



Gay & Lesbian Rights Lobby

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

Friday 4 September 2015

Dear Committee Members

New South Wales Gay and Lesbian Rights Lobby Submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into a popular vote

Thank you for the opportunity to make a submission to this inquiry.

The mission of the NSW Gay and Lesbian Rights Lobby (GLRL) is to achieve legal equality and social justice for lesbians, gay men and their families. This includes, but is not limited to, marriage equality.

Our submission is divided into three parts. In the first part we provide a background to GLRL, the community consultation survey which informs our submission and a summary of our position. In the second part we outline and explain our preference that this matter be resolved by a vote of Parliament, rather than a national vote in the form of a plebiscite or referendum. In the final part we respond to the specific terms of reference of the inquiry; noting, however, that we do not support the premise of the Bill, which facilitates a national vote on marriage equality.

We trust that our submission is useful and we would welcome the opportunity to appear before the Committee in a public hearing to supplement our written submission.

Please let us know if we can be of any further assistance.

Yours sincerely

Dr Justin Koonin
Convenor
NSW Gay and Lesbian Rights Lobby



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1. BACKGROUND

1.1. About the New South Wales Gay and Lesbian Rights Lobby

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the leading organisation for lesbian and gay rights in NSW. Our mission is to achieve legal equality and social justice for lesbians, gay men and their families. The GLRL has a strong history in legislative reform.

In NSW, we led the process for the recognition of same-sex de facto relationships, which resulted in the passage of the Property (Relationships) Legislation Amendment Act 1999 (NSW) and subsequent amendments. The GLRL was also successful in campaigning for an equal age of consent in NSW for gay men in 2003 and the equal recognition of same-sex partners in federal law in 2008.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched Meet the Parents, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the reform recommendations outlined in our 2003 report, *And Then ... The Bride Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and enacted into law under the Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 (NSW). In 2010, we successfully lobbied for amendments to remove discrimination against same-sex couples in the Adoption Act 2000 (NSW).

More recently, in 2013, we were instrumental in lobbying to secure the passage of federal anti-discrimination protections for LGBTIQ Australians through amendments to the *Sex Discrimination Act 1984* (Cth). In 2014 we also campaigned successfully for the removal of the "homosexual advance" defence from the *Crimes Act 1900* (NSW) and the extinguishment of historical homosexual sex convictions, both in 2014.



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1.2. Community consultation

Following the announcement of the inquiry, GLRL partnered with the Victorian Gay and Lesbian Rights Lobby (VGLRL) to develop and distribute a short survey seeking the views of the LGBTIQ community on whether there should be a public vote on marriage equality and, if there is a vote, when and how it should be held, and what can be done to protect vulnerable LGBTIQ people. In total, 977 people participated in the survey, of whom 681 identified as a member of the LGBTIQ community. The results of this survey are referred to in the body of this submission.

1.3. Position summary

In conformity with the community consultation, GLRL considers that marriage equality should be dealt with by the vote of Parliament, not by a national vote, for the reasons outlined in this submission.

In the event that a national vote is held despite the reservations of the LGBTIQ community, we would prefer a plebiscite, rather than referendum, that meets the following criteria:

- a question resolved by a cross-party bill through both Houses of Parliament before the end of the current parliamentary term;
- conducted after the next federal election on the single issue of marriage equality;
- compulsory voting for all Australian on the electoral roll;
- polling booths at all locations that would usually be polling booths at the time of a Federal election;
- postal and absentee voting provisions in keeping with the process for Federal elections;
- public funding for the 'yes' and 'no' campaigns, as was the case at the 1999 referendum;
- all advertising related to the plebiscite be subject to the same legislative and regulatory constraints on election advertising.



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2. POSITION ON A NATIONAL VOTE

This section explains our preference that marriage equality be dealt with by the vote of Parliament, not by a national vote.

