

Senate Committee into Legal and Constitutional Affairs

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31 August 2015

Dear Committee,

I thank you for the opportunity to make a submission to the [inquiry into](#) a popular vote, in the form of a plebiscite or referendum, on marriage in Australia.

I have broken my submission into sections to match the terms of reference for the inquiry.

An assessment of the content and implications of a question to be put to electors.

I have significant concerns about the content and implications of the question.

Putting a question that is based on human rights and equality to a public vote undermines many aspects of good government. Firstly, it takes away from the democratic ideals enshrined in the Australian Constitution – electors vote for representatives in both houses. A key role of those elected representatives is to enact laws for the good government of Australia.

My submission does not intend to be a ‘Constitutional Law for Dummies’ exercise. I have faith in the Senate and in the honourable members of the Committee.

The Commonwealth’s legislative power is vested solely in Federal Parliament. Those powers extend, amongst other things, to make laws pertaining to marriage. To try and pass those powers to the electorate is not in my view constitutionally valid. Australia cannot be asked about how powers under subsection 51(xxi) may be exercised.

I submit, however, that a valid question would be the removal of 51(xxi) from the Constitution and to grant those powers to the States and Territories. It appears as though Parliament is not intending to pursue that option.

Rather, the question raises a framework in which intolerance will obtain a public platform. The question is also ambiguously worded – it may be read as either support for marriage as a whole provision, or as marriage between two people of the same gender. The ambiguity means that the outcome of the plebiscite may be continued uncertainty.

Further to this, to put the rights and hopes of LGBTIQ (lesbian, gay, bisexual, transgender, intersex and queer) members of our community to public vote has the potential to create an environment of fear and hatred towards those people and their family, friends, and other loved ones. As a member of that community (I identify as a gay man) I have no right to question the rights of any other member of society to marry, so why should they have a say in my right?

Parliament has had ample opportunity to address this issue. It is their role to make laws for

the good government of Australia and its people. They are failing in their mandate on this point.

Putting human rights and equality to a popular vote also trivialises the issue. It seems to say that the rights of some members of our community are no different to calling up in support for your favourite hopeful on a reality television show.

A further concern I hold, is that the question and the process associated with putting it to electors will be seen as some a carte blanche platform to be hateful, and to engage in severely homophobic communication. Australia does not have an absolute right to free speech, and it lacks strong legislation for the protection of LGBTIQ individuals. In the absence of strong anti-discrimination laws, and laws which protect all Australians from hate speech the question of equality should not be put to public vote.

I am also concerned as a 41-year-old that putting human rights to popular vote casts a sad and wrong message to youth. I am well aware, and many other members of my community, that insults based on sexuality are painful and continue to be a painful part of youth for many. 'Poofster', 'fag' and 'lezzo' were common insults during my school years and sadly I continue to hear these abusive words yelled out at people. The ingrained culture of homophobia in Australia needs to be challenged and eradicated.

To say that the rights of the said poofsters, fags and lezzos to be granted marriage equality has to be put to the public shows that government has no comfort or confidence in how to handle a human rights based issue.

The question is also divisive. It has the potential to create an environment of extreme homophobia (in making reference to homophobia, it is used as blanket term to cover any 'phobia' against members of the LGBTIQ community and is intended to include lesbophobia, transphobia etc) It has no requirement at law. The Bill should fail on those grounds.

Australia has had a limited exposure to the use of plebiscites. Of the three that have previously occurred, two have been clear conscience issues – the matter of Australians being sent to possible death in warfare; and the other was about the national anthem.

The possibility of putting the question to a referendum is made more difficult. On the submissions above, the question is not necessarily one which requires an alteration to the Constitution. Further, the track record of failure of questions sent to a referendum means that there is ill intent in putting this question to a process with a significantly high threshold for success.

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.

From preliminary estimates, the resources required to conduct such an activity are exorbitant and extravagant. I note that various parliamentarians and news reports have mentioned the figure of \$120 million. The funds are effectively being 'thrown away' on the basis that there is no need to ask such a question – polls, conducted by varying bodies, have consistently shown that a significant majority of Australians are in support of marriage equality.

In terms of funds required to run campaigns, this would highlight the extreme inequality faced in the marriage equality debate. A number of organisations that oppose marriage equality have federally granted tax exemption status. This is a highly contentious issue – religious organisations should only be granted exemptions where that exemption provides a benefit to society.

Campaigning, if it were to occur, should happen on an even footing. Many organisations that support and campaign for marriage equality do not have the luxury of tax exempt status. If any organisation that receives tax exemptions, in any form, campaign for a 'no' vote that organisation should be stripped of its tax-exempt status and face the full force of Australia's taxation system. To argue against basic equality and human rights should not be a state subsidised activity.

Indeed, a number of religious organisations have come out in favour of marriage equality. I do not seek to tarnish organised religions. I simply argue that if organisations argue against human rights and equality, they should not meet the relevant public benefit threshold for financial benefits funded by all taxpayers.

In the much-touted age of austerity this is a blatant misuse of Commonwealth funds. Buy books for schools. Run a health care program. Increase the funding for the Children's E-Safety Commissioner. Don't spent money on this.

An assessment of the impact of the timing of such an activity, including the opportunity for it to coincide with a general election.

To be honest, there is no need for such an activity to ever happen. To tie the activity to a general election is to highly politicise a question of love, ethics and equal rights.

As a gay man, my rights should not be a political stunt.

Whilst I do like a sausage sizzle, I have Bunnings for my regular Saturday fix. I shouldn't have to do a Member of Parliament's work to qualify for the right to buy a sausage in bread.

Whether such an activity is an appropriate method to address matters of equality and human rights.

In my view, this is the key question for this inquiry. As discussed above, I do not believe that there is a constitutional basis to such a process.

The power to make laws in relation to marriage is vested in Parliament. The Constitution is clear on this point. The High Court has very clearly affirmed this. The Prime Minister, responding to the plebiscite in Ireland also articulated this.

We have seen that, despite growing evidence of society's preference/support for marriage equality, moves to achieve this are consistently stalled in Parliament. The Prime Minister has denied members of the Coalition a conscience vote and thus current bills seeking to introduce marriage equality are doomed to fail.

Therefore, having a divisive process such as a plebiscite can only cause damage. Even if such a plebiscite were to show that Australians overwhelmingly support equality, parliamentarians are not bound to amend the Marriage Act.

The terms of the Marriage Equality Plebiscite Bill 2015 currently before the Senate.

The Bill lacks a binding commitment on Parliament to make necessary amendments to the Marriage Act. As currently drafted, it is merely tokenistic. It has no clear procedural substantive obligations that bind Parliament.

Any other related matters.

Consideration must also be given to the outcome if a 'no' vote succeeds. My heart breaks to believe that such an outcome is possible, but such an outcome must be contemplated.

It may appear to some to be a state sanctioned 'green light' for increased homophobia, increased violence, and increased discrimination. It has the capacity to ostracise families with gay members. It says to children with gay parents that their parents aren't as good as heterosexual parents. It says that we are all 'not the same', 'a bit different' or any of the other hateful things we have heard over the years.

Yours sincerely,
Stephen Jones