

REVIEW INTO RECALL ELECTIONS

Submission by New South Wales Electoral Commission

Introduction

The New South Wales Electoral Commission (NSWEC) is pleased to make a submission to the constitutional panel review into recall elections. The terms of reference state that the panel has been established to investigate the potential for a recall procedure to allow early State elections based on a petition by voters (Recall Petition).

It is noted that the term "recall election" in recent debate has been characterised as a mechanism for "voting out" a government in which the people have lost confidence. This is a variation of the recall process as already established in other jurisdictions which enables the electorate to petition for a vote on whether an individual elected representative should continue in office.

Of these two recall election models, the NSWEC submits that the recall of an individual representative model is more consistent with the Westminster-style tradition of parliamentary or responsible government that is a feature of our State and Federal systems of government in Australia. On this basis we propose that a recall petition be the trigger for a by-election for an individual member of the NSW Legislative Assembly (rather than for an early state election).

This submission also outlines the form that a recall election procedure might take in the context of petitions for the recall of individual representatives, and sets out a number of requirements or mechanisms which the NSWEC suggest form a part of the proposed recall petition procedure, in order to ensure its reasonableness and workability in the NSW context.

Part 1: Is there a role for a recall election procedure within the NSW system of government?

The suggestion that a recall petition can be used to trigger an early state election is an argument that has developed in the context of a system of government which is characterised by a four year fixed term parliament, and an electorate which is powerless to call an early state election.¹

A recall petition, by providing the electorate with an opportunity to oust a government in whom they have lost confidence before the end of its fixed term, constitutes a kind of 'direct democracy check on representative democracy'.² This direct democratic device is inconsistent with the principles of representative democracy and responsible government that are the hallmarks of our Westminster system of government. So too is a petition system that provides for the statewide recall for an entire government – as it 'could allow voters in some electorates to recall representatives who continue to retain the support of voters in a separate electorate'.³

Nevertheless, this Westminster system, as it operates in NSW, has itself evolved over time to accommodate new practices and ideas. The introduction of fixed four year terms and of referendums, are just two recent examples of changes that have been made to the Westminster tradition of responsible government. Consequently, this inconsistency should not be the basis for disregarding the introduction of a recall petition procedure altogether.

In this regard, the NSWEC submits that **a recall petition to trigger a by-election for an individual member of the NSW Legislative Assembly** is feasible. This 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. Also, this model still, achieves the overarching objective of the alternative "recall government" model (namely, empowering the electorate to trigger a potential change of government

¹ Currently, the Legislative Assembly may only be dissolved in those circumstances specified in section 24(2)-(4) of *Constitution Act 1902* (NSW)

² Gareth Griffiths and Lenny Roth, *Recall Elections*, NSW Parliamentary Library Research Service, February 2010 E-Brief 3/2010, p1, accessed at [http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/RecallElections/\\$File/Recall+Elections+E+Brief.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/RecallElections/$File/Recall+Elections+E+Brief.pdf) (last visited 10 August 2011)

³ Tanya Gadiel, Hansard p14158, 31 March 2009, accessed at <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LA20090331045> (last visited 10 August 2011)

before the end of a fixed term) without skewing the fundamental principles underlying the system of responsible and representative government⁴. This is because the governing party is formed on the basis of securing the support of the majority of Legislative Assembly members, and one or more recall by-elections may be enough to shift this balance.

⁴Namely, that it is the function of Parliament to provide from its membership the members of the Government, and the Government is itself responsible to Parliament

Part 2: Recall petition requirements

The following sections detail a number of requirements and mechanisms that the NSWEC suggest be built into any recall petition procedure implemented in NSW. The effect of these requirements would be to limit the circumstances in which a recall petition:

1. may be initiated; and
2. may be successful.

The NSWEC considers these requirements to be necessary to prevent the political process from being unnecessarily disrupted by the recall petition mechanism, and to strike an appropriate balance between the need to protect elected representatives from unnecessary political harassment, and the desire to give voters a direct influence over their elected representatives (beyond the act of the casting of their vote at election time).⁵

2.1 How can a petition be initiated?

In other jurisdictions, recall petitions are generally initiated by submitting a Recall Petition Application, which satisfies certain requirements, to the relevant body (usually the Electoral Commission or the Secretary of State, whichever is applicable).

