date can be no later than the 40th day from the date of the issue of the writs for the election.

¹⁷³ The referendum, on 25 March 1995, was approved by 2,449,796 voters, with 795,706 voting No.

Section 22A(3) sets the date for a Legislative Council periodic election as same date as for the Legislative Assembly general election. Hence the two elections must be run together. Section 22B also sets the term of service of a Member of the Legislative Council by reference to Legislative Assembly elections. The term of a Member of the Legislative Council therefore expires on the date that the Legislative Assembly expires or is dissolved prior to the second general election after the Member of the Legislative Council was elected (i.e. two terms of the Legislative Assembly, whatever the length of those terms might be). If the Legislative Assembly's term is cut short, this therefore has an impact upon the terms of Members of the Legislative Council.

Section 24B is the critical provision for determining when an early election may be held, instead of waiting the fixed four years. It allows the Governor to dissolve the Legislative Assembly early, but only in the listed circumstances. The main ones are where a motion of no confidence in the Government is passed by the Legislative Assembly and where the Legislative Assembly rejects an annual appropriation bill or fails to pass it before the time it is required. There is also provision for dissolving the Legislative Assembly up to two months early if the election date would otherwise be the same as that of a Commonwealth general election or if it would be in a holiday period or at any other inconvenient time. Finally, there is a provision that states that the Governor is not prevented from dissolving the Legislative Assembly early, despite any advice of the Premier or Executive Council, 'if the Governor could do so in accordance with established constitutional conventions'. This provision was an attempt to preserve the Governor's 'reserve powers', but it is poorly drafted and is likely to be ineffective.¹⁷⁴

If the Legislative Assembly is dissolved early under s 24B, then a general election for the Legislative Assembly must be held within 40 days from the issue of the election writs.¹⁷⁵ A periodic election for half the Legislative Council must also be held at the same time because of the application of s 22A(3). The difficulty then lies in getting elections back into kilter with four year cycles. This is done by s 24. It states that the new Legislative Assembly, regardless of when it was elected, will expire 'on the Friday before the first Saturday in March in the fourth calendar year after the calendar year in which the return of the writs for choosing that Assembly occurred'.

For example, if a Legislative Assembly were elected in March 2011 and a motion of no confidence was passed by the Legislative Assembly in June 2012, after the Assembly had served just over a year, and an election were then held within forty days in July 2012 and the writs were returned in August 2012, then that House would expire on the first Saturday in March in 2016, being the fourth calendar year after the calendar year in which the writs were returned, which was 2012. In most cases this will mean that the Parliament elected at an early election will serve less than four years. However, if the election writs are returned in January or February, which is unlikely given the holiday

¹⁷⁴ See further: A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) pp 656-8.

¹⁷⁵ The election writs must be issued within four clear days of the publication in the Gazette of the proclamation dissolving the Legislative Assembly: *Parliamentary Electorates and Elections Act 1912* (NSW), s 68.

season, the Parliament elected at that early election could serve a little more than four years. This was why a referendum was needed to implement the fixed four year terms provisions for New South Wales.

Entrenchment

Section 7B of the *Constitution Act 1902* (NSW) provides that a Bill that ‘contains any provision to reduce or extend, or to authorise the reduction or extension of, the duration of any Legislative Assembly or to alter the date required to be named for the taking of the poll in the writs for a general election, shall not be presented to the Governor for Her Majesty’s assent until the Bill has been approved by the electors in accordance with this section’. It then sets out the requirements for a referendum.

Accordingly, any proposed legislation that either reduces the term of the Legislative Assembly (eg from four years back to three years) or which authorises such a reduction (eg by allowing the Premier to call an early election or allowing the people to initiate an early election) would require the holding of a referendum to ensure compliance with s 7B.

Fixed four year terms across Australia

All Australian States have moved from three year terms to four year terms, except Queensland. Tasmania made this change first in 1973, followed by New South Wales in 1981, Victoria in 1984, South Australia in 1985 and Western Australia in 1987.¹⁷⁶

There has also been a movement towards fixing parliamentary terms. Currently, New South Wales, Victoria and South Australia have constitutionally fixed four year terms for their lower Houses.¹⁷⁷ The Northern Territory and the Australian Capital Territory also have fixed four year terms.¹⁷⁸

Western Australia has a maximum four year term for its Legislative Assembly and recently introduced a Bill to move to fixed four year terms.¹⁷⁹ Tasmania, which also has a maximum four year term for its House of Assembly, has similarly been contemplating the idea of moving to fixed four year terms and but has not yet achieved this reform. Both Western Australia and Tasmania have fixed terms for their upper Houses.

Queensland has a maximum parliamentary term of three years. It held a referendum on the extension of the maximum parliamentary term to four years in 1991. It did not

¹⁷⁶ *Final Report of the Constitutional Commission*, (AGPS, 1988), Vol 1, p 204.

¹⁷⁷ *Constitution Act 1902* (NSW), ss 24 and 24A; *Constitution Act 1934* (SA), ss 28 and 28A; *Constitution Act 1975* (Vic), ss 38 and 38A.

¹⁷⁸ See: *Electoral Act 2004* (NT), ss 23-26A; and *Electoral Act 1992* (ACT), s 100, with the exceptions set out in ss 16 and 48 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

¹⁷⁹ *Electoral and Constitutional Amendment Bill 2011* (WA).

propose to fix the term. The referendum failed¹⁸⁰ and the subject does not appear to be currently on the political agenda in Queensland.

Length of terms in other countries

According to the Inter-Parliamentary Union, nearly all lower Houses of Parliament in the world have terms of 4 or 5 years. Overall, 39.58% of unicameral Parliaments and lower Houses of bicameral Parliaments have a term of four years and 51.04% have a term of five years. Only 4.17% have a term of three years and 1.56% have a term of two years.¹⁸¹ Australia is quite rare in having a term as short as 3 years at the national level. The main other exceptions are New Zealand with a maximum term of 3 years and the United States with a fixed term of 2 years.

Fixed term parliaments in other countries

United States: In the United States members of the House of Representatives of the Congress are elected for fixed two year terms and Senators are elected for fixed six year terms, with one-third being elected every two years. At the State level most lower Houses are elected for fixed two year terms with most upper Houses being elected for fixed four year terms.

Canada: In 2007 Canada introduced fixed four year terms at the national level. Section 56.1 of the *Canadian Elections Act* provides:

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

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

The preservation of the Governor-General's discretion to call an early election means, however, that the Prime Minister can still advise the Governor-General to do so at any time, even if he or she has not lost the confidence of the House of Commons.¹⁸² Indeed, although the provision stated that the next election would be held in 2009, it was in fact held in October 2008. The validity of this early election was challenged. The federal Court of Appeal held in *Conacher v Canada* that s 56.1 neither prevented the Prime

¹⁸⁰ The referendum result was: 48.79% in favour and 51.21% against.

¹⁸¹ Inter-Parliamentary Union data: http://www.ipu.org/parline-e/TermofParliament.asp?LANG=ENG®ION_SUB_REGION=All&typesearch=6&Submit1=Launch+query [viewed 16 July 2011].

¹⁸² P Hogg, 'Prorogation and the Power of the Governor General' (2009) 27 *National Journal of Constitutional Law* 193, 194.

Minister from advising the Governor-General to dissolve Parliament early, nor constrained the Governor-General's powers. Their Honours observed:

Section 56.1 must be interpreted in light of the constitutional status and role of the Governor General. Section 56.1 does not prohibit the Governor General from dissolving Parliament and setting an election date. In fact, this discretion and power (enshrined in section 50 of the *Constitution Act, 1867*) is specifically preserved by subsection 56.1(1). The Governor General's status, role, powers, and discretions are unaffected by section 56.1....

