



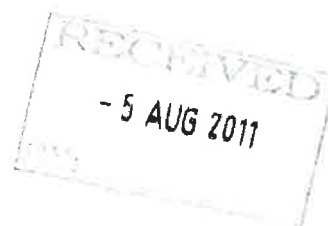
The New South Wales Bar Association

11/209

4 August 2011

Mr David Jackson QC
Chair
Panel of Constitutional Experts
Review into Recall Elections
GPO Box 5341
Sydney NSW 2011

FN	
LN	2011/60213



Dear Mr Jackson

Recall Elections – Invitation for Submissions

Thank you for your letter to the President of 27 July 2011 inviting the New South Wales Bar Association to make a submission to the above Review.

A submission to the Review, prepared by the Association's Constitutional and Administrative Law Section, is attached.

Please feel free to contact me on _____ if you require any clarification as to the content of the submission.

Thank you again for the opportunity to make a contribution to this important Review.

Yours sincerely


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Submission of the Constitutional and Administrative Law Section of the New South Wales Bar Association to the Panel of Constitutional Experts providing advice to the New South Wales Government on the potential for a recall procedure to allow early State elections based on a petition by voters

Introduction

1. Submissions have been invited from the public to facilitate consideration by the Panel of Constitutional Experts of the potential for a "recall" procedure to allow early State elections based on a petition by voters. It is understood that the expression "Recall Elections" in the Panel's terms of reference is intended to refer to a procedure for triggering an early State election rather than a vote on the suitability of a particular elected representative to continue in office. Recall procedures can apply only to certain elected representatives, or can be more general in their application. In a system of responsible government, recall of an elected government entails dissolution of at least the lower house of the Parliament. For that to be brought about by a petition of voters is, in our view, markedly different from recall of an individual elected representative.

2. The Panel's terms of reference are as follows:

Whether or not it is desirable to amend the Constitution Act 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.*

If Recall Elections were to be permitted, the relevant requirements or mechanisms, including:

- e. the reasons or grounds (if any) for a petition by voters for a Recall Election;*
- f. the appropriate percentage of voters who would need to petition and the time frame for collecting signatures;*
- g. processes for verifying and auditing signatures against eligible voters;*
- h. the time limits (if any) that should be imposed before a Government is subject to a petition; and*
- i. appropriate funding arrangements for the process.*

If Recall Elections were to be permitted, the best ways for constitutional reform to take place in NSW, including:

- j. *mechanisms for canvassing the level of community support for any proposed constitutional changes; and*
- k. *potential referendum questions.*

Any other matters relevant to Recall Elections.

3. No submission is made as to the desirability of a recall procedure being put in place, nor as to the characteristics which such a procedure should have if it is to be implemented. We would, however, make the following general observations:

- a. Recall should not be seen as a response to particular issues arising from the fixed term for the Legislative Assembly in NSW under Section 24 of the *Constitution Act 1902* (NSW). The situation recently seen in NSW of an unpopular government that could not be removed from office is equally capable of arising under the more traditional Westminster model which places any decision to call an early election in the hands of the leader of the government. The proposal for recall elections is thus a challenge to the form of representative democracy practised in Australia, rather than a response to more specific issues arising from fixed parliamentary terms. 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.
- b. Recall may well lead to an increased need for the Government to adopt short term policies and respond to immediate demands of a small but vocal and active segment of the voting population. It has been observed that recall discourages necessary decisions from being taken because they may be unpopular.¹ It has also been observed that recall can lead to abuses by well financed special interest groups.²
- c. Recall may also well lead to significant expenses being incurred in planning and contesting elections on a more frequent basis than would otherwise be the case. These costs, and diversion of the government's attention from the job of governing, should not be underestimated. They mandate that the test for recall be stringent and any recall procedure be carefully scrutinised for validity before it can trigger the costs and political expense of the preparation for an election.

