

RECALL ELECTIONS FOR NEW SOUTH WALES?
REPORT OF THE PANEL OF CONSTITUTIONAL EXPERTS

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The views expressed herein are those of the Expert Panel on Recall Elections and do not necessarily represent the views of the State of NSW.

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SECTION A. THE PANEL

1. On 20 June 2011 the Premier of New South Wales, the Hon Barry O'Farrell MP, announced the proposed appointment 'of a panel of constitutional experts to advise the NSW Government on the possibility of introducing recall elections in NSW'.
2. The members of the Panel were appointed by Letters Patent and the Panel's Terms of Reference are:

'TERMS OF REFERENCE

The Government believes that Parliament should be responsive to the people and the issues they want debated. Accordingly, it wishes to investigate the potential for a recall procedure to allow early State elections based on a petition by voters (Recall Elections).

For these purposes, the panel of constitutional experts is to consider and report to the Premier by **30 September 2011** on the following issues in relation to Recall Elections:

1. Whether or not it is desirable to amend the *New South Wales Constitution 1902* to permit Recall Elections, in particular, having considered:
 - (a) international practices, including in Canada and the United States of America, and their applicability to a Westminster system;
 - (b) their compatibility with democratic principles;
 - (c) the potential of any proposed changes to improve the accountability, integrity and quality of government; and
 - (d) any risks or negative consequences for the accountability, integrity and quality of government.
2. If Recall Elections were to be permitted, the relevant requirements or mechanisms, including:
 - (a) the reasons or grounds (if any) for a petition by voters for a Recall Election;
 - (b) the appropriate percentage of voters who would need to petition and the time frame for collecting signatures;
 - (c) processes for verifying and auditing signatures against eligible voters;
 - (d) the time limits (if any) that should be imposed before a Government is subject to a petition; and
 - (e) appropriate funding arrangements for the process.
3. If Recall Elections were to be permitted, the best ways for constitutional reform to take place in NSW, including:
 - (a) mechanisms for canvassing the level of community support for any proposed constitutional changes; and
 - (b) potential referendum questions.
4. Any other matters relevant to Recall Elections.'

3. The Panel is required by the Letters Patent to report to the Premier and to the Office of the Governor.
4. The persons appointed as members of the Panel were:
 - (a) Mr David Jackson AM, QC (Chairman);
 - (b) Dr Elaine Thompson; and
 - (c) Professor George Williams AO.
5. The Panel advertised for submissions to be made to it on the Terms of Reference. The published advertisement, and the list of newspapers in which it appeared, is contained in Annexure A. In consequence, 21 submissions were received (see Annexure B). The Panel also invited submissions from a large number of persons and bodies (see Annexure C). The Panel thanks those who provided submissions.
6. The Panel established a website *www.dpc.nsw.gov.au/recallelections*.
7. The Panel has been assisted in its deliberations by those appointed to assist it in its administration and research. They are:
 - (a) Karen Smith, Acting Executive Director, Legal Branch, Department of Premier and Cabinet New South Wales;
 - (b) Rachel McCallum, Acting Executive Director, Legal Branch; Department of Premier and Cabinet New South Wales;
 - (c) Jo Lennan, Research Assistant; and
 - (d) Lisa Burton, Research Assistant.

The Panel thanks them for their work.

SECTION B. ARRANGEMENT OF THE REPORT

- 1 **Section C** outlines the basic institutions of government in New South Wales. This is followed by a discussion of the nature of recall elections and their history in Australia and elsewhere (**Section D**).
- 2 In **Section E** the Report discusses the existing constitutional and related provisions concerning the legislative and executive branches of government. **Section F** deals with the circumstances in which the seat of a member of a House may become vacant, or the member may be disqualified from sitting.
- 3 **Section G** contains a summary of the Submissions made to the Panel.
- 4 In **Section H** the Panel discusses the compatibility of proposals for recall elections with the systems of representative and responsible government in New South Wales.
- 5 In **Section I** the Panel discusses, and rejects, the proposals for recall elections for individual members of the Legislative Assembly or of the Legislative Council.
- 6 It then discusses in **Section J**, whether there could be recall elections in respect of both Houses of the Parliament, and in **Section K** and **Section L** deals with the mechanisms for such elections and the other matters relating to the introduction of such elections.
- 7 In **Section M** the members of the Panel express their views on the issue raised by Term of Reference 1.
- 8 A summary of the Panel's views is in **Section N**.

SECTION C. GOVERNMENT IN NEW SOUTH WALES – AN OUTLINE

INTRODUCTION

- 1 This Section commences with a short statement of the present position of government in New South Wales. It then describes the development of responsible and representative government in the State, and the State's history of experimenting with new ideas. This description is followed by a fuller discussion of responsible government in New South Wales today, and a discussion of modern notions of citizens' rights.

GOVERNMENT IN NEW SOUTH WALES: A BRIEF STATEMENT OF THE PRESENT POSITION

- 2 New South Wales is a State of the Commonwealth of Australia for the purposes of the *Commonwealth Constitution*. The State has its own constitution – principally contained in the *New South Wales Constitution Act 1902* (NSW) (the '*New South Wales Constitution*') – and its own legislature, executive and judiciary. This Report is concerned with the legislative branch of government and, to a lesser extent, the relationship between the legislature and the executive branch of government. More particularly, this Report is concerned with the relationship between the legislative branch and the electors – the people of New South Wales entitled to vote for the members of the legislature.
- 3 The New South Wales legislature is bicameral, consisting of a Legislative Assembly (the lower House) and a Legislative Council (the upper House).
- 4 The Parliament is representative: both Houses are directly elected,¹ and voting is compulsory. The Legislative Assembly has 93 members, each representing single member electorates of around 50,000 voters. Representatives are elected using optional preferential voting.
- 5 The Legislative Council has 42 members. Each member is elected by a system of proportional representation, in which the State votes as a single electorate. Legislative Councillors serve two terms of the Legislative Assembly (normally eight years), with half standing for re-election at the same time as the Assembly at each election. Whilst such a system of multi-member proportional representation has been described as the

¹ The Council since 1978.

fairest form of democratic representation, recent New South Wales history has demonstrated that, when there are large numbers of candidates representative of many political parties, the results can be unpredictable, especially for the last three or four Councillors to be elected.²

- 6 The four year term of the Legislative Assembly is fixed. Except in very unusual circumstances, the members of that House (and half of the members of the Legislative Council) must face the people at a given time, not at a time of the government's or the Assembly's choosing.
- 7 The executive government of the State is drawn from the members of both Houses. By constitutional convention, the leader of the political party able to command a majority in the Legislative Assembly is entitled to be invited by the Governor to form a Government. The Government's members (the Premier and Ministers) will be principally drawn from members of the Legislative Assembly; however, some, including some who may hold important offices, are likely to be members of the Legislative Council.
- 8 New South Wales has a system of responsible government in that the Premier and Ministers are members of a House and responsible to Parliament. The Preamble to the *Code of Conduct for Members of Parliament*³ states that their principal responsibility in serving as Members is to the people of New South Wales. The present system of parliamentary democracy in New South Wales has evolved over time, as have the ideas underlying it.⁴

THE DEVELOPMENT OF RESPONSIBLE GOVERNMENT⁵

- 9 The first half of the 19th century saw pressure build for self-government in New South Wales. The colonists wanted a form of government founded, as closely as circumstances would allow, on English constitutional principles.⁶

² In 2011, it took 308 counts to fill the last four of the 21 places in the Legislative Council, while the first 17 took only 17 counts. Moreover, the last four candidates elected did not receive a quota.

³ Adopted by both Houses of Parliament for the purposes of s 9 of the *Independent Commission Against Corruption Act 1988* (NSW). See Annexure D.

⁴ See also the submission made by Paul Lynch (Submission 18).

⁵ For a longer account, see Parliament of New South Wales, *History of Democracy in New South Wales* (2011) <www.parliament.nsw.gov.au/prod/web/common.nsf/key/HistoryofDemocracyinNSW> at 13 September 2011.

⁶ Elaine Thompson, 'English Institutions Transplanted and Transformed' in James Jupp (ed) *The Australian People* (Angus and Robertson, 2001) 442.

- 10 By stages between 1823 and 1855, as the colony petitioned for change, the Colonial Office moderated the absolute power of the Governor. The Office created a procedure of trial by jury and separated the judiciary from the executive, which then consisted of a ‘blended’, advisory Legislative Council, with some members nominated by the Crown and some elected by voters with property qualifications.
- 11 A draft constitution for responsible self-government for New South Wales was developed by a select committee of the Legislative Council in the mid 1800s. The concept of creating a ‘bunyip’ aristocracy to fill the upper House was rejected;⁷ however, most of the draft was otherwise accepted. A Constitution for New South Wales was enacted by the British Parliament in 1855.⁸
- 12 New South Wales thereafter had a system of responsible self-government, albeit with some limitations, and a bicameral legislature. This system incorporated the principles of government which were in place in Britain: for example, the concept of parliamentary sovereignty (including the requirement of parliamentary authorisation of the annual budget); responsibility of elected ministers to Parliament; the drawing of the Premier from the lower House; the existence of a ‘loyal opposition’ capable of forming an alternative government; and the holding of regular, unavoidable elections. However, the system differed from the British in (at least) one important respect: New South Wales was governed by a written constitution, which could only be amended by a two-thirds majority in both Houses.
- 13 The extent of popular sovereignty was limited; the appointed upper House strongly asserted its authority,⁹ and the unelected Governor retained significant powers.

THE DEVELOPMENT OF REPRESENTATIVE DEMOCRACY

- 14 New South Wales’ system of representative government developed over time, reflecting changing ideas about the value and nature of democracy and representation. Voting rights quickly became a key issue.

⁷ The term ‘bunyip aristocracy’ was coined in a speech made by Daniel Deniehy, a journalist and politician, in 1853, criticising William Wentworth’s proposals to create a titled aristocracy in New South Wales similar to that which existed in the UK. *Dan Deniehy’s Bunyip Aristocracy Speech* <<http://www.southsearepublic.org/story/2004/8/17/7431/18874>> at 14 September 2011.

⁸ *New South Wales Constitution Act 1855* (UK).

⁹ Of course, the House of Lords in the Parliament at Westminster was not an elected body, either.

The Legislative Assembly

- 15 In 1856, only males over the age of 21 who met a (fairly modest) property or income qualification could register as voters.¹⁰ Subject to certain defined exceptions, any registered voter could also run for election to the new Legislative Assembly.¹¹ At this time, the Assembly had 54 members.¹² Sixteen of New South Wales' 34 electoral districts returned more than one member.
- 16 Relatively radical reforms were introduced by the *Electoral Act of 1858* (NSW). This Act abolished the property qualifications for suffrage, giving every male over the age of 21 years who had been born in New South Wales or lived there for three years the right to vote – and to vote in secret. However, '[t]he wealthy and better-educated of the colony still ... had a disproportionately strong voice in government'.¹³ There were also still great disparities between electorates. For example, a pastoral district consisting of approximately 3,000 voters, and the district encompassing Sydney, consisting of approximately 5,900 voters, would each elect one member to the Assembly.
- 17 Further changes were made in the latter part of the 19th century, a time when New South Wales and the other colonies were seen as the experimental 'democratic laboratory of the world'. In 1874, the maximum electoral term for the Legislative Assembly was changed from five years to three. In 1893 plural voting was abolished. From that time onwards, the principle of 'one man, one vote' became an important concept.¹⁴ From 1889, members of Parliament were paid a 'parliamentary allowance'; which allowed the composition of Parliament to change and in turn caused Parliament to become more representative of the general population.
- 18 As ideas about democratic representation expanded, so did the franchise. Women were given the right to vote in New South Wales in 1902. Women gained the right to stand

¹⁰ *An Act To Enable Her Majesty To Assent To A Bill, As Amended, Of The Legislature Of New South Wales, To Confer A Constitution On New South Wales, And To Grant A Civil List To Her Majesty 1855* (NSW) (the 'Constitution Act 1855') s 11.

¹¹ *Ibid* s 16.

¹² *Ibid* s 10.

¹³ Parliament of New South Wales, *1856 to 1889 – Responsible Government and Colonial Development*, <<http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/HistoryResponsibleGovernment>> at 14 September 2011.

¹⁴ From 1926, all electorates were to be represented by a single member.

for the Legislative Assembly in 1918 and the right to stand for the Legislative Council in 1926.

19 Aboriginal Australians were not officially prevented from voting in New South Wales, but were effectively denied the vote until as late as 1962.¹⁵

20 In 1973 the voting age was reduced to 18 years.

21 In 1980 ‘one vote, one value’ was introduced as the basis of representation in New South Wales. This ended the apportionment which had favoured country areas in the past.¹⁶

22 The size of the Legislative Assembly has since been reduced, from 109 members to 99 members in 1991 and 93 members in 1999.

23 In 1981 the term of the Legislative Assembly was increased to 4 years. In 1995, voters supported a referendum which resulted in that term becoming fixed.

The Legislative Council

24 The history of the Legislative Council demonstrates how understandings of representative democracy have changed.

25 Originally, those Legislative Councillors who were not government officials were generally independent and unpaid. They tended to work in an essentially part-time capacity; some rarely attended parliament. Between 1843 and 1855 the Council had been partly elected and partly appointed; however, between 1855 and 1933 the Council was entirely appointed.¹⁷ In the 20th century, members tended increasingly to be members of a political party. Until 1934, the non-legislative Council had no size limit; at times, it had more than 120 members.

¹⁵ The right to vote was finally guaranteed by amendments to the *Electoral Act 1918* (Cth) in 1949 and then in 1962. See further Anne Twomey, *The Constitution of New South Wales* (The Federation Press, 2004) 327.

¹⁶ Two bills were enacted. One amended the *Parliamentary Electorates and Elections Act 1912* (NSW) to incorporate new electoral and redistribution procedures, thereby embedding a one-vote one-value principle in the Constitution. Any future Government would be required to hold a referendum if it wished to change these provisions. Additionally, all future redistributions would require districts to be drawn with equal enrolment, with a permitted variation from quota of up to 10 per cent: New South Wales Government, Land & Property Information, *Elections: 1980 Redistribution*, Atlas of New South Wales Website <<http://atlas.nsw.gov.au/public/nsw/home/topic/article/1980-redistribution.html>> at 13 September 2011. Presently, the permitted margin of variation is up to 5 per cent of the average enrolment: NSWEC, *Electoral Boundaries* <http://www.elections.nsw.gov.au/about_elections/electoral_boundaries> at 20 September 2011.

¹⁷ Parliament of New South Wales, *The History of the Council* <<http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/LCRole>> at 14 September 2011.

- 26 In the early 20th century, the Labor Party advocated the abolition of the Legislative Council. The Labor Party viewed the Council as an anachronistic institution and an anti-democratic brake on the will of the majority, as expressed by the Legislative Assembly.
- 27 During 1925-27 and again in 1930, the Labor Government attempted to abolish the Legislative Council. The 1930 attempt was supported in both Houses, but a conservative government had previously altered the *New South Wales Constitution* to ensure that abolition could only be achieved via a referendum, and the attempt to abolish the Council failed.
- 28 However, the Legislative Council was soon reformed. A referendum held in 1933 approved amendments which would require the Legislative Council to be indirectly elected. The Legislative Council then became a House of 60 members, elected by the members of both Houses of Parliament. Members of the Legislative Council were elected for a term of 12 years, with 15 members (one quarter of the Council) retiring every 3 years. This indirect method of election was favoured because of fears that the Council would rival the authority of the Assembly if it were also directly elected by the people.
- 29 The Labor Party continued to press for the abolition of the Council. A referendum proposing abolition was put to the voters in 1961, and rejected.
- 30 In the 1970s, the Wran Labor government introduced a series of amendments to transform the Legislative Council into a fully elected House. This commenced in stages from 1978.¹⁸ The members of the Legislative Council were thereafter elected by the whole state voting as one electorate, using a system of proportional representation. The Council was reduced in size to 45 members, one-third of whom were elected at each election. Each member served a maximum nine year term. In 1991, the size of the Legislative Council was further reduced to 42 members, half of whom are elected at each election.
- 31 As a result of these reforms, the Legislative Council is today sometimes seen as the more democratic, representative House; at other times, it is still said to thwart the will of the majority as expressed by the Legislative Assembly. Whichever view of the upper House is taken, it is clear that it can act as a check on the power of the lower

¹⁸ Ibid.

House and – perhaps more importantly – as a chamber that reviews and oversees government.¹⁹

Summary of the development of representative democracy

- 32 The history of the two Houses of Parliament demonstrates that in New South Wales, the concept of representative democracy is intimately linked with the existence of a fair voting system and the holding of regular elections. There has been extensive experimentation with different systems of voting in pursuit of those aims. For example, the Legislative Assembly has, over time, been elected via a system of voluntary voting, first past the post voting, a system of simple plurality with a second ballot, proportional multi-member representative voting, contingent voting, preferential voting and – the current system – compulsory voting by an optional preferential method. There has also been much experimentation with the terms of parliament; reforms have changed the term of the lower House from three to a fixed four year term, and the term of the upper House from 12 years to two terms of the lower House.
- 33 The Government gains its mandate to govern through the majority vote of the people at free, fair, highly competitive, unavoidable regular elections. The great majority of citizens accept elections and the parliamentary system as legitimate vehicles for popular representation.²⁰ Thus government is essentially democratic, though it does include some non-democratic elements (such as the capacity of the Governor to act contrary to the advice of the Premier).²¹
- 34 The popular vote can play another important role in modern New South Wales. State referendums are required in order to change certain parts of the *New South Wales Constitution*, or if a deadlock arises between the two Houses of Parliament. In the latter instance, the Legislative Assembly may direct that the Bill the subject of the deadlock be submitted by way of referendum to the electors for approval.²²

¹⁹ Parliament of New South Wales, *The Legislative Council of New South Wales: Past Present and Future* <<http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/ResearchBf011990#5>> at 13 September 2011.

²⁰ As indicated by the continuing high turnout and low informal voting figures. See the Virtual Tally Room containing the results of the 2011 State Election: Electoral Commission NSW, *NSW State Election Results (2011)* <<http://vtr.elections.nsw.gov.au>> at 14 September 2011.

²¹ Important reserve powers remain, as demonstrated by Governor Philip Game's dismissal of Premier Jack Lang in 1932.

²² *New South Wales Constitution* s 5B.

- 35 At present, the New South Wales parliament is not ‘representative’ in the sense of being a microcosmic representation of the make-up of the greater community. Women, the young, Australians from a non-English background and Aboriginal Australians are under-represented. However, that is but one understanding of the requirements of ‘representative democracy’. Another (now rather challenged)²³ view is that parliamentarians are trustees of the public interest in all its complexity, without necessarily being an accurate mirror of its composition.²⁴ The theory of representative democracy can also encompass the notion that parliamentarians have a mandate to act as representatives of their political parties and support their policies, or the notion that they have a direct mandate from their individual electorates and are bound to further their interests.²⁵ Parliamentarians could also be said to have a responsibility to act in accordance with their own consciences, and a duty to exercise their own judgment and wisdom. Our modern understanding of ‘representation’ contains all these elements.²⁶
- 36 Many of the submissions received by the Panel recognise that a system of government which permits recall posits parliamentarians to be, to a greater extent than the above discussion would suppose, *agents* or *delegates* of their particular constituents.²⁷ Most submissions reject that view of representation as inconsistent with the principles of representative government.²⁸ Some nonetheless believe that the apparent inconsistency between recall and representative democracy is not a conclusive or sufficient reason to reject the introduction of recalls.²⁹

MODERN RESPONSIBLE GOVERNMENT

- 37 New South Wales has traditionally had a strong system of responsible government. Ministers sit in Parliament and are answerable or responsible to the Parliament. The Parliament as a whole, and each of its individual members, are also responsible to the people. The Governor's powers are usually exercisable only on the advice of and

²³ For example, Anne Phillips, ‘Representation Renewed’ in Marian Sawer and Gianna Zappala (eds) *Speaking for the People: Representation in Australian Politics* (Melbourne University Press, 2001) 19, 26.

²⁴ See, for example, the comment by former Legislative Council member the Hon Helen Sham-Ho on the potential for multiple personal and political identities. Marian Sawer, ‘Representing Trees, Acres, Voters and Non-voters: Concept of Parliamentary Representation in Australia’ in Marian Sawer & Gianna Zappala (eds) *Speaking for the People: Representation in Australian Politics* (Melbourne University Press, 2001) 36, 59-60.

²⁵ See also the submission made by Paul Lynch (Submission 18).

²⁶ Ken Coghill (Submission 17), 3.

²⁷ Anne Twomey (Submission 12), 4, 6-7; Graeme Orr (Submission 15), 1; Ken Coghill (Submission 17), 3; Paul Lynch (Submission 18); New South Wales Electoral Commission (‘NSWEC’) (Submission 21), 4.

²⁸ Anne Twomey (Submission 12), 5, 6-7, the New South Wales Bar Association (Submission 16), Ken Coghill (Submission 17), NSWEC (Submission 21), 4 (discussing recall of the ‘whole of government’).

²⁹ Paul Lynch (Submission 18), NSWEC (Submission 21), 4 and n 3.

through the Ministers responsible to the Parliament. Governments are formed from the party or coalition that can hold a majority in the Legislative Assembly. None of these features of government are spelt out in the *New South Wales Constitution*; they are matters of convention, inherited from the British system.

- 38 As the electoral base widened and payment for members of Parliament was introduced via the process described above, ‘modern’ political parties have developed. Throughout most of the 20th century, party discipline has guaranteed that the party which holds a majority of seats in the Legislative Assembly will remain in power for the duration of the parliamentary term.
- 39 A price of this stability, however, has been the increased domination of Parliament by the Executive. Earlier in the 20th century, there was an expectation that Ministers were directly accountable for major policies in the departments under their control, and for all major decisions of their public servants. In the event of a major problem, a Minister would resign. While there are still disputes about what ministerial responsibility should mean, in general it appears to mean that Ministers should answer to Parliament truthfully questions about their areas of policy and ensure the competent oversight of their policy area. Ministers only resign when so directed by the Premier because they have told deliberate lies to Parliament or have been found to act in corrupt or dishonest ways.³⁰
- 40 The role of the people in this system of responsible government is to elect the Parliament. Originally, ‘Parliament’ here meant some members of the Legislative Council; it then came to mean the members of the ‘governing’ house, the Legislative Assembly. Today, following the reforms discussed above, it means both Houses of Parliament.
- 41 At elections the people, in a variety of ways, pass judgement on the government of the day, assess which parties or groups are more suited to govern, and also assess their local member. With some important exceptions, voters today tend to vote for a political party, rather than an individual candidate.³¹ This is particularly the case regarding the Legislative Council, where members are almost entirely chosen on the basis of political affiliation. However, because that House is elected through

³⁰ See the discussion of the informal pressures which may ‘force’ a member to resign in the submission made by Graeme Orr (Submission 15), 2.

³¹ This point was also made by Graeme Orr (Submission 15), 1.

proportional representation, some of those political parties can be very small and representative of views outside the mainstream.

CITIZENS' RIGHTS

- 42 As ideas about representative and responsible democracy expanded, so too have ideas about 'citizens' rights'; that is, the idea that it is necessary to protect citizens from maladministration by government, and to enhance citizens' oversight of government action. Such ideas may seek to strike a different balance between the right of government to govern as it perceives to be in the public interest, and the right of citizens to oversee government and ensure that it remains accountable.
- 43 In New South Wales, the tradition of strong responsible government has tended to predominate over these notions of 'citizens' rights'. This can be contrasted with the style of government seen in the United States, where the rights of citizens to oversee government action and intervene if they perceive the government to be acting undesirably are far more prevalent and accepted.
- 44 Nevertheless, over the past 40 years changes have been made in New South Wales in order to increase or protect 'citizens' rights'. These changes include the introduction of codes of conduct for members of Parliament, improved modes of audit and improved systems of Parliamentary committees, the establishment of the Independent Commission Against Corruption and the Ombudsman, the enactment of freedom of information legislation, and the introduction of the measures broadly described as the 'new administrative law', which expanded the role of the judiciary and administrative tribunals in scrutinising government activity and gave citizens greater scope to challenge government decisions. On the other hand, New South Wales has never adopted a Bill of Rights.
- 45 Despite initial anxieties that such changes would threaten the Westminster system of responsible government, New South Wales' system of government has adapted to accommodate them.³² In fact, many of these measures have been introduced into other Westminster systems, including in the United Kingdom. There has, however, been a limit to the change; there is, for example, no provision in New South Wales to allow citizen initiated legislation, citizen initiated referendums for the recall of legislation,

³² For example, the theoretical problems with introducing an Ombudsman into a Westminster system disappeared with the practical successes of the office.

citizen veto of legislation, citizen initiated recall of individual members of Parliament, the Executive or the whole, or part, of the Parliament.

- 46 Representative and responsible democracy have, to a large extent, evolved to keep pace with the changing needs of society and ideas. No doubt there will be further changes over time.
- 47 Proposals for change should be assessed in the light of overlapping and competing ideas, such as the desire for increased accountability and transparency of government, the increased complexity of modern society and policy-making, the need for coherence and stability in government, and the need to remedy or minimise the sense of powerlessness that can sometimes be experienced by individual citizens.
- 48 Decisions for substantial change should not be resisted because they are novel.³³ Equally, decisions for substantial change should not be introduced without due recognition of their significance and assessment of their potential consequences, good and bad, for the New South Wales system of government.

³³ Paul Lynch (Submission 18), NSWEC (Submission 21).

SECTION D. RECALL ELECTIONS: AUSTRALIAN AND INTERNATIONAL EXPERIENCES

INTRODUCTION

1 This Section considers Australian and international experiences of recall elections. First, it explains what recall elections are. Secondly, it describes the history of the idea of recall elections in Australia, including past proposals to introduce recall elections. Thirdly, it describes the recall elections mechanisms that exist in other nations, and the use that has been made of such mechanisms.

WHAT ARE RECALL ELECTIONS?

2 Recall elections commonly involve the use of a petition to initiate an early election at which an elected official may be removed from office by constituents before the end of his or her term, and replaced.³⁴ Rationales for the practice include the notion that there ought to be a means of removing ineffective or wayward officials before the end of their set terms in office.³⁵ They also extend to the view that, if an elected official does not give effect to his or her constituents' wishes, constituents ought to be able to recall the official in order to put another in their place.³⁶

3 Due to the direct involvement of the electors in voting in this way, the recall election is often described as a mechanism of direct democracy.³⁷ Direct democracy is a form of government, often contrasted with representative democracy, whereby people collectively decide political questions for themselves, rather than have their representatives decide on their behalf. Usually, the jurisdictions where recall elections are available also provide for other (and more common) mechanisms of direct democracy, like citizens' initiated referendums.

4 Presently, mechanisms for recall elections exist in a number of countries, either at the national or sub-national levels. These include: the United States of America (in 19 states); Canada (in the province of British Columbia); Switzerland (in six cantons);

³⁴ Anne Twomey (Submission 12), 4. A condensed version of this submission was published as Anne Twomey, 'The Recall of Members of Parliament and Citizens' Initiated Elections' (2011) 34(1) *University of New South Wales Law Journal* 41.

³⁵ *Ibid.*

³⁶ William Munro, *The Initiative, Referendum and Recall* (Appleton, 1916), 314.

³⁷ However, as Graeme Orr notes, even a recall election will result in the appointment of representatives; in this sense, the recall is a 'less direct' form of democracy than, for example, citizen initiated legislation. Submission 15, 2.

Germany (in six states, or *Länder*); Liechtenstein; Bolivia; Venezuela; Japan; Taiwan; and the Philippines. The practices of these countries will be discussed in more detail later in this Section.

- 5 The rules and procedures for recall elections vary, but typically a recall election law will require that a certain number of voter signatures must be collected and verified before a poll is initiated.³⁸ If this requirement is met, voters are asked at a poll whether the official should be recalled. If a majority of votes is cast in favour of the 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.³⁹
- 6 In some jurisdictions where recall elections are available, the law states that elected officials may only be recalled on specified grounds, while in other jurisdictions an elected official may be recalled for any reason at all. Recall provisions exist for the recall of federal, state and municipal representatives, and even of certain executive members of government and judges, in systems where these officials are popularly elected, as in some states of the United States.
- 7 In jurisdictions where recall elections are available, a recall does not usually involve an early general election. Rather, an individual representative is recalled.⁴⁰ Thus, the device is said to be focused on the recall of an elected member, not the whole government.⁴¹ In New South Wales, by contrast, it has been proposed that recall elections could be used to trigger a general State election before the end of the fixed four year term. That is, a mechanism would ‘allow the public to initiate an election if, through petitions, citizens are able to enlist sufficient popular support.’⁴²
- 8 In this sense, the closest analogues to the proposal are procedures, albeit ones which are rarely (if at all) used, for the citizen initiated dissolution of legislatures in

³⁸ There are also examples of processes whereby some branch of the government, not citizens, may initiate a referendum on the recall of certain elected officials: Austria; Germany; Iceland; Palau; Romania; Serbia; Taiwan; and Turkmenistan. These recall processes, which the International Institute for Democracy and Electoral Assistance terms ‘mixed recalls’, are of less relevance to the Terms of Reference for this Report. See International Institute for Democracy and Electoral Assistance, *Direct Democracy: The International IDEA Handbook* (IDEA, 2008) 114, 120-121.

³⁹ Anne Twomey (Submission 12), 6.

⁴⁰ Many submissions made to the Panel stressed that this must be kept in mind when attempting to draw conclusions from international experiences. Anne Twomey (Submission 12), 4; Graeme Orr (Submission 15), 1; New South Wales Bar Association (Submission 16), 3; Ken Coghill (Submission 17), 2.

⁴¹ Peter McCormick, ‘The Recall of Elected Members’ (1994) *Canadian Parliamentary Review* 11, 11.

⁴² Barry O’Farrell, ‘What if ... recall elections were available in NSW?’ in Peta Seaton (ed), *What If?* (Connor Court, 2010) 234, 235.

Switzerland, Germany and Liechtenstein.⁴³ These examples are discussed at paragraphs 96 to 111 below.

- 9 Recall elections have occurred in recent years in Wisconsin, California, and British Columbia. The following paragraphs outline some of the issues that arose in those elections.

Example 1: Wisconsin

- 10 Since 1926, article XIII section 12 of the Wisconsin Constitution has permitted the recall of ‘any incumbent elective officer’.⁴⁴ Any qualified voter may initiate a recall petition. However, a recall petition cannot be initiated during the first year of an officer’s elected term.⁴⁵ The petition must be signed by ‘electors equalling at least 25 per cent of the vote cast for the office of governor at the last preceding election, in the state, county or district which the incumbent represents.’⁴⁶ The signatures must be collected within 60 days of the petition being initiated.⁴⁷ A recall election will then be held six weeks later; however, a primary – to determine which candidates will run for election to replace the officer, if recalled – may be held first.⁴⁸ The candidate who receives the most votes in the recall election will then replace the recalled officer and serve out the remainder of the relevant term of office.⁴⁹ If the officer survives the recall election, ‘no further recall petition shall be filed against (him or her) during the term for which he was elected’.⁵⁰ These recall provisions – in particular, the significant window of time during which an officer cannot be recalled, the relatively high signature threshold, and the short time limit in which signatures must be collected – are stricter than those seen in many other states.⁵¹
- 11 In July and August of 2011, recall petitions were initiated against 16 State senators; indeed ‘everyone in the 33-member Wisconsin Senate who [was] legally eligible to be recalled this year’⁵². Nine of the petitions gathered sufficient signatures to trigger a recall election. Ultimately, two Republican Senators were recalled; all other Senators

⁴³ Anne Twomey (Submission 12), 33.

⁴⁴ International Institute for Democracy and Electoral Assistance, above n 38.

⁴⁵ *Wisconsin Constitution* art XIII s 12.

⁴⁶ *Ibid* s 12(1).

⁴⁷ Craig Gilbert, ‘Recall drives could make history’ *Milwaukee- Wisconsin Journal Sentinel* (online), 6 March 2011 <<http://www.jsonline.com/news/statepolitics/117501513.html>> at 21 August 2011.

⁴⁸ *Wisconsin Constitution* art XIII s 12(4).

⁴⁹ *Ibid* s 12(5).

⁵⁰ *Ibid* s 12(6).

⁵¹ Craig Gilbert, above n 47.

⁵² *Ibid*.

retained their seats. This was an unprecedented use of the recall; until 2011, there had only been 20 state level recall elections in US history.⁵³

- 12 The trigger was the introduction of legislative reforms designed to cut government spending by Republican Governor Scott Walker. The reforms included amendments which drastically reduced the collective bargaining rights of public sector employees, and were unpopular with sections of the Wisconsin electorate, labour unions and the Democrats.⁵⁴
- 13 In an attempt to prevent the reforms being approved by the legislature, Wisconsin's 14 Democrat Senators left the state so that they would not be present to vote.⁵⁵ This angered some voters, who felt the Senators had abdicated their political responsibilities.⁵⁶ This dissatisfaction prompted the initiation of recall petitions against eight of the Democrat Senators. Three of these petitions received enough signatures to trigger recall elections. The first recall election was held in July; the other two in August. All three Democrat Senators retained their seats.
- 14 The controversial reforms were passed by the Wisconsin legislature. This then prompted the Democrat party and labour unions to mobilise support for recall petitions against eight Republican Senators. The choice of Senators was purposeful; for example, Senator Alberta Darling, the co-chairwoman of the legislature's Joint Finance Committee, was identified as a 'key target'. Governor Walker was not targeted.⁵⁷
- 15 It was clear that these recall petitions against the Republican Senators had little to do with the performance of the Senators involved. Most clearly, the initiation of multiple, simultaneous recall petitions was an attempt to shift the balance of power in the Senate away from the Republican party.⁵⁸ Alternatively, the recalls could be

⁵³ Brendan O'Brien, 'Democrats hold seats in Wisconsin recall elections' *Reuters* (online) 17 August 2011 <<http://www.reuters.com/article/2011/08/17/us-wisconsin-recalls-idUSTRE77F2W820110817>> at 21 August 2011; Dinesh Ramde, 'Two Wisconsin Democrats keep their Senate seats in recall elections, but party still in minority' *The Washington Post* (online), 16 August 2011 <http://www.washingtonpost.com/national/wisconsin-democrats-look-to-2-more-recall-elections-to-hold-senate-gains-they-made-last-week/2011/08/16/gIQAfDaIJ_story.htm> at 21 August 2011.

⁵⁴ Similar reforms have prompted a citizen initiated referendum in Ohio, USA.

⁵⁵ Dinesh Ramde, above n 53.

⁵⁶ *Ibid.*

⁵⁷ Monica Davey, 'In Wisconsin, a big recall push comes up short', *The New York Times* (online), 10 August 2011 <<http://www.nytimes.com/2011/08/11/us/politics/11wisconsin.html>> at 21 August 2011.

⁵⁸ Monica Davey, above n 57; Charles Richardson, 'No recall: two out of six ain't good for Wisconsin' *Crikey* (online), 11 August 2011 <<http://www.crikey.com.au/2011/08/11/no-recall-two-out-of-six-aint-good-for-wisconsin-democrats>> at 21 August 2011.

characterised as an attempt to force a quasi-referendum on the reforms in question and Republican economic policy.⁵⁹ Finally, the recalls had a national dimension. The recall campaigns attracted significant attention and interstate funding because Wisconsin is a ‘purple state’, which is ‘likely to be among the swing states that decide the national election in 2012’.⁶⁰ The Wisconsin recall elections therefore took on an additional significance: they were, in part, a test run for bigger political issues of how government should cut debt, and whether there was ‘a backlash against Tea Party conservatives’.⁶¹

- 16 Six of the eight petitions initiated against Republican Senators gathered sufficient signatures to trigger a recall election. The six elections were held on 9 August 2011. Ultimately, only two Senators were recalled. However, several only retained their seats by close margins.⁶² This was a significant result given the general tendency of recall elections to fail.⁶³
- 17 The series of recall petitions and elections had a significant impact on Wisconsin state politics. The recall of two Republican Senators diminished – but did not destroy – the Republican majority in the state Senate.⁶⁴ This shift in the balance of power may result in Wisconsin politics proceeding in a more moderate, conciliatory fashion. For example, Governor Walker has indicated that he will engage in discussions with Democrat Senators and attempt to find ‘shared agenda items’ in the future⁶⁵. Conversely, some suggest the experience has sparked a ‘political war’; now that the utility of the recall mechanism has been demonstrated, it will continue to be used as a

⁵⁹ Ted Rowlands, Gabriella Schwarz et al, ‘GOP retains Wisconsin Senate control in recall battle’ *CNN* (online) 10 August 2011 <<http://edition.cnn.com/2011/POLITICS/08/10/wisconsin.recall.elections/index.html>> at 21 August 2011; The Washington Times Editorial, ‘Democracy in action; tipping point: record low numbers support the federal government’ *The Washington Times* (online), 10 August 2011 <<http://www.washingtontimes.com/news/2011/aug/10/democracy-in-action-in-wisconsin/>> at 21 August 2011; Mark Guarino, ‘Democrats win in latest Wisconsin recall: is state a little less red now?’ *The Christian Science Monitor* (online), 17 August 2011 <<http://news.yahoo.com/democrats-win-latest-wisconsin-recall-state-little-less-140727385.html>> at 21 August 2011.

