

Legal and Constitutional Affairs References Committee
C/- Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House

Via email: legcon.sen@aph.gov.au

Dear Committee members

Submission on the issue of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia

This submission relates specifically to item (d) of the terms of reference for the above named inquiry, which asks for views on “whether [a plebiscite or referendum] is an appropriate method to address matters of equality and human rights”.

We note the short deadline for submissions. Due to the timeframe, we are unable to prepare a comprehensive submission and instead attach as annexures two recent opinion pieces that we have written on the issue.

The main points made in these two pieces are as follows:

Regarding a Constitutional referendum

- Constitutional referenda generally fail, often in spite of strong public support for the issue: only eight of 44 referenda since 1901 have succeeded, and none have passed without bipartisan support. The proposal would be very unlikely to have bipartisan support.
- There is no relevant constitutional issue: the recent High Court case of *Commonwealth v Australian Capital Territory* (2013) confirmed that the Commonwealth already has the power to legislate for marriage equality under the “marriage power” in section 51 (xxi) of the Constitution. Therefore, the proposed referendum would be to grant the Commonwealth a power that it already has.
- If such a referendum succeeded, the Commonwealth would still have to use its power (which it already has) to enact legislation, bringing the whole issue back to square one.
- A “no” vote would not change the status quo – the Commonwealth would still have the power to legislate for marriage equality in spite of the vote (the High Court being unlikely to change its interpretation of the marriage power in light of a “no” vote).

Regarding a plebiscite:

- A plebiscite would be a glorified opinion poll that is unnecessary and expensive, particularly in light of the numerous opinion polls which all point in the same direction: the Australian people favour marriage equality by a wide margin and in increasing numbers.

- A plebiscite has no legal force, so a government would be free to ignore the result, just as the current Parliament is ignoring the clear will of the Australian people already by failing to act on this matter.

Generally on the issue of a popular vote:

- It is inherently oppressive to ask the majority to approve of equal rights for a minority. Human rights are applicable to everybody, regardless of majority opinion.
- A public vote is unnecessary, and yet it would give license to bigots to step up their vitriol against LGBTI persons.

We are confident that the Committee will reach the swift conclusion that a public vote, in the form of a referendum or plebiscite, is an unnecessary waste of time and resources that would stand in the way of Australia's Parliament acting immediately, as it should, to recognise equality for all.

Yours sincerely

Professor Sarah Joseph
Director

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Annexure 1

Opinion Piece by Associate Professor Paula Gerber, Deputy Director of the Castan Centre for Human Rights Law. Published in *The Conversation*, 12 August 2015. For an online version, visit <http://castancentre.com/2015/08/13/with-no-coalition-free-vote-where-to-now-on-the-road-to-same-sex-marriage/>

With no Coalition free vote, where to now on the road to same sex marriage?

By Paula Gerber

The much-anticipated announcement of the government's position on same-sex marriage raised more questions than it answered. By rejecting a free vote on same-sex marriage for Coalition MPs during this term of parliament, the government ensured that Australia will continue to be the only developed English-speaking country in the world where marriage is an exclusively heterosexual institution.

Some 72% of Australians believe that same-sex couples should be allowed to marry, according to a June 2014 opinion poll. The government's position is not just out of step with the Australian population, but it is going in the opposite direction.

So what is the way forward? Prime Minister Tony Abbott raised several possibilities on Tuesday night. Let's consider each of them.

Referendum?

Australia's legal framework means that the only time it holds referendums is when it needs to change the Constitution. Allowing same-sex couples to marry in Australia, or recognising such marriages performed legally overseas, does not require any constitutional amendment.

Marriage is mentioned only once in the Constitution. Section 51 (xxi) provides that the federal parliament has the power to make laws with respect to marriage. The High Court made it very clear in its judgment in the 2013 challenge to the ACT's same-sex marriage laws that this power includes amending the Marriage Act to allow same-sex couples to marry.

So, unlike Ireland, there is no basis in Australia for holding a referendum on the issue of same-sex marriage.

Plebiscite?

Is a plebiscite appropriate or necessary? How does it differ from a referendum?

A plebiscite involves holding a national vote to garner public opinion on a particular issue. However, the decision reached in a plebiscite has absolutely no legal force.

There are no rules for how a plebiscite should be conducted. A plebiscite does not have any hurdles for success, unlike a referendum. Would Abbott impose the high hurdle of a referendum – that is, that the government will only consider it a vote in favour of same-sex marriage if a majority of voters across the nation and a majority of voters in a majority of states say "yes" to allowing same-sex couples to marry?

A plebiscite would be no more than a glorified opinion poll. We've already had plenty of them, and know that the Australian people want same-sex marriage now. And when the government is constantly saying that it needs to curtail spending, the idea of running an expensive and

unnecessary plebiscite cannot be justified. This is particularly so when its outcome would be of no legal force, leaving the government free to ignore any result it didn't like.