In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.¹⁸³

The Court also declined to 'make a declaration that there is a new constitutional convention that limits the ability of the Prime Minister to advise the Governor General in these circumstances'.¹⁸⁴ Hence four year terms are not truly 'fixed' in Canada.

Germany: The German Bundestag (lower House) has fixed four year terms. It can only be dissolved earlier if the Chancellor loses a vote of confidence. This has happened on three occasions, most recently in 2005, through the use of what is known as a 'false confidence motion', in which the Chancellor initiates a vote of confidence in his or her government and then instructs his or her party members to vote against the motion or abstain, in order to allow an early election. The use of such a mechanism remains controversial in Germany.¹⁸⁵

United Kingdom: The United Kingdom's House of Commons currently has maximum five year terms. The *Fixed Term Parliaments Bill 2010* (UK), as proposed by the UK Government, states that the polling day for the next election will be 7 May 2015 and thereafter on the first Thursday in May in the fifth calendar year after the previous election. There is also limited provision for an early election. Clause 2 of the Bill provides:

- 2(1) An early parliamentary general election is to take place if the Speaker of the House of Commons issues a certificate—
- (a) certifying that the House has passed a motion that there should be an early parliamentary general election,
 - (b) certifying whether or not the motion was passed on a division, and
 - (c) if it is certified that the motion was passed on a division, certifying that the number of members who voted in favour of the motion was a number

¹⁸³ *Conacher v Canada* [2010] FCA 131, [4] and [5] (Létourneau JA, Layden-Stevenson JA, Stratas JA)

¹⁸⁴ [2010] FCA 131, [12].

¹⁸⁵ Werner Reutter, 'Yet another coup d'état in Germany? Schröder's vote of confidence and parliamentary government in Germany' (2006) 15(3) *German Politics* 302.

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

(2) An early parliamentary general election is also to take place if the Speaker of the House of Commons issues a certificate certifying that—

(a) on a specified day the House passed a motion of no confidence in Her Majesty's Government (as then constituted), and

(b) the period of 14 days after the specified day has ended without the House passing any motion expressing confidence in any Government of Her Majesty.

Clause 3 states that Parliament cannot otherwise be dissolved. This means that the only way in which an early election can be called is if two thirds of the House of Commons vote in favour of an early election or if a motion of no confidence in the Government is passed without any motion of confidence in a Government being expressed within 14 days. All prerogatives or reserve powers of the Queen will be removed.

It should be noted, however, that if passed, this Act would not be constitutionally entrenched, so it could be amended by the passage of an Act of Parliament by ordinary majorities.

At the time of writing, the Bill had been amended by the House of Lords to provide that ss 2 and 3 only had effect until the next Parliament was formed, but that any new Parliament could bring these provisions back into effect by the passage of a resolution in each House. This effectively means that each new Parliament could decide whether or not it would be for a fixed term. At the time of writing, these amendments had been rejected by the House of Commons, and the Bill was subject to 'ping-pong' between the Houses.¹⁸⁶

Arguments for and against fixed four year terms

Arguments in favour of fixed four year terms

In the course of debate upon reform of the current system, the advantages of fixed four year terms should not be forgotten. They include the following:

- fewer elections, reducing cost to the public (both in running elections as well as public funding for political parties, the need for campaign donations and the like);
- the elimination of speculation about an early election being called and the resulting reduction of public and governmental disruption;
- fairness to all political parties, as the election date is known in advance by all and they can therefore plan and budget accordingly;
- better economic planning and a longer-term focus; and

¹⁸⁶ UK Parliament, *Fixed Term Parliaments Bill*: <http://www.parliament.uk/business/news/2011/july/fixed-term-parliaments-bill/> [viewed 16 July 2011].

- more time for governments to govern, rather than being on an electoral-footing all the time, including the space to make the unpopular but necessary decisions involved in good government.¹⁸⁷

Arguments against fixed four year terms

Arguments against fixed four year terms include the following:

- fewer opportunities for the people to hold their representatives to account in elections;
- the inability to remove a government that has lost the support of the people, as long as it retains support in the lower House;
- the risk of unstable and ineffectual government if a minority government is constantly being defeated by independents or small parties but they do not support a motion of no confidence, so there can be no election or change of government; and
- lack of flexibility in the election date, which can be problematic in a crisis.

¹⁸⁷ See further: Gareth Griffith, 'Fixed Term Parliaments, with a commentary on the Constitution (Fixed Term Parliaments) Amendment Bill 1992', NSW Parliamentary Library Briefing Note No 003/1995, p 19; and *Final Report of the Constitutional Commission*, (AGPS, 1988), Vol 1, pp 200-3.

CHAPTER 5 – OPTIONS FOR NEW SOUTH WALES

Identifying the mischief

Before entering into reform, it is important to identify clearly the mischief that it is sought to rectify. The type of approach chosen ought to correspond with the type of problem that it is desired to resolve. The different types of recall procedures discussed in Chapters 2 and 3 above amount to responses to different perceived problems. The mischief that recall is directed at variously includes:

1. the continuation in office of elected representatives who are corrupt or who have committed criminal acts or other forms of misconduct;
2. the continuation in office of elected representatives who exercise their parliamentary vote in a manner with which the majority of their constituents disagree;
3. the continuation in office of a government that no longer holds majority public support.

While the public debate on the use of recall in New South Wales has suffered from a degree of ambiguity and confusion, it would appear that most commentators perceive point 3 above to be the mischief that needs to be addressed in New South Wales.¹⁸⁸ Nonetheless these three different mischiefs and possible options to deal with them are discussed below.

1. The removal of Members who engage in corruption or misconduct

If the concern is to remove from office Members of Parliament who have engaged in corruption or misconduct, then reconsideration might first be given to the existing provisions that deal with disqualification or expulsion in such circumstances, as discussed in Chapter 4 above, and whether they need alteration.

Option 1A – Improve existing provisions for removal of corrupt MPs

New South Wales has the advantage over many other jurisdictions of already having in place a formal body, the Independent Commission Against Corruption ('ICAC'), with extensive powers to investigate and make findings of corruption. If the scope of its

¹⁸⁸ Barry O'Farrell, 'Power to the people, not factions', *Sydney Morning Herald*, 11 December 2009, p 21; Crispin Hull, 'There's merit in voters having recall rights on rotten governments', *Canberra Times*, 19 December 2009, p 15; Andrew Stoner, 'In NSW, scandal fatigue has set in', *Sydney Morning Herald*, 22 December 2009, p 11; Tim Dick, 'Political ground shifting on fixed terms', *Sydney Morning Herald*, 30 January 2010, p 7; AAP, 'State Opp'n calls on Keneally to move on recall elections', AAP General News, 10 April 2010.

jurisdiction were regarded as too limited, it could be extended to cover other forms of wrongdoing.

The ICAC has power to make findings in relation to conduct. It also has the power to give ‘opinions’ as to whether consideration should be given to taking any further action against people who have engaged in corrupt conduct. For example, in July 2003 the ICAC Commissioner stated that in her opinion Parliament should consider the expulsion of Mr Malcolm Jones from the Legislative Council.¹⁸⁹ Mr Jones later resigned before an expulsion motion could be debated in the House. In practice, while issues of misconduct and corruption arise from time to time, they are almost always resolved by resignation before formal methods for removal are exercised.

If there is a real need to establish more formal mechanisms for the removal of Members of Parliament who engage in misconduct, then reforms could be considered to the *Independent Commission Against Corruption Act* 1988 to widen the scope of its findings from matters of corruption to a broader range of misconduct and to formalize the consequences of such findings, such as the direct vacation of a Member’s seat rather than leaving it as a matter for resignation or expulsion motions. Such an approach would be much cheaper and probably fairer than a system of recall elections. The decisions of the ICAC could also be reviewed by a court.