If a recall petition procedure were to be implemented in NSW, we propose that a similar initiation process be adopted. This could include the following requirements:

1. A Recall Petition Application (Application) must be submitted to the NSWEC.
2. The Application must comply with certain requirements as to form which are specified in legislation;
3. The Application must include a statement limited to a prescribed maximum number of words which specifies the grounds for recall of an elected representative and the acts of the representative which satisfy these grounds (see section 2.2 for further discussion on proposed grounds for recall)
4. The Application must be supported by at least 15 persons (this is the number of supporters that were required to nominate the member to run as a candidate for the Legislative Assembly⁶), each of whose name is on the roll in that electorate; and

⁵ Joshua Osborne-Klein, *Electoral Recall in Washington State and California: California needs stricter standards to Protect Elected Officials from Harassment*, p147, Seattle University Law Review Vol.28:145

⁶ Section 79(2)(b) *Parliamentary Electorates and Elections Act 1912* (NSW)

5. The Application must be accompanied by a deposit of an appropriate amount. The deposit money would be returnable to the petition supporters if the petition is ultimately successful in triggering a by-election for the electorate. If the petition is unsuccessful, the deposit money would be forfeited to the NSW Treasury.

2.2 A recall petition should be based on specific grounds

A recall petition should not be able to be initiated for any reason. This is because, the absence of any restriction on the grounds on which an elected representative may be recalled, has the potential to expose members of parliament to frivolous claims of incompetence, and to waste public money.

We propose that an application for a recall petition be required to be based on certain specified grounds which are provided for in Statute. This requirement is a feature of a number of jurisdictions in which recall petitions currently operate, for example: Alaska⁷, Georgia⁸, Kansas⁹, Minnesota¹⁰, Montana¹¹, Rhode Island¹² and Virginia¹³.

The grounds for recall in these jurisdictions are substantially similar to one another, and include the following as sufficient reason to petition for an elected official to be removed from office:

1. Lack of fitness or incompetence;
2. Neglect or violation of duty;
3. The misuse of office;
4. Conviction of a crime.

The above grounds for recall provide voters with an opportunity to remove elected representatives that they feel are ineffective or who have misconducted themselves

⁷ Lack of fitness, incompetence, neglect of duties or corruption

⁸ Act of malfeasance or misconduct while in office; violation of oath of office; failure to perform duties prescribed by law; wilfully misused, converted, or misappropriated, without authority, public property or public funds entrusted to or associated with the elective office to which the official has been elected or appointed. Discretionary performance of a lawful act or a prescribed duty shall not constitute a ground for recall of an elected public official

⁹ Conviction for a felony, misconduct in office, incompetence, or failure to perform duties prescribed by law.

¹⁰ Serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office of a serious crime

¹¹ Physical or mental lack of fitness, incompetence, violation of oath of office, official misconduct, conviction of certain felony offenses (enumerated in Title 45). No person may be recalled for performing a mandatory duty of the office he holds or for not performing any act that, if performed, would subject him to prosecution for official misconduct

¹² Authorized in the case of a general officer who has been indicted or informed against for a felony, convicted of a misdemeanor, or against whom a finding of probable cause of violation of the code of ethics has been made by the ethics commission

¹³ Neglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office, or upon conviction of a drug-related misdemeanor or a misdemeanor involving a "hate crime".

and would serve as a good starting point from which the grounds for recall of a member of Legislative Assembly in NSW may be developed.