2.1. Views of the LGBTIQ Community

70.09% of participants in our marriage plebiscite survey did not support a national vote on marriage equality. Participants identified a number of reasons why they did not support a national vote, including:

- Concern about the impact of national campaigns and debate on the mental health and wellbeing of LGBTIQ Australians;
- Concern about the impact of national campaigns and debates on community cohesion;
- Belief that fundamental rights should not be determined by popular vote;
- Opinion that it is the role of Parliament to resolve such matters;
- The level of expense associated with a national vote;
- The non-binding nature of plebiscites;
- The existing evidence of popular support for marriage equality; and
- Concern that a question for a national vote would not be fairly worded.

2.2. Effects of campaigns on community cohesion and the health and wellbeing of LGBTIQ Australians

We also have substantial concerns about the effect of campaigns associated with a national vote on marriage equality on community cohesion and the health and wellbeing of LGBTIQ Australians, including, but not limited to, young LGBTIQ Australians.

2.2.1. Community Cohesion

Reflecting on the potential effect of a national vote on the community, George Williams, Professor of Law at the University of New South Wales, has observed that, “[r]ather than uniting Australians, a plebiscite on gay marriage is likely to deepen divisions and further polarise the community.”¹

Similar concerns were raised by community members in the consultation:

“It’s a tool designed to delay the inevitable and further divide the wider community.”

“It would be divisive.”

“Debate will be divisive instead [sic] of inclusive.”

¹ George Williams, ‘Windsor Vote Push Could Open Can of Worms’, *Sydney Morning Herald* 30 April 2013 <<http://www.smh.com.au/federal-politics/political-opinion/windsor-vote-push-could-open-can-of-worms-20130429-2iosl.html>>.



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“It will unnecessarily divide those with different views, into ‘supporters’ and ‘opponents’ which will do none of us any favours in the short, medium or long term.”

In light of parliament’s capacity to enact marriage equality, we see no reason why the matter should be taken to a national vote given the potential divisions it will cause in the broader community.

2.2.2. Health and Wellbeing of LGBTIQ Australians

In addition to his concerns about the divisiveness of a national vote, Williams has also noted the potential negative effects of a vote for LGBTIQ people:²

National polls of this kind involve more than reasoned debate. They attract extreme views and give licence to the media to report them. This would likely include absurd and offensive claims that vilify gay and lesbian people. There are real dangers in holding a vote on contentious moral topics like gay marriage, abortion and euthanasia.

The 2012 survey undertaken by the Australian Research Centre in Sex, Health & Society into the health and wellbeing of gay, lesbian, bisexual and transgender Australians found that the mental health of the 3,835 participants was “markedly poorer than that of the general population”.³ The most common health conditions amongst participants were depression and anxiety/nervous disorders, and “over a quarter of respondents had been diagnosed with, or treated for, an anxiety disorder” within the preceding twelve months.⁴

The risk of increased bullying, harassment and violence against LGBTIQ people as a result of public campaigns on marriage equality was a key concern of survey participants.

“I fear the impact on my own mental health let alone that of people who are less strong or more vulnerable than I am (young people questioning their sexuality, people with a mental illness or other difficulties in their life).”

“...my biggest reason for rejecting it [the plebiscite] is because of the damage to people’s mental health and wellbeing. These campaigns are difficult to live through, and will adversely affect many people I know, including my children who should not have to be exposed to the hateful messages that will be aired (and to some extent, funded) if there is a plebiscite.”

“I also think that it [a plebiscite campaign] puts young and closeted people’s mental health at serious risk.”

² Williams, above n 2.

³ William Leonard, Marian Pitts, Anne Mitchell, Anthony Lyons, Anthony Smith, Sunil Patel, Murray Couch and Anna Barrett (2012) *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*. Monograph Series Number 86. Melbourne: The Australian Research Centre in Sex, Health & Society, La Trobe University, VII.

⁴ Ibid.



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“Putting the issue to a national vote risks months (or years) of negative advertising about the queer community, which could be harmful to the mental health of the queer community and their families.”

“...I fear that months of the 'no' campaign could be really damaging to the mental health and self esteem of GLBTIQ people, especially young people.”

“[It] will cause massive mental distress for LGBTI persons.”

In our view, a national vote and accompanying campaigns and community debate would provide a platform for extreme views that would pose an unnecessary risk to the health and well-being of LGBTIQ Australians, given that there is an existing means of resolving the question of marriage equality by vote of the Federal Parliament. In Federal Parliament, politicians are more accountable to the general public for the nature and content of their debate.

