Chapter 2

A referendum, a plebiscite or a parliamentary vote?

Introduction

2.1 The committee received submissions which ranged from strongly supporting a popular vote on the issue of marriage to outright opposition to a popular vote. In this chapter the committee outlines the arguments both in support and against the following options:

- a referendum;
- a plebiscite; and
- a parliamentary vote.

A referendum

2.2 Many submissions emphasised that a referendum is unnecessary as the High Court has already held that the Parliament has the constitutional power to pass legislation with respect to marriage, including same-sex marriage.[1]

2.3 Section 51(xxi) of the Commonwealth Constitution gives the Parliament the power to make laws with respect to 'marriage'. 'Marriage' is not defined in the Constitution but, as noted previously, is defined in the Marriage Act as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.[2]

2.4 In December 2013, in its decision in *The Commonwealth of Australia v The Australian Capital Territory* (*Commonwealth v ACT*),[3] the High Court held that the marriage power in section 51(xxi) of the Constitution encompasses same-sex marriage.[4] The High Court stated:

> Under the Constitution and federal law as it now stands, whether same sex marriage should be provided for by law…is a matter for the federal Parliament.[5]

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1 See for example Law Council of Australia, *Submission 1*, p. 1; The University of Adelaide - Public Law & Policy Research Unit, *Submission 2*, p. 3; Professor Anne Twomey, *Submission 6*, p. 2; Liberty Victoria, *Submission 18*, p. 2; Centre for Comparative Constitutional Studies, *Submission 21*, p. 2; Australian Human Rights Commission, *Submission 22*, pp 1-2.

2 Section 5 of the *Marriage Act 1961*.

3 [2013] HCA 55.

4 [2013] HCA 55 at paragraph 38.

5 [2013] HCA 55 at paragraph 1.

2.5 Associate Professor Kristen Walker QC noted:

> There is thus no uncertainty about the scope of the Commonwealth legislative power in this regard. It is not necessary for a referendum to confirm the High Court's interpretation.[6]

2.6 However, a number of submitters argued in favour of a referendum on the issue of marriage. Mr Paul Hanrahan, Executive Director of Family Life International (Australia), outlined the reason he favoured a referendum:

> I would support a referendum over a plebiscite. I believe the matter has not been settled on the constitutionality of these proposed changes, despite the statement of the High Court in 2013[.][7]

2.7 The Australian Catholic Bishops Conference (ACBC), while stating that it did not have a view on how the issue of marriage should be decided, argued that there is a 'strong case' for a public vote on the issue of marriage.[8] The ACBC continued:

> Because of the importance of this matter for the future of our community a strong case can be made for deciding the matter by referendum rather than plebiscite or parliamentary vote, as this 'sets the bar high' in terms of informed public debate and consensus required (a majority of votes nationally and in a majority of states after a clear explanation of the arguments for and against).[9]

2.8 Submissions acknowledged the decision in *Commonwealth v ACT* is binding in relation to section 51(xxi) of the Constitution.[10] Despite this, Lawyers for the Preservation of Marriage, among others, criticised the decision of the High Court in *Commonwealth v ACT* to the extent that it dealt with the scope of the marriage power in the Constitution:

> The High Court's decision as to the breadth of the marriage power in s51(xxi) of the Constitution was made without the benefit of the contradictor. It was made, therefore without the benefit of full argument and was not necessary to decide the question which the Court faced, namely the validity of the [ACT legislation, the *Marriage Equality (Same Sex) Act 2013* (ACT),] and in the circumstances its status as a precedent in relation to the meaning of the marriage power in the Constitution is not beyond question.[11]

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6 *Submission 36*, p. 1.

7 *Committee Hansard*, 10 September 2015, p. 10.

8 *Submission 24*, pp 6-7.

9 *Submission 24*, p. 7.

10 See for example Lawyers for the Preservation of the Definition of Marriage, *Submission 20*, pp 2-3; FamilyVoice Australia, *Submission 23*, p. 3.

11 *Submission 20*, p. 2. See also Associate Professor Neil Foster, *Submission 7*, pp 2-3.