Option 1B – Recall of Members for corruption or wrongdoing

If it were considered necessary for there to be an additional popular method for recalling a Member of Parliament on the ground of corruption or misconduct, a model similar to that proposed in the United Kingdom might be appropriate. While in the United Kingdom, the recall proposal has been temporarily stymied by the absence of an appropriate body to determine whether a Member has engaged in ‘serious wrongdoing’, the obvious body to undertake such a finding in New South Wales would be the ICAC.

A finding of ‘corrupt conduct’ (which could be changed to incorporate a broader category of ‘misconduct’ or ‘serious wrongdoing’, as appropriate) could provide a trigger that would permit electors to initiate the recall of a Member of Parliament if the Member did not choose to resign within a specified period and notice of motion to expel the Member was not given within a specified period (eg 5 sitting days after the date that the ICAC made its finding). Consideration would have to be given to whether legal challenges to such a finding should be permitted and to whether any review and appeal process ought to be completed before a recall petition could be initiated. Potential problems would arise if a finding by the ICAC was later overturned by a court but the Member had in the meantime been recalled.

¹⁸⁹ ICAC, ‘Report on an Investigation into the Conduct of the Hon Malcolm Jones MLC’ 10 July 2003, p 31.

Recall of a Member of the Legislative Assembly

A Member of the Legislative Assembly is elected by the electors in his or her electorate. At the 2007 State election, the average number of voters in each electorate was around 47,000. If the law were to require that a petition for the recall of a Member of the Legislative Assembly be signed by, say, 30% of registered voters within the Member's electorate,¹⁹⁰ then the number of signatures required would be approximately 14,100. Consideration would have to be given to the period within which these signatures would have to be collected. In the United States it is commonly 60-90 days and in British Columbia it is 60 days.

If the requisite number of signatures on a petition were achieved and verified by the NSW Electoral Commission, a vote could be taken at which electors from the Member's electorate could decide whether or not the Member ought to be recalled.

A question then arises as to whether a by-election could be held at the same time, or whether it would have to be held separately. The problem would be that if the two were held simultaneously, the vote to fill the seat would be contingent upon there being a vacancy as a result of the vote to recall. It might be queried whether Australian courts would accept that a by-election could be held to fill a seat which was not yet vacant at the time the election took place and might not become vacant, rendering the election ineffective.

In New South Wales, by-elections are not controlled by, or entrenched in, the *Constitution Act 1902*. They are dealt with by the *Parliamentary Electorates and Elections Act 1912* (NSW). Hence provisions concerning by-elections could be amended by ordinary legislation (subject to the discussion below about the entrenchment of provisions concerning seats becoming vacant). However, it is possible that a court, in applying the principles of responsible and representative government, might take the view that a by-election can only be held once a seat is declared vacant and cannot be held where the effectiveness of the by-election is contingent upon a simultaneous vote to recall. If this were so, there would need to be a separate by-election, effectively doubling the cost.

Alternatively, the effect of the petition could be to render the seat vacant, with the incumbent being entitled to stand for the vacancy, leaving the by-election vote to determine, effectively, whether the incumbent ought to be recalled or continue as the Member for that electorate.

One matter to consider, particularly if two separate elections were required, would be whether the recall vote could be held by way of a postal ballot only and on a voluntary voting basis, similar to the election for candidates to the Republic Constitutional Convention in 1998. If so, this would reduce some of the cost of the recall procedure. A full by-election, however, ought to be held to elect the person who fills the vacant seat.

¹⁹⁰ Most US States use 25% of the number of voters who *actually* voted at the previous election. British Columbia uses 40% of registered voters, Venezuela uses 20% and the United Kingdom has proposed 10%.

Section 11B of the *Constitution Act* 1902 requires that it is compulsory to vote at periodic Council elections and elections of Members of the Legislative Assembly and this provision is entrenched by s 7B of the *Constitution Act*.¹⁹¹ Hence compulsory voting would have to apply to any by-election, but need not apply to a vote on recall.

Recall of a Member of the Legislative Council

Matters become more complicated with respect to the recall of a Member of the Legislative Council. The electorate, for Members of the Legislative Council, is the entire State. The total number of enrolled voters for the State, at the State election in 2007 was 4,373,029. If the same figure of 30% of registered voters were required for the recall of a Member of the Legislative Council, the amount of signatures required would be 1,311,909. If the period for the collection of this number of signatures were the same as for the Legislative Assembly, then the burden of collecting that many signatures in the relevant time would be far greater.

Even greater difficulties arise when it comes to a recall election and the replacement of the recalled Member. As the Member's electorate is the whole State, then the whole State would have to vote with respect to the recall of one Member. Moreover, because of the proportional representation system in the Legislative Council, that particular Member may have been elected with an extremely small percentage of first preference votes.¹⁹² If the Member faced recall and replacement on his or her own (unlike in a periodic election where the candidate is one of 21 Members elected at a periodic election), it is likely that no Member who belonged to a small party would have a hope of survival and any replacement would come from one of the major parties.

Clearly, individual recalls do not work well where there are multi-member electorates and Members are elected by a system of proportional representation. However, if it is argued that recall is required with respect to Members of the Legislative Assembly, then the same rationale must apply to Members of the Legislative Council. One way of dealing with the problem would be to require different criteria for the recall of Members of the Legislative Council, such as a lower percentage for the number of signatures required on a petition and the replacement of a recalled Member by way of the normal mechanism for filling casual vacancies, rather than by a state-wide election. This still leaves the problem of how to determine whether a Member should be recalled. Should it be left to a vote of the entire State (which many voters might regard as overkill) or should the size of the petition be enough to cause the vacancy, as in British Columbia, leaving the vacancy to be filled by the ordinary casual vacancy procedure?

¹⁹¹ Section 7B requires a referendum to amend or repeal s 11B. Note, however, doubts about whether this provision is effectively entrenched: A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) p 311.

¹⁹² For example, at the 1999 NSW election, the candidates from the Unity Party and the Reform the Legal System Party were elected with only 1% of first preference votes and a candidate from the Outdoor Recreation Party was elected with only 0.2% of first preference votes, being 7,264 votes.

In British Columbia the number of petitioners has deliberately been made higher than in other places (40%) in acknowledgement of the fact that it is the petition that causes the Member to be recalled, rather than an election. As noted above, the Chief Electoral Commissioner of British Columbia has criticised this approach, as petitions do not include the same safeguards as elections. There have also been studies that show that people signing petitions often do not read them and do not understand the significance of their signature.¹⁹³ Cronin has asserted most citizens do not ask to read the petition and 50-70% sign on the basis of a slogan alone.¹⁹⁴

The other difference in British Columbia is that the recalled Member can stand for his or her seat in the by-election, so the will of the people is still directly expressed, but through the by-election. The voters can re-elect the Member if they disagree with the recall initiated by the petition. In New South Wales, however, if one were to fill the casual vacancy in the Legislative Council by means of a joint sitting in which the recalled Member's party nominates the replacement Member, as is normally the case,¹⁹⁵ it would not be sensible to allow the recalled Member to be his or her own replacement. Hence a petition would be used to recall a Member without a direct vote of the people on either recall or replacement, which is problematic from a democratic perspective.

Entrenchment and referenda

To add to these complexities, s 7A of the *Constitution Act* 1902 provides that no 'provision with respect to the circumstances in which the seat of a Member of either House of Parliament becomes vacant' shall be enacted unless it is approved by the people in a referendum. This is qualified by s 7A(6)(e) which states that the referendum requirements do not apply to 'a provision with respect to the circumstances in which the seat of a Member of either House of Parliament becomes vacant which applies in the same way to the circumstances in which the seat of a Member of the other House of Parliament becomes vacant'. This means that to implement a recall system regarding Members of Parliament, which would affect the way their seats become vacant, the provisions would have to be the same for both Houses or otherwise a referendum would have to be approved by the people. As noted above, it is impractical for recall provisions to apply the same way in relation to the Legislative Council as the Legislative Assembly. Hence a referendum would be required.

