

THE RECALL OF MEMBERS OF PARLIAMENT AND CITIZENS' INITIATED ELECTIONS

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I INTRODUCTION

Proposals have recently been raised in New South Wales ('NSW')¹ and the United Kingdom² to introduce a form of 'recall' of members of Parliament by the electorate. In the United Kingdom, this was a response to scandals concerning the use and abuse by members of Parliament of their expense allowances. There, the recall proposal is directed at individual members who have committed some form of wrongdoing. In the case of New South Wales, calls for the introduction of a system of recall have been directed instead at the termination of the term of office of an unpopular government. In effect, what is really sought is power by voters to cut short a government's fixed four year term and initiate an early election.

After discussing the rationale for the recall and its support in Australia, the first half of this article considers the use of recall in the comparative jurisdictions of the United States and Canada and proposals for the introduction of the recall in the United Kingdom. It also examines the use of 'collective recall', being a form of citizens' initiated elections, in Switzerland, Germany and Japan. Drawing on this material, the second half of the article outlines various options for New South Wales. These options are designed to achieve the different outcomes which the recall is variously said to support, being:

1. the removal of members of Parliament who engage in corruption or misconduct;
2. the removal of members of Parliament for political or policy reasons; or

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1 Barry O'Farrell, 'Restoring Good Governance' (Speech delivered at the Sydney Institute, 12 March 2009); Andrew Stoner, 'In NSW, Scandal and Fatigue has Set In', *The Sydney Morning Herald* (Sydney), 22 December 2009, 11. See also New South Wales State Government, *First 100 Days Action Plan* (2011) 4 <www.nsw.liberal.org.au/download/100-day-plan.html>.

2 United Kingdom, *Parliamentary Debates*, House of Commons, 25 May 2010, vol 510, col 32; United Kingdom, *Parliamentary Debates*, House of Commons, 1 March 2011, vol 524, cols 145–7.

3. the removal of members of Parliament by way of an early general election.

The article concludes with a discussion of the particular problems that tend to arise in relation to the recall and how they might be avoided or mitigated in establishing a recall system.

II THE RECALL AND ITS RATIONALE

The recall is a means by which electors can remove an elected official from office before that official's term of office expires. It is commonly initiated by a petition calling for the recall of a particular elected official. If the requisite number of signatures is collected from the electors of the official's constituency and verified, then a poll is initiated at which electors are asked whether the official should be recalled or not. If a majority of those voting cast their ballot 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. In its common form, the recall only applies to particular individuals and may only be exercised by the constituents who elected that individual. The use of the recall with respect to an entire legislative body is extremely rare and is discussed further below.

The recall is one element of a system of 'direct democracy', often described collectively as the 'initiative, referendum and recall'. In those jurisdictions that have adopted direct democracy, it is the citizens' initiated referendum that has dominated the exercise of direct democracy,³ with the recall being much less commonly exercised as it is a less direct and less efficient method of achieving changed policy outcomes. It is rare for a jurisdiction to adopt the recall without also adopting the initiative and referendum. Hence, any analysis of the exercise of the recall in other jurisdictions which also allow citizens' initiated referenda must be made cautiously, as it is likely that the exercise of the recall will be different if the people do not have the alternative of recourse to a citizens' initiated referendum.

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

3 On the citizens' initiated referendum, see Shaun Bowler, Todd Donovan and Caroline 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* (Cambridge University Press, 2011); George Williams, 'Distrust of Representative Government: Australian Experiments with Direct Democracy' in Marian Sawyer and Gianni Zappala, *Speaking for the People – Representation in Australian Politics* (Melbourne University Press, 2001) 80.

their constituents.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.⁵

This theory is inconsistent with the Australian system of representative and responsible government, under which members of Parliament represent their constituents but also hold state or national responsibilities and are more than mere agents or political automatons. Crisp has noted that the reason the main political parties have previously abandoned the idea of implementing the recall is because it 'cut[s] right across the basic principles of responsible Cabinet Government' and it leaves members vulnerable to destructive harassment by outside pressure groups, extremist forces and opposing political parties.⁶

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 (for example, corrupt conduct), misfeasance (for example, incompetence) and nonfeasance (for example, failure to perform duties). It is this rationale that is more consistent with systems of representative and responsible government than the agency theory above.

III SUPPORT FOR THE RECALL IN AUSTRALIA

In Australia, 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. It 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 proved right, but it would then be too late to correct the error'.⁷ It was again defeated at the ALP

4 Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997) 5. While this theory might represent an extreme form of democracy, it has also been adopted by communist countries as a way of controlling elected officials. Countries such as North Korea, China and Cuba have provisions for recall in their Constitutions, although in practice they are not exercised: European Commission of Democracy Through Law, *Report on the Imperative Mandate and Similar Practices*, (2009) 3–4, <[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)>.

