

## Submission to the Panel of Constitutional Experts - Review into Recall Elections

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Dear Panel Members,

The idea for recall elections in NSW comes after the experience of fixed term electoral cycles and, a long term Labor Government in this State, whose governance progressively deteriorated, to the point where absurdity met stupidity; along with every other descriptor between these points.<sup>1</sup> This history does not need to be repeated in this submission.

While recall elections do feature in Congressional systems of Government (most notably, in California, which saw Austrian-born body builder and actor Arnold Schwarzenegger become that US State's 38th Governor<sup>2</sup>), they are not as common in Westminster systems of Government. However, there is a highly developed form of recall election in the Canadian Province of British Columbia. This jurisdiction has systems in place for both the recall of politicians,<sup>3</sup> as well as a capacity for citizens to initiate referenda to introduce or amend Provincial laws.<sup>4</sup>

A complicating factor is that while British Columbia has a unicameral Parliament,<sup>5</sup> NSW has a bicameral system of parliamentary representation. Ideally, Legislative Councillors should be similarly subject to recall, just as any Member of the Assembly. The Victorian Legislative Council divided

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<sup>1</sup> While I am a member of the Liberal Party of Australia, I am writing this submission from a purely personal perspective, not a partisan one. All comments, references, research, errors and omissions are my own, as are the conclusions and recommendations.

<sup>2</sup> For example, see *Arnold Schwarzenegger: From Wikipedia, the free encyclopedia* [http://en.wikipedia.org/wiki/Arnold\\_Schwarzenegger](http://en.wikipedia.org/wiki/Arnold_Schwarzenegger) as at 24 July 2011

<sup>3</sup> See Elections BC, *A Guide to the Recall Process*, <http://www.elections.bc.ca/docs/guidebooks/865.pdf> as at 17 July 2011

<sup>4</sup> See Elections BC, *Guide to the Initiative Process* <http://www.elections.bc.ca/docs/guidebooks/869.pdf> as at 17 July 2011

<sup>5</sup> See the Legislative Assembly of British Columbia Homepage <http://www.leg.bc.ca/> at 24 July 2011; also see *Legislative Assembly of British Columbia, From Wikipedia, the free encyclopedia* [http://en.wikipedia.org/wiki/Legislative\\_Assembly\\_of\\_British\\_Columbia](http://en.wikipedia.org/wiki/Legislative_Assembly_of_British_Columbia) as at 24 July 2011

into geographic regions returning a specific number of members,<sup>6</sup> demonstrates that an Upper House ballot need not represent a State-wide vote. Dividing the NSW Legislative Council up into Victorian-style regions would make the concept of an Upper House Member's recall election geographically, numerically and financially feasible.

The percentage of eligible voters needed to sign a British Columbia-style recall petition could be adjusted upwards on account of the population size of metropolitan regions, while being adjusted the other way for rural regions on account of the 'tyranny of long distance campaigning'. Meanwhile, Victoria also limits the number of Upper House members who can be appointed as Government Ministers and, sends the whole Council to the ballot box at an election.<sup>7</sup> A similar reform would be an effective way to end the guaranteed eight-year term for Legislative Councillors in NSW, as well as preventing any "sheltering" of Ministers (or Shadow Ministers) in the Legislative Council.

Additionally, there seems no reason why the concept of the public recalling of officials should be limited to State parliamentarians. Petitions could similarly recall bureaucrats, local government councillors and civic officials and judicial officers, in an expansion of Premier O'Farrell's *People's Petition* procedure.<sup>8</sup> After all, while electors may periodically change governments, and the politicians who temporarily lead them regularly change senior departmental staff; and what parts of which (renamed and reorganised) agency report to one or other Minister, the bureaucracy itself largely remains intact. Arguably, a recall capacity affecting all branches of Government asserts the democratic values of parliamentary and popular sovereignty simultaneously, consistent with the Australian Westminster-style parliamentary traditions. Officials responsible for any State department or agency could be called before Parliament to explain themselves in light of a Recall Petition. The Parliament could then determine whether it wished to send a message to the Governor recommending dismissal of the officers concerned.

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<sup>6</sup> See generally *Composition of the Legislative Council*, <http://www.parliament.vic.gov.au/council/publications-a-research/information-sheets/712> as at 24 July 2011

<sup>7</sup> See *ibid*

<sup>8</sup> See The Hon Barry O'Farrell MP, Premier of NSW, Minister for Western Sydney, *MEDIA RELEASE Thursday 12 May 2011 - WRITE ON: O'FARRELL DELIVERS ON PEOPLE'S PETITION PLEDGE* [http://www.premier.nsw.gov.au/sites/default/files/110512-Petition\\_0.pdf](http://www.premier.nsw.gov.au/sites/default/files/110512-Petition_0.pdf) as at 25 July 2011

Finally, given the growing amount of Government goods and services being delivered by the private sector,<sup>9</sup> it is in my view vital to bring government contractors and private sector providers of goods and services funded by the State, within the remit of the recall procedures. As someone with a disability, government funded employment, equipment and other care providers who fail to deliver on promises (even when I sign contracts of service) have truly tested my patience at times. To find further that one cannot legally enforce fulfillment of agreements because they are based on unenforceable memoranda of understanding (to which I as a client am not a party to) is the ultimate insult and frustration.<sup>10</sup>

