



## Electoral Commissioner

Our ref: 15/648

Ms Sophie Dunstone  
Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Ms Dunstone

### **AEC submission to the 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 provide a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia.

The Australian Electoral Commission's (AEC) submission provides a discussion of technical matters pertaining to items b, c and e from the inquiry's terms of reference.

This discussion of technical matters applies to all topics that a plebiscite or referendum may consider.

I am happy to provide further information as required.

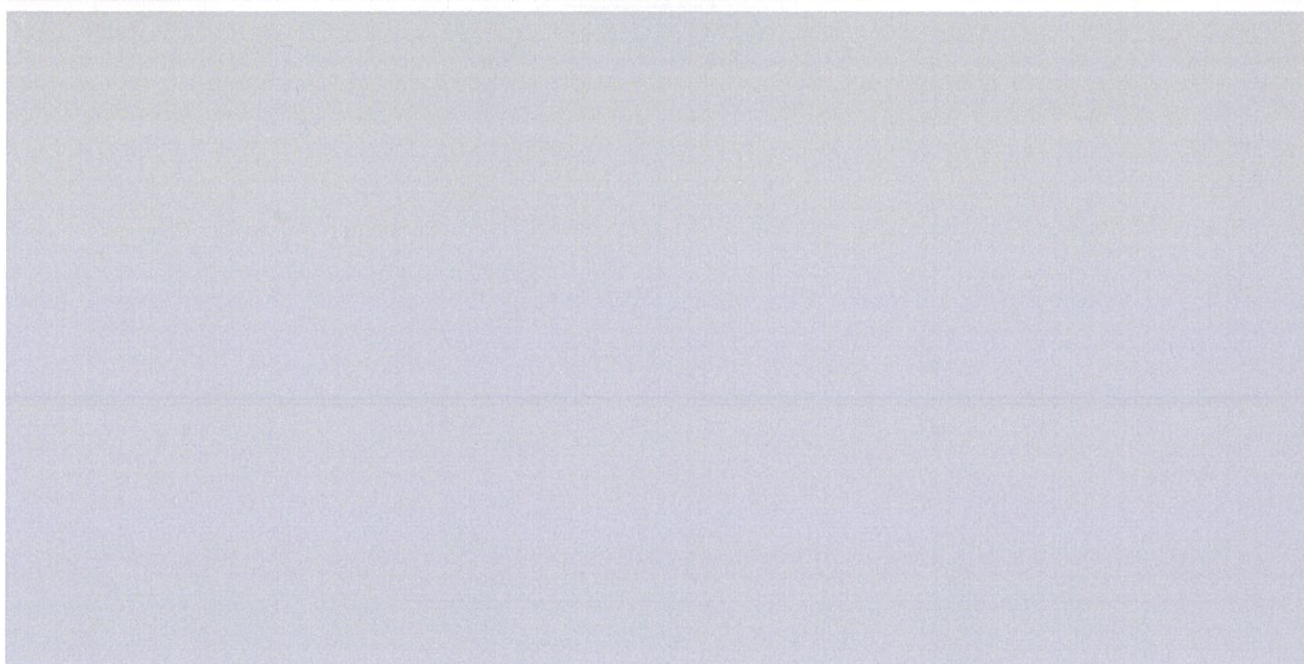
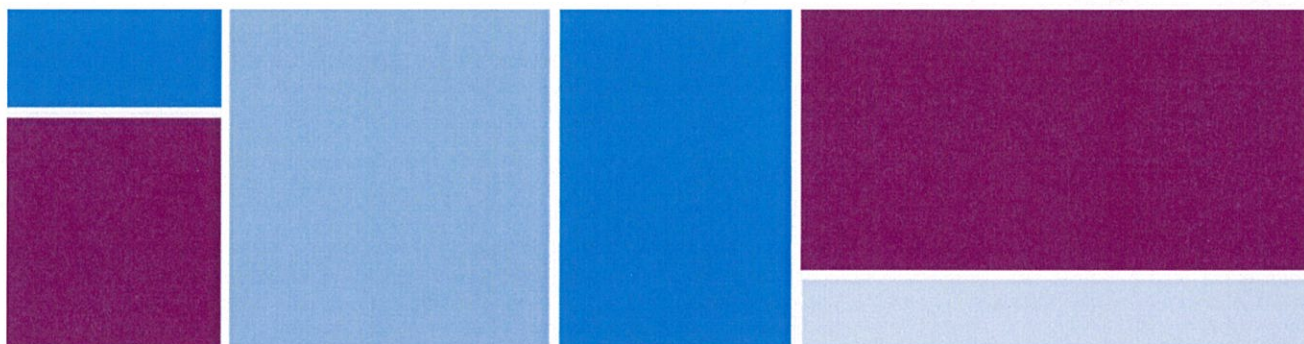
Yours sincerely,