5 William Munro, *The Initiative, Referendum and Recall* (Appleton, 1916) 314.

6 L F Crisp, *The Australian Federal Labour Party 1901-1951* (Hale & Iremonger, 2nd ed, 1978) 213.

7 *Ibid* 210–11, quoting from Mr P L O'Loughlen.

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’.⁸ 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.⁹ 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.¹⁰ In any case, when in government the ALP never implemented the recall.¹¹ It was removed from the ALP federal party platform in 1963.¹²

Crisp 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 principle and expediency the Australian parties have long since turned their backs on these devices ...¹³

In more recent times the recall has been given support by the Coalition. In a speech to the Sydney Institute entitled ‘Restoring Good Governance’ on 12 March 2009, the then NSW Opposition Leader, Mr Barry O’Farrell, proposed consideration of the introduction of a recall procedure. He saw it as providing an incentive for governments to perform throughout their term in office, rather than only in the last year. He concluded:

A Liberal/Nationals Government will establish an independent panel of Constitutional experts to advise on the potential for recall elections in NSW. The 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 referenda 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.¹⁴

8 Crisp, above n 6, 212, quoting from conference records.

9 Ibid.

10 Note however, that the recall of MPs was also included in ALP policy at the NSW Branch level: Gareth Griffith and Lenny Roth, ‘Recall Elections’ (E-Brief 3/2010, Parliamentary Library, Parliament of New South Wales, 2010) 2.

11 In Queensland in 1917, eg, the Legislative Council amended a Labor Government Bill to include the recall, against the wishes of the Government which ultimately let the Bill lapse. As *The Queenslander* noted, now that Labor had a majority in the Legislative Assembly, the caucus did not wish to implement the recall as it might result in the removal of its own members: ‘The Popular Initiative and the Referendum’, *The Queenslander* (Queensland), 13 October 1917, 20.

12 Geoffrey de Q Walker, *Initiative and Referendum: The People’s Law* (Centre for Independent Studies, 1987) 154–5.

13 Crisp, above n 6, 213.

14 O’Farrell, above n 1.

On 31 March 2009, the then 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 state-wide referendum.¹⁵

The recall is also currently supported in Australia by the Democratic Labor Party,¹⁶ the Liberal Democratic Party¹⁷ and the Australian League of Rights.¹⁸

IV THE RECALL IN THE UNITED STATES

Nineteen states in the United States permit the recall of state elected officials.¹⁹ A number of other states apply it only to the county and municipal level of government. Indeed, it is at the local government level that the recall is most commonly exercised. A 1999 estimate suggested that about 2000 county and municipal officials had been recalled in the United States.²⁰ The recall is rarely used at the state-wide level, with only two state Governors ever having been recalled²¹ and a relatively modest number of members of state legislatures

15 New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 March 2009, 14159. See also Stoner, above n 1.

16 Democratic Labor Party, *Constitutional and Democratic Rights* <<http://www.dlp.org.au/index.php?page=constitutional-and-democratic-rights>>.

17 Liberal Democratic Party, *Democracy* <http://www.ldp.org.au/index.php?option=com_content&view=article&id=1145:democracy&catid=101:policies&Itemid=290>.

18 The Australian League of Rights, *Introducing the System of Initiative, Referendum and Recall* <<http://www.alor.org/Library/InitiativeReferendumandRecall.htm>>.

19 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: National Conference of State Legislatures ('NCSL'), *Recall of State Officials* (5 April 2011) <<http://www.ncsl.org/default.aspx?tabid=16581>>. The United States influence is also evident in the use of the recall in Venezuela and the Philippines.

20 Cronin, above n 3, 128.

21 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.

being successfully recalled.²² This may be due to the greater difficulty of collecting the requisite number of signatures in state-wide ballots.²³ It is much easier to mobilise a small local community to respond to a particular unpopular action than it is to mobilise an entire 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 perceived need to use the recall, as state legislators can be removed soon enough at the next election. Further, the 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, than to attempt to recall relevant officials, as recall will not change the policy outcome.²⁴ 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.²⁵

If, however, the recall is pursued and the requisite number of signatures is collected to qualify for a ballot, the success rate of recall ballots appears to be around 50 per cent.²⁶ 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.