¹ The ACE Electoral Knowledge Network encyclopaedia: <http://aceproject.org/ace-en/focus/direct-democracy/recall>

² National Conference of State Legislatures July 2011:
<http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/RecallofStateOfficials/tabid/16581/Default.aspx>

- d. Great care is required before translating the more common procedure for recall of an individual elected representative to apply to recall of an entire parliament or house of parliament. In our view, procedures should ensure that it is only in the most exceptional circumstances that recall of the government should be capable of being triggered by a petition of voters.
- e. These considerations suggest that there would be merit in providing for a period in which a recall election could not be triggered (eg the first half of a parliamentary term); setting a relatively high bar for the triggering of an election; and requiring the necessary number of signatures to be collected within a relatively short period (so that recall would be a response to particular issues of grave public concern, rather than the accumulation of more minor grievances over time).

4. This submission addresses in more detail only the following points:

- a. issues which may arise out of grounds being required before a recall procedure could be implemented; and
- b. the importance of safeguards being in place to ensure that the validity of the process by which recall is implemented is capable of being tested and, if necessary, enforced.

Issues arising out of a requirement for grounds

- 5. Recall can be based upon a signature threshold or upon specified grounds, or both.
- 6. We note that in eight states in the United States of America grounds for recall are required.³ These include lack of fitness, incompetence, neglect of duties, corruption, act of misfeasance, violation of oath of office, failure to perform duties prescribed by law. These grounds need only be recited for the desirability of judicial supervision of recall on grounds to become apparent.
- 7. We also note, however, that in some states, for example Michigan, it is provided that the sufficiency of the grounds for recall shall be a political rather than a judicial decision.⁴ It is not clear to us, in those circumstances, what function grounds for recall in fact serve. Political opponents of a government will rarely if ever hesitate to describe it as incompetent or as neglecting its duties.

³ National Conference of State Legislatures July

2011 :<http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/RecallofStateOfficials/tabid/16581/Default.aspx>.

⁴ Constitution of the State of Michigan of 1963, Art II, § 8.

8. If recall is to be based on grounds, we would strongly advise in favour of those grounds being subject to some degree of judicial supervision given the significance of the triggering of the recall procedure and its function in depriving an individual (or indeed a Government) of the benefit of democratic and valid election to office.
9. This in turn necessitates a judgment as to the appropriate degree of judicial supervision. On one view this could go to the establishment of the ground as a jurisdictional fact. On another, it could go merely to whether or not the facts alleged, if established, could satisfy the ground relied upon. These are essentially political questions upon which we offer no view, but are important elements of the debate.
10. It would appear to us, in any event, that recall based upon grounds will lead to inevitable delays between the instigation of the recall procedure and any resulting election, given the strong likelihood of litigation seeking to challenge the validity of a petition. We would thus strongly advise in favour of a regime which included stringent time limits and carefully delineated grounds upon which the validity of the recall in the particular case could be tested in advance of the recall election taking place.
11. The prospect of challenges to the validity of a recall election after the event – and thus to the legitimacy of the new Parliament and government – must also be addressed. Arguments to the effect that an entire general election was invalid have never enjoyed any success in the High Court;⁵ but the reason why such an argument cannot succeed after the event (apart from the profound inconvenience of its consequences) is not clear. Any reform that permits a general election to be triggered by a new statutory process should include provisions to ensure that challenges to the validity of the process can only occur before the election; or alternatively include a procedure akin to those provided for in Part XXII of the *Commonwealth Electoral Act 1918* 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 seek relief as regards an election after the event.
12. Moreover, we would observe that a requirement for grounds may well require a differentiation between the grounds which can be relied upon as regards recall of a general election or an election in one or other House of Parliament and those applicable to recall of a particular elected member of the Upper or Lower House. It is difficult in our opinion to envisage an appropriate ground for recall of an entire Government or of a House of Parliament.
13. These distinctions will in turn lead to difficulties in formulation of appropriate grounds. It is difficult, for example, to see how a party or group of parties which has obtained a parliamentary majority and formed a government could, as a whole, be found to be unfit or guilty of misfeasance.