Additionally, it is important to consider, that the recall petition procedure, if introduced, would operate side by side with the process for the disqualification of a member of parliament that is provided for in section 13A of the *Constitution Act 1902 (NSW)*. The outcome of both a successful recall petition, and of disqualification of a member is the same – the declaration by the House that the seat of an elected representative is vacant.¹⁴ Consequently, any grounds of recall which are developed and implemented in NSW, should not overlap with, but should operate in addition to, the grounds for disqualification. These are:

1. Failure to attend either House for one whole session – unless excused;
2. the taking of any oath or the making of any declaration of acknowledgement of allegiance, obedience or adherence to any foreign prince or power;
3. Bankruptcy;
4. Public default;
5. Conviction of an infamous crime, or of an offence punishable by imprisonment for life or for 5 years or more.¹⁵

Taking this into consideration, we propose that the grounds for recall of a member of the NSW Legislative Assembly include:

1. lack of fitness or incompetence; and
2. a loss of confidence in the Member's capacity to carry out their parliamentary duty

2.3 How should the grounds of recall be tested?

Where the grounds for recall are specified in statute, the sufficiency of the grounds that are included in a recall petition application must somehow be tested. In our view, the political nature of the question regarding the sufficiency of the grounds of recall means that neither the judiciary nor the NSWEC are the appropriate arbiter of this question. Consequently, these bodies should have a limited role in the review and assessment of an application for a recall petition.

¹⁴ However, the proposed recall mechanism and disqualification differ in the processes applicable to the election of a Member after a seat has been declared vacant. After disqualification a joint sitting of parliament is convened for the purpose of an election to fill a vacant seat. By contrast, after a successful recall petition, a by-election is called.

¹⁵ Section 13A *Constitution Act 1902 (NSW)*

The role of the NSWEC

If a recall petition mechanism were implemented in NSW, the NSWEC, as the body responsible for administering recall elections, would be obliged to discharge these duties in an impartial way. The role of the NSWEC should therefore be limited to ensuring that the petition complies with legislative (form and procedural) requirements. For example, the NSWEC may only refuse an application for a recall petition on the grounds that the application:

1. was not submitted within the time period in which it is permissible for the electorate to initiate a recall petition (refer to section 2.7 for further detail);
2. was not substantially complete;
3. was not in the specified form;
4. did not include a statement which specifies the grounds for recall of an elected representative and the acts of the representative which satisfy these grounds, or this statement was not clear enough to enable voters to understand and identify the conduct which is the basis for recall;
5. was not supported by the requisite number of eligible voters; and
6. was not accompanied by the requisite deposit amount.

These form and procedural requirements are similar in nature to those which the NSW Electoral Commissioner is required to consider when assessing the validity of a nomination of a Legislative Assembly candidate.¹⁶

The role of the courts

The sufficiency of the grounds for recall should NOT be permitted to be challenged in the courts. The role of the courts should be limited to the review of a determination by the NSWEC (regarding a petition's legislative compliance), in circumstances where this determination has been challenged by a person that claims to have been aggrieved.

The role of the electorate

This would leave the question of the sufficiency of the grounds for recall, to be tested by the electorate, through the act of casting their vote on the question of whether the elected representative, the subject of the petition, should be recalled.

¹⁶ Section 79 *Parliamentary Electorates and Elections Act 1912* (NSW)

2.4 How will the support for the petition be measured? And what should be the process for verifying and auditing signatures against eligible voters?

Support for a recall petition is generally measured by the number of (verified) 'signatures' of eligible voters which are collected within a specified time period.

In a number of jurisdictions in which recall petition procedures have been implemented, the signatures (as well as the name and address) of eligible voters are gathered by registered canvassers who physically circulate hard copies of the approved form of petitions within the relevant electorate. Petition sheets, once signed and submitted, must then be manually counted. If the threshold number of signatures is reached, the eligibility of signatories is then assessed by cross-checking the signatories details with eligible voter records. The validity of signatures is then confirmed by contacting a random selection of signatories.¹⁷

In our view this is an outdated and imprecise method of measuring support of a petition, and of verifying the legitimacy of its signatories. With this in mind, and in light of the efficacy and success of the iVote registration system that was implemented in respect of the NSW State General Election on 26 March 2011¹⁸, **we propose that a similar system of remote electronic registration be used for recall petitioners.** This would enable voters that are registered in the electorate of the representative the subject of the petition, to register their support for the petition on-line. Before registering their support for the petition, the on-line system would require the petitioner to acknowledge that they have read the cases for and against the recall of the relevant representative.

As with the iVote system, eligible petitioners will only be able to access the online petition and register as a "signatory" to it, by using specific PIN and identification numbers that have been allocated to them by the system. Both the PIN and identification numbers can then be used by the NSWEC to simply and accurately verify and audit the registered 'signatures' against eligible voters in the electorate.