In the United States, the rationale for the recall varies amongst the states. In those states where the 'agency rationale' applies, there is no requirement that there be malfeasance or some form of neglect or wrongdoing on the part of the targeted elected official. If reasons are given for the official's recall, they are not justiciable as the whole procedure is regarded as political in nature.²⁷ 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'.²⁸ The *Californian Constitution* also provides that the sufficiency of the reasons in recall petitions is not reviewable²⁹ and the *Colorado Constitution* provides that 'the registered electors shall be the sole and exclusive judges of the legality, reasonableness and sufficiency' of the stated grounds for

22 See, eg, the recall of two members of the State legislature in California in 1913–14, one in Wisconsin in 1933, two in Idaho in 1971, two in Michigan in 1983, one in Oregon in 1988, two in California in 1995, one in Wisconsin in 1996 and another in 2003. See further: Cronin, above n 3, 127.

23 Eg, 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.

24 Zimmerman, above n 4, 80.

25 The signature requirements for citizens' initiated referenda that amend a state constitution range from three per cent of votes cast in the last gubernatorial election in Massachusetts to 15 per cent in Arizona and Oklahoma: NCSL, *Initiative Petition Signature Requirements* (7 April 2010) <<http://www.ncsl.org/default.aspx?tabid=16585>>. In comparison, the signature requirements for recall of state-wide officers range from 12 per cent to 40 per cent of voters at the last gubernatorial election.

26 Cronin, above n 3, 142.

27 See further, Zimmerman, above n 4, 34–6.

28 *Constitution of the State of Michigan* art II §8.

29 *Constitution of California* art II §14(a).

recall.³⁰ This means that an elected official may be recalled on the basis of charges that are untrue, unfair or so lacking in specific detail that they are impossible to refute.³¹

If, however, the rationale for recall is to allow the people to remove a representative for misconduct, corruption or incompetence, then specific grounds are usually required and it is more likely that the sufficiency of the grounds given will be justiciable.³² 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.³³

The states also structure recall elections in different ways. In six states there is a single election which determines both the recall and the replacement of the official if the recall is successful. In two of those states, the first question on the ballot deals with recall and the second question deals with the replacement for the recalled official – if the recall is approved. In the other four states there is a simple vote to fill that office, for which the incumbent may stand along with other candidates. If the incumbent wins, he or she is not recalled. If he or she loses, then the winner becomes the newly elected official. In twelve states, the recall ballot deals only with the question of recall. If a majority approves the recall of the official, he or she is replaced either by means of a by-election or the appointment of another person for the rest of the term.³⁴

Eight states specify the grounds for recall.³⁵ 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).³⁶ Montana also 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 the person to prosecution for official misconduct'.³⁷

In practice, the grounds on which state-wide office holders have been recalled have varied. While in some cases the grounds concerned allegations of

30 *Constitution of the State of Colorado* art 21§1. See also *Bernzen v City of Boulder* 525 P 2d 416, 418–9 (Colo, 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.

31 Cronin, above n 3, 151.

32 See, eg, *Constitution of the State of Minnesota*, Art VIII, s 6.

33 See, eg, *Kotar v Zupan* 658 P 2d 1095 (Mont, 1982). See further, Zimmerman, above n 4, 38–9.

34 See also NCSL, above n 19.

35 Alaska, Georgia, Kansas, Minnesota, Montana, Rhode Island, Virginia and Washington: NCSL, above n 19. Note that Florida also has a ground of 'drunkenness', but it only applies to elected municipal officials: Florida Statutes, Title IX, Chapter 100, §100.361.

36 NCSL, above n 19.

37 *Montana Code* §2-16-603.

corruption or personal misconduct,³⁸ 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.³⁹ The recall has also been used as a means of dealing with party defectors who have voted with the other side on critical matters.⁴⁰

Must a politician receive due process and natural justice in such circumstances, or is it simply a matter of politics? The United States 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.⁴¹

The most prominent example of the use of recall in recent times was the recall of Governor Gray Davis in California in 2003.⁴² California only requires signatures equal to 12 per cent of those who voted at the last gubernatorial election to initiate the removal of a Governor.⁴³ In the absence of compulsory voting, the low voter turnout in the previous gubernatorial election significantly reduced the number of signatures needed to initiate a recall. Nonetheless, the recall proponents would still have ordinarily failed to collect the relevant number of signatures in the statutory period to initiate a recall ballot. 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.⁴⁴ 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

38 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 an Oregon representative in 1985 for making false statements and forging a signature.