Australia has only ever held three plebiscites. Two of these were in 1916 and 1917, and related to introducing conscription during the first world war. Both were defeated.

So, plebiscites actually have an even worse success rate than referendums. Is this something Abbott is counting on?

Even if successful in demonstrating Australia wants same-sex marriage, a plebiscite on this issue could have negative consequences. Any campaign leading up to a vote would give license to bigots to step up their vitriol against LGBTI persons, potentially damaging the mental health of vulnerable members of this community.

And rather than uniting the country under the "Team Australia" banner – as Abbott is so keen to do – such a move would likely be highly divisive, and include both homophobic attacks and religious vilification.

Court challenge?

If not a referendum or plebiscite, what about a court challenge? This is how the US ultimately achieved same-sex marriage across all 50 states.

Just as Australia is the last English-speaking developed country to hold out on marriage equality, so too is it on its own in not having a national Human Rights Act or Bill of Rights.

Thus, there is no basis on which a same-sex couple that is denied the right to marry can challenge that in the courts.

Parliament?

All of this leads to the inevitable conclusion that the only way Australia is going to achieve same-sex marriage is through parliament. In 2004, then-prime minister John Howard amended Section 5 of the Marriage Act to insert a requirement that marriage be between a man and a woman.

Parliament should undo that change. The question is: who will be the prime minister that finally brings Australia in line with the rest of the developed world by recognising the rights of LGBTI people to have their intimate partnerships recognised on an equal footing with heterosexual couples?

Too much time and energy has already been spent fighting for something that the majority of Australians have made clear they want to happen. It is time to get this out of the way, so we can focus on addressing other fundamental human rights issues such as the treatment of LGBTI asylum seekers and refugees, homophobia in schools and the high rates of mental health problems and suicide within LGBTI populations.

Annexure 2

Opinion Piece by Professor Sarah Joseph, Director of the Castan Centre for Human Rights Law. Published in *The Conversation*, 14 August 2015. For an online version, visit <http://castancentre.com/2015/08/17/a-constitutional-referendum-a-hail-mary-for-those-opposed-to-marriage-equality/>

A constitutional referendum: a 'Hail Mary' for those opposed to same-sex marriage

By Professor Sarah Joseph

On Tuesday, August 11, prospects for same-sex marriage legislation in Australia in the near future were quashed when the governing Coalition partyroom voted against a conscience vote in favour of maintaining opposition to same-sex marriage.

However, senior members of the government have surprised us by suddenly expressing support for a plebiscite on the matter after the next election. Some on the government benches, such as Social Services Minister Scott Morrison and conservative Senator Cory Bernardi, have gone even further and expressed support for the matter to be “resolved” by the people in a constitutional referendum, again after the next election.

The prospect of a constitutional referendum seems unlikely, especially after the prospect was dismissed by George Brandis, the attorney-general. However, it is not impossible, especially when someone of Morrison’s influence supports the idea. Make no mistake, however: it is a terrible idea. Here’s why.

Constitutional referenda generally fail

Australians are extraordinarily conservative, compared to other countries, when it comes to changing our Constitution. Under Section 128 of the Constitution, constitutional amendments must be approved by a majority of voters in a majority of states.

Only eight of 44 referenda have succeeded since the Constitution came into force in 1901. Rejected amendments include proposals which were initially very popular, such as the 1951 proposal to give the federal parliament power over communism, which would have paved the way for the banning of the Communist Party. According to a contemporaneous Gallup poll, that proposal had 80% support initially, and yet it was (thankfully) ultimately voted down.

Poll after poll has confirmed that a comfortable majority of Australians favour same-sex marriage. However, the communism referendum experience suggests we should be cautious that that majority (in a majority of states) would approve a relevant constitutional proposal. The question would be different. Standard poll questions such as “are you in favour of same-sex marriage” are simply not the same as a question such as “should same-sex marriage be enshrined in the Constitution”.

The stakes are raised enormously with constitutional change. Unlike an ordinary statute (such as the Marriage Act 1961 (Cth)), the Constitution cannot be easily changed back – hence those in favour of the constitutional status quo on any issue find it easy to run scare campaigns. Note how the “no” campaign against a Republic latched onto the idea that one should vote “no” if one didn’t completely understand the republican model on offer in the 1999 referendum. Ignorance is bliss for those opposed to change.

Campaigns opposed to constitutional confirmation of same-sex marriage could, and probably would, focus on the danger of a same-sex marriage provision being “abused” by “activist judges” to have a far greater impact than originally thought. Probably not a bad thing, from the point of view of those of us in favour of LGBTI rights.

However, Australians have been very reluctant to approve new constitutional rights. It is already, for example, assumed in many quarters that Australians would not approve a constitutional guarantee against racial discrimination, one of the sticking points which has arisen over a proposed referendum on the recognition of Australia’s First Peoples.

