

## Submission to Panel of Constitutional Experts on Elections

No recall mechanism for Parliament or Parliamentarians currently exists in any Australian jurisdiction. The recall of a Government as opposed to individual Members is best described as a mechanism for an early election. The Panel's Terms of Reference restrict its consideration to the early election mechanism, not the recall of an individual representative.

Any such proposal must acknowledge the fact that the current four years term was adopted by referendum in 1995 and would seem to be an entrenched provision of the Constitution.<sup>1</sup>

Recall mechanisms are largely designed for single representatives and in electoral systems very different to those in Australia, most obviously the 18 states of the United State of America<sup>1</sup> or jurisdictions such as Venezuela.<sup>2</sup>

The only example of a recall mechanism in a jurisdiction part of the Westminster system is the Canadian province of British Columbia. This however is directed at a single representative not a government as a whole.

These are not arguments to categorically reject a recall mechanism in NSW but they simply underline the novelty of any such proposals and emphasise they must be rigorously considered and carefully designed.

One of the fundamental issues in this discussion relates to the nature of our Parliamentary institutions. Traditionally Representative Parliament is described by referring to Edmund Burke's speech to the electors of Bristol. Burke argued in 1774 that

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<sup>1</sup> A. Twomey: The Constitution of New South Wales (Federation Press; 2004) Pp316-319, 341-342.

<sup>2</sup> R. Gott, Hugo Chavez and the Bolivarian Revolution (Verso Books; 2005).

"It ought be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect; their business, unremitting attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own."

However, on Burke's view a representative is not a delegate:-

"But his unbiased opinion, his mature judgement, his enlightened conscience, he ought not sacrifice to you, to any man, or any set of men living.....Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion."

If this is the basis of our political structure, there can be no proper philosophical basis for any recall mechanism. However, despite the rhetoric surrounding Burke and his speech and constant reliance on it over two centuries, this view of our institutions has not been uncontested. Burke was very much a product of his time and place. This was a pre-democratic time that predated modern party structures and pre-dated 'delegate' views of representation.

Certainly more radical figures from the Chartists to some Labor party units or members have argued for a recall mechanism although with varying degrees of success.<sup>3</sup> They had very much a 'delegate' view of representatives in Parliamentary Institutions, and supported recall provisions. This was also advocated by the Bolsheviks in 1917.<sup>4</sup>

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<sup>3</sup> Eg 1897 PLC Annual Conference in M. Hogan (ed): Labor Pains: Early Conferences and Executive Reports of the Labor Party in New South Wales (The Federation Press; 2006) p173, 1913 PLC Annual Conference in M. Hogan (ed): Labor Pains: Early Conference and Executive Reports of the Labor Party in New South Wales, Vol 3 (The Federation Press; 2008) Pp 98-9; L.F Crisp: The Australian Federal Labor Party 1901-1951(Hale Inemonger 1978) Pp210-3.

<sup>4</sup> EH Carr: The Bolshevik Revolution 1917-1923, Vol 1, (Penguin Books; 1976) P116.

In fact, the current provisions in NSW for referenda could be said to be inconsistent with the Burke/Bristol speech representative model. The Burke/Bristol speech model is inconsistent with the concept of election mandates and the reliance on them by incoming governments.

Societies evolve and community expectations develop. The approach of 1774 is hard to square with contemporary realities.

The philosopher most closely identified with the origins of Representative Parliamentarians was John Locke. He's also been described as one of the founders of English Colonial Slavery.<sup>5</sup>

The tradition of Burke and Locke has little utility in the debate on recall elections. The concept is anathema to that tradition of Burke and Locke. Recall elections could however easily be reconciled within the framework of a 'monitory democracy' described by John Keane, in his work The Life and Times of Democracy.<sup>6</sup>

Similarly there is contemporary support for the recall of MP's in the House of Commons although that is restricted to individual MP's and does not involve an early election trigger. The House of Commons does not have a fixed term, but has a longer normal term than 4 years.

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<sup>5</sup> R. Blackburn: The Making of New World Slavery: From the Baroque to the Modern 1492-1800 (Verso Books; 2010) P329, Cf.R. Woolhouse: Locke: A Biography (Cambridge University Press; 2007) Pp111, 187.

<sup>6</sup> J. Keane: The Life and Times of Democracy (Simon and Schuster: 2009)

Any early election trigger should commence with a requisition signed by electors.

The conditions attaching to a requisition should recognize the seriousness of the step involved but not be impossible of achievement.

The conditions should include the following:

#### Requisitions and Requisitioners

Requisitioners should all be required to be enrolled to vote in New South Wales as at the date of signing the requisition. An alternative and unnecessarily restrictive requirement could be that they were enrolled to vote at the previous election.

Granted the enormity of the implications of a successful requisition and its consequences for the entire state requisitioners should come from a broad range of areas across the state.

There should be more than merely a token number of requisitioners from each electorate.

This could be achieved by requiring a successful requisition to have at least 1% of each of 75% of the state's electorate's voters sign the requisition.

There is considerable variance between different jurisdictions as to the total number of requisitioners required for a successful recall. Most of those examples of course relate to the recall of an individual representative rather than of a whole government. As the forcing of an early election is such a significant step it seems appropriate that requisitioners constitute 25% of the NSW electorate enrolled at the commencement of the requisition period.

The requisition period during which signatures can be gathered should be limited to 40 days. Such a length of time is not short enough to make it impossible to gather signatures, but not that long as to be unreasonable.

## Grounds for a successful Requisition

A requisition should be only allowable on specified grounds.

These might include:

(i) Introducing legislative change to institutional arrangements that directly affect wages and conditions of a significant proportion of the workforce of the state. The current government's changes to the Industrial Relations Commission were introduced without advising the electorate and will have a very significant impact on many residents of the state. Something of this magnitude could justify an early election.

Interestingly, the best known contemporary use of the recall mechanism is in Wisconsin, USA, and relates to industrial relations and wages and conditions of State employees.

(ii) Significantly altering or de facto confiscating property rights

The proposal to retrospectively abolish the solar bonus scheme was a significant attack on the property rights of citizens of the state contrary to advise to the electorate before the election. The inclusion of such a provision is particularly appropriate because the citizens of the state don't have the protection of a charter of rights that might otherwise deal with the problem. Moreover, NSW citizens do not in respect of state laws, have the benefit of the commonwealth constitution fair terms compensation provision.

(iii) ICAC Determination

A formal finding of systematic corruption within a Government should be a satisfactory basis to found a requisition if the Government had not resigned. An appropriate tribunal to determine this is the Independent Commission Against

Corruption. This provision is analogous to the currently existing provisions concerning the dismissal of Councils.

#### Other Provisions

- (a) If a requisition were successful, a general election would result. It would seem desirable that any incoming Government would then commence to serve a fresh four year term, rather than merely complete the balance of the current term.
- (b) Requisitions should not be allowed to proceed within six months of a regular general election i.e. not within the first six months after a previous election or within the last six months before a planned election.
- (c) Judicial Review should be available for the recall. This would include review of both the substance of the recall and of the procedural steps. The Court of Disputed Returns already successfully performs functions of judicial review of profoundly political processes. There is no reason to suppose that it would not be just as successful in relation to a recall procedure.
- (d) There must be mechanisms and provisions to prevent wealthy pressure groups from manipulating and misusing recall procedures. Media corporations should not be able to organise requisitions.