39 See, eg, the recall of Californian Senator Grant in 1914 as a result of policies such as prohibition; Governor Frazier of North Dakota in 1921 for financial policies concerning the Bank of North Dakota; a Senator and Representative 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 also Zimmerman, above n 4, 59, 83–91; Joshua Spivak, ‘California’s Recall – Adoption of the “Grand Bounce” for Elected Officials’, (2004) 82(2) *California History* 20, 28–37.

40 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.

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

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

43 Curiously, the figure is higher to remove members of the Californian legislature – 20 per cent. Most States that permit recall have a higher signature requirement of 25 per cent of votes last cast in the election for that office: Alaska, Arizona, Colorado, Minnesota, Nevada, New Jersey, North Dakota and Washington (re statewide offices). See also Michigan and Wisconsin, where it is 25 per cent of votes cast for the office of Governor in the last election in the targeted official’s electoral district: Council of State Governments, *Book of the States 2010* (2010), Table 6.19 <http://knowledgecenter.csg.org/drupal/system/files/Table_6.19.pdf>.

44 Elizabeth Garrett, ‘Democracy in the Wake of the California Recall’ (2004) 153 *University of Pennsylvania Law Review* 239, 241; Spivak, above n 39, 35. Ironically, Issa never ran in the recall election, being squeezed out by the greater money and celebrity of Arnold Schwarzenegger.

signatures are collected, whether it be for a recall or a citizens' initiated referendum on any subject. The effect is that anyone rich enough can buy a recall election.⁴⁵

The election itself was also dominated by money. 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.⁴⁶ 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.⁴⁷ 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.

V THE RECALL IN CANADA

The recall was briefly introduced in Alberta, Canada, in 1936. The threshold for the petition was two-thirds of eligible voters⁴⁸ and only 40 days were given to collect the signatures which also had to be witnessed.⁴⁹ The provisions concerning the recall were repealed a year later after a sustained recall campaign against Alberta's Premier, Mr Aberhart.⁵⁰ This led him to conclude 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.⁵¹

It was not until 1995 that the recall was again implemented in Canada, this time in the province of British Columbia. 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.

In British Columbia there is no recall election as such. If the high signature threshold (40 per cent of persons eligible to sign the petition) is met, then instead

45 Garrett, above n 44, 241.

46 Ibid, 247–9.

47 Spivak, above n 39.

48 *Legislative Assembly (Recall) Act 1936* (Alberta). See also Peter McCormick, 'The Recall of Elected Members' (1994) 17(2) *Canadian Parliamentary Review* 11, 12.

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

50 McCormick, above n 48, 11.

51 Conacher, above n 49, 208.

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.

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.⁵²

In the first parliamentary term in which the recall system was operative, eleven recall petitions were issued. In the second parliamentary term, at least nine were issued. So far none has been successful, although in one case in 1998 the petition was returned with approximately 8000 more signatures than were required,⁵³ but the member of the Legislative Assembly who was the subject of the petition, Paul Reitsma, resigned before the petition signatures could be verified.

Criticism has been levelled at the British Columbia system on a number of grounds. One concern is that there is no requirement of misconduct. Some see it as a right of harassment which may be abused for personal or political reasons.⁵⁴ 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.⁵⁵

The Chief Electoral Officer of British Columbia has been critical of the use of the petition to vacate a member's seat, rather than initiate 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.⁵⁶ Such a change has not been made.

VI PROPOSALS FOR THE INTRODUCTION OF THE RECALL IN THE UNITED KINGDOM

At the 2010 British election, all three main parties promised to introduce a recall procedure for members of Parliament who had committed acts of serious

52 McCormick, above n 48, 12.

53 17 020 signatures were required and 25 430 signatures were collected: Elections BC, *Summary of Recall Petitions* (5 April 2011) <<http://www.elections.bc.ca/docs/rcf/Summary-of-Recall-Petitions.pdf>>.

54 See, eg, Professor Robert Hazell, *The Conservative-Liberal Democrat Agenda for Constitutional and Political Reform* (The Constitution Unit, 2010) 38.

55 See, eg, Richard Johnson, 'A Piece of Democratic Window Dressing', *The Sydney Morning Herald* (online), 31 December 2009 <<http://www.smh.com.au/opinion/politics/a-piece-of-democratic-window-dressing-20091229-linf.html>>.