Other matters

A number of other matters, such as whether petition circulators may be paid, how the petition is to be circulated, criminal offences and the verification of signatures are discussed below in relation to option 3C. However, several additional issues arise where

¹⁹³ Elizabeth Garrett, 'Money, Agenda Setting, and Direct Democracy' (1999) 77 *Texas Law Review* 1845, 1851.

¹⁹⁴ Thomas Cronin, *Direct Democracy – The Politics of Initiative, Referendum and Recall* (Harvard University Press, 1999) p 64.

¹⁹⁵ *Constitution Act* 1902 (NSW), s 22D.

a recall petition is directed at an individual Member, rather than a House or the Parliament as a whole.

In California, if a recall election is held and the incumbent Member wins, defeating the attempt to recall him or her from office, the Member is reimbursed for the cost of his or her anti-recall campaign. Consideration would need to be given to what, if any, public funding would apply in New South Wales, both with respect to the campaign of the Member whom it is sought to recall and with respect to the recall campaign as well as the campaign costs of candidates to fill the vacant seat, whether or not there is a seat to fill.

Another issue is whether the petition itself should be a public document. As noted above, in the United States, the Supreme Court has held that it is not unconstitutional for a petition to be treated as a public document. In British Columbia, recall petitions are public documents, but the Chief Electoral Commissioner has been critical of this. In Venezuela, accusations were made that people were discriminated against or lost their jobs for signing a petition to recall the President. On the one hand making a recall petition a public document enhances transparency, reduces the risk of fraud and helps ensure that people who sign it are genuinely supportive of the proposal and prepared publicly to commit to it. On the other hand there may be a risk that people who sign a petition may be harassed or discriminated against and that this will discourage people from signing a petition, even if they support the recall proposal. Although this issue also arises with respect to the recall of the Parliament or one of its Houses, it is perhaps a matter of greater concern in a smaller community, such as an electorate, where the number of signatures is much smaller and therefore the names of individuals are more likely to be prominent.

2. Removal of Members because of how they vote or for other political or policy reasons

If the reason for implementing a recall process in New South Wales is that the voters should be able to remove their Member of Parliament if the voters object to the way their Member votes or fulfils his or her functions, then this is a more difficult matter. This approach is one that downgrades the status of Members and treats them as mere ciphers or agents of the electors¹⁹⁶ without any capacity to exercise their own initiative, obey their conscience or move beyond the parochial to consider the interests of the State as a whole. As Crisp noted it ‘cut[s] right across the basic principles of responsible Cabinet government.’¹⁹⁷ It is also contrary to the way our system of representative government is intended to operate.¹⁹⁸

¹⁹⁶ See, for example, the Senator Online Party which promised that its Senators would vote strictly in accordance with online votes on every bill and every issue in Parliament: <http://senatoronline.org.au/> [viewed 16 July 2011]. It is not clear how this would be feasible in relation to votes that arise immediately on the floor of Parliament, including amendments proposed to bills, or how the Senator would vote if no internet votes were lodged.

¹⁹⁷ L F Crisp, *The Australian Federal Labour Party 1901-1951* (Hale & Iremonger, Sydney, 1978) p 213.

¹⁹⁸ George Williams, ‘Debate the recall, but safeguard the system’, *Sydney Morning Herald*, 15 December 2009, p 15.

Such a system would have a number of significant consequences:

- It would pressure Members to vote only in favour of populist measures and reject measures that are necessary for the well-being of the State, but not popular within their electorates;
- It could potentially undermine political parties, as Members would be likely not to follow party policy if it would result in the risk of recall;¹⁹⁹
- It could potentially lead to instability in government, if governments could not rely on their supporters where an issue was important but unpopular; and
- It would be likely to raise parochial interests above the interests of the State as a whole, with ‘not in my backyard’ being the prime consideration for local Members in exercising their vote on matters such as urban consolidation.

The most vulnerable people to this kind of recall process would be those in marginal seats, regardless of their performance and their actions. In contrast, those Members with safe seats, regardless of whether they are popularly regarded as lazy, unethical or unwise in their behaviour, would be largely invulnerable to removal through recall. It is therefore an inherently unfair system.

Where an election result was particularly close, it is likely that government Members in marginal seats would be picked off by campaigns, one by one, in an effort to change the government. For example, in Wisconsin in 1996 Senator Petak was recalled, resulting in a change of control of the upper House. Control of the upper House also changed in Michigan in 1983 when Senators Mastin and Serotkin were recalled for supporting a tax increase.

The recall has also been used in the United States by political parties to attack and replace members of their own party who have defected to another party or voted with another party on a major issue. It can therefore be used as a weapon to increase party control over Members.²⁰⁰ For example, Paul Horcher and Doris Allen of the lower House of the Californian State legislature were recalled in 1995 after both alienated their own Republican party by doing deals with the Democrats. Their recall helped the Republicans regain control of the House.²⁰¹

Recall petitions can also be used as a political tactic simply to harass and tie up the time and finances of Members to prevent them from concentrating on other duties and to deplete their campaign resources prior to the next election. These sorts of petitions do not need to succeed. Their mere existence can damage the standing of a Member in his or her local community, provoke agitation and conflict within the community and

¹⁹⁹ Note, however, the point below that it could have the opposite effect of increasing party control, because parties are more capable than most of raising signatures and campaigning to attack their own Members who have betrayed their trust.

²⁰⁰ Joshua Spivak, ‘California’s Recall – Adoption of the “Grand Bounce” for Elected Officials’, (2004) 81(2) *California History* 20, 31-3.

²⁰¹ See further: Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997), pp 85-7.

undermine the Member's capacity to hold the seat at the next election. Recall petitions can also be a very effective way of publishing unfounded allegations and smears against a Member in a political context that potentially lends such statements the protection of the implied freedom of political communication and limits the effectiveness of defamation laws.

Option 2A – Recall of Members for political reasons

A recall system in New South Wales which did not require proven misconduct could operate in a similar manner to Option 1B, but would also face the same problems as set out above in relation to its operation in each House. In addition, in the absence of the 'gate-keeper' type function of the ICAC, consideration would need to be given to how a petition ought to be initiated, when it might be initiated, what is included within its wording and whether the procedure should be regarded as purely political or whether courts should become involved in hearing legal challenges or reviewing recall petitions.

Initiation of the recall petition

There must be a formal procedure for the initiation of recall petitions, if for no other reason than to start the clock on the period for the collection of signatures. Consideration would need to be given to who could initiate the petition and any hurdles that should be put in place before it is formally initiated to ensure that it is not an easy tool of harassment. It is usually the case that the person or persons initiating a petition must be electors enrolled within the constituency of the Member whose recall is sought. In some jurisdictions, a registration fee is applicable (eg \$50 in British Columbia) to cover the costs of administration and to discourage frivolous and vexatious petitions. In some, the application is also required to be supported by a small number of other enrolled voters (eg 100 voters enrolled in the electorate) in order to show that the petition has a modicum of support before it is formally initiated.

Timing of recall initiatives

Where the basis of recall is political, rather than acts of misconduct, a question arises as to whether a Member should be given a reasonable time in office to give the electors sufficient evidence of the Member's performance upon which they can fairly make a judgment. For this reason, some jurisdictions require a proportion of the Member's term of office to have passed (eg a year or half the Member's term in office) before a recall petition can be initiated. This also avoids attempts by sore losers to re-run an election shortly after the election is held. There is also good sense in having a period at the end of a Member's term in office (eg the last six months) in which recall petitions cannot be commenced as it is wasteful to run a by-election so close to a general election. Accordingly, in many jurisdictions there is a defined window in which recall petitions can be brought.