The question would likely be framed by a prime minister who was opposed to same-sex marriage. After all, it is unlikely that a referendum would be held under a PM who was in favour – that PM would probably be able to usher a marriage reform bill through parliament by for example allowing a bipartisan conscience vote. Given the question would likely be framed by a PM who was opposed to reform, the words chosen would likely be chosen to give the “no” campaign the greatest chance.

No constitutional referendum has passed in Australia without bipartisan support, which would likely be lacking. As just noted, a referendum is unlikely to happen if the prime minister actually supports marriage equality.

A failed referendum would be a disaster for the cause of marriage equality, and could stave off reform for many years. This is probably one reason why prominent proponents of the status quo, such as Morrison and Bernardi, are in favour: it is their Hail Mary play against the apparent inevitability of same-sex marriage legislation in the near future.

There is no relevant constitutional issue

The federal parliament may only enact laws in areas where it has been given power under the Commonwealth Constitution. That is, federal legislative power must be specifically authorised under a “head of power” in the Constitution.

The federal parliament has power under Section 51(xxi) over the topic of “marriage”. Morrison has suggested that a referendum might clarify the scope of the federal marriage power, Section 51(xxi) of the Constitution.

But that is not necessary. Once upon a time (two years ago), it may have been arguable that the term “marriage” in Section 51(xxi) only encompassed marriage between men and women. However, in *Commonwealth v Australian Capital Territory (2013)*, the case which struck down the ACT same-sex marriage law, the High Court unanimously confirmed that “marriage” for the purposes of Section 51(xxi) could include same-sex marriage. Hence, it confirmed that the Commonwealth has power, if it wishes to exercise it, to legislate to allow marriage between adults of the same sex. There is no need for a referendum to clarify this issue.

We have never had a constitutional referendum where a “change” is not actually proposed. In any case, there is something inherently oppressive in asking the majority to approve of equal rights for a minority – this betrays an impoverished and utilitarian approach to human rights.

A referendum should only be held when there is an actual constitutional issue at stake. This was, for example, the case in Ireland. Its Constitution prohibited same-sex marriage, so a referendum was needed in order to enact marriage reform legislation in that country.

What would or could a referendum achieve?

Morrison has indicated that we would be asked to clarify the scope of the marriage power. As noted above, its scope with regard to same-sex marriage has already been clarified by the High Court. So what could a referendum achieve?

Suppose we were asked whether to include clarifying words in Section 51(xxi), so that it read something like: “marriage including opposite and same-sex marriage”. This is Morrison’s suggestion.

Suppose that change of wording was approved. All that would be achieved is that the people would be approving a pre-existing interpretation of Section 51(xxi) by the High Court. The change itself would not actually introduce marriage equality. We would be back to Square 1 again, with the Australian people relying on the Commonwealth parliament to act. All such a referendum would prove is that the Australian people are happy for the federal parliament to have the power; it arguably would not prove that we want them to exercise that power. So a “yes” vote could easily have no real consequence.

Even more intriguing would be the consequences of the change being rejected. The one-word Section 51(xxi) would remain the same. But what would that one word mean? The High Court has already decided that it incorporates opposite and same-sex marriage. Would the referendum mean that the High Court has to change its mind? It would not. The High Court has already rejected the relevance of failed referenda in the famous Workchoices case. So, a “no” vote may have no real consequence.

Finally, let us assume that a “no” vote led the High Court to alter its interpretation, such that “same-sex” marriage was excluded from Section 51(xxi). This would not prohibit same-sex marriage in Australia. It would transfer power from the Commonwealth to the state/territories over the matter. In the High Court case on the ACT same-sex marriage legislation, it was held that federal marriage legislation “covers the field” of all opposite and same-sex marriage.

That circumstance currently quashes opportunities for same-sex marriage legislation in the states or territories. If Commonwealth power over same-sex marriage disappears, that part of the field would be vacated and the states and territories would be free to legislate as they wish.

That would lead us back to square 1 again, but dealing with eight jurisdictions instead of one. And many of those eight jurisdictions, such as the ACT and Victoria, would likely take up a new opportunity to legislate for same-sex marriage. So, it does not seem that Morrison and Bernardi have thought this through.

Conclusion: expensive pointless obfuscation

A constitutional referendum on same-sex marriage could be a disaster for those in favour of reform. More likely, however, it could achieve nothing at all. Or it could lead to a confusing legal mess, with total uncertainty over the true constitutional locus of legislative power over same-sex marriage.

The Hail Mary move of those wedded to the status quo would be divisive, expensive and likely pointless, to the satisfaction of nobody.

Note: A plebiscite is different to a constitutional referendum. A plebiscite would be a simple vote on a question such as “Should Australia have same-sex marriage?”, with no direct legal effect and no

constitutional consequence. This article is not about plebiscites. This footnote added for clarity three hours after initial posting.