56 Elections BC, *Report of the Chief Electoral Officer on the Recall Process in British Columbia* (2003) 16.

wrongdoing. The Queen's Speech upon the opening of the new Parliament contained a commitment by the Conservative-Liberal Democrat Coalition that '[c]onstituents will be given the right to recall their members of Parliament where they are guilty of serious wrongdoing'.⁵⁷

A briefing paper from No 10 Downing Street stated that the intention was:

To provide that where an MP is judged to have engaged in serious wrongdoing, constituents can petition for the 'recall' of the MP. If more than 10 per cent of electors sign the petition, then a by-election will be held in the seat.⁵⁸

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 lesser forms of wrongdoing.⁵⁹ 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.⁶⁰

VII THE COLLECTIVE RECALL – CITIZENS' INITIATED ELECTIONS

The recall is almost always 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 such 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-

57 United Kingdom, *Parliamentary Debates*, House of Commons, 25 May 2010, vol 510, col 32.

58 No 10 Downing Street, 'Queen's Speech – Parliamentary Reform Bill' (Media release, 25 May 2010) <<http://www.number10.gov.uk/queens-speech/2010/05/queens-speech-Parliamentary-reform-bill-50657>>.

59 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/>>. 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: United Kingdom, *Parliamentary Debates*, House of Commons, 1 March 2011, vol 524, cols 146–7.

60 Hazell, above n 54, 37–40.

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 (in the past) and Japan at the local government level, as described below.

A Citizens' Initiated Elections in Switzerland

A number of Swiss cantons include in their constitutions, provisions that permit the recall of, 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).⁶¹ The provisions vary, particularly in the number of signatures required for recall⁶² and the period for collecting them.

Despite the existence of such provisions and the relatively low thresholds,⁶³ 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'.⁶⁴ The use of the recall in Switzerland was also more recently investigated by the British Columbia Electoral Commission, but it too reported that recall was rarely used in Switzerland and that 'an elected official has yet to be removed'.⁶⁵ Finally, Linder and Steffen have observed that recall was used 'very rarely in the nineteenth century and always failed in the popular vote (for example 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'.⁶⁶ The reason is likely to be the more active use in Switzerland of citizens' initiated referenda to change unpopular laws or policies, rather than the removal of their supporters.

B 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

61 *Constitution of Bern* art 57; *Constitution of Lucerne* art 44; *Constitution of Schaffhausen* art 27; *Constitution of Solothurn* art 28; *Constitution of Thurgau* art 25; *Constitution of Ticino* art 44.

62 The required number of signatures ranges from 1000 in Schaffhausen to 30 000 in Berne.

63 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.

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

65 Elections BC, above n 56, 29.

66 Wolf Linder and Isabelle Steffen, 'Swiss Confederation' in Katy Le Roy and Cheryl Saunders (eds), *Legislative, Executive and Judicial Governance in Federal Countries*, (McGill-Queen's University Press, 2006) 305.

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 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.⁶⁷ Only in the case of Oldenburg in 1932, however, was the petition to dissolve the *Landtag* approved by the voters. 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.⁶⁸

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.⁶⁹

Greene concluded in 1933:

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.⁷⁰

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 *Länder*⁷¹ also authorised voters in cities to initiate the dissolution of local government councils. 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'.⁷² Nonetheless, Wells also observed that recall was not commonly used in the big cities, in part due to the difficulty of obtaining

67 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, Anhalt in 1931, Oldenburg in 1932 and Bremen in 1932: Lee S Greene, 'Direct Legislation in the German Länder 1919–32' (1933) 27 *American Political Science Review* 445, 451.

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

69 Greene, above n 67, 452.

70 Ibid 454.

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

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

the requisite number of signatures and votes, but also because there were sometimes easier ways of getting a new election.⁷³

C 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. The system went beyond the American model, however, in permitting electors to initiate the early dissolution of local government assemblies.⁷⁴

One third of the electorate must ordinarily initiate the call for dissolution.⁷⁵ Once the requisite number of signatures is collected and verified, the call for dissolution must then be approved by a popular vote. 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.⁷⁶

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 per cent 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.⁷⁷

The reasons for dissolution of assemblies previously tended to concern corruption and other scandals but in more recent times have been based upon policy differences.⁷⁸ 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 had ever been successful in a major

73 Ibid 35.

74 Local Autonomy Law, art 76-3 (Japan).

75 In local entities with over 400 000 voters, the requirement is 1/3 of the 400,000 voters plus 1/6 of the amount of voters over 400 000: *ibid*.

76 See Jau-Yuan Hwang, *Direct Democracy in Asia: A Reference Guide to the Legislations and Practices* (Taiwan Foundation for Democracy, 2006) 87.

77 Takanobu Tsujiyama, 'Local Self-Governance in Japan: The Realities of the Direct Demand System' (2000) 7(2) *National Institute for Research Advancement Review* 26, 29.