We urge the Committee to consider the health and wellbeing of LGBTIQ Australians in its deliberations.

2.3. Costs associated with a national vote

The potential costs associated with a national vote are substantial. As George Williams and David Hume observe in their history of referenda in Australia, “[t]he challenge with plebiscites is that they are not cheap to hold on a national basis...”.⁵ The Australian Electoral Commission reports that the 2013 Federal election for the House of Representatives and Half-Senate cost \$197 646 219, and the 2010 Federal election cost \$161 342 861.⁶ The last referendum, conducted in 1999, cost \$66 820 894.⁷ In July 2013, the Australian Electoral Commission estimated that a referendum on the recognition of local government held outside the electoral cycle would cost in excess of \$120 million.⁸

In our survey, community members expressed concern about the waste of public expenditure on a plebiscite; noting that public polling already suggests that support for marriage equality is approximately 70%,⁹ and that the matter can readily be resolved by Parliament without the expense of a national vote. For example, one respondent considered that “[T]he level of expense to the public is absurd”, and another respondent suggested that the money that would be spent on a plebiscite would be better directed towards youth suicide prevention.

2.4. Contrary to system of representative government

⁵ George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*, (UNSW Press: 2010) 250.

⁶ Australian Electoral Commission, ‘Costs of Elections and Referendums’ <http://www.aec.gov.au/Elections/australian_electoral_history/Cost_of_Election_1901_Present.htm>.

⁷ Ibid.

⁸ David Fawcett, MR07/13 ‘\$120 Million Hit to Taxpayers for Separate Local Government Referendum’ <http://www.senator.fawcett.net.au/LGReferendum180713.pdf> 18 July 2013

⁹ Crosby Textor, ‘Record Support for Same-Sex Marriage’ 15 July 2014 <http://www.crosbytextor.com/news/record-support-for-same-sex-marriage/>>.



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A national vote on marriage equality would represent a significant departure from our existing system of representative democracy. Under this system, electors participate in the democratic process of electing representatives to represent them in Parliament. To date, Federal Parliament has been responsible for voting on a number of significant matters of human rights and equality, for example no-fault divorce, abortion, and Australia's involvement in overseas conflict. On this basis, it is difficult to rationalise a departure from this model for the sole purpose of amending the *Marriage Act*, which has always been amended by vote of Parliament.

There was strong community sentiment that a vote by Parliament is the appropriate method of resolving this issue:

"Parliament should do their jobs as representatives of their electorates, and vote on a Bill to modify the existing discriminatory Act."

"MPs should not shirk their responsibilities."

"This is a matter for the Parliament and the outcome of a plebiscite isn't binding anyway."

2.5. Contrary to the finding of the High Court in *Commonwealth v Australian Capital Territory* [2013] HCA 55

In the matter of *Commonwealth v Australian Capital Territory* [2013] HCA 55, the High Court unanimously confirmed that 'the federal Parliament has power under s 51(xxi) [of the Australian constitution] to make a national law with respect to same sex marriage'.¹⁰ This position was reiterated by the Commonwealth Attorney-General in Question Time on 13 August 2015, when he confirmed that 'The High Court has settled the matter', noting that the judgment 'unanimously said that the federal parliament has legislative power to provide for marriage between persons of the same sex'.

2.6. Human rights considerations

These are discussed in [3.4].

2.7. Conclusion on the need for a national vote

In light of the High Court's finding in *Commonwealth v Australian Capital Territory* [2013] HCA 55, combined with the substantial costs associated with a national vote, our system of representative democracy, and the potential risks of campaigns to community cohesion and the health and wellbeing of LGBTIQ Australians, particularly, but not exclusively, young LGBTIQ Australians, we submit that marriage equality is a matter best dealt with by the Federal Parliament.

¹⁰ *Commonwealth v Australian Capital Territory* [2013] HCA 55 [56].



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3. RESPONSE TO THE TERMS OF REFERENCE

3.1. The content and implications of a question to be put to electors

Any question put to the public must be inclusive and simple enough for people to understand easily.