Tom Rogers

4 September 2015

# Submission to the inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia

September 2015



**AEC**

Australian Electoral Commission

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## 1. Introduction

1.1 On 20 August 2015, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee (the Committee) for inquiry and report by 16 September 2015:

The matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia, with particular reference to:

- (a) an assessment of the content and implications of a question to be put to electors;
- (b) an examination of the resources required to enact such an activity, including the question of the contribution of Commonwealth funding to the 'yes' and 'no' campaigns;
- (c) an assessment of the impact of the timing of such an activity, including the opportunity for it to coincide with a general election;
- (d) whether such an activity is an appropriate method to address matters of equality and human rights;
- (e) the terms of the Marriage Equality Plebiscite Bill 2015 currently before the Senate; and
- (f) any other related matters.

1.2 The Committee invited the Australian Electoral Commission (AEC) to provide a submission addressing these terms of reference.

1.3 This submission addresses the legal and constitutional framework for the conduct of a plebiscite or constitutional referendum, and responds to the matters listed in parts (b), (c) and (e) of the inquiry's terms of reference.

## 2. Marriage Equality Plebiscite Bill 2015

2.1 The AEC notes the intention of the Marriage Equality Plebiscite Bill 2015 (the Bill) as provided in its Explanatory Memorandum which is to 'hold a national plebiscite on the issue of same-sex marriage to be conducted at the next general election'. The Explanatory Memorandum indicates the plebiscite should be conducted in accordance with the provisions of the *Referendum (Machinery Provisions) Act 1984* (Referendum Act).

- 2.2 Clause 8 of the Bill states that the provisions of the Referendum Act would apply 'to the submission of the question ... and the scrutiny of the result of the plebiscite with such modifications as are necessary to allow the submission of the question and scrutiny of the result on the same basis as a referendum under that Act'. As there are a range of specific provisions in the Referendum Act that regulate the conduct of a referendum, it is not clear from the terms of the Bill whether this clause has the legal effect of requiring the operation of all of the necessary Referendum Act requirements.
- 2.3 The Explanatory Memorandum to the Bill states subsection 11(4) of the Referendum Act would apply in relation to the expenditure for presentation of the 'yes' and 'no' cases of the plebiscite, the manner in which these cases would be prepared as set out in ss. 11(1) and (2)) of the Referendum Act is unclear in the context of the plebiscite proposed by the Bill.
- 2.4 Ultimately the Courts may determine whether the effect of clause 8 of the Bill, if enacted in its present form, is sufficiently clear to attract the operation of matters such as the offence provisions contained in Part X of the Referendum Act.
- 2.5 The AEC recommends that any bill proposing a plebiscite should specify which, if any, provisions of the Referendum Act and the Commonwealth Electoral Act 1918 (the Electoral Act) are to apply.

### 3. Legislative Framework

- 3.1 It is critical to note that the Australian Constitution itself does not specifically refer to the term 'referendum', despite outlining at s. 128 the mechanism used to alter the Constitution. The term 'referendum' is first defined at s. 3 of the Referendum Act as 'the submission to the electors of a proposed law for the alteration of the Constitution'. To be successful, a constitutional referendum must have a national 'Yes' majority, and a 'Yes' majority in at least four of the six states in Australia. The last referendum held was in 1999 on the question of Australia becoming a republic.
- 3.2 A plebiscite is not defined in the Australian Constitution, the Electoral Act or the Referendum Act. A plebiscite can also be referred to as a simple national

vote and is non-binding. An example of a popular vote held in the form of a plebiscite was the National Song Poll in 1977.