2.9 FamilyVoice Australia argued that the High Court decision in *Commonwealth v ACT* on the issue of same-sex marriage could 'theoretically' be considered 'only persuasive'.[12]

2.10 Lawyers for the Preservation of the Definition of Marriage contended:

> A referendum will be the clearest way in which a question is put to the people, as it will define the exact changes to be made to the Constitution, and so, for all practical purposes fix (in constitutional and legislative terms) the meaning of marriage in Australia.[13]

2.11 However, the Australian Human Rights Commission (AHRC) stated that an amendment to section 51(xxi) of the Constitution is 'unlikely to resolve the substantive issue at hand'.[14] The AHRC set out the four possible scenarios that could result from a referendum to amend section 51(xxi) of the Constitution:

> 1. A question is put to define marriage, for the purposes of section 51 (xxi), as a union of "two people (including two people of the same sex)" and is successful: the result would still leave the Parliament able to legislate marriage for same-sex couples.
>
> 2. A question is put to define marriage as a union of "two people" and is unsuccessful: the result would still leave the Parliament able to legislate under its existing constitutional powers marriage for same-sex couples.
>
> 3. A question is put to define marriage as a union between a "man and a woman" and is unsuccessful: the result would still leave the Parliament able to legislate under its existing constitutional powers marriage for same-sex couples.
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> 4. A question is put to define marriage as a union between a "man and a woman" and is successful: the practical result would be less certain. State Parliaments would retain the constitutional power to legislate with respect to same-sex relationships. It would be arguable whether any State legislation relating to same-sex marriages would impair, alter or detract from the Commonwealth Marriage Act in its current form. States would be likely to have the power to legislate an equivalent status for same-sex couples, but a same-sex marriage would have a different legal status from a marriage under the Marriage Act.[15]

2.12 Given these outcomes AHRC concluded:

> In all scenarios a Parliament in Australia would be left with the Constitutional capacity to legislate marriage or an equivalent status for same-sex couples. And the fourth scenario would raise questions about recognition of those marriages between different jurisdictions.[16]

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12 *Submission 23*, p. 3.

13 *Submission 20*, p. 5.

14 *Submission 22*, p. 2.

15 *Submission 22*, p. 2.

16 *Submission 22*, p. 2.

A plebiscite

2.13 The committee also received a limited number of submissions which strongly supported a plebiscite on the issue of marriage. For example, Professor Jim Allan explained that he believed social policy issues ought to be resolved by means of a democratic process, such as a plebiscite:

> Such processes have the great advantage of counting all electors as equal, so that a plumber or secretary's moral views count for as much as a lawyer's or someone working for some United Nations agency. This, in my view is the appropriate way of resolving all divisive social policy issues, even if they have been translated into the language of rights or of human rights. On issues such as euthanasia, abortion, same-sex marriage and the rest there is no special expertise that a law degree and a decade working at the Bar provides to someone. Nor does employment with the United Nations or expertise in the finer points of international law make one's preferences and opinions somehow superior. Nor is there any persuasive reason for thinking that Australians need to follow the dictates of the European Court of Human Rights or any other committee of unelected ex-lawyers.[17]

2.14 The Ambrose Centre for Religious Liberty also favoured a plebiscite arguing it would deliver a 'clear picture' of the belief of the Australian population on the question of marriage:

> Once such a view is obtained it is then a question for the Parliament to make (or restate) the law pursuant to the Marriage Act…
>
> The outcome [of a plebiscite] would inform the Parliament as to the wishes of the majority and allow the appropriate legislation to be adopted with the necessary consequential changes to the existing law.[18]

2.15 However, many submissions expressed concern that the nature of a plebiscite meant it was an inappropriate mechanism by which to conduct a popular vote on marriage. For example, the AHRC, noting that a plebiscite is non-binding on the Parliament, outlined its reservations about a plebiscite:

> The outcome of a plebiscite is limited in its ability to assist in the complex process of reforming the Marriage Act. The lack of regulation on the conduct and outcome of a plebiscite, raises concerns regarding the exact wording of any proposal and the threshold test for a vote to be considered a success. Without legal force a plebiscite is an unreliable method for establishing a clear mandate for legislative change.[19]

2.16 Professor George Williams stated that the fact that a plebiscite had no legal effect made it 'no more than a formalised, national opinion poll'.[20]

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17 *Submission 19*, p. 1.