⁶⁰ Mark Guarino, above n 59; ‘When politics is war, recalls represent just another weapon’ *USA Today* (online) 15 August 2011 <http://www.usatoday.com/NEWS/usaedition/2011-08-15-Our-view-on-recall-elections_ST_U.htm> at 21 August 2011.

⁶¹ Ibid; ‘Wisconsin recall election tests Obama’s foes’ *Sky News* (online), 10 August 2011 <<http://www.skynews.com.au/politics/article.aspx?id=648494>> at 21 August 2011; Monica Davey, ‘After bruising political fights, two governors alter their tones’, *The New York Times* (online), 21 August 2011 <<http://www.nytimes.com/2011/08/22/us/22states.html>> at 21 August 2011.

⁶² Charles Richardson, above n 58. Official results from Wisconsin Government Accountability Board are forthcoming.

⁶³ International Institute for Democracy and Electoral Assistance, above n 38, 112.

⁶⁴ Charles Richardson, above n 58.

⁶⁵ Governor Walker is currently serving his first year of office, and so is not liable to recall under article XIII Section 12. Monica Davey, above n 57; Brendan O’Brien, above n 53; Dinesh Ramde, above n 53.

weapon to achieve party political purposes.⁶⁶ The Democratic Party of Wisconsin has already indicated it intends to initiate a recall petition against Governor Walker when he becomes liable to recall in January 2012.⁶⁷

- 18 The Wisconsin recall elections highlight important features of the recall process. *First*, the coordinated use of multiple simultaneous recall elections against individual members demonstrates the recall's potential scope. A recall mechanism apparently limited to the removal of individuals can nevertheless be utilised to force a de facto referendum on a contentious policy issue, or to shift the balance of power in the legislature.
- 19 *Secondly*, the Wisconsin experience demonstrates, not for the first time, the role that money can play in the recall election process. It is estimated that 40 million USD was spent in campaign funding across the various recall petitions and elections,⁶⁸ the vast majority being provided by special interest groups.⁶⁹
- 20 *Thirdly*, the Wisconsin experience demonstrates that recall elections can become 'normalised', and become part of the 'standard tool-kit of political conflict', rather than an extraordinary measure.⁷⁰ If the use of recall elections becomes generally accepted, 'then the next campaign begins as soon as the last one is over, and elections bleed into each other'.⁷¹ Constant campaigning can fatigue voters and encourage short term populism. It may also act as a disincentive for compromise. It can be argued however, that prolific use of the recall mechanism is justifiable in extraordinary times as, some argue, were experienced in Wisconsin.⁷²

Example 2: California

- 21 California adopted a recall process in 1911.⁷³ The California Constitution requires that petition circulators gather signatures equal to 12 per cent of those who voted in the last gubernatorial election. In some circumstances the required signatures must be

⁶⁶ Mark Guarino, above n 59; 'Gov. Scott Walker prepares for recall election: Walker asks supporters to cover his back' *Wisn.com* (online), 11 August 2011 <<http://www.wisn.com/print/28943474/detail.html>> at 21 August 2011.

⁶⁷ 'Gov. Scott Walker prepares for recall election', above n 66.

⁶⁸ Brendan O'Brien, above n 53; Dinesh Ramde, above n 53.

⁶⁹ Mark Guarino, above n 59.

⁷⁰ Craig Gilbert, above n 47.

⁷¹ Mark Guarino, above n 59.

⁷² Craig Gilbert, above n 47.

⁷³ *California Constitution* art II § 14(b). See generally Elizabeth Garrett, 'Democracy in the wake of the California recall' (2004) 153 *University of Pennsylvania Law Review* 239.

equal to 20 per cent, for example if the official who is the subject of recall is a Senator, a member of the Assembly, or a judge. A petition must allege reasons for recall, but the sufficiency of reasons is not reviewable.

- 22 Until 2003 there had been 31 attempts at gubernatorial recall, but none had succeeded. In 2003, there was a state-wide general election on a gubernatorial recall measure, for the first time in the state's history. The first part of the ballot asked whether Governor Gray Davis should be recalled from his four-year term. The second part asked which candidate should replace him should he get fewer than 50 per cent of the votes on the first question. A majority of voters ousted Governor Davis and elected Mr Arnold Schwarzenegger as his successor.

Example 3: British Columbia

- 23 In British Columbia the law gives voters the power to remove their member of the Legislative Assembly from office between elections, except that a member cannot be the subject of a recall during the first 18 months after election.⁷⁴ Any registered voter in British Columbia can apply for a petition to recall the voter's member upon paying a \$50 fee and submitting a form that includes a 200-word statement as to why the member should be recalled. The proponent then has 60 days to collect signatures of more than 40 per cent of the registered voters in the member's electoral district. Only unpaid volunteers (who must also be registered voters) may help the proponent collect signatures, and there are stringent petition financing rules. The relevant electoral authority, Elections BC, then verifies that enough signatures have been collected. If the requirements are met, the member ceases to hold office and a by-election must be called within 90 days. A recalled member can be a candidate in the by-election. In British Columbia, of the 24 petitions issued since the law's enactment, only two have proceeded to verification. Of these, one did not have sufficient signatures, while the other was halted during the verification process because the member in question, Mr Paul Reitsma, resigned.

THE HISTORY OF RECALL ELECTIONS IN AUSTRALIA

- 24 In Australia there have been prior debates about the possibility of introducing recall elections, along with other direct democracy mechanisms like referendums. An early

⁷⁴ See generally Elections BC, 'Report of the Chief Electoral Officer on the Recall Process in British Columbia', November 2003. The relevant provisions are found in *Recall and Initiative Act*, RSBC 1996, c 398, Pts 3 and 7.

interest in the use of referendums led, for example, to the several colonies' referendums on Australia's draft Constitution prior to federation.⁷⁵ It was also reflected in the provision requiring any alteration to the Constitution to be approved by electors at a referendum (section 128).

25 Recall has formed a part of the Australian Labor Party (the 'ALP') federal policy platform. The platform adopted other direct democracy mechanisms first. In 1908, the ALP adopted as part of its federal policy platform the plank of 'Initiative and Referendum'. This meant: (i) the use of initiatives and referendums to bring about alterations to the Constitution (since section 128 of the Constitution does not contemplate that the referendum will be triggered by popular initiative); and (ii) the use of the referendum instead of a double dissolution for resolving deadlocks between the two houses of Parliament. The policy found champions in the federal Parliament, and in particular Dr WRN Maloney.⁷⁶ Dr Maloney also championed a policy of permitting the recall of members by constituents.⁷⁷ Yet, compared with the 'Initiative and Referendum' plank, the recall took longer to become a part of the ALP's policy platform. In the 1910s, the ALP debated the recall at a number of its Federal Conferences, but the idea did not initially attract sufficient support. The 1915 Conference, for example, rejected a proposal for the recall of members on the petition of their constituents during a parliamentary term. As Western Australian State Member PL O'Loughlen argued:

The Recall is a weapon which can be unfairly used against public men. With vigorous organisations and members coming before constituents at least once in three years, the people are amply safeguarded. The Recall could be used 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.⁷⁸

Among those who took the contrary view was Arthur Rae, formerly a Labor Senator from New South Wales, who said that 'Parliament can so frame Recall that it could not be used as a mere weapon of oppressiveness by a small, disgruntled section'.⁷⁹ At Conferences in the 1920s, there were further proposals for 'the Recall' of particular

⁷⁵ LF Crisp, *The Australian Federal Labour Party 1901-1951* (1978) 207-208.

⁷⁶ *Ibid* 209.

⁷⁷ As historian LF Crisp described it: 'Not a Parliament went by, and usually not a Session, without the "Little Doctor" obtaining leave of the F.P.L.P. to introduce a motion, a Bill or an amendment providing for the Initiative, Referendum or Recall (or all three).' *Ibid* 209.

⁷⁸ *Ibid* 211.

⁷⁹ *Ibid* 209.

pieces of legislation.⁸⁰ The recall became a part of the ALP's national policy platform in 1924, but there is some doubt as to whether this time 'the Recall' meant the recall of legislation or the recall of members of parliament.⁸¹ It remained in the ALP platform until 1963.⁸²

26 There has been only one instance of an Australian legislature considering a bill containing a recall mechanism. The *Popular Initiative and Referendum Bill*, as first introduced into the Legislative Assembly by the Queensland Labor government in 1914, did not originally contain a recall provision.⁸³ Instead the Bill, which was principally promoted as a proposal which would enable people to have a say about the question of restricted liquor trading hours, included other direct democracy proposals, namely to introduce indirect constitutional initiative, indirect legislative initiative and a voters' veto. The recall proposal, which would have permitted the recall of any member of the Legislative Assembly, originated as an amendment made by the upper house, the Legislative Council, in 1917 and then again in 1918. These amendments were among a number of amendments made on the four occasions between 1914 and 1919 on which the Bill was introduced into and passed by the Legislative Assembly with minimal amendment, and then significantly amended by the Legislative Council in ways that the lower House found unacceptable. The Bill was eventually abandoned after it was for the fourth time passed by the Assembly but significantly amended by the Council.

27 More recently, in July 2011, the Hon Robert Brokenshire, a Family First Member of the Legislative Council of South Australia, stated that he intended to introduce a bill proposing recall elections into the South Australian Parliament. The bill's recall provisions would compel the state governor to call an election if a petition gathered 150,000 signatures within 30 days of being initiated. Mr Brokenshire said:

I'm putting this bill forward because I've had so many people across the state telling me that they're frustrated with the lack of direction, in-fighting, and they feel that the state has stalled as a result of government inaction ... If we're not performing and the South

⁸⁰ Ibid 213.

⁸¹ Anne Twomey (Submission 12).

⁸² Geoffrey de Q Walker, 'Constitutional Change in the 1990s: Moves for Direct Democracy' (Papers on Parliament No 21, The Senate, Parliament of Australia, December 1993).

⁸³ See George Williams, 'The Failure of Citizens' Initiated Referendums Proposals in Australia: New Directions for Popular Participation?' (2000) 35 *Australian Journal of Political Science* 27.

Australian community are not happy, it's not only the government that would be under pressure, but it's every politician who would be up for re-election.⁸⁴

Such a bill has yet to be introduced at the time of this Report.

- 28 In the Australian Capital Territory in 1990, political scientist Dr John Hart suggested that US-style individual member recall be introduced as a remedy for the then lack of popularity of the Legislative Assembly, but the proposal went no further.⁸⁵
- 29 In recent years, the issue of recall elections has resurfaced in New South Wales. The main impetus for the proposal was dissatisfaction with New South Wales' former Labor Government. This dissatisfaction is evident in the submissions to this Panel received from members of the public, discussed in Section G.
- 30 In this context, the fixed four year parliamentary term, introduced in 1995 in order to enhance the stability and efficacy of Government, began to be seen as a hindrance. The fixed term provided a period of safety during which Government was relatively unaccountable to the electorate. Some argued that it restricted the ability of the voters to remove a Government which they no longer supported.⁸⁶ Even without a fixed term, however, the Government would have been entitled to remain in power so long as it retained the confidence of a majority of the Legislative Assembly.
- 31 In the lead-up to the 2011 state election, the Liberal/National Coalition advanced the idea of introducing recall as a means of bringing about an early general election. In a speech on 12 March 2009, the then Leader of the Opposition, Mr Barry O'Farrell, proposed that consideration be given to the introduction of a recall mechanism.⁸⁷ The proposal was elaborated upon in the Legislative Assembly by Opposition Shadow Minister Mr Chris Hartcher on 31 March 2009.⁸⁸ In his speech, Mr O'Farrell portrayed recall elections as a means of restoring fundamental values of good governance. He said that fear of recall could 'provide the stimulus needed for

⁸⁴ 'MP keen for early polls by petition', *ABC News* (online), 25 July 2011 <<http://www.abc.net.au/news/2011-07-25/recall-elections-petition-robert-brokenshire/2808664>> at 21 August 2011.

⁸⁵ John Hart, 'Why don't we recall? An American remedy for unpopular government in the A.C.T.' (Paper presented at the Department of Political Science, Australian National University, 27 July 1990); Leanne Mason, 'US remedy for the ACT's democratic peculiarities?' *Canberra Times*, 28 July 1990, 2.

⁸⁶ The New South Wales Bar Association states that the dissatisfaction with the previous Government called into question 'the form of representative democracy practised in Australia' rather than the desirability of fixed parliamentary terms (Submission 16, 2). By contrast, Graeme Orr suggested that the difficulties with the previous Government may warrant reconsideration of fixed parliamentary terms as well (Submission 15, 3).

⁸⁷ Barry O'Farrell, 'Restoring Good Governance', Speech to the Sydney Institute, 12 March 2009.

⁸⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 March 2009, 14159 (Chris Hartcher).

government ... to perform throughout its term', and the electorate could remove a truly wayward Government if the need arose.⁸⁹

- 32 The State Leader of the National Party, Mr Andrew Stoner, also expressed support for introducing the recall.⁹⁰ Additionally, the Greens' Member in the New South Wales Legislative Council, Ms Lee Rhiannon, commented that the party was open to debating the idea on its merits.⁹¹ Currently, the recall is also supported by the Liberal Democratic Party.⁹²
- 33 The proposal for introducing recall elections drew support from *The Sydney Morning Herald*. In December 2009, *The Sydney Morning Herald* initiated an online petition that called for a referendum on the question at the upcoming state election in March 2011. As at 5 January 2010, it was reported that more than 20,000 people had completed the petition.⁹³ As at 30 January 2010, the last report on the petition, it was reported that more than 24,000 people had completed it, albeit with 14 of these adding comments that were 'negative' towards the proposal.⁹⁴ In 2009, *The Daily Telegraph* also initiated a petition that called on the Governor to dissolve the Parliament and thereby trigger an early election.⁹⁵ However, that petition did not propose the introduction of recall elections.
- 34 The Labor Government was defeated in the 2011 general election. Its replacement, the O'Farrell Government, continues to support consideration of the recall issue, as evidenced by the appointment of this Panel.

⁸⁹ Ibid.

⁹⁰ Andrew Stoner, 'In NSW, scandal and fatigue has set in', *The Sydney Morning Herald*, 22 December 2009.

⁹¹ Lee Rhiannon, 'Yes, it's time for change - but we need more than a recall provision', *The Sydney Morning Herald*, 17 December 2009.

⁹² Liberal Democratic Party, 'Policies: Democracy', Liberal Democratic Party website <http://www.ldp.org.au/index.php?option=com_content&view=article&id=1145:democracy&catid=101:policies&Itemid=290> at 21 August 2011.

⁹³ Brian Robbins and Louise Hall, 'Online petition for recall mechanism passes 20,000', *The Sydney Morning Herald* (online), 5 January 2010 <<http://www.smh.com.au/national/online-petition-for-recall-mechanism-passes-20000-20100104-lq7m.html#ixzz1Ua7S9GsH>> at 21 August 2011 .

⁹⁴ The newspaper explained, '[m]ost simply signed up online or [filled] out the form and posted it back to the paper. But some readers, fuelled by frustration, were driven to augment the petition with neatly written critiques.' Eric Jensen, 'This pack of incompetents must go', *The Sydney Morning Herald* (online), 30 January 2010 <<http://www.smh.com.au/national/this-pack-of-incompetents-must-go-20100129-n492.html>> at 21 August 2011.

⁹⁵ 'Petition for an early NSW election,' *The Daily Telegraph* (online), 3 December 2009 <<http://dsc.dailytelegraph.news.com.au/m/dt.aspx?group=Daily+Telegraph&id=6822148244&name=Petition+for+an+early+election+in+NSW>> at 21 August 2009.

RECALL ELECTIONS OVERSEAS

35 The following paragraphs discuss the following countries' experiences with recall elections:

- (a) Canada;
- (b) The United States of America;
- (c) Europe: Switzerland, Germany and Liechtenstein;
- (d) South America: Venezuela and Bolivia; and
- (e) Asia: Japan, Taiwan, the Philippines and India.

36 This discussion concludes with a brief discussion of the use of recall elections in other Westminster systems.

Canada

Overview

37 The recall device has remained relatively alien to the Canadian political and legal system.⁹⁶ However, it was previously (although very briefly) available in Alberta and, as noted earlier, is currently available in British Columbia.

38 This Section provides an overview of the recall mechanism which previously operated in Alberta and currently exists in British Columbia. It then provides a brief summary of those aspects of the Canadian experience, and in particular, the perceived incompatibility between the recall election and Canadian principles of representative democracy.

Alberta

39 Recall was available in the Canadian province of Alberta between 1936 and 1937.

40 The introduction of recall elections was first advocated in Alberta by the United Farmers movement, in the years following World War I. Support for the cause soon waned, before being taken up as a key tenet of the election platform of William Aberhart, the leader of the Social Credit movement, in the general election of 1935.⁹⁷ Aberhart became Premier, and saw to the enactment of the *Legislative Assembly*

⁹⁶ J. Patrick Boyer, *Lawmaking by the People: Referendums and Plebiscites in Canada* (Butterworths, 1982) 22; Duff Conacher 'Power to the People: Initiative, Referendum, Recall and the Possibility of Popular Sovereignty in Canada' (1991) 49 *University of Toronto Law Review* 174, 208; Peter McCormick, above n 41.

⁹⁷ J. Patrick Boyer, above n 96, 22.

(Recall) Act 1936 (the ‘Alberta Act’). At the time, the Alberta Act was ‘the only ... law in Canada which made recall of an elected member a possibility’.⁹⁸ The Alberta Act was repealed – with retroactive effect – just a year later, after a sustained campaign to have Aberhart himself recalled.⁹⁹

- 41 Whilst in force, the Alberta Act provided for a relatively unusual recall process. An application to initiate a petition for recall had to be lodged. Such an application could only be lodged by a group of at least ten citizens who were registered to vote at the time of the last election. The application had to briefly state the reasons recall was sought; however, the Alberta Act did not limit the grounds on which recall was permitted.¹⁰⁰
- 42 Once the application was approved, the petition was then to be circulated. Here, the Alberta Act ‘raised a number of significant hurdles’.¹⁰¹ It required the signatures of two thirds of the citizens registered to vote at the time of the last election.¹⁰² These signatures were to be witnessed, and collected within 40 days of the application for the petition being granted.¹⁰³ Citizens could not be paid for their signatures; if this was shown to occur, the petition would be null and void.¹⁰⁴ If the requisite number of signatures were collected in time, the petition was then scrutinised for compliance with the Alberta Act.¹⁰⁵
- 43 Importantly, if the petition was found to satisfy the requirements of the Alberta Act, the seat of the relevant official was automatically declared vacant. The petition itself was the trigger for recall.¹⁰⁶ A by-election would then be held to fill the vacant seat. The recalled member could stand for re-election.¹⁰⁷
- 44 Alberta’s brief dalliance with the recall election appears to be perceived as a resounding failure, and was never repeated.¹⁰⁸ Premier Aberhart himself argued that the process was misused as a means of harassment and political attack.¹⁰⁹

⁹⁸ J. Patrick Boyer, above n 96, 22.

⁹⁹ Peter McCormick, above n 41, 11.

¹⁰⁰ J. Patrick Boyer, above n 96, 22.

¹⁰¹ Ibid 23.

¹⁰² Peter McCormick, above n 41, 12.

¹⁰³ Anne Twomey, above n 34, 49.

¹⁰⁴ Alberta Act s 12.

¹⁰⁵ J. Patrick Boyer, above n 96, 23.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 22.

¹⁰⁸ Ibid.

British Columbia

45 Currently, the *Recall and Initiative Act* (1995) (the ‘British Columbia Act’) empowers citizens to remove their representative member of the Legislative Assembly between elections.

(i) Debate preceding the introduction of recall in British Columbia

46 Before the enactment of the British Columbia Act, recall elections were perceived as a largely American idea that ‘never caught on in Canada’.¹¹⁰ According to the established principles of representative democracy and parliamentary sovereignty, elected officials were not perceived as mere agents of their constituents. They were also members of the legislative assemblies, and owed duties to parliament which must co-exist with their responsibilities to their electorate.¹¹¹

47 There were, however, advocates who supported introducing recall elections. They clearly envisaged recall as a process targeting specific, individual elected officials, rather than governments.¹¹² For example, political scientist Professor Peter McCormick argued that the recall process would serve a valuable communicative function, even if – as the British Columbia experience later proved – it never resulted in anyone being removed from office. The mere initiation of a petition would signal the degree of discontent existing in the community, and prompt a government response. Professor McCormick rejected suggestions that the recall process would be hijacked by party politics or used indiscriminately. *First*, he argued that there was not a sufficient degree of party loyalty amongst the Canadian electorate to enable voters to be mobilised to vote for recall by party politicking.¹¹³ *Secondly*, he reasoned that ‘[i]f we can trust the electors to show some wisdom and some judgment in electing people in the first place, surely it is not unreasonable to say they will exercise similar wisdom and judgment in how often and to what purposes they recall’.¹¹⁴

48 Duff Conacher, founder of the organisation Democracy Watch, argued strongly for the implementation of various mechanisms of initiative, referendum and recall in Canada in order to enable meaningful citizen participation in government decision

¹⁰⁹ Anne Twomey, above n 34, 49.

¹¹⁰ J. Patrick Boyer, above n 96, 22; Duff Conacher, above n 96, 208; Peter McCormick, above n 41, 11.

¹¹¹ J. Patrick Boyer, above n 96, 22.

¹¹² Duff Conacher, above n 96, 182. See also Peter McCormick above n 41, 11.

¹¹³ Peter McCormick, above n 41, 12.

¹¹⁴ *Ibid.*

making process.¹¹⁵ Mr Conacher presented such forms of direct democracy as an antidote to the elitism and party politics which, he argued, distracted parliament from the task of remaining accountable to the people. Initiative, referendum and reform could, Mr Conacher argued, be used as a way of bolstering the influence of the electorate, so as to counter-balance the powerful influences of big business and the media on political policy.¹¹⁶

49 However, Mr Conacher admitted that Canada would face substantial difficulties in implementing a broad mechanism of recall. In a preferential voting system, officials may well have been elected without obtaining a majority of the primary vote. It could then be relatively easy for that official to be removed via a first-past-the-post style recall election, which could pervert the electoral process. These factors, along with the tradition of party discipline and the potential for recall to be misused as a symbolic, political weapon, would hinder the effective operation of a recall mechanism.¹¹⁷ For this reason, Mr Conacher concluded that recall should only be available at the municipal – but not provincial or federal – level of government.¹¹⁸

50 These concerns were echoed by the Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills established to report on the possibility of introducing the recall in British Columbia. The Committee concluded that the recall ‘is alien to our parliamentary of government and posed special problems if it was to be integrated effectively into our legislative system’.¹¹⁹

(ii) The recall procedure introduced in British Columbia

51 Notwithstanding such reservations, the British Columbia Act was introduced in 1995. Any registered voter can apply for a petition by lodging the relevant application form and paying a \$50 processing fee.¹²⁰ A petition cannot be initiated during the first 18 months of an elected member’s term of office.¹²¹ The applicant then has 60 days to collect the signatures of at least 40 per cent of the citizens who were registered to vote in the relevant member’s electorate at the time of the last election, and continue so

¹¹⁵ Duff Conacher, above n 96, 174.

¹¹⁶ Ibid 174, 176, 177, 186.

¹¹⁷ Duff Conacher gives the example of key officials – such as the Prime Minister – being targeted for recall, despite having been elected to their positions by their political party rather than their electorate. Ibid 207.

¹¹⁸ Ibid 208.

¹¹⁹ Elections BC, above n 74, 13.

¹²⁰ Peter McCormick, above n 41, 4.

¹²¹ Elections BC, above n 74, 4.

registered.¹²² As was the case in Alberta, if enough valid signatures are obtained, and the applicant complies with the applicable finance rules, the seat of the relevant official is automatically vacated. There is no need for a subsequent election to determine this question. A by-election must then be held, within 90 days, to fill the vacant seat. The recalled member may run in this election.¹²³

52 Since 1995, 20 recall petitions have been initiated. None succeeded.¹²⁴ The British Columbia Act was amended in 2002. Amendments included the removal of spending limits for recall advertising sponsors.¹²⁵

(iii) Difficulties in the Canadian experience

53 The British Columbia recall experience has not been problem free. At least two challenges to the constitutional validity of the British Columbia Act have been initiated, though not followed through.¹²⁶ These centred on the fact that the British Columbia Act required the recall petition to be publicised; therefore, it was argued, it provided for election by non-secret ballot, contrary to the constitutional principles of Canada.

54 In 2003 Elections BC, the administrator of the British Columbia recall process, issued a report highlighting significant problems with the recall process.¹²⁷ Elections BC reiterated concerns regarding the secrecy of the election-by-ballot process. It was also particularly critical of the fact the recall petition served as a complete recall process to remove a member of the Legislative Assembly, rather than simply triggering a recall election. This was seen as ‘inappropriate’, given ‘any petition process lacks the formality, rigor and safeguards necessary for such a consequence’. Elections BC recommended that ‘[t]he outcome of a recall petition should be a recall vote, by way of a special election or recall referendum vote’, rather than automatic removal of the relevant official.¹²⁸

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid 2.

¹²⁵ Ibid 13.

¹²⁶ In 1998 the British Columbia Civil Liberties Association challenged the British Columbia Act on the ground that, as it required the recall petition to be publicised, it provided for election by non-secret ballot. The challenge was subsequently withdrawn. A second challenge was considered in 2003, but not pursued. Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid 14-16.

- 55 The high signature thresholds required by the British Columbia Act have also been criticised. Professor Richard Johnston, a political scientist, has argued that the mechanism is mere ‘political window dressing’ and confers no real ‘power on the people’, as the signature thresholds required were so high that petitions are ‘destined to fail’.¹²⁹ However, as Professor McCormick pointed out, it may be dangerous to lower these thresholds – without making broader structural changes to the recall process – given a successful petition will automatically result in the relevant member being recalled.¹³⁰
- 56 Finally, criticism has been made of the fact the British Columbia Act does not specify the grounds on which a recall petition may be initiated. Professor Robert Hazell argues that this enables the process to be misused, for personal or political reasons, as a means of harassment.¹³¹ Elections BC disagrees. In its 2003 report, it concluded that the recall process is a political rather than judicial one. The concept it seeks to embody – political accountability – is incapable of being reduced to a narrow set of grounds for removal.¹³²

United States of America

Overview

- 57 The recall was introduced into the United States during the colonial period of the 17th century, inherited, to some extent, from the English notion of the ‘right of petition’.¹³³ The concept of recall became popular during the early twentieth century, when it was adopted in numerous states.¹³⁴ However, a proposal to include a recall provision at the national level in the United States Constitution was rejected, for fear that it ‘may make members of Congress slaves to the wishes of their own electors’.¹³⁵ As such, there is no provision for recall at the national level.

¹²⁹ Richard Johnston, ‘A piece of democratic window dressing’ *The Sydney Morning Herald* (Sydney) December 30 2009, 13.

¹³⁰ Peter McCormick, above n 41, 12.

¹³¹ Robert Hazell, ‘The Conservative-Liberal Democrat Agenda for Constitutional and Political Reform’ (2010) The Constitution Unit, University College London, June 2010, 38.

¹³² Elections BC, above n 74, 32- 33.

¹³³ Anne Twomey (Submission 12); Geoffrey de Q Walker, above n 82, 154.

¹³⁴ Anne Twomey (Submission 12), 8.

¹³⁵ Anne Twomey (Submission 12), 8.

- 58 At present, nineteen states in the United States permit the recall of state officials.¹³⁶ Significantly more states permit the recall of local officials.¹³⁷ As the National Conference of State Legislatures notes, recall elections have occurred far more frequently, and met with more success, at the local level than they have at the state level.¹³⁸
- 59 As noted at the outset of this Section, there have been two recent and significant recall elections in the United States. In 2003, California's Governor, Gray Davis, was replaced by Arnold Schwarzenegger in a recall election. The election attracted great attention, and prompted criticism of the way the recall process operates.¹³⁹ In July and August of 2011 in Wisconsin, an unprecedented series of nine recall elections resulted in two state Senators being removed from office.¹⁴⁰ This election has been criticised as a manipulation of the recall process and as an attempt to overturn the Republican majority in the senate and to force a quasi-referendum on controversial anti collective bargaining laws.¹⁴¹
- 60 The recall reflects a concept of 'direct democracy' that is far more prevalent in the US than in many other systems. In his extensive review of the topic, Professor Joseph Zimmerman suggests that the impetus for direct democracy evolved out of growing distrust of elected officials throughout the 19th century.¹⁴² Now '[t]he proposition that citizens should play an informed and active role in the governance process is enshrined deeply in the political culture of the United States'.¹⁴³ Professor Vikram David Amar likewise states that popular – rather than parliamentary – sovereignty is

¹³⁶ Anne Twomey, above n 34, 45; National Conference of State Legislatures, *Recall of State Officials* <<http://www.ncsl.org/default.aspx?tabid=16581>> at 21 August 2011. The District of Columbia also permits recalls. Virginia permits a process of recall trial rather than election.

¹³⁷ Walker states that all but ten states permit recall of local officials: Geoffrey de Q Walker, above n 82. According to The National Conference of State Legislatures, the number is at least 29 and at most 36: National Conference of State Legislatures, above n 136. Cf Anne Twomey (Submission 12).

¹³⁸ Above n 136.

¹³⁹ Vikram David Amar, 'Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience' (2004) 92 *California Law Review* 927; see also Anne Twomey (Submission 12), 22-23; Ken Coghill (Submission 17), 3; Patrick Conrick (Submission 1).

¹⁴⁰ Charles Richardson, above n 58. The Wisconsin recall elections are discussed in more detail above at paragraphs 10 to 20 of Section D of this Report.

¹⁴¹ This issue is discussed further in this report at paragraphs 15 to 20 of Section D. Charles Richardson, above n 58; Monica Davey, above n 57.

¹⁴² Joseph F Zimmerman, *The Recall: Tribunal of the People* (Praeger, 1997), 7.

¹⁴³ *Ibid* 1.

‘the foundation upon which the entire edifice of American constitutionalism is built’.¹⁴⁴

61 However, this does not mean the concept of representative democracy is absent from politics in the United States. Professor Elizabeth Garrett describes the system operating in states such as California, which elect officials for fixed terms but also support direct democratic mechanisms such as the recall, as a ‘hybrid’ of direct and representative democracy.¹⁴⁵ On one view this is unstable. Critics argue that processes of direct democracy, such as the recall, seriously undermine representative democracy by creating governments constantly fearful of rejection, incapable or unwilling to pursue unpopular but perhaps necessary policies.¹⁴⁶ Professor Garrett recognises these concerns but argues they are not insurmountable; arguing that if properly supervised and regulated, the recall can act as a means of enhancing the efficacy and accountability of elected representatives.¹⁴⁷

Process

62 As stated above, in the United States recalls are only permitted at the state (or local government) level. Therefore, the availability, structure and process of recall elections is determined by state legislation, and varies significantly between states. The following paragraphs provide an overview of the systems in place across the United States, outlining:

- (a) which officials are amenable to recall;
- (b) the grounds on which an official can be recalled;
- (c) the process by which a petition is initiated and signatures collected;
- (d) the procedure of the consequent recall election; and
- (e) the interrelationship between the recall election and other electoral processes.

Officials amenable to recall

63 In some states, recall is limited to elected officials. In others, it can apply to both elected and non-elected officials.¹⁴⁸ Judges may be specifically excluded due to the

¹⁴⁴ Vikram David Amar, above n 139, 948.

¹⁴⁵ Elizabeth Garrett, above n 73, 273-274.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid 274.

¹⁴⁸ Geoffrey de Q Walker, above n 82, 155.

unique requirements of their role.¹⁴⁹ Most significantly, recall can be used to remove state Governors from office.

64 It should be remembered that in the US many more officials are elected to their positions than in Australia, where large numbers of officials are appointed by the Executive.¹⁵⁰ Thus, the ability to recall individual elected officials has a greater practical impact in the US than would a similar mechanism in Australia.

65 Strictly speaking, only individual officials in the US can be recalled; no state permits the recall of an entire government. However, in practice, recall elections may be capable of achieving like results. There are two ways this can occur.

66 Firstly, a state Governor may be recalled. This will effectively remove most of a state government, as the government comprises the elected head of state supported by his or her appointed staff.¹⁵¹ The 2003 Californian gubernatorial recall election is an example of this result.¹⁵² This is a result specific to the structure of American state governments. By way of contrast, the removal of the New South Wales Premier would not result in a change of the whole government.

67 Secondly, if multiple members of the state legislature are simultaneously recalled, the government may in practice lose the balance of power, thus forcing a change of government. The recent recall elections in Wisconsin attempted to achieve this result.¹⁵³ Through six, simultaneous, recall elections targeting six individual Senators, the Democratic party attempted to overturn Republican Governor Scott Walker's majority in the Senate.¹⁵⁴ Ultimately, two of the six senators were recalled; this diminished but did not destroy the Republicans' majority in the Senate.

68 In its submission to the Panel,¹⁵⁵ the New South Wales Electoral Commission suggests that the second result could be achieved in New South Wales, were a recall procedure for individual members to be introduced. The removal of multiple members

¹⁴⁹ Ibid 158-159; Joseph Zimmerman, above n 142, 25.

¹⁵⁰ Geoffrey de Q Walker, above n 82, 155-157; Joseph Zimmerman, above n 142, 1.

¹⁵¹ Ken Coghill (Submission 17), 2. Other elected officials would of course remain in office.

¹⁵² Prior to 2003, the only successful recall of a state governor took place in North Dakota in 1921. International Institute for Democracy and Electoral Assistance, above n 38, 112.

¹⁵³ This was not Wisconsin's first experience with simultaneous recall elections. In 2002, several elected members of the board of Milwaukee County, Wisconsin were recalled following a retirement pension controversy. Wisconsin Legislative Reference Bureau, 'Governing Wisconsin', Document GW-SQ-No.13, <http://legis.wisconsin.gov/LRB/gw/gw_13.pdf> at 21 August 2011.

¹⁵⁴ Charles Richardson, above n 58; Monica Davey, above n 57.

¹⁵⁵ Submission 21.

of the New South Wales Legislative Assembly could shift the balance of power in that House sufficiently to trigger a change of government.¹⁵⁶ Further, it is likely that there is a sufficient degree of party affiliation in New South Wales politics to enable one political party to mount a series of simultaneous recall attempts for such strategic purposes.

Grounds for recall

- 69 Eight states provide that recall elections can only occur on specific grounds. The grounds specified typically include what could be broadly described as malfeasance, misfeasance or nonfeasance. In these states – such as Kansas and Georgia – the recall petition must include a statement of reasons specific enough to both fall within one of the specified grounds and enable the relevant official to respond.¹⁵⁷
- 70 The remaining 11 states do not specify the grounds on which a recall election can be sought: that is, a recall election can be sought for any reason. This structure is reflective of an ‘agency rationale’; it ‘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.’¹⁵⁸
- 71 In those states where recall may be sought on any ground, it is typically provided that the justification for the recall is not a justiciable question.¹⁵⁹ Rather, ‘the whole procedure is regarded as political in nature’.¹⁶⁰ For this reason, there is no requirement of due process; the US courts have held that the electorate may choose to recall an elected official ‘for a good reason, a bad reason, or for no reason whatsoever.’¹⁶¹

Petition process

- 72 Each state stipulates different requirements for the recall petition. The most significant concerns the number of signatures required for a petition to succeed.

¹⁵⁶ NSWEC (Submission 21), 4-5.

¹⁵⁷ Joseph Zimmerman, above n 142, 36-40.

¹⁵⁸ Anne Twomey (Submission 12), 43.