¹⁷ This is the procedure followed in British Columbia

¹⁸ The Allen Consulting Group, Evaluation of technology assisted voting provided at the New South Wales State General Election March 2011, 11 July 2011, accessed at http://www.elections.nsw.gov.au/data/assets/pdf_file/0004/93766/July_2011_Final_ACG_iVote_Report_ELE01-C_Final.pdf (last viewed 9 August 2011)

In order to ensure that all eligible voters are given an equal opportunity to register their support for a recall petition, the supplementary options of registration by telephone and mail would also be available.

2.5 What is the appropriate percentage of voters who would need to petition?

The outcome of a successful recall election petition – the calling of a by-election for an elected representative – has significant financial and political implications. Consequently, a recall petition should be required to gain the support of a sizeable portion of eligible voters before it is activated.

We propose that the threshold number of 'signatures' or votes required be 25% of registered voters in the electorate of the relevant representative. This is the signature requirement in the majority of the US jurisdictions in which a recall petition process operates,¹⁹ and in our view it strikes an appropriate balance. This 'signature' threshold is not so onerous so as to render the recall petition process unworkable, while at the same time it is demanding enough to prevent the too frequent or unwarranted political harassment of elected representatives.

2.6 What should be the time frame for collecting signatures?

Both the threshold number of 'signatures' required before a recall petition is activated, and the method by which these 'signatures' are gathered, are important considerations when determining the appropriate 'circulation time' of a recall petition.

In those US jurisdictions in which the signature threshold is 25%, the 'circulation time' allowed for recall petitions ranges from 60 to 120 days. In all of these jurisdictions, the signatures of eligible voters are gathered by registered canvassers who physically circulate hard copies of the approved form of petitions within the relevant electorate. This process of gathering support differs to the remote electronic registration system proposed by the NSWEC (see section 2.4). In our view, the circulation time required for an electronic system would be at the lowest end of the 60 to 120 day range. This is because an electronic system allows members of an electorate to register their support for a recall petition 24 hours a day, and independently of canvassers. **We therefore recommend that the time frame for**

¹⁹ Alaska, Arizona, Colorado, Michigan, Minnesota, Nevada, New Jersey, North Dakota, Washington (for statewide officers), Wisconsin (for statewide officers).

collecting signatures be limited to 60 days from the date that the remote electronic registration system for a recall petition is activated.

2.7 What time limits should be imposed before a representative is subject to a petition?

A recall system, without appropriate time limits on the use of the petition mechanism, has the potential to cause significant disruption to the political system and the normal functioning of government. This is because governments or representatives, faced with the threat of recall, may be reluctant to take 'unpopular but necessary decisions for the long term benefit of the state.'²⁰

We therefore propose 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 (see timeline in Figure 1 below). Limiting the window of opportunity for lodging a petition, ensures a reasonable amount of time for representatives to make progress on their policies and election commitments, and to ensure that funds are not wasted in calling for an early election close to the end of the representative's term of office.²¹

Figure 1

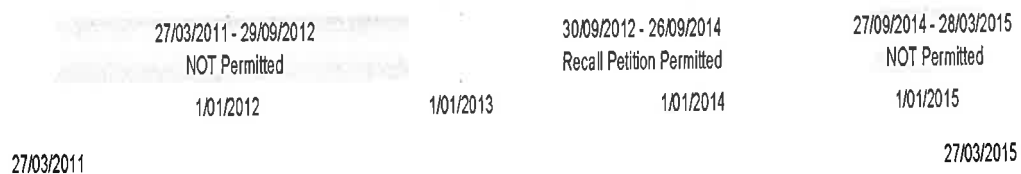


Figure 1 is a pictorial representation of the proposed time limits on recall petition initiation. It is based on the period between the March 2011 and March 2015 State general elections. The section coloured in yellow represents the time period during which it is permissible for a recall petition to be initiated.