18 *Submission 35*, pp 4-5.

19 *Submission 22*, p. 3.

20 *Submission 32*, p. 2.

2.17 Australian Marriage Equality (AME) submitted that it would be 'an act of bad faith' to hold a plebiscite on a matter, and then have the outcome of the plebiscite 'treated as advisory and not final'.[21] However, AME continued:

> The non-binding nature of plebiscites also means parliament can ignore the result of a plebiscite or delay its implementation for as long as it wishes. We note it took seven years for the result of the 1977 national anthem plebiscite to be implemented.[22]

2.18 It was also argued that there was no rationale for singling out the issue of marriage in this particular context as a topic for a plebiscite when a number of other similarly controversial issues have been decided without a plebiscite. As The University of Adelaide – Public Law & Policy Research Unit explained:

> What is evident from the [examples] of the use of a plebiscite in Australia [previously] is that they do not yield any criteria or rationale for when or why the Executive or the Parliament designates to the electorate a decision wholly within their capacities. This can be contrasted with referendum mechanism which is clearly linked to the amendment of the *Constitution*. The list of other significant policy questions that have not been submitted to the people for consideration only highlights the fact that similar moral or highly charged questions remain with the traditional capacity of the Parliament. For example, decisions to declare war, enter into trade agreements, raise taxes or provide Medicare benefits for termination services are all issues that could equally be referred to the Australian people.[23]

2.19 In a similar vein, Professor Geoffrey Lindell AM noted that governments and Parliaments have been able to deal with controversial issues previously without requiring a plebiscite:

> It is true that two plebiscites were held during World War I on the question of conscription for military service overseas during that War. 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. 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.[24]

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21 *Submission 17*, pp 6-7.

22 *Submission 17*, p. 7. See also The University of Adelaide – Public Law & Policy Research Unit, *Submission 2*, p. 4.

23 *Submission 2*, p. 4.

24 *Submission 4*, p. 4.

2.20 Professor Lindell concluded:

> 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.[25]

2.21 At the public hearing the committee sought the view of witnesses on whether a successful vote at a plebiscite would bring the debate about marriage to a conclusion. Mr Rodney Croome, National Director, Australian Marriage Equality, explained that majority support for the question at a plebiscite would not provide an end to the debate:

> [B]ecause of course it has to return to parliament. Only a vote in parliament that amends the Marriage Act to allow all Australians to enter into a legally recognised, intimate, lifelong relationship called a marriage will end the debate—as it has in Britain and New Zealand and the United States and Canada and every other country where this has been achieved. That ends the debate.[26]

2.22 Mr William Leonard, Director of Gay and Lesbian Health Victoria, also described the concern amongst the lesbian, gay, bisexual and transgender (LGBT) community about the implications of an unsuccessful plebiscite:

> The assumption built into a plebiscite is that, if it were defeated, a popular vote could justifiably instate the moral objections of people against LGBT people—that it is actually legitimate within law to hold those things, because that is the consequence of a plebiscite if it does not get up. Many LGBT people in 2015 in Australia feel we should not be held to account by a popular vote. There is simply nothing to vote on.[27]

Parliamentary vote

2.23 The committee received many submissions which strongly argued that it was not appropriate to determine the issue of marriage with a popular vote, either in the form of a referendum or a plebiscite.[28] For example, Liberty Victoria roundly condemned a popular vote:

> To seek to put ordinary legislation to a popular vote, especially legislation about discrimination against one group long subject to a history of

25 *Submission 4*, pp 4-5.

26 *Committee Hansard*, 10 September 2015, p. 23. See also The Hon Penny Sharpe, MLC, NSW Parliamentary Working Group on Marriage Equality, *Committee Hansard*, 10 September 2015, p. 22.

