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Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs References Committee
Department of the Senate
Parliament House
CANBERRA, ACT, 2600

Dear Ms Dunstone,

Please accept the following as a submission to the Committee's 'Inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia'.

Distinctions between a plebiscite and a referendum

In Australia, the term 'referendum' is used to describe a formal vote by the people to authorise the amendment of the Commonwealth Constitution or a State Constitution. The only choice is a Yes/No choice as to whether to approve the proposed constitutional amendments. If the proposed changes are approved by a majority of electors overall and by majorities in a majority of States (four out of six states) then the Governor-General gives assent to the proposed changes and they take effect upon the relevant commencement date. There is no need for any further action by Parliament to give them effect.

The term plebiscite is used to describe a vote of the people on any subject, which indicates to the relevant government the view of the people on a particular question. It may involve choosing from amongst a range of options – eg different hours for pub closing times, different choices for where a dam is to be built or different choices for Australia's national song – or it may involve a Yes/No choice, such as whether to approve daylight saving. The criteria for the passing of a plebiscite would normally be approved by a simple majority of voters (although this could be changed by legislation).

If passed, a plebiscite does not itself achieve a change in the law. It would still be up to Parliament to enact a law to make the desired legislative change. It would be possible, however, for Parliament to pass a law in advance that would give effect to a successful outcome of the plebiscite (eg to enact a law authorising same-sex marriage), but to place as a condition of the commencement of that Act that it is approved by the people in a plebiscite within six months. This would mean that the passage of the plebiscite would

have the effect of causing the commencement of a change to the law. Failure of the plebiscite would mean the Act would not commence.

Is a referendum necessary to achieve same-sex marriage?

Section 51(xxi) of the Commonwealth Constitution gives the Commonwealth Parliament the power to legislate with respect to 'marriage'. The High Court held in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, at 461, that 'marriage' in s 51(xxi) means 'a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations'. It therefore includes same-sex unions and polygamous unions. The only constraints are that the union be between 'natural persons', consensual and intended to endure (although terminable by law).

It is therefore not necessary, according to current High Court authority, for the Constitution to be amended before the Commonwealth Parliament can legislate with respect to same-sex marriage.

It would be possible to seek to amend the Constitution to limit the scope of the term marriage so that, for example, it applies only to 'marriage between two persons' and therefore does not permit the Commonwealth Parliament to legislate to authorise polygamous unions. However, imposing any limitations on the scope of 'marriage' in s 51(xxi) would then risk opening this up as an area for State legislation, resulting in disparate laws concerning different types of marriage or equivalent unions across Australia.

It would also be possible to seek to amend s 51(xxi) so that it explicitly refers to 'marriage between two persons regardless of gender'. However, if such a referendum failed, and the Constitution remained as it was, it would still permit the Commonwealth Parliament to legislate with respect to marriage between two persons regardless of gender (according to the High Court's interpretation), so it would achieve nothing.

The alternative would be to seek to amend s 51(xxi) so that it referred only to 'marriage between a man and a woman'. This would place a substantial burden on the proponents of such a referendum to overcome the natural tendency of many voters to vote 'No' in a referendum. However, if it were successful, it would give rise to the same problem noted above that if same-sex unions were excluded from 'marriage' in s 51(xxi), then it is possible that the High Court would regard them as falling within State legislative power.

Plebiscites on social issues

The question of whether or not to authorise same-sex marriages is more suited to a plebiscite than a referendum. Plebiscites have been held before on divisive social issues, particularly where the division crosses party boundaries and there are strong differing views within political parties. Examples include the prohibition of alcohol and pub closing hours, conscription, religious instruction in State schools, gambling (casino and lotteries), shop trading hours, secession, daylight saving and the environment (choice of location of a dam). Attached is a rough list of plebiscites that have been held in the States and territories. It excludes locally based ones (eg the plebiscite for the establishment of a new State in northern New South Wales). While it may not be comprehensive, it is indicative of the issues that have previously been put to a vote of the people.

