



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia

Thank you for the invitation to make a submission to the Committee's inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia. We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

(a) The content and implications of the question to be put to electors

The Marriage Equality Plebiscite Bill 2015 ('the Bill') proposes to ask electors this question:

"Do you support Australia allowing marriage between 2 people regardless of their gender?"

The wording of this question reflects the intention to put it to electors in a plebiscite, rather than a referendum the result of which would itself determine constitutional amendment. For example, by contrast, in the Irish referendum held earlier this year voters were asked to approve the addition to the Irish constitution of the following words: "Marriage may be contracted in accordance with law by two persons without distinction as to their sex."

The difference reflects that in a constitutional referendum, the electorate is a necessary part of the law-making body, whereas plebiscites 'are in effect giant opinion polls to test the public mood on an issue'.¹ Consistently with this, no legal implications whatsoever follow from the proposal, enshrined in this Bill, to put this question to electors.

¹ G Williams & D Hume, *People Power – The History and Future of the Referendum in Australia* (2010) 6.

The only legal implications of the Bill are procedural and concern the obligations placed upon the Electoral Commissioner and the Minister by section 7.

As a matter of good practice, the wording of the question should be tested for clarity and fairness through public research. This is done as a matter of course in the United Kingdom, where the Electoral Commission has a statutory obligation to consider the wording of a proposed referendum question and publish a statement on its intelligibility.² Prior to the AV referendum in 2011, the Electoral Commission undertook research that included 15 focus groups and 41 interviews with citizens from a variety of geographic locations, backgrounds, ages and literacy levels.³ On the basis of this research, the Electoral Commission made a recommendation (subsequently adopted) that the government's proposed question be redrafted so that it be expressed in two short sentences rather than one long sentence.⁴ The wording of the question put to voters at the 2014 referendum on Scottish independence was also altered on the advice of the Commission. In the Australian context, undertaking public research of this nature would not alter the fact that Parliament has final say over the wording of the question.

(b) the resources required to enact such an activity, including the question of the contribution of Commonwealth funding to the 'yes' and 'no' campaigns;

1 Cost of a popular vote

A stand-alone popular vote on same-sex marriage would be expensive. While it is difficult to put a precise figure on it, estimates that the poll would cost around \$100 million seem plausible. As a point of comparison, the Australian Electoral Commission reports that the 1999 republic referendum cost more than \$66 million to run.⁵ This included costs for administering the ballot (\$33m), producing the official pamphlet (\$17m) and advertising (\$7m).⁶ This figure does not include the costs of funding the Yes and No campaigns (\$15m) and a 'neutral' education campaign (\$4.5m).

The cost of holding a popular vote would be reduced, but still significant, if the poll were held simultaneously with a federal election. A relevant point of comparison in this respect is the proposed (and subsequently abandoned) 2013 referendum on local government recognition. The federal government allocated \$44 million to the AEC to administer this vote. In addition, the government allocated \$11.6m for a civics education campaign and earmarked a further \$10.5m for the promotion of Yes and No arguments.⁷

2 Commonwealth funding of 'Yes' and 'No' campaigns

Should a popular vote on same-sex marriage go ahead, the Commonwealth should allocate funding to 'Yes' and 'No' campaign committees. This would enable partisans on both sides of the debate to promote their arguments to the community, and would be an effective way of raising public awareness about the cases for and against change. It would also follow the precedent set by the

² *Political Parties, Referendums and Elections Act 2000* (UK) s 104(1), (2).

³ Electoral Commission, *Referendum on the UK Parliamentary Voting System: Report of Views of the Electoral Commission on the Proposed Referendum Question* (Electoral Commission, 2010) 2.

⁴ *Ibid* 24.

⁵ Australian Electoral Commission, 'Costs of Elections and Referendums' (16 December 2014) <http://www.aec.gov.au/Elections/australian_electoral_history/Cost_of_Election_1901_Present.htm>.

⁶ All costs are approximate; see Williams and Hume, above n 1, 86-87.

⁷ Commonwealth, Budget Measures 2013-14 — Part 2: Expense Measures (14 May 2013) <http://www.budget.gov.au/2013-14/content/bp2/download/BP2_consolidated.pdf> 246; Anthony Albanese, 'Funding provided to promote public debate about constitutional change' (Media release, 17 June 2013).

