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4 September 2015

Committee Secretary
Senate Legal and Constitutional Affairs References Committee

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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**

Liberty Victoria thanks the Legal and Constitutional Affairs References Committee for the opportunity to provide a submission.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

In summary, Liberty submits that neither a referendum nor a plebiscite is an appropriate method to address matters of equality and human rights. Liberty urges the committee to reject the proposal, but to recommend instead that a Bill to amend the *Marriage Act 1961* - to provide for equality in access to its provisions, regardless of the sex or gender of the parties - be enacted as a matter of urgency.

A popular vote is inappropriate - ToR (d)

A popular vote is not "an appropriate method to address matters of equality and human rights," at least when the rights of any group of the citizenry are at issue. The only occasion when human rights could properly be subject to a popular vote is when the people are asked to vote on placing respect for human rights into the Constitution, as they certainly should be. This is not such an occasion.

To seek to put ordinary legislation to a popular vote, especially legislation about discrimination against one group long subject to a history of discrimination, is to misunderstand the nature of representative democracy. Members of the public delegate their power to make laws to parliamentary representatives. It is the duty of MPs and Senators to act, to the best of their ability, without fear or favour, honestly and diligently, in carrying out the responsibility so delegated. They betray the people's trust if they shirk

that responsibility. Putting marriage equality to a glorified opinion poll is just such a dereliction of duty.

Thus Liberty opposes the use of a plebiscite on this question, and even more strongly, if this were possible, opposes the use of a referendum.

As Senators must be aware, a referendum is used in Australia to determine a proposed change to the Constitution. As the High Court has recently stated, in a unanimous decision, the Constitution needs no change to permit the *Marriage Act* 1961 to be amended to remove the inequality inserted in 2004. At paragraph 38 of its judgment¹ the Full Court concluded: 'When used in s 51(xxi) [of the Constitution], "marriage" is a term which includes a marriage between persons of the same sex.'

(In Ireland recently there was sufficient legal doubt about the terms of the Irish constitution to make a referendum prudent. That is not the case here. Furthermore, it was clear that the Irish Government wished to legislate for marriage equality, and had undertaken to do so if the people confirmed or bestowed the constitutional power. Again, that is not the case here.)

So a referendum is out of the question, and is only proposed by persons who do not understand, or are wilfully ignorant of, the law. The Parliament has the power. It should exercise it.

Resources - ToR (b)

Liberty reiterates its submission that a popular vote on marriage equality is inappropriate and should be rejected. This conclusion is independent of the resources issue.

The resources involved, however, are significant, and would be a significant diversion of resources that could be put to worthy uses. The sums suggested by various experts place the cost to the Commonwealth in the order of \$100 million or more. Significant sums would also have to be incurred by members of the community.

Timing - ToR (c)

Liberty reiterates its submission that a popular vote on marriage equality is inappropriate and should be rejected. This conclusion is independent of the timing issue.

If a plebiscite were to be held, it would presumably be cheaper if held in conjunction with a general election. Nothing in the current political circumstances suggests, even were a plebiscite conducted, confirming popular support for marriage equality, before the general election, that the current government would permit passage of a marriage equality bill, and the terms of the plebiscite could not compel it to. If there is a change of government at the general election the question of a plebiscite is moot, as the ALP has pledged to introduce such a bill in its first 100 days, and there is no reason to doubt this would both be done and be carried. If there were no change of government there is no cause for optimism that a post-election plebiscite would be any more effective than a pre-election one.

None of these reflections alters the firm view that a plebiscite is inappropriate.

¹ *The Commonwealth v Australian Capital Territory* [2013] HCA 55
12 December 2013 C13/2013

Question: Content and implications - ToR (a)

Liberty reiterates its submission that a popular vote on marriage equality is inappropriate and should be rejected. This conclusion is independent of the question issue.

If the Parliament were to continue with the plebiscite proposal, however, the question put to the people could be significant. A poorly chosen question could easily confuse some electors, or by misleading or inflammatory wording lead to electors voting for an outcome they do not, on reflection, intend. The question proposed in the Bill as introduced, namely "Do you support Australia allowing marriage between 2 people regardless of their gender?", is *prima facie* unobjectionable; it would, of course, if answered in the affirmative, still leave a tricky government,² if it even bothered to prepare a bill, much room to introduce minimalist and still discriminatory legislation. The movers of the current Bill are nevertheless to be congratulated for seeking to forestall an unfair question with a sensible one of their own.