If a plebiscite were to be held, then the Parliament would need to legislate to set the rules for it. Questions to consider would include the criterion for approval (eg a simple majority or a special majority), whether or not voting is compulsory or voluntary, when it was to be held, the method for holding it, whether a Yes/No case is necessary or appropriate and whether Commonwealth funding should be given to either side of the question and whether limits should be imposed upon campaign expenditure. The strict rules in s 128 of the Constitution would not apply to a plebiscite and there may be reason for altering other rules given that no constitutional amendment is involved. For example, as there are no technical constitutional changes that need an explanation, it is arguable that there is no need for a formal Yes or No case.

Cost and method of holding the plebiscite

The cost of any national vote is significant and efforts should be made to reduce that cost, especially where constitutional change is not involved. It would be appropriate to consider whether or not the vote could be held as a postal vote, as was the vote for candidates to the 1998 Constitutional Convention, so as to exclude the cost of hiring polling booths and staff for the day. New Zealand currently proposes to hold two plebiscites in December 2015 and April 2016 in relation to a choice of a new flag, both of which will be postal votes run over a three week period.

It could also be used as a trial for electronic voting, given that New South Wales has already undertaken significant work in this area at the most recent NSW State election where 283,669 people voted using 'iVote'. People could be given the choice between a postal vote and an electronic vote. Any postal ballots could be marked in a machine-readable form (rather than hand-writing Yes or No), so that the ballots could be counted efficiently and accurately.

The question

The question asked should not only be approved by Parliament, but should first be tested by an independent body (eg the Electoral Commission) to ensure that it does not give rise to ambiguity or confusion. New Zealand had particular problems in 2009 with the ambiguity of a citizens'-initiated referendum question. In the United Kingdom, the Electoral Commission is required by law to comment on the intelligibility of any question included in a referendum bill introduced into the UK Parliament. It carries out research with voters from different backgrounds and seeks advice from experts in plain language to ensure that the question is as clear and understandable as possible. Its guidelines for referendum question assessment are set out here:

http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/82626/Referendum-Question-guidelines-final.pdf.

If the Committee would like any further information, please do not hesitate to contact me.

Yours sincerely,

Anne Twomey
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APPENDIX - Plebiscites and outcomes in the Australian States and Territories

- 1896 – SA – secular education, scripture in State schools and grants to denominational schools (Yes, No, No).
- 1898 and 1899 – all colonies – approval of federation and Commonwealth Constitution.
- 1900 – WA – Federation (Yes)
- 1910 – Qld – Religious instruction in State Schools (Yes)
- 1911 – SA – Approval of increased payment of Members of Parliament (No)
- 1911 – WA – Hotel licences for publicans (3 qns, No, Yes, Yes)
- 1915 – SA – Pub closing time (6 choices – winner was 6pm)
- 1916 – Tas – Hotel Closing hours (6 choices – winner was 6pm)
- 1916 – NSW – Hotel Closing Hours (6 choices – winner was 6pm)
- 1920 – Qld – Prohibition (No)
- 1921 – WA – Licensing of publicans in local districts/prohibition (No prohibition)
- 1923 – Qld – Prohibition (No)
- 1925 – WA – Prohibition (No)
- 1928 – NSW – Prohibition (No)
- 1933 – WA – Secession (Yes)
- 1947 – NSW – Hotel Closing Hours (3 choices, 6pm won)
- 1950 – WA – Prohibition (No)
- 1954 – NSW – Hotel Closing Hours (2 choices – 10pm won)
- 1956 – Vic – Hotel Closing Hours
- 1965 – SA – State lotteries (Yes)
- 1968 – Tas – Casino at Wrest Point, Hobart (Yes)
- 1969 – NSW – Hotel trading on a Sunday afternoon (No)
- 1970 – SA – Late night shopping on Fridays (No)
- 1975 – WA – Daylight saving (No)
- 1976 – NSW – Daylight saving (Yes)
- 1978 – ACT – Self-Government (three choices – vote in favour of status quo)
- 1981 – Tas – Choice of Hydro Dam (two choices - Gordon Below Franklin won)
- 1982 – SA – Daylight saving (Yes)
- 1984 – WA – Daylight saving (No)
- 1992 – Qld – Daylight saving (No)
- 1992 – ACT – Electoral system (two choices – Hare-Clark won)
- 1992 – WA – Daylight saving (No)
- 1995 – ACT – Entrenchment of electoral system (Yes)
- 1998 – NT – Statehood (No)
- 2005 – WA – Extension of shop trading Hours (No)
- 2009 – WA – Daylight saving (No)