¹⁵⁹ For example, art II § 8 of the Michigan Constitution states that the ‘sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question.’

¹⁶⁰ *Ibid* 46.

¹⁶¹ *Gordon v Leatherman* 450 F 2d 562 (5th Circuit, 1971), 567.

- 73 In order to succeed, state legislation generally provides that a petition must be signed by a certain percentage of ‘eligible voters’ – those eligible to vote at the last election, those currently eligible to vote, or some other variant.¹⁶²
- 74 Generally, ‘the signature requirements are high’; for example, the required threshold is 25 per cent of eligible voters in nine of the states which permit recall.¹⁶³ For this reason, the criticisms made of the Californian petition process should be kept in perspective. The Californian Constitution stipulates the lowest signature threshold in the US (12 per cent).¹⁶⁴ This percentage is tied to the number of eligible voters who actually cast votes at the previous election. Some commentators argue this framework enabled then Governor Gray Davis to be removed from office ‘too easily’ in 2003; voter turnout at the previous gubernatorial election had been low¹⁶⁵, and so the number of signatures required to recall and replace Davis was even lower.¹⁶⁶
- 75 A controversial issue relevant to the petitioning process is the use of paid signature collectors. Companies can be engaged to collect signatures on a petitioner’s behalf. Such companies may offer a ‘money-back guarantee’ if the requisite number of signatures is not collected. A Colorado law attempting to outlaw the use of paid signature collectors was struck down as contrary to the First Amendment to the United States Constitution in *Meyer v Grant*.¹⁶⁷
- 76 The constitutionally protected use of paid signature collectors has led some commentators to argue that anyone with enough money can essentially ‘buy’ a recall election.¹⁶⁸ If this is the case, it represents a serious subversion of the core purposes of the recall election, rendering them ‘accessible only by the rich or by well-funded special interest groups’ rather than grass-roots, citizen initiatives. This enables such groups to force ‘legislators [to] dance to their own tune’.¹⁶⁹

¹⁶² Mark Guarino, above n 59, 109.

¹⁶³ Ibid.

¹⁶⁴ Elizabeth Garrett, above n 73, 242.

¹⁶⁵ Voter turnout had reached a new low in 2002, the year Gray Davis was re-elected, of just 36.1 per cent of eligible adults (50.6 per cent of registered voters). For a discussion see, for example, Public Policy Institute of California, *Governor’s Elections in California* (November 2006)

<http://www.ppic.org/content/pubs/jtf/JTF_GovernorsElectionJTF.pdf> at 21 September 2011.

¹⁶⁶ *Californian Constitution*, art II s 14(b). Vikram David Amar, above n 139, 930.

¹⁶⁷ 486 US 414, 421 (1998). For further discussion of constitutional challenges to paid signature collectors, see Elizabeth Garrett, ‘Money, Agenda Setting and Direct Democracy’ (1999) 77 *Texas Law Review* 1845, 1879-1889.

¹⁶⁸ Ibid 1849-1854.

¹⁶⁹ Anne Twomey (Submission 12), 49; Elizabeth Garrett, above n 73, 243; Elizabeth Garrett, above n 167, 1849-1854.

77 Often, there will be a ‘grace period’ which prevents a recall being initiated at the beginning or end of an elected official’s term of office.¹⁷⁰

Recall election process

78 In contrast to British Columbia, in the United States a successful petition will not automatically cause the relevant official to lose office. Instead, a petition which satisfies the requirement of the relevant state legislation will then trigger a recall election.

79 In six states, one recall election ballot will ask electors to answer two questions: whether the relevant official should be recalled and, if so, who should replace the recalled official. In the other thirteen states the process is further bifurcated. The recall election ballot only asks whether the official should be recalled; the office is then filled by a separate special election or the ordinary process provided by law.¹⁷¹ Some states prohibit the recalled official from re-running for office.¹⁷²

80 A key problem which arose during the Californian 2003 gubernatorial election was the ‘lax provisions regarding nominations for candidates to replace the Governor’. In order to run for election, candidates could either obtain a sufficient number of signatures or pay a USD3,500 nomination fee.¹⁷³

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.¹⁷⁴

81 These problems are clearly unusual and, to a large extent, specific to the 2003 Californian context. However, in any system a recall election will usually take place at a time when the electorate is frustrated and angry. This may produce unusual electoral dynamics.

Interrelationship with other electoral processes

82 In the United States, the recall works in conjunction with other mechanisms enabling removal of elected officials. These include processes of impeachment and legislative

¹⁷⁰ Joseph Zimmerman, above n 142, 36-40, 67.

¹⁷¹ National Conference of State Legislatures, above n 136.

¹⁷² Ibid.

¹⁷³ International Institute for Democracy and Electoral Assistance, above n 38,113.

¹⁷⁴ Anne Twomey (Submission 12), 23.

address, as well as laws – similar to those which exist in New South Wales, in relation to members of parliament¹⁷⁵ – providing that an elected official who has committed certain offences may be deemed to have automatically vacated office.¹⁷⁶

83 The recall also, often, coexists with other mechanisms of ‘direct democracy’: the citizen initiative and citizen initiated referendum.¹⁷⁷ This may in part explain why recall elections of state officials are relatively seldom attempted in the United States. If citizens are unhappy with a particular policy decision, it may be more effective to get the decision overturned via a referendum than to recall the official responsible for the decision; ‘recall will not change the policy outcome’.¹⁷⁸ Many states also require fewer signatures to trigger a citizen initiated referendum than would be required to trigger a recall election. The former may also be more likely to succeed, and thus be more likely to be pursued.¹⁷⁹ However, recall elections are still valued as ‘the ultimate control device’.¹⁸⁰

84 There is no suggestion at present that New South Wales should adopt citizen initiated referendums in conjunction with recall elections.¹⁸¹ Therefore, the kinds of pressures which would lead to direct democratic intervention may be more likely to be channelled towards seeking recall elections. This could mean recall elections are sought more frequently in New South Wales than in the United States.

Difficulties in the US experience

85 The abundance of state legislation permitting recall in the US does not mean its use has not been criticised. Several of the difficulties accounted by the recall election process have been noted above. Three key problems will be reiterated here.

86 First, money has appeared to play a ‘troubling role ... in recall elections’.¹⁸² This was obvious in the Californian gubernatorial recall election of 2003 and the series of nine recall elections in Wisconsin in 2011. Professor Elizabeth Garrett notes that it is difficult to construct effective and comprehensive campaign finance laws to suit all

¹⁷⁵ For example, *New South Wales Constitution* s 13A.

¹⁷⁶ Joseph Zimmerman, above n 142, 28.

¹⁷⁷ Anne Twomey (Submission 12), 46.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Joseph Zimmerman, above n 142, 9.

¹⁸¹ Though Graeme Orr suggests ‘if there is a desire for more direct democracy [in New South Wales], then the New South Wales government should consider measures such as citizen initiated referendums, deliberative democracy initiatives and popular election of the Governor’: Submission 15, 2.

¹⁸² Elizabeth Garrett, above n 73, 239.

steps of the unique recall process.¹⁸³ In California, caps on general election spending do not apply to the recall election process, despite the obvious links between recall election and the election which subsequently determines who should fill the vacant seat.¹⁸⁴ In Wisconsin, the state's normal fundraising rules apply during the election phase, but there is no limit on the amount of money that can be spent promoting the recall petition.¹⁸⁵

- 87 Some commentators have argued that the relative wealth of the respective candidates in the 2003 Californian recall election was a key factor in determining its outcome.¹⁸⁶ In essence, the Californian experience demonstrates that if the recall election campaign spending is not tightly regulated, a wealthy candidate can attain the very advantage which most state legislatures have attempted to ensure would not arise in a 'normal' election campaign.¹⁸⁷
- 88 Recall funding was also a contentious issue in Wisconsin. Commentators suggest that the vast majority of funding was received from interstate special interest groups (particularly Democratic Party supporters and pro-union movements).¹⁸⁸ The prevalence of interstate funding heightened a sense that Wisconsin was used as a testing ground for national issues, and that the recall process was driven by special interest groups rather than the electorate.
- 89 The use of paid signature collectors has also raised questions as to whether recall petitions accurately represent the views of the electorate.¹⁸⁹ It has led some commentators to advocate for simple reforms – for example, requiring that electors travel to a designated place, such as a town hall, in order to sign the petition – designed to ensure petitions are only signed by electors who genuinely support the cause.¹⁹⁰ Craig Gilbert, Washington bureau chief and chief political reporter for the *Milwaukee Journal Sentinel*, notes that provisions designed to ensure the recall is difficult to initiate and tightly regulated in other respects – for example a small window of time in which petition signatures must be collected – can increase the

¹⁸³ Ibid.

¹⁸⁴ Joseph Zimmerman, above n 142, 61.

¹⁸⁵ Craig Gilbert, above n 47.

¹⁸⁶ Elizabeth Garrett, above n 73, 247. See also Anne Twomey (Submission 12), 22-23.

¹⁸⁷ Elizabeth Garrett explains the various 'loopholes' in campaign expenditure rules which enabled candidates to spend large sums on their recall election campaigns: above n 73, 247-252.

¹⁸⁸ Mark Guarino, above n 59.

¹⁸⁹ Anne Twomey (Submission 12), 49.

¹⁹⁰ For a summary of these proposals, see Elizabeth Garrett, above n 73, 244-246.

pressure to use paid signature collectors.¹⁹¹ The impetus to use such collectors would have to be addressed if recall elections were introduced in New South Wales. The kind of ban on paid signature collectors struck down in Colorado may be permissible in New South Wales, given our different laws.¹⁹²

90 Finally, the United States experience has revealed the fundamental political difficulties created by embracing a comprehensive system of direct democratic mechanisms, including the recall. Concepts of direct democracy will at times stand in direct conflict with concepts of representative democracy and encourage short term populism. The recall election may also be utilised for party purposes, as recently seen in Wisconsin.

91 However, it must be remembered that the recall election has proved most contentious in California, a state which, as noted above, prescribes the lowest petition signature thresholds in the United States and permits a wide range of other direct democratic mechanisms such as the citizen initiated referendums. Furthermore, as Professor Garrett argues, several of the difficulties encountered in California might have been avoided if appropriate regulation had been in place designed to ensure the recall is a truly democratic process untainted by the influence of wealth or special interest lobbying.¹⁹³

The United Kingdom: Recent proposals

92 In Britain in mid-2009, both the Prime Minister, Mr Gordon Brown, and the Opposition Leader, Mr David Cameron, raised the idea of adopting a recall mechanism applicable to individual members of Parliament who engage in misconduct.¹⁹⁴ The statements followed revelations that members had been misusing expense-reimbursement arrangements. As described by the Prime Minister, the power of recall would allow a by-election to be held when a member of Parliament was found to have committed serious financial misconduct. In September 2009, the Prime

¹⁹¹ Craig Gilbert, above n 47.

¹⁹² Anne Twomey (Submission 12), 61.

¹⁹³ Elizabeth Garrett, above n 73, 273-274.

¹⁹⁴ 'Cameron backs MP "sacking" powers', *BBC News* (online) 31 May 2009 <http://news.bbc.co.uk/2/hi/uk_news/politics/8075846.stm> at 21 August 2011; Andrew Sparrow, 'Voters could "recall" errant MPs, says Gordon Brown', *The Guardian* (online) 10 June 2009 <<http://www.guardian.co.uk/politics/2009/jun/10/voters-could-recall-mps-says-gordon-brown>> at 21 August 2011.

Minister repeated that it was his intention to implement the proposal, stating in a speech to the Labour Party Conference:

where there is proven financial corruption by an MP and in cases where wrongdoing has been demonstrated but Parliament fails to act we will give constituents the right to recall their Member of Parliament.¹⁹⁵

The Liberal Democrats also supported the introduction of such recall provisions for British members of Parliament (and for the European Parliament).¹⁹⁶ Thus, during the lead-up to the 2010 election, all three main parties promised to introduce a recall procedure for members of Parliament who committed acts of wrongdoing.

93 In October 2009, a Conservative Member of the House of Commons, Mr Douglas Carswell, introduced a bill that provided for a recall of an individual Member of the House of Commons where the Member was found guilty of serious wrongdoing by the Committee on Standards and Privileges, and if the recall was supported by ‘a significant number of local people’.¹⁹⁷ However, the bill did not receive a second hearing.

94 On the opening of the new Parliament on 25 May 2010, the Queen’s Speech, reflecting a commitment by the Conservative-Liberal Democrat Coalition, said that ‘[c]onstituents will be given the right to recall their members of Parliament where they are guilty of serious wrongdoing’.¹⁹⁸ The triggers for a Member’s recall were to have been that ‘an MP is judged to have engaged in serious wrongdoing’ and ‘more than 10 per cent of electors sign the petition’.¹⁹⁹ A by-election would then be held in the seat. It was not made clear, however, what would be classed as serious wrongdoing, or how it would be judged that an MP had engaged in it. One commentator suggested the task be given to the Select Committee on Standards and Privileges, but noted that the body is potentially subject to party political influence.²⁰⁰ On 7 June 2010, the Deputy Prime Minister, Mr Nick Clegg, raised this issue in debate in the House of Commons, and stated that he ‘certainly would not be content

¹⁹⁵ Gordon Brown, ‘Speech to Labour Conference’, Speech delivered to the 2009 Labour Party Annual Conference, Brighton, 29 September 2009 <<http://www.labour.org.uk/gordon-brown-speech-conference>> at 21 August 2011.

¹⁹⁶ Liberal Democrats, ‘Liberal Democrat Manifesto 2010’, London, 14 April 2010, 89 <http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf> at 21 August 2011.

¹⁹⁷ United Kingdom, *Parliamentary Debates*, House of Commons, 13 October 2009, col 166-167 (Douglas Carswell).

¹⁹⁸ United Kingdom, *Parliamentary Debates*, House of Commons, 25 May 2010, col 32.

¹⁹⁹ No 10 Downing Street, ‘Queen’s Speech – Parliamentary Reform Bill’, Media release, 25 May 2010.

²⁰⁰ Robert Hazell, above n 131, 38. See also Anne Twomey, above n 34, 51.

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', and that the Government was considering what the trigger ought to be.²⁰¹ On 27 July 2010, Mr Clegg stated that the procedure would enable constituents to 'trigger a process of recall by a petition from 10% of constituents'.²⁰² More recently, Mr Clegg confirmed on 5 July 2011 that the Government was still committed to the proposal, and that it planned to publish a draft Bill for pre-legislative scrutiny.²⁰³

95 Of the British proposals, it may be noted that they would apply to *individual* legislators; they do not contemplate the recall of the whole of the House of Commons.

Europe: Switzerland, Germany and Liechtenstein

96 Recall processes exist in three European nations: Switzerland, at the cantonal level; Germany at the state and (in the past) local levels; and Liechtenstein at the national level.

Switzerland

97 Six Swiss cantons have constitutional provisions permitting the recall of, and the holding of a new general election for the polity's unicameral legislature, the Grand Council.²⁰⁴ Some of the canton constitutions likewise provide for the recall of the executive of the canton, the Council of State. There are variations in the number of signatures required as a trigger, which range from 1,000 in Schaffhausen to 30,000 in Berne, as well as the length of time allowed for their collection.

98 Despite these provisions, the procedure does not appear to have been used.²⁰⁵ As Professor Twomey has concluded, '[t]he reason is likely to be the more active use in Switzerland of citizens' initiated referendums to change unpopular laws or policies, rather than the removal of their various supporters.'²⁰⁶

²⁰¹ United Kingdom, *Parliamentary Debates*, House of Commons, 7 June 2010, col 42.

²⁰² United Kingdom, *Parliamentary Debates*, House of Commons, 7 June 2010, col 853.

²⁰³ United Kingdom, *Parliamentary Debates*, House of Commons, 5 July 2011, col 1161W.

²⁰⁴ Constitutions of Bern (art 57), Lucerne (art 44), Schaffhouse (art 27), Solothurn (art 28), Thurgovie (art 25), Soleure (art 28) and Tessin (art 44). These articles' various requirements were detailed in Anne Twomey (Submission 12), 37.

²⁰⁵ This was the finding of the British Columbia Electoral Commission when it investigated the Swiss example: Elections BC, above n 74, 29. It echoed the observation of William E Rappard in 1912 that the recall 'is little known and less practised in Switzerland'. See further Anne Twomey, above n 34, 52.

²⁰⁶ Anne Twomey, above n 34, 52.

Germany

99 Germany has had both historical and recent experiences of recall elections. During the Weimar Republic, the *Länder* (States) introduced direct democratic measures that included citizens' initiated dissolution of a unicameral *Länder* legislature, the *Landtag*. In Prussia, for example, the signatures of one fifth of the registered voters were needed for a resolution to dissolve the *Landtag*.²⁰⁷ During the 1920s and 30s, there were numerous petitions for referendums for the dissolution of the *Landtag* in the *Länder*:

[I]nitiatives introduced by political parties in opposition to the government and calling to Landtag dissolution have been introduced in Saxony (1922, 1924, 1931-32), Bavaria (1924), Brunswick (1924, 1931), Schaumburg-Lippe (1924), Mecklenburg-Schwerin (1925), Hesse (1926), Lippe (1929, 1931), Prussia (1931), Anhalt (1931), Oldenburg (1932), and Bremen (1932).²⁰⁸

100 However, it was only in Oldenburg in 1932 that the proposal was approved by the voters at a referendum initiated by the National Socialist party.²⁰⁹ In a number of other cases, the legislatures dissolved themselves after having received a petition that would otherwise have allowed a referendum on dissolution.²¹⁰

101 Voter-initiated referendums on the dissolution of local government councils was also permitted in nine of the *Länder*: Baden, Bavaria, Bremen, Brunswick, Lippe, Mecklenburg-Schwerin, Oldenburg, Saxony, and Thuringia.²¹¹ As with triggers for *Landtag* dissolution referendums, the number of voter signatures required varied, from one fifth to one third. The majority required at the referendums likewise varied, from half to three-fifths of the votes cast. A council elected at a new election would serve out the rest of the term of its predecessor.

102 As to the way in which referendums for *Landtag* dissolution worked in practice, the actions were initiated largely by the German National People's party, the National Socialist party, and the Communist party. Occasionally they received support from

²⁰⁷ Richard Thoma, 'The Referendum in Germany' (1928) 10 *Journal of Comparative Legislation and International Law* 3d series 55, 69.

²⁰⁸ Lee Greene, 'Direct Legislation in the German Länder 1919-32' (1933) 27(3) *American Political Science Review* 445, 451.

²⁰⁹ *Ibid* 452.

²¹⁰ Richard Thoma, above n 207, 69-72.

²¹¹ See Roger Wells, 'The Initiative, Referendum and Recall in German Cities' (1929) 18 *National Municipal Review* 31.

other parties, including the Social Democrats. The purposes, as Professor Lee S Greene observed, writing in 1933, were generally ones of party strategy:

Especially in the last few years, this form of action has been taken by opposition parties as a means of undermining the parliamentary regime. No further proof of this statement could be required than the fact that in Prussia in 1931 and Saxony in 1932, the National Socialists and Communists stood in united support of the referendum calling for dissolution. 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.²¹²

103 Greene concluded that experience of direct legislation in the German *Länder* 'does not seem to have resulted in much beneficial activity'. He also pointed to the expense of frequent voting. But he did not think voting on the dissolution of the *Landtag* to be worthless; it would be very important, for instance, where the ministry lacked the power to dissolve the legislature, and otherwise for resolving deadlocks.²¹³

104 As to how referendums for the dissolution of the local councils worked in practice, an analysis of their use between 1920 and 1927 by Professor Roger H Wells concluded that they were rarely used, especially in the large cities where it was difficult to obtain the necessary signatures. According to Professor Wells, another reason for the lack of use was that there were other means of dissolving a council and ending a deadlock. Where it was used, it was '[i]n short ... a party instrument used to improve the representation or position of the party in the municipal legislature.'²¹⁴

105 Since the 1990s, recall procedures, like other mechanisms of direct democracy, have increased in the German *Länder*.²¹⁵ Currently, six *Länder* have recall processes for the removal of the entire legislature: Baden-Württemberg; Bavaria; Berlin; Brandenburg; Bremen; and Rhineland-Palatinate.²¹⁶ To take the Berlin process in more detail, the city-state's constitution provides by article 63:

A referendum aimed at premature termination of the legislative period of the House of Representatives requires as proof of support the signatures of at least 50,000 people entitled to vote in elections for the House of Representatives. A referendum must be

²¹² Lee Greene, above n 208, 452.

²¹³ Lee Greene, above n 208, 454.

²¹⁴ Roger Wells, above n 211, 35.

²¹⁵ Arthur Gunlicks, 'Land Constitutions in Germany' (1998) 28(4) *Publius* 105.

²¹⁶ Constitution of the Free State of Bavaria, art 18(3); The Constitution of Berlin, s 63(3); Landesverfassung Baden-Württemberg, art 43(2); Landesverfassung Bremen, arts 70(c), 76; Landesverfassung Brandenburg, arts 76(1), 77, 78; Landesverfassung Rheinland-Pfalz, art 109. Of these constitutions, only the Berlin and Bavarian constitutions are available in English translation.

held if at least one fifth of the people entitled to vote in House of Representatives elections agree to the petition within four months. The referendum shall become effective only if at least half of those entitled to cast their votes, with a majority in favour of early termination.²¹⁷

106 An example of the use of this procedure in Berlin is as follows:

During a political crisis in January 1981 the Christian Democratic opposition started a citizens' initiative to recall the legislature (Abgeordnetenhaus). Within a few days, 300,000 signatures—more than the quorum required—had been collected. In March, the parliament decided to call an early election in May 1981, without waiting for the referendum vote. Since the goal of the initiative had been reached the petition was withdrawn.²¹⁸

At the subsequent election, members who had been the subject of criticism, including the mayor, lost seats. As political scientist Dr Matt Qvortrup observed of the result, '[a]s often in politics, it is the "dog that didn't bark" that is important.'²¹⁹

107 In the other *Länder*, however, a higher number of signatures is required in order to trigger a referendum.²²⁰ In Bavaria, for example, there must be a motion of a million state citizens.²²¹ In Baden-Württemberg the requisite threshold is one sixth of the electorate.²²² In Brandenburg, there is a three-step system. First, an initiative for the dissolution of the *Landtag* may be introduced if it is signed by at least 150,000 petitioners (article 76(1)). Secondly, if this initiative is not approved by the *Landtag*, a minimum of 200,000 people may make a popular request for dissolution (article 77). Thirdly, if the *Landtag* does not accede to this request within two months, a referendum will be held within a further three months (article 78(1)). The referendum will succeed if supported by at least a two-thirds majority of those that vote and, as a minimum, half of those entitled to vote (article 78(2)).

108 It appears that in these *Länder*, the more stringent requirements for signatures have meant that the recall procedures have not been used.²²³

²¹⁷ *Constitution of Berlin*, s 63(3).

²¹⁸ International Institute for Democracy and Electoral Assistance, above n 38, 116.

²¹⁹ Matt Qvortrup, 'Hasta La Vista: A Comparative Institutional Analysis of the Recall' (2011) 47(2) *Representation* 161, 166.

²²⁰ See International Institute for Democracy and Electoral Assistance, above n 38, 115-6.

²²¹ *Constitution of the Free State of Bavaria*, art 18(3).

²²² *Landesverfassung Baden-Württemberg*, art 43(2).

²²³ See International Institute for Democracy and Electoral Assistance, above n 38, 115-6.

Liechtenstein

- 109 A mechanism for popularly-initiated referendums to dissolve the parliament exists in Liechtenstein, in a provision that dates back to 1921. The Constitution of the Principality of Liechtenstein provides by article 48 that 1,500 Liechtenstein citizens eligible to vote or four municipalities, by means of resolutions of their municipal assemblies, may demand a popular vote on the dissolution of Parliament. If the majority of the voters agree, Parliament will be dismissed and new parliamentary elections held.
- 110 Liechtenstein thus offers an interesting example of a government that has a form of recall, while also exhibiting the features of representative democracy and constitutional monarchy, including a power in the crown to dissolve the legislature, by article 48 of the Constitution. In Liechtenstein, the prince also retains the right to approve or refuse votes on initiatives and referendums. It can thus be contrasted with Switzerland, where direct democracy is the ultimate expression of popular sovereignty in the political system.²²⁴ However, Liechtenstein's recall procedure has apparently never been used.²²⁵
- 111 The three European nations discussed above offer examples of citizen initiated referendums on the dissolution of legislatures, rather than the recall of individual officials. Their procedures are therefore closer to what has been suggested for New South Wales. The legislative systems are also based on a representative rather than a mandate theory of elected office.²²⁶ On the other hand, in two of the examples, Switzerland and Liechtenstein, the law has not been used, so few lessons can be drawn. In the case of Germany, there has been little recent use of the procedures. During the Weimar Republic, there were frequent attempts to use the procedure to dissolve state legislatures, with one such attempt succeeding, but history serves to illustrate the scope for such procedures to be used for party-political advantage.

²²⁴ Wilfried Marxer, 'Direct Democracy in Liechtenstein' (Paper presented to the International Conference on Direct Democracy in Latin America, Buenos Aires, 14-15 March 2007) <http://www.liechtenstein-institut.li/Portals/11/pdf/politikwissenschaft/Marxer_Wilfried_Direct_Democracy.pdf> at 21 August 2011, 7-8.

²²⁵ *Ibid* 5.

²²⁶ For example, article 27 of the constitution of the state of Baden-Württemberg states explicitly that: '(3) The Members of Parliament are representatives of the entire population. They are not bound by any mandate or instructions and are subject only to their own conscience.'

South America: Venezuela and Bolivia

Venezuela

112 Venezuela is a federal, presidential republic consisting of 23 states. The President serves six year terms. The country has a unicameral legislature, and a voluntary voting system. Recall elections of all elected officials, including the President, are permitted by the Venezuelan Constitution.²²⁷

113 The recall – and the concept of direct democracy which it embodies – is integral to the Venezuelan political system.²²⁸ Article 5 of the Venezuelan Constitution states:

[s]overeignty resides... in the people, who exercise it directly in the manner provided for in this Constitution and in the law, and indirectly, by suffrage, through the organs exercising Public Power. The organs of the State emanate from and are subject to the sovereignty of the people.

114 Further, article 6 states (emphasis added):

the Bolivarian Republic of Venezuela and of the political organs comprising the same, is and shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist, *with revocable mandates*.

(i) Historical background to the introduction of the recall election in Venezuela

115 Venezuela experienced an extended period of economic, social and political instability during the 1980s and 90s. Professor Jennifer McCoy states that this instability created a desire for drastic political change amongst the Venezuelan people.²²⁹ Hugo Chávez ran for President during the 1998 elections, and promised to rewrite the Constitution if elected.²³⁰ Chávez succeeded, and in 1999 the Constitution was redrafted to, amongst other things, permit recall elections for the first time. It was thought that recall elections could be used to clarify the level of public support for the President – a useful tool in a country with a history of destabilising military coups.²³¹

²²⁷ The version of the Venezuelan Constitution referred to in this report is a translation provided by Venezuelanalysis.com, an independent Venezuelan news service. It is available at <<http://venezuelanalysis.com/constitution/title/1>> as at 21 August 2011.

²²⁸ International Institute for Democracy and Electoral Assistance, above n 38, 111.

²²⁹ Jennifer L McCoy, 'The 2003 Venezuelan Recall Referendum' (2006) 2 *Taiwan Journal of Democracy* 61, 63.

²³⁰ *Ibid.*

²³¹ Two unsuccessful military coup d'états were staged in 1992, one of which was led by the current President, Hugo Chávez. *Ibid* 64.

116 Support for President Chávez soon declined. In 2002, he was removed from the Presidency by military coup, but reinstated 48 hours later. Chávez himself was then the subject of a recall election in 2004. The recall election failed, and Chávez remains President.

(ii) Relevant constitutional provisions

117 There are two constitutional provisions relevant to recall: the first applies to all elected officials; the second provides specifically for the recall of the President.

118 Article 72 provides that ‘all magistrates and other offices filled by popular vote are subject to revocation’.²³² The recall is initiated by petition. At least 20 per cent of the voters ‘registered to vote in the pertinent circumscription’ must sign the petition. A petition cannot be initiated until ‘half of the term of the office to which an official has been elected has elapsed’.²³³

119 If the petition is successful, there is then a separate recall election. For the election to succeed, three requirements must be satisfied:

(a) at least 25 per cent of the total number of registered voters in the relevant electorate must vote in the recall election;

(b) the majority of votes cast must favour recall; and

(c) the number of votes which favour recall must be equal to or greater than the number of votes the relevant official received at the last election.²³⁴

120 If the petition satisfies these requirements, the official is recalled. ‘Immediate action’ must then be taken to fill the vacancy via the ordinary process prescribed by law. The recall referendum must be held within 97 days of the petition being certified as valid.²³⁵ It is not clear whether a recalled official may stand for re-election.²³⁶ Only one recall petition may be lodged against an official during his or her term of office.²³⁷

²³² *Constitution of the Bolivarian Republic of Venezuela* (online) <<http://venezuelanalysis.com/constitution>> at 21 August 2011.

²³³ International Institute for Democracy and Electoral Assistance, above n 38, 120.

²³⁴ Anne Twomey (Submission 12), 29; International Institute for Democracy and Electoral Assistance, above n 38, 121.

²³⁵ International Institute for Democracy and Electoral Assistance, above n 38, 123.

²³⁶ Miriam Kornblith ‘Direct Democracy and Referendum to Recall the President in Venezuela’ (Paper presented at the 6th Global Forum on Reinventing Government, Seoul, 24-27 May 2005) 5.

²³⁷ Anne Twomey (Submission 12), 29.

121 Article 233 provides that the President may also be recalled by popular vote.²³⁸ It appears that the recall itself occurs via the process applicable to all elected officials, described in article 72.²³⁹ However, article 233 does make specific provision for the election of a presidential replacement.

122 If the President is recalled within the first four years of the presidency, a ballot to elect his replacement must be held within 30 days. The Executive Vice President takes charge of the Republic in the interim. The newly elected President will then serve out the remaining term of the presidency.

123 If the President is recalled within the last two years of the presidency, no election is held to replace him or her. Instead, the Executive Vice President will serve out the remainder of the presidency.

(iii) The 2004 recall election

124 After initiating the introduction of the recall election in 1999, Hugo Chávez found himself the subject of a recall election campaign in 2004. Two petitions were initiated in 2003; the first was invalid as the signatures had been collected before Chávez had completed half of his presidential term; the second was signed by enough voters to trigger a recall election. However, the electorate ultimately voted to retain Chávez as President in 2004. One of the three requirements prescribed by article 72 was not satisfied; the majority of votes cast did not favour recall.²⁴⁰

125 The recall election was plagued by delays, recounts and suspected fraud.²⁴¹ Many of these difficulties arose out of factors unique to the Venezuelan context. In particular, the recall election took place during a time when – for largely historical reasons – the electorate was deeply suspicious of their elected officials, the electoral process, and the ability (or lack thereof) of government institutions to verify the authenticity of the recall election.²⁴² The following four aspects of the Venezuelan experience may be of relevance to New South Wales.

126 *First*, there was no clearly objective, impartial arbiter to oversee the validity of the recall election process. For this reason, the legitimacy of the final result – and

²³⁸ *Constitution of the Bolivarian Republic of Venezuela*, above n 232.

²³⁹ Jennifer L McCoy, above n 229, 66-67.

²⁴⁰ Anne Twomey (Submission 12), 30.

²⁴¹ See Jennifer L McCoy, above n 229, and Miriam Kornblith, above n 236.

²⁴² Jennifer L McCoy, above n 229, 61-62, 77-79.

Chávez's rule – is still questioned.²⁴³ The National Electoral Council ('NEC') was meant to act as arbiter, but it was perceived to be partial to the Government.²⁴⁴ The NEC 'opted for a hybrid process in which both it and the [political] parties has some responsibility' for verifying the signatures collected on the petition; but this created 'a confusion of authority and a source of complaints and appeals throughout the subsequent phases'.²⁴⁵ The role to be played by the Supreme Court in the whole process was unclear, and it too was seen to be partial to Government interests.²⁴⁶ The lack of an objective arbiter exacerbated the public's distrust of the electoral process.

127 *Secondly*, clear and comprehensive regulations to govern the recall process had not been drafted by the time the recall election was called. This meant that regulations to govern the various phases of the process were being written as the process unfolded.²⁴⁷ For example, the requirements of a valid signature and process for determining its authenticity were vague. This enabled the Government to challenge the validity of over one million of the signatures collected (on the second, valid petition). The challenge lead to riots in which a number of people were killed.²⁴⁸ Eventually, a compromise was reached whereby voters were given the opportunity to 'ratify' their signatures, further drawing out the recall process.²⁴⁹ Professor Miriam Kornblith, a Venezuelan political scientist, also suggests the use of coercion was not properly regulated, either during the initial collection of signatures or during the latter process of ratification.²⁵⁰

128 *Thirdly* – and in part because of the above problems – the recall election was costly and inefficient.²⁵¹ New touch screen machines were purchased, so that the finger prints of individual voters could be recorded as they voted to ensure no one voted twice.²⁵² These were expensive and viewed with suspicion by voters.²⁵³ The time limits eventually prescribed by law were also not complied with. For example, the NEC was supposed to verify the signatures on the recall petition within 30 days, but

²⁴³ Ibid 61.

²⁴⁴ Ibid 63, 65-66, 72.

²⁴⁵ Ibid 66.

²⁴⁶ Ibid 72-73.

²⁴⁷ Ibid 66.

²⁴⁸ Ibid 61, 67; Anne Twomey (Submission 12), 29-30.

²⁴⁹ Miriam Kornblith, above n 236, 7.

²⁵⁰ Ibid 8.

²⁵¹ Ibid 8.

²⁵² Jennifer L McCoy, above n 229, 75.

²⁵³ Ibid 6.

in fact took 100. Professor Kornblith states that the recall process was supposed to take three months, but ended up taking 11.²⁵⁴

129 Fourthly, the Venezuelan experience demonstrates the capacity of the recall process to inflame – rather than release – pre-existing political tensions.²⁵⁵ Both Professor McCoy and Professor Kornblith refer to an inherently negative, ‘zero-sum’ dynamic witnessed during the Venezuelan recall election.²⁵⁶ Professor McCoy suggests that the fact a recall election involves ‘a simple yes or no [vote], for or against the president, rather than a choice among multiple candidates’ meant there was no impetus to moderate electoral rhetoric.²⁵⁷ Professor Kornblith suggests the culture of direct democracy has led to deeper, more worrying changes in Venezuelan politics:

An individualist scheme centred on the president’s figure takes shape, sustained by the support of the military and of weakened mediating civilian organisations and institutions.²⁵⁸

Bolivia

(i) System of government

130 Bolivia is a unitary, presidential state with a bicameral legislature. Its parliamentarians are now elected by a ‘Germany-style, mixed-member proportional system’.²⁵⁹

131 Like Venezuela, Bolivia has experienced a long history of military coups. However, it has been governed by democratically elected governments since 1982. The transition to stability was aided by a political agreement that ‘both left and right in the country’s multiparty system [would] abide by election results, no matter how unpalatable these might be.’²⁶⁰

132 Despite the advent of stability, there is still ‘a large constituency for radical politics’,²⁶¹ and ‘long term political weaknesses’ such as ‘cronyism, corruption and [a] general disregard for the rule of law’.²⁶² Moreover, Bolivia’s current government,

²⁵⁴ Ibid 5, 6.

²⁵⁵ Jennifer L McCoy, above n 229, 73-76.

²⁵⁶ Ibid 65; Miriam Kornblith, above n 236, 9-10.

²⁵⁷ Jennifer L McCoy, above n 229, 71.

²⁵⁸ Miriam Kornblith, above n 236, 4.

²⁵⁹ Fabrice Lehoucq, ‘Bolivia’s Constitutional Breakdown’ (2008) 19(4) *Journal of Democracy* 110, 113.

²⁶⁰ Ibid 113.

²⁶¹ Ibid 114.

²⁶² Ibid 115.

headed by Evo Morales, has created new controversy by its attempts to nationalise the country's gas deposits and water supply and implement a new Constitution.²⁶³

(ii) Recall elections in Bolivia

- 133 It is difficult to identify a verifiable translation of the Bolivian Constitution. In outline, it appears a recall election will be successful if more electors vote to recall the relevant official then originally voted to appoint him or her. A separate election is then held to fill the vacancy.²⁶⁴
- 134 A significant recall election was held in 2008. The proposed recall targeted current President Morales, his Vice-President and eight (of nine) regional 'prefects' or Governors. In the final result, only two of the eight prefects were recalled. They currently face re-election.²⁶⁵ This election again demonstrates the capacity of recalls of multiple, individual officials to be orchestrated in an attempt to remove 'the whole government'.

