TO: **Legal and Constitutional Affairs Reference Committee**

FROM: **Professor Geoffrey Lindell**

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

DATE: **30 August 2015**

SUBMISSION

Introduction

1. The purpose of this document is to provide a brief submission in relation to the above inquiry.

2. I have taught and published widely in the field of Australian constitutional law and private international law. I have also published articles and provided legal advice on the subject of same-sex marriage; [1] and provided by invitation evidence and a submission to a State Parliamentary Committee on the same subject. [2]

Summary

3. The views expressed in this submission are summarised below:

   (1) The Parliament has the power to pass a law authorising the holding of a plebiscite as a means of obtaining a non-legally binding popular vote on the question whether the recognition of marriages should extend to marriages between persons of the same - sex under ss1 1, 51 (xxi) and (xxxix) of the Constitution. It also has the undoubted power to *initiate* a referendum to alter the Constitution to confirm whether it has the power to legislate on the same subject. But the proposed law seeking such a change in the Constitution could not be initiated and submitted to the voters without being approved either by an absolute majority of both Houses, or of only one House, if it satisfies the deadlock procedure prescribed by s 128 of the Constitution. (See paras 5-6 below.)

   (2) However the fact that either course is legally possible does not necessarily make them the appropriate courses of action to follow in regard to the enactment of laws dealing with same- sex marriage. (See para 7 below.)

   (3) The role of the people in the enactment of legislation in Australia has always been limited. (See para 8 below)

[1] I have attached to this submission a short biographical description of myself.

[2] This was cited and quoted extensively in the Legislative Council Standing Committee on Social Issues, "Same-sex marriage law in New South Wales" Report 47, July 2013.

(4) Section 1 of the Constitution vests the legislative power on the Commonwealth in the Parliament and not, legally speaking the people as well except when it comes to the amendment of the Constitution itself. (See para 9 below.)

(5) The High Court has made it clear beyond doubt that Parliament has the power under s 51(xxi) of the Constitution to pass a law to recognise marriages between persons of the same-sex without the need for either a plebiscite or a referendum. This renders such a popular vote legally and constitutionally unnecessary. (See para 10 – 11 below.)

(6) I do not believe that any special reason has been advanced to justify a departure from the usual practice followed in a representative democracy of allowing the Parliament to represent the views of the electorate without the need for obtaining a popular vote in relation to the enactment of legislation which it is competent to enact either in the form of a plebiscite or a constitutional referendum. (See paras 12 - 14 below.)

(7) I believe that if, contrary to my view, there is to be a popular vote it should be a plebiscite which is held at the same time as the next general elections for the Parliament and that the Commonwealth should provide funding to the 'yes' and 'no' campaigns in accordance with the usual procedure followed for the holding of constitutional referenda. (See paras 15 – 16 below.)

(8) I also believe that if a plebiscite is held, the question to be submitted to the voters should be agreed to by the Parliament and be worded as follows:

> "Do you approve of an alteration to the law for the purpose of recognising marriages between two persons of the same-sex whether entered into in Australia or elsewhere?"

(See para 17 below.)

Elaboration

4. As I have had occasion to mention elsewhere, the concept of marriage has changed over time and never been immutable. [3] Perhaps the most outstanding illustration in modern time is the fact that marriage is no longer treated as a relationship which lasts for life despite the vows taken when marriage is contracted. What has been surprising is the speed with which the previous community consensus on restricting marriage to a relationship entered into by persons of the opposite sex has fractured in recent times.

5. Parliament has the power to pass a law authorising the holding of a plebiscite as a means of obtaining a non-legally binding popular vote on the question whether the recognition of

[3] G Lindell, "Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey - North America and Australasia" (2008) 30 *Sydney Law Review* 27 at pp 28 -9.

marriages should extend to marriages between persons of the same - sex. It is not inconsistent with the nature of our system of representative democracy for the Parliament to seek to ascertain the wishes of the electorate on whether a law should be enacted in the same way that it can establish royal and other commissions of inquiry to deal with the same issue. This may enable Parliament to make up its mind on whether the legislation should be enacted. Such measures would be seen to be reasonably incidental to the execution of the legislative powers conferred on the Parliament which, in this case, would be those contained in ss1 1, 51 (xxi) and (xxxix) of the Constitution.