- 3.3 Under s. 7A of the Electoral Act, the AEC can conduct a plebiscite as a fee-for-service election, with the AEC entering into 'an agreement, on behalf of the Commonwealth, for the supply of goods or services to a person or body'. The rules for a plebiscite or fee-for-service election are normally contained in the terms of the agreement between the AEC and the person funding the election. A typical example of a fee-for-service election is an election for office holders in a trade union.
- 3.4 In 2007 the AEC conducted fee-for-service elections in Queensland in the form of plebiscites for the purpose of council amalgamations in Queensland. These plebiscites were conducted using a voluntary postal vote methodology. The conduct of the plebiscites also followed the passage of the *Commonwealth Electoral Amendment (Democratic Plebiscites) Act 2007*, which amended s. 7A of the Electoral Act to enable the Commonwealth Electoral Roll to be used for the conduct of a plebiscite.

## 4. Types of Votes

There are three ways the AEC can conduct a vote.

### **Stand-alone attendance vote**

- 4.1 A stand-alone attendance vote could be undertaken in line with the requirements of the conduct of a referendum if the enabling legislation or fee-for-service agreement outlined the event as such. This could include postal voting.

### **Combined event vote**

- 4.2 A referendum held in conjunction with a federal election is catered for in the provisions of the Referendum Act. The Referendum Act could be amended to include similar processes that would apply to a plebiscite, while excluding those provisions that can only apply to a referendum (for example, appointment of scrutineers).
- 4.3 The AEC has established systems, operational procedures and instructions for counting and scrutinising referendum votes in conjunction with a federal

event. The issuing of votes is conducted as a combined exercise, with voters issued both types of ballot paper consecutively along with appropriate instructions. Separate ballot boxes are provided at each polling place for each type of vote. There are also discrete reporting mechanisms for the results of a referendum, compared with those provided for the election of the House of Representatives and the Senate.

- 4.4 It is relevant to note that there may be an increased risk of informal voting in any scenario where multiple votes are being cast consecutively with different voting systems or requirements.

#### **Stand-alone postal vote**

- 4.5 A plebiscite could be undertaken as a stand-alone postal vote, with no 'in-person' voting available to voters (if outlined as such by the enabling legislation or fee-for-service agreement). A stand-alone postal vote is not available for a referendum, as the provision of voting services in a referendum matches the requirements of an electoral event to be conducted under the Electoral Act.
- 4.6 The AEC has previously undertaken a national postal ballot for the election of candidates to the National Constitutional Convention in 1997 under legislation passed specifically for this purpose, *Constitutional Convention (Election) Act 1997*. This ballot was voluntary.

#### **When would the result of the vote be known?**

- 4.7 The timing of availability of results would depend on the specific type of event (referendum or plebiscite) conducted and the agreement or legislation prescribing the event.
- 4.8 As a general indication, if the poll was to be conducted according to the general principles of a referendum, the legislative requirement to allow 13 days after polling day for the return of declaration votes (both those taken at and sent from other locations, or postal votes) would necessitate a counting period of at least that amount of time. Further, additional time would be required to scrutinise and admit the votes received up until that date. The current indicative target for the AEC to declare results of a referendum would be no later than four weeks after polling day.

- 4.9 If the poll was conducted as a referendum (or legislated as such) the requirement would be that the writ would need to be returned within 100 days of issue.

## 5. Operational considerations

- 5.1 If a referendum were to be conducted under the Referendum Act, the following provisions would apply.
- **Compulsory voting.** Section 245 of the Electoral Act and s. 45 of the Referendum Act outline the requirements for compulsory voting in a federal election or referendum. They also contain the associated offences and actions required of the AEC in administering the investigation of apparent non-voting. It is noted that clause 8 of the Bill proposed refers specifically to s. 45 of the Referendum Act.
  - **One vote per person.**
  - **Formality rules.** Formality provisions are set out in Part VI of the Referendum Act.
  - **Scrutineers.** Section 89 of the Referendum Act states that scrutineers are appointed by the Governor-General, the State Governors, the ACT Chief Minister and the NT Administrator. In contrast, candidates appoint scrutineers at an election.
  - **Challenges.** Section 100 of the Referendum Act states that the only persons able to challenge the results of a referendum conducted under the Referendum Act are those persons who are able to appoint scrutineers.
  - **The six metre rule.** Section 131 of the Referendum Act provides for the control of behaviour at polling places, including the six metre rule. The Committee should note that the six metre rule does not apply to pre-poll voting centres.
  - **Polling offences – enforcement.** Part X of the Referendum Act provides for offences. The mechanism for enforcing offences is the relevant Courts. Courts have previously taken a conservative approach to the interpretation of offence provisions (see the comments of Gibbs J in *Beckwith v R* (1976) 12 ALR 333 at 339). Accordingly, any legislation will need to clearly specify the offences that would apply to the conduct of a plebiscite.