Some jurisdictions also prevent the initiation of another recall petition after the first one has failed, either by placing a limit on how many recall petitions can be initiated within

one term of office or by prohibiting the initiation of another petition for a set period, such as a year. The intention is to minimise the use of recall as a form of political harassment.

Control of the form of the recall petition

In jurisdictions where the reason for recall may be purely political, those seeking recall are sometimes required to provide an explanation as to why recall is sought (usually limited to 200 words) and the Member subject to recall has the right to provide a response (with the same word limit). Both accusation and response are then included on each copy of the petition, which is formally printed by the administering body, usually the electoral commission. It is important that the form of the petition is controlled by an official body to ensure that it contains adequate information for anyone contemplating signing. It is also important to ensure that the petition is not presented in a biased or inflammatory fashion by, for example, controlling fonts, font sizes, underlining and the like.

A right to natural justice?

Another matter for consideration is whether a Member has any right to natural justice and to challenge the veracity of statements in a petition or the sufficiency of the allegations. In the United States, in those jurisdictions where the grounds for recall may be purely political, the courts are most commonly excluded from reviewing such matters. This has the advantage of avoiding delay and the tactical use of litigation. It has the disadvantage of exposing Members to the serious risk that allegations will be false or unfair and the Member will have no formal avenue to disprove them in an authoritative manner.

3. A mechanism for achieving an early election

As noted above, most discussion of the introduction of the recall in New South Wales characterises it as a means of achieving an early election. If the aim is to permit an early election, consideration should first be given to whether there are other ways of achieving this outcome without introducing a form of collective recall or citizens' initiated election. Accordingly, two other options are addressed below, followed by a detailed consideration of how a citizens' initiated election might be implemented in New South Wales.

Option 3A – Maximum 4 yr term with fixed minimum period

Before moving to fixed four year terms, both Victoria²⁰² and South Australia²⁰³ had a system where there was a maximum term of four years and a government had to run a full three year term, but could decide to hold an election at any time during the fourth year of its term. This stopped governments from going to the polls opportunistically too early in their term, but permitted an election at any time between three and four years. This approach was also recommended by the Constitutional Commission in relation to the Commonwealth House of Representatives.²⁰⁴ It proposed that an early dissolution within the fixed three year period could only occur if a vote of no confidence in the Government was passed and no other government could be formed from the existing House. It also proposed to exclude the holding of a double dissolution election in the first three years of a parliamentary term, confining it to the final year.²⁰⁵

Whether such a provision would resolve the public concerns expressed in recent times is debatable. On the one hand, in practice, an unpopular government is unlikely to go to the polls early even if it has the right to choose to do so. Hence whether a parliamentary term is fixed or flexible, it is unlikely to make any difference in circumstances where a government is aware that it is likely to lose an election. On the other hand, the fact that the election date is fixed seems to have been the main source of public concern and the *possibility* that an election could be held early might be regarded as valuable.

In NSW, because of the application of s 7B of the *Constitution Act 1902* (NSW), the term of the Legislative Assembly cannot be altered by law, nor can authority be given to reduce or extend it, without approval by the people in a referendum. This means that any such proposal would require a referendum. Any reduction of the term of the Legislative Assembly would also result in a reduction in the term of the Legislative Council, as elections are held simultaneously and Legislative Councillors serve for two terms of the Legislative Assembly. Accordingly a periodic election for half the Legislative Council would be held at the same time as an early election for the Legislative Assembly.

Option 3B – Power for the Legislative Assembly to dissolve itself

As noted above, the United Kingdom has recently proposed the introduction of fixed five year terms but with an option for the House of Commons to dissolve itself by a resolution

²⁰² Victoria had this system in place from 1984 to 2003 when it moved to fixed four year terms, following New South Wales. See: *Constitution (Duration of Parliament) Act 1984* (Vic). Grounds for an early election within the first three years were: (a) rejection of supply by the Legislative Council; (b) development of a deadlock over a Bill of special importance; and (c) a vote of no confidence by the Legislative Assembly. See: *Final Report of the Constitutional Commission*, (AGPS, 1988), Vol 1, p 206.

²⁰³ This system was implemented in South Australia in 1985. See: *Constitution Act Amendment Act 1985* (SA). Grounds for an early election in the first three years were: 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. See: *Final Report of the Constitutional Commission*, (AGPS, 1988), Vol 1, p 206.

²⁰⁴ *Final Report of the Constitutional Commission*, (AGPS, 1988), Vol 1, pp 195-206.

²⁰⁵ *Final Report of the Constitutional Commission*, (AGPS, 1988), Vol 1, p 206.

passed by a special majority of two-thirds of Members. Similarly, as noted above, during the Weimar Republic, some of the legislatures of the German Länder had the power to dissolve themselves, either by an ordinary majority or a special majority.

It would be possible to amend s 24B of the *Constitution Act* 1902 (NSW) by including an additional ground upon which the Legislative Assembly could be dissolved early, being a resolution passed by the Legislative Assembly by a requisite majority or a resolution passed by each House. If the resolution were too easy for a Government to achieve, it would effectively negate the benefits of fixed term Parliaments by putting the power of dissolution back in the hands of the government. If, however, it required the support of the Opposition or minor parties, either by requiring a special majority to support the resolution or by requiring resolutions in each House (given that the Legislative Council is rarely controlled by the Government), this would provide a mechanism for achieving an early election if it were generally desired.²⁰⁶

Again, a referendum would be required because of the application of s 7B.

Option 3C – A citizens’ initiated election

The third option, and the most radical, would be to allow the people to initiate an election by recalling the Legislative Assembly and causing the dissolution of the House and a new general election. In order to keep elections simultaneous, this would also entail a periodic election for half the Legislative Council, as its Members serve two terms of the Legislative Assembly.

A query would also arise as to whether the people should be permitted to initiate the recall of the whole of the Legislative Council if they were dissatisfied with its operation, either resulting in a double dissolution or simply the complete dissolution of the Legislative Council alone. This would require the enactment of additional transitional provisions to get the Legislative Council back into its cycle of periodic elections for half its Members. An alternative would be to provide that either House could be dissolved on its own, but the replacement House would only serve the remainder of the term of the recalled House. This would ensure that the elections for the Houses would get back into kilter and restore the four year cycle, but special provisions would have to be included regarding Legislative Council terms, especially if the whole House were to be dissolved. It would also require a referendum to make this change and it would result in extra elections, imposing an additional financial burden on taxpayers.

For present purposes, the discussion below will assume that half the seats in the Legislative Council would be vacated and filled at a citizens’ initiated election along with the whole of the Legislative Assembly. The details of how such a system might work are set out below. In summary, however, voters would initiate a petition and collect signatures over a limited period. If the requisite number of signatures were collected and verified, then there are two main options as to how to proceed.

²⁰⁶ Note that it might also force minority governments to go to elections against their will.

The first option is to hold what would effectively be a referendum on whether the Legislative Assembly should be dissolved and a general election held. If this was approved by the people, then a full general election and periodic Legislative Council election could be held.

The second option, intended to avoid going to the polls twice, is to have a high signature requirement (eg 40% or 50% of registered voters) and then use this as sufficient evidence that the Legislative Assembly should be dissolved. An election would then be held for the whole of the Legislative Assembly and half the Legislative Council. This would avoid the need to run both a separate referendum and a general election and would therefore be a quicker and cheaper option. Some might, however, make the same objections as in British Columbia – that on the one hand the number of signatures required is so high the mechanism is ineffective and on the other hand signatures do not amount to an election and do not have the necessary safeguards.