Asia: Japan, Taiwan, the Philippines and India

Japan

- 135 At the local government level in Japan, electors may initiate the early dissolution of local government assemblies by a procedure set out in the Local Autonomy Law.²⁶⁶ One third of the electorate must initiate the motion for dissolution in order to trigger a referendum on dissolution.²⁶⁷ A simple majority of votes will then result in dissolution. The same process also applies to the recall of individual members of assemblies,²⁶⁸ procedures which exist alongside other direct democratic procedures, including citizen initiated petitions for demands for legal enactments or repeals and demands for administrative audit.²⁶⁹
- 136 There has been active use of the procedure since its introduction in the immediate post-war period, with a high degree of success. A study by Professor Takanobu

²⁶³ Ibid 110-111, 116 and generally.

²⁶⁴ 'Morales sets Bolivia recall date', *BBC News* (online), 12 May 2008 <<http://news.bbc.co.uk/2/hi/americas/7396809.stm>> at 21 August 2011.

²⁶⁵ 'Bolivia's Morales hails poll win', *BBC News* (online), 11 August 2008 <<http://news.bbc.co.uk/2/hi/americas/7551994.stm>> at 21 August 2011.

²⁶⁶ See Jau-Yuan Hwang, *Direct Democracy in Asia: A Reference Guide to the Legislation and Practices* (Taiwan Foundation for Democracy, 2006) 78.

²⁶⁷ Takanobu Tsujiyama, 'Local Self-Governance in Japan: The Realities of the Direct Demand System' (2000) 7(2) *National Institute for Research Advancement Review* 26, 27; Jau-Yuan Hwang, above n 266, 80 and 81.

²⁶⁸ Local Autonomy Law (Japan), art 76, 80 and 81. See Jau-Yuan Hwang, above n 266, 78.

²⁶⁹ Takanobu Tsujiyama, above n 267, 27.

Tsujiyama considered the 400 such petitions that were submitted between 1947 and 1992. Of the petitions that proceeded to a referendum, most (89 per cent) were passed. Professor Tsujiyama observed:

This phenomenon can be attributed to the effectiveness of the system, which is supported by the final decision being made by a referendum of residents. Moreover, the demand holds only after clearing the challenging hurdle of the support of a third of the constituents, which means that substantial support already exists for it in the community. In the past, the reasons for such demands centred on corruption and scandals, but more recently the system is being used to determine the validity of, or flaws in, policy decisions.²⁷⁰

137 Yet it was apparently only recently that the procedure resulted in the dissolution of an assembly in a major city.²⁷¹ This was in August 2010, when the Mayor of Nagoya, Takashi Kawamura, initiated a recall petition for his own local assembly, which would not support his policy of cutting the number of assembly members and their salaries. After the requisite number of signatures was collected, a referendum on recall succeeded in February 2011.²⁷²

138 An aspect of the recall procedure that Professor Tsujiyama identified as problematic was the required threshold of voter signatures, which requires a higher number of voters to petition for dissolution than that which elected the assembly in the first place, since voter turnout at local assembly elections is often less than a third of registered voters.²⁷³ Professor Tsujiyama suggests as a better model the approach of certain US states, in which the requirement for recall is a percentage of the total vote cast in the previous election.

Taiwan

139 In Taiwan, procedures exist to recall individual elected officials, such as the President and Vice-President.²⁷⁴ There are also procedures for recalling individual elected officials at the local government level.²⁷⁵ There are apparently no such procedures for

²⁷⁰ Ibid 27.

²⁷¹ Akira Osanai, Chikako Tatebayashi and Akihisa Aoyama, 'Nagoya mayor, assembly clash / Kawamura leads drive to dissolve municipal body for recall election', *The Yomiuri Shimbun* (online), 29 August 2010 <<http://www.yomiuri.co.jp/dy/national/T100828002203.htm>> at 21 August 2011.

²⁷² 'Osaka mayor, gov. split on Aichi votes', *The Yomiuri Shimbun* (online), 8 February 2011 <<http://www.yomiuri.co.jp/dy/national/T110207004330.htm>> at 21 August 2011.

²⁷³ Takanobu Tsujiyama, above n 267, 29.

²⁷⁴ Presidential and Vice Presidential Election and Recall Law (Taiwan), Chapter IV ('Recall').

²⁷⁵ International Institute for Democracy and Electoral Assistance, above n 38, 115.

the recall of a legislature in its entirety.²⁷⁶ In 2006, President Chen Shui-bian survived a parliamentary vote that would otherwise have led to his recall, only to subsequently lose the following election, and ultimately to be gaoled for embezzlement, bribery and money laundering.²⁷⁷

The Philippines

- 140 In the Philippines, there are procedures for recalling individual elected officials at the local government level.²⁷⁸ On 13 November 2008, the Commission on Elections suspended the availability of recall elections due to lack of funds, but that suspension was lifted on 29 January 2009.²⁷⁹ There are apparently no such procedures for the recall of a legislature in its entirety.

India

- 141 Very recently in India, prominent anti-corruption campaigner Anna Hazare has called for the introduction of recall elections for individual MPs and MLAs in India.²⁸⁰ The Bharatiya Janata Party (BJP) has said that consideration should be given to the proposal, but a Congress spokesperson has said that it would not be practical in India.²⁸¹

Other nations

- 142 There are other nations with recall processes that apply to individual elected officials at the level of national politics. As listed by the International Institute for Democracy and Electoral Assistance, these include Belarus, Ecuador, Ethiopia, Kiribati, Kyrgyzstan, Micronesia, Nigeria and Palau.²⁸² The European Commission of

²⁷⁶ Ibid.

²⁷⁷ Ting-I Tsai, 'No winners in Taiwan's recall campaign' *Asia Times* (online), 29 June 2006 <<http://www.atimes.com/atimes/China/HF29Ad02.html>> at 21 August 2011; 'Chen Shui-bian jail term reduced', *Asia Times* (online), 27 August 2011 <<http://news.asiaone.com/News/Latest%2BNews/Asia/Story/A1Story20110827-296481.html>> at 21 August 2011.

²⁷⁸ Local Government Code of 1991 (Philippines), ss 69-75.

²⁷⁹ COMELEC Resolution No. 8547 (Philippines), 13 November 2008; COMELEC in Resolution No. 8579 (Philippines), 13 November 2008 <http://www.comelec.gov.ph/press_statements/2010natl_local/comelec_lifts_recall_suspensions.html> at 21 August 2011.

²⁸⁰ Chetan Chauhan, 'Anna: We need right to reject and right to recall', *Hindustan Times* (online), 28 August 2011 <<http://www.hindustantimes.com/Anna-We-need-right-to-reject-and-right-to-recall/Article1-738944.aspx>> at 31 August 2011.

²⁸¹ 'Right to recall candidate: Cong says it's impractical, BJP differs', *The Times of India* (online), 29 August 2011 <http://articles.timesofindia.indiatimes.com/2011-08-29/india/29940464_1_poll-reforms-lokpal-issue-electoral-system> at 31 August 2011.

²⁸² See International Institute for Democracy and Electoral Assistance, above n 38, 126.

Democracy Through Law also lists Romania, North Korea and China as having recall provisions in their constitutions, although the procedures tend not to be exercised in practice.²⁸³ Similarly, there are also a number of other nations with recall processes that apply to individual elected officials at the regional or local levels of politics, including Argentina, Colombia, Cuba and Peru.²⁸⁴ Having already discussed a number of examples where recall procedures are available for individual officials, and given their limited relevance to the Terms of Reference, the Panel does not feel it necessary to consider these nations in detail.

RECALL ELECTIONS AND THE WESTMINSTER SYSTEM

- 143 In considering international practices on recall, examples from Westminster systems resembling that of New South Wales are more instructive than those drawn from other systems of government. Westminster systems embody principles of representative and responsible government which mean, relevantly, that elected members of parliament are not mere agents of the constituents in their electorate, but also owe duties to the parliament, and may also hold executive office. Additionally, legislatures are very often, like the New South Wales Parliament, bicameral.²⁸⁵
- 144 Very few of the examples of recall procedures discussed above are drawn from Westminster systems. The sole current example is the Canadian province of British Columbia. Formerly, as stated above, the province of Alberta also briefly had such a procedure. In both Canadian examples, the recall procedure was designed to permit citizen initiated recall of an individual elected member of the legislature, not citizen initiated dissolution of the legislature. Further, British Columbia had a unicameral legislature, so that the particular difficulties of recalling members of a Legislative Council do not arise.
- 145 The British Government has indicated an intention to introduce a recall procedure that would similarly lie against members of Parliament, but it has not yet done so.

²⁸³ European Commission of Democracy Through Law, *Report on the Imperial Mandate and Similar Practices* (2009) Strasbourg, June 2009, 3-4. However, the recall in some of these countries (for example, Romania) is a 'mixed recall', initiated at least in part by a branch of government; see n 38, above. The inclusion of such provisions in communist or formerly communist constitutions can perhaps be attributed to Vladimir Lenin's support for the procedure, which was incorporated into Soviet constitutional law: Matt Qvortrup, above n 219, 166-167.

²⁸⁴ International Institute for Democracy and Electoral Assistance, above n 38, 126; European Commission of Democracy Through Law, above n 283, 3-4.

²⁸⁵ Obvious exceptions are Queensland and New Zealand, the Australian Capital Territory and Northern Territory.

- 146 No Westminster system has thus adopted a recall procedure that permits the dissolution of the legislature. The lack of such examples is significant given that to permit the recall of an individual official (as British Columbia does) is a lesser departure from the Westminster system than would be permitting the dissolution of a legislature by a citizen initiated early election. This said, even the procedure in British Columbia for the citizen initiated recall of an elected member of the legislature, involves a degree of departure from, or change to, a Westminster system. It would seem, however, that the difficulty of obtaining recall in British Columbia has meant that potential tensions with the broader understanding of a member's role in a Westminster system have not crystallised.
- 147 As has been outlined above, examples of procedures for citizen initiated referendums for the dissolution of legislatures are found in Switzerland (in six cantons), Liechtenstein and Germany (in six *Länder*), although these have largely remained unused. Despite their differences from Westminster systems, these examples are instructive. For example, in Germany, it is recognised that *Landtag* members are only accountable to their own conscience and are not tied to any mandates. Liechtenstein's system of government also bears some resemblance to New South Wales in that it is both a parliamentary democracy and a constitutional monarchy in which the sovereign (there, the Prince) is, formally at least, vested with the power to dissolve parliament. However, there are significant differences between these systems and New South Wales: in the Swiss cantons, Liechtenstein, and the German *Länder*, the legislatures are unicameral. As such, the provisions do not offer an example of how dissolution could work in a bicameral parliament that functions according to the principle of responsible government.
- 148 As for those examples of recall procedures that lie against individual elected officials in non-Westminster systems of government – for example, in the United States, Venezuela, Bolivia and Taiwan – these are instructive insofar as they illustrate a range of approaches to practical aspects of recall. They also suggest the potential dynamics of recall campaigning, signature-gathering and referendums that could result in New South Wales.

SECTION E. SOME EXISTING CONSTITUTIONAL AND RELATED PROVISIONS

INTRODUCTION

- 1 The Panel's Terms of Reference describe 'Recall Elections' as 'a recall procedure to allow early State elections based on a petition by voters'. To understand what is involved, it is necessary first to indicate the present procedure for State elections, as established by the *Constitution Act 1902* (NSW) (the "*New South Wales Constitution*") and the *Parliamentary Electorates and Elections Act 1912* (NSW).
- 2 As noted in Section C of this Report, New South Wales has a bicameral Parliament, the two houses being the Legislative Council and the Legislative Assembly. The Parliament is 'representative': all members of the Houses are elected. The form of government is also 'responsible': the Premier and Ministers are members of a House and responsible to Parliament.

TERMS OF OFFICE

- 3 The Legislative Assembly and each of its members serve a fixed, four year term.²⁸⁶ Each member of the Legislative Council holds office for two terms of the Legislative Assembly.²⁸⁷

LEGISLATIVE ASSEMBLY

- 4 The Legislative Assembly has 93 members.²⁸⁸ Each member represents one electoral district.²⁸⁹ At the elections for the Legislative Assembly held in 2011, the average number of voters for each electorate was approximately 50,000.²⁹⁰
- 5 Although the term of the Legislative Assembly is, generally speaking, fixed at four years, it is possible for the Assembly to be dissolved early in the circumstances set out in section 24B of the *New South Wales Constitution*. These circumstances are as follows.

²⁸⁶ Or approximately four years, and unless dissolved earlier: *New South Wales Constitution* s 24(1), 24B.

²⁸⁷ *Ibid* ss 22B(1)(c) and (2).

²⁸⁸ *Ibid* s 25.

²⁸⁹ *Ibid* s 26.

²⁹⁰ Precise data as at 2006 is contained in New South Wales Parliamentary Library Research Service, 'NSW Electoral Profiles: 2007 Redistribution' (Background Paper No 4 of 2009, Parliament of New South Wales, September 2009).

<[http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/A595C34B230CD186CA25763A0018CD8A/\\$File/Electorate%20profile%202007%20Redistribution%20BP%204%2009.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/A595C34B230CD186CA25763A0018CD8A/$File/Electorate%20profile%202007%20Redistribution%20BP%204%2009.pdf)> at 31 August 2011.

6 *First*, the Legislative Assembly may be dissolved early if a motion of *no confidence* in the Government is passed by the Legislative Assembly, and a motion of *confidence* is not passed by the Legislative Assembly within eight days thereafter.²⁹¹

7 *Secondly*, the Legislative Assembly may be dissolved early if it:

(a) rejects a Bill which appropriates revenue or moneys for the ordinary annual services of the Government, or

(b) fails to pass such a Bill before the time that the Governor considers that the appropriation is required.

This subsection does not apply to a Bill which appropriates revenue or moneys for the Legislature only.²⁹²

8 *Thirdly*, the Legislative Assembly may be dissolved up to two months before it would ordinarily expire, if the general election which would otherwise be held would fall during the same period as a Commonwealth election, a holiday period or at any other inconvenient time.²⁹³

9 This list is not exhaustive; the Governor may dissolve the Legislative Assembly in circumstances other than those described above, notwithstanding any advice of the Premier or Executive Council to the contrary, if the Governor would be permitted to do so by established constitutional convention.²⁹⁴ There are few circumstances in modern times in which the Governor might so act.

10 Dissolving the Legislative Assembly is intended to be something of a last resort:

When deciding whether the Legislative Assembly should be dissolved in accordance with this section, the Governor is to consider whether a viable alternative Government can be formed without a dissolution and, in so doing, is to have regard to any motion passed by the Legislative Assembly expressing confidence in an alternative Government in which a named person would be Premier.²⁹⁵

11 There are no equivalent provisions in the *New South Wales Constitution* permitting the dissolution of the Legislative Council. This is a reflection of the constitutional and political convention that the political party entitled to govern is that which can command a majority in the lower House.

²⁹¹ Ibid s 24B(2).

²⁹² Ibid s 24B(3).

²⁹³ Ibid s 24B(4).

²⁹⁴ Ibid s 24B(5).

²⁹⁵ Ibid s 24B(6).

- 12 Elections to the Legislative Assembly are to be conducted in accordance with the Seventh Schedule to the *New South Wales Constitution*.²⁹⁶ Casual vacancies are to be filled by a further election as provided by the *Parliamentary Electorates and Elections Act*.²⁹⁷ The *Parliamentary Electorates and Elections Act* also deals with many of the detailed, but important, aspects of the conduct of elections.

LEGISLATIVE COUNCIL

- 13 The Legislative Council consists of 42 members elected at periodic Council elections.²⁹⁸ The citizens who are entitled to vote at these elections are those who would be entitled to vote at a general election for the Legislative Assembly, if an election for that House were to be held at the same time.²⁹⁹
- 14 A periodic Council election is an election for the return of 21 members of the Legislative Council.³⁰⁰ Such elections are to be conducted in accordance with the Sixth Schedule to the *New South Wales Constitution*.³⁰¹ The whole of the State is a single electorate for the purposes of a periodic Council election.³⁰²
- 15 Periodic Council elections are to be held on the same day as the next general election of members of the Legislative Assembly.³⁰³ As noted above at paragraph 3, the term of office of a Member of the Legislative Council is for two terms of the Legislative Assembly.³⁰⁴ The procedure for filling casual vacancies is contained in section 22D of the *New South Wales Constitution* – broadly speaking it is done by a joint sitting of both Houses of the Parliament.

EXECUTIVE GOVERNMENT

- 16 Section 35B of the *New South Wales Constitution* states:

There shall continue to be an Executive Council to advise the Governor in the government of the State.

²⁹⁶ Ibid s 29.

²⁹⁷ Sections 69A and 70.

²⁹⁸ *New South Wales Constitution* s 17(2).

²⁹⁹ Ibid s 22.

³⁰⁰ Ibid s 3.

³⁰¹ Ibid s 22A(1).

³⁰² Ibid Sixth Schedule, cl 1.

³⁰³ Ibid s 22A(3).

³⁰⁴ Ibid ss 22B(1)(c) and (2).

- 17 The members of the Executive Council are such persons as may be appointed by the Governor, from time to time.³⁰⁵ These members hold office ‘during the Governor’s pleasure’.³⁰⁶
- 18 There is no legal requirement for members of the Executive Council to be members of Parliament. However, as a matter of constitutional convention, those who attend the Executive Council are the members of the Government, and will therefore be members of a House of the Parliament. Further, the Premier and other Ministers of State are to be appointed from among the members of the Executive Council.³⁰⁷ They also hold those offices during the Governor’s pleasure.³⁰⁸
- 19 The *New South Wales Constitution* also makes provision for the appointment of Parliamentary Secretaries. They are appointed by the Premier, rather than the Governor.³⁰⁹ A person so appointed must be a member of the Legislative Council or Legislative Assembly.³¹⁰ A Minister or member of the Executive Council may not be appointed a Parliamentary Secretary.³¹¹
- 20 Although, as noted earlier, ‘the Government’ – the Premier and the Ministers – holds that role by reason of the Premier being able to command, at the time of appointment, a majority in the Legislative Assembly, some of the Ministers in fact will be members of the Legislative Council rather than the Legislative Assembly. They may hold very senior portfolios, such as Treasurer. If there is dissatisfaction with the Government giving rise to a perceived need for a recall election, that dissatisfaction may well stem in whole or part from the activities of these Ministers as part of the Government.
- 21 The presence of Ministers sitting as members in both Houses gives rise to other questions relevant to the issue of recall. These include: whether recall should be available only in respect of individual members of the Legislative Assembly and, if recall is to be available in respect of members of the Legislative Council (each member having been elected by the whole State voting as one electorate), what number or proportion of voters is required to initiate such a process? Similar questions arise if recall of the whole of both Houses were to be permitted: should a recall

³⁰⁵ Ibid s 35C(1).

³⁰⁶ Ibid s 35C(2).

³⁰⁷ Ibid s 35E(1).

³⁰⁸ Ibid s 35E(2).

³⁰⁹ Ibid s 38B.

³¹⁰ Ibid s 38B(1).

³¹¹ Ibid s 38E.

dissolve the entire Legislative Council, or only recall those members of the Council whose places were ‘due’ to expire at the next ordinary election?³¹²

REFERENDUMS

22 The *New South Wales Constitution* stipulates that certain changes which would affect the Legislative Council or Legislative Assembly must be approved by referendum. This stipulation may apply to several of the changes which would be necessary in order to introduce recall elections. These changes are flagged here, though their practical application is dealt with in Section L.

23 In relation to the Legislative Assembly, 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 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.³¹³

Provision is then made for the approval of the Bill by the electorate at a referendum.³¹⁴

24 Any proposal for recall process which would result in a general election (and thus, which would reduce the duration of the Legislative Assembly’s term) would fall within the scope of this provision and require a referendum. There are exceptions to this provision, but none is presently relevant.

25 In relation to the Legislative Council:

[t]he Legislative Council shall not be abolished or dissolved, nor shall ... (d) any provision with respect to the circumstances in which the seat of a Member of either House of Parliament becomes vacant be enacted, except in the manner provided by this section.³¹⁵

Provision is then made requiring a referendum as a step in the enactment of such legislation.³¹⁶

26 There are, however, exceptions to this provision which may be relevant here. Section 7A(6) of the *New South Wales Constitution* states relevantly:

[t]he provisions of this section do not apply to ... (e) 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.

³¹² See Graeme Orr’s discussion of the difficulty of adapting a recall procedure to the Legislative Council in Submission 19 and the similar difficulties flagged by Adam Johnston in Submission 6.

³¹³ *New South Wales Constitution* s 7B(1).

³¹⁴ *Ibid* ss 7B(2) to (5).

³¹⁵ *Ibid* s 7A(1).

³¹⁶ *Ibid* s 7A(2) to (5).

- 27 Provisions for recall elections will inevitably deal with the circumstances in which the seats of members of the Parliament may become vacant; this suggests such changes could fall (or be made to fall) within this exception. However, due to the differences in the composition of the electorates for the two Houses and the terms of the office of the members of those Houses, it may be difficult to draft legislation which satisfies section 7A(6)(e) by applying ‘in the same way’ to the circumstances in which the seats of members of each House become vacant.
- 28 In any event, a referendum would be required to introduce those changes which would affect the Legislative Assembly.

SECTION F. EXISTING PROVISIONS FOR DISQUALIFICATION OF MEMBERS OF PARLIAMENT

- 1 The *New South Wales Constitution* provides for a number of circumstances in which a person may be disqualified from holding, or continuing to hold, office as a member of Parliament. The conduct of Ministers and members of Parliament may also be examined by the Independent Commission Against Corruption. It is desirable to examine these provisions, because their existence and efficacy may weigh against the need to introduce any form of recall.³¹⁷
- 2 *First*, section 13 of the *New South Wales Constitution* provides that a person may be disqualified by reason of financial dealings with the Government. This rule states that any person:

who directly, or indirectly, himself, or by any person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part any contract or agreement for or on account of the Public Service of New South Wales shall be incapable of being elected or of sitting or voting as a Member of the Legislative Council or Legislative Assembly during the time he executes, holds or enjoys any such contract or any part or share thereof or any benefit or emolument arising from the same.³¹⁸
- 3 If a person who is already a member of either House enters into any such a contract or agreement or, having entered into any such contract or agreement, ‘continues to hold it’, the House of which the person is a member is to declare the person’s seat vacant.³¹⁹
- 4 There are, as one might expect, some exceptions to the strictures of this rule. It does not extend to a contract or agreement with an incorporated or trading company of more than 20 persons, where the contract or agreement is for the general benefit of such incorporated or trading company.³²⁰ There are further provisions which reduce the effect of the rule, but it does not seem necessary to refer to them here.³²¹ It may be noted that this rule and its exceptions are expressed in what is rather dated language, but their intent is clear enough. If a person subject to a disqualification under section

³¹⁷ Graeme Orr (Submission 15), 2; New South Wales Bar Association (Submission 16), 4; Ken Coghill (Submission 17), 5; Paul Lynch (Submission 18); NSWEC (Submission 21), 8.

³¹⁸ *New South Wales Constitution* s 13(1).

³¹⁹ *Ibid* s 13(2).

³²⁰ *Ibid* s 13(3).

³²¹ *Ibid* s 13(4) to (5),

13 sits or votes as a member of the House while so disqualified, the member is liable to a penalty.³²²

5 It is clear that the perception that there have been improper dealings between a member of Parliament and the Executive Government of the State may diminish confidence in a Government. This would tend to support the introduction of a mechanism enabling members who have engaged in such conduct to be recalled, if there were no other way of remedying the situation. However, section 13 already causes such members to lose their seats; in this circumstance, recall is not needed.

6 *Secondly*, section 13A(1) of the *New South Wales Constitution* stipulates a number of other circumstances in which the seat of a member of either House may become vacant. Thus a member will ‘lose’ his or her seat if the member:

- (a) fails for a whole session of the House to give attendance in the House, unless excused by permission of that House;³²³
- (b) becomes a citizen or subject of a foreign power or acknowledges allegiance to such a body (broadly speaking);³²⁴
- (c) ‘becomes bankrupt or takes the benefit of any law for the relief of bankrupt or insolvent debtors’ (section 13A(1)(c), discussed further below);³²⁵
- (d) ‘becomes a public defaulter’;³²⁶
- (e) is convicted of ‘an infamous crime’, or of an offence punishable by imprisonment for life or a term of 5 years or more.³²⁷

7 Sections 13A(2), (4) and (5) deal with determining when the disqualification takes place, in the light of provisions for appeals.

³²² Ibid s 14(2). It may be noted that a session of each House is to be held at least once a year and sessions cannot be more than 12 months apart: Ibid s 11.

³²³ Ibid s 13A(1)(a).

³²⁴ Ibid s 13A(1)(b).

³²⁵ Ibid s 13A(1)(c).

³²⁶ Ibid s 13A(1)(d). This is an old provision about which Anne Twomey has said: ‘There is debate as to the meaning of ‘public defaulter’. While some argue that it refers to default in a public office or with respect to public funds, others consider that it includes persons who do not pay their debts. Certainly, the British courts have given consideration to the notion of ‘public’ insolvency, which is the ‘inability to pay debts in full proved by some outward act, such as stopping payment or compounding with creditors’. It may be that a ‘public defaulter’ is therefore a person who defaults upon payment of his or her debts, but does so in a ‘public’ manner.’ Anne Twomey, above n 15, 426 (references omitted).

³²⁷ *New South Wales Constitution* s 13A(1)(e).

- 8 The presence of section 13A may suggest that there is no need for recall elections to be introduced in order to deal with the types of conduct listed above. However, the conduct which would fall within section 13A might well create dissatisfaction with the Government as a whole, even if the members elected to replace the relevant individual are beyond reproach.
- 9 *Thirdly*, section 13B of the *New South Wales Constitution* disqualifies any person who holds an office of profit under the Crown or a pension from the Crown from sitting as a member of either House.
- 10 If the member holds the office or pension at the time he or she is elected, the member's seat will become vacant after the expiration of a period commencing with the member's election and ending seven sitting days after notification to the House, in accordance with Standing Rules and Orders, that the member holds the office or receives the pension.³²⁸
- 11 If a sitting member accepts such an office or accepts such a pension, the member's seat becomes vacant upon the expiration of a period commencing on the acceptance of the office or pension and again ending on the expiration of seven sitting days after notice of the Member's having accepting that office or pension has been given in accordance with Standing Rules and Orders.³²⁹
- 12 In both cases, there is an exception if the House in which the member sits has previously passed a resolution indicating that it is satisfied that the member has ceased to hold that office or pension or that the right to the pension has ceased or is suspended during the member's membership of the House.³³⁰ There are some further exceptions which are unnecessary to deal with here.³³¹
- 13 *Fourthly*, and as section 13A(3) of the *New South Wales Constitution* recognises, each House has an inherent power to expel a member. This power is inherent in each House because it is reasonably necessary to enable the proper exercise of their functions.³³² A member may be expelled on the basis of their conduct in or outside of Parliament.

³²⁸ Ibid s 13B(1).

³²⁹ Ibid s 13B(2).

³³⁰ Ibid s 13B(3).

³³¹ Ibid s 13B(3).

³³² *Armstrong v Budd* (1969) 89 WN (NSW) 241.

There have been suggestions that there may be a need to review or refine the ambit of the internal power.³³³

14 Further, Standing Order 254 of the Legislative Assembly provides that a member of that House adjudged by the House to be guilty of conduct ‘unworthy of a member of Parliament’ may be expelled by a vote. The Standing Orders of the Legislative Council do not expressly provide for expulsion of a member, but the inherent power to do so (discussed above) is sought to be retained by Standing Order 194.

15 *Fifthly*, section 14A(1) of the *New South Wales Constitution* allows the Governor to make regulations requiring members of each House to disclose their various pecuniary interests.³³⁴ If a member wilfully contravenes any such regulation, the relevant House may declare the member’s seat vacant.³³⁵

16 If a person who is ‘disabled or declared incapable to sit’ in either House by one of the processes described above – other than the *third* (section 13B) – is nevertheless subsequently elected and returned as a member, then

such election and return shall be declared by the Council and Assembly, as the case may require, to be void, and thereupon the same shall become and be void to all intents and purposes whatsoever.³³⁶

COURT OF DISPUTED RETURNS

17 The *Parliamentary Electorates and Elections Act* establishes the Supreme Court as a Court of Disputed Returns.³³⁷ The Legislative Assembly may refer to the Court of Disputed Returns any ‘question respecting the qualification of a member of the Legislative Assembly’.³³⁸ Similar provision is made in respect of the qualifications of members of the Legislative Council.³³⁹

INDEPENDENT COMMISSION AGAINST CORRUPTION

18 New South Wales has an Independent Commission Against Corruption (‘the Commission’). The Commission is established by section 4(1) of the *Independent Commission Against Corruption Act 1988* (NSW) (the ‘ICAC Act’). The principal

³³³ *Egan v Willis* (1998) 195 CLR 424.

³³⁴ The regulations made in pursuance of this power are the *Constitution (Disclosure by Members) Regulation 1983* (NSW).

³³⁵ *New South Wales Constitution* s 14A(2).

³³⁶ *Ibid* s 14.

³³⁷ *Ibid* s 156(1).

³³⁸ *Ibid* s 175B.

³³⁹ *Ibid* s 175H.

object of this section is to establish an independent and accountable body, empowered to investigate, expose and prevent corruption involving or affecting public authorities and ‘public officials’,³⁴⁰ and given special powers to inquire into allegations of corruption.³⁴¹

- 19 The term ‘public official’ is very widely defined in section 3(1) of the *ICAC Act* and specifically includes Ministers, members of the Executive Council and Parliamentary Secretaries and members of the Legislative Council and Legislative Assembly.
- 20 The principal functions of the Commission are set out in section 13(1) of the *ICAC Act*. They include investigating allegations of: corrupt conduct; conduct liable to allow, encourage or cause the occurrence of corrupt conduct; and, conduct connected with corrupt conduct. ‘Corrupt conduct’ as used in this context is also very widely defined (although there is a qualification of its meaning in relation to Ministers and members of Parliament, further discussed below).³⁴² The Commission also has the function of investigating ‘any matter referred to the Commission by both Houses of Parliament’. Matters may be referred to the Commission by resolution of each House.³⁴³
- 21 The meaning of ‘corrupt conduct’ is qualified in its application to Ministers and members of Parliament. Section 9(1)(d) of the *ICAC Act* provides that conduct does not amount to ‘corrupt conduct’ unless, in the case of a Minister or member of Parliament, the conduct would amount to ‘a substantial breach of an applicable code of conduct’. The *ICAC Act* provides in section 9(3) for the making of such codes of conduct (by regulations in the case of Ministers, and by the relevant House of Parliament in the case of a member).
- 22 The Houses of Parliament have agreed on a code of conduct in similar terms for each House. A copy of the Code, as adopted on 8 May 2007 by the Legislative Assembly and amended in June 2007, is set out in Annexure D.
- 23 However, section 9(4) of the *ICAC Act* provides that this qualification does not preclude the Commission from considering conduct of a Minister or member of a House which would otherwise be ‘corrupt conduct’

³⁴⁰ *ICAC Act* s 2A(a)(i).

³⁴¹ *Ibid* s 2A(b).

³⁴² *Ibid* ss 8 and 9.

³⁴³ *Ibid* s 73(1).

if it is conduct that will cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Such conduct must be a breach of a law, other than the *ICAC Act* itself.³⁴⁴

³⁴⁴ Ibid s 9(5).

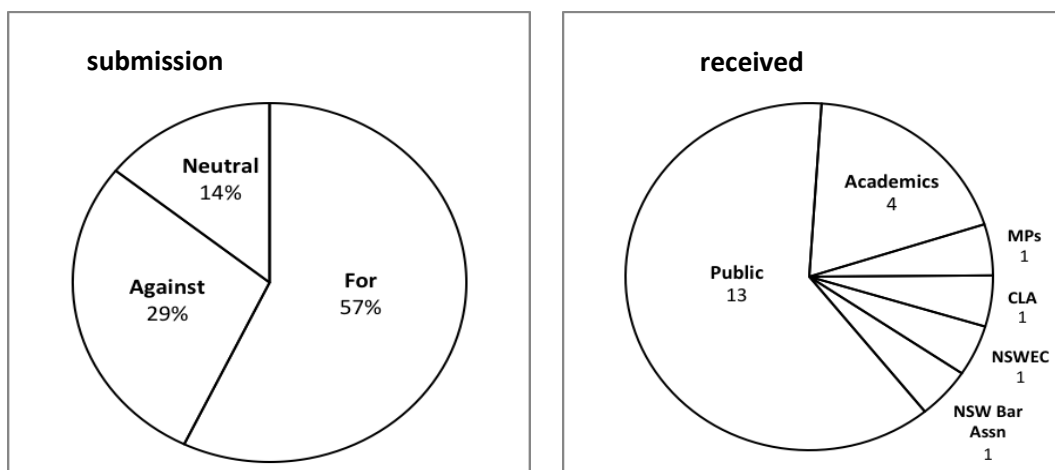
SECTION G. SUMMARY OF SUBMISSIONS RECEIVED

- 1 The process for inviting submissions to the Panel is referred to in Section A.
- 2 This Section analyses the submissions made to the Panel and contains:
 - (a) a general overview of all the submissions received;
 - (b) a summary of the submissions received from members of the public; and
 - (c) individual summaries of the seven most comprehensive submissions.

GENERAL OVERVIEW OF SUBMISSIONS

- 3 The Panel received 21 submissions from 19 submitters (see Annexure B).³⁴⁵ The low number of submissions received, after a well-publicised public consultation period, does not suggest a strong public desire to see recall elections introduced.
- 4 The following diagrams provide a general overview of the breakdown of the submissions set out in more detail below.

Opinion expressed in Submissions



- 5 Of the 21 submissions received, 13 were from members of the public, four from political or legal academics,³⁴⁶ one from a member of parliament (Mr Paul Lynch MP, Shadow Attorney General and Shadow Minister for Justice),³⁴⁷ one from the New

³⁴⁵ Submissions 5 and 9 were both submitted by Valerie Bower. Submission 10 was received from the same email address as Submissions 5 and 9, though signed in a different name. Submissions 15 and 19 were both submitted by Graeme Orr.

³⁴⁶ Anne Twomey (Submission 12), Graeme Orr (Submissions 15 and 19) and Ken Coghill (Submission 17).

³⁴⁷ Paul Lynch (Submission 18).

South Wales Electoral Commission (the ‘NSWEC’),³⁴⁸ one from Civil Liberties Australia (the ‘CLA’)³⁴⁹ and one from the New South Wales Bar Association.³⁵⁰

6 Twelve submissions supported the introduction of recall elections. Eleven of these were submitted by members of the public. The other, from the NSWEC, supported only a more targeted form of recall, limited to removing individual members of the Legislative Assembly.³⁵¹

7 Six submissions did not support the introduction of recall elections. Three of these were submitted by academics,³⁵² two from members of the public,³⁵³ and one from CLA.³⁵⁴

8 Three submissions could be said to be neutral, neither supporting nor opposing the introduction of recall elections.³⁵⁵ These submissions instead sought to highlight particular issues in the debate which required further consideration.

SUBMISSIONS RECEIVED FROM THE GENERAL PUBLIC

9 Thirteen submissions were received from the general public.³⁵⁶ Eleven supported the introduction of recall elections. Two did not. The breakdown might tend to suggest that the public supports the introduction of recall elections. However, given that the total number of submissions received was very low, it is impossible to treat the submissions as indicative of the opinion held by the majority of the electorate.

10 In these submissions, recall was generally envisaged as a means of removing the whole government before the end of the fixed electoral term, rather than a mechanism targeting individual members.

³⁴⁸ NSWEC (Submission 21).

³⁴⁹ CLA (Submission 20).

³⁵⁰ New South Wales Bar Association (Submission 16).

³⁵¹ NSWEC (Submission 21).

³⁵² Graeme Orr (Submissions 15 and 19); Ken Coghill (Submission 17).

³⁵³ Patrick Conrick (Submission 1) and Barry O’Connell (Submission 2).

³⁵⁴ CLA (Submission 20). CLA instead recommended that surveys could be used to determine the views of the electorate and communicate those views to government.