6. The Parliament also has the undoubted power to initiate a referendum to alter the Constitution to confirm whether it has the power to legislate on the same subject. But the proposed law seeking such a change in the Constitution could not be initiated and submitted to the voters without being approved either by an absolute majority of both Houses, or of only one House, if it satisfies the deadlock procedure prescribed by s 128 of the Constitution.

7. However the fact that either course is legally possible does not necessarily make them the appropriate courses of action to follow in regard to the enactment of laws dealing with same-sex marriage.

8. The system of initiative and referendum which allows electors to bypass a legislature and enact or reject legislation in some parts of the United States, has not been adopted in Australia. The role of the people in the enactment of legislation in Australia has always been limited. Thus it has been said:

> Apart from the role of the Executive… the most obvious characteristic of the legislative process is that the participation in the enactment of laws is limited, by and large, to the elected parliamentarians. Whilst interest groups may seek to influence the drafting of legislation, and a number of parliamentary committees examining bills have taken evidence from witnesses, the enactment of legislation, with the exception of the constitutional requirement of public involvement in any legislation to amend the Constitution, is the province of the Parliament. [4]

9. The limited role of the people is underlined by the fact that section 1 of the Constitution vests the legislative power on the Commonwealth in the Parliament and not, legally speaking, the people as well except when it comes to the amendment of the Constitution itself. Indeed it can be strongly argued that seeking a popular vote on any issue which falls within the legislative competence of the Parliament to enact, especially if it became a precedent for resolving many other controversial issues, could help to significantly weaken the confidence of the voters in the ability of their elected representatives to reach their own decisions in the lawmaking system provided under our system of representative government.

10. Moreover the High Court has made it abundantly clear that –

[4] G Reid and M Forrest, *Australia's Commonwealth Parliament 1901-1988: Ten Perspectives* (1989) at p 241.

(i) the Australian Constitution is founded on the principles of representative and responsible government, thus making it unnecessary to seek and obtain a popular vote on whether the Parliament should pass a law within its legislative competence. [5]

(ii) The Parliament may pass a law to recognise marriages between persons of the same-sex without having to obtain the approval of a popular vote under s51 (xxi) of the Constitution. [6]

(iii) The Parliament may pass a law which restricts marriage to marriages between persons of the opposite sex and ensures that the legal recognition of marriage is not, unless the law is changed, extended to marriages between persons of the same-sex by State or Territory Parliaments again without having to obtain the approval of a popular vote. [7]

11. It follows that a popular vote, whether by way of plebiscite or referendum, is legally and constitutionally unnecessary to determine whether Parliament should pass a law recognising (or continuing its refusal to recognise) same-sex marriages.

12. It is true that two plebiscites were held during World War I on the question of conscription for military service overseas during that War. [8] But this method of governing in Australia is comparatively rare. A number of important and controversial social and political issues have been decided by Parliaments and Governments without the holding of a popular vote as was the case with sending Australian troops to fight in the Vietnam and Iraq Wars. It is well known that the issue of euthanasia is a current controversial issue which has not been put to the people even though it has gained high levels of public approval. [9] More to the point, no such vote was obtained to herald in the changes to our divorce laws which have had an equally important effect on changing the nature of the relationship of marriage. As already indicated that relationship is no longer treated as lasting for life despite the vows taken in the marriage ceremony. This came about by the process of widening the grounds of divorce by abolishing the concept of fault as a necessary condition of divorce. It began in 1959 with the passage of the *Matrimonial Causes Act* 1959 (Cth) and culminated in the passing of the *Family Law Act* 1975(Cth). [10] Both those measures were controversial and involved the relaxation of the usual party discipline to enable the grant of a free vote in Parliament. [11]

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[5] See *Australian Capital Television Pty Ltd & New South Wales* v Commonwealth (1992) 177 CLR 106 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[6] See *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (ACT Marriage Act Case).

[7] See the ACT *Marriage Act Case*.

[8] See G Sawer *Australian Federal Politics and Law 1901-1929* (1956) at pp 132, 135-6, 159-160.

[9] See eg "Survey shows support for legalised euthanasia" – ABC News: The World Today. Available to me as at 27 August 2015 <*http://www.abc.net.au/news/2012-11-16/survey-shows-australian-support-for-legalised-euthanasia/4376524*>.