Citizens' initiated referenda – Issues of concern

The observation is often made that the use of the recall procedure is relatively rare in the United States, at least at the State level with regard to Governors or Members of State legislatures. The assumption is therefore made that the same would be true in relation to New South Wales. One needs to take into account, however, that in those American States in which recall is permitted, it is usually the case that citizens' initiated referenda are also permitted, so that most of the focus is on changing policies or laws to which the people object through this means rather than recall. Other factors are also at play in the United States, such as short legislative terms and the imposition of term limits. In the absence of these factors in New South Wales, it may well be that the use of petitions to initiate an election would be both popular and frequently used. It would therefore be wise to pay close consideration to the potential ramifications.

The main advantages of permitting the people to initiate an early election include the enhancement of the democratic involvement of the people in the political process and the capacity to hold an early election, where needed, at the initiation of the people, rather than the government.

There are, however, a number of serious concerns that would arise in relation to any such proposal. These concerns need to be addressed and ameliorated by the mechanisms chosen to implement such a proposal. They include the following:

- the role of money;
- the cost of the proposal;
- the stability and effectiveness of government; and
- the use of election petitions as political weapons.

The role of money

Experience in the United States has shown the dominant role played by money in relation to citizens' initiated referenda and the recall. It has been estimated that the recent series of nine recall elections in Wisconsin in 2011 resulted in expenditure of \$37 million.²⁰⁷ As discussed above, the collection of signatures has become professionalised and any recall petition can be guaranteed to achieve the required number of signatures as long as a sufficient amount of money is paid to professional signature gatherers.²⁰⁸ There is already sufficient public disquiet in Australia about the potential influence of political donations upon governments. It would be far more disquieting if wealthy corporations and individuals could buy a new election in New South Wales and potentially cause a change in government.

Recall campaigns can also be used as a form of political blackmail. A campaign could be initiated with the promise that it would be terminated if the government acted in a particular manner. This has occurred in the United States.²⁰⁹ If, for example, a system of citizens' initiated elections applied at the Commonwealth level, it could be used by well-resourced mining companies or tobacco companies to pressure the Commonwealth into backing down on legislative proposals about mining or carbon taxes or plain paper packaging for tobacco. A recall mechanism could therefore increase the influence on governments of wealthy corporations or well-financed lobby-groups.

Accordingly, if the idea of citizens' initiated elections is to be pursued, serious consideration should be given to ensuring that the role of money is limited and control is placed in the hands of the general population, rather than the rich or well-financed special interest groups. Increasing the percentage of signatures required is not an effective way of dealing with this problem as it makes it even harder for grassroots groups to get the requisite number of signatures and leaves the field to the very rich.²¹⁰

The first step to deal with the problem of money would therefore be to consider banning the use of paid signature gatherers and making it an offence to offer inducements or rewards to people for collecting signatures or signing a petition.²¹¹ In the United States,

²⁰⁷ Brendan O'Brien, 'Democrats hold seats in Wisconsin recall elections', *Reuters*, 17 August 2011, <http://www.reuters.com/article/2011/08/17/us-wisconsin-recalls-idUSTRE77F2W820110817> [viewed 4 September 2011].

²⁰⁸ Elizabeth Garrett, 'Money, Agenda Setting, and Direct Democracy' (1999) 77 *Texas Law Review* 1845, 1852-3. Note, however, that it is likely that without a system of citizens' initiated referenda in New South Wales, there would not be a sufficient market for professional signature gathering agencies. Nonetheless, on an ad hoc basis, money to pay petition gatherers would still have a substantial effect.

²⁰⁹ See, for example, the petition in California for a citizens' initiated referendum on the expansion of the charter school program. Legislators were told that they could either take action to increase the number of charter schools or the wealthy proponents would spend another \$12 million to get the referendum passed. The legislature passed legislation to meet the proponents' wishes and the initiative was terminated: Elizabeth Garrett, 'Money, Agenda Setting, and Direct Democracy' (1999) 77 *Texas Law Review* 1845, 1859-60.

²¹⁰ Elizabeth Garrett, 'Democracy in the Wake of the California Recall' (2004) 153 *University of Pennsylvania Law Review* 239, 244.

²¹¹ See, eg, the relevant offences in British Columbia: *Recall and Initiative Act* 1994 (BC), ss 156 and 159.

attempts to ban paid signature collectors have been struck down as constitutionally invalid.²¹² However, the High Court of Australia might well take a different approach, finding that such a law is reasonably appropriate and adapted to achieving the legitimate end of ensuring the integrity of the petition process and avoiding the risk or perception of corruption or undue influence.²¹³

Banning professional signature gatherers might also need to be balanced by mechanisms for making signature collection easier and more efficient for volunteers. Consideration might therefore be given to the use of electronic petitions through the internet.²¹⁴ Internet communication and email is a much more cost-effective and efficient way to garner wide-spread public support through grass-roots groups. The challenge, however, is to do this in a manner that does not result in wide-spread fraud. A personal signature should therefore still be required, in addition to a name and address. In 2010, Justice Perram of the Federal Court of Australia held that an electronic signature using a digital pen on the track-pad of a lap-top computer was a valid signature for the purposes of enrolling to vote.²¹⁵

Electronic petitions are currently used by the Queensland Parliament, the Scottish Parliament and No 10 Downing St, amongst other places. Systems can readily be implemented to prevent computer generated fraud on a wide-spread basis by, for example, requiring each petitioner to insert a number that is not machine readable or requiring petitioners to confirm their support for a petition in a separate e-mail.²¹⁶ The petition host can also check ISP addresses to ensure that large numbers of signatures are not being generated by the same computer. Duplicate names can also easily be checked and eliminated.²¹⁷ The difficulty of preventing fraud by individual signatories remains an issue, as it does with paper petitions. If, however, voters were required to enter their full name and address as registered with the Electoral Commission, it would be easier to check this electronically against the electoral roll than with paper petitions. Other random sampling methods could be used to check that signatures are genuine.

Another proposal that is sometimes raised in the United States is the provision of public funding to support signature gathering.²¹⁸ It would not be appropriate to fund every

²¹² *Meyer v Grant* 486 US 414, 421 (1988).

²¹³ See the general test in: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

²¹⁴ See further: House of Representatives Standing Committee on Petitions, *Electronic Petitioning to the House of Representatives*, (Commonwealth Parliament, October 2009); Tasmania, Joint Select Committee on Working Arrangements of the Parliament, *E-Petitions*, (Report No 12, May 2004); and Stephen Finnimore, 'E-Petitions – The Queensland Experience' ANZACATT Seminar Presentation, January 2008: [http://www.anzacatt.org.au/prod/anacatt/anacatt.nsf/ca3cb73640e4b7d4ca2567ee0016638b/cb1d4264a4f7331bca257452001ec143/\\$FILE/Workshop%204C%20E-Petitions%20-%20The%20Queensland%20Experience.pdf](http://www.anzacatt.org.au/prod/anacatt/anacatt.nsf/ca3cb73640e4b7d4ca2567ee0016638b/cb1d4264a4f7331bca257452001ec143/$FILE/Workshop%204C%20E-Petitions%20-%20The%20Queensland%20Experience.pdf) [viewed 16 July 2011].

²¹⁵ *Getup Ltd & Trevitt v Electoral Commissioner* [2010] FCA 869.

²¹⁶ The problem with this system is that it requires an e-mail address and not all voters have e-mail addresses, although they are easy to obtain.

²¹⁷ House of Representatives Standing Committee on Petitions, *Electronic Petitioning to the House of Representatives*, (Commonwealth Parliament, October 2009) pp 14-15 and 41-5.