- **Arguments for and against the proposed law.** Section 11 of the Referendum Act provides for the creation of the argument for and against a proposed law. It also outlines the associated funding arrangements.
- **Distribution of the pamphlet containing arguments for and against the proposed law.** Section 11 of the Referendum Act also provides for the distribution of the argument for and against the proposed law in the form of a pamphlet. Attachment A of this submission provides an outline of the key issues and timings associated with the preparation of a pamphlet and development and delivery of a media campaign.
- **Employment of temporary staff.** Under s. 35 of the Electoral Act, the AEC may employ temporary staff to assist in the conduct of the election or referendum.

## 6. Other Considerations

### Broadcast of material and the media blackout

- 6.1 The Parliament may wish to consider whether it intends the requirements for authorisation for broadcast material and the 'media blackout' to apply. Questions relating to the 'media blackout' should be addressed to the Australian Communications and Media Authority.

### Scrutiny

- 6.2 Scrutiny timing for a plebiscite or referendum held concurrently with another electoral event would be in line with the current election night and scrutiny timing and requirements stated by the AEC.
- 6.3 After election night, a fresh scrutiny of ordinary referendum ballot papers must be undertaken to check that on election night all ballot papers were correctly allocated. Although not required under the Referendum Act, it is AEC policy to conduct a fresh scrutiny of all declaration vote referendum papers after election night.

## 7. Estimated costings

- 7.1 For the purpose of estimating cost, it has been assumed that the conduct of a compulsory attendance plebiscite or referendum would operate in a similar

manner to that of a general federal election. Further, estimates provided in this submission assume that the proposed event would occur within the next twelve months and that no public funding would be provided to the Yes or No campaigns except in accordance with the instructions outlined in the Explanatory Memorandum to clause 6 of the Bill.

7.2 If a plebiscite were to be conducted as if it were a referendum alongside the next general federal election, the additional cost estimated by the AEC is \$44.0 million. The following major items would contribute to the additional cost:

- i. additional temporary staff to manage the throughput of electors in polling places, noting the extra time required for an additional ballot paper (three instead of two) to be issued and completed;
- ii. additional paper and storage requirements to manage an additional ballot paper;
- iii. the design, production and delivery to households of a pamphlet containing arguments for and against;
- iv. education and promotion materials to inform electors in regard to the plebiscite.

7.3 If a plebiscite was to be conducted as if it was a referendum and as a stand-alone event, the total cost is estimated at \$158.4 million. Given the assumption that the same coverage of polling places would be required as for a federal election, the savings noted for a stand-alone event are minor. While items iii and iv (above) are noted as additional costs not normally incurred during a general federal election, the requirement for only one ballot paper for a stand-alone event would see fewer temporary staff, paper and storage costs. There would also be some flow-on effects in increased costs associated with procurement of paper. By way of comparison, the 2013 general federal election cost approximately \$139.6 million, excluding public funding.

## 8. Timetable

- 8.1 Timetables for the conduct of a general federal election and a constitutional referendum are set out in the Constitution, the Electoral Act and the Referendum Act.
- 8.2 Section 128 of the Constitution has one key timeframe. It requires that there must be not less than two and not more than six months between the passage of the proposed law and the referendum question being put to electors. This timeframe allows for the proposed law to be publicised, and gives some certainty in the preparation of the arguments for and against and for the necessary arrangements to be put in place to conduct the referendum.
- 8.3 The AEC would require adequate lead time of to procure materials, and to make any required operational or technical adjustments in preparation for an additional electoral event (be it stand-alone, joint or postal). In terms of the preparation of a referendum advertising campaign, a truncated or minimum timeframe carries certain risks. These include insufficient or no market testing to confirm the objectivity and effectiveness of materials (which in turn could impact formality levels), escalation of costs relating to the development and market testing, and impacts on preparations.