[10] G Davison, J Hirst and S Macintyre, *The Oxford Companion to Australian History* (1998) at p 191

[11] G Souter, Acts *of Parliament: A narrative history of the Senate and the House of Representatives Commonwealth of Australia* (1988) at pp 32-3 , 195

13. The defeat of a popular vote on whether to approve of the recognition of same-sex marriage would not legally prevent the Parliament subsequently passing a law to provide for such recognition. Equally the success of such a vote will not legally bind the Parliament to legislate to give effect to the proposed recognition. But the current Parliament cannot legally bind its successors. At most it can only represent, at the most, the intention or wish by the current Parliament that a future Parliament will legislate in that way. [12]

14. Whether a popular vote should be held is of course a question of policy on which it seems minds have differed despite the absence of any legal or constitutional necessity for such a vote. I do not believe that any special reason has been demonstrated for departing from the usual way of legislating by holding a plebiscite on the matter once a matter is clearly within legislative power. This is so even though sharply conflicting views have been expressed in the community on the question of same-sex marriage. The case for holding a referendum to alter the Constitution is even harder to justify since confirmation of the power of the Parliament to recognise same-sex marriage is not needed. Seeking such an unnecessary confirmation along with its attendant time, expense and political effort expended would amount to an exercise in empty futility. Even if such a proposal was defeated this would be legally ineffective to prevent a future Parliament relying on the *ACT Marriage Act Case* to pass the law recognising same-sex marriages. The only conceivable reason for seeking an amendment to the Constitution would be to seek the *reversal of* what was unanimously decided by the High Court as recently as 2013 and thereby seek to deny to the Parliament (and presumably also the State and Territory parliaments) the power to recognise same-sex marriages. In the present political atmosphere all the available signs suggest that such a proposal would be likely to fail at a referendum given the need to satisfy the onerous double majority required for its success under s 128 of the Constitution. History has shown that the agreement of the major political parties is an essential but even then not sufficient condition of success.

15. I believe that if, contrary to my view, a popular vote is held, it should take the form of a plebiscite and follow the 'yes' and 'no' cases procedure used for constitutional referenda as has been proposed by the sponsors of the *Marriage Equality Plebiscite Bill* 2015 (Cth) currently before the Senate. [13]

16. As has also been proposed by the sponsors of the same Bill, I believe it should also be held at the same time as the next general elections in order to reduce the cost of holding the plebiscite. [14]

17. I agree with sponsors of the same Bill in thinking that the form of the question should be agreed to by the Parliament. This would help to minimise the chances of the wording being distorted by one or other sides to the debate on the issue in the hope of unfairly influencing

[12] See eg cl 3(2) of the Bill referred to below in paras 15-17.
[13] See cll 5, 6 and 8. The Bill referred to in this submission was introduced in the Senate on 19 August 2015 as to which see *Parliamentary Debates (Senate)* 19 August 2015 at p 62.
[14] See cl 5.

the result of the popular vote. [15] But I would prefer the question to be submitted to the voter to be worded as follows instead of the wording proposed in cl 6 of *the Marriage Equality Plebiscite Bill.* I believe it would make more explicit the recognition of same-sex marriages entered into both in Australia and overseas.

> ” Do you approve of an alteration to the law for the purpose of recognising marriages between two persons of the same-sex whether entered into in Australia or elsewhere?”

ADDENDUM TO PARAGRAPH 14

In reference to what is stated in paragraph 14, the defeat of past referendums to expand Commonwealth legislative powers the existence of which was originally denied by the High Court has not prevented the Court from subsequently upholding the existence of those powers : see *New South Wales v Commonwealth* (*Work Choices Case*)(2006) 229 CLR 1 at [125] – [135]. Given the diverse and contradictory reasons which different voters have for voting against a constitutional amendment, the position is unlikely to be different if an unsuccessful referendum is subsequently held to confirm the existence of the power originally upheld by the Court. The fact remains that unsuccessful referendums have had little or no effect in influencing the judicial interpretation of Commonwealth legislative power: see M Coper, “The People and the Judges: Constitutional Referendums and Judicial Interpretation” in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) at pp 78 – 82, 84. This can only heighten the need to question the utility of holding a referendum to confirm the existence of the power of the Commonwealth Parliament to legislate regarding the recognition of same sex-sex marriage.

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[15] See the second reading speech delivered by Senator Rice which is reported in the *Parliamentary Debates* at p 62.