²¹⁸ Elizabeth Garrett, 'Money, Agenda Setting, and Direct Democracy' (1999) 77 *Texas Law Review* 1845, 1876-9.

petition for the dissolution of the Legislative Assembly, especially those with little merit or support. However, a system similar to the funding of political parties could be devised if a requisite threshold of signature collection were reached (eg half the required amount). The issue would then be the cost to the public purse and the value received for such amounts.

The cost of the proposal

Cost is a considerable factor that would need to be considered. First, there is the cost of additional elections, being a referendum on whether the Legislative Assembly should be dissolved and a full general election for the Legislative Assembly and periodic election for the Legislative Council. It costs in the realm of \$40 million to run a general election. In addition, there is the public funding of candidates and political parties in relation to the election to take into account. Significant administration costs would also apply to the NSW Electoral Commission, including the cost of verifying petitions.

As noted above, the cost would be reduced if the separate vote on whether to dissolve the Legislative Assembly were eliminated in favour of a higher signature threshold on the petition. An alternative might be to consider a postal vote on the issue of dissolution, rather than a full election with polling booths and the like. Both alternatives, however, are conducive to fraud.

The stability and effectiveness of government

One of the great risks with such a proposal is that it will cause governments to act in a populist manner and not take the often hard but unpopular decisions that are in the long-term interests of the State. It would magnify the political interests of governments in achieving short-term fixes rather than long-term benefits that will not directly benefit the government making the decision. As Mike Steketee has observed:

Should the Hawke government have been subject to recall because it made unpopular decisions to cut tariffs or privatise government businesses, even though they since have been generally accepted as being in Australia's long-term interests? Should the Howard government have been forced to the polls because it suffered a backlash over introducing the GST? Australians elect governments to govern, not to subject every decision to a life-or-death verdict. Voters, as well as governments, should be allowed time for reflection.²¹⁹

One of the reasons behind the introduction of fixed four year terms was to allow governments some space to govern responsibly in the public interest without having to be on an election-footing, constantly seeking popularity. The risk with citizens' initiated elections would be that governments would be perpetually on an election-footing, undermining their effectiveness and the long-term interests of the State.

²¹⁹ Mike Steketee, 'Shorter terms a worse option in the long run', *The Australian*, 19 December 2009, (Inquirer p 8).

One of the other advantages of fixed four year terms is the end of the constant destabilising speculation about when an early election might be held. Everyone knows the election date and can prepare well in advance for it. A system of citizens' initiated elections is likely to lead to significant periods of hype and speculation while petitions are underway or are being verified. As the Constitutional Commission has recognised:

The possibility of an election before the end of a Government's maximum term often leads to a long period of speculation and rumour. The uncertainty generated by this can have harmful consequences for public administration, business and the community generally. Further, it distracts the Government and the Parliament from giving proper attention to carrying out their respective functions.²²⁰

The risk is that a system of citizens' initiated elections would bring back into New South Wales, and potentially magnify, the kind of economic and social disruption and instability that was intended to be eliminated by fixed four year terms.

One way of ameliorating these concerns would be to give governments a clear period in which they can govern, without the threat of an early election. In Venezuela, for example, an official must serve at least half his or her term before a recall petition can be initiated. In New South Wales a government could have the right to serve at least two years of its four year term before an election petition could be commenced.

As noted above, it also makes sense not to allow election petitions to be initiated in the last six months or year or the term of a government, as by the time the election can be held, it would be too close to the regularly scheduled election. Equally, many jurisdictions forbid the holding of second recall elections or the initiation of second petitions during a term in which the first has failed. Such measures could also be considered for New South Wales.

It would therefore be appropriate to have a 'window' in which an election petition could be initiated of about 1 year or 18 months. This would give the community the confidence that in extreme cases they would have the opportunity to remove an unpopular or incompetent government mid-way through its term and would not have to wait the full four years to do so, while on the other hand it would limit the period in which there is potentially destabilising speculation and campaigning and would allow governments a space in which they could govern without being distracted by petitions for an early election.

The use of election petitions as political weapons

Experience in California with respect to the recall and in the Weimar Republic with respect to citizens' initiated elections has shown that there is a significant risk that such

²²⁰ *Final Report of the Constitutional Commission*, (AGPS, 1988), Vol 1, p 205. See also p 200 noting the submission of the Business Council of Australia that the 'frequency of elections has had an adverse impact on Government economic policy-making which has, in turn, had an adverse effect on private sector planning and business confidence'.

measures will be used as political weapons to re-run elections or disrupt and tie-up the time of the government. Petitions may be initiated, even if there is no hope of success, in order to damage the reputation of a government, to distract or deter it from pursuing difficult policy issues or to burn up the governing party's financial resources in defending its position so that it is inadequately resourced at the next general election.²²¹ Political parties have significant resources in terms of membership and volunteers who could collect signatures. Hence they are the organisations most likely to initiate a petition and most capable of collecting a significant number of signatures.

One way of avoiding the scenario of sore losers re-running an election is to prevent the initiation of an election petition until the government has served half its term, as discussed above. Confining the window in which a petition can be brought also reduces the opportunities for opposition parties to disrupt governments and deter them from making hard policy decisions. Imposing a significant threshold of signatures before a petition can succeed would also be important to ensure that political parties could not cause an early election through the use of partisan supporters alone and would require more broad-based community concern about the government before a petition would be successful.

In some jurisdictions, the incentive for political parties behaving in this way is reduced by providing that the person who replaces a recalled Member only serves out the remainder of that Member's term. In the Swiss Cantons the newly elected Grand Council simply fills the rest of the term of the recalled Grand Council. If the newly elected Legislative Assembly were simply to fulfil the term of the recalled one, this would increase the number of elections, at significant cost to taxpayers. However, there is an in-built disincentive for opposition parties to initiate early elections to the extent that the terms of their own Members will be cut short (including those in the Legislative Council) and they will also be burdened with the cost of funding an early election campaign.

Mechanics of how a citizens' initiated election in NSW might operate

Initiation of the petition: The first stage would be the lodgement of an intention to initiate an election petition by an enrolled voter with the relevant body, being most likely the NSW Electoral Commission. As discussed above, it would probably be appropriate to include a filing fee and require some minimal level of support, such as the signatures of a number of enrolled voters, to avoid frivolous and vexatious petitions. As an early general election for the whole State would be at issue, rather than simply the recall of an individual Member, it would be appropriate for a higher fee and a higher number of signatures to be required than those used for an individual recall in the United States.

²²¹ See, for example, the case of David Roberti who was Democratic leader in the Californian Senate. He was a supporter of gun control. The gun lobby decided to send a message to politicians generally by initiating Roberti's recall in 1994, shortly before the end of his final term in office (as California has term limits). Although Roberti won the recall election he later lost his bid to be State Treasurer because his campaign funds had been drained by dealing with the recall issue: Joshua Spivak, 'California's Recall – Adoption of the "Grand Bounce" for Elected Officials', (2004) 81(2) *California History* 20, 31.

Time in which a petition may be initiated: For the reasons discussed above it would be appropriate to limit the window in which a petition can be brought to the period of a year or eighteen months after the half-way point in a government's term. This would give the government a reasonable time in which to establish its credentials, make necessary decisions and prevent the re-running of elections and undue disruption to government.

Control over the form of petition: It is important that an official body, such as the NSW Electoral Commission, be the one to officially print or host on its web-site the form of a petition to ensure that its format is fair and clearly informs signatories about what they are signing. Consideration should be given to whether to include on the face of the petition short statements as to why an early election is sought and any response. Consideration should also be given to providing more detailed statements both for and against an early election on the Commission's web-site to ensure that potential signatories have access to relevant information and can inform themselves if they choose to do so.