78 *Ibid* 27.

city, such as Nagoya. The requisite number of signatures was collected and a referendum on recall succeeded in February 2011.⁷⁹

VIII OPTIONS FOR NEW SOUTH WALES

If the proposal to introduce a form of the recall in NSW is to be pursued, then the first step must be 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 mischief that recall may be directed at includes:

1. the continuation in office of elected representatives who are corrupt or who have committed criminal acts or other forms of serious 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; and
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 NSW has suffered from a degree of ambiguity and confusion, it would appear that most commentators perceive point three above to be the mischief that needs to be addressed.⁸⁰ Nonetheless, these three different mischiefs and possible options to deal with them are discussed below. Six different options are set out. Two of them (options 1A and 1B) are responses to mischief number one above, focusing on the removal of members who engage in corruption or serious misconduct. Another option (option 2) addresses the removal of members on political or policy grounds in response to mischief number two. Three further options (options 3A, 3B and 3C) address mischief number three by setting out means of achieving an early election.

79 'Mayor's Supporters Request Recall Referendum for Nagoya Assembly', *Japan Today* (online), 18 December 2010 <<http://www.japantoday.com/category/politics/view/mayors-supporters-request-recall-referendum-for-nagoya-assembly>>; 'In Reversal – Nagoya's Assembly Faces Recall', *The Japan Times Online* (online), 16 December 2010 <<http://search.japantimes.co.jp/cgi-bin/nn20101216a2.html>>; 'Nagoya Elections' *The Asahi Shimbun* (online), 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> .

80 Barry O'Farrell, 'Power To The People, Not Factions', *The Sydney Morning Herald* (Sydney), 11 December 2009, 21; Crispin Hull, 'There's Merit in Voters Having Recall Rights on Rotten Governments', *Canberra Times* (Canberra), 19 December 2009, 15; Stoner, above n 1; Tim Dick, 'Political Ground Shifting on Fixed Terms', *The Sydney Morning Herald* (Sydney), 30 January 2010, 7; AAP, 'State Opp'n Calls on Keneally to Move on Recall Elections', *AAP General News* (online), 10 April 2010.

A The Removal of Members Who Engage in Corruption or Serious Misconduct

If the concern is to remove from office members of Parliament who have engaged in corruption or serious misconduct, then two options arise. The first is to improve the existing provisions for the removal of members of Parliament who are corrupt or engage in some form of serious misconduct. The second is to provide a mechanism for the recall of members of Parliament on the grounds of corruption or serious misconduct.

1 *Option 1A – Improve Existing Provisions for the Removal of MPs Who Engage in Corruption or Serious Misconduct*

In NSW, members of Parliament may be disqualified from sitting and voting as a member of Parliament on a number of grounds,⁸¹ including:

- failure to attend the House for a whole session of Parliament, unless excused (*Constitution Act 1902*, section 13A(1)(a));
- bankruptcy or becoming a public defaulter (*Constitution Act 1902*, section 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*, section 13A(1)(e));
- holding an office of profit under the Crown or accepting a pension from the Crown (*Constitution Act 1902*, section 13B);
- failure to disclose the member's pecuniary interests (*Constitution Act 1902*, section 14A); and
- the commission of certain electoral offences (*Parliamentary Electorates and Elections Act 1912*, section 164).⁸²

In addition, a member may be expelled from Parliament by the house to which the member belongs. To warrant expulsion, the conduct in question must be of 'sufficient gravity to render the member unfit for service'.⁸³ This has been explained as meaning that the member is 'unfitted because of serious misconduct to be entrusted with parliamentary responsibilities'.⁸⁴ In particular, conduct involving want of honesty and probity would fall within this category.⁸⁵ Standing Order 254 of the Legislative Assembly also provides that a member adjudged by

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

82 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.

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

84 *Ibid* 253 (Wallace P).

85 *Ibid* 250 (Herron CJ); 256 (Wallace P); and 261 (Sugerman JA).

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.⁸⁶

NSW also 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 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.⁸⁷ 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 serious misconduct, then reforms could be considered to the *Independent Commission Against Corruption Act 1988* (NSW) to widen the scope of its findings from matters of corruption to a broader range of misconduct and to formalise 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.

2 Option 1B – Recall of Members for Corruption or Serious Misconduct

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 serious 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 NSW would be the ICAC.

A finding of 'corrupt conduct' (which could be changed to incorporate a broader category of 'serious 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 (for example, five sitting days after the date that the ICAC made its finding). Consideration would have to be given to whether legal challenges to

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

87 ICAC, *Report on an Investigation into the Conduct of the Hon Malcolm Jones MLC* (2003) 31.

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.⁸⁸

The recall of a member of the Legislative Assembly after a finding of corrupt conduct would be relatively straightforward. 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 be signed by, say, 30 per cent of registered voters within the member's electorate,⁸⁹ then the number of signatures required would be approximately 14 100. If the requisite number of signatures on a petition were achieved within a specified period 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. 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.