Whatever the question, however, the implications for public harmony and the safety of children and young people are dire.

The public conversation around a marriage plebiscite would not simply be a more-or-less respectful debate between adults. It is clear from the conduct over the past decade or so of lobby groups and public figures opposed to marriage equality, and to the human rights of lesbians and gay men, bisexual, transgender and intersex people in general, that vulnerable people, particularly children and young people, would be exposed to harmful levels of vituperation and aspersions against themselves or their friends or their parents or relatives. The psychological research, not to mention the common sense and daily experience of LGBTI folk and their families and allies, shows clearly that such vituperation and denigration leads to distress and exacerbates or triggers illnesses such as depression or anxiety.

If the proposal for a plebiscite were to go ahead it would be vital to put in place resources and services to support vulnerable people, especially young people, to resist and overcome the gale of negative publicity and harmful advertisements and diatribes that the opponents of equality would unleash on them.

It should be noted that such supports are needed on a longer term basis anyway, and that the opponents of equality are, to their shame, also opponents of existing programs to support young people, such as the Safe Schools Coalition.

Terms of the Bill - ToR (e)

Liberty reiterates its submission that a popular vote on marriage equality is inappropriate and should be rejected. This conclusion is independent of, and cannot be altered by, the terms of the *Marriage Equality Plebiscite Bill* 2015 currently before the Senate.

Though the Bill should be rejected in its entirety, as pursuing a misconceived, albeit well-intentioned, objective, a few remarks are in order.

² Peter Munro, Sydney Morning Herald 14 August 2015, <http://www.smh.com.au/comment/tricky-tony-abbott-won-the-round-but-not-the-fight-on-samesex-marriage-20150813-giymjv.html#ixzz3kXfaV6Ov> "Abbott had privately promised supporters he would use "tricky processes" to diddle a free vote. ... His latest ruse includes promises of a possible plebiscite or constitutional referendum, despite ruling this out only three months ago. Mr Tricky has all the constancy of a weather vane on one of those "ugly" wind farms. ... Who could trust Mr Tricky to frame a fair question for such a poll?"

First, the attempt in Clause 3(2) to make the result of a plebiscite bind the government or parliament elected at the concurrent election is quixotic at best. It cannot be done, and if the Parliament and Government were inclined to legislate for marriage equality it would not be necessary anyway. This will be the case if there is a change of government (as noted above).

Secondly, the inclusion by reference of the provisions, as relevant, of the *Referendum (Machinery Provisions) Act* 1984 seems likely to mean that even a plebiscite will only be seen to have been carried if carried in both absolute majority and in a majority of states. While the anxieties of the smaller colonies at being outvoted by more populous ones made that double majority requirement in the Constitution understandable in 1899, its repetition in the machinery legislation seems overkill for a plebiscite.

Finally, it is a pity that the *Statement of Compatibility with Human Rights* contained within the Explanatory Memorandum, while narrowly appropriate, does not consider the wider human rights implications of the effect of the Bill, such as the mental health harms that a plebiscite and the ugly community conversation it will entail may cause. Human rights must be considered in relation to the well-being of people, not merely the letter of the law. In the opening words of the UDHR³ "All human beings are born free and equal in dignity and rights." Will the plebiscite lead to public language and commentary that respects the dignity and enhances the rights of a long persecuted and discriminated against minority; or not?

Conclusion

A popular vote, whether by referendum or plebiscite, on the question of marriage equality is inappropriate.

Liberty Victoria urges that the Committee, and the Senate, reject the proposal, and not proceed with the current bill, on grounds of principle, of cost and to avoid harm to the community.

Liberty acknowledges the Committee's request that submissions be confined to the terms of reference, but under the heading of paragraph (f) Any other related matters, it is obviously necessary to add that Liberty submits the Committee should recommend instead that a Bill to amend the *Marriage Act* 1961—to provide for equality in access to its provisions, regardless of the sex or gender of the parties—be enacted as a matter of urgency. Liberty refers the Committee to its several previous submissions to earlier inquiries on the matter.

Should you wish to discuss this issue further please contact Liberty Vice President, Jamie Gardiner
This is a public submission and is not confidential.

Your sincerely

George A Georgiou SC
President
Liberty Victoria

³ Art. 1, *Universal Declaration of Human Rights*, 10 December 1948