³⁵⁵ Anne Twomey (Submission 12), New South Wales Bar Association (Submission 16), Paul Lynch (Submission 18).

³⁵⁶ Patrick Conrick (Submission 1), Barry O’Connell (Submission 2), Alex Portnoy (Submission 3), Konrad B (Submission 4), Valerie Bower (Submissions 5 and 9), Adam Johnston (a member of the Australian Liberal Party) (Submission 6), Noelene Kerfoot (Submission 7), Rochelle Sutherland (Submission 8), Leonore Powell (Submission 10), Mitchell Mazoudier (Submission 11), Brian Gray (Submission 13), Bryan Morrow (Submission 14).

- 11 The submissions in support of recall elections tended to be brief. These submissions often expressed a general sense of dissatisfaction, if not outrage, with the former state government. Reasons given in support of the recall concept included:
- (a) a view that the previous state government, particularly in regards to the management of state resources,³⁵⁷ was highly dysfunctional;
 - (b) a belief that parliament had become dominated by party politics or the self interest of politicians, and was no longer representing the interests of the electorate;³⁵⁸
 - (c) a perception that politicians were misleading or ‘lying to’ the electorate,³⁵⁹ and
 - (d) a suggestion that the government was falling under the influence of communism.³⁶⁰
- 12 Generally, these submissions did not express an opinion as to the structure or format that a recall election should take. However:
- (a) Adam Johnston³⁶¹ and Bryan Morrow³⁶² acknowledged the difficulties that would arise in adapting the recall process to the New South Wales system of government;
 - (b) Alex Portnoy³⁶³ and Brian Gray³⁶⁴ proposed specific signature thresholds which recall petitions should be required to satisfy (100,000 people and two thirds of the electorate, respectively); and
 - (c) Konrad B³⁶⁵ and Bryan Morrow³⁶⁶ recommended that safeguards be put in place to ensure the recall process was not manipulated or abused.
- 13 Adam Johnston³⁶⁷ also recommended broader, structural changes to the electoral process in addition to the introduction of recalls.

³⁵⁷ Adam Johnston (Submission 6), Noelene Kerfoot (Submission 7) and Brian Gray (Submission 13).

³⁵⁸ Konrad B (Submission 4), Adam Johnston (Submission 6) and Brian Gray (Submission 13).

³⁵⁹ Brian Gray (Submission 13).

³⁶⁰ Valerie Bower (Submissions 5 and 9).

³⁶¹ Submission 6.

³⁶² Submission 14.

³⁶³ Submission 3.

³⁶⁴ Submission 13.

³⁶⁵ Submission 4.

³⁶⁶ Submission 14.

³⁶⁷ Submission 6.

14 As noted above, only two submissions from the general public argued against the introduction of recall elections (those received from Patrick Conrick and Barry O’Connell).³⁶⁸ Broadly speaking, these submissions argued that recall elections would be manipulated by the wealthy or the media, and would not improve the accountability or efficacy of state government.

SUBMISSIONS OF PARTICULAR INTEREST

15 The following section provides individual summaries of seven of the more comprehensive submissions.³⁶⁹ Where possible, the summaries have been structured to correspond with the terms of reference.

16 The opinions expressed in these seven submissions are as follows:

- (a) Dr Graeme Orr³⁷⁰ and Dr Ken Coghill³⁷¹ opposed the introduction of recall election;
- (b) the NSWEC supported the introduction of a limited form of recall applying to individual members of the Legislative Assembly only;³⁷² and
- (c) Dr Anne Twomey,³⁷³ the New South Wales Bar Association³⁷⁴ and Paul Lynch MP,³⁷⁵ neither supported nor opposed the introduction of recall elections.

17 All seven submissions noted with differing degrees of emphasis the potential incompatibility – practically and conceptually – of the recall election with New South Wales’ system of responsible and representative government.

18 The majority of these submissions did consider alternative forms of recall. A more limited mechanism, permitting the recall of individual members of parliament only, was generally regarded as more compatible with New South Wales’ system of government than a mechanism which enabled the recall of the ‘whole of government’.

³⁶⁸ Submissions 1 and 2 respectively.

³⁶⁹ Received from Anne Twomey (Submission 12), Graeme Orr (Submissions 15 and 19), the New South Wales Bar Association (Submission 16), Ken Coghill (Submission 17) and the NSWEC (Submission 21).

³⁷⁰ Submissions 15 and 19.

³⁷¹ Submission 17.

³⁷² Submission 21.

³⁷³ Submission 12.

³⁷⁴ Submission 16.

³⁷⁵ Submission 18.

However, this more limited mechanism would still be difficult to apply to members of the Legislative Council.³⁷⁶

- 19 Similarly, several of the submissions stressed that, in the international context, ‘recall’ generally means the recall of individual officials rather than the whole of government. For this reason, it is difficult to draw firm conclusions from the experiences of other countries.³⁷⁷
- 20 Six of the seven submissions identified significant risks that recall elections could pose to the accountability, integrity and quality of government.³⁷⁸ The two major risks identified were the potential for money to play an undesirably influential role in the recall election process and the potential for recall elections to encourage short term populism in state politics.
- 21 Key areas in which these submissions differ are the question whether recall should only be permitted on certain specified grounds,³⁷⁹ and whether the recall process should be subject to judicial review.³⁸⁰

Dr Anne Twomey (Submission 12)

- 22 Dr Anne Twomey is an Associate Professor and Director of the Constitutional Reform Unit at Sydney Law School, University of Sydney.
- 23 Dr Twomey submitted a comprehensive paper titled ‘The Recall and Citizens’ Initiated Elections: Options for New South Wales’ to the Panel.³⁸¹ The paper concludes that ‘introducing citizens’ initiated elections in NSW is a feasible, but radical reform’. However, the paper ‘neither advocates nor opposes a system of recall’. ‘Instead, it sets out the history of recall and its use in other countries, and then analyses how it might be implemented within the constitution system of New South

³⁷⁶ Anne Twomey (Submissions 12), Graeme Orr (Submissions 15 and 19), NSWEC (Submission 21).

³⁷⁷ Anne Twomey (Submission 12), New South Wales Bar Association (Submission 16), Ken Coghill (Submission 17), Paul Lynch (Submission 18), NSWEC (Submission 21).

³⁷⁸ Anne Twomey (Submission 12), Graeme Orr (Submissions 15 and 19), New South Wales Bar Association (Submission 16), Ken Coghill (Submission 17), NSWEC (Submission 21).

³⁷⁹ Ken Coghill, Paul Lynch and the NSWEC argue that grounds should be required (Submissions 17, 18 and 21). The New South Wales Bar Association tentatively concludes against the specification of grounds (Submission 16).

³⁸⁰ Ken Coghill suggests responsibility for scrutinising the recall process should lie with the Australian Electoral Commission (Submissions 17). The NSWEC argues that this is an inherently political question that should not be subject to judicial review (Submission 21). The New South Wales Bar Association considers the issue in some depth, and tentatively suggests the same conclusion (Submission 16, 3-5). Conversely, Paul Lynch submits that this would be a proper role for a court. Anne Twomey and Graeme Orr do not make a recommendation.

³⁸¹ This is a longer version of a paper previously published as an article, see above n 34.

Wales and the types of potential problems that would need to be addressed in doing so.³⁸²

24 This detailed paper has been of great assistance and is referred to extensively throughout this Report. The following summary identifies key submissions made by Dr Twomey that refer directly to the Terms of Reference, but does not attempt to summarise the entire content of her paper.

(1) Whether or not it is desirable to amend the New South Wales Constitution 1902 to permit Recall Elections

25 As noted above, Dr Twomey neither advocates nor opposes the introduction of a system of recall. She summarises the main arguments which have been given for and against recall elections in her report.³⁸³

26 Arguments made for introducing the recall include:

- (a) ensuring or enhancing government accountability;
- (b) providing a check on undue influence by increasing the power of voters over their elected representatives and diminishing the influence of donors and political parties;
- (c) diminishing the need for frequent elections, and therefore enabling legislatures and officials to be elected for longer terms; this in turn allows more efficient and stable governance;
- (d) fulfilling the role of a ‘safety-valve when political conflict becomes too heated and rebellion might otherwise be likely’;
- (e) providing a simpler and more effective way of removing an elected official than impeachment;
- (f) reducing the alienation of voters and keeping them engaged;
- (g) requiring ‘true leadership’, as governments will need to be able to explain to the people why tough decisions are necessary; and
- (h) a loosening of party discipline.

³⁸² Submission 12, 4.

³⁸³ Ibid 30-32.

27 Arguments made against introducing the recall include:

- (a) the cost;
- (b) the potential for the recall election to be misused ‘by the loser of an election to have a second chance’;
- (c) the potential for the recall to be misused ‘as a political weapon’;
- (d) the potential for the recall election to be influenced by money, or ‘used as an instrument of oppression by well-financed special interest groups’;
- (e) the potential for an increase in populist but ineffectual governance;
- (f) the tendency for recalls to be used arbitrarily; for example, targeting marginal seats;
- (g) the destabilising effect on government;³⁸⁴ and
- (h) the potential for divisiveness and political conflict within the community to increase.

(1)(a) International practices, including in Canada and the United States of America, and their applicability to a Westminster system

28 Dr Twomey summarises international recall practices in extensive detail. She notes that ‘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’.³⁸⁵ However, ‘in these jurisdictions ... recall is directed at individual members and does not involve the holding of an early election’,³⁸⁶ so it is difficult to extrapolate from these examples.

29 The concept of a citizens’ initiated early election does exist. However, ‘it is ... a rare and radical phenomenon, even in those countries that champion direct democracy’.³⁸⁷ It is not currently used in any Westminster style government.³⁸⁸ It exists at the cantonal level in Switzerland. However, ‘it has not been exercised in centuries and is regarded as obsolete’.³⁸⁹

³⁸⁴ See a more detailed discussion of this issue in Submission 12, 63.

³⁸⁵ Submission 12, Ch 2.

³⁸⁶ Ibid 4.

³⁸⁷ Ibid 9.

³⁸⁸ Ibid Ch 3.

³⁸⁹ Ibid 4, 33-35.

30 Citizen initiated early elections can occur at the local government level in Japan. The mechanism was used in 2010, to recall the local assembly of Nagoya.³⁹⁰

(b) Their compatibility with democratic principles

31 Dr Twomey submits that a recall election has the potential to ‘fundamentally clash’ with the democratic and political principles of New South Wales.

32 A system of recall which permitted recall of members ‘simply because their constituents no longer approve of how they vote ... would be difficult to marry with the (NSW) system of responsible government’. Such a system ‘assumes that MPs are simply agents of their constituents and have no greater responsibility to the State or country’.³⁹¹ ‘This theory is inconsistent with the system of representative [and responsible] government, under which Members of Parliament represent their constituents, but also hold state or national responsibilities.’³⁹²

33 A recall system premised on the need to remove ‘corrupt, incompetent or lazy officials ... is more consistent with systems of responsible government than the agency theory above’.³⁹³ However, if the relevant official is a member of the Legislative Council, a further more significant difficulty arises. Dr Twomey explains:

If voters wanted to recall a particular Member of the Legislative Council, 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.³⁹⁴

34 In fact, Dr Twomey notes, it does appear ‘that what is intended by the O’Farrell Government is the establishment of a means of holding an early election.’³⁹⁵ As noted above, examples of this structure of recall are rare. If the recall were to take this form, two further issues would arise.

³⁹⁰ Ibid 4.

³⁹¹ Ibid 4, 6-7.

³⁹² Ibid 7.

³⁹³ Ibid 7.

³⁹⁴ Ibid 33.

³⁹⁵ Ibid 4.

35 First, it would need to be determined which houses of Parliament would in fact be recalled. Secondly, it would need to be determined what structure the recall should take. That is, it would be necessary to determine 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. ‘Issues here arise 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.’³⁹⁶

36 Dr Twomey concludes that implementing a form of recall is feasible. However, given its potential incompatibilities with New South Wales’ system of representative and responsible government, great care must be taken to accommodate and tailor the proposal to fit the existing political and constitutional structure.³⁹⁷ Alternatively, the Government may wish to pursue other types of reform better suited to achieving its desired ends. These alternatives are discussed in Chapter 5 of Dr Twomey’s submission.

(c) The potential of any proposed changes to improve the accountability, integrity and quality of government; and (d) Any risks or negative consequences for the accountability, integrity and quality of government

37 Dr Twomey offers a comprehensive summary of the potential disadvantages involved in introducing recall elections in her report. This is discussed above. Dr Twomey stresses two particular risks: the potential for recall elections to undermine the stability and effectiveness of government, and the potential for recall elections to be misused as political weapons.

38 Dr Twomey notes that if petitions could be initiated ‘every time a government acts in a manner that is unpopular but necessary for the benefit of the State’, government could be destabilised and ‘fenced into short-term populism’.³⁹⁸ She states:

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

³⁹⁶ Ibid 5.

³⁹⁷ Ibid 69.

³⁹⁸ Ibid 5, 63-64.

elections would be that governments would be perpetually on an election-footing, undermining their effectiveness and the long-term interests of the State.³⁹⁹

39 These submissions support Dr Twomey's submissions regarding the potential incompatibility between the recall process and New South Wales' system of responsible government.

40 Further, 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.'⁴⁰⁰

41 Dr Twomey suggests that time limits and high signature thresholds may be capable of ameliorating some of these dangers, in ways that are discussed in more detail below.

(2) If Recall Elections were to be permitted, the relevant requirements or mechanisms, including: (b) the appropriate percentage of voters who would need to petition and the time frame for collecting signatures

42 Dr Twomey recommends that any amendment should 'require some minimal level of support ... 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 number of signatures to be required than those used for an individual recall in the United States.'⁴⁰¹ Dr Twomey notes that 'percentages of signatures required for recall petitions tend to sit between 20% and 40% of enrolled voters' and states that 'a figure on the higher end of (that) spectrum would be appropriate'.⁴⁰²

43 Dr Twomey also notes that 'it might be appropriate to include a requirement that a certain proportion of signatures be 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.'⁴⁰³

³⁹⁹ Ibid 63.

⁴⁰⁰ Ibid 5, 10 (on the Australian Labour Party), 22-23 (on the 2003 gubernatorial recall election in California), 27 (on the system in British Columbia), 64-65.

⁴⁰¹ Ibid 65.

⁴⁰² Ibid 66.

⁴⁰³ Ibid 66.

44 Dr Twomey submits that '[t]he period for the collection of signatures needs to be limited as it is important to minimise the amount of uncertainty and disruption involved'. While noting that '[t]he period most commonly used is 60-90 days', Dr Twomey does not herself recommend any particular time period.⁴⁰⁴

(c) Processes for verifying and auditing signatures against eligible voters

45 Dr Twomey suggests that signatures collected may need to be registered, as is the case in British Columbia. Signature collectors may then 'be required to certify that they witnessed petition signatures and that all signatures were genuine, with penalties for collecting false signatures.'⁴⁰⁵

46 Dr Twomey also notes that '[t]he 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', and suggests that 'a similar process could be used for verification of petitions.'⁴⁰⁶

(d) The time limits (if any) that should be imposed before a Government is subject to a petition

47 As noted above, Dr Twomey submits that government would be destabilised if petitions could be initiated 'every time a government acts in a manner that is unpopular but necessary for the benefit of the State'.

48 Therefore, 'it would be important to minimise the risk of fencing governments into short-term populism.' For this reason, it may be necessary to have 'a small 'window' in which recall petition could be brought'. Dr Twomey suggests a mechanism enabling Governments to serve at least half their term before facing the possibility of recall by way of example.⁴⁰⁷

(e) Appropriate funding arrangements for the process

49 Dr Twomey states that 'experience in the United States has shown the dominant role played by money in ... the recall'.⁴⁰⁸ The constitutionally protected right to engage

⁴⁰⁴ Ibid 67.

⁴⁰⁵ Ibid 66.

⁴⁰⁶ Ibid 68.

⁴⁰⁷ Ibid 5.

⁴⁰⁸ Ibid 61.

paid signature collectors means that ‘any recall petition can be guaranteed to achieve the required number of signatures as long as a sufficient amount of money is paid’.⁴⁰⁹

50 Dr Twomey notes that ‘[t]here is already significant disquiet in Australia about the potential influence of political donations upon individuals’, and that ‘[i]t 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.’⁴¹⁰ 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 of well-financed special interest groups.⁴¹¹

51 Merely increasing the percentage of signatures required on a recall petition ‘is not an effective way of dealing with this problem [of wealth influencing the recall result] as it makes it even harder for grassroots groups to get the requisite number of signatures and leaves the field to the very rich’.⁴¹² Instead, Dr Twomey recommends considering ‘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.’⁴¹³ Such a ban is unlikely to be struck down as unconstitutional by the High Court of Australia.⁴¹⁴

52 A ban on paid signature gatherers may need to be balanced by mechanisms making signature collection easier and more efficient for volunteers. For example, electronic petitions could be lodged via the internet; however, regard would then have to be had to addressing the increased risk of fraud.⁴¹⁵ Alternatively, there could be public funding for meritorious petitions.⁴¹⁶

53 Cost may be an issue which informs the structuring of the recall process. Dr Twomey suggests that the issue whether Parliament should be dissolved could be determined via postal vote, though notes this may also be conducive to fraud.⁴¹⁷

⁴⁰⁹ Ibid 61. See *Meyer v Grant*, discussed in Section D, paragraph 75 of this report.

⁴¹⁰ Ibid 61.

⁴¹¹ Ibid 61.

⁴¹² Ibid 61.

⁴¹³ Ibid 61.

⁴¹⁴ Ibid 61.

⁴¹⁵ Ibid 62. The NSWEC also suggests the use of electronic signature collection (Submission 21).

⁴¹⁶ Ibid 62-63.

⁴¹⁷ Ibid 63.

(4) Any other matters relevant to Recall Elections

- 54 Dr Twomey states that ‘there should be no prohibition on the Members of the dissolved Legislative Assembly or the Legislative Council standing for office [again]’.⁴¹⁸ She recommends that the replacement government should only serve out the remainder of the recalled government’s term of office. ‘The existing provisions in the Constitution would [then] apply to get the Houses back into their four year fixed term cycles’.⁴¹⁹
- 55 Dr Twomey proposes several options which the New South Wales government may wish to consider as an alternative to recall. These are set out in Chapter 5 of her submission.
- 56 Dr Twomey also considers the question of how to structure the various stages of the recall process in more detail at pages 65 to 69 of her report.

Dr Graeme Orr (Submissions 15 and 19)

- 57 Dr Graeme Orr is an Associate Professor of Law at the University of Queensland.
- 58 Dr Orr made two submissions: the first opposes the introduction of recall elections;⁴²⁰ the second supplementary submission considers the application of recall elections to the Legislative Council and the question of campaign finance.⁴²¹

(1) Whether or not it is desirable to amend the New South Wales Constitution 1902 to permit Recall Elections

- 59 Dr Orr submits that such an amendment is undesirable.
- 60 First, Dr Orr stresses that the proposal to amend the Constitution ‘was an ad hoc response to a tired government’; a problem ‘which resolved itself when the parliamentary cycle run its course’ and the former state government was replaced.⁴²² The dissatisfaction with the former government which triggered the current proposals ‘cannot be neatly caught in any recall process, short of a petition for a fresh general election.’ Dr Orr argues it is common for government to become unpopular mid-term.

⁴¹⁸ Ibid 69.

⁴¹⁹ Ibid 69.

⁴²⁰ Submission 15.

⁴²¹ Submission 19.

⁴²² Submission 15, 1.

In this context, he suggests recall petitions may be initiated every electoral cycle, ‘if only as a tactic to gain attention.’⁴²³

61 In a similar vein, Dr Orr argues that recall elections are unnecessary in New South Wales. He notes there are already significant mechanisms in place for ensuring the accountability and responsiveness of the government as a whole. These include ‘committees, the ICAC and other arms of the “integrity branch”’. Dr Orr suggests that, ‘if anything we might be concerned ... that governments are too obsessed with the weekly opinion poll and daily media cycles’.⁴²⁴

62 Secondly, an ability to recall individual MPs is, Dr Orr argues, equally unnecessary. Individual MPs are subject to specific and extensive accountability measures. These include formal measures (which legally disqualify MPs in certain situations) and informal pressures (such as party discipline, and the intense media scrutiny which will often ‘force’ MPs embroiled in scandal to resign).⁴²⁵ Furthermore, an additional means of removing MPs seems unnecessary in a system where electors ‘tend to vote not for local candidates but for parties or on state-wide issues’.⁴²⁶

63 Thirdly, Dr Orr submits that recall elections have the potential to undesirably ‘skew the focus’ of government, placing undue pressure on particular issues or marginal seats.⁴²⁷ This potential would likely be exacerbated by the influence of ‘oppositions, powerful lobby groups and partisan media’.⁴²⁸ For these reasons, the recall election process is unlikely to be representative of the views of the electorate at large. The ability of narrow interest groups to ‘hijack’ the recall election process is also likely to create great instability,⁴²⁹ and create an electoral dynamic which is ‘inherently negative’. Dr Orr states ‘it is not clear why we would (further) encourage a framing of electoral politics in destructive and negative terms, as the recall does’.⁴³⁰

64 Finally, and perhaps most fundamentally, Dr Orr argues that the recall election is not congruent with New South Wales’ system of government. The New South Wales system is ‘rooted in Westminster forms and traditions’. The recall election, however,

⁴²³ Ibid 1.

⁴²⁴ Ibid 2

⁴²⁵ Ibid 2.

⁴²⁶ Ibid 2

⁴²⁷ Ibid 2.

⁴²⁸ Ibid 2.

⁴²⁹ Ibid 2.

⁴³⁰ Ibid 3.

is modelled on ‘US-style, candidate-centred politics’. Whilst the recall may serve a useful purpose in the United States, it does not ‘make sense’ in a system where executive offices are not directly elected and constituency representation is party-centred.⁴³¹

65 Dr Orr elaborates this argument in his supplementary submission.⁴³² He suggests that it would be extremely difficult to adapt to a system of proportional representation, such as that entrenched for the New South Wales Legislative Council, where MLCs do not represent a defined constituency. Dr Orr suggests that one means of doing this may be ‘a recall process, but with electors only voting on the question of recall and the vacancy being filled by a count-back from the relevant general election’, similar to the process for filling Senate vacancies provided by s 15 of the Commonwealth Constitution.⁴³³

66 ‘However’, Dr Orr states, ‘this [system] would be a travesty on at least three grounds: (1) a statewide vote to oust an MLC might be overkill; (2) the countback could date to six or seven years earlier; and (3) intra-party factionalism could come into play, so that a party might support a recall of their own MP, just to replace him/her with someone who had been placed lower on the original ticket.’⁴³⁴

(2)(e) Appropriate funding arrangements for the process

67 Dr Orr notes that ‘any proposal for a recall process would need to address some complex campaign finance considerations, given the recently minted *Election Campaign and Disclosures Amendment Act 2010* (NSW) and the bipartisan support for the principle of expenditure limits.’⁴³⁵

68 Under the 2010 Act, ‘any fresh election would be subject to a limited capped expenditure period, although a recall election is not really a snap or unexpected election but one preceded by significant campaigning.’⁴³⁶

69 The principle of limiting expenditure should apply to campaigns for recall, but would have to be adapted to the specific structure of the recall campaign (for example, the signature collection process).⁴³⁷

⁴³¹ Ibid 1.

⁴³² Submission 19.

⁴³³ Submission 19, 1.

⁴³⁴ Ibid 1-2.

⁴³⁵ Ibid 2.

⁴³⁶ Ibid 2.

(4) Any other matters relevant to Recall Elections.

70 Dr Orr makes two suggestions relevant to the broader debate surrounding recall elections.

71 First, he notes that recall elections are at best a superficial form of direct democracy, given ‘elections by definition involve electing *representatives*. If there is a desire for more direct democracy, then the NSW government could consider measures such as citizen initiated referendums, deliberative democracy initiatives and popular election of the Governor’.⁴³⁸

72 Secondly, Dr Orr suggests that it may be worth reconsidering the question of the four year parliamentary term.⁴³⁹

New South Wales Bar Association (Submission 16)

73 PA Selth, Executive Director of the New South Wales Bar Association, provided a detailed submission prepared by the Association’s Constitutional and Administrative Law Section.

(1) Whether or not it is desirable to amend the New South Wales Constitution 1902 to permit Recall Elections

74 The Association declined to make a submission as to the desirability of a recall procedure being put in place, or as to the characteristics which such a procedure should have if it is implemented. Rather, the submission seeks to draw attention to critical issues which require further consideration.

75 The following general observations were made:

(a) ‘Introduction of a recall procedure would represent a significant constitutional reform which might well have a far reaching impact upon the Government’s short term accountability to the electorate. Care must thus be taken not to see recall as a solution to the difficulties people may have perceived to have been caused by an unpopular government within the fixed term.’⁴⁴⁰

(b) The recall debate calls into question ‘the form of representative democracy practised in Australia’, rather than the desirability of fixed parliamentary

⁴³⁷ Ibid 2.

⁴³⁸ Submission 15, 2.

⁴³⁹ Ibid 3.

⁴⁴⁰ Submission 16, 2.

terms.⁴⁴¹ The difficulties experienced under the previous government are equally capable of arising under a traditional Westminster system ‘which places any decision to call an early election in the hands of the leader of the government’.⁴⁴²

- (c) Introducing recall elections may force the Government ‘to adopt short term policies and respond to immediate demands of a small but vocal and active segment of the voting population’ or ‘well financed special interest groups’. It may ‘discourage necessary decisions from being taken because they may be unpopular.’⁴⁴³
- (d) Recall elections will incur significant costs and distract ‘the government’s attention from the job of governing’. For this reason, ‘the test for recall (should) be stringent and any recall procedure (should) be carefully scrutinised’.⁴⁴⁴
- (e) The procedures used in other jurisdictions for recall of an individual representative must be carefully adapted for a system which leads to recall of an entire parliament or house thereof. The latter form of recall should be viewed as an exceptional procedure.⁴⁴⁵
- (f) The above observations suggest it may be necessary to: restrict the time periods in which a recall can be triggered (eg. not in the first half of a parliamentary term); set a relatively high signature threshold; and, require such signatures to be collected within a relatively short time.⁴⁴⁶

(2) If Recall Elections were to be permitted, the relevant requirements or mechanisms which would be required.

76 Throughout its submission, the Association emphasised that any recall process must be subject to strict safeguards and scrutiny. Specific safeguards recommended by way of example include:

- (a) regulating the means of challenging a recall petition prior to the triggering of an election;

⁴⁴¹ Cf Submission 15, 3.

⁴⁴² Ibid 2.

⁴⁴³ Ibid 2.

⁴⁴⁴ Ibid 2.

⁴⁴⁵ Ibid 3.

⁴⁴⁶ Ibid 3.

- (b) ‘ensuring the electoral roll is valid and up to date for the purpose of assessing whether or not a required percentage of electors ... had signed the recall petition’;
- (c) a means of validly and accurately ascertaining the number of electors eligible to vote at the previous election, if the signature threshold is defined by reference to that number;
- (d) the safeguards of democratic voting which would usually accompany a general election, should the petition alone be sufficient to trigger an election;
- (e) a process for objecting to the inclusion of particular names on the electoral roll at the appropriate period;
- (f) a time limit upon the time period within which successive recall petitions could be presented, and possibly a prohibition on repeat recall petitions, at least if such petitions were based on the same issues or promoted the same persons’; and
- (g) requirements of public disclosure of funding, and appropriate penalties.⁴⁴⁷

The New South Wales Bar Association suggested there may need to be a procedure ‘akin to those provided for in Part XXII of the *Commonwealth Electoral Act 1918* (Cth) and Part 6 of the *Parliamentary Electorates and Elections Act 1912* (NSW) in respect of the Court of Disputed Returns to enable a time limited right’ to challenge the results of a recall.⁴⁴⁸

(2)(a) The reasons or grounds (if any) for a petition by voters for a Recall Election

77 After reviewing the difficulties which could arise if recall were only permitted on specified grounds, the Association tentatively concluded ‘that the signatures of a specified number of electors, collected within a specified time frame, should be only requirement for a recall election’.⁴⁴⁹

78 The difficulties which may arise if grounds were specified include:

- (a) determining if, and to what extent, the courts should then scrutinise whether those grounds have been made out;

⁴⁴⁷ Ibid 5-6.

⁴⁴⁸ Ibid 4.

⁴⁴⁹ Ibid 5.

- (b) the delays which would inevitably arise, ‘given the strong likelihood of litigation seeking to challenge the validity of a petition’, and indeed perhaps the ‘validity of a recall election after the event – and thus ... the legitimacy of the new Parliament and government’; and
- (c) adapting grounds naturally suited to recall of individual MPs (such as misfeasance) to the recall of an entire government.⁴⁵⁰

Dr Ken Coghill (Submission 17)

79 Associate Professor Hon Dr Ken Coghill is the Convenor of the PRME Working Party, Co-director of the Parliamentary Studies Unit and Director of the Monash Governance Research Unit at the Monash University Department of Management.

80 Dr Coghill’s submission opposes the introduction of recall elections.

(1) Whether or not it is desirable to amend the New South Wales Constitution 1902 to permit Recall Elections

81 Dr Coghill argues such an amendment is undesirable, due to:

- (a) the significant practical difficulties such an amendment would encounter;
- (b) the fundamental inconsistencies between the recall concept and New South Wales’ system of parliamentary democracy; and
- (c) the potential for recall elections to undermine and weaken good governance.

82 Dr Coghill first states that there are significant uncertainties in the debate surrounding recall elections which require clarification.⁴⁵¹ He notes a shift in the taxonomy of the debate, from ‘recall’ as a means of removing individual MPs or perhaps the whole of government, to ‘recall’ as a means of triggering an early election. Dr Coghill warns that, internationally, ‘recall’ typically refers to the former process, and it is therefore difficult to use international experience as precedent.⁴⁵² Dr Coghill also highlights some of the problems which have arisen in recall elections overseas.⁴⁵³

83 Dr Coghill then outlines the practical and conceptual difficulties involved in implementing either form of ‘recall’ in New South Wales.

⁴⁵⁰ Ibid 4.

⁴⁵¹ Submission 17, 2.

⁴⁵² Ibid 2.

⁴⁵³ Ibid 4.

84 A mechanism which permitted recall of individual MPs would face practical and conceptual difficulties.⁴⁵⁴ Practically, it is difficult to apply to the Legislative Council; ‘the Legislative Council is elected by a single state-wide electorate and vacancies are filled by the Houses sitting together’.⁴⁵⁵ Conceptually, such a mechanism is inconsistent with common conceptions of the role and function of MPs. Dr Coghill states:

[i]n the NSW parliamentary system the (MP) is clearly not a delegate acting under instruction, but is elected on the basis of a complex mix of criteria which are aggregated in the individual mind of each voter and the collective will of the constituency. These criteria will include party affiliation, party policies, government performance (of a candidate’s party or political opponent), representational performance of the incumbent and personal qualities. This is a great strength of Westminster and other parliamentary systems.⁴⁵⁶

85 It is, Dr Coghill argues, undesirable to introduce a mechanism which moves towards the ‘instructed delegate model’. This model:

is intrinsically unstable as it reduces the capacity of the MP to exercise judgement in the face of threats by special interests to seek recall unless the MP bows to their will. By exposing individual MPs to greater personal pressure from narrowly based interests, it dilutes the capacity for the parliament’s exercise of collective wisdom, one of the great strengths of parliamentary democracy.⁴⁵⁷

The recall is therefore capable of ‘undermining and weakening accountability, integrity and good government’.⁴⁵⁸

86 Dr Coghill does however note that recall of individual MPs has been introduced in British Columbia, a Westminster-derived parliamentary system.⁴⁵⁹

87 A mechanism which triggered an early election would also face significant practical difficulties, some ‘insurmountable’.⁴⁶⁰ Dr Coghill questions which bodies would in fact be removed; for example, he asks whether it would remove only members of the governing party or coalition (the ‘government’ as understood colloquially), the

⁴⁵⁴ Ibid 2-3.
⁴⁵⁵ Ibid 3.
⁴⁵⁶ Ibid 3.
⁴⁵⁷ Ibid 3.
⁴⁵⁸ Ibid 4, 5.
⁴⁵⁹ Ibid 4.
⁴⁶⁰ Ibid 2.

Legislative Assembly, or the Legislative Assembly and half of the Legislative Council.⁴⁶¹

(2) If Recall Elections were to be permitted, the relevant requirements or mechanisms, including: (a) The reasons or grounds (if any) for a petition by voters for a Recall Election

88 Dr Coghill states ‘(p)etitions by voters for a Recall Election should not be simply on the basis of some disagreement with government policy or advocacy of some policy or to advance a special interest.’ He thus argues that recall should only be permitted on narrow, specified grounds.⁴⁶²

89 A petition to precipitate an early State election ‘should be required to assert and cite evidence of gross, continuing incompetence in the administration of the government of New South Wales.’⁴⁶³

90 Similarly, ‘a petition for a recall election for an individual MP ... should be required to assert and cite evidence of gross, continuing negligence or incompetence in representation of the constituency.’⁴⁶⁴

91 In both cases, ‘alleged illegality should be dealt with by the system of justice’ rather than recall.⁴⁶⁵

92 Dr Coghill argues that the Electoral Commission should be trusted to verify whether ‘the claim of the petition is reasonable, and be authorised in its absolute direction to disallow a petition which fails to do so.’ This is not an appropriate role for the courts.⁴⁶⁶

*(b) The appropriate percentage of voters who would need to petition and the time frame for collecting signatures*⁴⁶⁷

93 Dr Coghill suggests the following signature thresholds:

(a) in the case of an early state election:

(i) 10 per cent of enrolled voters in every state electorate; and

⁴⁶¹ Ibid 2.

⁴⁶² Ibid 5.

⁴⁶³ Ibid 5.

⁴⁶⁴ Ibid 5.

⁴⁶⁵ Ibid 5.

⁴⁶⁶ Ibid 5-6.

⁴⁶⁷ Ibid 6.

(ii) One third of the voters enrolled in the State.

(b) In the case of Recall Elections for individual members of the Legislative Assembly, one third of the voters enrolled in the electorate concerned.

(c) In the case of Recall Elections for individual members of the Legislative Council:

(i) 10 per cent of enrolled voters in every state electorate; and

(ii) One third of voters enrolled in the State.

94 Dr Coghill suggests that four months is a reasonable timeframe for the collection of signatures.⁴⁶⁸

(c) Processes for verifying and auditing signatures against eligible voters

95 Dr Coghill recommends that '(t)he Electoral Commission should be required to apply the standards and procedures applied at general elections plus additional procedures' specific to the recall process.

96 These additional procedures may include ensuring that 'no inducement has been offered or accepted to collect a signature or sign a petition', and that signatures on the petition are valid.⁴⁶⁹

(d) The time limits (if any) that should be imposed before a Government is subject to a petition

97 Dr Coghill states that the possibility of recall will 'severely distract and divert policy making, policy implementation and the routine administration of government programs and services'.⁴⁷⁰ For this reason, Dr Coghill recommends that parliaments should not be subject to recall during their first or fourth year of sitting.

98 If a petition succeeds, 'the Recall Election should occur according to the normal timetable for dissolution of the Parliament and the conduct of general elections for a fixed term'.⁴⁷¹

⁴⁶⁸ Ibid 6.

⁴⁶⁹ Ibid 6.

⁴⁷⁰ Ibid 4.

⁴⁷¹ Ibid 6.

(e) Appropriate funding arrangements for the process

99 Dr Coghill suggests that ‘no funding should be provided for the collection of signatures. Corporations and natural persons should be banned from any financial support for gathering signatures.’⁴⁷² Dr Coghill further submits that the same rules of public funding and expenditure restrictions which apply to general elections should apply to Recall Elections.⁴⁷³

Paul Lynch MP (Submission 18)

100 Paul Lynch MP is the Shadow Attorney General and Shadow Minister of Justice for New South Wales. He provided Submission 18 on behalf of the ALP State Opposition.