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 in 2007 was 4 373 029. If the same figure of 30 per cent 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.

If this burden were met, then the whole State would have to vote with respect to the recall of one member. This would be an expensive exercise. 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.⁹⁰ If the member faced recall and replacement on his or her

88 Note the resignation of Premier Greiner as a result of a finding of corrupt conduct, only for that finding to be later overturned by a court: *Greiner v ICAC* (1992) 28 NSWLR 125.

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

90 Eg, at the 1999 NSW election, the candidates from the Unity Party and the Reform the Legal System Party were elected with only one per cent of first preference votes and a candidate from the Outdoor Recreation Party was elected with only 0.2 per cent of first preference votes, being 7 264 votes.

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, recalls do not work well where there are multi-member electorates and members are elected by a system of proportional representation.⁹¹ 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 by joint sittings, 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?

To add to these complexities, section 7A of the *Constitution Act 1902* (NSW) 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 section 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. Given that it is impractical for recall provisions to apply in the same way in relation to the Legislative Assembly and the Legislative Council, a referendum would be required.

B Removal of Members for Political or Policy Reasons

If the reason for implementing a recall process in NSW is that the voters should be able to remove representatives if the voters object to the way their representative 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

91 See the discussion of the difficulty of constructing a recall system in New Zealand where there is a proportional MMP electoral system Caroline Morris, 'Misbehaving Members of Parliament and How to Deal with Them' (Research Paper No 69, Queen Mary University of London School of Law Legal Studies, 2010).

them as mere ciphers or agents of the electors.⁹² It would therefore seem contrary to the way our system of representative government is intended to operate.⁹³

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 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 or their actions. In contrast, those members with safe seats, regardless of whether they were lazy, unethical or unwise in their behaviour, would be largely invulnerable to removal through recall.

Where an election is particularly tight, it is likely that government members in marginal seats would be targeted by recall campaigns 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.⁹⁴

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 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

92 See, eg, the Senator Online Party which promises that its Senators will vote strictly in accordance with online votes on every bill and every issue in Parliament: <<http://senatoronline.org.au/>>. 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.

93 George Williams, 'Debate the Recall, but Safeguard the System', *The Sydney Morning Herald*, 15 December 2009, 15.

94 Spivak, above n 39, 31–3. See, eg, the recall of Paul Horcher and Doris Allen in California in 1995, which allowed the Republicans to take control of the House: Zimmerman, above n 4, 85–7.

context that potentially lends such statements the protection of the implied freedom of political communication and limits the effectiveness of defamation laws.⁹⁵

1 Option 2 – Recall of Members for Political Reasons

A recall system in NSW 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 must be 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.

In particular, 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 overseas jurisdictions require a proportion of the member's term of office to have passed (for example, 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 (for example, 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 avoid recall being used as a form of political harassment.

C A Mechanism for Achieving an Early Election

As noted above, most discussion of the introduction of the recall in NSW 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 consideration of how a citizens' initiated election might be implemented in NSW.

95 See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

1 *Option 3A – Maximum Four-Year Term with Fixed Minimum Period*

Before moving to fixed four-year terms, both Victoria and South Australia had a system under which there was a maximum term of four years and a government had to run a minimum of three years, but could decide to hold an election at any time during the fourth year of its term.⁹⁶ 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.⁹⁷ It proposed that an early dissolution within the fixed three year period should 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.⁹⁸

Whether such a provision would resolve the public concern 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 section 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.

2 *Option 3B – Power for the Parliament to dissolve itself*

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

96 Victoria had this system in place from 1984 to 2003 when it moved to fixed four year terms, following NSW. 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; or (c) a vote of no confidence by the Legislative Assembly. South Australia implemented this system 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; or a double dissolution. See also: Constitutional Commission, *Final Report of the Constitutional Commission*, (AGPS, 1988) Vol 1, 206.

97 Constitutional Commission, above n 96, Vol 1, 195–206.

98 Ibid 206.

resolution passed by a special majority of two-thirds of members.⁹⁹ Similarly, 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 section 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 special 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. Under this system, a minority government might be forced to the polls against its wishes, but a majority government could not be forced to an early election.

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

3 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 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 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 potentially 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. Under such a system, voters would initiate a petition and collect signatures over a limited period. If the

99 *Fixed-Term Parliaments Bill 2010* (UK).

requisite number of signatures were collected and verified, then there would be two main options as to how to proceed.