27 *Committee Hansard*, 10 September 2015, p. 27.

28 See for example The University of Adelaide – Public Law & Policy Research Unit, *Submission 2*, p. 1; Gilbert+Tobin Centre of Public Law, *Submission 11*, pp 4-6; Castan Centre for Human Rights Law, *Submission 12*, pp 1-2; Rainbow Families Council, *Submission 13*, p. 4; Salt Shakers, *Submission 15*, p. 3; Australian Human Rights Centre, *Submission 25*, p. 1.

> 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 [Members of Parliament] 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.[29]

2.24 Similarly, Mr Christopher Puplick AM and Mr Larry Galbraith argued:

> We wish to start by stating as clearly as possible that we believe that the responsibility for determining the question of marriage equality is one which lies squarely at the feet of the Australian Parliament and that we see it as a gross derogation of its constitutional and legal responsibilities to seek to avoid resolving the question by the artificial device of reference of the matter to a referendum or plebiscite.[30]

2.25 In contrast, the ACBC stated that it had reservations about whether a parliamentary vote would be able to resolve the issue of marriage:

> Same-sex marriage continues to be a controversial issue in the Australian community. Both the Senate and the House of Representatives voted strongly in 2012 against changing the definition of marriage. Some groups continued campaigning to change the law. It may be that any bill to redefine marriage would fail again this year in the Australian Parliament if put to the test, or prevail in one house of parliament but not the other, or prevail by a narrow majority in both houses. Such parliamentary votes would be unlikely to resolve such a fundamental issue in our community and might only serve further to divide us. Polls suggest that three quarters of Australians want a popular vote on the issue of whether to redefine marriage and at least half want more time for an informed debate.[31]

2.26 Some submissions favouring a parliamentary vote argued that a public vote was not an appropriate means by which to address an issue of human rights. As the AHRC explained:

> Public votes are not an appropriate way to resolve issues of fundamental rights. It is not an appropriate instrument to resolve issues of equality before the law. Nor it is an appropriate instrument to resolve issues of religious freedom.
>
> The Constitution gives the power to resolve these issues to the Parliament for a reason. On the substantive matter, it is not appropriate that the Australian population is given a vote on the legal standing of the relationships of same-sex attracted Australians any more than it would be

29 *Submission 18*, pp 1-2.

30 *Submission 10*, p. 1.

31 *Submission 24*, p. 6.

> for the Australian population to vote on the legal standing of opposite-sex attracted Australians.[32]

2.27 The Centre for Comparative Constitutional Studies referred specifically to plebiscites as 'manifestly inappropriate in circumstances where minority rights, including the right to equality, are at issue'.[33]

2.28 Submissions also referred to the potential cost of a popular vote as a reason why this issue should be dealt with by the Parliament. The Australian Electoral Commission estimated that a popular vote held in conjunction with a federal election would cost an additional $44 million and a popular vote held as a stand-alone election issue would cost $158.4 million.[34]

2.29 Mr Puplick and Mr Galbraith observed that '[e]xpenditure of $100 million…to resolve a matter which Parliament could address without cost is utterly unjustified' and that 'there is no justification for such extravagance and waste of public money'.[35] Mr Puplick and Mr Galbraith also put the cost of a popular vote in a broader context, noting that if a plebiscite on marriage was not held in conjunction with the next election then it was possible it would not be held until 2018, after the proposed referendum on Indigenous recognition. Mr Puplick and Mr Galbraith described as 'scandalous' the expenditure of two lots of $100 million in one year.[36]

2.30 Liberty Victoria stated that the resources involved in holding a public vote would be significant and a diversion of resources that could be put to worthy uses.[37]

2.31 A number of submissions also expressed concern about the impact of a public vote on the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community. For example:

> In particular the [Rainbow Families] Council is extremely concerned about the impact of such a public debate on our children and young LGBTIQ people living in our communities.
>
> No matter what explanation is provided about the need for a 'people's vote' by way of a plebiscite or a referendum, no matter what assurances or agreements are made to ask that the debate be respectful or must stick to the topic of marriage equality between two adults, we strongly believe our

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32 *Submission 22*, p. 3. See also NSW Gay and Lesbian Rights Lobby, *Submission14*, p. 11.