Howard government in the lead-up to the 1999 republic referendum, whereby it allocated \$7.5m each to Yes and No campaign committees.

Problematically, current rules on federal referendum expenditure – set out in section 11(4) of the *Referendum (Machinery Provisions) Act 1984* (Cth) – prohibit Commonwealth funding of partisan campaign committees. Section 11(4) of the Referendum Act provides that the Commonwealth ‘shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law’ unless that spending is in relation to the production and distribution of the official ‘Yes/No’ information pamphlet, or ancillary activities. This provision therefore stands in the way of any federal government that wishes to fund Yes and No committees. It also prevents the Commonwealth from spending money to promote referendum arguments via mass media outlets such as television, radio and newspapers, even if it wishes to do so in an even-handed manner. The expenditure limits further pose a barrier to government spending on education campaigns, as such spending will be vulnerable to challenge where any information materials produced could be perceived as crossing the fine line between neutral information and ‘argument’.⁸

These considerable restrictions on federal expenditure would apply to any plebiscite on same-sex marriage held under this Bill. This is because section 8 of the Bill provides that the Referendum Act will apply to the conduct of a plebiscite.

The expenditure restrictions in section 11(4), and picked up by the Bill, are unsuited to a modern-day campaign environment. This is demonstrated by the fact that, in both 1999 and 2013, the Parliament passed legislation to suspend the operation of section 11(4) for the duration of the referendum campaign. (It was this that enabled the Howard government to allocate funding to Yes and No campaign committees.) The House of Representatives Standing Committee on Legal and Constitutional Affairs lends further support to this view. In 2009 it found that section 11(4) ‘severely restricts the way in which the Government can engage with electors on issues of constitutional change’ and recommended that existing spending limits be lifted.⁹

Rather than apply the Referendum Act’s overly strict expenditure limits to a future popular vote on same-sex marriage, the Bill should set down rules that provide the Commonwealth with a greater degree of spending freedom, as is appropriate in today’s campaign environment.

(c) the impact of the timing of such an activity, including the opportunity for it to coincide with a general election;

For cost reasons (see part (b) above), any popular vote on same-sex marriage should be held at the same time as a general election.

Australia’s referendum history suggests that propositions put to the people are just as likely to succeed whether the ballot is held on election day or mid-term. Of 44 referendum questions, 22 have been put to voters on election day, resulting in 4 successes. The success rate is identical for referendums held mid-term. However, the last successful referendum held on election day was in 1946, and since mid-century most referendum questions have been put mid-term.¹⁰

⁸ *Reith v Morling* (1988) 83 ALR 667.

⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs (hereafter ‘House Standing Committee’), Parliament of Australia, *A Time for Change: Yes/No? — Inquiry into the Machinery of Referendums* (2009) 62; recommendation 11.

¹⁰ Williams and Hume, above n 1, 92-93, 96.

(d) whether such an activity is an appropriate method to address matters of equality and human rights;

1 Not a referendum

The title of this inquiry suggests an interest in receiving submissions on the issue of whether that vote should be conducted as a plebiscite or a referendum. Further to what was said at (a) above in respect of the difference between those two approaches, we submit that any proposal for a popular vote on marriage equality should take the form of a plebiscite and not a referendum. This is so for two reasons:

- (1) Some commentators have suggested that the Irish referendum provides a relevant overseas precedent for holding a referendum on the question in Australia. But the prior constitutional position in Ireland, however, was clearly distinct from the position in Australia: the concept of ‘marriage’ in Art 41 of the Irish Constitution is explicitly connected to ideas about ‘the family as the natural primary and fundamental group of society’, which could be understood as restricting ‘marriage’ to as available only to opposite-sex couples. In Australia, by contrast, the text of the Constitution simply refers to the idea of ‘marriage’, in a way that is much broader, or more open-textured, in nature. In 2013, the High Court of Australia unanimously held that the Commonwealth’s constitutional power extends to both opposite and same-sex marriage, whereas in Ireland, there was no equivalent court ruling.

To quote directly from the High Court’s judgment in *Commonwealth v Australian Capital Territory* [2013] HCA 55, [33]:

‘marriage’ is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.