Eligibility to sign petition and collect signatures: Persons enrolled to vote in New South Wales should be eligible to sign an election petition and to collect signatures where paper petitions are being used. Consideration should be given to whether signature collectors should be formally registered, as in British Columbia, to ensure compliance with relevant laws and avoid fraud. Registered signature collectors might also be required to certify that they witnessed petition signatures and that all signatures were genuine, with penalties for collecting false signatures.

Number of signatures required: Percentages of signatures required for recall petitions tend to sit between 20% and 40% of enrolled voters. Where a general election is at issue, rather than the recall of an individual Member, a figure on the higher end of the spectrum would be appropriate. The number of signatures required ought also to depend upon a number of other factors. These will include:

- the ease of collecting signatures (eg whether electronic petitions will be permitted, using the internet);
- whether the petition is used to initiate a referendum on whether there should be an early election or whether it is to be used directly to cause the dissolution of the Legislative Assembly and the early election itself;
- the time period in which the signatures may be collected; and
- whether signatures must be collected across the whole State or may be concentrated in high density areas.

Geographical spread of signatures: In some jurisdictions that use the recall, a proportion of signatures must also be collected in a certain number of electoral districts.²²² In New South Wales, as the petition would result in a State-wide election, it might be appropriate to include a requirement that a certain proportion of signatures be

²²² See, for example, California, where signatures amounting to at least 1% of the vote in the previous gubernatorial election must come from at least five counties. See also: George Williams, 'Debate the recall, but safeguard the system', *Sydney Morning Herald*, 15 December 2009, p 15.

collected in either each electorate or in particular regions of the State, to ensure that the popular desire for an election is wide-spread throughout the State and not just concentrated in one place. Consideration would have to be given, however, to the administrative burden of verifying the correct spread of petition signatures.

Time period for collection of signatures: The period for the collection of signatures needs to be limited as it is important to minimise the amount of uncertainty and disruption involved. A fixed period also limits campaign costs and provides an incentive for signature collection. The period most commonly used is 60-90 days, but it would need to be balanced against the number of signatures that need to be collected. It is certainly possible to collect a large amount of signatures in a short period where the public desire to sign is strong enough. In Venezuela, 3.6 million signatures were collected in four days, often at huge rallies. However, population density and any requirement for a geographical spread of signatories would affect how feasible it is to collect signatures within a fixed period, as would the means of collection (eg individual collection at shopping centres as opposed to electronic petitions).

Offences: It would be prudent to create a number of offences to discourage fraud. They could include collecting false signatures, inducing a person to sign a petition by providing false or misleading information, bribing a person to sign a petition or offering rewards for doing so, etc. As discussed above, it might also be appropriate to ban the payment or reward of signature collectors so that it is done purely on a volunteer basis. If so, some consideration would have to be given to how employees of political parties or the staff of Members of Parliament could be involved in the signature collection process.

Method of petition: One of the biggest issues is whether the petition should be a paper petition with signatures gathered by registered signature collectors at shopping centres, public rallies and other public places, or whether an electronic petition should be used. Three main issues arise with electronic petitions. One is accessibility. On the one hand an electronic petition would be accessible throughout the State, not just where volunteers happen to be collecting signatures. This would make it more accessible than paper petitions. On the other hand those who do not have internet access, or who are not sufficiently familiar with the internet to use it, would be excluded. There may be ways of ameliorating this concern, such as the provisions of free internet access at local libraries and at Electoral Commission Offices where assistance could be given to those unfamiliar with internet use.

The second main issue is whether there are sufficient mechanisms available to ensure the security of an electronic petition (eg from hacking) and to prevent wide-spread fraud. As noted above, electronic petitioning is becoming more common and various methods have been developed to avoid computer-generated fraud.²²³ The problem with individual fraudulent signatures remains, as it does with paper petitions, but an electronic petition will make it easier to eliminate duplicate signatures and to exclude those whose names and addresses do not correspond to information on the electoral roll. Other methods for

²²³ House of Representatives Standing Committee on Petitions, *Electronic Petitioning to the House of Representatives*, (Commonwealth Parliament, October 2009).

the verification of signatures through random sampling would still be required. Stiff penalties could also be applied in relation to fraud (which may also be more easily traced through electronic systems).

The third issue is ensuring that the petition web-site has sufficient capacity so that it does not crash when it receives large amounts of activity. This is particularly important when there is a limited period for collecting signatures and a web-site crash might prevent a petition succeeding by excluding people from registering their signatures. Some flexibility in collection periods might be built-in to accommodate such eventualities.

If an electronic petitioning system were to be established, it would be preferable for the petition to be hosted by one central official body, such as the Electoral Commission, so that greater control could be exercised over the petition to detect and prevent fraud. Privacy measures could also be applied to ensure that the information collected is not used for other purposes. Persons campaigning for signatures could then provide potential signatories with a link to the official web-site through email or could make computers available in shopping centres and the like so that voters could sign the petition on the spot. The official petition web-site could also be set up to provide signatories with relevant information before they sign the petition.

Public disclosure: There would need to be a public disclosure regime regarding the funding of election petitions to ensure that the public knew, in good time, who was behind them and how much was being contributed. Consideration would need to be given to how the petition process would be incorporated into existing laws concerning electoral donations and disclosure.

Public funding: Consideration would need to be given to whether there should be public funding of the petition stage and in relation to any ensuing election.

Publication of petition: As discussed above, consideration would need to be given to whether a petition should be a public document (which would help avoid fraud) or whether the names and addresses of signatories should be kept confidential for privacy reasons. The application of privacy legislation should also be taken into account.

Verification: If the petition is submitted before the end of the statutory collection period with the requisite number of signatures, a process of verification must then take place. In some jurisdictions, a strict time limit is placed on verification. Whether or not this is feasible depends upon how verification is to be performed. In some places such as British Columbia and Venezuela, each signature is checked, taking a long period and requiring (to be efficient) an electronic database of the names, addresses and signatures of enrolled voters. In other jurisdictions petitions are verified by a process of random statistical sampling. The NSW Electoral Commission already has a process in place for verifying the signatures of supporters of political parties for the purposes of registering political parties.²²⁴ A similar process could be used for verification of petitions.

²²⁴ *Parliamentary Electorates and Elections Act 1912 (NSW) s 66G.*

A further issue is whether the petition initiators get a chance to rectify errors and collect additional signatures if the petition is rejected because of minor defects. In Venezuela this is known as the ‘repair’ period.

Elections: As noted above, the critical choice here is between having a two-stage process, as in Switzerland, with a vote (effectively a referendum) on whether there should be an early election, which if successful would be followed by a general election for the Legislative Assembly and a periodic election for the Legislative Council, or a one stage process, as in British Columbia, where a successful petition results in a new election without an intermediate vote. In either case, the ordinary rules for referenda and general elections should be applied. Unlike the case of recall of individual Members, there should be no prohibition on the Members of the dissolved Legislative Assembly or the Legislative Council standing for office in that election again. The existing provisions in the Constitution would apply to get the Houses back into their four year fixed term cycles.

Conclusion

The implementation of a form of recall in New South Wales is feasible, but first the Government needs to be clear about what it is trying to achieve and tailor the system to meet that need (or find an alternative to recall that better meets that need). Consideration also needs to be given to the existing political and constitutional system of representative and responsible government and how a recall procedure could be accommodated within it, rather than clashing fundamentally with it.

Whatever method is chosen, it is likely that a referendum will be required to implement it, so an effective case in favour of this particular method of recall will need to be made to the people. Overseas experience has shown that there are many pitfalls in implementing a system of recall and there is the potential for it to achieve the opposite of what it was meant to achieve. Particular care therefore needs to be taken to address potential problems in advance and think through the likely consequences of any such proposal.