### Table 1: The election timetable according to The Constitution and the Electoral Act

The following timeframe contains the key procedural requirements for the conduct of a House of Representatives and a half-Senate election.

	Minimum number of days	Maximum number of days
<b>Expiry or dissolution of Parliament</b>		
The House of Representatives expires three years after its first meeting but can be dissolved earlier (s. 28 Constitution)		
<b>Election announcement</b>		
No fixed time		
<b>Issue of writs</b>	0	10
Writs are issued within 10 days of the expiry of the House of Representatives or within 10 days of the proclamation of dissolution of the House of Representatives or Senate (s. 12, 32 Constitution, s. 151 Electoral Act).		
<b>Close of rolls</b>	7	17
Rolls close at 8pm, seven days after the issue of writs (s. 155 Electoral Act).		
<b>Close of nominations</b>	10	37
Nominations close at 12 noon, between 10 and 27 days after the issue of writs (s. 156 Electoral Act).		
<b>Polling day</b>	33	68
Polling day is fixed between 23 and 31 days after the date of nominations (s. 157 Electoral Act).		
<b>Return of writs</b>		110
The maximum time for the return of writs is no more than 100 days after the issue of writs (s. 159 Electoral Act).		

**Note:** If a referendum was run with a general election there are some variations to the timetable that arise from the operation of s. 128 of the Constitution.

## Attachment A

### Preparation of a communication campaign and yes/no pamphlet to support a referendum in conjunction with the next federal election

#### *Pamphlet*

#### Key points/issues

- The pamphlet containing arguments for and against the proposal is a complex and expensive product managed by the AEC requiring several months of planning ahead of a referendum period.
- The requirements of the pamphlet containing the arguments for and against the proposal are set out in s. 11 of the Referendum Act and include:
  - strict legislative timeframes and requirements in relation to content, printing and delivery;
  - enough time to adequately market test the pamphlet design, and develop clear guidelines for the Yes/No committees providing pamphlet content, in order to ensure a balanced and neutral presentation of the cases;
  - printing and delivery of over 10 million copies to all households – requires more time than is allowed in a minimum election/referendum timetable scenario; and
  - the pamphlet to be provided in accessible formats including translations.
- Content for the pamphlet must be provided to the AEC. In a referendum this is presented to the AEC by groups, formed by the Senators and Members, who voted for or against the legislation in Parliament.
- Section 11 of the Referendum Act requires that the referendum pamphlet be delivered to each address on the electoral roll. A household mailing will not cover all addresses – special measures are required to reach all, which means advance notice is required to allow time for consultation between Australia Post and the Australian Electoral Commission to match address data from both organisations

- Timing, costing and resourcing would change depending on length of the pamphlet.
- With a large pamphlet, there is unlikely to be adequate paper stock in Australia to complete this mail out. Special orders of paper and plastic are required, including a minimum four week lead time for milling of paper.

### **Tasks**

- Development and market testing of pamphlet template – 8 weeks
- Development of Guidelines for MPs and Senators – 4 weeks
- Waiting period between passage of legislation and delivery of cases to the AEC - 4 weeks
- Further design and layout – 1 week
- Feedback and clearances – 1 week
- Further market testing, as required – 3 weeks
- Feedback and finalisation of design and content – 2 weeks
- Printing and delivery (occurring concurrently) – 6 weeks minimum

Total time required: 29 weeks

### ***Communication campaign***

#### **Key points/issues**

- Developmental research is critical to inform the development of the AEC's communication strategy, and to inform the development of a new advertising campaign for a combined event. The market research would help to inform the scope, channels, timing and suitable budget of the campaign.
- Based on the developmental research, there could be a need for communication to start well ahead of the voting period. This could include advertising, direct mail or other activities.
- The AEC's advertising campaign must cater for special audience groups, in line with the whole-of-government advertising guidelines. While the AEC

is exempt from the guidelines, the agency has committed to adhering to the principles of the guidelines. This includes the requirement for the Electoral Commissioner to certify the campaign meets the principles.

### **Timings**

- Previous advice has indicated planning for a new campaign for use at the (predicted) 2016 federal election needed to start by April 2015 to be ready for an election called on or after 1 July 2016.
- A campaign could be developed in the remaining ten months. Risks and costs would increase with a contracted timeframe.