<sup>9</sup> See Peter Shergold, *Contracting Out Government – Collaboration or Control? Neil Walker Memorial Lecture*, 15 October 2008, Lecture Series No. 1, The Centre for Social Impact, <http://www.csi.edu.au/assets/assetdoc/99fd50bd4c6e43e5/Lecture%20Series%20No.%201%20-%20Contracting%20out%20Government.pdf> as at 25 July 2011. In particular, Dr Shergold writes:

The delivery of publicly-funded programs in areas such as labour market placement, skill training, provision of welfare, health and housing services and relationship counselling was outsourced. Services were contracted out through competitive tenders. At least to some extent program recipients were able to choose from a range of providers....(However, driven) by the best of motives – to improve commitment to service delivery – the private sector language dangerously confuses the nature of the public sector. Customers can choose whether to buy and from whom. Citizens (and I embrace residents in this term) have no such choice. They are being delivered responsibilities as well as rights: the services they receive as entitlements also impose obligations. Public services are not shopping malls. ..During the years in which I oversighted line agencies I gained considerable experience in contracting out the delivery of publicly-funded programs in indigenous affairs, employment, training and education. I recognised it was not without risk. *I saw a danger that public servants might mistakenly believe they could outsource accountability or, worse, hide administrative failure behind a cloak of commercial-in-confident. I thought it was a good thing that the APS integrity network – particularly the Commonwealth Ombudsman and the Auditor-General – were given the powers to bring the same scrutiny to the behaviour of contractors (insofar as their activities related to the use of public funds) as to public servants.* (my emphasis)

While such reforms as the ones I have emphasised above are important and welcome steps, they do not necessarily provide aggrieved service recipients the same form of public acknowledgement as a petition. The Parliamentary Petition, with a renewed force and standing, may well be of assistance to many people. Information on the NSW Parliamentary website indicated the Petition's historic importance in the Westminster tradition, but that it does not have anything like the prominence it once did. Refer to *NSW Legislative Assembly Practice, Procedure and Privilege - Part One Chapter 13 – Petitions* [http://www.parliament.nsw.gov.au/prod/1.A/precedent.nsf/0/DF2178120FD59221CA25765A00778C8A/\\$file/Part%201%20Chapter%2013%20Petitions.pdf](http://www.parliament.nsw.gov.au/prod/1.A/precedent.nsf/0/DF2178120FD59221CA25765A00778C8A/$file/Part%201%20Chapter%2013%20Petitions.pdf) as at 25 July 2011.

<sup>10</sup> See my submission to the *Henry Tax Review*, particularly the Appendix at pages 6 – 9 (Adobe numbering), beginning at the heading "Employment agencies". From this heading on I discuss my less than positive view of the memorandum of understanding which encapsulated the allegedly 'special' relationship between Disability Works Australia (an employment broker) and the ACT Government. At great personal inconvenience in terms of time, and some money, I prepared papers and went to meetings for an employment program, which was ultimately discontinued in mid-process by the ACT. There was no-one from either the ACT Government or Disability Works Australia who suffered any funding penalty or other consequences for their failure to deliver to "clients" like me. The Web link is: [http://taxreview.treasury.gov.au/content/submissions/pre\\_14\\_november\\_2008/Adam Johnston.pdf](http://taxreview.treasury.gov.au/content/submissions/pre_14_november_2008/Adam%20Johnston.pdf) as at 25 July 2011

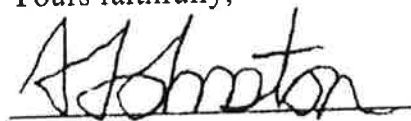
While admittedly, my examples are mainly in the Commonwealth jurisdiction, State Governments of all political persuasions have been ready to facilitate the corporatisation, privatisation and/or sale of public instrumentalities. While agreeing with Dr. Shergold that this policy has had clear benefits,<sup>11</sup> this is not the full story. When it comes to the question of individual service recipients (particularly those with disabilities or who have other conditions which may make them vulnerable) being able to hold private sector bodies, charitable non-government organisations and the like, to true account for goods, support or other agreed outcomes delivered, only one party has most of the bargaining power. And, it is not the service recipient or their family most of the time.

Ministers, Department CEO's and Director Generals, the Executive Officers of NGO's, their staff, judicial and other officers; indeed anyone who finds themselves responsible for running a publicly funded agency or program, whether it is identified in the State Budget for financial assistance, or support comes as a grant or via some departmental instrument, agreement, or authorisation, all should know the potential power of a Recall Petition.

In short, I recommend that:

1. NSW adopt a Recall Election process, similar to that in operation in the Province of British Columbia, Canada;
2. NSW reform the Legislative Council, in line with arrangements in the State of Victoria, in order that recall provisions can be fairly applied to Council Members, as well as Assembly Members;
3. NSW apply recall principles to all branches of Government and state officials, including those from the private, charitable and non-government sectors, who from time to time, are given State funds to implement Government policies and programs.

Yours faithfully,



Adam Johnston

July 26, 2011

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<sup>11</sup> See Shergold, op. cit., p.4