101 Mr Lynch’s submission can be broadly described as neutral. Mr Lynch states that the recall mechanism is relatively ‘novel’. However, Mr Lynch also draws attention to the various ways in which New South Wales’ system of government has evolved over time. Therefore, Mr Lynch submits, the present novelty of the recall should not be used as a reason to ‘categorically reject’ its introduction; rather, it simply demonstrates that any proposal to introduce recalls ‘must be rigorously considered and carefully designed’.⁴⁷⁴

(1) Whether or not it is desirable to amend the New South Wales Constitution 1902 to permit Recall Elections

102 The submission does not openly support the introduction of recall elections. However, it does seek to demonstrate that the recall concept is not fundamentally inconsistent with New South Wales’ system of government. Mr Lynch states that ‘contemporary reality’ does not fit squarely within the concept of representative democracy as expounded by theorists such as Edmund Burke in the 18th century. Mr Lynch draws attention to other more ‘modern’ conceptions of democracy – such as Professor John Keane’s theory of ‘monitory democracy’⁴⁷⁵ – which are arguably consistent with the recall concept.

⁴⁷² Ibid 7.

⁴⁷³ Ibid 7.

⁴⁷⁴ Since Submission 18 is not paginated, and interested persons may view it in electronic form online, this Report will not cite particular pages within the submission.

⁴⁷⁵ Keane’s theory of monitory democracy conceptualises democracy as a means of guaranteeing political equality against concentrations of publicly unaccountable power. It emphasises the ongoing public scrutiny and public control of decision makers. John Keane, *The Life and Death of Democracy* (WW Norton & Co, 2009) 688-9.

(2) If Recall Elections were to be permitted, the relevant requirements or mechanisms, including: (a) The reasons or grounds (if any) for a petition by voters for a Recall Election

103 Mr Lynch recommends that recall should only be permitted on specified grounds.

104 The grounds suggested by Mr Lynch differ from the traditional categories of misfeasance, malfeasance and nonfeasance. He suggests a recall petition should be able to be commenced if the government:

- (a) introduces legislative change to institutional arrangements that directly affect wages and conditions of a significant proportion of the workforce of the state;
- (b) significantly alters or de facto confiscates property rights; or
- (c) if there is an ICAC finding of corruption.

(b) The appropriate percentage of voters who would need to petition and the time frame for collecting signatures

105 Mr Lynch recommends that a petition to trigger an early election should require signatures from:

- (a) at least 1 per cent of voters in 75 per cent of the state's electorates; and
- (b) 25 per cent of the total number of voters in the state.

106 Mr Lynch suggests that 40 days is an appropriate time limit on the collection of signatures.

(c) Processes for verifying and auditing signatures against eligible voters

107 Mr Lynch recommends that the Court of Disputed Returns review both the substance and process of the recall.⁴⁷⁶

108 He states '[t]here must be mechanisms and provisions to prevent wealthy pressure groups from manipulating and misusing recall procedures. Media corporations should not be able to organise [petitions].'

⁴⁷⁶ The Court of Disputed Returns is discussed above in Section F, paragraph 17 of this Report.

(d) The time limits (if any) that should be imposed before a Government is subject to a petition

109 Mr Lynch recommends that petitions should not be allowed within six months of a regular general election (before or after).

(4) Any other matters relevant to Recall Elections

110 Mr Lynch recommends that if a government were recalled and replaced, the replacement government should ‘commence ... a fresh four year term, rather than merely complete the balance of the current term.’

Mr Colin Barry, Electoral Commissioner of New South Wales, on behalf of the New South Wales Electoral Commission (the ‘NSWEC’) (Submission 21)

111 Mr Colin Barry was appointed Commissioner of the NSWEC in July 2004. The NSWEC is an independent statutory authority established under the *Parliamentary Electorates and Elections Act*. It is responsible for conducting ‘State elections, Local Government elections, NSW Aboriginal Land Council elections and certain statutory elections.’⁴⁷⁷

112 The NSWEC opposes the introduction of a mechanism which would permit the recall of the entire State government. However, the NSWEC supports the introduction of by-elections for individual members of the New South Wales Legislative Assembly, triggered by petition.

(1) Whether or not it is desirable to amend the New South Wales Constitution 1902 to permit Recall Elections

113 The NSWEC notes that, in the current debate, ‘the term ‘recall election’ ... has been characterised as a mechanism for “voting out” a [whole] government’.⁴⁷⁸ It submits that such a mechanism is ‘inconsistent with the principles of representative democracy and responsible government that are the hallmarks of our Westminster system of government ... as it could allow voters in some electorates to recall representatives who continue to retain the support of voters in a separate electorate.’⁴⁷⁹

114 However, the NSWEC argues that our Westminster system of government ‘has itself evolved over time to accommodate new practices and ideas’, including the

⁴⁷⁷ NSWEC, *About us* (15 July 2011) <http://www.elections.nsw.gov.au/about_us> at 21 August 2011.

⁴⁷⁸ Submission 21, 3.

⁴⁷⁹ *Ibid* 4, n 3.

introduction of four year fixed parliamentary terms. Therefore, the *prima facie* inconsistency between recall and the Westminster system ‘should not be the basis for disregarding the introduction of a recall petition procedure altogether’.⁴⁸⁰

- 115 On this basis, the NSWEC submits that amending the Constitution to permit recall elections in the more limited form of ‘a by-election for an individual member of the NSW Assembly is feasible.’⁴⁸¹ The NSWEC states that ‘[t]his procedure is consistent with the recall petition model that currently operates in British Columbia, and that has been proposed in the United Kingdom – two countries whose systems of government derive from the Westminster tradition. This more limited model is still capable of achieving ‘the overarching objective of the alternative ‘recall government’ model’: one or more recall elections of individual members may be enough to shift the balance in the Legislative Assembly, and thereby trigger a change of government, ‘without skewing the fundamental principles underlying the system of responsible and representative government’.⁴⁸²

(2) If Recall Elections were to be permitted, the relevant requirements or mechanisms

- 116 A significant proportion of the NSWEC’s submission outlines requirements and mechanisms ‘that the NSWEC suggest be built into any recall ... procedure implemented in NSW’.⁴⁸³

The NSWEC considers these requirements to be necessary to prevent the political process from being unnecessarily disrupted ... and to strike an appropriate balance between the need to protect elected representatives from unnecessary political harassment, and the desire to give voters [an additional] direct influence over their elected representatives.⁴⁸⁴

- 117 The requirements suggested by the NSWEC are specific to the more limited form of recall it advocates; namely, recall of individual members of the Legislative Assembly.

⁴⁸⁰ Ibid 4.

⁴⁸¹ Ibid 4.

⁴⁸² Ibid 4-5.

⁴⁸³ Ibid 6.

⁴⁸⁴ Ibid 6.

(a) *The reasons or grounds (if any) for a petition by voters for a Recall Election*

118 The NSWEC recommends that '[a] recall petition should not be able to be initiated for any reason'. To do so could 'expose members of parliament to frivolous claims of incompetence, and ... waste public money.'⁴⁸⁵

119 Rather, the NSWEC recommends that recall should only be permitted on specific grounds, specified by statute.⁴⁸⁶ The NSWEC states that '[a]ny [such] grounds of recall ... should not overlap with, but should operate in addition to', the grounds on which a member of parliament can already be disqualified under section 13A of the *New South Wales Constitution*.⁴⁸⁷ Thus, the grounds the NSWEC proposes for inclusion are:

- (a) lack of fitness and competence; and
- (b) a loss of confidence in the member's capacity to carry out the member's parliamentary duty.⁴⁸⁸

120 The NSWEC states that the application to initiate a recall petition should 'include a statement limited to a prescribed number of words which specifies the grounds for recall ... and the acts of the representative which satisfy these grounds'.⁴⁸⁹

121 The NSWEC makes further suggestions regarding the application procedure. These are discussed below at paragraph 134.

122 Though the NSWEC recommends that recall be permitted on limited grounds, it states that the question of whether those grounds are made out is essentially 'political'.⁴⁹⁰ Therefore, primary responsibility for determining whether the grounds for recall have been made out should be left to the electorate, 'through the act of casting their vote on whether [to recall] the elected representative'.⁴⁹¹

123 The NSWEC should play the limited role of 'ensuring that the petition complies with [formal and procedural] requirements'.⁴⁹² This determination should be

⁴⁸⁵ Ibid 7.

⁴⁸⁶ Ibid 7.

⁴⁸⁷ Ibid 8.

⁴⁸⁸ Ibid 8.

⁴⁸⁹ Ibid 6.

⁴⁹⁰ Ibid 8.

⁴⁹¹ Ibid 9.

⁴⁹² Ibid 9.

judicially reviewable. However, ‘the sufficiency of the grounds for recall should NOT be permitted to be challenged in the courts’.⁴⁹³

(b) The appropriate percentage of voters who would need to petition and the time frame for collecting signatures

124 The NSWEC makes specific recommendations regarding the way signatures should be collected. It argues that the process used in British Columbia, and other jurisdictions – where signatures are manually collected on hard copy petitions – is ‘outdated and imprecise’.⁴⁹⁴ The NSWEC proposes signatures should instead be collected via a ‘system of remote electronic registration’, similar to the iVote registration system used in the 2011 general state election.⁴⁹⁵

125 This online, electronic system ‘would require the petitioner to acknowledge that they have read the cases for and against the recall of the relevant representative’. It could also utilise individual PIN codes, which would enable the NSWEC ‘to simply and accurately verify and audit the registered ‘signatures’ against eligible voters in the electorate’.⁴⁹⁶

126 However, NSWEC suggests that voters should be given ‘supplementary options of registration by telephone and mail’ to ‘ensure that all eligible voters are given an equal opportunity to register’.⁴⁹⁷ The NSWEC also recommends that a comprehensive public information campaign be conducted by the NSWEC to inform the public that a recall petition has been activated.⁴⁹⁸

127 The NSWEC then turns to the issue of signature thresholds. It recommends that a ‘sizeable’ threshold be required, given the ‘significant financial and political implications’ of a successful petition. Importantly, the NSWEC recommends that if a petition is signed by the requisite number of voters it should automatically result in the relevant member being recalled. This is discussed further below.

128 The NSWEC proposes that a petition should be signed by 25 per cent of registered voters in the electorate of the relevant, individual representative. This suggestion is informed by reference to the US, and is said to ‘strike an

⁴⁹³ Ibid 9.

⁴⁹⁴ Ibid 10.

⁴⁹⁵ Ibid 10.

⁴⁹⁶ Ibid 10.

⁴⁹⁷ Ibid 11.

⁴⁹⁸ Ibid 13.

appropriate balance’; it is neither so onerous ‘as to render the recall petition process unworkable’, yet ‘demanding enough to prevent the too frequent or unwarranted political harassment of elected representatives’.⁴⁹⁹

- 129 The NSWEC proposes that the time frame for collecting signatures should be 60 days from the date that the electronic registration system (discussed above) is activated.⁵⁰⁰ It reaches this conclusion by considering the average time frames imposed in the US, and reducing them to reflect the fact that signatures would be collected electronically.⁵⁰¹

(c) Processes for verifying and auditing signatures against eligible voters

- 130 The NSWEC suggests that an electronic registration system could include built-in processes for verifying and auditing signatures. The NSWEC would be responsible for performing this task. See above at (2)(b).

(d) The time limits (if any) that should be imposed before a Government is subject to a petition

- 131 The NSWEC recommends that ‘it should not be permissible for a recall petition to be initiated during the first 18 months or the last 6 months of the term of a Legislative Assembly representative’. These time limits will provide representatives with ‘a reasonable amount of time ... to make progress on their policies and election commitments, and ... ensure that funds are not wasted in calling for an early election close to the end of the representative’s term of office.’⁵⁰²

(e) Appropriate funding arrangements for the process

- 132 Like many of the submissions, the NSWEC emphasised the need to ensure money does not play an overly influential role in the recall process. It suggests that paid recall advertising could be prohibited, or at least regulated in the same manner as normal election expenditure.⁵⁰³

⁴⁹⁹ Ibid 11.

⁵⁰⁰ Ibid 12.

⁵⁰¹ Ibid 11.

⁵⁰² Ibid 12.

⁵⁰³ Ibid 14.

(4) Any other matters relevant to Recall Elections

- 133 The NSWEC suggests that if a recall petition succeeds, the relevant individual should automatically be recalled. In more detail, the NSWEC proposes that:
- (a) if a petition is signed by the requisite number of voters and verified by the NSWEC, the NSWEC shall issue a report to the Speaker of the New South Wales Legislative Assembly;
 - (b) the Speaker shall then declare the seat of the relevant representative vacant; and
 - (c) a by-election to fill the seat should then be held within 90 days. The recalled representative should be permitted to run for re-election.⁵⁰⁴
- 134 The NSWEC also makes additional submissions regarding the process which should be followed in order to initiate a petition.⁵⁰⁵ The NSWEC recommends that it should be responsible for receiving and processing applications to initiate petitions.⁵⁰⁶ It suggests that an application must be supported by at least 15 registered voters; the same number of supporters required to nominate a member to run as a candidate for the Legislative Assembly.⁵⁰⁷ The application should also be accompanied by a deposit, ‘returnable ... if the petition is ultimately successful in triggering a by-election for the electorate’, and ‘forfeited to the NSW treasury’ if not.⁵⁰⁸

⁵⁰⁴ Ibid 13.

⁵⁰⁵ Ibid 6-7.

⁵⁰⁶ Ibid 6.

⁵⁰⁷ Ibid 6.

⁵⁰⁸ Ibid 7.

SECTION H. COMPATIBILITY OF PROVISIONS FOR RECALL ELECTIONS WITH REPRESENTATIVE AND RESPONSIBLE GOVERNMENT

- 1 The discussion in Section D and the submissions summarised in Section G have drawn attention to the different theoretical bases of responsible and representative government on the one hand, and direct democracy on the other. The submissions made to the Panel have also highlighted the potential impact the introduction of recall elections may have on New South Wales' system of representative and responsible government.
- 2 The Panel will discuss in Section I the possible application of recall elections to the seats of individual members of Parliament, and in Section J the possible application of recall elections to the Parliament as a whole.⁵⁰⁹ Before that material, we discuss the issues involved a little more generally.
- 3 In New South Wales, democracy is a long and well-established principle of our system of government. Whilst there are no mechanisms for citizen initiated legislation, referendums, recall of legislation, or recall elections, the core of our system of government is democratic, due to the role of the people in electing Parliament and thereby choosing government. The Parliament also sits for fixed terms, and so must face the people at a predetermined time rather than a time of its own choosing; these terms cannot be changed without referendum.
- 4 A key assumption which underlies New South Wales' system of government is the expectation that, every four years, electors will elect the Legislative Assembly and half of the Legislative Council. As a matter of convention, the leader of the political party which wins (or is able to put together) a majority in the Legislative Assembly is entitled to be appointed Premier and thus to form a government. That government is seen, by and large, as the body responsible for enhancing the wellbeing of the people of the State. If the voters of the State are unhappy with the government or its individual members, their remedy is to vote out that government or relevant member at the next election.⁵¹⁰

⁵⁰⁹ The expression 'Parliament as a whole' is used here for brevity, rather than with complete accuracy.

⁵¹⁰ There are, of course, many reasons why voters may be unhappy with a government. At the lowest it may simply be the manifestation of a belief that it is 'time for a change'.

5 New South Wales' system of government is also one of responsible government. At any time, the government and each member of the Parliament, knows when it, he or she must next face the electors. Whilst there is, in that sense responsibility to the electors, in the periods between elections members of the government are primarily responsible to Parliament.⁵¹¹

6 The introduction of any form of recall elections would necessarily alter the position just described. It would do by adding a new element to the electoral landscape: the possibility of an election occurring at a time other than the end of the four year term.⁵¹²

7 There is no doubt that this change would result in a shift in the conceptions which underlie government. The government's responsibility to the electors would become more significant, and the need for members of parliament to be alive to the views of their electors would become (more) acute. It does not follow, of course, that such changes are necessarily undesirable or unworkable; however, the fact that such change is involved does need to be borne in mind when considering proposals for change.

8 The following paragraphs discuss, in more detail, the potential changes which the introduction of recall elections could effect on our system of responsible and representative government: positive and negative. The discussion seeks to highlight ways in which the introduction of recall elections could affect the accountability, integrity and quality of government.

Potential benefits⁵¹³

9 The notion that the people should, on certain conditions, be able to procure an early election is *prima facie* appealing. It is democratic, and it involves resolving political grievances via the ballot box; a very Australian way of dealing with such issues.⁵¹⁴

10 Recall, by shifting the balance of the nature of representation, could strengthen the direct links between elected representatives and the people. Elected officials are, at present, representatives of their electorate; they are expected to be sensitive and

⁵¹¹ Anne Twomey (Submission 12), 7; NSWEC (Submission 21), 4.

⁵¹² We leave aside, of course, by-elections for seats where members have died or resigned or been removed from office.

⁵¹³ See also Anne Twomey's summary of the potential benefits of recalls in Submission 12, 30-31.

⁵¹⁴ A long history of compulsory voting in federal, state and municipal elections and referendums has made generations of Australians familiar with the ballot as the means of resolution of political differences.

responsive to the needs of their constituents, serve them diligently as local members, and at times argue on their behalf and in their interest in Parliament. The introduction of recall elections could strengthen this sense of representation even further. If they are given the power to potentially bring about an early election, citizens might feel more ‘connected’ to their representatives, and less alienated and powerless.

- 11 Elections are the most explicit form of accountability of the Parliament to the people. Elections are the third ‘step’ of responsible government: the government is created from the Parliament; the government is responsible and answerable to the Parliament, and Parliament is responsible and answerable to the people. Recall strengthens that third step and makes it more influential over government.
- 12 Provisions for recall elections could reduce the occasions on which the Governor might have to exercise reserve powers to dismiss a government. The circumstances in which reserve powers might be exercised are very rare, and the potential for a recall election may reduce them further. The availability of recall may be a matter which the Governor could take into account in determining whether to exercise the reserve powers.
- 13 Recall elections are not absolutely inconsistent with the Westminster system of government, on which New South Wales’ system of government is based. In the classic Westminster model there are maximum terms for Parliament and elections are unavoidable. However, early elections may be called at any time by the government of the day, or if a vote of no confidence in the government is passed by Parliament. In New South Wales, the four year term of Parliament is fixed and governments cannot call early elections; however the vote of no confidence mechanism remains. This demonstrates there is no *absolute* contradiction between the concept of the people procuring an early election and the Westminster system. Of course, the concept would be innovative; however, New South Wales has long experimented with new and innovative electoral processes, and the United Kingdom itself is exploring the concept of introducing recall elections for individual members of Parliament.
- 14 Recall elections could act as an additional mechanism of accountability. Between elections, government would be accountable to the people as well as the Parliament. The purpose of recall can be to remove a government which, or an individual member who, has lost the confidence of the people to a significant extent. The existence of a

carefully developed and tightly regulated system of recall could therefore improve accountability between elections because governments would be aware that extreme dissatisfaction on the part of the people could lead to an early election.

- 15 Such awareness could also improve a government's sense of responsibility to the people and their elected representatives. Governments may strive to a greater extent serve the public interests in preference to party political interests.

Potential detriments⁵¹⁵

- 16 Any form of recall election would interrupt government. This could make the implementation of complex policies (which can take time) less likely.⁵¹⁶
- 17 In general, governments are elected on the basis of party politics and then expected to act as trustees of the public interest; to use their best judgement to balance the often short-term demands of the electorate, the short and long term needs of the electorate and the broader public interest. That complex mix of representative functions could be weakened if recall elections were introduced.⁵¹⁷
- 18 There is a serious risk that recall elections could be used by the Opposition or its surrogates to disrupt government, especially if opinion polls indicate that the Opposition could win an election. Oppositions might well be watching for opportunities to trigger recall over contentious issues.⁵¹⁸
- 19 The introduction of recall elections might prompt a return to the 'continuous election campaign' that was seen to be a hallmark of the political system before the introduction of the fixed four year term. This would tend to make politics even more poll driven than it is at present, and could jeopardise good government.⁵¹⁹
- 20 Government, intent on protecting itself from tactical behaviour by the Opposition, could tend to adopt more conservative policies or policies disproportionately tailored to the interests of marginal electorates in an attempt to quarantine itself from recall.⁵²⁰

⁵¹⁵ See also Anne Twomey's summary of the potential detriments of recalls in Submission 12, 31-32.

⁵¹⁶ New South Wales Bar Association (Submission 16), 2; Ken Coghill (Submission 17), 4; NSWEC (Submission 21), 14.

⁵¹⁷ Ken Coghill (Submission 17), 3.

⁵¹⁸ Anne Twomey (Submission 12), 5, 10, 22-23, 27, 30-32; Graeme Orr (Submission 15), 1, 2.

⁵¹⁹ Anne Twomey (Submission 12), 63-65; New South Wales Bar Association (Submission 16), 2.

⁵²⁰ Barry O'Connell (Submission 2); Anne Twomey (Submission 12), 30-32; Graeme Orr (Submission 15), 2; New South Wales Bar Association (Submission 16), 2; Ken Coghill (Submission 17), 3-5. On the other hand, this is hardly unknown in Australia as things stand.

- 21 The potential for recall may deter the implementation of difficult but necessary policies. Certain policies may be essential for the future of the State, yet be extremely unpopular when first introduced – particularly if they are introduced during hard economic times. These are the very policies which are likely to trigger a recall, particularly if the Opposition or mass media oppose them.⁵²¹
- 22 Special interest groups or well-funded lobbyists may attempt to promote recalls because of specific policies they do not like.⁵²²
- 23 It is also possible also that the availability of recall would exacerbate divisions in the community.⁵²³

General changes to government

- 24 It is possible that the introduction of recall elections would result in some changes in political attitudes.
- 25 Government might come to believe that it is only answerable to the people – not Parliament. If at any given time the people are not petitioning for recall, this may be taken to mean that the people are sufficiently satisfied with Government and that there is nothing for Government to answer to Parliament for. More bills may be guillotined, debates foreshortened, and the research and oversight capacity of Parliament cut back.⁵²⁴
- 26 Parliament could also come to see its own role as secondary to that of the people, if recall were available. Parliament's oversight of government activity could therefore become more of a formality.
- 27 Responsible government is usually taken very seriously in Australia. At present, the floor of Parliament still acts as a testing ground for ministers, leaders and potential leaders and ministers. A failure to properly account for oneself on the floor of Parliament can end a political career.

⁵²¹ Graeme Orr (Submission 15), 2.

⁵²² Anne Twomey (Submission 12), 61; Brian Morrow (Submission 14); Graeme Orr (Submission 15), 2; New South Wales Bar Association (Submission 16), 2; Ken Coghill (Submission 17), 7; NSWEC (Submission 21), 14.

⁵²³ See Graeme Orr's discussion of the 'inherently negative' dynamic created by recall elections: Submission 15, 3.

⁵²⁴ For details of sitting days, see Parliament of New South Wales, *Procedure Statistics: Legislative Assembly* <[http://www.parliament.nsw.gov.au/Prod/la/lapaper.nsf/0/985B126E7B4E5A3ACA2577F1001ADFDD/\\$file/stats09.pdf](http://www.parliament.nsw.gov.au/Prod/la/lapaper.nsf/0/985B126E7B4E5A3ACA2577F1001ADFDD/$file/stats09.pdf)> at 13 September 2011.

- 28 Were Parliament to be seen as less relevant because of the availability of recall, question time could be cut back. Government may well become less concerned with ‘self-censoring’ its own behaviour.
- 29 New South Wales currently has an electoral system which requires regular and unavoidable elections at fixed times. This means that the Government must face the people at a predetermined time, not at a time of its choosing. This remains a powerful check on governments that overstep their mandate to govern in the interests of the people.⁵²⁵ If the voters are not satisfied with the performance of the government of the day – for failing to represent their needs, or act in the public interest – they are able to vote them out of power at the next election.
- 30 A fixed four year term is, however, a long time if the government is generally perceived to be self-serving or incompetent. The frustration which is produced in such circumstances is real. However, such circumstances are rare. The advantages which could be gained by introducing recall in order to deal with this rare problem may be outweighed by the disadvantages which recall could create:⁵²⁶ for example, increased instability in government, a weakening of responsible government, and increased complexity of the electoral process.
- 31 Nevertheless, the members of the Panel do not regard the possibility of introducing a form of recall election as *necessarily* incompatible with New South Wales’ system of representative and responsible government. Introducing recall elections would of course involve change. It is desirable that this change be duly recognised. However, as outlined in Section C, New South Wales has introduced many important changes in order to enhance the nature of representative and accountable democratic government. The fact this will cause change is an insufficient reason to categorically reject the introduction of recall elections.

⁵²⁵ Graeme Orr (Submission 15), 3.

⁵²⁶ See Graeme Orr (Submission 15), 1; New South Wales Bar Association (Submission 16), 2.

SECTION I. RECALL ELECTIONS FOR INDIVIDUAL MEMBERS OF THE LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL

INTRODUCTION

- 1 Previous Sections have discussed the various forms a recall election can take. This Section discusses the possibility of elections to recall individual members of the Legislative Assembly and individual members of the Legislative Council.
- 2 An immediate question is: what would the recall of an individual member of either House seek to achieve? Is it to remove a member because of misconduct unbefitting of office? Is it to express disapproval of or respond to the member's political conduct – for example, voting in particular ways, or taking positions, which do not appeal to the member's electorate? Is it simply to distract the existing government from its ordinary activities, by there being one or more recall elections for its parliamentary members? Is it being used by the Government to distract the attention of the Opposition and require it to call on and utilise funds which would otherwise be available for the next general election? Or, is the recall of the individual member being used in attempt to force a change of government, or at least demonstrate the electorate's disapproval of the existing government?
- 3 The Panel takes the view that concerns relating to the conduct of an individual member would *not* merit the introduction of recall elections for individual members. Such concerns are adequately covered by other provisions, discussed in Section F of this Report. As there discussed, there are already a number of significant provisions in the *New South Wales Constitution* which may cause an individual member to lose his or her seat for various forms of conduct. Further, the provisions of the *ICAC Act* seem adequate to deal with instances of corruption in office.⁵²⁷
- 4 The Panel's view is that if these existing provisions are thought in some way inadequate to deal with the conduct of individual members, it would be preferable to amend the relevant provisions of the *New South Wales Constitution* or *ICAC Act* to

⁵²⁷ See the very broad definition of 'corrupt conduct' in sections 7, 8 and 9 of the *ICAC Act*, and the discussion in Section E.

remedy this, rather than introduce recall elections for individual members of the Legislative Assembly.⁵²⁸

LEGISLATIVE ASSEMBLY

- 5 It will be appreciated that the members of the Legislative Assembly each represent one electorate or 'seat'. That electorate may be a densely populated Sydney seat, a sparsely populated rural seat, or somewhere in between. Seats may be held by a member of the party in government, by a member of the opposition, by a member of a minor or non-aligned party or by an independent member. A member may have won a seat by a large or a narrow majority, or somewhere in between. Some seats are regarded as marginal, in that they could be lost by only a relatively slight swing in voting patterns. A proposal for recall of a member of the Legislative Assembly would have to allow for recall of *any* such member.
- 6 The population of an electorate is not static. Electors die, others attain voting age, electors move out of the electorate, new electors move in. The political allegiances of the electorate (and absence of them) and views of electors can change over time, and sometimes change relatively rapidly. The boundaries of electorates may change, as redistributions occur pursuant to sections 27, 28 and 28A of the *New South Wales Constitution*. Marginal seats can become safe, safe seats can become marginal, and seats which have favoured one party for years may become likely to change hands; members can become vulnerable.
- 7 All these features of the Legislative Assembly need to be taken into account in determining whether it should be possible to recall its individual members.
- 8 The Panel sees little merit in the various reasons which might be advanced in support of introducing recall elections for individual members of the Legislative Assembly.
- 9 The present political theory is that, once elected, a member should adopt the courses which the member considers are best for the State, subject of course to questions of party allegiance and discipline. No doubt, the member is entitled to seek to do what is best for the member's specific electorate. However, a member should not be liable to

⁵²⁸ This view was also expressed in a number of submissions: Graeme Orr (Submission 15), 2; New South Wales Bar Association (Submission 16), 4; Ken Coghill (Submission 17), 5; Paul Lynch (Submission 18); NSWEC (Submission 21), 8.

recall because a sufficiently high number of electors in the member's electorate disagree, even vigorously, with positions which the member has taken, nor in order to vent displeasure at the government's policies. The opportunity to vent this frustration or disappointment will arise at the next general election.

- 10 Recall elections for individual members of the Legislative Assembly may also be used in a number of ways which the Panel regards as undesirable. Thus members of the government, or of the opposition, in marginal seats may be targeted in recall elections.⁵²⁹ The need to contest such elections will divert attention from the business of government or opposition, and will eat into funds which would otherwise be available for later 'ordinary' elections.⁵³⁰ Further, regard must be had to the possibility of multiple, simultaneous recall elections. If the government only has a small majority in the Legislative Assembly, the need to contest multiple recall elections at the same time could effectively paralyse government. If multiple individual members were ultimately recalled, the party that lost the previous general election could end up taking government.
- 11 In short, the Panel's view is introducing recall elections for individual members of the Legislative Assembly could create unnecessary instability in government. Even if the threshold of signatures required in order to recall an individual member were set high (for example, 30 or 40 per cent of eligible voters, which would be 15,000–20,000 people in an electorate of 50,000 eligible voters), it might not be too difficult – particularly in marginal electorates, at a time of mid-term dissatisfaction with government – to collect enough signatures to put the seats of multiple members of the governing party in jeopardy.

LEGISLATIVE COUNCIL

- 12 The Panel also opposes the introduction of recall of individual members of the Legislative Council. Some of the reasons for this view apply equally to the Legislative Assembly; some differ.

⁵²⁹ Anne Twomey (Submission 12), 30-32; Graeme Orr (Submission 15), 2.

⁵³⁰ New South Wales Bar Association (Submission 16), 2; Ken Coghill (Submission 17), 4; NSWEC (Submission 21), 14.

- 13 As has been noted earlier, the members of the Legislative Council are elected by the whole of the State voting as one constituency. Members are elected for two terms of the Legislative Assembly, which will ordinarily amount to eight years. At any point in time half the members of Council will be in the first four years of their term, the other half in their second. Due to the method of proportional voting used to elect the Legislative Council, some members may be elected with a very small primary vote.⁵³¹
- 14 It is difficult to see why any one member of the Legislative Council should be the subject of recall. An individual member is likely to have been elected as part of a party ‘ticket’ or as an independent. In a recall election for such a seat what would the voting method be? If it were ‘first past the post’, or preferential, a major party would be likely to win and the provision for recall elections could be used to force from office members who were independents or who belonged to minor parties.
- 15 As with members of the Legislative Assembly, the recall mechanism could be used to target members of the Legislative Council who are also Ministers. Some ministerial portfolios are traditionally difficult (for example, Treasurer, Health and Transport). Ministers of these portfolios may be responsible for policies which are very unpopular (for example, increasing stamp duties, closing hospitals, or building or not building railway lines). It seems undesirable to expose individual Ministers who are responsible for making difficult policy choices to recall.⁵³² Shadow Ministers or other members of the opposition in the Legislative Council could be similarly targeted. This process would create a serious distraction – of time and funds.
- 16 Further difficulties arise because the Legislative Council is elected by the whole State voting as one electorate. As a result, the number of signatures which would be required on a recall petition for any one member of the Legislative Council would be very high. For example, if the threshold were again set at 40 per cent, this would equate to approximately 1.86 million signatures. Whilst, as discussed in Section J, such a significant requirement may be appropriate enough in cases where it is sought to recall the government as a whole, it supports the view that the recall election

⁵³¹ See Graeme Orr’s discussion of the difficulty of ‘mapping’ a recall procedure onto this system of proportional voting in Submission 19 and the similar difficulties flagged by Adam Johnston in Submission 6.

⁵³² In this regard, see the discussion of the Wisconsin experience in Section D.

procedure is simply inappropriate and unworkable for individual members of the Legislative Council.

GROUNDS?

- 17 In some of the jurisdictions discussed in Section D, the recall procedures in place require those seeking a recall election to state grounds or reasons why the proposed recall should occur. Sometimes there is provision for those grounds to be challenged and reviewed by a court; sometimes they are not justiciable.
- 18 In New South Wales, many of the grounds on which recall of an individual member could be sought would fall within the existing statutory grounds for removal from office, or the jurisdiction of the Independent Commission Against Corruption, discussed in Section F. As noted at the commencement of this Section, the Panel's view is that these existing provisions are satisfactory; if they are thought to be unsatisfactory, it would be desirable to amend them.
- 19 It is difficult to see a useful purpose in requiring a recall petition, in addition to being signed by the requisite number of voters, to state grounds which would *not* be captured by the provisions discussed above; for example:
 - (a) 'The member has moved out of the electorate.'
 - (b) 'The member does not devote sufficient time and effort to the well-being of the people in the electorate.'
 - (c) 'The member has not fulfilled the provisions he/she made at the last election.'and so on.
- 20 In short the Panel, if it otherwise had been in favour of recall elections for individual members, would oppose a requirement that a recall petition be made on stated grounds.

SECTION J. RECALL ELECTIONS FOR THE PARLIAMENT

- 1 In Section I, the Panel stated that it does not favour introducing recall elections for individual members of either House of Parliament. The next question is whether there could be recall elections ‘for the Parliament’ and, if so, what is meant by that concept.⁵³³ Does it mean an election only for the seats of the members of the Legislative Assembly, or for the members of the Legislative Assembly and for the seats of the half of the Legislative Council whose terms would next expire, or for all the members of both Houses?
- 2 Other related matters must also be considered. Should there be two elections – a poll to decide whether to have a recall election, followed if successful by the recall election itself? Are there parts of the term of office of a Parliament during which recall elections should not be available? Are the persons elected at the recall election to hold office for the remainder of the terms of office of those whom they have replaced? Should there be a limit on the number of recall elections which may be conducted during the term of a Parliament? And, once again, should there be a requirement for the grounds of the proposed recall to be stated?

TWO POLLS OR ONE?

- 3 A possible view is that there should be a poll to determine whether there should be a recall election. Such a poll would involve a question for the electors – desirably framed in relatively simple terms and capable of a ‘Yes’ or ‘No’ answer. Typically, one would think, the question would simply ask whether there should be a recall election; complications should be avoided.
- 4 It would then become necessary to determine how the result of that poll should be determined. Presumably, the poll would be regarded as in favour of a recall election if 50 per cent or more of the votes were in the affirmative. However, that is not the only possibility. Alternatively, the requirement could be that 50 per cent of votes in 50 per cent of Legislative Assembly electorates were in the affirmative. Alternatively again, a lower percentage of affirmative voters could be required.

⁵³³ Ken Coghill (Submission 17), 2.

5 The Panel's view is that a requirement to hold a successful poll before a recall election is undesirable.⁵³⁴ It takes that view for a number of reasons. First and foremost, if the requirements for a successful recall petition are met, that should itself be taken as an adequate demonstration of the desire for a recall election. The conduct of a separate poll for a recall election is also expensive.⁵³⁵ It would require political organisations to incur considerable additional expense. While Australians generally appear happy to participate in the democratic process, many may feel that they are being called on to vote too frequently if recall elections first required a prior successful poll. Questions would then arise as to whether voting at such a poll should be compulsory. In conclusion, one poll is preferable to two.

TIMES WHEN A RECALL ELECTION IS NOT PERMITTED

6 A government serves a four year term. It must go to the electors at the end of that time. It seems *prima facie* obvious that recall elections should not be permitted during some parts of that term. Equally, it seems *prima facie* obvious that the parts of the parliamentary term where recall elections should not be permitted are at its start and at its end.

7 There are many reasons why recall elections should not be available immediately following the commencement of a new term of office by a government, as noted in many of the submissions made to the Panel. It will inevitably take some time for a new government to find its feet. Even a government is formed by the same political party as the previous government, the composition of the new Ministry is likely to be different, ministerial portfolios may be redistributed, and there may be a different Premier. Members of a coalition or minor parties or independents may have to be accommodated. The government will also have to determine which persons hold senior positions in the Public Service and on each Minister's personal staff. Restructuring of Public Service Departments and other government entities may also be under consideration or in progress. Further, in many cases the new government will claim to have been elected with a mandate to change policy or the style of government.

⁵³⁴ This view is shared by the NSWEC (in relation to its support of a more limited form of recall): Submission 21, 13.

⁵³⁵ The costs of the last two general state elections in 2007 and 2011 (which are likely to be roughly comparable to the cost of the polls contemplated here) were \$38.527 million and \$40.917 million, respectively. The Panel thanks Mr Trevor Follett, NSWEC Finance Director, for providing these figures.