²⁰ Gareth Griffiths and Lenny Roth, *Recall Elections*, NSW Parliamentary Library Research Service, February 2010 E-Brief 3/2010, p 9

²¹ Gareth Griffiths and Lenny Roth, *Recall Elections*, NSW Parliamentary Library Research Service, February 2010 E-Brief 3/2010, p 10

2.8 What procedure is followed if a petition is successful?

If the threshold number of 'signatures' is gathered within the requisite time period, and the verification process confirms that these 'signatures' are valid, we recommend that the following procedure is prescribed:

1. The NSWEC issues a report to the Speaker of NSW Legislative Assembly (Speaker) confirming the above;
2. The Speaker, without delay, declares the seat of the relevant representative to be vacant; and
3. A by-election for the recalled representative is called within 90 days.

The recalled representative should themselves be permitted to run as a candidate in the by-election.

2.9 How would the public be informed of a petition?

Once a recall petition is activated (i.e all recall application requirements have been satisfied), a public information campaign needs to be undertaken to inform eligible voters in the relevant electorate of their rights and obligations in relation to the recall petition. It is appropriate for this **public information campaign to be undertaken by the NSWEC**. We recommend that the following information be provided to the electorate via letters sent to the residential address of enrolled voters and the placement of advertisements in local newspapers:

1. That a petition for by-election in their electorate has been initiated;
2. The grounds on which the petition was initiated and the acts of the representative which satisfy these grounds;
3. The right of eligible electors to cast a vote on whether the representative should be recalled (and the applicable time limits to do so);
4. How to cast a vote either by:
 - a. remote electronic voting system (which will include telephone); or
 - b. post.
5. Where to access detailed information on the case for and against the recall of the elected representative (either online via the NSWEC website or by post).
See Part 3 below, for further detail on communication of the cases for and against recall of a representative.

2.10 Regulation of recall petition expenditure and donations during the 60 day recall petition period

In a number of the jurisdictions in which a recall petition mechanism operates, large sums of money are spent, by both petition proponents and opponents, on advertisements which promote or oppose, directly or indirectly, the recall of a Member the subject of the petition ('recall advertising').

The US experience, and in particular the relentless campaigning that was a feature of the California Gubernatorial recall election in 2003, highlights the potential for a recall petition mechanism to be subject to manipulation and abuse by groups that are able to launch large advertising campaigns in the mass media.²² Consequently, any discussion regarding the implementation of a recall petition procedure in NSW needs to consider whether, and if so, how, this recall advertising will be regulated.

One possible option is to **impose a prohibition on paid recall advertising** during the period in which a petition is 'circulated'. While this prohibition is in place, the cases for and against the proposed recall of a representative could be communicated through statutory advertising by the NSWEC via the NSWEC's website. Prior to the 'circulation' of a recall petition, both recall proponents and the representative the subject of the petition would be given the opportunity to submit their case for or against recall, to the NSWEC. Eligible voters who are unable to access the internet could request this information be sent to them by post.

An alternative option is to **regulate paid recall advertising** under the *Election Funding, Expenditure and Disclosures Act (1981)* and the *Election Funding, Expenditure and Disclosures Regulation (2009)*). For example through:

1. The imposition of caps on recall communication expenditure (during a defined period);
2. The imposition of caps on donations that can be received (during a defined period);
3. The obligation to disclose all recall communication expenditure incurred and donations received (during a defined period);
4. The requirement that a recall account be established (through which all recall expenditure/donations must be processed)

²² Gareth Griffiths and Lenny Roth, *Recall Elections*, NSW Parliamentary Library Research Service, February 2010 E-Brief 3/2010, p 9

Conclusion

The inconsistency of the recall petition mechanism with the Westminster system of government should not be the basis for disregarding the introduction of recall petitions altogether. In this regard, the NSWEC proposes that a recall petition mechanism, if introduced, should be the trigger for a by-election for an individual member of the NSW Legislative Assembly (rather than for an early State election), as this model still achieves the overarching objective of the alternative "recall government" model without skewing the fundamental principles underlying the system of responsible and representative government. Furthermore, we recommend that the requirements and mechanisms outlined in this submission be built into any recall petition mechanism. If implemented, these requirements will help to strike an appropriate balance between the need to protect elected representatives from unnecessary political harassment, and the desire to give voters a more direct influence over their elected representative.