Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia

This submission was produced by the Public Law and Policy Research Unit at the University of Adelaide.

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1. Introduction

In early August 2015 the Prime Minister announced that there would be a plebiscite or referendum on the matter of marriage equality in Australia.

This submission focuses on part (d) of the terms of reference – whether such an activity is an appropriate method to address matters of equality and human rights. This submission explains that neither a referendum nor plebiscite is a necessary or appropriate method to address the matter of marriage equality.

Finally, this submission also makes the point that a 'yes' vote in either a referendum or a plebiscite is *not sufficient* of itself to establish marriage equality in Australia. Such a vote would not obviate the need for legislative change by the Parliament. For marriage equality to be established in Australia, the Commonwealth Parliament must amend the *Marriage Act 1961* (Cth). Neither a referendum nor a plebiscite presents a *legal* guarantee that such a legislative amendment will be introduced or indeed passed. And while politically it might be thought very unlikely that a 'yes' vote in a referendum or a plebiscite would be ignored by the Parliament, such a vote will not, and indeed cannot, legally bind the Parliament to make the necessary legislative change.

2. The difference between a referendum and a plebiscite

A referendum is required when amendment is sought to the *Australian Constitution*.[1] If a referendum is successful, the change to the *Constitution* is 'presented to the Governor-General for the Queen's assent' and the change to the wording of the *Constitution* is made; the amendment *must* be made.

In contrast, while a plebiscite allows the public to express directly a view on a matter, the result of a plebiscite can be ignored by Members or Senators. While clause 3 of the Marriage Equality Plebiscite Bill 2015 states that 'if the result of the national plebiscite is that the majority of electors respond in the affirmative [on the question of marriage equality] Parliament will pass any legislation necessary to allow marriage between 2 people regardless of their gender',[2] it does not bind Members or Senators as to how they must vote on any future amendment to the *Marriage Act 1961* (Cth).

While not the focus of this Bill, if a referendum were proposed instead of a plebiscite, more than a simple majority of voters would be required. Section 128 of the *Constitution* requires that for an amendment to be made to the *Constitution*, a majority of Australian voters must approve the change *and* there must also be a majority of voters in a majority of states – that is, a majority in at least 4 states.

It is also worth noting that a referendum must be initiated by the Parliament. A referendum on the issue of marriage equality would still require agreement in the Parliament as to the wording of the legislation setting out the proposed constitutional amendment to be put to the voters.[3]

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1 *Australian Constitution* s 128.

2 *Marriage Equality Plebiscite Bill 2015* (Cth) cl 3.

3 Section 128 of the *Constitution* provides: 'The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives. But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.'

3. A referendum is unnecessary

Section 51(xxi) of the *Constitution* gives the Commonwealth Parliament the power to make laws with respect to 'marriage'.

The *Constitution* does not define the scope of the Commonwealth's power to legislate with respect to marriage. Instead, it is left to the High Court to interpret the meaning of the word 'marriage'. In 2013 the High Court considered the meaning of 'marriage' within the *Constitution* in the context of determining the validity of the *Marriage Equality (Same Sex) Act 2013* (ACT). In that case – *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 – the Court defined marriage in this way:

> "Marriage" is to be understood in s 51(xxi) of the Constitution as referring to 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.

What is most important to take from the case is the Court's conclusion that marriage 'is a term which includes a marriage between persons of the same sex.'[4] The case clarified the meaning of 'marriage' within the *Constitution* and confirmed that the power to legislate with respect to same-sex marriage rests with the Commonwealth Parliament.

While there have been changes in the composition of the High Court since 2013, there does not appear to be any reason why a future High Court would deviate from the 2013 decision in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.[5] Consequently, it is unnecessary to hold a referendum to amend the *Constitution* to provide expressly the Commonwealth Parliament with the power to legislate with respect to same-sex marriage.

4. A plebiscite is unnecessary

Only three national plebiscites have been held since Federation. Two plebiscites dealing with the issue of conscription were held in 1916 and 1917. A further plebiscite on the question of which song should be Australia's national anthem was held at the same time as the 1977 referendum. While *Advance Australia Fair* was the preferred song, it was not proclaimed as the national anthem for a further seven years.[6]

When examining the two major examples of the use of the plebiscite in Australia – conscription during the First World War and the confirmation of the national anthem in May 1977 – no consistent criteria for when and why a plebiscite is desirable or warranted emerge.

The decision to engage a plebiscite of the Australian people prior to the commitment of conscripted forces to foreign theatres of conflict was not itself a limit on the Executive's prerogative to declare war and to take other consequential decisions. Moreover, the plebiscite in the First World War proved to be a divisive and a bitter moment in Australian political history.

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4 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 463 [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

5 Cf *John v Federal Comissioner of Taxation* (1989) 166 CLR 417, 438-9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

6 National Archives of Australia, *Australia's National Anthem – Fact Sheet 251* <http://www.naa.gov.au/collection/fact-sheets/fs251.aspx>.

Reflecting on the plebiscite relating to the selection of the national anthem held by the Fraser Government, it was a relatively minor issue (when compared to the conscription debate). However, the fact that *Advance Australia Fair* was not proclaimed as Australia's national anthem for a further 7 years does illustrate the point that the Executive was not bound by the plebiscite

What is evident from the two examples of the use of a plebiscite in Australia 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.

As is explained above, the result of the plebiscite would not bind any Member or Senator on any future vote on an amendment to the *Marriage Act 1961* (Cth). It also may present difficulty for some Members if, for example, a majority of electors voted 'yes', but a majority in a particular electorate voted 'no'. Should the Member of Parliament vote to reflect to will of their electorate or of the majority of the Australian public? The same dilemma could equally apply to Senators if a majority of the Australian public voted 'yes' and a majority in the Senator's state voted 'no'. A plebiscite only complicates matters.

The Parliament regularly deals with legislation on matters of equality and human rights. More specifically, the Parliament has previously amended legislation dealing with the issue of providing people in same-sex relationships with the same rights as those in heterosexual relationships.[7] The Parliament was able to deal with those amendments without the need for a plebiscite.

A plebiscite on the issue of amendment to the *Marriage Act 1961* (Cth) might also lead to future unnecessary calls for a plebiscite on other matters dealing with equality. Setting such a precedent might raise the question of whether other matters in the future should be put to the people and, if so, what sort of matters should be the subject of a plebiscite. There are many ways for a parliamentarian to canvas the views of the Australian people without the need for a plebiscite.

All that is required to legislate to allow for marriage equality in Australia is both houses of the Parliament passing an amendment to the *Marriage Act 1961* (Cth) and the proposed law receiving the Governor-General's assent.

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7 See, for example, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* (Cth).