- 8 The Panel thinks that a government which has been elected should be given a suitable period within which to govern, without being open to the possibility of a recall election.⁵³⁶ This is so whether the party in government obtained an absolute majority in the Legislative Assembly at the general election or whether it has had to cobble together a majority with the participation of minor parties or independents. Indeed, if the government's majority has been obtained by making arrangements with minor parties or independents, there is perhaps a stronger case for immunising it from the possibility of recall elections during a certain period after the general election.⁵³⁷
- 9 The problem, however, is to identify the length of the period following a general election during which a recall election cannot be held. The selection of an appropriate period involves, of course, a value judgment, and the Panel recognises that the issue is one on which views might well differ, as the views expressed in the submissions made to the Panel did.
- 10 One view is that members of the Legislative Assembly are elected for a term of four years: a government formed from such members should have at least half that term within which to govern – governing may involve implementing policies which it regards as needed but which will be unpopular – without having the spectre of a recall election in the background.
- 11 Another view is that recall election should only be available in the last year – perhaps year and a half – of a four year term. In such a case the recall election would effectively be an acceleration of the end of the four year term. If such an approach were adopted, there would seem little point in having a period at the end of the term when recall elections could not take place. There would also, of course, seem little reason why anyone would seek to have a recall election in the last months of a government's term. And, one would expect, attempts to obtain sufficient support for a recall election would be more likely to founder as the end of the term of the Legislative Assembly drew closer.

⁵³⁶ This view is expressed in the several submissions: Anne Twomey (Submission 12), 5; New South Wales Bar Association (Submission 16), 3; Ken Coghill (Submission 17), 4; Paul Lynch (Submission 18); NSWEC (Submission 21), 12.

⁵³⁷ Governments so formed are inherently less stable than those when the principal party in government obtained an absolute majority. The possibility of changing allegiances is already dealt with by sections 24B(2) and 24B(6) of the *New South Wales Constitution*. See Section E.

- 12 A third view is that the period after an election when there is not to be a recall election should be more than a year but less than two years. The Panel's view, it may be noted, is that a new government should have a period of at least a year before it is exposed to the possibility of a recall election. Anything less than that would expose governments to undesirable potential instability. Losing parties at the general election might seek to seize on the new government's temporary difficulties in order to have, by way of a recall election, a re-run of the last general election.
- 13 Assuming that the appropriate period during which recalls cannot occur should be more than a year but less than two years after the last general election, the possible periods within which a recall election might not be held would seem to be 15, 18 or 21 months. It may be said immediately that it seems relatively unlikely that a new government would demonstrate sufficient incompetence or corruption that the electors would want it recalled after only 15 months, but it is possible. Similar observations apply, with diminishing weight, to periods of 18 and 21 months. It should also be noted that the closer the period would be to 12 months, the more the considerations referred to in paragraph 12 intrude.
- 14 At the same time, however, a matter to be remembered is that if there is to be a possibility of a recall election, the 'window' within which it might take place has to be sufficiently wide to allow the procedure a practical operation. A further matter is that discussed in Section H, namely that adoption of this notion of recall elections does involve a change in the philosophy underlying the democratic system in New South Wales, and would involve a change in the way in which governments would conduct themselves in governing, in both their legislative and executive roles. The selection of any post-election immunity period has to be made with these matters in mind. The selection of that period also needs to take into account whether any, and what, period at the end of a four year term should be one where a recall election may not take place.
- 15 To have provision for a recall election in circumstances where a general election must in any event be held in the near future seems unnecessary, indeed a little bizarre. That period is one when the parties and candidates are in or getting into 'campaign mode', developing policies and selecting candidates. The prospect of a recall election during that period would require many of these activities to be conducted prematurely and in a time frame which is unduly compressed. In the event the Panel's view is that there

should not be recall elections in the last six months of the term of office of a Parliament.⁵³⁸

- 16 Returning then to the starting point of the window during which recall elections may be held, the Panel's view is that recall should not be permitted during the first 18 months of a Parliament's term.⁵³⁹ The Panel recognises, as it has noted above, that this is an issue on which different views might well be held, but it takes that view because it regards it as desirable that there be a sufficient period during which a new Parliament is not subject to recall, but that there yet remains a sufficient window within which recall may take place. That window is half the four year term, from the 19th to the 42nd month of that term.
- 17 A further question arises in relation to the period of 18 months. Should it be the time in which a recall election may not be held, or a petition for a recall election may not be lodged, or signatures for a recall petition may not be sought? Clearly a recall election itself should not be held in that period, but there is a question whether the procedure for a recall election could be initiated during that time.
- 18 The Panel's view is that the formal procedure for a recall election should not be commenced during the 18 month period, i.e. that the petition for a recall election may not be lodged during that period.⁵⁴⁰ The Panel is also of the view that the signatures for such a petition should not be valid if obtained during the 18 month period. The prospect of a recall election can be destabilising to government. It can at least divert attention from the business of government. The Panel regards it as undesirable that, before the expiration of the 18 month period, opponents of the government be able to say that they have a petition for recall 'ready to go', i.e. ready to be lodged on the first day after the 18 months has expired.
- 19 In short the Panel's view is that a recall election should not be able to be held, nor should a petition for such an election be able to be lodged during the first 18 months after a general election. Signatures collected for an election petition before the expiration of the 18 month period should not be valid.

⁵³⁸ This view is shared by Paul Lynch (Submission 18) and the NSWEC (Submission 21, 12).

⁵³⁹ This view is shared by the NSWEC (in respect of the more limited form of recall which it supports): Submission 21, 12.

⁵⁴⁰ This view is shared by the NSWEC: Submission 21, 12.

20 A similar question does not arise in relation to the last six month period. It would be sufficient to provide that a recall election is not to be held during that period.

RECALL ELECTION FOR WHOM?

21 This is an issue of considerable difficulty.⁵⁴¹

22 A political party is appointed to govern if it is able to command a majority in the lower House. A simple, perhaps deceptively so, solution would be that the recall election be held for the Legislative Assembly only.

23 This solution is deceptively simple because it does not resolve the immediately following question of the term of office of the members of the Legislative Assembly elected at the recall election. Are they to hold office for a new term of four years, or are they to hold office for the remainder of the four year term of those members of the Legislative Assembly whom they have replaced?

24 If one accepts the latter proposition, i.e. that their term is the remainder of that of the members whom they have replaced, there would be no need to give consideration to the position of members of the Legislative Council whose terms of office are two terms of the Legislative Assembly. There is a problem, however, if that course be adopted. It means that the Legislative Assembly, as composed of members elected at the recall election, will necessarily only have a short life and one must wonder whether there is much benefit in having two short term governments in a four year period.

25 An obvious alternative would be to treat the recall election as if it were a general election, with the consequence that a new term of four years would commence for the members of the Legislative Assembly elected at the recall election.

26 It would be necessary to deal with the position of members of the Legislative Council if that proposal were adopted. As matters stand, half the members of the Legislative Council are required to stand for election at the time of each election for the Legislative Assembly. Adoption of this proposal would have the result that:

- (a) The seats of members of the Legislative Council which would have become vacant at the next ordinary election for the Legislative Assembly will become vacant earlier. (If a recall election were held at, say, the end of the third year of

⁵⁴¹ See Graeme Orr, Submission 19.

the then current term, the retiring members would have served seven years in the Legislative Council.)

(b) The seats of the other members of the Legislative Council will become vacant earlier. (Using the three year example in (a), they too would serve a total of seven years, assuming no recall election occurred during the remainder of their term of office.)

27 A further possibility is that a recall election be for all members of both Houses – in effect a double dissolution of the Parliament. If that course were adopted it would be necessary for provision to be made dividing those who became members of the Legislative Council at the recall election into two different terms of office, one group holding office for four years, the other for eight years.

28 The Panel's preferred view is that the recall election should replace the general election for the Legislative Assembly which would next have been held, and that at the same time the seats of those members of the Legislative Council which would have become vacant at the time also be the subject of the recall election.

MORE THAN ONE RECALL PETITION?

29 The question of multiple petitions during the life of a Parliament should be mentioned. The point could be made that if the ability to petition is given to citizens, they should be able to petition as and when circumstances unfold.

30 The issue, however, goes away if the recall election takes the place of the next general election. It goes away because the result of the recall election will be a new government with a new term. In relation to such new government there could not be a petition for a recall election until the end of its first 18 months.

31 Further the adoption of the view that there should not be a separate poll for a recall election – see paragraphs 3 to 5 above – means that if the support for a petition satisfies the requirements for a successful recall election petition, the recall election follows automatically. If the recall election petition does not satisfy those requirements, nothing flows from it. In those circumstances there seems no reason to prevent the lodgement of a later petition, which may comply with such requirements.

GROUNDS?

- 32 The notion that an application for a recall election for the Legislative Assembly and for half the Legislative Council should have to identify ‘grounds’ on which the recall election is sought has a somewhat odd air to it. For there to be a recall election there will have been collected a very substantial number of signatures, which may have been provided for a wide variety of reasons. Further, since what is sought is, in effect, an acceleration of the next election, most of such ‘grounds’ would be so broadly stated as to be political slogans.
- 33 Again, the Panel is against any need for a statement of ‘grounds’ or ‘cause’.⁵⁴²

⁵⁴² This view is supported, though tentatively, by the New South Wales Bar Association (Submission 16).

SECTION K. MECHANISMS

- 1 This Section outlines the procedure which the Panel would recommend if recall elections along the lines referred to in Section J were introduced in New South Wales.
- 2 A diagram summarising these procedures is at the end of this Section.

THE RECALL PETITION

- 3 The first step in the recall process is the recall petition. The following paragraphs describe the process which the Panel would recommend a recall petition should follow. This process consists of three steps:
 - (a) Step 1: Applying to commence a petition
 - (b) Step 2: The petition
 - (c) Step 3: Verifying the petition

Step 1: Applying to commence a petition

Persons eligible to apply for a petition

- 4 The Panel recommends that an application to commence a petition must be supported by the signatures of 500 persons registered to vote in New South Wales at the time the application is lodged. A sitting member of either House should not be capable of being a signatory to a petition. There should be no requirement that those 500 people be drawn from a certain percentage of electorates.
- 5 The Panel recognises that this is a more difficult procedural hurdle than that imposed in many other systems discussed in Section D (where often one voter alone can apply to commence a petition) and recommended in the majority of submissions to the Panel but regards this restriction as appropriate.⁵⁴³ A successful application will obligate the NSWEC to set up and administer a petition of significant size and scope. The

⁵⁴³ Anne Twomey does suggest that ‘it would probably be appropriate to ... require some minimal level of support, such as the signatures of a number of enrolled voters, to avoid frivolous and vexatious petitions’: Submission 12, 65.

administration of the petition will be time consuming and costly. Further, according to the current proposal, a successful recall petition would result in all the Legislative Assembly and half the Legislative Council seats being up for election. It is appropriate that a petition can only be commenced if there is evidence of a serious degree of discontent in the electorate, evidenced by the signatures of 500 voters.

Application procedure

- 6 The NSWEC is a trusted and efficient body, already responsible for administering other electoral processes. It has already in place many of the procedures necessary to handle such processes. Therefore, as was suggested to the Panel, including by the NSWEC itself,⁵⁴⁴ applications to commence a recall petition should be made to and administered by the NSWEC.
- 7 For reasons similar to those discussed above at paragraph 5, the Panel recommends that an application to commence a petition should not be able to be made online. Applications should only be able to be lodged in person by one of the 500 applicants, or by mail.
- 8 It is likely that the NSWEC will need to charge an application fee to cover or defray the administrative costs associated with processing the application and running the petition, if the application is approved.⁵⁴⁵ As the NSWEC suggests, this application fee could be forfeited if the application is found to be invalid, or the petition does not receive enough signatures.⁵⁴⁶
- 9 At paragraph 33 of Section J the Panel expressed the view that it should be possible to commence a petition on any ground, and that there should be no restriction on the number of petitions that can be commenced ‘against’ a government. Therefore, it is not necessary for an application to involve proof that any such grounds have been made out, or that the recall petition differs from others that may have come before. However, to ensure that the petition process is not over-used or abused by particular interest groups, an individual voter should only be able to apply to commence a petition once. That is, a voter can only act as one of the 500 voters who apply to

⁵⁴⁴ Anne Twomey (Submission 12), 65; NSWEC (Submission 21), 6.

⁵⁴⁵ Anne Twomey (Submission 12), 65.

⁵⁴⁶ Submission 21, 7.

commence a petition once during the lifetime of a government. There should be no limit, however, on the number of petitions as distinct from applications for petitions any one voter can sign.

Window within which an application can be made

- 10 For the reasons discussed as paragraphs 6-19 of Section J the Panel recommends that there should be a limited window of time within which a government can be recalled; namely, from the beginning of the nineteenth month of a government's term to the end of the 42nd month of that term. The government should be immune from recall in the first 18 or the last six months of a government's term.
- 11 No formal step in the recall process should be able to occur outside this window. It should not be possible to lodge an application to commence a petition with the NSWEC outside the window. Any applications received by the NSWEC outside the window should be automatically rejected and no application fee charged.

Multiple petitions

- 12 For the reasons discussed at paragraphs 29 to 31 of Section J, the Panel recommends that there should be no limitation preventing multiple recall petitions from being initiated against the same government, whatever the reason.
- 13 As discussed above at paragraph 9, however, an individual voter should only be able to apply to commence one petition against each government. This, plus the requirement that an application be signed by 500 voters, and the attendant application fee, should suffice to deter frivolous or vexatious attempts at recall.
- 14 Only one recall petition or election should be on foot at any one time. Applications to commence a recall petition whilst:
 - (a) another application is being verified;
 - (b) another petition is active;
 - (c) the results of a petition are being verified;
 - (d) a petition has succeeded and a recall election is pending; or

(e) the results of a recall election are being verified;

should be automatically rejected and no application fee charged.

Verification of the application

- 15 The NSWEC should again be entrusted with verifying that any application received complies with all the relevant requirements.⁵⁴⁷ This will involve verifying that the application satisfies the formal requirements discussed above (for example that all 500 applicants are duly registered to vote in New South Wales, and have not previously applied to commence a recall petition). It will also involve verifying that there has been no breach of the funding, disclosure or other rules which, the Panel recommends, should apply to all stages of the recall process (see below).
- 16 If the NSWEC detects any breach of the funding, disclosure or other rules it should automatically declare the application to be void. The application fee should be forfeited to Treasury, as suggested by the NSWEC,⁵⁴⁸ and no recall petition should be launched. However, an applicant should be able to apply to the Supreme Court to have the breach excused if it is trivial or inconsequential and occurred innocently.
- 17 It does not seem desirable to place a strict limit on the time within which the NSWEC should verify an application once received. The NSWEC would no doubt carry out its task with expedition, bearing in mind the seriousness of the proposal which is inherent in such an application, and circumstances will vary.

Step 2: The Petition

- 18 Once an application has been lodged with and verified by the NSWEC, the petition stage can commence.

Launching the petition

- 19 The NSWEC will require some time to launch the recall petition. It will be required to set up the primary, online signature collection system, publish additional forms for collecting signatures from voters in person or by mail, and commence a campaign to ensure public awareness of the recall. Again, it does not seem necessary to impose any

⁵⁴⁷ Anne Twomey (Submission 12), 68; NSWEC (Submission 21), 9.

⁵⁴⁸ Submission 21, 7.

strict time limit on the time allowed the NSWEC to complete these processes. In any event, subsequent relevant time limits will not start to run until this process is complete and the petition is ‘active’.

Format of the petition

- 20 In their submissions to the Panel, both the NSWEC⁵⁴⁹ and Dr Anne Twomey⁵⁵⁰ suggested that the petition could be run ‘online’. The NSWEC suggested that the iVote system used at the last general election could be adapted for this purpose.⁵⁵¹ Such an online system is less cumbersome than the collection of thousands of hardcopy signatures. The use of an electronic system can increase the potential for some forms of fraud.⁵⁵² However, an online system such as the NSWEC’s iVote system can comprise inbuilt security mechanisms designed to prevent fraud and enable quick verification of signatures collected.⁵⁵³ For these reasons, the Panel agrees that the petition should be run online. Voters should also be able to signal support for the petition in person, by telephone and by mail, in order to ensure that no one is excluded from the petition process.⁵⁵⁴

Petition active

- 21 The Panel’s view is that – as in most systems discussed in Section D, and as suggested by most submissions made to the Panel – a recall petition should only be active for a limited period of time. The requisite number of signatures must be collected within this time. Limiting the life span of a recall petition will ensure that uncertainty produced by the launch of the petition does not continue longer than is strictly necessary to enable the electorate to signal its support or disapproval.
- 22 The time during which signatures must be collected should commence as soon as the primary, online recall petition has been launched. The recall petition should then be active for a period of 60 days. The Panel recommends this period of time for the following reasons.

⁵⁴⁹ Submission 21, 9-10

⁵⁵⁰ Submission 12, 62.

⁵⁵¹ Submission 21, 10.

⁵⁵² Submission 12, 62.

⁵⁵³ Submission 21, 10.

⁵⁵⁴ Submission 21, 11.

- 23 *First*, 60 days is a short enough time to ensure that government is not unnecessarily disturbed by the recall process, and that a successful recall petition is a genuine expression of a significant level of dissatisfaction amongst the electorate, rather than the result of eventually ‘drumming up’ enough support via forceful advertising or politicking.
- 24 *Secondly*, 60 days was the time recommended by the NSWEC in its submission to the Panel. The Panel recognises that in making its submission, the NSWEC was contemplating a more limited form of recall applicable only to individual members of Parliament. More resources may well be necessary in the broader form of recall, but if the recall procedure were adopted its administration would form part of the administration of the electoral system of the State, which already contains the ‘peaks’ brought about by four year general elections, and by by-elections.
- 25 A period of 60 days is shorter than that commonly seen in other jurisdictions, such as the United States. The Panel, however, proposes that signatures be collected electronically, which is a quicker and easier process than collecting signatures manually, as occurs in the United States.⁵⁵⁵

Number of signatures required – the threshold

- 26 The Panel’s view is that for a recall petition to have the effect of triggering a recall election, there should be a threshold of signatures in support of it, and that the level of such support should be high, and spread across electorates in the State.
- 27 In this regard the Panel’s view is that in order to trigger a recall election, a petition must be signed by 35 per cent of voters registered to vote in New South Wales at the time the recall petition is commenced, and by 5 per cent of voters in at least 50 per cent of the State’s electorates. The Panel recommends this for the following reasons.
- 28 *First*, for reasons similar to those discussed in paragraph 5, the signature threshold should be relatively high but, as discussed in relation to British Columbia in Section D and as evidenced by Australia’s own experience with constitutional referendums, the threshold should not be so high that it is practically impossible for a recall election to occur.

⁵⁵⁵ See Anne Twomey (Submission 12), 67; NSWEC (Submission 21), 11-12.

- 29 *Secondly*, it should be remembered that the form of recall being proposed is the recall of the government,⁵⁵⁶ in the context of a system of representative democracy involving preferential voting and proportional representation. In such a system, the government of the day may well only have received less than 50 per cent of the primary vote at the relevant election. The percentage of signatures required to remove that government should bear some relation to these figures. Choosing a particular percentage will necessarily involve a value judgment on which reasonable opinions could differ. The Panel believes 35 per cent strikes a fair balance between these considerations.
- 30 *Thirdly*, it is important that signatures are received from a broad spectrum of voters.⁵⁵⁷ The recall process should not be dominated by interests concentrated in particular areas of the State, nor should a recall election be able to be triggered if the vast (geographical) majority of the State does not support it. A requirement that petitioners be drawn from the majority – i.e. at least 50 per cent – of the State’s electorates minimises these risks. The five per cent threshold is again a value judgment. It should ensure, however, that the representative aspect of the petition is not merely a token, but is also not so high as to be impossible to satisfy.
- 31 *Fourthly*, the signature threshold should be defined by reference to the number of voters registered to vote at the time the petition is commenced. This differs from the approach in many of the jurisdictions discussed in Section D, where the threshold is commonly defined by the number of voters who were registered to vote or actually voted at the previous relevant election. The Panel disagrees with the approach in such jurisdictions. A recall election is designed to redress *current* dissatisfaction with government. If a government is to be recalled, it should be because it is failing to act in the best interests of the electorate today, not simply because it failed to do what it had promised those voting at the last election. A percentage referable to the number of presently enrolled voters seems also more appropriate in a system having compulsory voting, and where government is thought to consist of responsible representatives, entrusted to make policy decisions in the best interest of the state, rather than ‘instructed delegates’, appointed only to put in place the mandate on which they were elected.

⁵⁵⁶ In such circumstances, ‘a figure on the higher end of the (possible) spectrum would be appropriate’: Anne Twomey (Submission 12), 66.

⁵⁵⁷ This view was expressed in many submissions: Anne Twomey (Submission 12), 66-67; Ken Coghill (Submission 17), 6; Paul Lynch (Submission 18).

Petition deactivated

- 32 Once the 60 day period has elapsed, the online petition shall be deactivated. No more signatures should be accepted in person or by phone, and no signatures sent by post after this date should be accepted.

Step 3: Verifying the petition

- 33 Once the petition has been deactivated, the NSWEC should then be entrusted with the task of verifying the results.⁵⁵⁸ This will involve, amongst other things, tallying the number of signatures, checking that all are genuine and belong to citizens currently registered to vote, and, the Panel would recommend, ensuring that the relevant financial restrictions (discussed below) have been complied with.
- 34 Once again the Panel is reluctant to recommend a strict time frame within this verification process must be completed. Rather, it would recommend that the NSWEC should endeavour to verify the petition as expeditiously as possible, as no doubt it would. Here, the Panel notes that many of the safeguards which can be built in to an online signature collection system, discussed in the NSWEC's Submission⁵⁵⁹ and paragraph 20 above, could greatly assist and expedite the NSWEC's task.⁵⁶⁰
- 35 As noted earlier, the Panel also recommends that, insofar as possible, the NSWEC should monitor compliance of the petition process with the applicable finance, disclosure and other rules (discussed below). If breach is detected the petition should be automatically deactivated and declared void, rather than allowed to run its course, in order to prevent unnecessary disruption to government and expense.

Result of the petition

- 36 Once the verification procedure is complete, the NSWEC would declare whether the petition was successful or unsuccessful. A petition would be successful if:
- (a) if had been signed by the requisite number and spread of voters; *and*

⁵⁵⁸ Anne Twomey (Submission 12), 68-69; New South Wales Bar Association (Submission 16), Ken Coghill (Submission 17), 5-6; NSWEC (Submission 21), 10.

⁵⁵⁹ Submission 21, 10

⁵⁶⁰ Anne Twomey (Submission 21), 68.

(b) the relevant finance and disclosure rules had been complied with.

A petition would be unsuccessful if:

(a) it had not been signed by the requisite number of voters; *or*

(b) the relevant finance and disclosure rules had not been complied with.

37 A petition would automatically trigger a recall election. For the reasons discussed in Section J there would not then be a separate election to determine whether there should be a recall election

38 If a petition is unsuccessful:

(a) no recall election is triggered, and the government of the day continues;

(b) the application fee paid by the 500 applicants is forfeited to the Treasury, as recommended by the NSWEC in its submission;⁵⁶¹ and

(c) a new application to commence a recall petition can be lodged at any time (within the 'window of time' during which recall is possible).

39 However, if the petition is unsuccessful because one of the financial restrictions or other formal requirements has been breached, an applicant can apply to have the breach excused by a court. This process is discussed further below.

THE RECALL ELECTION

Timing of election

40 Once the NSWEC has declared that a recall petition has been successful, a recall election must then be called. The procedure by which this occurs should mirror, as far as possible, the ordinary electoral processes provided for by the *New South Wales Constitution* and other electoral laws (as amended, where necessary, in the manner discussed in Section L).⁵⁶²

41 In outline, this will mean that when the NSWEC has declared that a recall petition has succeeded:

⁵⁶¹ Submission 21, 7.

⁵⁶² Ken Coghill (Submission 17), 6.

- (a) the Governor must make a proclamation dissolving the Legislative Assembly and the relevant half of the Legislative Council;⁵⁶³
- (b) the Governor must then, within four days of this proclamation, issue writs calling for an election to be held;⁵⁶⁴ and
- (c) an election will then be held on the date specified in the writs. This date must be a Saturday, and no later than the 40th day after the issue of the writs (as is the case following the dissolution of parliament because of a vote of no confidence).⁵⁶⁵

The new Parliament

- 42 Following the election a new Parliamentary term would commence. The newly elected Legislative Assembly would begin a four year term, and the newly elected half of the Legislative Council would begin a term equivalent to twice that of the new Legislative Assembly.⁵⁶⁶ The term of the other half of the Legislative Council would conclude at the end of the term of the newly elected Legislative Assembly.
- 43 The ‘window’ during which a recall petition cannot be commenced would run afresh from the commencement of the term of the newly elected Legislative Assembly.

FINANCE, DISCLOSURE AND OTHER RULES

Finance and disclosure rules

- 44 Fear that money could play an undesirably influential role in the recall process was one of the key concerns expressed in the submissions to the Panel, and by the Panel itself. This concern is supported by the international experiences discussed in Section D – particularly the discussion of the corrupting influence wealth and special interest group funding has had in the United States. For these reasons, it is necessary to consider how recall petitions and elections should be permitted to be financed.

⁵⁶³ *New South Wales Constitution* s 25B.

⁵⁶⁴ *Ibid* s 11A.

⁵⁶⁵ *Ibid* ss 11A, 24A, 25B; Margaret Healy, ‘State Election Dates’ (Current Issues Brief 8 of 1998-99, Parliamentary Library, Parliament of Australia, 30 March 1999) <<http://www.aph.gov.au/library/pubs/cib/1998-99/99cib08.htm>> at 14 September 2011.

⁵⁶⁶ Anne Twomey (Submission 21), 69.

Recall process subject to ordinary rules of finance and disclosure

- 45 The recall process – both petition, and election – should be subject to the rules contained in the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (the ‘*Election Funding Act*’) in so far as possible.
- 46 A detailed examination of the terms of the *Election Funding Act* and their application to the recall process is beyond the scope of the Report. The Panel recommends, however, that if recall elections are to be introduced, there be the necessary amendments to the *Election Funding Act* to ensure it sufficiently covers the various stages of the recall process described above.⁵⁶⁷
- 47 For example, it may be of importance to ensure that the initial 500 voters who lodge an application to commence a recall petition disclose any funding they have received, and that details of that funding is prominently displayed on the online petition and paper petition forms sufficiently prominently that voters are aware of the origin of and interests behind the recall petition.

Paid signature collectors

- 48 The international experiences described in Section D demonstrate that the use of paid signature collectors has been a prominent and contentious aspect of recall elections. It requires particular mention.
- 49 If, as the Panel recommends, signatures are primarily collected electronically, the issue of paid signature collectors would not arise in the same way that it has in the United States. There would, for example, be no paid employees walking the streets to entice voters to sign paper petitions there and then. However there may, for example, be companies or individuals paid to send emails encouraging voters to visit the recall petition website, or ‘bloggers’ paid to communicate certain views about the recall campaign. These forms of paid advertising are very difficult to police or ban altogether. And, of course, one cannot underestimate the ingenuity in the use of electronic communications of those who have an interest in avoiding instructions. Nevertheless the Panel’s view is that the problem of paid signature collectors would

⁵⁶⁷ Anne Twomey (Submission 12), 61, 68; New South Wales Bar Association (Submission 16), 5-6; Graeme Orr (Submission 19), 2.

be sufficiently addressed by the development of strict disclosure rules together with appropriately condign sanctions for their breach.

Other rules

- 50 Rules will need to be in place to ensure that other fraudulent activity does not take place in connection with the recall petition or election. Risks which require particular attention include fraudulent signatures appearing on the petition (though the electronic systems discussed above may serve to reduce the likelihood of this occurring) and voters being paid to sign the petition. Existing electoral legislation would require amendment to make it applicable to recall petitions and, as mentioned above, to recall elections.

Sanctions for breach

- 51 Throughout this Report, the Panel has noted the significance of adopting a new electoral process which would enable a government to be prematurely recalled, and the cost, time and potential disruption to government which a recall procedure could involve. Such cost, delay and disruption would be justifiable if the process results in an outcome that is genuinely reflective of the electorate's dissatisfaction with the government of the day. However, the process must be closely policed to ensure that these inconveniences are not caused without good reason, and that the process itself is not manipulated for personal or purely partisan reasons, or by vested political interests.
- 52 For these reasons, the Panel recommends that a breach of the finance, disclosure or other rules which, it recommends, should apply to the recall process should be punishable to significant financial penalties and, where appropriate, imprisonment. This may require an amendment to the *Election Funding Act* and to the *Election Funding and Disclosure Regulation 2009* (NSW).
- 53 For these reasons, the Panel also recommends that if a breach of the finance or disclosure rules is discovered to have occurred at any time during the application or petition process, the application or petition should be automatically declared void regardless of the number of signatures collected. This declaration would be made by the NSWEC.

54 The Panel acknowledges, however, that such a breach may be small or inconsequential, or an innocent mistake. For these reasons, it should be possible for one or more of the applicants to apply to the Supreme Court to have the declaration of the NSWEC set aside. It would be within the court's discretion to allow the application or petition to proceed, or that no penalty should be payable, notwithstanding the breach.

SCRUTINY OF THE RECALL PROCESS

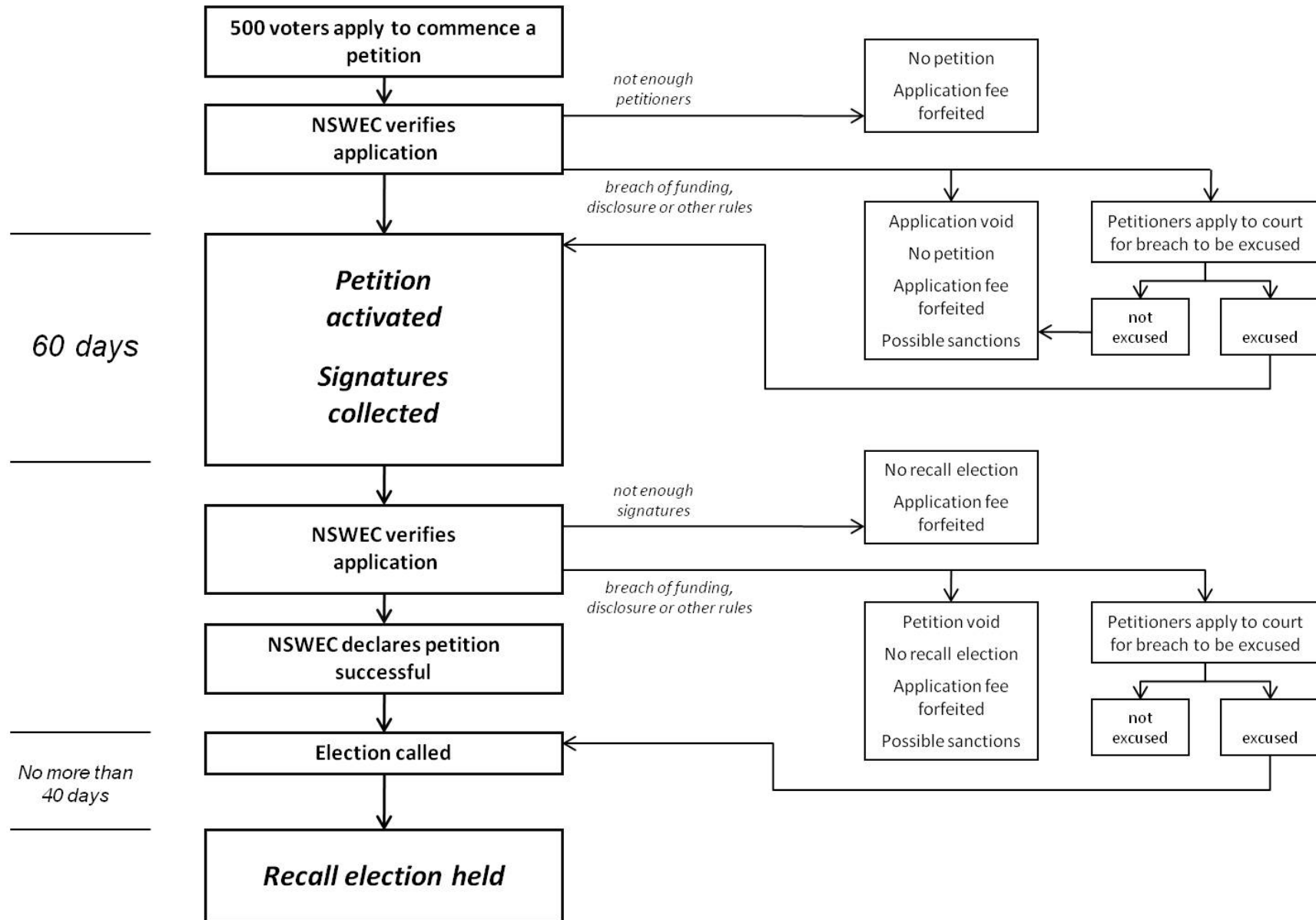
55 The international experiences discussed in Section D demonstrate that the recall process can often be contentious. In particular, the Venezuelan experience discussed at paragraph 126 of Section D of this Report demonstrates that it is necessary to appoint a trusted institution with clear authority to scrutinise the recall process and determine its legitimacy.

Scrutiny of petitions

56 As it suggested in its submission to the Panel, the NSWEC should be responsible for scrutinising the formal elements of the recall application and petition, in the manner described above.⁵⁶⁸ The Supreme Court should, however, be vested with the limited jurisdiction of the nature described above.

⁵⁶⁸ Submission 21, 9.

SUMMARY DIAGRAM



SECTION L. IMPLEMENTATION OF PROVISIONS FOR RECALL ELECTIONS

- 1 The Terms of Reference, in Item 3, seek the Panel's views on the best ways for constitutional reform to take place, if recall elections are introduced. The matters the Panel is asked to consider include 'mechanisms for canvassing the level of community support for any proposed constitutional changes' and 'potential referendum questions'.
- 2 As is apparent from Sections J and M, the Panel's majority view is that the only form of recall elections which it could support is a recall election for the Legislative Assembly accompanied by an election for the seats of the members of the Legislative Council whose terms of office would otherwise come to an end at the same time as the end of the four year term of the then current Legislative Assembly. The Legislative Assembly so elected would then have a fresh term of four years. The members of the Legislative Council so elected would commence an eight year term. The remaining members of the Legislative Council would have a term the same as the life of the Legislative Assembly elected at the recall election (i.e. four years).
- 3 This Section proceeds upon the basis that the procedure to be implemented is that just described. The implementation of such a proposal would, of course, require legislative change. For the reasons set out below, such legislative change would itself also require the support of a referendum.
- 4 Even if the reforms needed to implement recall elections were not constitutionally required, it seems appropriate that a change of such significance – reform involving citizen initiated recall – be approved by the people, that is, by referendum.

REFERENDUM

- 5 The need for a referendum has been touched upon in Section E. It is necessary now to deal with the topic more fully. The provisions of the *New South Wales Constitution* which are relevant are sections 7A and 7B. It is convenient to deal first with section 7B.

Section 7B

- 6 Section 7B(1) provides that:

A Bill that (a) expressly or impliedly repeals or amends section 11B, 26, 27, 28 or 29, Part 9, the Seventh Schedule or this section, or (b) contains any provision to reduce or extend, or to authorise the reduction or extension of, the duration of any Legislative Assembly or to alter the date required to 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.

7 Subsections 7B(2) to (5) then set out the procedure to be adopted in conducting the referendum required by section 7B(1).

8 It is therefore necessary to determine which legislative changes would fall within the scope of section 7B and require a referendum.

9 *First*, legislation implementing recall elections would inevitably contain provisions which reduced the duration of a Legislative Assembly. A referendum would thus be required by section 7B(1)(b) for their implementation.

10 *Secondly*, it is unlikely that legislation implementing recall elections would expressly or impliedly repeal any of the sections referred to in 7B(1)(a).

11 In this regard, section 11B of the *New South Wales Constitution* refers to voting being compulsory at periodic Council elections or at elections for the Legislative Assembly. Section 26 of the *New South Wales Constitution* provides that each member of the Legislative Assembly shall be elected to represent one electoral district only. Neither provision would be repealed or amended expressly or impliedly by the recall election procedure.

12 Section 28 deals with equality of numbers of voters in electoral districts for the Legislative Assembly. They are to be equal 'but subject to a margin of allowance not exceeding 10 per cent more or less of that quotient'. This provision would not be affected by the proposed recall provisions. Section 29 provides that the election of members of the Legislative Assembly shall be conducted in accordance with the provisions of the Seventh Schedule. It would not be repealed or amended expressly or impliedly by the recall election procedure. Nor would the Seventh Schedule or section 7B itself.