In a later passage, the Court said, more simply: ‘When used in s 51(xxi), “marriage” is a term which includes a marriage between persons of the same sex.’

A referendum is a mechanism for effecting a formal alteration of the Constitution – typically to either confer power upon an arm of government that it presently lacks or restrain the future exercise of those powers it presently holds. A referendum on same-sex marriage would achieve neither outcome. The Commonwealth Parliament already has the necessary power to legislate for same-sex marriage.

- (2) The requirements of a referendum are set out in section 128 of the Commonwealth Constitution. Reflecting the federal structure of the Australian polity, for the successful carriage of a referendum that provision requires not only a national majority of ‘Yes’ votes but also a majority in favour of ‘Yes’ in a majority of States. While this second requirement ensures that the more populous states cannot use their size to overwhelm the wishes of electors in less populous states in the Australian Federation, this protection draws its justification from the Constitution’s central concern with the division of power between the Commonwealth and States as tiers of government. It has no relevance as a requirement to be satisfied when the nation engages in a popular vote on a social or ‘conscience’ issue.

That satisfaction of the federal requirements of section 128 would be inappropriate on such questions is well demonstrated by the fact that when Australians voted on conscription in World War I (twice) and the preferred national anthem in 1977, they did so in a simple plebiscite, not a referendum in which significance was attached to their identity as electors state by state.

2 *Not a plebiscite*

Although we strongly recommend that if the Parliament supports holding a popular vote on marriage equality then this should be by plebiscite and not referendum, we also submit that a plebiscite is neither necessary nor desirable.

In addition to the significant costs of conducting such a vote, discussed above at (b), and the lack of any substantive effect, discussed above at (a), there are two other reasons against the holding of a plebiscite on this issue:

- (1) As suggested by the very terms in which the Committee has sought submissions, it should be acknowledged that ‘matters of equality and human rights’ are matters not of opinion (such as a poll on which song Australians would like as their national anthem) but of principle in accordance with international and domestic standards of fairness, equality and freedom from discrimination. It would be a worrying development for questions of this sort to be seen as ones to be referred to the electorate, where majoritarian impulses may see social tensions entrenched in legal discrimination of minority groups and interests. It is not difficult to imagine other contexts in which the earlier precedent of a popular vote on the rights of same-sex persons to enter into marriage may lead to a similar mechanism being used and at great cost to national harmony in a multi-cultural and secular modern state.
- (2) Australia is a representative democracy. Electors choose their representatives to sit in the legislature and decide on the enactment of laws over an almost infinite range of topics, including many that are not discussed in election campaigns or emerge as concerns between polls. Australians have only very rarely resorted to a plebiscite – on just three occasions and on two issues (one about conscripting young men for war almost a century ago and the other about national symbolism). The World War I plebiscites should be appreciated as ones that concerned an issue on which public opinion was in fact very closely divided, and where public support was essential, given the sacrifices potentially being required of those affected had conscription been adopted. That a national poll has only been used in such exceptional circumstances reflects the fact that we elect our representatives to govern.

In the specific context of marriage law reform, Professor Mark Finnane recently pointed out that the Menzies government’s creation of marriage under Commonwealth law by enactment of the *Marriage Act 1961* (Cth) did not involve a plebiscite.¹¹ More generally, there are many issues decided by the current Parliament that affect Australians just as much, if not more, directly than marriage equality and for which no one suggests a popular vote is needed. Electors were not asked, just as one example, to provide their support for the government’s new meta-data surveillance laws.

¹¹ M Finnane, ‘A plebiscite on marriage? Robert Menzies didn’t need it’ *The Conversation* (27 August 2015) avail at <https://theconversation.com/a-plebiscite-on-marriage-robert-menzies-didnt-need-it-46547>.

Conducting a plebiscite is a non-binding and expensive step, inappropriate for the determination of principled matters of legal rights affecting minorities and, essentially, an abdication of responsibility by the people's elected representatives under our system of government.

(e) the terms of the Marriage Equality Plebiscite Bill 2015 currently before the Senate; and

We make no further comment on the provisions of the Bill beyond those raised earlier in this submission.

Yours sincerely,

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