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 (for example, 40 per cent or 50 per cent 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 recall 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.

IX 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 NSW. 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 NSW, 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 it is needed because of the failings of 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.

A 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. 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.¹⁰⁰ 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 NSW 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.¹⁰¹ A recall mechanism could therefore increase the influence on government of wealthy corporations and other wealthy bodies.

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 better resourced.¹⁰²

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.¹⁰³ In the United States, attempts to ban paid signature collectors have been struck down as constitutionally invalid.¹⁰⁴ 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.¹⁰⁵

100 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 NSW, 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.

101 See, eg, 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: Garrett, above n 100, 1859–60.

102 Garrett, above n 44, 244.

103 See, eg, the relevant offences in British Columbia: *Recall and Initiative Act 1994* (BC), ss 156, 159. An alternative is the public funding of recall campaigns, but this adds to public expense and gives rise to difficulties in sorting genuine campaigns from the frivolous and the harassing. See also Conacher, above n 49, 213–4.

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

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

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 use of electronic petitions using the internet.¹⁰⁶ 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 recent litigation, Perram J of the Federal Court of Australia held that an electronic signature using a digital pen on the track-pad of a laptop computer was a valid signature for the purposes of enrolling to vote.¹⁰⁷

Electronic petitions are currently used by the Queensland Parliament, the Scottish Parliament and No 10 Downing Street, amongst other places. Systems can readily be implemented to prevent computer generated fraud on a widespread 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.¹⁰⁸ 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.¹⁰⁹ 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.

B 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 administrative costs would also apply to the NSW Electoral Commission, including the cost of verifying petitions.

106 See also House of Representatives Standing Committee on Petitions, Commonwealth Parliament *Electronic Petitioning to the House of Representatives* (2009); Joint Select Committee on Working Arrangements of the Parliament, Parliament of Tasmania, *E-Petitions*, (2004); and Stephen Finimore, 'E-Petitions – The Queensland Experience' (Paper presented at ANZACATT, Hobart, January 2008) <[http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/ca3cb73640e4b7d4ca2567ee0016638b/cb1d4264a4f7331bca257452001ec143/\\$FILE/Workshop%204C%20E-Petitions%20-%20The%20Queensland%20Experience.pdf](http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/ca3cb73640e4b7d4ca2567ee0016638b/cb1d4264a4f7331bca257452001ec143/$FILE/Workshop%204C%20E-Petitions%20-%20The%20Queensland%20Experience.pdf)> .

107 *Getup Ltd v Electoral Commissioner* (2010) 189 FCR 165.

108 The problem with this system is that it requires an e-mail address and not all voters have e-mail addresses. See the discussion of this issue at the No 10 Downing Street petition site: <<http://petitions.number10.gov.uk/faq>>.

109 House of Representatives Standing Committee on Petitions, above n 106, 14–15 and 41–5.

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.

C 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.¹¹⁰

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 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.

One of the other advantages of fixed four-year terms is ending the constant de-stabilising 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.¹¹¹

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

110 Mike Steketee, 'Shorter Terms a Worse Option in the Long Run', *The Australian* (Melbourne), 19 December 2009, 8.

111 Constitutional Commission, above n 96, vol 1, 205. See also 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'.

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 NSW 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 of 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 NSW.

It would therefore be appropriate to have a window in which an election petition could be initiated of about one 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. Conversely, it would limit the period in which there is potentially destabilising speculation and campaigning and would allow governments space in which they could govern without being distracted by petitions for an early election.

D 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 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, distract or deter it from pursuing difficult policy issues or burn up the governing party's financial resources in defending its position so that it is inadequately resourced at the next general election.¹¹² 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.

Again, 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. 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

112 See, eg, the case of David Roberti who was the 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: Spivak, above n 39, 31.

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.

X CONCLUSION

While the idea of electors being able to recall their representatives has the attraction of democratic empowerment of the people, experience elsewhere has shown that there are significant risks involved which would need to be addressed. The rationale for introducing the recall needs to be clear as does its intended consequences. A system that allows the rich to buy a new election or political parties to harass each other is unlikely to satisfy the wishes of voters. Consideration also needs to be given to the existing political and constitutional system and how a system of recall could be accommodated within it, rather than clashing fundamentally with it.

Politicians are fond of calling for cost-benefit analyses for proposed capital projects. Before any proposals proceed for the implementation of the recall in NSW there needs to be a clear analysis of the likely benefits of such a proposal and the costs to our system of representative and responsible government. This article is intended to contribute to that assessment.