13 Part 9 of the *New South Wales Constitution* deals with the position of the judiciary. It would not be affected by legislation for recall elections.

14 Section 27 provides for the distribution of New South Wales into electoral districts for the purpose of elections for the Legislative Assembly. The proposal for recall elections would not affect the words of the provision. *However*, the need to treat recall elections as 'general elections' may affect an implied amendment to the provision.

- 15 In the result some of the legislative changes required to implement recall elections would fall within the scope of section 7B. If proposed legislation falls within section 7B(1), it cannot be presented to the Governor for Royal assent ‘until the Bill has been approved by the electors’ in accordance with the procedure described in section 7B.
- 16 The procedure described in section 7B is as follows. First, the Bill must pass through both Houses of Parliament. Secondly, the Bill must then be approved at referendum; the referendum is to take place ‘not sooner than’ two months after the passage of the Bill through both Houses,⁵⁶⁹ on a date fixed by the Governor.⁵⁷⁰ The persons entitled to vote at the referendum are those entitled to vote at a general election for members of the Legislative Assembly.⁵⁷¹ Such entitlement is dealt with by Part 3B of the *Parliamentary Electorates and Elections Act*. The actual voting at the referendum is to take place in accordance with the *Constitution (Further Amendment) Referendum Act 1930* (the ‘*Referendum Act*’).⁵⁷² Thirdly, if a majority of electors voting approve the Bill it is then to be presented to the Governor for the Royal assent.⁵⁷³

Section 7A

- 17 The second provision which is relevant is section 7A of the *New South Wales Constitution*. Section 7A(1) provides that:

The Legislative Council shall not be abolished or dissolved, nor shall:

- (a) its powers be altered,
 - (b) section 11A, Division 2 of Part 3 (sections 22G, 22H, 22I and 22J excepted), the Sixth Schedule or this section be expressly or impliedly repealed or amended,
 - (c) any provision with respect to the persons capable of being elected or of sitting and voting as Members of either House of Parliament be enacted, or
 - (d) any provision with respect to the circumstances in which the seat of a Member of either House of Parliament becomes vacant be enacted,
- except in the manner provided by this section.

- 18 The following paragraphs consider whether the legislation required to implement recall elections would fall within the scope of any of these provisions.

⁵⁶⁹ *New South Wales Constitution* s 7B(2).

⁵⁷⁰ *Ibid* s 7B(3).

⁵⁷¹ *Ibid* s 7B(2).

⁵⁷² *Ibid* s 7B(4).

⁵⁷³ *Ibid* s 7B(5).

Opening words

19 The opening words of section 7A(1) appear not to be relevant for present purposes. The legislation required to implement recall election would not propose to ‘abolish’ nor ‘dissolve’ the Legislative Council.

Section 7A(1)(a)

20 Section 7A(1)(a) would also appear not to apply. The proposed legislation for recall elections would also not appear to involve an alteration of the ‘powers’ of the Legislative Council.

Section 7A(1)(b)

21 The provisions of section 7A(1)(b), however, may be potentially more relevant. Section 7A(1)(b), when read together with other subsections in section 7A, requires a referendum for a law that expressly or impliedly repeals or amends the provisions of the *New South Wales Constitution* specified in it.

22 The first provision so specified is section 11A. It provides that every general election of members of the Legislative Assembly and every periodic election of the Legislative Council ‘should be held pursuant to writs issued by the Governor’. If recall elections are introduced, they too should be held ‘pursuant to writs issued by the Governor’.⁵⁷⁴ There is no reason why the implementing legislation should dispense with that requirement; if it does not dispense with that requirement, that part of section 7A(1)(b) would not *itself* compel a referendum.

23 The second group of provisions specified is ‘Division 2 of Part 3 (sections 22G, 22H, 22I and 22J excepted)’. That means that the provisions to which this part of section 7A(1)(b) refers are sections 16, 17, 22, 22A, 22B, 22D, 22E and 22F.⁵⁷⁵

24 Some of these provisions do not require further consideration. Thus, section 16 is definitional and implementation of a proposal for recall elections would involve no change in its meaning or operation. The operation of section 17 is now spent.

25 It is also clear that the legislation required to implement recall elections would not affect several of the provisions referred to in section 7A(1)(b). For example, section 22 provides that at a periodic Legislative Council election the persons entitled to vote, and

⁵⁷⁴ See further the mechanisms discussed in Section K. The *Constitution Further Amendment (Referendum) Act 1930* (NSW) contemplates writs for a referendum: see sections 6-9.

⁵⁷⁵ The former sections 17A-21 and 22C have been repealed.

the only persons so entitled, are those who would be entitled to vote if it were a general election of members of the Legislative Assembly. Nothing in the proposal for recall elections would affect the meaning or operation of that provision.

26 Section 22A may be potentially relevant. Insofar as it is potentially relevant, section 22A provides:

(1) Periodic Council elections shall be conducted in accordance with the provisions of the Sixth Schedule.

...

(3) A writ for a periodic Council election shall not be issued until after the issue of the writs for the general election of Members of the Legislative Assembly held next after the immediately preceding periodic Council election and, when issued, shall name as the day for the taking of the poll the same day as the day for the taking of the poll at that general election.

...

(5) Subsection (1) does not limit the power of the Legislature to make laws (being laws that do not expressly or impliedly repeal or amend any of the provisions of the Sixth Schedule and are not inconsistent with any of those provisions) for or with respect to the conduct of periodic Council elections.

27 The Sixth Schedule referred to in sections 22A(1) and 22A(5) deals with the conduct of elections for the Legislative Council. Notably, it provides in clause 1 that, at a periodic Council election, ‘the whole of the State of New South Wales shall be a single electoral district’ for the return of the 21 members of the Council. The proposal for recall elections would not involve any repeal or amendment, express or implied, of section 22A(1) or the Sixth Schedule.

28 The position at first sight seems similar in relation to section 22A(3). Section 22A(3) is concerned to ensure that members of the Legislative Council are not put to an election unless there is also an election for the Legislative Assembly. This section also ensures that the two elections occur on the same day. Legislation implementing recall elections could potentially amend this section, if there is a need to define ‘general election’ so as to include a recall election. This may effect an implied amendment to provisions in which the definition of ‘general election’ is used.

Section 7A(1)(c)

29 Section 7A(1)(c) refers to legislation ‘with respect to the persons capable of being elected or of sitting and voting as Members of either House of Parliament’

Section 7A(1)(d)

- 30 The position may be different, however, in relation to section 7A(1)(d). Whilst the *words* of section 7A(1)(d) are capable of applying to circumstances in which a member's seat may become vacant because of matters such as misconduct or inaction of a member – see the discussion in Section F – the implementation of provisions for recall elections would also seem inevitably to describe circumstances in which the seats of members become vacant.
- 31 This would mean the legislation required to implement recall elections would fall within the scope of section 7A(1)(d), *unless* it falls within the exception in section 7A. The relevant parts of section 7A are:
- (6) The provisions of this section do not apply to: ... (e) 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.
- 32 As noted in Section E, the composition of the electorates of the two Houses and the terms of office of the members of each House are different. Therefore, it may be difficult to draft legislation which, in the terms required by section 7A(6)(e), applies 'in the same way' to both Houses of Parliament.
- 33 Accordingly, when considering any proposed implementation of recall elections, it must be borne in mind that a referendum may be required not only by section 7B(1), but also by section 7A(1).
- 34 If proposed legislation falls within the scope of section 7A(1), once again, the Bill for that legislation may not be presented to the Governor for Royal assent 'until the Bill has been approved by the electors' in accordance with the procedure described in section 7A.⁵⁷⁶
- 35 The procedure described in section 7A is similar to the procedure described in section 7B, discussed above. First, the Bill must first be passed by both Houses of Parliament. Secondly, the Bill must then be approved at referendum; the referendum is to take place 'not sooner than' two months after the passage of the Bill through the Houses of Parliament,⁵⁷⁷ on a date fixed by Parliament.⁵⁷⁸ The persons entitled to vote at the

⁵⁷⁶ *New South Wales Constitution* s 7A(2).

⁵⁷⁷ *Ibid* s 7A(3).

⁵⁷⁸ *Ibid* s 7A(3).

referendum are those qualified to vote at an election for the Legislative Assembly.⁵⁷⁹ The actual voting at the referendum is to take place in such a manner as the Parliament has prescribed.⁵⁸⁰ Thirdly, if a majority of electors approve the Bill, it is then to be presented to the Governor for the Royal assent.⁵⁸¹

REFERENDUM PROCEDURE

- 36 The *Referendum Act* is the principal legislation governing the procedure for a referendum. It may be noted, however, that the *New South Wales Constitution* itself provides for some temporal aspects of a referendum.
- 37 Thus a referendum required by section 7A(1) or 7B(1) of the *New South Wales Constitution* is to take place ‘not sooner than two months’ after the passage of the relevant bill through both Houses.⁵⁸² There is, however, a difference in the provision for selection of the date on which the referendum is to take place. Section 7A(3) provides that the date of the referendum is to be specified ‘by the Legislature’, whereas section 7B(3) provides that the date is to be specified ‘by the Governor’ pursuant to the *Referendum Act*, the relevant provisions of which are sections 6 and 7.⁵⁸³ It may be noted that section 7(2) of the *Referendum Act* requires that the referendum take place within 40 days after the issue by the Governor of the writ.
- 38 There is a further apparent difference in the methods of voting prescribed by sections 7A and 7B. Section 7B(4) of the *New South Wales Constitution* provides that the referendum vote is to be taken under and in accordance with the *Referendum Act*. Section 7A(4) provides that the vote shall be taken in such manner as the Parliament prescribes. The *Referendum Act* appears capable of being a prescription by the Parliament as contemplated by section 7A(4). Accordingly, the Panel treats the *Referendum Act* as that applicable to a referendum under section 7A(1) or section 7B(1).
- 39 It seems unnecessary to go through the legislation relating to the actual conduct of the referendum in detail, other than to note the form of ballot paper contemplated by the

⁵⁷⁹ Ibid s 7A(3).

⁵⁸⁰ Ibid s 7A(4).

⁵⁸¹ Ibid s 7A(5).

⁵⁸² Ibid ss 7A(3), 7B(2).

⁵⁸³ In any proposed referendum care would need to be taken that the Governor and the legislature fixed the same date.

Referendum Act. The ballot paper is to be simple in form.⁵⁸⁴ Those Forms simply require the voter to select a ‘YES’ or ‘NO’ square in response to the question:

‘DO YOU APPROVE of the Bill entitled (Here set out the title of the Bill)?’

REFERENDUM FOR A REFERENDUM?

40 The discussion in this Section has so far been based on the assumption that any provisions for a recall election would be implemented by legislation to that effect, which passed through both Houses and was approved by the voters of New South Wales at a State-wide referendum where the voters constituted one electorate.

41 Another view, however, is that such a procedure should be the second of two polls, with there being an earlier State-wide poll or referendum to determine whether the electors of the State were ‘really’ sufficiently interested in changing the structure of government in New South Wales to introduce *any form* of recall elections.

42 The Panel sees no need for such a first poll. The Panel is of the view that there should only be one poll, namely a poll which asks electors to vote by referendum on a particular legislative amendment bringing into being the recall procedure. It regards a referendum on whether the provisions for recall elections should be enacted, with the necessary attendant publicity and public discussion, as the ‘best way’ to canvass community support. More particularly, the Panel’s views are:

(a) A first poll to determine whether there might be any form of recall election, would necessarily be a poll in the abstract, i.e. one dealing with *all* the possible forms of recall elections. That is unsatisfactory; it does not present the electorate with an issue which is sufficiently focussed. Nor does it allow the political parties and other interests involved a sufficiently defined issue on which to formulate their policy. The question whether there should be recall elections is of potentially great significance. Interested parties should be able to express and promote their views on a topic which is adequately defined.

(b) A referendum on a bill which sets out in specific terms how recall elections are to be implemented, if approved – bearing in mind the times allowed before the referendum is to take place – allows debate on issues which are clearly identified. Of course, as with all referendums in this form, it allows those

⁵⁸⁴ See section 15(1) and Forms B and D in the Second Schedule.

opposed to the proposal to encourage voting adverse to the proposal for a variety of reasons, some going to the heart of the issue, some perhaps trivial, but it is difficult to see how that can be avoided. Further, it is difficult to see that this could be avoided by a 'two-poll' proposal: the issues would arise in any event on the second poll, the true referendum on the issue.

- 43 Of course, if the view were taken that it is politically desirable that there be a sufficient showing of public support for recall elections before an actual referendum is held, there are many steps which a government could take in order to gauge public awareness and support of the issue. For example, the government could organise polling, 'a people's parliament' or focus groups. However, none of these measures should be undertaken without a prior public information program to raise the level of awareness of the issue.

SECTION M. THE PANEL'S VIEWS

INTRODUCTION

1 As will be apparent from the earlier sections of this Report the members of the Panel are agreed as to type of recall election, and procedures for, and leading to, such an election, if provision is to be made for such elections in New South Wales.

2 This is a question on which there are shades of views amongst the Panel's members and it seemed desirable for each to use his or her own words to describe those views.

DAVID JACKSON

3 I have found this a difficult question on which to arrive at a final view, but in the end I favour the introduction of provisions for recall elections along the lines set out in this Report.

4 In expressing that view I recognise that the proposal, in providing for a recall election of the whole of the Legislative Assembly and half the Legislative Council, goes beyond that adopted elsewhere and in particular in the jurisdictions which have adopted the Westminster system of requiring Ministers to be members of Parliament.

5 I recognise also that provision for recall elections would involve some change to the underlying nature of parliamentary democracy in New South Wales and in consequence some shifts in perceptions and behaviours. In particular governments, and members of Parliament, would need to be more attuned to the views of their electorates. But this does not seem a particularly undesirable thing.

6 A feature which I regard as of significance is that the change proposed does not seem dramatically radical. There are presently four year fixed terms for the Legislative Assembly and in consequence the government. In that four year period there are many reasons why serious and widespread dissatisfaction can arise with such a government. The adoption of the present proposal gives an opportunity, in a limited manner, and subject to necessary safeguards, to bring that dissatisfaction to a head and resolve the issue at a ballot.

7 A matter which does concern me is that raised by George Williams in saying that recall elections would further restrict the capacity of government to make difficult, long-term decisions on behalf of the community and that there is a major risk that the option of a

recall election would prevent such decision-making in favour of more short-term populist thinking. I think it right to say that the possibility of a recall election would have such a tendency. I think, however, that governments would recognize that tendency and be assiduous (or more assiduous) in seeking to explain, and justify, to the electorate the reasons why it is necessary for the introduction of policies having longer-term advantages.

- 8 I also would take the view advanced by George Williams that stringent conditions, such as requiring a high number of signatures, are likely to mean that recall elections in practice become accessible only to powerful vested interests such as political parties and those with enough money to organise a concerted statewide campaign. I think, however, that it is inevitable that the necessarily high percentage of voters for a successful petition would require the support, in one fashion or another, of one or more political parties and I would regard their participation as simply part of the political process. So far as vested interests are concerned in recent times there appears to have been vigorous political activity by such interests in relation to matters potentially affecting them – mining tax, carbon tax, tobacco packaging, times of operation of liquor outlets, gambling machines etc. Not all of these are State matters, of course, but they do illustrate that potentially affected interests are likely to spend considerable sums of money to maintain their current social and economic position, whatever the electoral structure. I really doubt, however, whether such interests, largely single-issue interests, have the capacity to gain the necessary number of signatures in support of a petition. I can understand that one, or a number of such interests may have the combined financial capacity to wage a strong campaign, but provisions for the control of electoral spending, including for recall petitions and elections, should alleviate the problem.

ELAINE THOMPSON

- 9 I also found this a difficult question on which to come to a final recommendation. In the end, with some hesitation, I support the introduction of recall elections as outlined in the report, and subject to those limitations and mechanisms.
- 10 While the introduction of citizen initiated recall elections is a major change to the New South Wales system of responsible government, it is, if anything, a continuation of the evolution of the system. The last major change took the power to call an election at

will away from the Government of the day. Citizen initiated recall elections put the power to call an election in the hands of the people, subject to fairly stringent requirements.

- 11 The concern that the mechanism will be manipulated by powerful, partisan and monied interests is a serious one. Equally serious are the potential negative consequences for good government, including the possibility that governments could not introduce much needed, though unpopular changes. In the end I support the views expressed by David Jackson.
- 12 Moreover, there are advantages of the people being able to remove a Government with which there is serious discontent. The knowledge that such recall can take place should make governments more sensitive to the views of the people throughout their term of government. The mechanism of citizen initiated recall is democratic in itself and if successful it results in an election, the most democratic of all processes.

GEORGE WILLIAMS

- 13 After considering the evidence in other nations and all of the arguments, I cannot support recall elections for the New South Wales Parliament.
- 14 I am not concerned that recall elections would involve change to the current systems of representative and responsible government in New South Wales. Indeed, it is important that they continue to evolve in line with modern practice and the needs of the community. On the other hand, I do see recall elections for Parliament as being undesirable because they would likely bring about a number of negative consequences without corresponding benefits. I am also concerned that it is difficult to quantify the benefits given that no Westminster system has adopted a recall procedure that permits the dissolution of the legislature.
- 15 Recall elections would further restrict the capacity of our elected representatives to make difficult, long-term decisions on behalf of the community. There is a major risk that the option of holding a recall election would prevent such decision-making in favour of more short-term populist thinking. The pressures for this are already too great in our system of government, and should not be further exacerbated. Further pressure would result both from the persistent threat of an immediate election, and because there would be a significant shift in the system towards parliamentarians

acting as direct agents of their communities rather than having the capacity to make independent, informed decisions.

- 16 There is an immediate democratic appeal to recall elections, and there is a good argument that recall elections are desirable when there is an overwhelming clamour across community for an early election. However, there is no satisfactory way of designing recall procedures only for such instances. There is thus a real danger that introducing recall elections to deal with rare instances will have deeper, negative impacts across government generally in New South Wales.
- 17 International experience in places like Wisconsin shows how recall elections can be used for strategic, party political purposes. They can be used not in response to community demand for a fresh poll, but for partisan advantage. Even the proponent of recall elections in Alberta, Premier Aberhart came to argue that the process was misused as a means of harassment and political attack.
- 18 Some of the problems of recall elections can be met by imposing stringent conditions upon the use, such as by requiring a high number of signatures. However, this comes with the price of putting recall elections beyond the community. Instead, recall elections become accessible only to powerful vested interests such as political parties and those with enough money to organise a concerted statewide campaign. International experience suggests that this problem is insurmountable. My concern is that recall elections will not ultimately end up being used by the people they are meant to serve, but manipulated by powerful interests in ways that may be counter-productive to the public interest. Hence, I am convinced by the analysis of people such as Professor Richard Johnston that the necessarily high signature thresholds required by the British Columbia Act mean that those recall procedures are mere ‘political window dressing’ and confer no real ‘power on the people’. He simultaneously notes that it may be dangerous to lower these thresholds given the use to which recall procedures may be put.
- 19 Finally, I might be persuaded that recall elections should be tried in New South Wales if there was a public demand for the change. Indeed, a major change of this kind to our systems of responsible and representative government ought only to be made when it is backed by clear and strong public support. The evidence before this inquiry, however, fails to demonstrate this. The panel undertook a campaign of advertising with a view to

soliciting public opinion on the matter. Despite this, only 19 individuals and organisations made a submission. This is hardly sufficient to demonstrate a groundswell of opinion to justify a referendum on the topic. Indeed, it suggests that the heat has now gone out of the issue with the recent change of government in New South Wales, and that there is not now a strong public desire to make a major electoral change of this kind.

SECTION N. SUMMARY OF VIEWS

1 It is convenient to set out again the Panel's Terms of Reference.

“TERMS OF REFERENCE

The Government believes that Parliament should be responsive to the people and the issues they want debated. Accordingly, it wishes to investigate the potential for a recall procedure to allow early State elections based on a petition by voters (Recall Elections).

For these purposes, the panel of constitutional experts is to consider and report to the Premier by **30 September 2011** on the following issues in relation to Recall Elections:

5. Whether or not it is desirable to amend the *New South Wales Constitution 1902* to permit Recall Elections, in particular, having considered:
 - (a) international practices, including in Canada and the United States of America, and their applicability to a Westminster system;
 - (b) their compatibility with democratic principles;
 - (c) the potential of any proposed changes to improve the accountability, integrity and quality of government; and
 - (d) any risks or negative consequences for the accountability, integrity and quality of government.
6. If Recall Elections were to be permitted, the relevant requirements or mechanisms, including:
 - (a) the reasons or grounds (if any) for a petition by voters for a Recall Election;
 - (b) the appropriate percentage of voters who would need to petition and the time frame for collecting signatures;
 - (c) processes for verifying and auditing signatures against eligible voters;
 - (d) the time limits (if any) that should be imposed before a Government is subject to a petition; and
 - (e) appropriate funding arrangements for the process.
7. If Recall Elections were to be permitted, the best ways for constitutional reform to take place in NSW, including:
 - (a) mechanisms for canvassing the level of community support for any proposed constitutional changes; and
 - (b) potential referendum questions.
8. Any other matters relevant to Recall Elections.”

2 A summary of the Panel's views is as follows.

3 The Panel has given detailed consideration to international practices involving recall elections, including in Canada and the United Kingdom, and the applicability of those practices to a Westminster system. The consideration of the international position is set out in detail in Section D. This analysis is useful, as it provides examples of what recall

mechanisms exist in other countries and highlights some of the potential problems that the recall can create.

- 4 The guidance that such international practices can provide is, however, limited. Non-parliamentary systems where elected Presidents, Governors and other elected officials can be recalled are very different from the system of government which exists in New South Wales. There is no Westminster or Westminster derived system which provides for recall of a government. The British Columbia provision for recall is for recall of individual members of the legislature. Where provision for recall has elsewhere existed in parliamentary-type systems, it has not been used satisfactorily.
- 5 The Panel does not favour the concept of recall elections for individual members of the Legislative Assembly.
- 6 The Panel does not favour the concept of recall elections for individual members of the Legislative Council.
- 7 The Panel takes the views in paragraphs 5 and 6 for the following reasons:
 - (a) The introduction of recall elections for individual members of either House could create undesirable instability in the governance of the State. Individual members of either House, whether in government or opposition, or on the cross-benches, could be the subject of petitions for recall and potential recall elections. There is also the possibility that multiple, simultaneous recalls or multiple, sequential recalls could occur. The business of government would be significantly affected if multiple senior Ministers were the subject of such petitions. The potential of individual recall would make the position of those holding marginal seats or certain ministerial portfolios much more difficult. Such recalls would profoundly affect the quality of government and render individual members of the Assembly more vulnerable to pressures from their electorate, especially monied pressures, reducing their capacity to serve the overall public interest.
 - (b) The complex voting system used to elect the Legislative Council makes the recall and election of an individual member virtually impossible. The most coherent form of individual recall for a member of the Legislative Council would be recall, followed by the nomination of another Councillor from the

political party of the recalled Councillor. Such a system may or may not be satisfactory for resolving the issues which led to the recall.

- (c) The existing provisions of the *New South Wales Constitution* and the *ICAC Act* are sufficient to deal with cases of corruption, inappropriate conduct and so forth by individual members. If those provisions are thought inadequate in some respect, the more appropriate remedy would be to amend these provisions, rather than introduce recall elections for individual members.
- 8 The only form of recall election which the Panel would regard as feasible is a citizen initiated recall election of the whole of the Legislative Assembly. Such an election would be treated as if it were the general election of the Legislative Assembly which would next have occurred. Persons elected at such elections would hold office for a term of four years (subject, of course, to any recall election during that period). They would not hold office only for the remainder of the four year term of the previous Legislative Assembly. Such an election would be accompanied by an election for the seats of the 21 members of the Legislative Council which would otherwise have become vacant at the next general election for the Legislative Assembly. The members of the Legislative Council elected at the recall election would hold office for two terms of the Legislative Assembly elected at the recent election.
- 9 It should not be possible to have a recall election, or to take steps to initiate such an election, during the first 18 months of the term of a new Legislative Assembly, nor during the last six months of the term of a Legislative Assembly.
- 10 The recall procedure should commence by the making of an application to commence a petition to the New South Wales Electoral Commission, established under the *Parliamentary Electorates and Elections Act*.
- 11 The application should be supported by the signatures of at least 500 voters registered in New South Wales. An administration fee as determined by the Electoral Commission should be payable.
- 12 The application should be required to be lodged in person or by mail at the Electoral Commission, along with the payment of the required fee. It should not be possible to lodge an application electronically.
- 13 Sitting members of Parliament and voters who have applied to initiate a recall petition against the same government previously should be precluded from lodging any other

application. However, such persons may sign any petition once an application has been lodged and approved.

- 14 Once an application for a recall petition has been made, no other such application may be made pending the determination of that application or of a petition launched pursuant to it.
- 15 There should not be a requirement that the application, or any subsequent petition, be based on or state the ground(s) on which a recall election is sought. The support evidenced by the required number of signatures should be sufficient to legitimise the application and petition.
- 16 The application should be verified by the Electoral Commission. When the Electoral Commission has verified the signatures, a petition would then be launched.
- 17 The petition would only be 'active' for a limited time of 60 days.
- 18 Voting – i.e. providing signatures in support of it – would be primarily conducted online by the Electoral Commission. Signatures would be verified and audited by that body.
- 19 If a petition succeeds, a recall election would then take place. There would not be an intermediate poll or referendum to determine whether the recall election should take place following the petition.
- 20 A successful petition would essentially result in a new general election occurring ahead of time. Therefore, it is appropriate that a significant proportion of the eligible voters of the State sign the petition in order for it to succeed. The Panel's view is that that proportion should be 35 per cent.
- 21 The Panel is also of the view that a recall petition should be signed by a spread of voters across a number of electorates, in order to ensure that the desire for recall is not concentrated in one area of the State. The Panel recommends a requirement that at least five per cent of eligible voters from at least 50 per cent of electorates join the petition.
- 22 The legislation required to implement the recall procedure described above would require approval by a referendum, pursuant to section 7B and perhaps also section 7A of the *New South Wales Constitution*. The Panel's view is that the referendum should ask to electorate to decide whether a specific form of legislation designed to implement the recall procedure described above should be enacted, rather than simply asking

whether there should be recall elections in general. The referendum should take place in accordance with the *Referendum Act*.

- 23 The Panel believes that the process of the referendum referred to in the previous paragraph will itself generate the levels of discussion and public awareness necessary to enable a sound decision to be made by voters.
- 24 The evolution of the system of government in New South Wales from Westminster and from its own beginnings is considerable, especially given the introduction of fixed terms for the Parliament. Introducing citizen initiated recall would constitute another radical change. It would introduce the idea that the government is continuously and directly answerable to the people, rather than answerable to the people through their elected representatives in Parliament.
- 25 This change could enhance the accountability and integrity of government, because it would be aware that it could be recalled.
- 26 Conversely, the change could detract from and distract good government and reduce government's capacity to introduce long-term or difficult policy change. Monied interests could be the drivers of the recall rather than the public at large. Pure partisanship – whereby the Opposition would be looking for opportunities to undermine the Government and either directly or indirectly launch recalls – might occur. Such behaviour is contrary to responsible and accountable government.
- 27 In the end the members of the Panel have arrived at different views on whether the system of recall elections referred to above is appropriate for New South Wales. Two members, for the reasons referred to in Section M, would support the introduction of provision for recall elections along such lines. The third member of the Panel, again for reasons set out in that Section, would not support the introduction of such provision. The different views are based on their assessments of its potential impact on good government.

ANNEXURE A. ADVERTISEMENT CALLING FOR SUBMISSIONS TO THE PANEL

1 The Panel published this advertisement calling for submissions:

PANEL OF CONSTITUTIONAL EXPERTS – REVIEW INTO RECALL ELECTIONS

CALL FOR SUBMISSIONS

A Panel of Constitutional Experts has been established by the New South Wales Government to provide advice on the potential for a recall procedure to allow early State elections based on a petition by voters (Recall Elections).

The members of the Panel are Mr David Jackson QC (Chair), Professor George Williams and Dr Elaine Thompson.

The terms of reference require the Panel to consider and report to the Premier by 30 September 2011 in relation to Recall Elections.

The terms of reference and information regarding the Panel are available at www.dpc.nsw.gov.au/recallelections

The Panel invites submissions from the public to facilitate its consideration of the issue. Submissions from all stakeholders are welcome. Submissions should be addressed to the Panel of Constitutional Experts - Review into Recall Elections:

By email: Recallelections@dpc.nsw.gov.au

By mail: Panel of Constitutional Experts - Review into Recall Elections
GPO Box 5341 Sydney NSW 2001

For further enquiries, please contact the Panel by email at Recallelections@dpc.nsw.gov.au

The closing date for submissions is **5 August 2011**.

2 The advertisement was published in the following newspapers on Friday 15 July 2011:

- (a) The Daily Telegraph
- (b) The Sydney Morning Herald

- (c) The Australian
- (d) The Financial Review
- (e) Albury Wodonga Border Mail
- (f) Bathurst Western Advocate
- (g) Broken Hill Barrier Truth
- (h) Coffs Harbour Advocate
- (i) Dubbo Daily Liberal
- (j) The Post Weekly Goulburn
- (k) Grafton Daily Examiner
- (l) Griffith Area News
- (m) Lismore Northern Star
- (n) Maitland Mercury
- (o) Newcastle Herald
- (p) Orange Central Western Daily
- (q) Tamworth Northern Daily Leader
- (r) Tweed Daily News
- (s) Wagga Wagga Advertiser
- (t) Wollongong Illawarra Mercury

ANNEXURE B. LIST OF SUBMISSIONS MADE TO THE PANEL

Number	Name	Date
1	Patrick Conrick	15/7/2011
2	Barry O'Connell	16/7/2011
3	Alex Portnoy	19/7/2011
4	Konrad B	26/7/2011
5	Valerie Bower	26/7/2011
6	Adam Johnston	26/7/2011
7	Noelene Kerfoot	26/7/2011
8	Rochelle Sutherland	26/7/2011
9	Valerie Bower	28/7/2011
10	Leonore Powell	28/7/2011
11	Mitchell Mazoudier	29/7/2011
12	Associate Professor Dr Anne Twomey, University of Sydney	29/7/2011
13	Brian Gray	2/8/2011
14	Bryan Morrow	3/8/2011
15	Associate Professor Dr Graeme Orr, University of Queensland	3/8/2011
16	PA Selth, Executive Director of the New South Wales Bar Association, on behalf of the New South Wales Bar Association	4/8/2011
17	Associate Professor the Hon Dr Ken Coghill, Monash University	5/8/2011
18	Paul Lynch MP, Shadow Attorney General and Shadow Minister for Justice	5/8/2011

Number	Name	Date
19	Associate Professor Dr Graeme Orr, University of Queensland	8/8/2011
20	Bill Rowlings, CEO of Civil Liberties Australia, on behalf of Civil Liberties Australia	11/8/2011
21	Colin Barry, Electoral Commissioner of New South Wales, on behalf of the New South Wales Electoral Commission	12/8/2011

ANNEXURE C. LIST OF PERSONS INVITED TO MAKE SUBMISSIONS TO THE PANEL

Government / Agency officials

Mr Colin Barry, NSW Electoral Commissioner
Mr Ed Killesteyn, Australian Electoral Commissioner
Mr David Solomon, Queensland Integrity Commissioner

Political parties

Australian Labor Party, NSW Division
Liberal Party of Australia, NSW Division
Ms Christine Ferguson, Chairman, The Nationals
The Greens NSW
Messrs Robert Shaw / Robert Brown / Stephen Larsson, Shooters and Fishers Party
Dr Frederick Nile / Mr Ian Edward Smith, Christian Democratic Party (Fred Nile Group)
Mr Andrew Simmons, Australian Democrats – NSW Division
Mr Michael O’Donohue, Secretary, Democratic Labor Party (NSW Branch)
Mr Peter Whelan, NSW Coordinator, Liberal Democratic Party

Other organisations and bodies

Ms Judy Birkenhead, Executive Secretary, Electoral Council of Australia
Democratic Audit of Australia, Swinburne University of Technology
The Australian League of Rights
Women’s Electoral Lobby Australia
Ms Jennifer Westacott, Chief Executive, Business Council of Australia
Mr Stephen Cartwright, CEO, NSW Business Chamber
Dr David Phillips, National President, FamilyVoice Australia
Ms Kristine Klugman, President, Civil Liberties Australia
Mr Cameron Murphy, President, NSW Council of Civil Liberties
Mr Edward Santow, CEO, Public Interest Advocacy Centre
Mr Terry O’Gorman, President, Australian Council of Civil Liberties
Australian Association of Constitutional Law
Mr Stuart Westgarth, President, The Law Society of New South Wales
Mr Bernard Coles QC, President, The Bar Association of New South Wales

Academics

Dr Norman Abjorensen, Australian National University
Dr Peter Brent, Australian National University
Dr Peter Chen, The University of Sydney
Dr Ken Coghill, Monash University
Professor Brian Costar, Swinburne University of Technology
Dr John Hart, Australian National University
Dr Norm Kelly, Australian National University
Dr Ron Levy, Griffith University
Associate Professor Andrew Lynch, University of New South Wales

Professor Ian Marsh, University of Tasmania
Mr Stephen Mills, Sydney University
Associate Professor Graeme Orr, The University of Queensland
Professor Marian Sawer, Australian National University
Professor Adrienne Stone, Melbourne Law School
Associate Professor Joo Cheong Tham, University of Melbourne
Dr Anne Twomey, University of Sydney
Dr Sally Young, University of Melbourne

Other interested persons

Mr DMJ Bennett AC QC
The Hon R J Ellicott QC
The Hon Mary Gaudron QC
The Hon Murray Gleeson AC QC
Mr Antony Green, Australian Broadcasting Corporation
The Hon TEF Hughes AO QC
The Hon Michael McHugh AC QC
Ms Clover Moore MP (Legislative Assembly), Member for Sydney - Independent
Mr Andrew Norton, Research Fellow, Centre for Independent Studies
The Hon Kevin Rozzoli AM, President, Australasian Study of Parliament Group
The Hon Acting Justice Sackville AO, Court of Appeal, The Supreme Court of New South Wales
Mr Michael Sexton SC, Solicitor General
The Hon JJ Spigelman AC QC
Mr Richard Torbay MP (Legislative Assembly), Member for Northern Tablelands – Independent
Mr BW Walker SC

ANNEXURE D. CURRENT PARLIAMENTARY CODE OF CONDUCT

Preamble to the Code of Conduct

The Members of the Legislative Assembly and the Legislative Council have reached agreement on a Code of Conduct which is to apply to all Members of Parliament.

Members of Parliament recognise that they are in a unique position of being responsible to the electorate. The electorate has the right to dismiss them from office at regular elections.

Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.

Members of Parliament acknowledge that their principal responsibility in serving as Member is to the people of New South Wales.

THE CODE

Disclosure of conflict of interest

Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.

This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.

A conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.

Bribery

A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which the Member has received, is receiving or expects to receive.

A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which any of the following persons has received, is receiving or expects to receive:

- A member of the Member's family;
- A business associate of the Member; or
- Any other person or entity from whom the Member expects to receive a financial benefit.

A breach of the prohibition on bribery constitutes a substantial breach of this Code of Conduct.

Gifts

Members must declare all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests.

Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to improperly influence the Member in the exercise of his or her duties.

Members may accept political contributions in accordance with part 6 of the Election Funding Act 1981.

Use of public resource

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

Use of confidential information

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

Duties as a Member of Parliament

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

Secondary employment or engagements

Members must take all reasonable steps to disclose at the start of a parliamentary debate:

- the identity of any person by whom they are employed or engaged or by whom they were employed or engaged in the last two years (but not if it was before the Member was sworn in as a Member);
- the identity of any client of any such person or any former client who benefited from a Member's services within the previous two years (but not if it was before the Member was sworn in as a Member); and
- the nature of the interest held by the person, client or former client in the parliamentary debate.

This obligation only applies if the Member is aware, or ought to be aware, that the person, client or former client may have an interest in the parliamentary debate which goes beyond the general interest of the public.

This disclosure obligation does not apply if a Member simply votes on a matter; it will only apply when he or she participates in a debate. If the Member has already disclosed the information in the Member's entry in the pecuniary interest register, he or she is not required to make a further disclosure during the parliamentary debate.

This resolution has continuing effect unless and until amended or rescinded by resolution of the House.