To ensure the question is inclusive and clear we recommend that it refers to both sex and gender identity. For example,

“Do you support two people to marry regardless of their sex or gender?”

We note that this would require an amendment to the question currently proposed in the plebiscite bill.

3.2. The resources required to enact such an activity, including the question of the contribution of Commonwealth funding to the 'yes' and 'no' campaigns

The Australian Electoral Commission reports that in the 2013 federal election there were 9146 polling places in Australia and voting services were made available via 102 diplomatic missions around the world.¹¹ The election required the following resources:¹²

- Printing of over 43 million ballot papers
- Production of over 50 000 ballot boxes
- Production of over 150 000 voting screens
- Production of approximately 14 000 recycling bins
- Use of over 100,000 pencils and 140 kilometres of string.
- Distribution of approximately 9.7 million AEC guides to the federal election.
- Employment of approximately 80,000 temporary staff to work at voting centres, polling places on election day and for vote counting after the election.
- Training of approximately 500 election call centre operators.
- Operating the call centre from 8 am to 8 pm 7 days a week and 7 am to 9 pm on election day.
- Fielding over 550 000 calls and 30 000 email inquiries.

¹¹ Australian Electoral Commission, ‘Media Key Facts and Figures, 2013 Federal Election’
<http://www.aec.gov.au/Elections/federal_elections/2013/files/e2013-key-facts.pdf>.

¹² Ibid.



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As discussed in [2.3], the cost of a free-standing national vote outside a federal election was last estimated by the Australian Electoral Commission in 2013 as \$120 million. This does not include the cost of Commonwealth funding to a ‘yes’ and ‘no’ campaign.

We submit that any national vote on marriage equality must be allocated at least the same infrastructure resources required of a federal election, noting that certain provisions for candidates will not be required due to the nature of the vote.

3.3. Assessment of the impact of the timing of such an activity, including the opportunity for it to coincide with a general election;

As discussed previously, the majority of respondents to our survey did not support a national vote on marriage equality. In the event that a vote is held despite the concerns and reservations of the LGBTIQ community, the majority of respondents indicated a preference for a vote before or at the next election. This presumably and understandably reflects a desire for the matter to be resolved as quickly as possible.

If, and only if, a national vote is to be held despite our objections, GLRL is concerned to ensure that the process is adequately resourced to ensure the greatest possible participation and, importantly, that voters have the opportunity to focus on the question of marriage equality without the competing concerns of a federal election or other important issues that the Government intends to resolve by way of a national vote. Further, given the potential harmfulness of public campaigns to community cohesion and LGBTIQ Australians, we consider that the duration of the official campaigning period should be limited. On these grounds, we submit that if a national vote is to be held, the question and amending legislation should be determined before the end of this parliamentary term; however, the vote itself should take place after the next federal election to address the issues we have identified above.

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

3.4.1. Human Rights Framework

There are a number of international human rights principles that support marriage equality.¹³ For example, Article 26 of the International Covenant on Civil and Political Rights (ICCPR)¹⁴ states that all people ‘are equal before the law and are entitled

¹³ See further discussion in AHRC, Position Paper on Marriage Equality 2012, <https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/MarriagePositionPaper2012.pdf>.

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).



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without any discrimination to the equal protection of the law', and Article 2 of the ICCPR requires State Parties to ensure that all individuals can enjoy the rights set out in the ICCPR without discrimination. Article 23 of the ICCPR further confers a right to marry to men and women, and this is also reflected in article 16 of the Universal Declaration of Human Rights. Whilst in 1999 the Human Rights Committee decided that the right to marry in Article 23 of the ICCPR protects only heterosexual couples,¹⁵ this decision has been criticised for "the brevity and inconsistency with both the doctrine of interpretation established by the *Vienna Convention on the Law of Treaties* and norms of human rights treaty interpretation previously elucidated by the HRC itself".¹⁶

At a domestic level, all state and federal anti-discrimination legislation now prohibits discrimination against people on the basis of sexual orientation, gender identity or intersex status.¹⁷ Some states and territories also provide protections for vilification on the basis of sexual orientation.¹⁸ This is in addition to human rights legislation in the Australian Capital Territory, which confers a right to protection against discrimination on any ground.¹⁹

3.4.2. *Approaches to matters of human rights and equality should minimise, rather than exacerbate the risk of potential human rights breaches*

As noted at [2.3], there is a real risk that campaigns associated with a national vote will adversely affect community cohesion and the health and wellbeing of LGBTIQ Australians, particularly young LGBTIQ Australians. This includes, but is not limited to, the risk of offensive and vilifying statements being made on behalf of either campaigns against people on the basis of particular attributes, such as their sexual orientation or gender identity.