⁵ See *Victoria v Commonwealth and Connor* (1975) 134 CLR 81, 120, 156-157, 178, 183-184; *Langer v Commonwealth* (1996) 186 CLR 302, 304-305.

14. Indeed, the issues canvassed above may point to the conclusion that the signatures of a specified number of electors, collected within a specified time frame, should be the only requirement for a recall election. It may be thought to be undesirable for the Supreme Court to be placed in a position where it must stand in the way of a popular movement towards the holding of an election.

Safeguards to ensure the validity of the process

15. Recall procedures may take many forms. In some jurisdictions the recall petition has the effect of rescinding the outcome of the earlier election, effectively leaving the seat vacant. It is thus clear, in such a system, that the recall itself will have a fundamental and irrevocable effect upon the individual representative or government who has previously been duly and validly elected according to the prescribed procedures. In these circumstances, it is vital that the recall procedure be subject to strict scrutiny to ensure its validity. This will, of itself, lead to difficulties and delays; so that the difficulties discussed above, in connection with the prescription of grounds for recall, do not entirely disappear even if grounds are not prescribed.

16. We note the following by way of examples:

- a. Procedures must be established to regulate the means of challenge of a recall procedure prior to the triggering of an election. For example, the significance of misleading conduct or fraud in the preparation of presentation of a petition for recall needs to be considered in advance, as must be the procedure to determine whether or not the petition is invalidated on this ground. This requires a careful balance between ensuring that the procedure is not hijacked by the legal process, and ensuring that appropriate safeguards are in place to prevent unjustified and ultimately invalid uses of the recall procedure with all of its costs and consequences.
- b. The electoral roll at present remains open for a specified period of time after an election is called. Significant numbers of electors wait until an election is imminent to enroll or to update their enrolment. There would need to be some corresponding requirements to ensure that the electoral roll was valid and up to date for the purpose of assessing whether or not a required percentage of electors (and a required percentage in particular districts or electoral divisions, if that were a requirement) had signed the recall petition.
- c. In some states/countries recall itself requires a two stage process: first a petition, and then a vote on the recall. There is then a further stage – the holding of the further election. In other systems, once a petition is validly presented the vote on the recall is combined with the vote on

the fresh election.⁶ If a petition alone were sufficient to trigger an election then the validity of the petition, including verification that the signatures were genuine, voluntary and from those with the right to vote at the relevant time, would be of the utmost importance. However, the collection of signatures for a petition is unlikely to be accompanied by any of the safeguards of democratic voting which accompany an election. This immediately gives rise to the difficulty that highly significant and costly steps will be capable of initiation upon the presentation of a petition for recall without any real means (except, perhaps, expensive and time consuming litigation) of assessing the validity of the recall petition. This problem is exacerbated the greater the number of voters whose signatures are required.

- d. If the percentage of electors whose signature is required before a recall petition can validly be presented depends upon the number of voters at the previous election, this figure also must be capable of accurate and valid ascertainment. If the percentage is to be based upon current numbers on the electoral roll then (as noted above) it will be important that the electoral roll be kept up to date and accurately maintained.
- e. A procedure may need to be considered for the timing of objections to inclusion of particular names on the electoral roll under s 32 of the *Parliamentary Electorate and Elections Act 1912* (NSW). These may need to be facilitated in the period after the petition but before the triggering of the election given the practical reality that people may not turn their minds to this question other than around election time.
- f. In light of the general considerations mentioned at the beginning of this submission, we would also support a 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 by the same persons. However, any such limitations would in turn give rise to potential complications given that it may be difficult to identify whether or not a recall petition is the same or different from an earlier petition, or was the responsibility of the same individuals. Again, procedural safeguards to protect the integrity of the process are, in our view, highly desirable.
- g. Consideration should also be given to requirements as to public disclosure of funding of recall campaigns, and penalties for any false information provided in the course of such campaigns. We would advise that safeguards along the lines of those in the *Commonwealth Electoral Act 1918* ought to be considered for application to campaigns for recall.

4 August 2011

⁶ House of Commons Briefing Paper on Recall Elections:
<http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-05089.pdf>.