33 *Submission 21*, p. 5. See also Castan Centre for Human Rights Law, *Submission 12*, p. 2.

34 *Submission 26*, p. 10. The Australian Electoral Commission noted that for the purposes of estimating cost it was assumed that the conduct of a compulsory attendance plebiscite or referendum would operate in a similar manner to that of a general federal election and 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 Marriage Equality Plebiscite Bill 2015, see *Submission 26*, pp 9-10.

35 *Submission 10*, p. 3.

36 *Submission 10*, p. 2.

37 *Submission 18*, p. 2.

> children and our families will always be dragged into the fray. ***Indeed there is evidence of this already occurring***.[38]

2.32 At the public hearing Ms Amelia Basset, Co-Convenor of the Rainbow Families Council, expanded on these concerns:

> It is our strong belief that a lengthy public campaign would be a particular risk because it is so much in the community. It is not watching a David and Goliath parliamentary battle from the stands, where you are somewhat distant from it. It brings the debate into the streets, the schools, the swimming pools, these sports clubs and neighbourhood houses—all the places and spaces where our children hang out. I think it would be impossible in this media-saturated age for parents to enforce any kind of a media blackout as a way of trying to minimise the exposure of their children, including young children, to a publicly funded no campaign.
>
> …
>
> [W]e feel confident when we say that a public debate is going to be all encompassing and our children will be accessing it. It will say something very directly to them about the value and worth of their families. As other speakers have mentioned, our children are already vulnerable to discrimination and stigma. We know from research and anecdotally that that happens. A campaign run along these lines would amplify that, compound it. In fact, as a society we need to address that to remove it and end it. Those would be some of our major concerns.[39]

2.33 The Australian Psychological Society (APS) stated that 'a public vote is likely to present significant risks to the psychological health and wellbeing of those most affected'.[40] In its submission the APS explained:

> Recent evidence from a suite of studies confirms that the process of putting marriage equality to a public vote can be harmful to the psychological health of gender and sexual minorities. The findings highlight that lesbian, gay and bisexual people (LGB) not only have to contend with the possibility of having rights to marriage denied through a public vote but also the stress associated with the campaign itself.[41]

2.34 Although many submissions strongly supported a parliamentary vote and were not in favour of a popular vote, in the event of a popular vote being held, the preference appeared to be for a plebiscite held in conjunction with the next federal election. As Amnesty International, for example, stated in its submission:

> Amnesty International submits…that a popular vote on marriage equality is neither necessary nor appropriate, and that the Australian Parliament ought to legislate to enshrine marriage equality in Australia law as soon as

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38 *Submission 13*, p. 4, emphasis in original. See also NSW Parliamentary Working Group on Marriage Equality, *Submission 27*, pp 18-19.

39 *Committee Hansard*, 10 September 2015, p. 19.

40 *Submission 31*, p. 2.

41 *Submission 31*, p. 2.

> possible. Notwithstanding our view on a popular vote, Amnesty International holds that if one is to take place it ought to be a plebiscite at the next Federal election.[42]

2.35 However, at the public hearing, Mr Sean Mulcahy, Co-convenor of the Victorian Gay & Lesbian Rights Lobby, clarified:

> The plebiscite in our view is in no way a fallback position. We are strongly opposed to a plebiscite on this issue. Our submission simply sets out: if a plebiscite were to occur, what are the conditions of that? Again, I want to strongly affirm our view that a plebiscite is in no way an appropriate way of dealing with this issue.[43]

2.36 Although submissions did not necessarily support a popular vote, given that a plebiscite was the preferred method if such a vote were to occur, the next chapter of the report discusses the issues surrounding the conduct of a plebiscite and, in particular, the Marriage Equality Plebiscite Bill 2015.

42 *Submission 68*, p. 1.

43 *Committee Hansard*, 10 September 2015, p. 21.