The 2012 report, 'Private Lives 2: The Second National Survey of the Health and Wellbeing of GLBT Australians', reported that 25.5% of survey respondents reported that they had experienced homophobic abuse or harassment in the previous 12 months.²⁰ More recently, in an online survey developed by the Australian Human Rights Commission to inform its report, 'Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights', close to 75% of respondents reported that they had

¹⁵ Human Rights Committee, *Views: Communication No 902/1999*, 75th sess, UN Doc CCPR/C/75/D/902/1999 (17 July 2002) ('*Joslin v New Zealand*').

¹⁶ Paula Gerber, Kristine Tay and Advisha Sifris, 'Marriage: A Human Right for All?' (2014) 36 *Sydney Law Review* 642, 645.

¹⁷ *Sex Discrimination Act 1984* (Cth) s 5A.

¹⁸ *Anti-Discrimination Act 1977* (NSW) ss 49ZT, 49ZTA; *Anti-Discrimination Act 1998* (Tas) ss 3 ('public act' (inciting hatred on the ground of 'sexual orientation')) s 19; *Anti-Discrimination Act 1991* (Qld) s 124A (vilification on grounds of 'sexuality'); *Discrimination Act 1991* (ACT), pt 6 ('sexuality vilification').

¹⁹ *Human Rights Act 2004* (ACT) s 8(3). Section 8(3) of the *Charter of Rights and Responsibilities Act 2006* (Vic) states that every person "has the right to equal and effective protection against discrimination".

²⁰ William Leonard, Marian Pitts, Anne Mitchell, Anthony Lyons, Anthony Smith, Sunil Patel, Murray Couch and Anna Barrett (2012) *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*. Monograph Series Number 86. Melbourne: The Australian Research Centre in Sex, Health & Society, La Trobe University, VII.



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experienced some form of bullying, harassment or violence on the basis of their sexual orientation, gender identity or intersex status.²¹ Further, close to 90% reported that they knew someone who had reported that they had experienced bullying, harassment or violence.²² In our view, any attempt to address matters of human rights and equality must seek to minimise, rather than exacerbate the risk of human rights breaches in the process.

3.4.3. *Fundamental rights should not be bestowed by popular vote*

Community members also expressed concern about the fundamental human rights of particular minority groups to equality and non-discrimination being decided by direct popular vote. Such an approach is not consistent with the traditional approach to the protection of human rights in Australia, and has potentially serious ramifications for the future protection of the rights of minority groups, which governments have a responsibility to protect.

Community members expressed the following views about the most appropriate method of addressing this matter of equality and human rights:

“This should be resolved in the parliament. Our rights should not be the matter of a public vote.”

“I don't think the majority should vote on whether a minority can have rights. I think that is fundamentally unfair.”

“It should not be up to the majority to vote on the rights of the minority - this is NOT a reality TV show!”

“Because it is insulting and degrading that our rights are subjected to popular vote.”

“My equal civil rights should not be subject to the whims or vote or conscience of anyone.”

“My human rights are a decision for Parliament.”

“Because the rights of the minority have and should never be voted on by the majority in Australia. Women's, Aboriginal voting rights, the enactment and removal of the White Australia policy, no fault divorce, legalisation of homosexuality, etc were all decided by Parliament as they are elected to do so.”

In lights of these concerns, we submit that a national vote incorporating publically funded yes and no campaigns is not the most appropriate means by which to address this matter of equality and human rights. Instead, the matter should be dealt with by vote of both houses of Federal Parliament.

²¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 2-4
<https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf> 15.

²² Ibid.